No. 20-9627

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

M[redacted] P[redacted], A[redacted],

J.G.P., A[redacted]
Petitioners,

v.

MERRICK GARLAND, U.S. Attorney General,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

BRIEF OF AMICI CURIAE THE CENTER FOR GENDER & REFUGEE STUDIES AND THE CATHOLIC LEGAL IMMIGRATION NETWORK, INC. IN SUPPORT OF PETITIONERS AND REVERSAL

Blaine Bookey
CENTER FOR GENDER & REFUGEE STUDIES
UC Hastings College of the Law
200 McAllister Street
San Francisco, California 94102
T: (415) 703-8202

Victoria Neilson
CATHOLIC LEGAL IMMIGRATION NETWORK, INC.
8757 Georgia Avenue, Suite 850
Silver Spring, Maryland 20910
T: (301) 565-4820

Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, each amicus party certifies that it does not have a parent corporation and no publicly held corporation owns 10 percent or more of the stock of amicus.

Dated: April 8, 2021

/s/ Blaine Bookey
Blaine Bookey
Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

GLOSSARY

Board, BIA	Board of Immigration Appeals
UNHCR	United Nations High Commissioner for Refugees

RULE 29(a)(4)(E) STATEMENT

No person or entity other than counsel for Amici authored or contributed funds intended for the preparation or submission of the instant brief. The parties consent to this filing.

STATEMENT OF INTEREST

Amici curiae Center for Gender & Refugee Studies (CGRS) and Catholic Legal Immigration Network, Inc. (CLINIC) submit this brief pursuant to Federal Rule of Appellate Procedure 29(a). CGRS and CLINIC (collectively, Amici) have a direct interest and expertise in the proper development of refugee and asylum law. The questions presented in this petition for review relate directly to Amici's core missions to ensure that asylum protections under U.S. law comport with our international obligations.

CGRS has played a central role in the development of refugee and asylum law nationwide through its litigation, scholarship, and development of policy recommendations. CGRS provides expert technical assistance to attorneys representing asylum seekers at all levels of the immigration and federal court system and has created and distributed resources on litigating family-based claims after the Attorney General's *L-E-A-* decision. CGRS has submitted briefs as an amicus party and/or as counsel of record in nearly every Court of Appeals.

CGRS has a significant interest in the outcome of this case because the proper interpretation of the term "particular social group" and the nexus analysis directly implicates CGRS's central mission to advance protections for individuals fleeing persecution.

CLINIC is the nation's largest network of nonprofit immigration legal services providers, providing direct representation in asylum matters before the immigration agency and federal courts of appeals for hundreds of thousands of low-income immigrants each year. CLINIC attorneys are recognized national experts on asylum-related issues, especially in analysis of particular social group. CLINIC staff are counsel of record in *Matter of L-E-A-* and other matters raising the issue of whether a family unit may be a particular social group. *See, e.g.*, *Albizures-Lopez v. Barr*, No. 20-70640, 2020 WL 7406164 (9th Cir. Dec. 10, 2020); *S.A.P. v. Barr*, 19-cv-3549 (D.D.C. filed Nov. 25, 2019). CLINIC staff has developed numerous resources including a practice advisory on formulation of particular social groups following the Attorney General's *Matter of L-E-A-* decision.

INTRODUCTION

For decades, the Board of Immigration Appeals (Board or BIA) and federal courts of appeals have held that family-based particular social groups fit within the protective reach of the refugee definition in the Refugee Act of 1980, *codified at* 8 U.S.C. § 1101 *et seq.* The Board and the courts have repeatedly affirmed the uncontroversial proposition that societies around the world view families as distinctly recognizable groups and that, therefore, the family is the "prototypical example of a particular social group." *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) (internal quotation marks and citation omitted). Such an approach follows international guidance and interpretations of sister signatories to the foundational treaties establishing protections for asylum seekers that guide U.S. interpretation.

Petitioners sought asylum based on their membership in two family-based social groups: "immediate family of [J.G.P.]" and "immediate family members of [redacted]," Ms. P[redacted]'s brother who disappeared in 2011 after refusing to sell drugs for MS-13. In 2014, MS-13 members attempted to recruit Ms. P[redacted]'s son, J.G.P. They then threatened Ms. P[redacted], telling her that J.G.P. was the age to do what her brother had not been able to do, a not-so-subtle reference to her brother's disappearance and death. Ms. P[redacted] and her son fled, understanding the gang to be threatening their lives.

