UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-[redacted]

I[redacted] [redacted] U[redacted] A[redacted]
Petitioner,

v.

MERRICK GARLAND,
UNITED STATES ATTORNEY GENERAL,
Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals

PETITIONER'S OPENING BRIEF

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 20[redacted] Caption: [redacted] [redacted] v. Garland

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[redacted]
(name of party/amicus)

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

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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

N/A

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If yes, identify all such owners:

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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
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5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

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If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

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N/A

Signature: /s/ Sabrineh Ardalan Date: 03/26/2021

Counsel for: [redacted]

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STATEMENT OF JURISDICTION

Ms. ████ ████ is petitioning the Court to review a final order of removal issued by the Board of Immigration Appeals ("Board" or "BIA") on October 5, 2020. Ms. ████ ████'s petition to the Court was timely filed on November 4, 2020, which is within the thirty-day period required by 8 U.S.C. § 1252(b)(1).

The Court has jurisdiction to review final orders of removal pursuant to 8 U.S.C. § 1252(a)(1). *Camara v. Ashcroft*, 378 F.3d 361, 366 (4th Cir. 2004) ("The courts of appeals are granted jurisdiction to review final orders of removal, 8 U.S.C. § 1252(a)(1), and final orders in cases such as the one before us are generally made by the BIA following appeal from the decision of the [Immigration Judge]."). Here, the BIA issued its own opinion and incorporated in part the reasoning of the Immigration Judge ("IJ"). *See* AR 3–5 (BIA Decision). Thus, this Court reviews both decisions on appeal. *Orellana v. Barr*, 925 F.3d 145, 151 (4th Cir. 2019) (Where "the BIA affirmed the IJ's decision and supplemented it with its own opinion, [this Court] review[s] both opinions."); *see also Alvarez Lagos v. Barr*, 927 F.3d 236, 248 (4th Cir. 2019) ("When, as here, the BIA affirms the IJ's decision with an opinion of its own, we review both decisions." (quoting *Salgado-Sosa v. Sessions*, 882 F.3d 451, 456 (4th Cir. 2018)); *Martinez v. Holder*, 740 F.3d 902, 908 n.1 (4th Cir. 2014) (explaining that this Court reviews both opinions

when the "BIA decisions . . . incorporated some part of the IJ's opinion as part of the BIA's final order").

Ms. ████ ████ challenges the BIA's application of incorrect legal standards and its erroneous conclusions that the evidence presented did not support her claims for asylum, statutory withholding of removal, and protection under the Convention Against Torture ("CAT"). Thus, this case presents questions of law that fall squarely within the scope of this Court's jurisdiction. *Martinez*, 740 F.3d at 909 ("We review the BIA's legal determinations . . . *de novo*[.]"); *Cruz v. Sessions*, 853 F.3d 122, 128 (4th Cir. 2017) (explaining that the Court "review[s] de novo the question whether the BIA and the IJ applied the correct legal standard").

STATEMENT OF ISSUES

1. Whether the BIA erred when it applied the wrong legal test to determine the particularity of Ms. ████ ████'s proffered social groups.
2. Whether this Court should recognize the cognizability of Ms. ████ ████s proffered gender-based social groups.
3. Whether the BIA erred when it failed to perform a "mixed motive" or "intertwined reasons" analysis when considering the reasons Ms. ████ ████ suffered and fears persecution.

4. Whether the record compels a finding that either or both of Ms. [redacted] [redacted]'s social groups were or would be at least one central reason for the persecution she suffered and fears in El Salvador.
5. Whether the BIA erred in denying Ms. [redacted] [redacted]'s claim for CAT protection when it wholly failed to consider any country conditions evidence in the record.

STATEMENT OF THE CASE

Petitioner [redacted] [redacted] [redacted][1] is a native of El Salvador. Certified Administrative Record ("AR") 3 (BIA Decision). She entered the United States on or about [redacted] 2014 to escape [redacted] an MS-13 gang member. AR 57–62 (IJ Decision), AR 475 (I-589). [redacted] repeatedly targeted Ms. [redacted] [redacted] and her family with death threats and violence because she refused to submit to his demands to control her life (*i.e.*, to be his *jaina*, a Salvadoran term for a gang member's "woman"). AR 116–21, 126–29 (Transcript of Asylum Hearing Testimony (hereinafter, "Tr.")).

While Ms. [redacted] [redacted] attended university in [redacted] El Salvador, [redacted] began stalking her wherever she went, regularly traveling on multiple bus routes to follow her to the university. AR 116–17, 123, 127 (Tr.). While stalking

[1] Ms. [redacted] [redacted]'s name is incorrectly listed as "[redacted]" in some documents in the record.

her, ██████ demanded that she "be his woman." AR 116 (Tr.). ██████ declared that he would never "leave her in peace until [she]" complied, and he threatened her with violence or death if she refused his demands. AR 116, 120, 126–29 (Tr.). When Ms. █████ █████ moved to another part of El Salvador, he figured out where she lived and continued to stalk her. AR 132–33 (Tr.). ██████ repeatedly threatened to murder Ms. █████ █████ telling her that "[she] had to be his woman, or he was going to kill [her]." AR 126 (Tr.). While he threatened her, "he'd pat his weapon," so Ms. ██████████ knew he was dangerous and would carry out his threats. *Id.* She lived in fear that ██████ would kidnap or kill her, and eventually grew so afraid that she was unable to sleep or go anywhere alone. AR 117–19, 126 (Tr.), 544 (Credible Fear Interview, hereinafter "CFI").

Along with fearing for her own life, Ms. █████ █████ was also terrified that ██████ would kill her family to force her to submit to him. ██████ threatened Ms. █████ █████ that he would kill a member of her family "or anybody that came close to her" if she refused to be with him. AR 120, 121 (Tr.), 544 (CFI). He also directly threatened her sister after Ms. █████ █████ left, telling her that Ms. █████ █████ was "risking [the sister's] life" by leaving the country. AR 121 (Tr.).

Ms. █████ █████ was so afraid of ██████ that she "never left [her] house." AR 119 (Tr.). At one point, she stayed indoors for nearly a month

throughout a school break because she was terrified [redacted] would harm or kidnap her. AR 117, 119–20 (Tr.). Ms. [redacted] [redacted] was too scared to tell the police about these threats out of fear that [redacted] would retaliate against her or kill her. AR 117–18 (Tr.), AR 546 (CFI). She explained that "the police are allied with the gangs [and] corrupt" in El Salvador, and "if one reports someone, they will kill you." AR 546 (CFI).

Ms. [redacted] [redacted] also knew from personal experience that the police could not be trusted to investigate these threats. After repeated intimidation and threats aimed at Ms. [redacted] [redacted] [redacted] killed Ms. [redacted] [redacted] cousin. *Id.*; *see also* AR 193–96 (Death Certificate of [redacted] [redacted]). [redacted] was held in jail for this murder for only three days before he was released, because police officers are allied with gangs and "some police members are [gang members]" themselves. AR 546 (CFI) ("They incarcerated him when he killed my cousin, but quickly, three days later, he was out. It is always like that.").

