

1 Jesse Imbriano
California Bar No. 286785; EOIR ID No. GX694564
2 **CASA CORNELIA LAW CENTER**
2760 Fifth Avenue, Suite 200
3 San Diego, California 92103
(619) 231- 7788
4 *Amicus Curiae*

5 **UNITED STATES DEPARTMENT OF JUSTICE**
6 **EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
7 **BOARD OF IMMIGRATION APPEALS**
8 **FALLS CHURCH, VIRGINIA**

9 **Amicus Invitation No. 16-01-11**

10 *Request to Appear as Amicus Curiae*

11 *and*

12 *Amicus Curiae Brief*

13 *Submitted by Casa Cornelia Law Center*



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9 *Request to Appear as Amicus Curiae by Casa Cornelia Law Center*

10 Pursuant to the regulations and in furtherance of the public interest, Casa Cornelia Law
11 Center, through undersigned counsel, respectfully requests to appear before the Board of
12 Immigration Appeals as Amicus Curiae pursuant to the recently-issued invitation. *See* 8 C.F.R.
13 § 1291.2(d); Board of Immigration Appeals Amicus Invitation No. 16-01-11.

14 Casa Cornelia Law Center is a public interest law firm providing quality *pro bono* legal
15 services to victims of human and civil rights violations. It has a primary commitment to the
16 indigent within the immigrant community in Southern California. Casa Cornelia Law Center
17 strives to educate others regarding the impact of immigration law and policy on society and the
18 public good. Casa Cornelia Law Center has been providing *pro bono* representation to asylum
19 seekers since 1993, has been recognized by the Board of Immigration Appeals pursuant to 8
20 C.F.R. section 1292.2 since 2001, and is listed by the Executive Office for Immigration Review
21 as a Pro Bono Legal Service Provider in San Diego, California pursuant to 8 C.F.R. section
22 1003.61 *et seq.*

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10 *Amicus Curiae Brief Submitted by Casa Cornelia Law Center*

11 In response to the invitation issued by the Board of Immigration Appeals (“Board”) on
12 January 11, 2016, Casa Cornelia Law Center respectfully requests the Board to recognize it as
13 amicus curiae and to consider the following brief. We encourage the Board to disentangle the
14 distinct statutory elements for asylum and withholding of removal and to issue a precedential
15 decision holding that when (1) an applicant has established a cognizable particular social group
16 based on membership in a family unit and (2) persecution has occurred or may occur on account
17 of such membership, the enumerated ground and nexus requirements, respectively, under the
18 Immigration and Nationality Act (“Act”) have been fulfilled. Further inquiry, such as analysis of
19 the “defining family member,” places upon the applicant an extra-statutory burden that has no
20 basis in the Act or case law.

21 **I. Issue Presented**

22 In inviting amici curiae, the Board directed that a specific issue be addressed: “Where an
23 asylum applicant has demonstrated persecution because of his or her membership in a particular
24 social group comprised of the applicant’s family, has he or she satisfied the nexus requirement

1 without further analysis? Or does the family constitute a particular social group only if the
2 defining family member also was targeted on account of another protected ground?"

3 **II. Brief Answer**

4 The language of the Board's invitation for amici curiae itself answers the question at
5 hand. Once an applicant for asylum has already established that (1) they fall within a cognizable
6 particular social group composed of the applicant's family and (2) persecution is *because of* such
7 membership, the enumerated ground and nexus elements have been met. There is no need for
8 further analysis as to the reason why members of the applicant's family may face or have already
9 suffered persecution. The inclination by some adjudicators to look further into the reason why a
10 specific family is targeted is the product of the failure to properly differentiate and analyze two
11 distinct elements of statutory eligibility. The Board should take this opportunity to distinguish
12 between the existence of a cognizable enumerated ground, including a family unit as a particular
13 social group, and the presence of a nexus between the persecution and that enumerated ground.

14 **III. Standard of Review**

15 As the Board has invited analysis of a purely legal question, its consideration of this
16 matter as it relates to an earlier decision by an Immigration Judge is *de novo*. 8 C.F.R.
17 § 1003.1(d)(3)(ii). The Board has referenced five prior decisions by the United States Courts of
18 Appeals, four of which have precedential force. As discussed below, these decisions should be
19 read to support the analysis presented herein. However, to the extent that the Board's
20 forthcoming decision in this matter may conflict with some elements of precedential circuit court
21 law, the Board, as the chief interpreter of immigration law, should issue a decision pursuant to
22 *Nat'l Cable & Telecomm'n Ass'n v. Brand X Internet Svcs.*, 545 U.S. 967 (2005), giving
23 nationwide clarity on this matter.

