UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

MATTER OF L-E-A-,
Respondent.

Referred from:
United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Interim Decision #3893, 27 I.&N. Dec. 40 (BIA 2017)
Interim Decision #3946, 27 I.&N. Dec. 494 (A.G. 2018)

BRIEF OF AMICI KIDS IN NEED OF DEFENSE, INC. (KIND), YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS, THE TAHIRIH JUSTICE CENTER, AND PUBLIC COUNSEL LAW CENTER

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SUMMARY OF THE ARGUMENT

Congress has clearly stated its special care and concern for children pursuing claims to humanitarian protection. It has done so with a full understanding that children regularly receive asylum on the ground that they were persecuted "on account of" their membership in a "particular social group," as those terms are used in the definition of a "refugee" at 8 U.S.C. § 1101. Indeed, children's asylum claims present paradigmatic examples of persecution against persons sharing an immutable characteristic they did not choose and cannot disassociate from. Cases in which *amici* represent, or are appointed as a child advocate for, children seeking asylum exemplify not only the core particular social group characteristic of immutability, as recognized by the Board since 1985, but also the additional factors the Board has introduced into the social group analysis in recent years, and which the Attorney General recently endorsed.

The Department of Homeland Security's (DHS) suggestion that the Attorney General can declare that family units cannot be "particular social groups" is thus entirely unreasonable, both as a matter of textual interpretation and in light of the history of subsequent asylum legislation. In light of the continuity of family groupings and other protected categories of social groups, no reasonable neutral principle could be articulated to exclude family groupings *per se*. DHS's contrary suggestion must be rejected.

Moreover, while DHS is generally correct that social groupings must be determined and adjudicated on a case by case basis, it errs in suggesting that the Attorney General should cast particular skepticism on claims based on immediate family memberships. The immediate or nuclear family is a core social institution across societies, and given particular Constitutional protection.

If the Attorney General does anything in this case beyond restating existing Board precedent, he should make clear that the correct test for nexus under the statute—that persecution

is "on account of" membership in a protected class—has been stated by the Fourth Circuit, whose analysis focuses on whether the persecution experienced by the applicant has happened (or will happen) to her, as opposed to someone else, because of her group membership.

To the extent that the Attorney General decides to announce new rules or principles, he should remand to the Board to consider application to the facts of this case in the first instance.

INTERESTS OF THE AMICI

Amici submit this brief pursuant to then-Acting Attorney General Whitaker's invitation for interested *amici* to do so. 27 I.&N. Dec. 494 (A.G. 2018). As legal representatives or appointed child advocates of persons raising asylum claims, particularly children, and as advocacy organizations, *amici* have a substantial interest in ensuring that the Attorney General render a lawful and appropriate decision in this case, and particularly in response to the noted question regarding circumstances in which a family unit may form a "particular social group" under 8 U.S.C. § 1101(a)(42)(A).

Kids in Need of Defense, Inc. (KIND) is a national non-profit organization whose ten field offices provide free legal services to immigrant children who reach the United States unaccompanied by a parent or legal guardian, and face removal proceedings in Immigration Court. Since 2009, KIND has received referrals for over 15,800 children from 70 countries, and has partnered with *pro bono* counsel at over 600 law firms, along with corporations, law schools, and bar associations. KIND also advocates for changes in law, policy, and practice to enhance protections for unaccompanied children.

The Young Center for Immigrant Children's Rights ("Young Center") advocates on behalf of the best interests—safety, permanency, and well-being—of unaccompanied and separated immigrant children, including many who seek asylum. The Young Center has been appointed as the independent Child Advocate (best interests guardian *ad litem*) for thousands of

unaccompanied children pursuant to the 2008 Trafficking Victims Protection Reauthorization Act. Its role is to advocate with government officials to consider each child's best interests in every decision. The Young Center conducts this work through eight offices located in Chicago, Harlingen, Houston, Los Angeles, New York, Phoenix, San Antonio and Washington, DC. The Young Center also engages in policy initiatives to develop and promote standards for protecting the best interests of immigrant children while they are subject to decision-making by government officials.

The Tahirih Justice Center ("Tahirih") is the largest multi-city direct services and policy advocacy organization specializing in assisting immigrant women and girls who survive gender-based violence in five cities across the country. Tahirih offers legal and social services to women and girls fleeing all forms of gender-based violence, including human trafficking, forced labor, domestic violence, rape and sexual assault, female genital cutting/mutilation, and forced marriage. Since its beginning in 1997, Tahirih has provided free legal assistance to more than 25,000 individuals. In addition to direct legal and social services, Tahirih works in policy advocacy, training, and education to promote a world in which survivors can live in safety and dignity. Tahirih *amicus* briefs have been accepted in numerous federal courts across the country.

Public Counsel, based in Los Angeles, California, is the nation's largest not-for-profit law firm specializing in delivering *pro bono* legal services. Through a *pro bono* model that leverages the talents of thousands of attorney and law student volunteers, Public Counsel annually assists more than 30,000 families, children, and nonprofit organizations, and addresses systemic poverty and civil rights issues through impact litigation and policy advocacy. Public Counsel's Immigrants' Rights Project provides *pro bono* placement and direct representation to individuals and families—including unaccompanied children and asylum seekers—in the Los

Angeles Immigration Court, the Board of Immigration Appeals, and the United States Court of Appeals for the Ninth Circuit. Public Counsel has a strong interest in ensuring that immigrant children are able to access asylum and the protections to which they are entitled.