In rejecting both of Petitioners' family-defined groups in this case, the Board erroneously analyzed nexus and cognizability together instead of applying each element's distinct analytical framework. The Board also failed to employ the "one central reason" standard for nexus to analyze MS-13's "mixed motives" towards the family, and instead improperly found that if one motive of the gang was criminal, there could not be a nexus to a protected characteristic.

The Court should join the majority view and recognize that family can constitute a cognizable particular social group, as a globally recognized, and often fundamental, unit of society. It should accordingly reject the Board's flawed analysis of the family-based particular social groups in this case, require the Board to perform a separate analysis of social group cognizability and nexus, and require the Board to consider nexus to a protected characteristic in a "mixed motives" context under the statutory "one central reason" standard.

ARGUMENT

I. The Board, Federal Courts, and the United Nations High Commissioner for Refugees Have Long Interpreted "Particular Social Group" to Include Family-Based Groups

A. Since 1985, the Board Has Repeatedly Acknowledged Family Ties May Form the Basis of a Particular Social Group

Eligibility for asylum requires that the applicant be "unable or unwilling to return to" their home country "because of persecution or a well-founded fear of persecution on account of" any of five enumerated grounds—including, as relevant

here, membership in a "particular social group." 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A). Eligibility for withholding of removal requires a threat to one's life or freedom because of an enumerated ground. *Id.* § 1231(b)(3)(A).

From its earliest interpretation of the particular social group ground, in its seminal decision *Matter of Acosta*, 19 I&N Dec. 211 (B.I.A. 1985), the Board recognized that "kinship ties" may be defining characteristics of a cognizable group. *Id.* at 233. Finding that neither Congress nor the international agreements[1] from which the term "particular social group" was adopted provided guidance on the term's meaning, the Board turned to the canon of *ejusdem generis* and construed the term "particular social group" consistently with other enumerated grounds. *Id.* Reasoning that each enumerated ground "describes persecution aimed at an immutable characteristic," the Board held that a particular social group is one defined by a "common, immutable characteristic" which is "one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Id.* Kinship ties were

---

[1] Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (hereinafter Refugee Convention); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (hereinafter Refugee Protocol); *see* also *Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir. 1993) (providing background on how the Refugee Convention came to include particular social group as a protected ground); *infra* note 4.

among the few examples the Board explicitly provided of characteristics that could meet this definition. *Id.*

Following the *Acosta* framework, the Board consistently held that groups defined by kinship ties are cognizable. *See, e.g.*, *Matter of V-T-S-*, 21 I&N Dec. 792, 798 (B.I.A. 1997) (en banc) (positing "shared ties of kinship" as an example of a cognizable social group); *Matter of H-*, 21 I&N Dec. 337, 342 (B.I.A. 1996) (acknowledging agency guidance that "recognize[d] generally that clan membership is a highly recognizable, immutable characteristic that is acquired at birth and is inextricably linked to family ties").

From 2006 to 2014, the Board decided several cases in which it shifted its analytical framework to add the requirements of social distinction and particularity to the initial immutability analysis. *See Matter of C-A-*, 23 I&N Dec. 951, 955, 957 (B.I.A. 2006); *Matter of W-G-R-*, 26 I&N Dec. 208, 212, 217 (B.I.A. 2014) (renaming "social visibility" as "social distinction"), *vacated in part by Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016). *Matter of M-E-V-G-*, 26 I&N Dec. 227 (B.I.A. 2014), has become the seminal case defining the Board's current framework for analyzing the social distinction and particularity criteria, stating a generous and flexible test for the kinds of groups that should be considered socially distinct, under which it would suffice that "members of these factions generally understand their own affiliation with the grouping, and other people in the

particular society understand that such a distinct group exists." *Id.* at 236. The particularity criterion, "relates to the group's boundaries" or "the need to put 'outer limits'" on the group's definition. *Id*. at 238 (internal quotation marks omitted); *see also Rivera-Barrientos v. Holder*, 666 F.3d 641, 650 (10th Cir. 2012) (deferring to the Board's particularity requirement).