Ms. [redacted] [redacted] is certain that [redacted] would find her if she returned to El Salvador, as it is a small country where he could easily find her and kidnap or kill her. AR 61 (IJ Decision), AR 134–35 (Tr.) ("[El Salvador is] a very small country. [The gangs] have contacts that we can't even imagine."). After Ms. [redacted] [redacted] fled El Salvador, [redacted] told her sister he would "not forget"

what Ms. ████ ████ had done. AR 122 (Tr.). Indeed, fleeing the country to get away from █████ has put Ms. ████ ████ in even greater danger, making him even more likely to try to kill her now, because gang members "don't tolerate rejection." AR 133–34 (Tr.); *see also* AR 189–90 (Decl. of ████████ ████████████, neighbor of Ms. ████ ████ (explaining that "the gang member and other[s] . . . are still at the same place and are very upset because they took her action [of leaving] as refusing the gang member"). Further, the fact that Ms. ████ ████ is now married to another man makes it even more likely that █████ will target and murder her. AR 149–50 (Tr.) ("There's more reason for the gang member [to kill me] because I'm married and I'm with someone who is not the gang member."); AR 544 (CFI) ("He threatened to kill me . . . if he saw me with someone."); AR 248 (Immigration and Refugee Board of Canada, *El Salvador: Information Gathering Mission Report - Part 2. The Situation of Women Victims of Violence and of Sexual Minorities in El Salvador*, Sept. 2016) ("Women are considered to be a 'property' by gangs . . . If [a woman] is seen accompanied by other men, she, or a member of her family would be killed.").

Ms. ████ ████ is terrified █████ will see these threats through to completion——violence against women is extremely widespread in El Salvador, and Salvadoran authorities either cannot or will not protect them. *See, e.g.*, AR 232 (Molly O'Toole, *El Salvador's Gangs Are Targeting Young Girls*, The Atlantic

(Mar. 4, 2018)) ("The gangs' targeting of girls dovetails with a wider rise in femicide, or killing motivated by gender, in El Salvador. The rate of violent death for women is the third-highest in the world."); AR 213–14 (U.S. State Dep't, *El Salvador 2017 Crime & Safety Report*) ("Services for victims of rape are very limited[.]"); *see also infra* Part II.B (discussing Salvadoran authorities' failure to apprehend and prosecute perpetrators of violence against women).

Ms. ██████ ██████ applied for asylum, withholding of removal, and Convention Against Torture protection, based on the past persecution she suffered and her well-founded fear of future persecution on account of her status as a Salvadoran woman and a Salvadoran woman who refused to be a *jaina*, as well as the likelihood she would be tortured if forced to return to El Salvador. In May 2018, the IJ found Ms. ██████ ██████ credible, but denied her claims and concluded that she failed to establish eligibility for asylum or related relief. AR 67–74 (IJ Decision).[2] The BIA affirmed the IJ's ruling in a cursory three-page decision. AR 3–5 (BIA Decision). With respect to asylum and statutory withholding of removal, the Board reached only the cognizability of Ms. ██████ ██████ proffered social groups ("Salvadoran women" and "Salvadoran women

[2] Just two months after Ms. ██████ ██████ hearing before the IJ, the Attorney General issued his opinion in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), upon which the Board relied in making its determination. AR 4.

who refuse to be a *jaina*") and the disputed nexus between these social groups and the harm she suffered and fears. *Id.* The BIA also summarily upheld the IJ's denial of CAT protection. AR 5 (BIA Decision).

SUMMARY OF THE ARGUMENT

The BIA erred in denying Ms. ■■■■ ■■■■ claims for asylum, withholding of removal, and protection under the Torture Convention. Each of the Board's errors warrants reversal and remand by this Court.

First, the Board erred when it rejected Ms. ■■■■ ■■■■ gender-based particular social groups. Each of the proffered social groups are cognizable under relevant precedent. The Board wholly based its summary rejection of her social groups on its application of the wrong legal test. Specifically, the Board erred in analyzing the particularity of Ms. ■■■■ ■■■■ gender-based social groups by rejecting them based on their lack of narrowing characteristics. But this Court has explicitly overruled that test for evaluating the validity of a social group, recognizing instead that the only relevant question in a particularity analysis is whether a social group has discrete and definable boundaries.

Second, the BIA further erred when it applied the wrong legal test for nexus to a protected ground. Specifically, the Board failed to perform the requisite "mixed motive" or "intertwined reasons" analysis when considering the reasons why Ms. ■■■■ ■■■■ suffered and fears persecution. Under the INA and

binding precedent, a protected ground need only be *at least one* central reason for why Ms. [redacted] [redacted] was targeted, not *the* central reason. Indeed, the Board and this Court have repeatedly recognized that a persecutor may have multiple, "intertwined" reasons for targeting a specific individual, including some that are protected under domestic and international law, and others that are not. Yet here, the BIA failed to perform the required "mixed motive" analysis, instead discussing only one reason Ms. [redacted] [redacted] was targeted——namely, her persecutor's "attraction" to her. The Board improperly assumed that nexus can never be established where persecution occurs in the context of a personal relationship, and mischaracterized Ms. [redacted] [redacted] persecutor as motivated only by attraction, even where his words and actions demonstrated his clear goal of controlling her through intimidation and violence. In so doing, the Board failed to consider whether her status as a Salvadoran woman or her refusal to be a *jaina* was (or would be) at least one central reason for the persecution she suffered and fears.

Third, the BIA erred in denying Ms. [redacted] [redacted] protection under the Convention Against Torture when it failed to address or engage with independent evidence in the record, as required by regulation and precedent. The BIA and IJ improperly disregarded hundreds of pages of country conditions evidence in the record related to the risk of torture faced by Ms. [redacted] [redacted] if she is forced to

return to El Salvador, as well as the acquiescence and willful blindness of government officials to this harm.

STANDARD OF REVIEW

This Court "review[s] legal conclusions de novo and factual findings for substantial evidence." *Orellana*, 925 F.3d at 151; *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 246 (4th Cir. 2017). Whether a social group is cognizable is a question of law reviewed *de novo*. *See Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) ("The BIA committed legal error by concluding" that petitioner's PSG was not cognizable.); *see also Amaya v. Rosen*, 986 F.3d 424, 434 (4th Cir. 2021) ("Particularity is a definitional inquiry that, like immutability, by its very nature is a question of law.").

Similarly, this Court "review[s] de novo the question whether the BIA and the IJ applied the correct legal standard in assessing the applicant's proof of the statutory nexus requirement." *Cruz*, 853 F.3d at 128. The ultimate determination of whether a protected ground is "at least one central reason" for persecution is a factual question reviewed for substantial evidence. *Id.*; *see also Alvarez Lagos*, 927 F.3d at 248, 251 (reversing Board's finding that petitioner failed to establish nexus where record evidence "compel[led] the conclusion that the [gender-based] protected statuses identified by [petitioner were] a central reason" for the persecution).

This Court will overturn BIA determinations regarding CAT eligibility where "they are manifestly contrary to the law and an abuse of discretion." *Tassi v. Holder*, 660 F.3d 710, 719 (4th Cir. 2011). When determining eligibility for CAT relief, adjudicators are required by regulation "to consider '*all* evidence relevant to the possibility of future torture.'" *Turkson v. Holder*, 667 F.3d 523, 526 (4th Cir. 2012) (quoting 8 C.F.R. § 1208.16(c)(3) (emphasis added)). Thus, "[a]s [this Court has] made clear, it is an abuse of discretion for the BIA or IJ to arbitrarily ignore relevant evidence." *Cabrera Vasquez v. Barr*, 919 F.3d 218, 223 (4th Cir. 2019) (vacating denial of CAT claim for agency failure to address material evidence) (citations omitted); *see also Tassi*, 660 F.3d at 719 (explaining that the BIA abuses its discretion when "it fail[s] to offer a reasoned explanation for its decision, or if it distorted or disregarded important aspects of the applicant's claim").