ARGUMENT

I. CONGRESS'S AMENDMENTS TO THE IMMIGRATION AND NATIONALITY ACT TO PROTECT CHILD ASYLUM APPLICANTS REFLECT ITS RECOGNITION OF FAMILY-BASED ASYLUM CLAIMS.

The definition of "refugee" at issue in the Attorney General's question on certification in this matter, codified at 8 U.S.C. § 1101(a)(42)(A), came into the United States Code with the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. That definition derives from the United Nations Convention Relating to the Status of Refugees (19 U.S.T. 6259, 606 U.S.T.S. 267 (opened for signature July 28, 1951)), the substantive terms of which the United States acceded to via the Protocol Relating to the Status of Refugees (19 U.S.T. 6223, 606 U.N.T.S. 267 (Jan. 31, 1967)). *See generally INS v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987). The Board's principal exposition of the term "particular social group" came in *Matter of Acosta*, 19 I.&N. Dec. 211 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I.&N. Dec. 439 (BIA 1987).

It would be a serious mistake to seek to reinterpret the term "particular social group" in 2019 without recognizing substantial action Congress took beginning in 2008 to ensure the availability of refugee and asylum protections to children, whose claims frequently—perhaps usually—arise in the family context. First, in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044,

Congress ensured that unaccompanied alien children[1] could not be placed in expedited removal proceedings under Immigration and Nationality Act (INA) section 235, 8 U.S.C. § 1225, but must be placed in ordinary ("full") removal proceedings under INA section 240, 8 U.S.C. § 1229a. 8 U.S.C. § 1232(a)(5)(D). Second, it created special procedures providing that certain children from Canada and Mexico who had no fear of return or risk of trafficking, and who were capable of making an independent decision to return to their home countries, could do so without penalty, under the care and supervision of an appropriate child welfare agency. 8 U.S.C. § 1232(a)(2). Third, it ensured that initial jurisdiction over an asylum application filed by an unaccompanied child would lie with an asylum officer in U.S. Citizenship and Immigration Services (USCIS), not with the immigration court. 8 U.S.C. § 1158(b)(3)(C). Fourth, Congress directed that these proceedings be governed by special rules "which take into account the specialized needs of unaccompanied alien children," that all federal personnel dealing with those children be specially trained to do so, and that special child advocates be appointed to help "child trafficking victims and other vulnerable unaccompanied alien children." TVPRA sec. 235(c)(6), (d)(8) & (e).

In all of these respects—and the other child-protective provisions of the TVPRA—Congress clearly recognized that many unaccompanied alien children *would* raise asylum claims or be at risk of trafficking, and that for these children, a non-adversarial process to review those claims is particularly appropriate. As noted below, persecution on the basis of family groupings is paradigmatic of the asylum claims raised by unaccompanied alien children, including those

[1] An "unaccompanied alien child" is defined as "a child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody." 6 U.S.C. § 279(g), *incorporated by reference,* 8 U.S.C. § 1232(g).

represented by *amici*. And this was just as true in 2008, when Congress enacted these special procedures.[2] No later than 1998, the former Immigration and Naturalization Service dedicated a substantial portion of its asylum officer training on children's claims to those involving a "Social Group Defined by Family Membership."[3] And family-unit particular social group claims were commonly litigated in the period between *Acosta* and enactment of the TVPRA, in cases with substantial visibility to Congress. *See, e.g.*, *Gonzales v. Thomas*, 547 U.S. 183 (2006) (remanding question of family relationships as a particular social group to the Board); *Vumi v. Gonzales*, 502 F.3d 150 (2d Cir. 2007); *Konan v. Att'y Gen.*, 432 F.3d 497 (3d Cir. 2005); *Aguirre-Cervantes v. INS*, 242 F.3d 1169 (9th Cir. 2001); *Gebremichael v. INS*, 10 F.3d 28 (1st Cir. 1993).

The intent of Congress to *enable* children to make family-based persecution claims in an appropriate, non-adversarial system sensitive to their particular needs and vulnerabilities, as articulated in the TVPRA, is entirely clear. So it would vitiate that intent, and defy the entirety of the asylum statutory plan, for the Attorney General to interpret the underlying statutory provision to foreclose family-based claims *per se*. That is, considering the centrality of family-based claims to children's asylum cases, exclusion of family units from the "particular social group" definition in light of this later Congressional action would be plainly unreasonable.

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[2] The Congress that enacted the TVPRA also acted against a background of expert interpretations of the Refugee Protocol and other instruments that recognized that, for example, the refugee definition "must be interpreted in an age and gender sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children." U.N. Committee on the Rights of the Child, *General Comment* no. 6, "Treatment of Unaccompanied and Separated Children Outside Their Country of Origin," CRC/GC/2005 (Sept. 6, 2005), *available at* https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf.