The Board continued, correctly, to recognize family-based social groups under the modified framework it adopted and applied in *C-A-*, *M-E-V-G-*, and similar cases. In *Matter of C-A-*, adding the new requirements, the Board stated that "groups based on innate characteristics such as sex or *family relationship* are generally easily recognizable and understood by others to constitute social groups." 23 I&N Dec. at 959 (emphasis added); *see also M-E-V-G-*, 26 I&N Dec. at 240, 246-47 (citing with approval prior decisions finding family to be an easily recognizable social group); *W-G-R-*, 26 I&N Dec. at 216, 218-19 (same). The Board's conclusion in *Matter of L-E-A-*, where it again found the applicant had identified a cognizable, family-based social group, was therefore unsurprising given the development of the law and the Board's consistent recognition of family as a social group. 27 I&N Dec. 40, 42-43 (B.I.A. 2017) (*L-E-A- I*), ("We have long recognized that family ties may meet the requirements of a particular social group."), *overruled in part by Matter of L-E-A-*, 27 I&N Dec. 581, 596-97 (A.G. 2019) (*L-E-A- II*).

B. This Court Should Recognize the Viability of Family-Based Social Groups

While this Court has not yet had to decide in a published decision whether family can constitute a cognizable social group, it has recognized broad consensus among every circuit court to have considered the issue that it can. *Lopez v. Barr*, 773 F. App'x 459, 462 n.4 (10th Cir. 2019); *see, e.g.*, *Villalta-Martinez v. Sessions*, 882 F.3d 20, 26 (1st Cir. 2018) ("[I]t is well established that the nuclear family constitutes a recognizable social group."); *Vanegas-Ramirez v. Holder*, 768 F.3d 226, 237 (2d Cir. 2014) (explaining that petitioner's "membership in his family may, in fact, constitute a 'social-group basis of persecution' against him" (citation omitted)); *Vumi v. Gonzales*, 502 F.3d 150, 155 (2d Cir. 2007) ("[T]he Board has held unambiguously that membership in a nuclear family *may* substantiate a social-group basis of persecution."); *S.E.R.L. v. Att'y Gen.*, 894 F.3d 535, 556 (3d Cir. 2018) ("Kinship, marital status, and domestic relationships can each be a defining characteristic of a particular social group."); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015) ("[T]he government correctly acknowledges, that membership in a nuclear family qualifies as a protected ground for asylum purposes."); *Crespin-Valladares v. Holder*, 632 F.3d 117, 124, 126 (4th Cir. 2011) (holding that the Board's rejection of group defined by membership in nuclear family was "manifestly contrary to law"); *Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009) ("[A] family is a 'particular social group' if it is recognizable

as a distinctive subgroup of society."); *Gonzalez Ruano v. Barr*, 922 F.3d 346, 353 (7th Cir. 2019) ("[M]embership in a nuclear family can satisfy the social group requirement."); *Bernal-Rendon v. Gonzales*, 419 F.3d 877, 881 (8th Cir. 2005) ("[P]etitioners correctly contend that a nuclear family can constitute a social group."); *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) ("[T]he family remains the quintessential particular social group.").

The well-settled understanding that family constitutes a particular social group held firm for decades across all modifications to the Board's social group analysis until *L-E-A- II*. *L-E-A- II* reversed on narrow grounds the Board's finding in *L-E-A- I* that the applicant's family social group was cognizable. 27 I&N Dec. at 595-96. *L-E-A- II* is deeply flawed, as discussed below, but even on its own terms it does not "bar all family-based social groups from qualifying for asylum." *Id.* at 595.

As many courts have held, family can and often does meet the Board's cognizability test. This Court should follow the great weight of circuit authority and issue a published decision recognizing that family can constitute a cognizable social group.

C. International Law Supports Recognition of Family Social Groups

International law has long recognized family as the "natural and fundamental group unit of society." G.A. Res. 217 (III) A, Universal Declaration

of Human Rights, art. 16.3 (Dec. 10, 1948).[2] And UNHCR recognizes that family is a protected group under the Refugee Convention. *See, e.g.*, UNHCR, *Position on Claims for Refugee Status under the 1951 Convention Relating to the Status of Refugees Based on a Fear of Persecution Due to an Individual's Membership of a Family or Clan Engaged in a Blood Feud* ¶ 18 (Mar. 2006) ("[I]t is UNHCR's view that a family unit represents a classic example of a 'particular social group.'");[3] UNHCR, *Protection of the Refugee's Family, No. 88 (L) – 1999*, Executive Committee 50th session, Executive Committee of the High Commissioner's Programme (Contained in United Nations General Assembly document A/AC.96/928 et document no. 12A (A/54/12/Add.1)), (Oct. 8, 1999) ("[T]he family is the natural and fundamental group unit of society and is entitled to protection by the society and the State.").[4]

