No. 20-[redacted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[redacted]

Petitioner,

v.

WILLIAM P. BARR, U.S. Attorney General,
Respondent.

BRIEF OF *AMICUS CURIAE*
THE HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM IN SUPPORT OF PETITIONER

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RULE 26.1 DISCLOSURE STATEMENT

The Harvard Immigration and Refugee Clinical Program ("HIRC") is a clinical program at Harvard Law School. No publicly-held entity owns an interest of ten percent or more in HIRC, and it does not have any members who have issued shares or debt securities to the public.

Dated: Oct. 7, 2020

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The Harvard Immigration and Refugee Clinical Program ("HIRC") submits this brief pursuant to Federal Rules of Appellate Procedure, Rule 29(a) and Local Rule 29.0.[1] HIRC has been a leader in the field of refugee and asylum law for over 35 years and has a direct interest and extensive expertise in the proper development and application of immigration and asylum law, so that claims for protection receive fair and full consideration under existing standards of law.

HIRC is dedicated to the representation of individuals applying for U.S. asylum and related protections, as well as the representation of individuals who have survived domestic violence and other crimes and are seeking avoidance of forced removal in immigration proceedings. HIRC has worked with thousands of immigrants and refugees from around the world since its founding in 1984. It combines representation of individual applicants for asylum and related relief with appellate litigation and policy advocacy.

HIRC attorneys are recognized experts in asylum law, including asylum cases involving gender. HIRC was central to the drafting of the historic U.S. Gender Asylum Guidelines, which were adopted by the federal government, and HIRC has filed briefs as amicus curiae in cases before the U.S. Supreme Court, the federal

[1] Petitioner consents to this filing and Respondent does not oppose this filing. Amicus states that no counsel for the party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than Amicus contributed money that was intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

courts of appeals, the Board of Immigration Appeals, and various international tribunals.

Among HIRC's clients are victims of human rights abuses from all over the world, including women from El Salvador, applying for refugee protection. Accordingly, HIRC has a direct interest in the outcome of this action and respectfully submits this brief in support of the Petitioner.

INTRODUCTION

The Board of Immigration Appeals ("Board") erred in summarily rejecting [redacted] "Petitioner's") proposed particular social group ("PSG"), "married Salvadoran women who are unable to leave their relationship," as not cognizable in light of *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018). The Board further erred by failing to consider the particular social group of "Salvadoran women" included within Petitioner's proposed social group. The Board's decision is inconsistent both with longstanding precedent and with the narrow holding in *Matter of A-B-*, which is not applicable to [redacted] case.

Matter of A-B- upheld the seminal decision *Matter of Acosta*, in which the Board explicitly recognized "sex" as a quintessential example of a cognizable particular social group. *See Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). Indeed, *A-B-* relied on the reasoning of *Acosta*, emphasizing that "persecution . . . directed toward an individual who is a member of a group of persons all of whom

share a common, immutable characteristic" constitutes "persecution on account of membership in a particular social group." *A-B-*, 27 I. & N. Dec. at 328. The Attorney General's endorsement of *Acosta* in *A-B-* is hardly surprising: *Acosta*'s conclusion that a PSG can be defined by gender comports with the Immigration and Nationality Act ("INA") and the *ejusdem generis* canon of statutory interpretation.

Gender-based particular social groups, including gender itself or gender along with another immutable characteristic such as nationality, also satisfy the additional requirements of particularity and social distinction announced in Board decisions since *Acosta.* Indeed, since *A-B-*, numerous decisions of the immigration courts and the Board have recognized that such groups can satisfy both requirements.

[redacted] proposed social group includes the PSG of "Salvadoran women." Accordingly, the Board should necessarily have considered the PSG of Salvadoran women when evaluating the cognizability of her PSG on appeal. By failing to recognize that Petitioner proposed a cognizable PSG under *Acosta* and more recent decisions, the Board overlooked what courts have long recognized both nationally and internationally: The Refugee Convention provides protection to survivors of gender-based violence on account of their gender.

For these reasons, the Board erred when it categorically rejected Petitioner's gender-based social group claim based on *A-B-*. This Court should correct that error, and should direct the Board to consider whether Petitioner is eligible for relief based

on past persecution and/or a well-founded fear of future persecution on account of her membership in a cognizable particular social group comprised of Salvadoran women.