[3] U.S. Dep't of Justice, Immigration and Naturalization Serv., *Guidelines For Children's Asylum Claims*, No. 120/11.26 (Dec. 10, 1998), *available at* https://www.immigrantjustice.org/sites/default/files/INS%2520Guideline%2520on%2520Children%2520Asylum%2520Claims.pdf.

DHS's argument that Congressional action or inaction after the Refugee Act supports its claim that families may not be particular social groups is exactly backward. DHS seems to claim that because Congress's did *not* amend the statute to provide specifically that the term "particular social group" includes families, that fact supports an inference that it meant to *exclude* families. DHS Br. At 7-8. That is, DHS appears to argue that if the term "particular social group" *already* encompassed families, Congress *would have* "amended the INA to specify that certain familial relationships may satisfy the statutory definition of 'refugee.'" *Id.* This is an inversion of statutory interpretation methods. Congress is presumed to have acquiesced in an agency interpretation of a statutory term when it is aware of and does not overrule the interpretation. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156-59 (2000). In the face of a clear agency interpretation, such as *Acosta* (which is nearly as old as the Refugee Act itself), and the myriad cases that followed it finding a family grouping to be a particular social group, Congress must be presumed to have left the statutory text in place because it agreed with, or acquiesced in, that interpretation.

Indeed, DHS's argument relating to population control policies simply proves that point, since Congress amended the "refugee" definition at § 1101(a)(42)(A) to overrule Board precedent that it disagreed with. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, div. C, sec. 601, 110 Stat. 3009-689 (overruling *Matter of Chang*, 20 I.&N. Dec. 38 (BIA 1989), and adding final sentence to the paragraph).). Under bedrock principles of statutory interpretation, the long history of family groups being identified as particular social groups—and Congress's failure to amend the statute to provide otherwise—makes clear that there is no statutory basis to exclude family groups from the definition of particular social groups. Congress has manifestly acquiesced in the inclusion of family units

among particular social groups. The Government's suggestion to the contrary should be rejected.

II. CHILDREN'S ASYLUM CASES ARE, CONSISTENT WITH CONGRESS'S DETERMINATION, PARADIGM EXAMPLES OF FAMILY UNITS FUNCTIONING AS PARTICULAR SOCIAL GROUPS UNDER THE REFUGEE DEFINITION.

Many asylum claims advanced by the *amici* and their associated *pro bono* attorneys on behalf of child clients provide clear illustrations of why children's persecution abroad is often on account of their membership in a family unit. Family membership is a central and defining fact of a child's life. Children's place in their family is immutable—even in places where family ties can be legally disavowed or broken (as through marriage, divorce, or adoption), children lack capacity and control over those procedures. In circumstances where persecution of a family derives from one family member's political activism or religious exercise, children lack both control over the family member and the agency or independence to disclaim their family affiliation. Indeed, as the INS and later USCIS guidance for processing children's asylum claims emphasize, children may not even understand the societal forces that have prompted persecution of their family.[4]

Notwithstanding the Government's dismissive treatment of some "common scenarios" or "other circumstances in which protection claims involve a family unit," DHS Br. at 27-32, *amici* have observed in countless representations that children can and do experience persecution on

[4] *E.g.*, 1998 INS Guidance, *supra* note 3, at 13 ("For both developmental and cultural reasons, children cannot be expected to present testimony with the same degree of precision as adults. . . . For example, the child may not know whether any family members belonged to a political party."); USCIS, "Guidelines for Children's Asylum Claims" (March 21, 2009), at 29, *available at* https://cliniclegal.org/sites/default/files/AOBTC_Lesson_29_Guidelines_for_Childrens_Asylum_Claims_0.pdf (same language in different format).

account of these family memberships. That persecution is analytically indistinguishable from other kinds of refugee claims invoking the particular social group analysis. Indeed, while in many cases it is good practice to plead alternative theories of social group membership, *amici* find that family-based claims are often the best conceptual approach to children's cases because the facts demonstrate that persecution occurs on account of their membership in their particular family. Any approach that deprecates family-based social groups in favor of other formulations will create doctrinal uncertainty, leading adjudicators to force the compelling facts of these cases through other, more artificial, conceptions of persecution.

While these cases arise with regularity, and published opinions by the Board and Article III courts on children's family-based claims are plentiful and cited throughout this and other *amicus* briefs, *amici* here also present recent unreported case examples that arose in affirmative applications before USCIS under the special TVPRA procedures. It is critical that the Attorney General's view be informed not only by cases that do reach an appellate stage, but also those that are readily granted, based on clear facts that conform to the statutory requirements. These sorts of cases can strikingly demonstrate why Congress has provided particular solicitude for children's persecution claims, and the centrality of family membership to making sense of the persecution they experienced.