ARGUMENT

I. THE BIA ERRED IN REJECTING MS. [redacted] [redacted]'S COGNIZABLE PARTICULAR SOCIAL GROUPS.

The Board erred in two critical ways when it rejected Ms. [redacted] [redacted]'s social groups. First, the Board applied the incorrect legal test in evaluating the particularity of the social groups. Second, the Board erred in concluding that the proffered gender-based social groups were not cognizable.

A. The BIA Applied the Wrong Legal Test to Determine the Particularity of Ms. ██ ██ Proffered Social Groups.

The BIA erred as a matter of law when it applied the wrong test in assessing the particularity of Ms. ██ ██'s particular social groups. Here, the BIA found that Ms. ██ ██'s proffered social group of Salvadoran women was not particular because it could not be subdivided, as it contained "no narrowing features such as a specific age range, [or] a specific position in Salvadoran society or its economy." AR 4 (BIA Decision). The Board summarily rejected Ms. ██ ██'s alternate social group (Salvadoran women who refuse to be a *jaina*) as "similarly" lacking particularity, without any additional explanation. *See id.* Yet, this Court explicitly rejected that approach to determining particularity in *Amaya v. Rosen* because "[w]hat matters is not whether the group can be subdivided based on some arbitrary characteristic but whether the group itself has clear boundaries." 986 F.3d at 434.

In *Amaya*, this Court found the Board's particularity analysis unreasonable because it relied on the "flawed" interpretation of particularity in *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014). *See Amaya*, 986 F.3d at 432–34. This Court concluded in *Amaya* that "the BIA unreasonably grounded its rejection of the PSG in *W-G-R-* in part on the fact that it could further subdivide the group in any number of ways—by 'age, sex, or background' or by level of 'involvement with the gang.'" 986 F.3d at 434. The *Amaya* Court rejected the Board's approach

as "provid[ing] [no] clarity to the group's boundaries, as it only points out that there are smaller parts to any whole." *Id.* The *Amaya* Court thus concluded that the Board erred and applied the incorrect test. The Court explained in *Amaya* that the only relevant question in a particularity analysis is whether the "PSG has discrete and definable boundaries." *Id.* at 427, 434 (internal quotations removed); *see also Matter of M-E-V-G-*, 26 I&N Dec. 227, 239 (BIA 2014) (noting that "[t]he [PSG] must also be discrete and have definable boundaries"); *Henriquez Rivas v. Holder*, 707 F.3d 1081, 1093–94 (9th Cir. 2013) (*en banc*) (rejecting the notion that a discrete social group can lack particularity because its members are diverse with respect to other characteristics).

Here, the BIA applied the same, now-overruled test. AR 4 (BIA Decision). Relying on *Matter of W-G-R-*, the Board rejected Ms. ████ ████'s social groups, reasoning that although members of the groups "share[] the characteristics of gender (female) and nationality (Salvadoran)," the groups could not be further subdivided by characteristics tracking those listed in *Matter of W-G-R-* and rejected by this Court, including age and background or "specific position in Salvadoran society or its economy." *Id*. The Board's decision in Ms. ████ ████ case is thus grounded in exactly the same reasoning that this Court has explicitly deemed impermissible. *Amaya*, 986 F.3d at 436. Indeed, like the social

groups at issue in *Amaya*, Ms. ████ █████ gender-based social groups have discrete and definable boundaries. *See infra* section B.2.

As in *Amaya*, the Board in Ms. ████ █████ case erred by "apply[ing] its particularity requirement in a way that disregards and distorts its own test." 986 F.3d at 437. Thus, even if this Court declines to recognize that the proffered social groups, including the social group "Salvadoran women," are cognizable as a matter of law, *see infra* section B, remand would be required so the Board can address the cognizability of each social group in a manner consistent with *Amaya*.

B. The Court Should Recognize the Proffered Social Groups as Cognizable.

The BIA erred as a matter of law in concluding that Ms. ████ ████ did not set forth a cognizable social group. In order to be cognizable, a particular social group must satisfy three criteria: the group must (1) "share a common, immutable characteristic;" (2) be defined with particularity, or "by characteristics that provide a clear benchmark for determining who falls within the group;" and (3) be socially distinct, or "perceived as a group by society." *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985) (defining immutability); *M-E-V-G-*, 26 I&N Dec. at 239–40 (defining particularity and social distinction). Ms. ████ █████ proffered

social groups of "Salvadoran women" and "Salvadoran women who refuse to be a *jaina*" meet these criteria.[3]

1. "Salvadoran women" is immutable as a matter of law.

"Salvadoran women" is a social group defined by immutable characteristics of gender and nationality. A characteristic is immutable if it is "either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed." *Acosta*, 19 I&N Dec. at 233. In *Acosta*, the Board explicitly pointed to "sex" as an immutable characteristic that can define a cognizable social group. *Id.* (noting that the immutable characteristic "might be an innate one such as *sex*, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership" (emphasis added)).

Ms. ████ ████ is unable to, and should not have to, change her nationality or gender, as both are fundamental to her identity. *See id*. As the IJ acknowledged in this case, "an asylum applicant's gender is clearly an immutable characteristic in a group comprised of only women." AR 69 (IJ Decision). Indeed, courts have time and again recognized that gender and nationality constitute

[3] Whether "Salvadoran women" is a cognizable social group is a separate legal question from whether "Salvadoran women who refuse to be a *jaina*" is a cognizable group.

immutable characteristics.[4] *See, e.g.*, *De Pena-Paniagua v. Barr*, 957 F.3d 88, 95 (1st Cir. 2020) ("This circuit has . . . recognize[d] sex as an immutable characteristic[.]"); *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2006) (recognizing gender and nationality as immutable characteristics); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (same); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005) ("Both gender and tribal membership are immutable characteristics."); *see also Juan Antonio v. Barr*, 959 F.3d 778, 790–91 (6th Cir. 2020) (gender and marital status found to be immutable characteristics); *Cece v. Holder*, 733 F.3d 662, 671–72 (7th Cir. 2013) (*en banc*) (recognizing the social group of "young Albanian women" as immutable). Salvadoran women is therefore defined by an immutable characteristic.

2. "Salvadoran women" is particular as a matter of law.

When assessing particularity, "[w]hat matters is not whether the group can be subdivided based on some arbitrary characteristic but whether the group itself has clear boundaries." *Amaya*, 986 F.3d at 434. The limiting terms "Salvadoran" and "women" each provide a well-defined boundary as to who is a member of the group and who is not. *See id.* at 434 (acknowledging that the petitioner's

[4] *See* Deborah Anker, Law of Asylum in the United States § 5:45 n. 12, 47, 48 (2020 ed.) (collecting cases where the Board and/or immigration judges recognized gender *per se* social groups as immutable and ultimately cognizable).

Salvadoran nationality was inherently particular and self-limiting, as it clearly delineates between Salvadorans and non-Salvadorans); *see also De Pena-Paniagua*, 957 F.3d at 96 ("It is. . . difficult to think of a country in which women do not form a 'particular' and 'well-defined' group of persons."). The Salvadoran government is certainly capable of distinguishing who is Salvadoran and who is a woman, and does so regularly. *See, e.g.*, AR 485 (passport identifying Ms. ████ ████ as Salvadoran and female); AR 468 (birth certificate of Ms. ████ ████).