ARGUMENT

I. MEMBERSHIP IN A COGNIZABLE PARTICULAR SOCIAL GROUP MAY BE SHOWN BASED ON GENDER ALONE

Since *Matter of A-B-*, several sister circuit courts of appeal, the Board, and immigration judges have recognized that a PSG defined by gender or gender-plus-nationality can form the basis of a cognizable social group. In *Silvestre-Mendoza v. Sessions*, for example, the Ninth Circuit recognized "Guatemalan women" as a cognizable particular social group and remanded to the Board for consideration of that PSG, emphasizing that gender was "the gravamen of [the petitioner's] persecution claim." *Silvestre-Mendoza v. Sessions*, 729 F. App'x 597, 598 (9th Cir. 2018) (concluding that "the BIA should have considered whether 'Guatemalan women' is a particular social group [where] 'Guatemalan women' subsumes 'young Guatemalan females who have suffered violence due to female gender'" even though petitioner had not explicitly proffered the PSG of Guatemalan women); *see also Ticas-Guillen v. Whitaker*, 744 F. App'x 410 (9th Cir. 2018) (finding that "gender and nationality can form a particular social group"). So too here.

As in *Silvestre-Mendoza*, Petitioner's gender is "the gravamen of [her] persecution claim," and the Board should therefore have "considered whether '[Salvadoran] women' is a particular social group." *See Silvestre-Mendoza*, 729 F.

App'x at 598. Indeed, as the First Circuit recently declared, it is "difficult to think of a country in which women are not viewed as 'distinct' from other members of society" and "do not form a 'particular' and 'well-defined' group of persons." *De Pena-Paniagua v. Barr*, 957 F.3d 88, 96 (1st Cir. 2020) (recognizing the cognizability of "women" or "women in country X" as a PSG); *see also Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1079–80 (9th Cir. 2020) (emphasizing that the cognizability of social groups, including those based on gender, must be considered on a case-by-case basis). El Salvador is no exception.

The Board and immigration judges across the country have also continued to recognize the cognizability of gender-based social groups since *Matter of A-B-* and have granted asylum and withholding of removal on that ground. *See, e.g.*, *T-S-M-*, (BIA, Apr. 16, 2019) (unpublished) ("[B]eing a woman is an immutable characteristic . . . as gender is fundamental to one's individual identity or conscience."), Add. 2; *C-*, (Philadelphia Immigration Court, May 15, 2019) (unpublished) (recognizing "Guatemalan women" as a valid particular social group and granting asylum), Add. 23; —, (Denver Immigration Court, Mar. 7, 2019) (unpublished) (finding "Mexican women" cognizable and granting asylum), Add. 32, 39; —, (San Francisco Immigration Court, Sept. 13, 2018) (unpublished) (concluding that "Mexican females" are a cognizable social group), Add. 49; —, (Boston Immigration Court, June 18, 2019) (citing legislation aimed at targeting violence against women to find that Guatemalan society views women as a separate and distinct group), Add. 126; —, (Arlington Immigration Court, 2018)

(unpublished) (finding the particular social group of "women in Honduras" cognizable and granting asylum), Add. 73; —, (Newark Immigration Court, Mar. 13, 2020) (unpublished) (finding "Honduran women" cognizable and granting asylum), Add. 84, 86; —, (Arlington Immigration Court, May 1, 2020) (same), Add. 98, 102.[2]

The Board thus erred in categorically rejecting Petitioner's claim based on *Matter of A-B-*, and further erred in failing to consider the social group of "Salvadoran women" included within the PSG presented. *See Silvestre-Mendoza*, 729 F. App'x at 598; *De Pena-Paniagua*, 957 F.3d at 96; *see also Grace v. Barr*, 965 F.3d 883, 905–06 (D.C. Cir. 2020) (holding that *A-B-* did not create a general rule against claims involving domestic violence, and emphasizing the need for a case-by-case approach); *Diaz-Reynoso*, 968 F.3d 1070, 1079–80 (same); *Juan Antonio v. Barr*, 959 F.3d 778, 790 n.3 (6th Cir. 2020) (emphasizing there can be "no general rule against claims involving domestic violence as a basis for membership in a particular social group") (citing *Padilla-Maldonado v. Att'y Gen. U.S.*, 751 F. App'x 263, 268–69 (3d Cir. 2018) (finding that "the overruling of *A-R-C-G-* . . . does not automatically defeat [petitioner's] claim" where the PSG presented "paralleled the proposed social group in *A-R-C-G-*" and "remand[ing] to

[2] All unpublished decisions cited here have been included in the Addendum.

the BIA to remand to the IJ . . . [to] determine whether [petitioner's] membership in the group . . . is cognizable[.]")).