Case example: Alan[5]

Alan, a teenager from a West African nation, sought asylum before an immigration court in 2017. Alan was born into his parents' tribe, an ethnic minority in his home town. When Alan was just 14 years old, the majority tribe attempted to recruit him into a fight against a third tribe,

[5] The *amici*'s clients and their relatives have been assigned pseudonyms to protect their identities. Further case information may be made available upon inquiry by the Office of the Attorney General.

while the third tribe offered Alan money to fight against the majority tribe. Alan refused both tribes, but shortly thereafter, members of the majority tribe kidnapped and beat Alan, and held him for days in a home where he was whipped, restrained, and denied food and water. The judge immigration found credible Alan's testimony that when releasing him, the majority tribe told him that the city belonged to their tribe and that they had attacked him for refusing to help them, "and because [he is] [of the minority tribe]." At his hearing, Alan showed the scars from this attack. When he was released, Alan attempted to report these crimes to the police, but they turned him away, stating that prosecution was futile as the majority tribe controlled the government. After his father—who had protected Alan—died, Alan was attacked two more times by the majority tribe before he fled his country.

The immigration judge granted asylum based on the particular social group of "ethnic minority members who refuse to join majority ethnic groups" in Alan's home country, and described how the ethnic social group was based on Alan's family relationships. Illustrating Alan's inability, as a child, to change the fact of those relationships, the judge explained that Alan "is a member of the tribe by virtue of the fact that his mother and father are part of the tribe. He was born into the tribe and cannot leave the tribe or switch to another." The judge noted that, "after respondent's father died, who was part of the same minority ethnic group, the respondent felt that he had no remaining protection against the dominant tribe. In fact, the [majority] tribe appeared to become more aggressive in their interactions with the respondent after his father's death." Alan's status as a member of his tribe—essentially his extended family, which included his father, mother and siblings, and which he was immutably a part of by his parentage—was a fundamental aspect of his eligibility for asylum. His claim was appropriately granted, illustrating the close connection between ethnic groups and more-immediate kinship ties.

Case example: Aria

Similarly, a 14-year-old Honduran girl named Aria Apple applied for and was granted asylum in 2017. Aria lived in a large, recognizable house with her mother, four brothers, two sisters, grandmother, and several aunts, uncles, and cousins. Aria's family operated a tortilla stand out of the home. MS-13 demanded that the family turn over the home to the gang and extorted "war taxes" on the business by entering the home and threatening the family at gunpoint. When the family could not afford to pay the tax, two MS-13 members disguised as police entered Aria's house and killed her aunt and uncle. After the family closed and then reopened the business, the gang murdered Aria's brother near the family's house and murdered the father of Aria's half-sister while he was grocery shopping for the family. The family again closed the tortilla stand again, but when they reopened it the gang's threats and harassment resumed, and the family resumed paying the gang's "taxes." But again, Aria's mother stopped paying the taxes because she could not afford to. The gang sent Aria's mother a threatening message, then went to the family's house and fatally shot Aria's mother, shot and wounded Aria's sister and aunt, and aimlessly shot inside the house. Later that year, the gang murdered another of Aria's uncles. The family again closed the stand, but less than a year later, financial hardship led Aria's grandmother and another uncle's girlfriend to reopen the business. Shortly thereafter, the gang murdered Aria's uncle, whose girlfriend was operating the stand. The day after that murder, Aria learned that her father had disappeared; he was later found strangled inside a black plastic bag with his hands and feet tied and bearing signs of torture. About a month later, a fourth of Aria's uncles was murdered one block from the family's house. The gang also attempted to kill Aria's sister while she rode her bicycle.

After these nine murders and various other violence against the family, Aria and her sister, who were both children, fled Honduras, leaving their grandmother and adult sister behind in the family's house. The gang continued to threaten Aria's grandmother and adult sister until they too left Honduras, leaving the house unoccupied. Aria sought asylum based on two theories of membership in family-based particular social groups in Honduras:

- members of the Apple family; and
- members of landowning families.

Aria's persecution was on account of her membership in her family, and her asylum application was granted by the USCIS Asylum Office.

Case example: Jane

A teenaged Salvadoran girl, Jane, sought asylum before a northeastern asylum office in 2018. Jane was in a relationship with a teenaged boy named Jack, living with him and his grandfather. They intended to marry formally and considered themselves husband and wife. Jane was considered part of Jack's family, by both the family and their community at large.

Jack and his grandfather, aunt, and uncle worked on the same plantation. One day, the MS gang demanded that Jack's uncle give them money from Jack's family and threatened to kill the family if they did not pay. Jack's uncle was unable to pay, and two weeks later, MS members came to the plantation and brutally murdered Jack's grandfather, aunt, and uncle. Jane presented evidence that MS also intended to murder Jack that day, but he was absent from work due to an injury.

Jane was never targeted by MS prior to her relationship with Jack, but after the murders, MS watched, followed, and terrorized Jack and Jane. Community members disclosed that MS wanted to kill them both, Jack's siblings were similarly targeted, and—when Jack and his

siblings left El Salvador—MS continued to target Jane, telling Jane's brother multiple times that they would kill her. Jane thus sought asylum protection based on her membership in two specified family-based particular social groups:

- [Jack's] Family; and
- Salvadoran women whose domestic partner was being targeted by gangs in El Salvador.

Jane's asylum application was recently, appropriately granted. Jane claimed no other grounds for asylum, and no aspects of her case related to her race, religion, nationality, or political opinion. What she claimed, and what the law recognizes, is that the persecution she experienced happened to her because she was a part of her family.