The BIA erroneously ruled that "Salvadoran women" lacked sufficient particularity, stating that "while the term 'women' may have a commonly understood definition, that does not in and of itself establish the requisite particularity for a particular social group."[5] AR 4 (BIA Decision). In so doing, the BIA improperly assumed that social groups need "narrowing features such as a

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[5] Here, the Board purported to rely on *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) in support of its reasoning. *See* AR 4. But the Board's summary ruling on particularity in fact violated *Matter of A-B-*'s actual holding. *Matter of A-B-* did not overturn *Matter of M-E-V-G-*, which defines the BIA's approach to particularity and social distinction as requiring a case-by-case analysis. *See M-E-V-G-*, 26 I&N Dec. at 242 ("[S]ocial group determination must be made on a case-by-case basis[.]"); *De Pena-Paniagua*, 957 F.3d at 94 (affirming the need for a case-by-case analysis); *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1079–80 (9th Cir. 2020) (holding that "the BIA must conduct the proper particular social group analysis on a case-by-case basis" and emphasizing that *Matter of A-B-* did not eliminate the case-by-case review requirement); *Grace v. Barr*, 965 F.3d 883, 905 (D.C. Cir. 2020) (same).

specific age range" in order to satisfy the particularity requirement, even though nationality and gender each provide clear boundaries for who is a member and who is not.

The Board's ruling relied on the mistaken premise—rejected both by this Court and by sister circuits—that a social group is not particular, or otherwise not cognizable, because the number of people described by that group is large. *See Alvarez Lagos*, 927 F.3d at 253 ("[A] putative particular social group need not be 'small' to possess particularity."); *see also Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) ("[T]he size and breadth of a group alone does not preclude a group from qualifying as such a social group."); *Niang*, 422 F.3d at 1199–200 ("[H]alf a nation's residents," could "certainly" constitute a valid PSG); *Malonga v. Mukasey*, 546 F.3d 546, 553–54 (8th Cir. 2008) (rejecting denial of petitioner's particular social group solely on the basis that his ethnic group was part of a tribe comprising forty-eight percent of the country's population); *see also Ticas-Guillen v. Whitaker*, 744 F. App'x 410, 410 (9th Cir. 2018) (remanding to the BIA after finding that the "IJ's ground for denial—that the proposed social group ['women in El Salvador'] was 'just too broad' to satisfy the 'particularity' requirement—cannot stand" as "gender and nationality can form a particular social group"). In sum, the social group "Salvadoran women" is particular as a matter of law.

3. “Salvadoran women” is socially distinct.

As the First Circuit explained in *De Pena-Paniagua*, “it is difficult to think of a country in which women are not viewed as ‘distinct’ from other members of society.” 957 F.3d at 96; *see also Silvestre-Mendoza v. Sessions*, 729 F. App’x 597, 598 (9th Cir. 2018) (holding that “Guatemalan women” could be socially distinct). To be socially distinct, a social group must be “*perceived* as a group by society.” *Amaya*, 986 F.3d at 433 (quoting *W-G-R-*, 26 I&N Dec. at 216) (emphasis in original). The pertinent question is whether the members of a proffered social group are “set apart, or distinct, from other persons within the society in *some* significant way.” *M-E-V-G-*, 26 I&N Dec. at 243 (emphasis added). Accordingly, evidence of social distinction may include, but is not limited to, “historical animosities,” discriminatory treatment of group members, and violence. *See id.* at 243–44; *see also Temu v. Holder*, 740 F.3d 887, 895 (4th Cir. 2014) (“[A] group is socially [distinct] if it can show that it is singled out for worse treatment than other groups.”).[6]

Here, the record plainly demonstrates that Salvadoran women are readily recognized in Salvadoran society as a distinct social group. The government lists

[6] While *Temu* utilizes the pre-*M-E-V-G-* term “social visibility,” *Temu*’s analysis is still pertinent here because, consistent with *M-E-V-G-*, it rejects an “ocular visibility” requirement. *See Temu*, 740 F.3d at 892–93.

gender on birth certificates and passports, including that of Ms. ████ ████ AR 468, 485 (Ms. ████ ████ identity documents).

Furthermore, the existence of laws focused on a particular group of persons is strong evidence that a group is socially distinct in the relevant society. *See Henriquez Rivas*, 707 F.3d at 1092 ("It is difficult to imagine better evidence that a society recognizes a particular class of individuals as uniquely vulnerable . . . than that a special witness protection law has been tailored to its characteristics"); *Guzman Orellana v. Att'y Gen. U.S.*, 956 F.3d 171, 179–80 n.28 (3d Cir. 2020) (citing witness protection law as evidence that a social group was socially distinct). Salvadoran society recognizes violence against women, including femicides, as a societal problem and the government established laws and social services specifically intended to protect women in El Salvador, even if unsuccessfully. As documented in the record, many such laws and services specifically name women as the group in their titles and recognize women's unique vulnerability in El Salvador. *See, e.g.*, AR 361 (Immigration and Refugee Board of Canada, *supra*) (citing "*Ley Especial Integral para Una Vida Libre de Violencia para las Mujeres*" (The Special Comprehensive Law for a Violence-free Life for Women)); AR 364 (*Id.*) (describing "*Ciudad Mujer*" or Women City, which is the name of women's centers established by the Salvadoran government with an ostensible mission to promote "a comprehensive approach to gender based violence, sexual and

reproductive health for women, economic empowerment for women, and dissemination and promotion of women's fundamental rights").

In addition, Spanish, the native language of El Salvador, *see* AR 475 (I-589), has a distinct set of grammatical rules, such as particular pronouns and articles, and vocabulary when addressing women in contrast to men.[7] *See, e.g.*, AR 464 (Teresa Andrade, *Mareros utilizaron una "jaina" para enamorar a médico y secuestrarlo,* El Salvador Times (Apr. 6, 2017) (using pronouns and articles such as "*ella*" when referring to women)). It also has a separate term, *machismo*, for sexism against women as a group. AR 233–34 (O'Toole, *supra*).

To the extent immutability, particularity, and social distinction are all legal inquiries reviewed de novo, this Court can and should recognize that "Salvadoran

[7] *See, e.g.*, Jenny Rivera, *Remark: Translating Equality: Language, Law and Poetry* (Nov. 6, 2009), in 13 N.Y. City L. Rev. 233, 252–53 (explaining how Spanish grammar distinguishes women from men) ("Spanish . . . and many of the Romance languages . . . always have the 'o,' the 'a,' or something to designate words that are feminine or masculine. The articles are feminine and masculine. Even without the obvious identifiers of what is generally the gendered use of language, some language is only appropriate for men versus women."); Gail Stein, Webster's New World Spanish Grammar Handbook 37 (1st ed. 2005) (laying out the distinct articles and noun endings used to refer to women and men in Spanish; for instance, "el muchacho" for "the boy," and "la muchacha" for "the girl"); *Gender–Easy Learning Spanish Grammar*, Collins Dictionary, https://grammar.collinsdictionary.com/us/spanish-easy-learning/gender (last visited Mar. 23, 2021) (surveying various distinct Spanish grammatical rules when referring to women and men).

women" satisfies each element and is cognizable, given the record in this case. *See Crespin-Vallardes*, 632 F.3d at 124 (reviewing social group cognizability as a question of law); *W-G-R-*, 26 I&N Dec. at 210 ("[T]he ultimate determination whether a particular social group has been established is a question of law."). But even if social distinction is a question of fact reviewed for substantial evidence, the record here compels the inference that Salvadoran society views the proffered social group of Salvadoran women as distinct.