1 **IV. Legal Analysis**

2 In its invitation for briefing, the Board suggests two alternatives when an asylum
3 applicant seeks relief because they fear persecution on account of membership in their family, a
4 particular social group. The first possibility is that, having proved the family in question is a
5 qualifying particular social group and having proved persecution will occur “on account of”
6 membership in that family, the applicant has met their burden to show eligibility for asylum.
7 The second possibility is that, in addition to proving both of these elements, the applicant must
8 also show that the “defining family member” was harmed on the basis of another enumerated
9 ground. The former is the only permissible conclusion; the latter finds no basis in the Act or
10 case law.

11 Every adjudicator entrusted with considering applications for asylum and for withholding
12 of removal must begin with the statutory language, which allows or requires the granting of relief
13 or protection from removal if persecution has or may occur “on account of . . . membership in a
14 particular social group.”¹ INA § 101(a)(42)(A); *see also* INA § 241(b)(3) (“because of the
15 alien’s . . . membership in a particular social group”). Since issuing the first and seminal case
16 regarding asylum, the Board has recognized that family/kinship ties are the quintessential
17 example of a particular social group. *Matter of Acosta*, 19 I&N Dec 211, 233 (BIA 1985). After
18 nearly three decades of additional adjudications, analysis of the particular social group became
19 so disparate across the federal circuits that the Board felt compelled to offer new, clearer
20 guidance in 2014. *See Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26
21 I&N Dec. 208 (BIA 2014). Such guidance, while helpful, did not provide adequate guidance on

22 _____
23 ¹ Whether analyzing applications for asylum under section 208 of the Act or for withholding of removal under
24 section 241 of the Act, there is no difference between the requirements that the applicant establish a qualifying
enumerated ground and that there exists a nexus between the enumerated ground and the persecution. *See Matter of*
C-T-L-, 25 I&N Dec. 341 (BIA 2010). Accordingly, the analysis proffered herein is intended to apply to both
asylum and withholding of removal under the Act.

1 the statutory requirement that there be a nexus between the particular social group (or any other
2 enumerated ground) and the persecution. The Board should now hold that persecution *on*
3 *account of* a qualifying particular social group is sufficient to merit asylum relief and related
4 protection.

5 A. Statutory analysis of the Act requires a distinction between the requirement of an
6 enumerated ground and a nexus.

7 It is axiomatic that, when analyzing a statute, interpretation begins with reading the plain
8 meaning of the statute. *See, e.g., Caminetti v. United States*, 242 U.S. 470 (1917). Further, the
9 statutory cannon against surplusage, while not absolute, guides against allowing a statute to be
10 read in such a way that words within the statute are redundant or without effect.

11 Unlike other forms of relief in the Act in which Congress clearly delineated statutory
12 elements, the definition of a refugee (cross-referenced as the basis for asylum eligibility) and the
13 prohibition on removal to certain countries (giving rise to withholding of removal under the Act)
14 are not clearly divided into elements. *Compare* INA §§ 240A(a) and 240A(b)(1) (providing,
15 respectively, the three or four clearly delineated elements for the two forms of cancellation of
16 removal) *with* INA § 101(a)(42)(A) (giving a block definition for refugee) and INA § 241(b)(3)
17 (prohibiting removal in certain circumstances). Over the last three decades, this has led to
18 adjudicators inconsistently enunciating the statutory elements of these forms of relief and
19 protection. *See, e.g., Acosta*, 19 I&N Dec. at 219 (citing four elements to demonstrate statutory
20 eligibility for asylum); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 948-49 (4th Cir. 2015) (citing
21 three elements to be proven for asylum eligibility).

22 As demonstrated by the Board's invitation that instigated this brief, adjudicators
23 commonly refer to the "nexus" element as short-hand for the statutory language "on account of
24