III. DHS'S SUGGESTIONS THAT FAMILY UNITS COULD BE ENTIRELY EXCLUDED, OR THAT IMMEDIATE AND NUCLEAR FAMILY GROUPINGS SHOULD BE PARTICULARLY SCRUTINIZED, SHOULD BE REJECTED.

In the face of these statutory arguments, and the plain fact that, since *Acosta*, thousands of family-based claims have been adjudicated (and often granted) by USCIS and the immigration courts, DHS generally concedes that family-based claims should be resolved through "individualized, case-by-case analysis," as are all other claims arising under the refugee definition. DHS Br. at 12. Yet DHS undermines its concession with two deeply misguided lines of argument.

First, it makes the unsustainable claim that the Attorney General could lawfully determine—not case-by-case, but as a facial interpretation of the statutory term "particular social group"—that membership in a family unit can never satisfy the definition. DHS Br. at 6-11. And second, it suggests that even in the realm of case-by-case adjudications, the Attorney General could limit asylum protection for persons who are persecuted on the basis of membership in an

"immediate" or "nuclear" family by requiring heightened scrutiny, beyond that required for other social groups. DHS Br. at 20. These arguments should be firmly rejected.

A. No Reasonable Interpretation of "Membership in a Particular Social Group" Could *Per Se* Exclude Family Units.

DHS's suggestion that it would be open to the Attorney General to articulate an interpretation of the statutory term "particular social group" that "excludes family-based protection claims" far exceeds the permissible bounds of administrative interpretation of the statutory "refugee" definition. DHS Br. at 11. Even assuming that the term "membership in a particular social group" is ambiguous in the technical sense of administrative law, and so is amenable to clarification by the Department of Justice and Department of Homeland Security pursuant to their statutory roles, any such interpretation is still subject to the ordinary bounds of permissible statutory interpretation. *See, e.g.*, *W.G.A. v. Sessions*, 900 F.3d 957, 964 (7th Cir. 2018). Family units are so contiguous with other categories protected by the asylum statute, and so akin to other cognizable particular social groups, that any interpretation of the statute that involved a *per se* exclusion of family groups would be arbitrary and capricious. *See Wei Sun v. Sessions*, 883 F.3d 23, 29-30 (2d Cir. 2018) (deferring to Board interpretation of corroboration provision as reasonable resolution of statutory ambiguity); *Grace v. Whitaker*, No. 18-cv-1853, 2018 WL 6628081 at *53 (D.D.C. Dec. 19, 2018) (rejecting arbitrary and capricious narrowing of "refugee" definition in recent Attorney General referral).

1. The Attorney General Recently Reaffirmed the Appropriate Framework for Analyzing Particular Social Group Claims, of which "Kinship Ties" Are a Prototypical Case.

Just last year, the Attorney General reaffirmed the fundamental correctness of *Acosta*, while endorsing the additional elements defined in subsequent Board precedent decisions *Matter of M-E-V-G-*, 26 I.&N. Dec. 227, 236 (BIA 2014), and *Matter of W-G-R-*, 26 I.&N. Dec. 208,

212 (BIA 2014), as the appropriate analytical framework for identifying particular social groups. *Matter of A-B-*, 27 I.&N. Dec. 316, 319 (A.G. 2018), *invalidated in part on other grounds by Grace v. Whitaker*, No. 18-cv-1853, 2018 WL 6628081 (D.D.C. Dec. 19, 2018).[6]

Under the approach Attorney General Sessions suggested in *A-B-*, an individual establishes membership in a particular social group under a three-part test wherein a cognizable group must be immutable, particular, and socially distinct:

- Immutability means the group members "share a common, 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." *Matter of Acosta*, 19 I.&N. at 233. "Kinship ties" are an exemplary "shared characteristic," *id.*, and there is "no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family." *Gebremichael*, 10 F.3d at 36.
- Particularity requires that "the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons." *Matter of S-E-G-*, 24 I.&N. Dec. 579, 584 (BIA 2008). Courts apply this standard by asking whether a family "is recognizable as a distinctive subgroup of society." *Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009).
- Social distinction means "the extent to which members of society perceive those with the relevant characteristic as members of a social group." *Matter of C-A-*, 23 I.&N. Dec. 951,

[6] For reasons stated in the Brief by *Amici Curiae* Non-Profit Organizations and Law School Clinics filed when this case was before the Board, a similar brief filed concurrently in this certification, and briefly in the text *infra*, *amici* strongly argue that the new factors added in *M-E-V-G-* and *W-G-R-*, and reiterated in *A-B-*, are inconsistent with the statute and should be withdrawn. For purposes of this argument, *amici* assume that those factors will remain part of the Attorney General's guidance. That assumption should not be read as a concession or endorsement of those cases.

956-60 (BIA 2006) (acknowledging families "are generally easily recognizable and understood by others to constitute social groups").