4. "Salvadoran women who refuse to be a *jaina*" is cognizable.

Similarly, the social group of "Salvadoran women who refuse to be a *jaina*" is immutable and particular, as it is comprised of persons with the immutable characteristics of gender and nationality. *See* Section B.1, *supra*.[8] Importantly, this Court previously explained in *Temu* that "[n]othing in the statute requires that if a group is defined by a collection of traits, that each individual trait must meet all of the criteria for 'particular social group.'" 740 F.3d at 895.

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[8] Additionally, Ms. ██████ ███████ refusal to be comply with a gang member's demands to own and control her, *e.g.,* AR 126 (Tr.), might be considered a shared past experience that she "cannot change" or otherwise should not have to change, *see Acosta*, 21 I&N Dec. at 233, or, alternatively, as a protected political opinion. *See Alvarez Lagos*, 927 F.3d at 251 (unmarried mother who refused gang demands had a protected, imputed political opinion); *Hernandez Chacon v. Barr*, 948 F.3d 94, 104 (2d Cir. 2020) (remanding for the BIA to consider if Salvadoran woman who refused sexual demands by MS-13 member expressed a protected political opinion "given the political context of gang violence and the treatment of women in El Salvador").

The group is also particular as nationality and gender provide clear benchmarks as to who is a member. *See Temu*, 740 F.3d at 895–96. Even if the concept of "refusal" might, *viewed in isolation*, lack particularity, that would not defeat the particularity of the group as a whole. *Cf. id.* at 896 ("The BIA faulted Mr. Temu's group [individuals with bipolar disorder who exhibit erratic behavior]; because it lacks an 'adequate benchmark' . . . but that is precisely what the DSM–V supplies with regard to the other component of Mr. Temu's group . . . . Thus, erratic behavior has unclear boundaries that the other component of Mr. Temu's group supplies.").[9] Looking to the group as a whole, it is clear who is a member and who is not. Notably, the Board recognized a similarly-defined group as cognizable in its seminal decision *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996) (*en banc*) (recognizing as cognizable the social group of "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice").

The record also shows that Salvadoran women who refuse to be a *jaina* is viewed in Salvadoran society as distinct. For instance, there is a separate Salvadoran slang word for gang members' girlfriends, *jainas. See* AR 360 (Immigration and Refugee Board of Canada, *supra*) ("Women and girls are forced

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[9] *See also id.* ("Time and again, case law from this Court, other circuits, and the BIA has accepted social groups that, as part of their definitions, contain components that might not meet the BIA's legal standard.").

to become girlfriends (*jainas*) of gang members"); AR 389 (Douglas Farah & Kathryn Babineau, *The Evolution of MS 13 in El Salvador and Honduras*, 7 PRISM 59, 69–70) ("*[J]ainas* . . . are by and large relegated to the role of sex slaves."); AR 467 (Andrade, *supra*) (Salvadoran newspaper article about a *jaina*). The violence committed against those who refuse to be *jainas* is prevalent and well known in Salvadoran society. *See, e.g.*, AR 360 (Immigration and Refugee Board of Canada, *supra*) ("Women and girls . . . cannot say 'no' to a gang member, or they would be killed."); AR 336–39 (Kelly McEvers et al., *The Surreal Reason Girls are Disappearing in El Salvador: #15Girls*, NPR (Oct. 5, 2015)) (police investigator speculated that murder of young woman by gang members was "because she didn't want to be [a *jaina*] or didn't want to do something for that gang"). Thus, "Salvadoran women who refuse to be a *jaina*" is cognizable.[10]

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[10] Petitioner submits this social group is legally cognizable and this Court should say so. Nonetheless, because the Board's analysis was (at most) an inchoate, flawed particularity analysis in direct conflict with *Amaya v. Rosen*, *see* sec. I, *supra*, the Court could, upon remand, instruct the Board to consider in the first instance this social group's cognizability using proper legal standards. *See, e.g.*, *Perdomo*, 611 F.3d at 669 (reversing the Board for erroneously ruling "all women in Guatemala" was "too broad" to be a cognizable social group, and remanding for proper consideration of PSG cognizability).

II. THE BIA AND IJ FAILED TO PERFORM THE REQUIRED "MIXED MOTIVE" OR "INTERTWINED REASONS" ANALYSIS.

The Board erred in its nexus analysis for two reasons: First, the Board applied the wrong legal test when considering the reasons Ms. ████ █████ persecutor targeted her and threatened to murder her. To determine whether persecution is "on account of" membership in a particular social group, statute and precedent require a "mixed motive" or "intertwined reasons" analysis that allows for a persecutor to have more than one central reason for targeting the asylum seeker. *See* 8 U.S.C. § 1158(b)(1)(B)(i) (requiring that an asylum applicant "establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant" (emphasis added)); *see also Alvarez Lagos*, 927 F.3d at 247 (explaining that one central reason for persecution may be "intertwined" with others).[11]

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[11] The Board further erred in failing to apply the appropriate nexus analysis to Ms. ████ █████ withholding of removal claim. Under the withholding statute, removal must be withheld for a noncitizen whose life or freedom is threatened "for *a* reason described" in the list of protected grounds. 8 U.S.C. § 1231(b)(3)(C) (emphasis added). As the Sixth and Ninth Circuits have held, that standard is less demanding than the "at least one *central* reason" standard for nexus in asylum claims. *See Guzman-Vazquez v. Barr*, 959 F.3d 253, 272 (6th Cir. 2020) ("We agree with the Ninth Circuit's reasoning in *Barajas-Romero*. The court's explanation of why the statutory text is unambiguous accounts for the government's various arguments in this case about statutory interpretation, practical considerations, and legislative intent."); *Barajas-Romero v. Lynch*, 846 F.3d 351, 360 (9th Cir. 2017) ("We hold that 'a reason' is a less demanding

Second, the Board erred in ignoring extensive evidence in the record that compels the conclusion that Ms. ████ █████ membership in the particular social groups of Salvadoran women and/or Salvadoran women who refuse to be a *jaina* was or will be at least one central reason for her persecution.

A. The BIA Erred in Applying the Wrong Legal Test in Determining Nexus.

The Board committed legal error when it failed to perform the requisite "mixed motive" or "intertwined reasons" analysis in considering nexus to a protected ground in Ms. ████ █████ case. *See Salgado-Sosa*, 882 F.3d at 458 (finding nexus requirement satisfied when protected status was "at least one of multiple central reasons" for persecution).

To be granted asylum, an applicant must prove that a protected ground was or will be at least one central reason for her persecution. 8 U.S.C. § 1158(b)(1)(B)(i). However, a protected ground "need not be the 'sole' or even the 'dominant motivation for her persecution.'" *Alvarez Lagos*, 927 F.3d at 247 (citing *Cruz*, 853 F.3d at 129). One central reason for the persecution may be

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standard than 'one central reason.' The statutory language is unambiguously different, with different meanings, so there is no ambiguity justifying deference to the administrative agency's contrary view."). We urge this Court to follow these sister circuit precedents in recognizing the Board's failure to apply the correct legal standard in evaluating nexus to a protected ground in the withholding of removal context.