At a minimum, the Board should have remanded Petitioner's case to permit the immigration judge to make a determination regarding the cognizability of "Salvadoran women" in the first instance.[3] The Board has followed that approach in several cases post-dating *Matter of A-B-*. *See, e.g.*, *M-D-A-*, (BIA, Feb. 14, 2019) (unpublished) (remanding for further consideration of whether "women in El Salvador" constituted a cognizable particular social group), Add. 106; *S-R-P-O-*, AXXX XXX 056 (BIA, Dec. 20, 2018) (unpublished) (remanding for further consideration of whether "Mexican women" constituted a cognizable particular social group), Add. 108; *X-Q-C-D-*, (BIA, Dec. 11, 2018) (unpublished) (same), Add. 112.

II. THE CONCLUSION THAT GENDER ALONE IS SUFFICIENT TO ESTABLISH MEMBERSHIP IN A PARTICULAR SOCIAL GROUP IS FAITHFUL TO THE INA, AS RECOGNIZED IN *ACOSTA*

[3] *Matter of W-Y-C- & H-O-B-*, 27 I. & N. Dec. 189 (BIA 2018), is inapposite to the present case. In *W-Y-C- & H-O-B-*, the Board declined to consider a social group raised for the first time on appeal that was "substantially different from the [PSG] delineated below." *See id.* at 192. Here, by contrast, the PSG of "Salvadoran women" is already fully encompassed within and subsumes the PSG presented. *See Silvestre-Mendoza*, 729 Fed. App'x at 598–99 (remanding for consideration of "Guatemalan women"). In a comparable situation, the First Circuit similarly invited the Board to consider upon remand a group defined by gender or gender-plus-nationality. *See De Pena-Paniagua*, 957 F.3d at 88.

The recognition that gender alone is sufficient to establish membership in a cognizable social group dates back to the Board's seminal 1985 decision in *Matter of Acosta*. In that case, the Board drew on the *ejusdem generis* canon of statutory construction, which "holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words," in order to clarify the meaning of the "membership in a particular social group" ground for asylum. *Acosta*, 19 I. & N. Dec. at 233. Looking to the other four protected grounds—race, religion, nationality, and political opinion—the Board found that each "describes persecution aimed at an immutable characteristic . . . that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed." *Id.* Based on that understanding, the Board determined that "membership in a particular social group" should be read to encompass "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic." *Id.* The Board then recognized that "[t]he shared characteristic" for purposes of establishing asylum eligibility "might be . . . *sex*, color, or kinship ties." *Id.* (emphasis added).

This Court has long accepted the *Acosta* framework and recognized gender as an immutable characteristic. As far back as 1993, then-Judge Alito of the Third Circuit cited *Acosta* approvingly in *Fatin v. INS*, 12 F. 3d 1233 (3d Cir. 1993). In *Fatin*, the Third Circuit noted that because *Acosta* "specifically mentioned 'sex' as an innate characteristic that could link the members of a 'particular social group,'"

Fatin had satisfied that requirement "to the extent that . . . [she] suggest[ed] that she would be persecuted . . . simply because she is a woman." *Fatin*, 12 F.3d at 1240 (recognizing "Iranian women" as a valid PSG); *see also Escobar v. Gonzales*, 417 F.3d 363, 367 (3d Cir. 2005) (relying on *Acosta* and determining that "membership in a 'particular social group' can be attributed to either: (1) those who possess immutable characteristics such as race, *gender* or a prior position, status or condition; or (2) those who possess a characteristic that is capable of being changed but is of such fundamental importance that individuals should not be required to modify it" (emphasis added)).[4]