The basic *Acosta* framework was frequently approved by circuit courts as an appropriate exercise of the Attorney General's discretion to interpret the statutory language. The addition of new requirements, in cases such as *S-E-G-*, *M-E-V-G*, and *W-G-R-*, has, however, been substantially rebuffed by multiple circuits. *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582 (3d Cir. 2011) (holding new elements both duplicative of one another and unreasonable as interpretations of the "refugee" definition); *Gatimi v. Holder*, 578 F.3d 611, 616 (7th Cir. 2009) (holding *S-E-G-*'s social visibility prong "makes no sense"); *but see Koudraichova v. Gonzales*, 490 F.3d 255, 262 (2d Cir. 2007) (holding the framework of *Acosta* and progeny "is reasonable and merits our deference under *Chevron* [*U.S.A. v. NRDC*, 467 U.S. 837, 843-44 (1984)]"). Even assuming that the Attorney General is permitted to require applicants to show both particularity and social distinctiveness, those elements necessarily encompass family-based claims on equal footing with other particular social groups.

2. Family Units Are on a Continuum with Other Kinship Groupings.

The Government makes the important point that family relationships are defined in the cultures in which they occur and may have different meanings in different countries and for different purposes. DHS Br. at 13. But the Government draws precisely the wrong conclusion from this fact: It is *because* family membership is a culturally and socially embedded concept that it would be impossible to differentiate family units, as such, from other particular social groups under any reasonable analytical framework that respects the statutory term.

Acosta recognized "kinship ties" as an exemplary "immutable characteristic" in the particular social group analysis, on par with "sex" or "color." 19 I.&N. Dec. at 233. But kinship ties, possibly in conjunction with other characteristics, arise in a spectrum of relationships, with

immediate families at one end, and larger and more extended family relationships—which may be denominated as "clans," "tribes," or even "ethnic groups"—on the other. Those kinship groupings are unquestionably particular social groups under longstanding asylum law. *See Aldana-Ramos v. Holder*, 757 F.3d 9, 15 (1st Cir. 2014); Matter *of H-*, 21 I.&N. Dec. 337, 340 (BIA 1996) (discussing clan and subclan membership, "identifiable by kinship ties and vocal inflection or accent," as particular social groups); *Malonga v. Mukasey*, 546 F.3d 546 (8th Cir. 2008) (discussing tribal and ethnic group membership as constituting particular social groups, irrespective of the size of the groups); *Awale v. Ashcroft*, 384 F.3d 527, 529 (8th Cir. 2004) (explaining that "clans are the key social group for virtually all Somalis" and potentially a particular social group for asylum purposes (citing *Hagi-Salad v. Ashcroft*, 359 F.3d 1044 (8th Cir. 2004)); *see also Gebremichael*, 10 F.3d at 36 (finding, under earlier version of *Acosta* framework, that "[t]here can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family"). These broader groupings fit alongside the other elements of the refugee definition—race, nationality, and religion—and, in accordance with the statutory cannon *ejusdem generis*, should be interpreted similarly, as *Acosta* recognized, 19 I.&N. Dec. at 233. The sociological or anthropological concepts of race, ethnic group, tribe, band, clan, subclan, and family, that is, are themselves regions of a spectrum without sharp boundaries.[7]

"[E]very circuit to have considered the question has held that family ties can provide a basis for asylum" by application of the *Acosta* framework. *Crespin-Valladares v. Holder*, 632

[7] For example, the *Oxford English Dictionary* (online ed. 2019) provides overlapping definitions of these kinship-grouping terms: *ethnicity*, "Status in respect of membership of a group regarded as ultimately of common descent . . ."; *race*, "A group of people belonging to the same family and descended from a common ancestor; a house, family kindred"; *clan*, "A number of persons claiming descent from a common ancestor, and associated together; a tribe"; etc.

F.3d 117, 125 (4th Circ. 2011) (collecting cases from First, Sixth, Seventh, and Ninth Circuits). This unanimity arises because the family is the "archetypal" or "prototypical" group that satisfies the Board's articulation of the concept. *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) ("Even under this refined framework [adding particularity and social distinction], the family remains the quintessential particular social group."); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) ("Perhaps a prototypical example of a `particular social group' would consist of the immediate members of a certain family, the family being a focus of fundamental affiliational concerns and common interests for most people.") That family ties are immutable is "widely recognized by the case-law" since *Acosta*, as kinship itself is seen as immutable. *Al-Ghorbani*, 585 F.3d at 995.

But courts have rejected Board departures from *Acosta* when such departures are both "inconsistent with its prior decisions" and the Board fails to "announce[] a 'principled reason' for its adoption of those inconsistent requirements." *Valdiviezo-Galdamez*, 663 F.3d at 608-09. *Per se* exclusion of family units from consideration as particular social groups, as DHS spends the first section of its brief suggesting, would therefore require wholesale reinvention of the framework developed by the Board and circuits over the course of thirty years, to include a principle that differentiates one size of kinship grouping from another, that is itself "[]capable of consistent application." There is no conceivable statutory basis for invoking such a differentiation, nor does DHS suggest any nonarbitrary principle that adjudicators would be able to apply. *Cf. Malonga*, 546 F.3d at 554 (rejecting determination that a kinship group composing a "substantial minority" of a broader population could be a particular social group); *see also Thomas v. Gonzales*, 409 F.3d 1177, 1189 (9th Cir. 2005) (*en banc*), *rev'd in part on other*

grounds, 547 U.S. 183 (2006) (finding prior circuit precedent rejecting family unit groupings irreconcilable with the *Acosta* analytical framework that recognizes other kinship ties).