"'intertwined' with others." *Id.* at 250 (citing *Cruz*, 853 F.3d at 129). The applicant does not need to provide a "smoking gun," but "must provide *some* evidence of [her persecutors' motive], direct or circumstantial." *Lopez Ordonez v. Barr*, 956 F.3d 238, 243 (4th Cir. 2020) (internal citations omitted); *see also Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015) ("To prove that persecution took place on account of [a social group], an asylum applicant . . . must demonstrate that [this social group is] more than an incidental, tangential, superficial, or subordinate reason for his persecution" (internal quotations omitted)).

This Court has warned against an "excessively narrow reading of the requirement that persecution be undertaken 'on account of'" a protected ground. *Hernandez-Avalos*, 784 F.3d at 949. A reading is "excessively narrow" when the adjudicator "draws a meaningless distinction under [the] facts" between the reasons the petitioner was, or would be, subjected to persecution. *Id. See also Oliva v. Lynch*, 807 F.3d 53, 60 (4th Cir. 2015) (explaining that the nexus requirement is analyzed "not by focusing myopically on a particular word or fact but rather by viewing the case holistically, with an eye to the full factual context"). This Court has rejected Board decisions that focus on the "immediate trigger" for the persecution, *Oliva*, 807 F.3d at 60, "while failing to consider the 'intertwined reasons' for those threats." *Cruz*, 853 F.3d at 129.

In the recent decision of *Diaz de Gomez v. Wilkinson*, this Court found that the petitioner's family ties were one central reason for her persecution, even though there were several other central reasons for her persecution, including her own personal resistance to gang recruitment and her job as a teacher. 987 F.3d 359, 364–65 (4th Cir. 2021). This Court explained that the Board's failure to recognize family ties as at least one central reason for her persecution represents an excessively narrow reading of the nexus requirement. *Id*. at 365. The Court also noted that the Board had made the same error "in many recent cases" on appeal. *Id.*

So too here. In Ms. [redacted] [redacted] case, the BIA and IJ failed to consider that [redacted] "attraction" to her was part and parcel of his desire to control and dominate her because of her gender and/or refusal to be his *jaina*.[12] Contrary to the agency's contention, AR 4–5 (BIA Decision), a persecutor's "attraction" to a female victim does not preclude her from demonstrating nexus to a protected ground. In fact, the case at bar demonstrates the opposite to be true. [redacted]

[12] The IJ's own fact finding recognizes this nexus. The IJ specifically states that "[t]he respondent's testimony was clear that the respondent was stalked. Stalked by a man who happened to be a gang member who wanted her to be his girlfriend." AR 71 (IJ Decision). The IJ thus found as a matter of fact that at least one central reason for [redacted] actions toward Ivania was his desire to control her and make her his "woman." Because that reason cannot be separated from her status as a Salvadoran woman, the IJ's own fact findings contradict her holding. *See Temu*, 740 F.3d at 896 (finding the BIA's determination that the applicant's social group was unclear to be internally inconsistent).

chauvinist views of Ms. ████ ████ as a Salvadoran woman informed his belief that he could dominate all aspects of her life, including personal and/or sexual relationships. *See, e.g.*, AR 116 (Tr.) (████ demanding Ms. ████ ████ "be his woman."); *see also Salgado-Sosa*, 882 F.3d at 458 (noting that nexus is satisfied where a protected ground is one central reason for persecution, even where that ground is inextricably linked with other reasons). Even if this Court believes ████ attraction to Ms. ████ ████ could be separated from her social groups, unprotected and protected reasons for persecution can exist alongside each other, or be intertwined, without negating nexus. *See Diaz de Gomez*, 987 F.3d at 364–65; *Ndayshimiye v. Att'y Gen. U.S.*, 557 F.3d 124, 129 (3d Cir. 2009) ("Section 208's use of the phrase 'one central reason' rather than 'the central reason,' . . . was a deliberate change in the drafting of this provision, [and] demonstrates that the mixed-motives analysis should not depend on a hierarchy of motivations in which one is dominant and the rest are subordinate.").

The BIA thus applied the wrong legal test and failed to perform the required "mixed motive" or "intertwined reasons" analysis in evaluating "why she, and not another person was" persecuted. *See Diaz de Gomez*, 987 F.3d at 364 (quoting *Hernandez-Avalos*, 784 F.3d at 950). The BIA summarily agreed with the IJ's explanation that ████ persecuted Ms. ████ ████ "because he was attracted to her," AR 4 (BIA Decision), failing to recognize the gender-based power

dynamics embedded in that conclusion and ignoring "intertwined reasons" for [redacted] persecution, including her membership in cognizable gender-based social groups. Ms. [redacted] [redacted] would not have been subject to [redacted] persecution if she was not a Salvadoran woman and/or a Salvadoran woman who refused to be a *jaina*, and she therefore established nexus to a protected ground.

B. The Record Compels the Conclusion that Ms. [redacted] [redacted] was Persecuted on Account of a Protected Ground.

The agency further erred in disregarding uncontroverted evidence that at least one central reason for Ms. [redacted] [redacted] persecution was her gender and/or her gender in combination with other characteristics, regardless of any personal attachment on the part of her persecutor. *See Alvarez Lagos*, 927 F.3d at 251 (finding the agency "failed to appreciate, or even address, critical evidence in the record bearing directly on the question of nexus" (internal quotation marks omitted)); *see also Baharon v. Holder*, 588 F.3d 228, 233 (4th Cir. 2009) ("Those who flee persecution and seek refuge under our laws have the right to know that the evidence they present of mistreatment in their home country will be fairly considered and weighed by those who decide their fate.").[13] Under the correct legal

[13] The BIA and IJ in *Baharon* limited their analysis of the applicant's past persecution to a specific three-day period where he was imprisoned, instead of considering the totality of his persecution, including "threats to his safety and the persecution of his relatives." *Id*. at 231. Similarly, the BIA and IJ in Ms. [redacted] [redacted] case failed to seriously consider the threats of murder made to Ms.

standard, Ms. [redacted] [redacted] presented evidence that demonstrated the past persecution she suffered and future persecution she fears are on account of her particular social groups.[14]

Proof of a persecutor's reasons for inflicting harm may be direct or circumstantial. *See, e.g.*, *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) ("[Petitioner] objects that he cannot be expected to provide direct proof of his persecutors' motives. We do not require that."); *Lopez Ordonez*, 956 F.3d at 243 (requiring "direct or circumstantial" evidence of motive); *Matter of S-P-*, 21 I&N Dec. 486, 489 (BIA 1996) (*en banc*) ("Persecutors may have differing motives for engaging in acts of persecution, some tied to reasons protected under the Act and others not. Proving the actual, exact reason for persecution or feared persecution

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[redacted] [redacted] and her family, as well as the murder of her cousin. Ms. [redacted] [redacted] was found to be credible by the IJ, AR 67 (IJ Decision), but relevant portions of her testimony were completely ignored.