Sister circuits have also adopted this framework. Reasoning from *Acosta*, the Ninth Circuit has observed that "the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application . . . [of the conclusion that] a 'particular social group' is one united by . . . an innate characteristic[.]" *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005); *see also Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (remanding the Board's decision that "women in

[4] *Acosta* also provided the framework for federal guidelines issued in 1995 regarding "asylum claims by women." *See generally* Memorandum from Phyllis Coven, INS Office of International Affairs, to All INS Asylum Officers and HQASM Coordinators, *Consideration for Asylum Officers Adjudicating Asylum Claims from Women* 9 (May 26, 1995) (describing *Fatin* as consistent "with the statement of the Board in *Acosta* that 'sex' might be the sort of shared characteristic that could define a particular social group"); *see also Matter of Kasinga*, 21 I. & N. Dec. 357, 377 (BIA 1996) (Rosenberg, concurring) ("Our recognition of a particular social group based upon tribal affiliation and gender is also in harmony with the guidelines for adjudicating women's asylum claims issued by the [INS].").

Guatemala" could not constitute a particular social group because it was "inconsistent with . . . *Acosta*").

In *Niang v. Gonzales*, the Tenth Circuit "[a]ppl[ied] the *Acosta* definition" to find that "female members of a tribe" qualified as a particular social group, observing that "[b]oth gender and tribal membership are immutable characteristics." 422 F.3d 1187, 1199 (10th Cir. 2005). And, in *Hassan v. Gonzales*, the Eighth Circuit recognized the particular social group "Somali females" based on the applicant's "possession of the immutable trait of being female." 484 F.3d 513, 518 (8th Cir. 2007); *see also Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008) (holding that "Cameroonian widows" is a cognizable particular social group); *Cece v. Holder*, 733 F.3d 662, 673 (7th Cir. 2013) (finding that gender and nationality are inalterable traits and reformulating PSG presented on appeal).

Importantly, the recognition that gender alone may define a particular social group does not mean that all women around the globe are entitled to protection under the Refugee Act. As is true in cases based on the other protected grounds (such as race or religion), an asylum applicant, in addition to showing that she belongs to a cognizable PSG, must also demonstrate that she satisfies all elements of the refugee definition. *See* 8 U.S.C. § 1101(a)(42); *see also Niang*, 422 F.3d at 1199–200 ("[T]he focus with respect to [gender-based asylum] claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the

members of that group are sufficiently likely to be persecuted that one could say that they are persecuted 'on account of' their membership").[5]

III. GENDER MEETS THE CRITERIA THE BOARD HAS ADDED TO DEFINE MEMBERSHIP IN A PARTICULAR SOCIAL GROUP SINCE *ACOSTA*

In recent years, the Board has "expanded the particular social group analysis beyond the *Acosta* test," requiring that the social group also be "particular" and "social[ly] visib[le]." *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 232 (BIA 2014). With respect to social visibility or distinction, the Board has explained that asylum seekers must offer evidence that "society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group." *Matter of W-G-R-*, 26 I. & N. Dec. 208, 217 (BIA 2014). With respect to particularity, the Board has emphasized that the group "must be defined by characteristics that provide a clear benchmark for determining who falls within [it]." *Id.* at 214.

This analysis of particularity and social distinction has not changed in light of *Matter of A-B-*. *See, e.g.*, *Diaz-Reynoso*, 968 F.3d at 1080 (emphasizing that "the

[5] For further discussion of nexus in gender-based asylum claims, see Brief of Amicus Curiae Center for Gender and Refugee Studies. The record evidence of pervasive violence against women in El Salvador and impunity for perpetrators of gender-based violence, as well as the physical and emotional abuse [redacted] husband [redacted] inflicted on her, supports a finding that [redacted] suffered and fears persecution on account of her status as a woman. *See, e.g.*, —, (Boston Immigration Court, June 18, 2019) (unpublished) (recognizing applicant's membership in PSG of "Guatemalan women" was at least one central reason for her persecution), Add. 127; —, (San Francisco Immigration Court, Sept. 13, 2018) (unpublished) (applicant demonstrated persecution was "on account of her membership in" a PSG of "Mexican females"), Add. 56.