---

[2] The United Nations adopted this language found in the Universal Declaration of Human Rights contemporaneously with the Refugee Convention, which introduced the term "particular social group," demonstrating the drafters' intent for the term to include families. *See* United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, U.N. Doc. A/CONF.2/108/Rev.1, at p.8 (July 25, 1951); Refugee Convention art. 1(A)(2).

[3] *Available at* https://www.refworld.org/docid/44201a574.html.

[4] *Available at* https://www.unhcr.org/excom/exconc/3ae68c4340/protection-refugees-family.html?query=family.

UNHCR's interpretation of the particular social group ground is persuasive given Congress's intent to align the United States' refugee definition with the Refugee Convention. *See Matter of S-P-*, 21 I&N Dec. 486, 492 (B.I.A. 1998); *see also Mohammed v. Gonzales*, 400 F.3d 785, 797-98 (9th Cir. 2005) (observing that the position of UNHCR "provides significant guidance for issues of refugee law" (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439-40 (1987)).

Board, federal circuit court precedent, and interpretation under international law, have all consistently supported the recognition of family as a particular social group—a conclusion that is not surprising given the important role that family plays in societies around the world.

II. Petitioners' Family-Based Social Groups Are Cognizable

A. The Board Made Several Legal Errors in Rejecting the Family Groups that the Court Must Reverse

1. Nexus and Particular Social Group Cognizability are Separate and Require Independent Analysis

The Board rejected Petitioners' family-based social groups, holding that neither "immediate family of [J.G.P.]" nor "immediate family members of J[redacted]" was a "sufficient particular social group, because a nexus was not established." AR 4. In short, the Board held that the groups were not cognizable because there was no nexus, without following its own three-part cognizability test. This was error, because as the Board has explained, nexus and particular social group cognizability are independent elements of an asylum claim with wholly separate requirements and must be separately considered. *W-G-R-*, 26 I&N Dec. at 218. In fact, agency precedent consistently emphasizes the importance of analyzing each element of the claim independently. *See, e.g.*, *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018) ("The respondent must present facts that undergird *each* of these elements, and . . . the Board has the duty to determine whether those facts satisfy all of the legal requirements for asylum."); *see also Cece v. Holder*, 733 F.3d 662, 673 (7th Cir. 2013). The Board erred when it based its cognizability finding on the (also flawed) nexus finding. This alone requires reversal.

2. *L-E-A- II* Does Not Foreclose Cognizability of Petitioners' Family-Based Groups

In rejecting the cognizability of Petitioner's family social groups, the Board cited *L-E-A- I* and *L-E-A- II*. AR 4. In *L-E-A- I*, the Board reaffirmed that "[a] determination whether a social group is cognizable is a fact-based inquiry made on a case-by-case basis," and while acknowledging that "[n]ot all social groups that involve family members meet the requirements of particularity and social distinction," affirmed the cognizability of the applicant's family-based social group. 27 I&N Dec. at 42-43. Two years later, in *L-E-A- II*, the Attorney General reversed, holding that "[t]he Board here did not perform the required fact-based inquiry to determine whether the respondent had satisfied his burden of establishing the existence of a particular social group within the legal requirements of the statute." 27 I&N Dec. at 581, 586. Notwithstanding generalized statements in *L-E-A- II* expressing doubt as to the viability of some family-based groups, the Attorney General's holding was narrow: that the specific family group in *L-E-A- I* did not satisfy the Board's three-part test on that record. *L-E-A- II*, 27 I&N Dec. at 591-92, 595-96. *L-E-A- II* did not hold that groups defined in terms of a nuclear family can never succeed; to the contrary, the Attorney General emphasized that the social group cognizability analysis "requires a fact-specific inquiry based on the evidence in a particular case." *Id.* at 591-92, 595. There was no such analysis in this case, which constitutes reversible error.