1 race, religion, nationality, membership in a particular social group, or political opinion” and
2 “because of the alien's race, religion, nationality, membership in a particular social group, or
3 political opinion.” INA §§ 101(a)(42)(A), 241(b)(3)(A); *see Acosta*, 19 I&N Dec. at 219 (“ . . .
4 (3) the persecution feared must be ‘on account of race, religion, nationality, membership in a
5 particular social group, or political opinion. . .’”); *Hernandez-Avalos*, 784 F.3d at 949 (“ . . . must
6 prove that she . . . (2) on account of a protected ground . . .”). However, adjudicators’ analyses
7 demonstrate this statutory language actually encompasses two distinct elements. *See, e.g.*,
8 *Flores Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) (holding that family is a particular
9 social group but requiring further analysis as to whether the persecution at issue is tied to the
10 applicant’s membership in that family); *Aldana-Ramos v. Holder*, 757 F.3d 9, 19 (1st Cir. 2014),
11 *as amended* (Aug. 8, 2014) (holding that a family is clearly a particular social group but
12 remanding for consideration of the separate nexus element); *Lin v. Holder*, 411 F. App’x 901,
13 905 (7th Cir. 2011) (“It is true that the family unit can constitute a social group, but Lin has not
14 demonstrated that his family ties *motivated* the alleged persecution.”) (emphasis added) (internal
15 citations omitted).

16 In 2014, through two concurrently-published decisions, the Board gave adjudicators a
17 three-part test for determining whether a proffered particular social group is cognizable under the
18 Act. *M-E-V-G-*, 26 I&N Dec. 227; *W-G-R-*, 26 I&N Dec. 208. Neither of those decisions,
19 however, clarified the relationship between the three-part test and the “on account of” and
20 “because of” language in the Act. The Board should direct adjudicators to first determine
21 whether there is a cognizable enumerated ground² and then to consider whether there is a legally-

22
23 ² This analysis is equally applicable to all five enumerated grounds. While “particular social group” has proven
24 most difficult to grasp given its inherent ambiguousness, every applicant for asylum or withholding of removal must
first demonstrate the presence of a qualifying enumerated ground and only thereafter can reasonably demonstrate a

1 sufficient connection between that enumerated ground and the persecution. This proper division
2 of statutory elements will clarify the proper means of demonstrating eligibility.

3 B. A family may play a role in four elements of the statutory definitions of asylum and
4 withholding of removal.

5 As is suggested above, there is no clear and consistent breakdown of the statutory
6 elements for asylum and for withholding of removal. The cases decided by the Circuit Courts of
7 Appeals that the Board has identified in the invitation for briefing, as they pertain to family
8 groups, implicate at least four distinct elements for both asylum and withholding of removal:
9 persecution, fear, enumerated ground, and nexus. The role a family group plays in each of these
10 is distinct and should be analyzed separately.

11 1. *Harm to the applicant's family implicates both persecution and fear of such*
12 *persecution.*

13 Applicants for asylum and withholding of removal may report that members of their
14 family have been or will be harmed. In some cases, the persecutor may harm the applicant's
15 family member as a manner of persecuting the applicant. For example, a persecutor may harm
16 an applicant's child as a way of inflicting emotional distress upon the applicant. *See, e.g.,*
17 *Sumolang v. Holder*, 723 F.3d 1080, 1084 (9th Cir. 2013).

18 In a related but distinct situation, a persecutor may harm the applicant's family member
19 not to harm the applicant but to harm the family member in their own right. An applicant may
20 proffer the harm to a family member perpetuated by the persecutor so as to demonstrate the
21 likelihood of the applicant suffering harm. Such evidence implicates the elemental requirement
22 that the applicant demonstrate a sufficient "fear" of harm based upon the subjective and objective

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24 connection from the enumerated ground to the persecution.

1 likelihood that it will occur. *See Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987).
2 Alternatively, harm to a family member as such may corroborate the applicant's credibility in
3 claiming to have previously suffered harm themselves, thereby creating a rebuttable presumption of
4 a future fear of harm. 8 C.F.R. §§ 1208.13(b)(1), 1208.16(b)(1).

5 The Court of Appeals for the Eight Circuit considered such issues when it decided
6 *Malonga v. Holder*, 621 F.3d 757 (8th Cir. 2010). Although Malonga's family is a factor in the
7 case, as presented by the Court, Malonga's family did not factor into his purported enumerated
8 ground but rather into the persecution and the fear of such persecution. *See id.* at 764-65 ("The
9 opinion's recitation of facts suggests that the BIA generally understood that the claim comprised
10 both threats as well as actual harm to Malonga, his belongings, *and his relatives.*") (emphasis
11 added). The Court considered all of the harm presented and considered whether Malonga met
12 the statutory elements for persecution and fear of such persecution. *Id.* at 765. Crucially, the
13 Court held that the harm to Malonga's family did not implicate an enumerated ground. *Id.* at
14 767.