B. The Refugee Definition Offers No Basis To Treat Nuclear Families as Less Particular Than Any Other Particular Social Group.

Without disclaiming the need for case-by-case examination of claimed social groups, the Government proposes to needlessly complicate the job of adjudicators by urging the Attorney General to "hold that so-called 'nuclear' and 'immediate' family groups are not *per se* sufficiently particular." DHS Br. at 20. But if the "particularity" element—that a group "be recognized, in the society in question, as a discrete class of persons," *S-E-G-*, 24 I.&N. at 584—carries any cross-cultural meaning, then immediate families are presumptively particular. *See WGA v. Sessions*, 900 F.3d 957, 965 (7th Cir. 2018). There is simply no ambiguity, and DHS points to none, as to whether any society recognizes the relationships between spouses, parents and children, and siblings, as defining a "discrete class of persons." Specially directing adjudicators to spend time taking in evidence that a particular culture recognizes those relationships as clearly defined, as DHS seems to suggest, would be wasteful of scarce adjudicative resources.

Adjudicators can take note of facts not subject to reasonable dispute, and the particularity of immediate families lies at the foundation of the American constitutional tradition. The Attorney General need not single immediate-family claims out for a heightened or culturally-specific showing of particularity. Indeed, he need not address this argument at all, but if he does, it should be to ensure that the cross-cultural importance of immediate families is not subjected to needless litigation across the cases in which it arises.

Long before nations or states arose, families—groups of parents, siblings, and children—constituted the organizing components of virtually all societies. *See, e.g.*, Tamara K. Hareven,

"The History of the Family and the Complexity of Social Change," 96 *Am. Hist. Rev*. 95 (1991) (gathering research relating to family role in historical development) (available at http://www.academicroom.com/article/history-family-and-complexity-social-change). And the immediate family relationships—between spouses and siblings, between parents and children—are self-evidently particular, in a way that so transcends time and place as to be "implicit in the concept of ordered liberty," in this society and others.[8]

Even in the dynamic society of the contemporary United States, the Supreme Court has singled out immediate family relationships for bright-line treatment due to their self-evident particularity. In *Troxel v. Granville*, for example, the Court confirmed that the due process rights of parents to determine the best interests of their children precluded a state court from requiring a grandparent be allowed visitation with a grandchild. 530 U.S. 57, 69-70 (2000) (O'Connor, J.) (plurality op.). And in considering the constitutionality of sex discrimination in marriage laws, the Court has emphasized the central, historic, and cross-cultural importance of marriage as a family relationship:

[8] The substantive due process standard, though a statement of federal law, draws on the Constitution's understanding of institutions and values that are not tied to American culture: values "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)). And so the Supreme Court has spelled out, on multiple occasions, that the substantive due process respect for immediate families arises from these pre-legal roots: "[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. East Cleveland*, 431 U.S. 494, 503-04 (1977) (Powell, J.) (plurality op.), *quoted with approval in, e.g.*, *Michael H. v. Gerald D.*, 491 U.S. 110, 123-24 (1989) (Scalia, J.) (plurality op.). "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). And "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by" substantive Due Process Clause jurisprudence. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (O'Connor, J.) (plurality op.).

> The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. . . . Cicero . . . wrote, "The first bond of society is marriage; next, children; and then the family."

Obergefell v. Hodges, 135 S.Ct. 2584, slip op. at 3 (2015).

The Attorney General need not address in this mother-child case all of the dimensions of the immediate family relationship that might come to bear on a particular social group analysis. But it would be a mistake to deny, as the Government would have it, the obvious particularity of marital, parent-child, and sibling bonds, or to disregard what the Supreme Court has recognized as their evident, cross-cultural centrality to human society. By the same token, it would be unreasonable for the Attorney General to direct adjudicators to ignore the self-evident particularity of immediate or nuclear family relationships.

IV. THE PROPER TEST FOR CAUSAL NEXUS IN A PARTICULAR SOCIAL GROUP CASE IS THE ONE ARTICULATED BY THE FOURTH CIRCUIT COURT OF APPEALS.

Having established membership in a social group is not dispositive of an asylum claim; the applicant must also show a "nexus," *i.e.*, that the persecution was "on account of" the group membership. 8 U.S.C. § 1101(a)(42). As reasonably explained by the Board, this does not mean that membership in the particular social group must provide "*the* central reason or even a dominant central reason" for the persecution, but it must be more than "an incidental, tangential, superficial, or subordinate reason." *Matter of J-B-N-,* 24 I. & N. Dec. 208, 214 (BIA 2007) (emphasis in original). While DHS's brief on certification largely focuses on the particular social group question,[9] to the extent that the Attorney General seeks to use this certification to revisit

[9] In prior briefing on this matter, the Board posed the suggestion that determinations in family cases might have an additional requirement that "the defining family member also was targeted on account of another protected ground." Amicus Inv. No. 16-01-11 (Jan. 11, 2016), *available at*

the causality or nexus element of an asylum claim, he should recognize the particularly clear articulation of the nexus analysis developed by the U.S. Court of Appeals for the Fourth Circuit.