3. Any Internal Diversity or Breadth of Family Groups Does Not Destroy Particularity

In its cursory analysis finding Petitioners' family social groups not cognizable, the Board reasoned that the group "immediate family members of [Ms. P[redacted]'s brother]" was "too broad and diverse" to be particular because it might include "parents, siblings, grandparents, aunts, uncles, and cousins." AR 4. But a group's internal diversity or breadth does not mandate rejection.

"The essence of the 'particularity' requirement is . . . whether 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." *Rivera-Barrientos*, 666 F.3d at 649 (quoting *Matter of S-E-G-*, 24 I&N Dec. 579, 582 (B.I.A. 2008)). As courts have engaged with the particularity requirement over time, other circuits have correctly identified the legal error in holding that internal diversity or overbreadth defeats particularity, because groups can be internally diverse and broad with respect to some characteristics, but still be recognizable as a group in society based on other, shared characteristics. *See, e.g.*, *Amaya v. Rosen*, 986 F.3d 424, 434 (4th Cir. 2021) ("What matters is not whether the group can be subdivided based on some arbitrary characteristic but whether the group itself has clear boundaries."); *Cordoba v. Holder*, 726 F.3d 1106, 1116 (9th Cir. 2013) (expressly criticizing the "breadth" and "diversity" concepts).

The absurdity of the Board's rejection of "immediate family" as overbroad is clear when viewed in light of the history of groups that have been recognized. Indeed, the term "particular social group" lends itself to recognition of large and broad groups when interpreted in relation to the other enumerated grounds—which often include broad and diverse membership without controversy. *See De Pena-Paniagua v. Barr*, 957 F.3d 88, 96 (1st Cir. 2020) ("[I]f race, religion, and nationality typically refer to large classes of persons, particular social groups—which are equally based on innate characteristics—may sometimes do so as well."); *Cece*, 733 F.3d at 674 (observing that "[m]any of the groups recognized by the Board and courts are indeed quite broad"); *see also, e.g.*, *Niang v. Gonzales*, 422 F.3d 1187, 1198 (10th Cir. 2005) (recognizing a group based on gender and tribal affiliation); *Rivera-Barrientos*, 666 F.3d at 647, 650, 653 (rejecting the Board's conclusion that the proposed group "women in El Salvador between the ages of 12 and 25 who resisted gang recruitment" lacked particularity, but finding on that case's record that the group failed on social visibility, later renamed "social distinction" in *M-E-V-G-*/*W-G-R-*).

Matter of S-E-G- and *Rivera-Barrientos* do not support the Board's analysis in this case. *Cf.* AR 4, 88-89. In *S-E-G-*, the Board rejected as too amorphous a proposed group defined in terms of youth who rejected or resisted gang membership. Its rejection of a second group, defined as family members of such

youth, was not a rejection of family-based groups per se. Instead, the rejection flowed from its relational definition to the first group, which the Board had deemed impermissible. As noted above, the flaw in the group articulation at issue in *Rivera-Barrientos* was lack of social distinction, not lack of particularity. 666 F.3d at 653.

In sum, the Court should reject reliance on internal diversity and overbreadth as measures of a group's particularity in general and with respect to family-based groups specifically.

B. Once the Board's Errors Are Corrected, It Is Clear that Petitioners' Family-Based Social Groups Are Cognizable

Family groups, like those presented by Petitioners, can meet the Board's three-part test as invariably recognized by the courts and the agency until *L-E-A- II*. The Board has repeatedly affirmed that kinship ties are an immutable or fundamental characteristic. *See* Section I.A., *supra*. Their boundaries are easily established by examining the biological, legal, and cultural customs that define families in a given society, and in the ordinary case, family should suffice as a cognizable particular social group. This conclusion not only flows easily from application of the Board's three-part test, but it also reflects the commonsense notion that, as observed by the Ninth Circuit, "family [is] a focus of fundamental affiliational concerns and common interests for most people." *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986), *abrogated on other grounds as*

recognized in Cordoba, 726 F.3d at 1116-17. Diversity and breadth are not barriers to cognizability either. The fact that subdivisions of family members such as parents, siblings, grandparents, and uncles differ from each other in important respects does not create uncertainty as to the outlines of the group because they can all be easily recognized as members of a family.

Under the required, fact-specific inquiry for determining social group cognizability, and consistent with decades of interpretation by the Board and federal courts of appeals, this Court should hold that the Board erred in finding Petitioners' family-based social groups not cognizable. *See* Pet'r's Opening Br. at 20-21.