BIA must conduct the proper particular social group analysis on a case-by-case basis"). Indeed, this Court and sister circuits have reaffirmed time and again that PSG determinations in all cases—whether or not they involve domestic relationships—require an individualized, case-by-case analysis. *See, e.g.*, *Serrano-Alberto v. Att'y Gen. U.S.*, 859 F.3d 208, 212 n.2 (3d Cir. 2017) ("Whether a social group constitutes a PSG, and is thus cognizable . . . must be answered on a case-by-case basis[.]"); *see also M-E-V-G-*, 26 I. & N. Dec. at 242 ("[S]ocial group determination[s] must be made on a case-by-case basis[.]"); *Ordonez Azmen v. Barr*, 965 F.3d 128, 135 (2d Cir. 2020) (same).

The cognizability analysis for "married Salvadoran women who are unable to leave their relationship" necessarily entails evaluating the characteristics of "Salvadoran women" under the immutability, particularity, and social distinction framework. A PSG comprised of Salvadoran women satisfies all three requirements. *See —,* (Arlington Immigration Court, May 22, 2018) (unpublished) (ruling "women in El Salvador" is a cognizable social group and granting asylum on that basis), Add. 144.

First, as noted, gender, like race or religion, is central to identity and is something a person cannot or should not be required to change. *See Acosta*, 19 I. & N. Dec. at 233.

Second, gender meets the requirement of particularity. *See Perdomo*, 611 F.3d at 669 (determining that the group of "women in Guatemala" can be sufficiently particular to be cognizable). Salvadoran women, like Ms. [redacted] are

"recognized in the society in question as a discrete class of persons." *See M-E-V-G-*, 26 I. & N. Dec. at 249. A PSG must have "definable boundaries" that are not "amorphous, overbroad, diffuse, or subjective." *Id*. at 239. Although the category covers a large group of persons, "Salvadoran women" has well-defined boundaries and therefore meets the particularity requirement established by the Board. *See, e.g.*, *De Pena-Paniagua*, 957 F.3d at 97 (noting "a particular social group may refer to an innate characteristic such as gender" and finding it "unclear" why "women" or "women in country X" would fail any particularity requirement); *Alvarez Lagos v. Barr*, 927 F.3d 236, 253 (4th Cir. 2019) (noting that a PSG need not be small to satisfy the particularity requirement); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 584 (BIA 2008) (same). *See also M-D-A-*, (BIA, Feb. 14, 2019) (unpublished) (rejecting notion that a persecuted group may be too large and remanding claim based on membership in "women in El Salvador"), Add. 106.

There are well-established benchmarks for determining who is a woman and who is not, and the Salvadoran government and society frequently make such determinations. The government, for example, lists gender on Salvadoran identification documents. *See* A.R. 000239 (Ms. [redacted] passport); AR 000226, 000240 (national ID cards).

The conclusion that "Salvadoran women" satisfies particularity is supported by circuit precedent including *Guzman Orellana v. Attorney General*, 956 F.3d 171 (3d Cir. 2020). *Id.* at 178 (holding that PSG of "persons, who publicly provide assistance to law enforcement against major Salvadoran gangs satisfies all three

[cognizability] criteria and, thus, constitutes a particular social group"). In that case, this Court held that a "group of witnesses who have publicly provided assistance to law enforcement against major Salvadoran gangs 'has definable boundaries and is equipped with a benchmark for determining who falls within it' sufficient to satisfy the particularity requirement." *Id*. at 179. Just as the prior experience of publicly providing assistance to law enforcement provides sufficiently clear boundaries for a PSG, so too does being a Salvadoran woman. *See* —, (Arlington Immigration Court, May 22, 2018) (unpublished) ("The respondent's proposed group—women in El Salvador — is defined with particularity. The boundaries of the group are precise, clearly delineated, and identifiable: women are members and men are not."), Add. 136.

Third, "Salvadoran women" satisfies the social distinction requirement. This Court and the Board have emphasized that "[t]o be socially distinct does not mean 'ocular' visibility[,]" but "[r]ather [the group] must be perceived as a group by society." *Guzman Orellana*, 956 F.3d at 179–80 (quoting *M-E-V-G-*, 26 I. & N. Dec. at 240). As the First Circuit recently noted, there is no clear reason why gender would not be a socially distinct group. *De Pena-Paniagua*, 957 F.3d at 96. Indeed, within Salvadoran society "all are readily aware of" the group 'Salvadoran women' "and its members[.]" *See Guzman Orellana*, 956 F.3d at 179–80.