While the causation standard for nexus has been articulated in various ways, *see Matter of L-E-A-*, 27 I.&N. Dec. 40, 43-45 (BIA 2017), the Fourth Circuit has correctly articulated that nexus "on account of" membership in a particular social group means that the persecution happened *because of* that membership: So long as the membership is "one of multiple central reasons" for the persecution, in the sense that it is "why [the applicant], and not another person," was persecuted, the nexus requirement is satisfied. *Salgado-Sosa v. Session*, 882 F.3d 451, 457-58 (4th Cir. 2018) (quoting *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015) (internal quotation marks omitted)); *see also Cruz v. Sessions*, 853 F.3d 122, 129-30 (4th Cir. 2017).

In *Hernandez-Avalos*, the Fourth Circuit reversed the Board's nexus finding against a mother whose claims arose from gang recruitment of her child. Two times, Mara 18 gang members threatened to kill Hernandez if she opposed her son joining the gang. *Id.* at 947. The Fourth Circuit found that these threats were made "on account of" Hernandez's membership in her nuclear family:

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https://www.justice.gov/eoir/file/811976/download. DHS, both in briefing to the Board and now, sensibly rejects this suggestion that family-unit social groups would have their own, "two-hop" nexus analysis, which lacks any mooring in the statute. The Board's decision instead maintained a consistent approach to the nexus analysis between families and other particular social groups. *L-E-A-*, 27 I.&N. Dec. at 45.

But in its current brief, the Government again proposes a novel and statutorily groundless mode for differentiating family-based group claims from other claims at the nexus stage: that "the persecutor's motive must be directed against the whole family unit, and not to a relationship to a specific person in that family unit." DHS Br. at 25. This proposal is unavailing for precisely the reasons the government provides for ensuring that family structures be analyzed in a case-by-case, culturally specific way. The question of whether persecution is "on account of" membership in a family unit relates not to whether the persecution arises from a relationship to a specific person in the unit or to the unit as a whole, but whether the persecution was, at least in part, *because of* the individual's membership in the family.

> Hernandez's relationship to her son is why *she, and not another person*, was threatened with death if she did not allow him to join Mara 18, and the gang members' demands leveraged her maternal authority to control her son's activities . . . . It is therefore unreasonable to assert that the fact that Hernandez is her son's mother is not at least one central reason for her persecution.
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> ***
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> Similarly, in this case, Mara 18 threatened Hernandez in order to recruit her son into their ranks, but they also threatened Hernandez, rather than another person, because of her family connection to her son. Thus, under *Cordova*, the government's argument that recruitment was Mara 18's primary motivation is unavailing, because there were multiple central reasons for the threats Hernandez received. Because any reasonable adjudicator would be compelled to conclude that Hernandez's maternal relationship to her son is at least one central reason for two of the threats she received, we hold that the BIA's conclusion that these threats were not made "on account of" her membership in her nuclear family is manifestly contrary to law and an abuse of discretion.

Id. at 950 (emphasis added); *see also Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 248-250 (4th Cir. 2017) ("Zavaleta Policiano's relationship to her father is why she, rather than some other person, was targeted for extortion.").

The Fourth Circuit's approach reflects Board precedent that the applicant must show that membership in a protected grouping "was or will be a central reason for his persecution," *W-G-R-*, 26 I.&N. Dec. at 224, "but need not be the only reason." *Olva v. Lynch*, 807 F.3d 53, 59 (4th Cir. 2015) (quoting *Crespin-Valladares*, 632 F.3d at 127). But it provides greater direction to adjudicators by articulating a very straightforward lens through which to view the highly varied fact patterns of particular social group cases: Whether, in the face of potentially multiple causes, the social group membership is why the applicant, and not another person, was subject to the alleged persecution. Since articulating this principle, the Fourth Circuit has both affirmed and reversed the Board in a range of cases that are notable for the clarity of their nexus analysis. *See, e.g.*, *Cortez-Mendez v. Whitaker*, __ F.3d. __, No. 16-2389 (4th Cir. Jan. 7, 2019) (denying

family-based claim on nexus grounds); *Velasquez v. Sessions*, 866 F.3d 188 (4th Cir. 2017) (same); *Cruz*, 853 F.3d at 129 (reversing where "BIA and IJ applied an improper and excessively narrow interpretation of the evidence relevant to the statutory nexus requirement"). To the extent that the Attorney General provides further guidance on nexus, he should reiterate the Fourth Circuit's clear articulation of the relevant principles.

CONCLUSION

The Attorney General should continue to direct adjudicators to engage in case-by-case determinations of whether a family unit constitutes a particular social group, and should either avoid addressing the nexus requirement or should reiterate the Fourth Circuit's approach. The Attorney General should remand to the Board to consider the application of any refined standard to the facts of this case in the first instance.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This amicus brief complies with the instructions in the Attorney General's most recent referral order, dated March 1, 2019: It contains 7596 words, exclusive of cover page, tables of contents and authorities, signatures, and certificates of compliance and of service.

CERTIFICATE OF SUBMISSION

I hereby certify that on March 13, 2019, the foregoing brief was submitted electronically, to AGCertification@usdoj.gov, and in triplicate to:

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