15 Based upon the facts presented by the Court, this conclusion is both legally and
16 intuitively correct. Malonga's claim suggested that he would be harmed because of his political
17 opinion, an imputed political opinion, and/or his identity as a member of a minority ethnic group.
18 *See id.* at 768-69. Malonga's family may have been harmed to punish Malonga, which may
19 constitute persecution. Or they may have been harmed for the same reason Malonga would be
20 harmed, thus demonstrating the likelihood that Malonga would be harmed and establishing
21 Malonga's fear of persecution. But there is no basis for suggesting that Malonga was harmed
22 because he was a member of his family. Thus, in this case, harm to the applicant's family
23 properly goes to the elements of persecution and/or the fear of persecution.

1 2. *The family unit is the quintessential particular social group and is a cognizable*
2 *enumerated ground when it meets the Board's three-part test.*

3 Upon first considering the newly-codified definition of a refugee, the Board found the
4 family group to be a cognizable particular social group. *Acosta*, 19 I&N Dec. at 233
5 (acknowledging both “family” and “kinship ties” as the basis for a particular social group). The
6 Circuit Courts have agreed. *See Aldana-Ramos*, 757 F.3d at 15 (“It is well established in the law
7 of this circuit that a nuclear family can constitute a particular social group. . . And we are not
8 aware of any circuit that has reached a contrary conclusion.”) (internal citations omitted); *see*
9 *also Flores Rios*, 807 F.3d at 1128 (“[T]he family remains the quintessential particular social
10 group.”); *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) (“[T]he family
11 provides a prototypical example of a ‘particular social group.’”); *Ayele v. Holder*, 564 F.3d 862,
12 869 (7th Cir. 2009) (“Our circuit recognizes a family as a cognizable social group . . .”).

13 In 2014, the Board gave adjudicators a clarified three-part test for analyzing a particular
14 social group. This test requires that a particular social group be (1) defined by a shared
15 characteristic; (2) particular; and (3) socially distinct. *M-E-V-G-*, 26 I&N Dec at 234; *W-G-R-*,
16 26 I&N Dec. at 212. Crucially, in laying out this test, the Board considered its prior decisions on
17 this matter as well as the decisions of the Circuit Courts and this revised test in no way
18 undermines the family as a particular social group. As the Board and the Circuit Courts have
19 found, family identity is the paradigmatic example of an immutable characteristic. *Aldana-*
20 *Ramos*, 757 F.3d at 15; *Crespin-Valladares*, 632 F.3d at 125; *Acosta*, 19 I&N Dec. at 233. The
21 second requirement, particularity, refers to the outer boundaries of the proposed particular social
22 group. *M-E-V-G-*, 26 I&N Dec. at 239-40. Family groups will necessarily have definable outer
23 boundaries. Finally, social distinction relates to whether the group is perceived by society in
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1 question. *M-E-V-G-*, 26 I&N Dec at 240. This will inevitably be a case-specific inquiry. But,
2 when the evidence shows that members of a certain family are recognized in the given
3 community, this requirement will be met.

4 In *Lin*, the Court of Appeals for the Seventh Circuit denied Lin's petition for review after
5 he was denied asylum based on his claim of being a member of the particular social group of
6 "known Chinese debtors who fear punishment from creditors for outstanding debt."
7 411 F. App'x at 905. The Court noted that the Immigration Judge "explained that family ties
8 could be a basis for asylum only when there was a 'protected ground tying the family
9 membership to the basis for fear of persecution'" and the Board affirmed this decision. *Id.* at
10 904. This statement certainly implies that the family unit cannot alone establish a qualifying
11 particular social group. While the Court did not explicitly repudiate this implication, such an
12 implication does not represent the position of the Seventh Circuit. In its analysis, the decision
13 notes that, "It is true that the family unit can constitute a social group." *Id.* at 905 (citing *Hassan*
14 *v. Holder*, 571 F.3d 631, 641-42 (7th Cir. 2009) and *Mema v. Gonzales*, 474 F.3d 412, 416-17
15 (7th Cir. 2007)); accord *Crespin-Vallardes*, 632 F.3d at 125.

16 While the Board's invitation for briefing on this matter references a circuit split, the
17 unpublished decision of the Seventh Circuit in *Lin* does not represent the position of that Circuit;
18 the Seventh Circuit should not be seen as in conflict with the Fourth and Ninth Circuits. The
19 Courts of Appeals for both the Ninth Circuit and the Fourth Circuit also agree that a family unit
20 can constitute a cognizable particular social group. *Flores Rios*, 807 F.3d at 1128 ("[T]he family
21 remains the quintessential particular social group."); *Hernandez-Avalos*, 784 F.3d at 949
22 ("Hernandez claims, and the government correctly acknowledges, that membership in a nuclear
23 family qualifies as a protected ground for asylum purposes."). So does the First Circuit. *Aldana-*
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1 *Ramos*, 757 F.3d at 15 (“The law in this circuit and others is clear that a family may be a
2 particular social group simply by virtue of its kinship ties, *without requiring anything more.*”)
3 (emphasis added).