Additionally, this Court and sister circuits alike have recognized that legislation addressing a specific group is among the best "evidence that a society

recognizes a particular class of individuals as uniquely vulnerable." *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1092 (9th Cir. 2013) (en banc); *see, e.g.*, *Guzman Orellana*, 956 F.3d at 179–80 (citing the Special Law for the Protection of Victims and Witnesses in El Salvador in support of the finding that witnesses who have publicly provided assistance to law enforcement against major Salvadoran gangs is a distinct group in Salvadoran society).

Indeed, cultural and legal norms permitting widespread violence against women can also demonstrate that women are "set apart" in society and are therefore "socially distinct." *See, e.g.*, —, (Denver Immigration Court, Mar. 7, 2019) (unpublished) ("The existence of laws that protect women in Mexico does not undermine this particular social group; rather, it emphasizes that Mexican society views women as a group and recognizes that it is a group in need of protection."), Add. 31–32; —, (Arlington Immigration Court, 2018) (finding that "women in Honduras" constitute a socially distinct group based on reports by the State Department and United Nations bodies showing marginalization, discrimination, and pervasive violence against women, as well as impunity for perpetrators), Add. 68; *see also* —, (Boston Immigration Court, June 18, 2019) (citing legislation aimed at targeting violence against women to find that Guatemalan society views women as a separate and distinct group), Add. 126.

As documented in the administrative record, Salvadoran laws and culture demonstrate that women are "uniquely vulnerable" and "set apart within the society in some significant way." *See M-E-V-G-*, 26 I. & N. Dec. at 244. For example, a U.S.

State Department report describes a specific Salvadoran government agency—"[t]he Salvadoran Institute for the Development of Women (ISDEMU)"—that has identified women as a discrete and vulnerable class, and provides services to them, even if it does not and cannot protect them. *See* A.R. 000258. Furthermore, domestic violence is "widespread" in El Salvador, and domestic violence laws are poorly enforced. A.R. 000202. Women suffer from cultural, economic, and general societal discrimination in El Salvador. A.R. 000203. El Salvador also has the highest rate of femicide in the world. A.R. 000273. These high rates of domestic violence and femicide, along with domestic violence laws that—at least on paper—address the needs of women as a class constitute evidence that women are viewed as distinct in Salvadoran society.

IV. OTHER SIGNATORIES TO THE REFUGEE CONVENTION AND INTERNATIONAL BODIES HAVE ALSO RECOGNIZED GENDER ALONE AS A COGNIZABLE SOCIAL GROUP.

Among other signatories to the Refugee Convention and 1967 Protocol to the Convention,[6] the *Acosta* framework and the consequent conclusion that gender may define a particular social group are well established. The views of other signatories are directly relevant to the proper interpretation of the INA, given that "the definition of 'refugee' that Congress adopted is virtually identical to the one" in the Refugee

[6] The United States is a signatory to the 1967 Protocol relating to the Status of Refugees, which incorporated most of the provisions of the 1951 Convention, while removing certain temporal and geographical limitations. *See* Protocol relating to the Status of Refugees, adopted Jan. 31, 1967, entered into force Oct. 4, 1967, 606 UNTS 267; Convention relating to the Status of Refugees, adopted July 28, 1951, entered into force Apr. 22, 1954, 189 UNTS 137.

Convention. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) (noting that "one of Congress' primary purposes [in passing the Refugee Act of 1980] was to bring United States refugee law into conformance with the [1967 Protocol relating to the Status of Refugees]" (internal quotation marks omitted)); *see also Negusie v. Holder*, 555 U.S. 511, 537 (2009) ("When we interpret treaties, we consider the interpretations of the courts of other nations, and we should do the same when Congress asks us to interpret a statute in light of a treaty's language.") (Stevens, J., concurring in part and dissenting in part)).