[14] The agency erred in failing to recognize the persecution Ms. [redacted] [redacted] suffered and fears on account of her protected grounds. Specifically, the IJ committed legal error when she determined that Ms. [redacted] [redacted] did not suffer past persecution because she was "never physically harmed." *See* AR 72 (IJ Decision). This Court has consistently held that death threats alone may be sufficient for a finding of past persecution. *See, e.g.*, *Tairou v. Whitaker*, 909 F.3d 702, 704 (4th Cir. 2018) ("Our binding precedent explicitly holds that a threat of death constitutes persecution."). The IJ committed further legal error when she ignored [redacted] attacks on and threats toward Ms. [redacted] [redacted] family. AR 72 (IJ Decision). The murder of Ms. [redacted] [redacted] cousin makes these death threats more credible, and itself contributes to a finding of past persecution, as do the death threats [redacted] made to her mother and sister. *See Baharon*, 588 F.3d at 232 ("Violence or threats to one's close relatives is an important factor in deciding whether mistreatment sinks to the level of persecution.").

may be impossible in many cases. An asylum applicant is not obliged to show conclusively why persecution has occurred or may occur."); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 211 (BIA 2007) ("[A]n applicant must produce evidence, either direct or circumstantial, from which it is reasonable to believe that the harm was or would be motivated in part by an actual or imputed protected ground."). The record in this case contains an abundance of both types of evidence.

First, Ms. persecutor made direct statements to her that establish nexus. told her, for example, that "[h]e wasn't going to let [her] be going around with any other person. [She] was going to be for him and that was it." AR 128 (Tr.). He threatened that she "had to be his woman, or he was going to kill [her]," while using his weapon to intimidate her. AR 126 (Tr.). He demanded that she "be his woman," AR 116 (Tr.), and declared that he was not going to "leave her in peace until [she] became his girlfriend." AR 120 (Tr.). The IJ herself recognized the realities of being a woman in El Salvador, stating "[y]ou just have to be a woman to have these kind of things happen." AR 61 (IJ Decision). Ms. further testified that the reason there are so many murders of women in El Salvador is because women "do not want to comply" when threatened by gang members like who demand that women enter into nonconsensual relationships. AR 133 (Tr.).

In addition to this direct evidence, circumstantial evidence in the record compels the conclusion that [redacted] targeted and threatened Ms. [redacted] [redacted] because she is a Salvadoran woman and/or a Salvadoran woman who refused to be a *jaina*. Hundreds of pages of country conditions evidence in the record demonstrate the high rates of femicide and violence against women in El Salvador and the state's failure to apprehend and prosecute the perpetrators. *See, e.g.*, AR 213–14 (*El Salvador 2017 Crime & Safety Report*, *supra*) ("Services for victims of rape are very limited. . . ."); AR 231–32 (O'Toole, *supra*) ("[T]he gangs' practice of explicitly targeting girls for sexual violence or coerced relationships is well known. . . . To refuse the gangs' demands can mean death for girls and their families" and this targeting "dovetails with a wider rise in femicide, or killing motivated by gender, in El Salvador. The rate of violent death for women is the third-highest in the world."); AR 248 (Immigration and Refugee Board of Canada, *supra*) ("Women are considered to be a 'property' by gangs . . . If a woman or girl does not visit an imprisoned gang member as ordered, or, if she is seen accompanied by other men, she, or a member of her family would be killed."); AR 295 (U.S. State Dep't*, El Salvador 2016 Human Rights Report*) ("Rape and other sexual crimes against women" as well as "[v]iolence against women" were "a widespread and serious problem.").

The record evidence specifically shows that violence against women in El Salvador, especially violence perpetrated by gang members, is unquestionably motivated by gender. *See, e.g.*, AR 295–96 (*El Salvador 2016 Human Rights Report, supra*) ("A large portion of the population considered domestic violence socially acceptable" with "many violent crimes against women occur[ing] within the context of gang structures, where women were 'corralled' and 'disposed of at the whims of male gang members' . . . Colleagues of [women's rights activist Aida Pineda, who was murdered in 2016] contended that . . . she was targeted for being a 'powerful woman' who challenged the control of the Barrio 18 gang's repressive behavior toward women."). The fact that El Salvador is an alarmingly dangerous country for women has never been contested, and at least one central reason █████ targeted Ms. █████ █████ is because she is a Salvadoran woman.[15]

The record thus compels the conclusion that █████ targeted Ms. █████ █████ because she is a Salvadoran woman, and/or because she is a Salvadoran woman who refused to be a *jaina*, and under the required "mixed motive" or

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[15] It is difficult to imagine similar stalking and threats leveraged against an American tourist in El Salvador, or against a Salvadoran man. For example, the U.S. travel advisory for El Salvador states "there is no information to suggest U.S. citizens are specifically targeted," AR 209 (U.S. Dep't of State, *El Salvador Travel Warning*), and the Canadian travel advisory similarly states "gang violence is rarely targeted at foreigners," AR 347 (Gov't of Canada, *Travel Advice and Advisories for El Salvador* (July 21, 2017)), as most gang violence in the country is aimed at other Salvadorans.

"intertwined reasons" analysis, Ms. ████ █████ membership in these social groups was or would be at least one central reason for her persecution.

III. THE BIA AND IJ ERRED BY DENYING MS. ██████ ██████ CLAIM FOR CAT PROTECTION.

The BIA and IJ erred in this case by wholly failing to address or engage with any independent evidence in the record—specifically, the hundreds of pages of country conditions evidence submitted by Ms. ████ █████–when determining her eligibility for CAT relief. The regulations require adjudicators to consider "*all* evidence relating to the possibility of future torture." 8 C.F.R. § 1208.16(c)(3) (emphasis added); *see also Turkson v. Holder*, 667 F.3d 523, 526 (4th Cir. 2012); *Ai Hua Chen v. Holder*, 742 F.3d 171, 179 (4th Cir. 2014) (requiring that the BIA "'offer a specific, cogent reason for rejecting evidence'" (quoting *Tassi*, 660 F.3d at 720)). Where, as here, the agency decision "lacks any meaningful engagement" with the evidence presented, the Court must vacate the denial of CAT relief. *See Cabrera Vasquez*, 919 F.3d at 223–24 (vacating denial of CAT when the BIA decision was "improperly based on a limited analysis of the country conditions"); *Rodriguez-Arias v. Whitaker*, 915 F.3d 968, 974 (4th Cir. 2019) ("[W]holesale failure to fully consider [applicant's] country-conditions evidence constitutes reversible error."); *Camara*, 378 F.3d at 372 (vacating denial of CAT relief when

IJ and BIA did "not consider[] all the evidence relative to [petitioner]'s CAT claim").

An applicant seeking CAT protection bears the burden of showing "'it is more likely than not that he or she would be tortured if removed to the proposed country of removal.'" *Cabrera Vasquez*, 919 F.3d at 222 (quoting 8 C.F.R. § 1208.16(c)(2)). To meet this standard, public officials "need not have actual knowledge of the torture; it is enough if they simply 'turn a blind eye' to it." *Mulyani v. Holder*, 771 F.3d 190, 200 (4th Cir. 2014). Further, "'[a] CAT applicant may satisfy his burden with evidence of country conditions alone.'" *Rodriguez-Arias*, 915 F.3d at 975 (quoting *Aguilar-Ramos v. Holder*, 594 F.3d 701, 705 (9th Cir. 2010)).