4 Precedent from both the Board and the Circuit Courts establishes that a family unit not
5 only can be a particular social group, but is the exemplar of a particular social group. *Aldana-*
6 *Ramos*, 757 F.3d at 19. Not every family unit will meet all three requirements to be a particular
7 social group, but when all three requirements are met that family unit must be treated as a
8 particular social group equivalent to any other under the law.

9 It has been repeatedly noted that “membership in a particular social group” was added to
10 the international definition of a refugee without explanation. See *W-G-R-*, 26 I&N Dec. at 211.
11 The Board has reasonably applied the cannon of statutory interpretation of ejusdem generis, “of
12 the same kind,” to link “particular social group” to the other enumerated grounds. *Acosta*,
13 19 I&N Dec. at 233. The test laid out in *M-E-V-G-* and *W-G-R-* was created to ensure that
14 recognized particular social groups are similar to the other enumerated grounds. The statute
15 clearly requires only one enumerated ground to be present. There is no basis in the law for
16 adding extra requirements, such as the presence of another enumerated ground, to those
17 applicants who seek asylum or withholding of removal on account of their membership in a
18 particular social group rather than race, religion, nationality, or political opinion.

19 3. *Whether there is a nexus between persecution and the enumerated ground is a*
20 *subsequent, distinct inquiry.*

21 The statutory language defining asylum and withholding of removal eligibility requires a
22 connection between persecution and the enumerated ground, respectively “on account of” and
23 “because of.” INA §§ 101(a)(42)(A), 241(b)(3)(A). Reading the statute plainly, the applicant’s
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1 affiliation with the enumerated ground must be the reason that the applicant has suffered or may
2 suffer persecution. INA § 208(b)(1)(B)(i); *C-T-L-*, 25 I&N Dec. 341.

3 It is well-established that asylum and withholding of removal do not protect everyone in
4 the world who has suffered or may suffer persecution but only those who suffer because of their
5 identity. Many people throughout the world suffer serious harm and practically everyone in the
6 world can demonstrate identification with at least one of the five enumerated grounds. But, not
7 all those who suffer do suffer *because of* their identification with one of the five grounds. Many
8 suffer because they find themselves in a community where suffering harm is commonplace on
9 account of civil strife, generalized violence, or a failed state. *Compare, e.g.*, asylum under
10 section 208 of the Act *with* temporary protected status under section 244 of the Act. The
11 lynchpin for successful applicants for asylum and withholding of removal is demonstrating the
12 connection between the persecution and the enumerated ground.

13 The Act recognizes that an applicant for asylum and withholding of removal may have
14 suffered or fear suffering persecution for various reasons. It is for this reason that Congress
15 required that the identification with the enumerated ground be “one central reason” for the prior
16 or future persecution. INA § 208(b)(1)(B)(i); *C-T-L-*, 25 I&N Dec. 341.

17 Too frequently, analysis of this connection (or “nexus”) is subsumed into consideration
18 of whether the applicant has identified a qualifying enumerated ground. Instead, adjudicators
19 must conduct a multi-step inquiry. Once it is determined that the proposed enumerated ground
20 (particular social group or otherwise) is cognizable (and applies to the applicant), then the
21 adjudicator should consider whether identification with that enumerated ground is the reason for
22 the persecution previously suffered or feared. *See, e.g., Hernandez-Avalos*, 784 F.3d at 949-50
23 (first recognizing that the applicant’s family is a cognizable particular social group and then
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1 reviewing the Board's consideration of the "on account of" language); *see also Matter of S-E-G-*,
2 24 I&N Dec. 579, 589 (BIA 2008) ("The respondents did not establish what political opinion, if
3 any, they held, and they have provided no evidence, direct or circumstantial, that the MS-13
4 gang in El Salvador imputed, or would impute to them, an anti-gang political opinion. Nor have
5 they established that the gang persecuted or would persecute them on the basis of such
6 opinion.").

7 In *Ramirez-Mejia v. Lynch*, the Court of Appeals for the Fifth Circuit denied a petition
8 for review in which an applicant for withholding of removal sought protection citing
9 membership in her family. 794 F.3d 485 (5th Cir. 2015). The applicant represented that her
10 brother had been killed and that the murderers thereafter sought to harm her. *Id.* at 487.
11 Specifically, she testified that after her brother's murder, the same men began "demanding that
12 she disclose information her brother had supposedly revealed to her" and "her failure to respond
13 led the individuals responsible for the murder to open fire on her father's business." *Id.* Her
14 application was denied by the Immigration Judge, the Board affirmed, and the Fifth Circuit
15 denied her petition for review.