The Supreme Court of Canada, for example, relied upon *Acosta* in its seminal decision *Canada (Attorney General) v. Ward*, finding that particular social group "would embrace individuals fearing persecution on such bases as gender," an "immutable characteristic." [1993] 2 S.C.R. 689, 75, 79 (Can., S.C.C.); *see also Josile v. Canada (Minister of Citizenship & Immigration)*, [2011] 382 FTR 188 (Can. FC, Jan. 17, 2011), at [10], [28]-[30] ("Haitian women"); *Kn v. Canada (Minister of Citizenship & Immigration)*, (2011) 391 FTR 108 (Can. FC, June 13, 2011), at [30] ("women in the [Democratic Republic of Congo]"), *cited in* James C. Hathaway & Michelle Foster, *The Law of Refugee Status* § 5.9.1 (2d ed. 2014) (collecting these and other cases). Canada also adopted gender asylum guidelines in 1993, updated in 1996, which recognized that gender is the type of innate characteristic that may define a particular social group. Immigration & Refugee Board of Canada, *Women Refugee Claimants Fearing Gender-Related Persecution:*

Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act (Mar. 9, 1993) (updated on Nov. 13, 1996).

The United Kingdom House of Lords similarly relied on *Acosta* to recognize "women in Pakistan" as a particular social group, observing that its conclusion was "neither novel nor heterodox," but "simply logical application of the seminal reasoning in *Acosta*." *Islam & Shah v. Sec'y of State Home Dep't*, [1999] 2 AC 629, 644–45 (U.K.); *see Fornah (FC) v. Sec'y of State for Home Dep't*, [2006] UKHL 46, para. 31 (Lord Cornhill) (identifying "women in Sierra Leone" as "a group of persons sharing a common characteristic which, without a fundamental change in social mores is unchangeable, namely a position of social inferiority compared with men"); *see also* Immigration Appellate Authority of the United Kingdom, *Asylum Gender Guidelines* 41 (Nov. 2000) ("Particular social groups can be identified by reference to innate or unchangeable characteristics or characteristics that a woman should not be expected to change," including "gender.").

Tribunals in New Zealand and Australia have similarly noted that "it is indisputable that sex and gender can be the defining characteristic of a social group and that 'women' may be a particular social group." *Refugee Appeal No. 76044* para. 92 (NZ RSAA, 2008); *accord Minister for Immigration & Multicultural Affairs v. Khawar* (2002) 76 A.L.J.R. 667 (Aust.) (recognizing "women in Pakistan" as a cognizable social group). Australia has also adopted guidelines recognizing that "whilst being a broad category, women nonetheless have both immutable characteristics and shared common social characteristics which may make them

cognizable as a group and which may attract persecution." Australian Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers* § 4.33 (July 1996).

Further support for the view that gender alone may establish membership in a particular social group comes from the UNHCR, which, as part of its supervisory responsibilities, provides interpretive guidance on the provisions of the 1951 Convention and 1967 Protocol relating to the Status of Refugees. In 2002, for example, the UNHCR issued gender guidelines which adopted *Acosta*'s *ejusdem generis* analysis and found that "sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics." UNHCR, *Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/01 (May 7, 2002); *see also* UNHCR, *Guidelines on International Protection: Membership of a Particular Social Group within the context of Article 1(A)(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/02 at 4 (May 7, 2002) ("[W]omen may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic."). These UNHCR materials constitute "persuasive authority in interpreting the scope of refugee status under domestic asylum law." *See, e.g.*, *Cardoza-Fonseca*, 480 U.S. at 439 n.22

(noting that UNHCR "provides significant guidance" in the interpretation of the Refugee Convention, upon which U.S. asylum law is based).

CONCLUSION

The Board thus erred when it categorically rejected the gender-based social group set forth by Petitioner and failed to consider the social group of Salvadoran women included within it. This Court should correct that error and vacate the Board's decision.

Respectfully Submitted,

Dated: October 7, 2020

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CERTIFICATE OF COMPLIANCE

I, Sabrineh Ardalan, certify that this brief contains approximately 5,000 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief is an amicus brief and complies with the word limit of Fed. R. App. P. 29(a)(5), and the Third Circuit Requirements for Amicus Briefs, which in this case is 6,500 words.

Pursuant to Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the paper copies.

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I hereby certify that on October 7, 2020, I electronically filed this BRIEF OF AMICUS CURIAE OF HARVARD IMMIGRATION & REFUGEE CLINICAL PROGRAM with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the CM/ECF system, which will automatically send an email notification of such filing to the attorneys of record who are registered CM/ECF users.

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