Here, the BIA and IJ erred by completely disregarding the abundant country conditions evidence in the record related to the risk of torture faced by Ms. ████ ████ if forced to return to El Salvador. In summarily disposing of Ms. ████ ████ CAT claim, neither the IJ nor the BIA addressed anything other than her personal testimony. *See* AR 3–5 (BIA Decision), 74 (IJ Decision). However, this Court has made clear that country conditions evidence must be meaningfully addressed because "'[c]ountry conditions alone can play a decisive role in granting relief under the [CAT].'" *Rodriguez-Arias*, 915 F.3d at 975 (quoting *Kamalthas v. I.N.S.*, 251 F.3d 1279, 1280 (9th Cir. 2001)).

Indeed, the evidence presented by Ms. █████ █████ establishes not only the likelihood of rape and murder that she faces at the hands of gangs if she were to return to El Salvador, but also the government's acquiescence to this kind of gang violence and torture. The record is replete with country conditions evidence demonstrating the high rates of torture, including femicide and other violence against women in El Salvador, especially perpetrated by gang members.[16]

In particular, this evidence included State Department reports detailing the "widespread" rape, sexual crimes, and violence faced by women in El Salvador. AR 275, 295–98 (*El Salvador 2016 Human Rights Report*, *supra*). As this Court noted in *Camara*, these State Department documents are "reports that courts have recognized as important in determining whether an [individual] is entitled to relief

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[16] S*ee, e.g.*, AR 212–14 (*El Salvador 2017 Crime & Safety Report*, *supra*) ("Crimes of every type routinely occur, and crime is . . . gang-centric and characterized by violence directed against . . . known victims . . . . Rape remains a serious concern . . . and survivors of rape may not report the crime for fear of retaliation."); AR 231 (O'Toole, *supra*) ("[T]he gangs' practice of explicitly targeting girls for sexual violence or coerced relationships is well known. Since 2000, the homicide rate for young women in El Salvador has also increased sharply, according to the latest data from the World Health Organization. To refuse the gangs' demands can mean death for girls and their families."); AR 347 (Gov't of Canada, *supra*) ("Violent crime——including homicide . . . rape, kidnapping—— is a serious problem throughout El Salvador and is escalating dramatically. A contributing factor to this increase in crime is the presence of organized gangs . . . The majority of victims are women."); AR 360 (Immigration and Refugee Board of Canada, *supra*) ("Women and girls are forced to become girlfriends (jainas) of gang members; they cannot say 'no' to a gang member, or they would be killed.").

under the CAT." 378 F.3d at 372. Further, in *Rodriguez-Arias*, this Court remanded when adjudicators failed to "meaningfully address the evidence that [she] provided about country conditions in El Salvador, especially the Salvadoran government's behavior towards gang members and suspected gang members." 915 F.3d at 974. This is exactly the same kind of evidence presented by Ms. ██████ ██████.[17] Yet, the BIA and IJ completely failed to address this evidence, let alone "meaningfully engage with" it. *Id.* at 975; *see* AR 5 (BIA Decision), 74 (IJ Decision).

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[17] *See, e.g.*, AR 275 (*El Salvador 2016 Human Rights Report, supra*) ("The principal human rights problems [in El Salvador] . . . included widespread corruption; weak rule of law, which contributed to high levels of impunity and government abuse, including . . . violence against women and girls (including by gangs)."); AR 324 (Óscar Martínez et al., *Killers on a Shoestring: Inside the Gangs of El Salvador*, New York Times (Nov. 20, 2016)) (explaining that state efforts to combat gang violence "was corrupted by, among other things, the secret efforts of the two major political parties to court the gang leaders' electoral support at the same time"); AR 360 (Immigration and Refugee Board of Canada, *supra*) ("[I]mpunity for gender-based violence remains a problem and the government does not take steps to improve the situation . . . there are high levels of impunity in El Salvador regarding violence against women . . . the justice system faces challenges such as lack of administrative and economic resources, lack of adequate investigations by prosecutors, and corruption among judges."); AR 389 (Farah & Babineau, *supra*) (explaining how government leaders offered "identity cards and financial rewards in exchange for gang-controlled votes," made payoffs, and "negotiat[ed] with gang leaders to gain their support [in] elections").

Ms. ████ █████ credible testimony,[18] combined with hundreds of pages of country conditions evidence establishing the prevalence of femicide and other gender-based violence perpetrated by gang-members in El Salvador,[19] compels the conclusion that torture is more likely than not if she is forced to return. Specifically, this evidence demonstrates that she will likely be murdered or raped by the gang member who targeted her if she returns to El Salvador. The likelihood of murder faced by Ms. ████ ████ if she returns to El Salvador is further substantiated by the fact that her persecutor murdered her cousin and was released from jail within days. *See* AR 546 (CFI) ("They incarcerated him when he killed my cousin, but quickly, three days later, he was out. It is always like that.").

Moreover, the record demonstrates that the Salvadoran government will "turn a blind eye" to the danger faced by Ms. ████ ████ because it is perpetrated by a gang. *See* AR 130 (Tr.) ("Human rights are not respected . . . [by] the president [and] the politicians."); AR 546 (CFI) ("The police are allied with the

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[18] *See* AR 122, (Tr.) (testifying that she knows her persecutor would still target her if she returned because he told her "sister that he would not forget what I had done to him"); AR 129, Tr. at 51 ("He told me he would assassinate me."); AR 133–34 (Tr.) (explaining that if she returns to El Salvador, "[h]e's going to make a[] [homicide] attempt against me. . . . Because the fact that I came here, left and came here means that I was fleeing from him. These people don't tolerate rejection. And that's why I think, and I am certain that he would attempt [to kill] me or someone in my family."); AR 545 (CFI) ("[If I return to El Salvador,] I fear that he will kill me. He knows that I came and he knows I came because of him.").

[19] *See supra* note 16 (describing the widespread violence against women in El Salvador at the hands of gangs, including rape and murder).

gangs over there . . . [and] the police are corrupt . . . [S]ome of the police members are [gang members].”); *supra* note 17 (describing the Salvadoran government’s widespread corruption, including to gain the support of gangs, and acquiescence to pervasive gang violence throughout the country, especially against women). Public officials’ willingness to turn a blind eye to gang violence in this manner reflects the government’s acquiescence to torture. *See Cabrera Vasquez*, 919 F.3d at 224 n.2.

Thus, the BIA’s erroneous denial of CAT relief must be vacated, and this Court should grant Ms. ████ ████ relief under CAT. Alternatively, the Court should remand in order for the BIA to engage in the required CAT analysis, including full consideration of the country conditions evidence in the record.

CONCLUSION

For the foregoing reasons, this Court should vacate the BIA’s decision and correct the Board’s errors with respect to its analysis of social group cognizability, nexus to a protected ground, and Ms. ████ ████ CAT eligibility, or at minimum remand with instructions for the agency to properly consider the remaining analysis.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case is one of first impression in light of this Court’s recent decision in *Amaya*, 986 F.3d at 426, which rejected a major, precedential BIA decision

defining membership in a particular social group. Ms. [redacted] [redacted] case involves complex legal issues related to gender-based social groups, and her case offers the opportunity for this Court to decide whether gender-based social groups, including the social group "Salvadoran women," are cognizable as a matter of law. This Court's decision will have a substantial impact on asylum seekers throughout the country, as other courts consider the cognizability of similar social groups. The opportunity to address these issues in greater detail, and to respond to inquiries from this Court, will aid the Court in its decision-making process.

Respectfully submitted,

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Dated: March 26, 2021

/s/ Sabrineh Ardalan
Harvard Immigration and Refugee Clinical Program

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I hereby certify that on March 26, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all the registered CM/ECF users.

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