16 The Fifth Circuit based its decision exclusively on the link between the applicant's stated
17 particular social group, her family, and the harm she thereafter suffered and feared suffering:

18 The primary purpose of the threats was to obtain information Ramirez-Mejia's
19 brother had supposedly given her. . . . Referring to individuals by name indicates
20 little, and certainly does not, in and of itself, evidence intent to persecute on the
21 basis of membership within a family. . . . Logically, there is no reason to suppose
22 that those who persecute to obtain information also do so out of hatred for a
23 family, or vice versa. . . . This is particularly true in light of the fact that other
24 members of her family, who have remained in Honduras, have not faced
persecution on the basis of their membership in the family. *Id.* at 492-93.

1 The Court's holding does not question whether a family can constitute a particular social
2 group. It also does not look into why the applicant's brother, the defining member of the
3 proposed family-based particular social group, was killed by the persecutors. Instead, it only
4 concludes that the nexus linking the persecution to the enumerated ground could not be
5 established.³ Thus, consistent with the circuit courts, the Board must hold the nexus inquiry
6 stands apart from the enumerated ground inquiry.

7 C. Proper distinction of the statutory elements demonstrates that further inquiry into the
8 defining family member is without basis in the statute.

9 As set out above, the Board's invitation for briefing allows for two alternatives when an
10 asylum applicant seeks relief and protection because of their family membership. As has been
11 demonstrated, proper statutory analysis and application militates that the first alternative be
12 followed. The second alternative is not only without basis in the law but is also unworkable.

13 1. *Analysis of the "defining family member" creates a distinction between family-based*
14 *particular social groups and all other enumerated grounds.*

15 The Board has held that "particular social group" is listed amongst the other four
16 enumerated grounds giving rise to eligibility for asylum and for withholding of removal and that,
17 as a matter of statutory construction, they should be treated as being "of the same kind." *Acosta*,
18 19 I&N Dec. at 233. However, looking to the "defining family member" of a family-based
19 particular social group is an analysis not applied to the other enumerated grounds. It is
20 inconsistent to place this additional burden upon the applicant who will be persecuted not
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22 ³ In considering briefing on this matter, the Board should be wary of any advocates espousing a "floodgates"
23 argument, that is, the suggestion that a finding consistent with this brief, regardless of its legal soundness, will allow
24 too many non-citizens to be eligible for asylum and/or withholding of removal. Such an argument has no place as
this is a question of law not policy. Further, as the Board has previously held, clarifying statutory eligibility, while it
may render more individuals eligible for relief and protection, does not absolve those individuals from meeting each
and every element required by the statute. See *Matter of H-*, 21 I&N Dec. 337, 343-44 (BIA 1996).

1 because of their race or religion or nationality or political opinion or non-family particular social
2 group but rather because of their family membership.

3 In *Matter of O-Z- and I-Z-*, the Board considered father and son applicants for asylum
4 who had been persecuted because of their Jewish nationality. 22 I&N Dec. 23 (BIA 1998). That
5 both men identified with an enumerated ground, their nationality, was not questioned. *See id.*
6 So, the Board appropriately considered both the harm they suffered (holding that it rose to the
7 level of persecution) and the nexus linking that persecution to their Jewish nationality. *Id.* The
8 Board held, “[T]he record reflects that in each instance, the persecutors were motivated by a
9 desire to punish the respondent and his son on account of their Jewish nationality” and “[T]he
10 respondent and his son were directly targeted for persecution on account of their Jewish
11 nationality.” *Id.* at 26. Crucially, the Board never considered why the persecutors acted in this
12 horrendous manner. It is irrelevant who the “first” or “defining” Jewish national was that these
13 persecutors chose to harm.

14 *Matter of S-A-* provides an even clearer example of the Board’s refusal to consider the
15 “why” behind a persecutor’s decision to persecute those who identify with a specific enumerated
16 ground. 22 I&N Dec. 1328 (BIA 2000). In that case, the Board considered an asylum
17 application by a woman with “liberal Muslim views” who was persecuted by her father, who
18 held “orthodox Muslim beliefs.” *Id.* at 1329. The Board held that first the applicant identified
19 with an enumerated ground, religion, because of her religious beliefs and second her father
20 persecuted her because of these beliefs. *Id.* at 1336. The Board insisted that this basis alone was
21 sufficient; there was no need to look further into why the father behaved in this way. *See id.*

22 There is no reason to treat a particular social group differently. In fact, the Board
23 generally does not. *See, e.g., Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1994)

1 (recognizing homosexual men in Cuba as a particular social group and granting asylum because
2 the applicant suffered persecution on account of his membership in this group). Yet, the
3 suggestion that, in analyzing a family-based particular social group, the adjudicator look at the
4 “defining family member” creates a new, distinct process. It requires that the applicant
5 demonstrate exactly what the Board found no reason to consider in *O-Z- and I-Z-, S-A-*, or any
6 other decision: *why* the persecutor persecutes the persecuted. Two decades ago, the Board
7 recognized that proving the “why” of persecution is an impossible burden; instead, the applicant
8 must only tie the persecution to the enumerated ground. *See Matter of S-P-*, 21 I&N Dec. 486
9 (BIA 1996).

10 In plain language, this possible analysis adds to the statute a new clause: the applicant
11 must suffer persecution on account of membership in a family group that is itself targeted on
12 account of race, religion, nationality, or political opinion. No such clause exists in the statute
13 and such a burden has not been placed upon those seeking protection under other enumerated
14 grounds.

15 The irrelevance of the defining family member is consistent with each of the precedent
16 decisions that the Board has directed this brief to consider. In *Hernandez-Avalos*, the Fourth
17 Circuit granted the petition for review because the petitioner’s “relationship to her son is why
18 she, and not another person, was threatened with death.” 784 F.3d at 950. Referring to its earlier
19 precedent, the Court noted that the *reason* the persecutors wished to harm the defining family
20 member was separate and apart from their desire to harm the petitioner because of her familial
21 relationship to the defining family member and thus irrelevant to this inquiry. *See id.* Similarly,
22 in *Rios v. Lynch*, the Ninth Circuit granted the petition for review for a petitioner who claimed
23 the persecutor had a vendetta against his family. 807 F.3d at 1126-27. The Court noted the
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1 adjudicator's emphasis on the defining family member's being a witness against the persecutors
2 constituted reversible error because the petitioner's claim was not that the applicant was a
3 witness but that there was now a vendetta against his family. *Id.* Again, the reason the defining
4 family member is in danger is irrelevant once it is clear that family members, as family members,
5 are in danger.

6 The supposedly contrasting circuit law is actually consistent. In *Ramirez-Mejia*, the Fifth
7 Circuit denied a petition for review for a petitioner who claimed she would be persecuted
8 because of her family identity. 794 F.3d at 493. But this decision was based upon a factual
9 determination made by the adjudicator. Specifically, the Court held that the adjudicator found
10 that the petitioner was persecuted not because of her family identity but because of information
11 she allegedly possessed. *Id.* The Court, consistent with the proper adjudicatory procedure
12 outlined above, did not say that the defining family member matters in determining whether the
13 nexus element is met. Rather, it confirmed that the applicant must still establish, consistent with
14 the Act, that the proposed enumerated ground—here a family group—is one central reason for
15 the persecution. For the reasons discussed above, *Malonga*, 621 F.3d 757, and *Lin*, 411 F. App'x
16 901, are inapposite.

17 2. *Consideration of the "defining family member" is impermissibly normative.*

18 This analysis, properly conducted by the Board in the cases discussed above, finds its
19 basis in the Act. The language of the Act providing this relief and protection is inherently
20 objective. The United States, taking the lead from the international community, chooses to
21 protect groups of people because of identity factors, the enumerated grounds. While the Act
22 protects those who will be persecuted because of race, no specific race is protected; all who will
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1 be persecuted because of their race merit protection. Similarly, no religion or nationality
2 receives special treatment. And all political opinions are protected.

3 Looking to the reasons for harming the “defining family member” of a family-based
4 particular social group, however, is not objective but normative and offensively prejudiced.
5 Even though the applicant has proved that they are a member of a particular social group and that
6 they will be harmed because of such membership, this extra-statutory analysis demands the
7 applicant to prove something more: the persecutor’s reasons for harming the family. Since there
8 is no basis for this analysis in the statute, the adjudicator would be left selecting some for
9 protection while denying protection to others. Implicitly, this suggests that some families are
10 more worthy of protection than others. Such an inquiry is anathema to the objective asylum
11 process. It is equivalent to suggesting that, based on the persecutors’ reasoning, individuals of
12 certain races or religions or nationalities are worthy of protection but others are not, despite the
13 fact that all will be persecuted because of who they are.

14 3. *Consideration of the reason for harm to the defining family member is impermissibly*
15 *circular as it re-entangles persecution and the enumerated ground.*

16 It is well-established that a particular social group cannot be defined simply by the fact
17 that the members of the group will suffer persecution. *M-E-V-G-*, 26 I&N Dec. at 232. This is
18 consistent with statutory analysis, because allowing persecution to define the particular social
19 group would render irrelevant the requirements that a social group exist and that persecution be
20 on account of membership in such a group; every persecuted person would inevitably fall into
21 the group of those persecuted and the persecution would always be on account of such
22 membership.

1 Yet, the proposed alternative analysis creates just such circular logic, albeit with a few
2 extra links: the applicant fears persecution because they are a member of a family; the members
3 of that family are in danger because the persecutor wants to harm that family; the persecutor
4 wants to harm that family because one family member has previously been “targeted” for some
5 reason. So, now the fact that the “defining family member” has been targeted has become an
6 essential factor in defining the group.

7 Inconsistent with the statute, this both narrows and broadens the category of applicants
8 eligible for asylum. It would disqualify many applicants who, as discussed, can meet each and
9 every element of the statutory definition yet cannot meet this extra, newly-created requirement.
10 But it also creates a huge pool of derivatives. Under the law and regulations as written, the only
11 derivatives on an asylum application are the applicant’s spouse and children under twenty-one
12 (and withholding of removal arguably allows for no derivatives). 8 C.F.R. § 1208.21. Yet,
13 under this analysis, in which a particular social group is now defined as the family of someone
14 who has demonstrated asylum eligibility on their own, the applicant’s entire extended family
15 may be eligible for asylum and withholding of removal.

16 4. *Inquiring as to the “defining family member” may be impossible as a family-based*
17 *particular social group may not have a “defining family member.”*

18 While many of the decisions considered in this brief involved family-based particular
19 social groups revolving around a family member, there is no reason to assume that every family
20 will have one. The Board has established the exclusive test for defining a particular social group.
21 See *M-E-V-G-*, 26 I&N Dec. 237; *W-G-R-*, 26 I&N Dec. 208. The three-part test established by
22 the Board requires that a cognizable particular special group be (1) defined by a shared,
23 immutable characteristic; (2) particular; and, (3) socially distinct. There is no requirement or
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1 even a suggestion that a particular social group have a titular member. In fact, most particular
2 social groups recognized by the Board have no such “defining member.” *See, e.g., Matter of*
3 *Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Toboso-Alfonso*, 20 I&N Dec. 819.

4 It is certainly foreseeable that some family-based particular social groups will be defined
5 by a specific individual. But it is equally foreseeable that other families who are being
6 persecuted because of their family identity will not. There is no reason, under the Act and the
7 Board’s three-part test, to favor “the family of John Doe” over “the Doe family.” As such, it
8 may be impossible to determine the reason the “defining family member” may be or has been
9 harmed as such a family member may not exist. Requiring such a family member would either
10 add a new requirement not present in the statute or would result in disparate treatment of those
11 who define their family by one member and those who do not, although they may equally fear
12 harm on account of the same basis, that is, their family membership. Such an outcome cannot be
13 the intent of the statute.

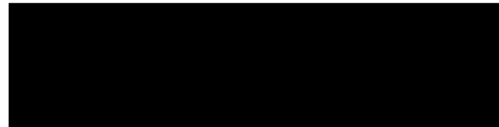
14 **V. Conclusion**

15 The complexity of immigration law is beyond dispute, and there is perhaps no issue in
16 immigration law with more disparate precedential decisions across the federal circuits than
17 asylum and withholding of removal applications based upon particular social groups. The Board
18 has the opportunity to build upon the worthwhile step it took in 2014 when it published
19 *M-E-V-G-* and *W-G-R-* by directing all adjudicators to closely apply the statutory language and
20 to require that applicants for this relief and protection meet each and every statutory requirement,
21 and to prohibit the invention of new, extra-statutory requirements. When an applicant
22 demonstrates that their family is a particular social group under the three-part test established by
23 the Board and that the persecution will occur on account of membership in such a family, the
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1 inquiry ends and the applicant must be granted the relief or protection for which they are eligible.

2 Any inquiry into the "defining family member" is a corruption of the statute and must be
3 rejected.

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5 Respectfully submitted,



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8 Jesse Imbriano
9 Supervising Attorney
10 Casa Cornelia Law Center
11 *Amicus Curiae*

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