In the alternative, this Court should remand and direct the Board to correct its errors in, *inter alia*, conflating nexus and social group cognizability, applying particularity inconsistent with its own precedent, and essentially deeming family groups foreclosed without adequate case-by-case inquiry.

III. A Proper Nexus Analysis Must Include a Persecutor's "Mixed Motives"

A. Mixed Motive Nexus Analysis Has Long Been a Part of Asylum Law

Nexus analysis has long recognized that a persecutor may have mixed motives. There was an emerging circuit split regarding the contours of nexus shortly after passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. While the Tenth Circuit did not issue a precedential

decision analyzing mixed motives in depth, it appeared to follow the minority view that "the victim's protected characteristic must be central to the persecutor's decision to act against the victim." *Niang*, 422 F.3d at 1200 (finding that Petitioner's particular social group of gender and tribal membership was central to the female genital mutilation she suffered). This approach followed the First Circuit's reasoning in *Gebremichael*, 10 F.3d at 35.

Most other circuits, however, recognized that the protected characteristic only needed to be one of the reasons for the harm, not necessarily central. For example, in *Singh v. Gonzales*, 406 F.3d 191, 197 (3d Cir. 2005), the Third Circuit held that even though the Indian government had some legitimate reasons for arresting him, Mr. Singh was targeted by the government "in significant part" because of his imputed political opinion, which sufficed to establish nexus. *See also Lopez-Soto v. Ashcroft*, 383 F.3d 228, 236 (4th Cir. 2004); *Marku v. Ashcroft*, 380 F.3d 982, 988 n.10 (6th Cir. 2004); *Girma v. INS*, 283 F.3d 664, 667-68 (5th Cir. 2002); *Singh v. Ilchert*, 63 F.3d 1501, 1509 (9th Cir. 1995); *Osorio v. INS*, 18 F.3d 1017, 1028 (2d Cir. 1994).

Congress resolved this emerging conflict when it passed the REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, § 101(a)(3), 119 Stat. 302, 303 (2005), *codified at* 8 U.S.C. § 1158(b)(1)(B)(i), amending the Immigration and Nationality Act to clarify that an applicant for asylum must establish that one of the protected

grounds "was or will be *at least one central reason* for persecuting the applicant" (emphasis added). The Board has interpreted the one central reason standard to mean that "Congress purposely did not require that the protected ground be *the* central reason for the actions of the persecutors." *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (B.I.A. 2007) ("Having considered the conference report and the language of the REAL ID Act, we find that our standard in mixed motive cases has not been radically altered by the amendments."). Rather, a central reason for persecution can be one among multiple mixed motives so long as the reason is not "incidental, tangential, superficial, or subordinate to another reason for harm." *Id.*; *cf. Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010).

Persecution on account of a characteristic protected under the refugee definition is frequently intertwined with the persecutors' desire to consolidate power or appropriate resources. Thus, Congress clearly intended to provide protection to a person fleeing a regime that persecutes religious, racial, or political minorities or other groups (i.e., protected reasons), even if the regime could *also* be considered to be attempting to bolster its military or economic power (i.e., not protected reasons). If Congress had codified the nexus standard as "the only reason" rather than "one central reason," asylum would not have been available to ethnic Tutsis fleeing the Rwandan genocide in the 1990s, as their Hutu persecutors' motivation could be characterized as consolidating and maintaining

control of the country,[5] nor to religious and racial minorities fleeing Nazi Germany, as that regime viewed violence against those groups as a means to a political and economic end. If a protected reason, such as belonging to a particular social group consisting of a family, "is why [the applicant], and not another person" reasonably fears persecution, then eligibility for asylum has been established.[6] *Hernandez-Avalos*, 784 F.3d at 950.

B. Several Circuits Have Issued Decisions Finding a Nexus to Family-Based Particular Social Groups Even When the Persecutor Had More than One Motive for Targeting the Asylum Seeker

Several circuits have examined nexus in the context of family-based particular social groups in published decisions and determined that the critical issue is whether or not the asylum seeker would have been targeted for harm without the existence of the familial relationship. For example, the Fourth Circuit has repeatedly held in factual situations similar to the Petitioners' case that family

---

[5] *See Rwanda: How the Genocide Happened*, BBC News, May 27, 2011, https://www.bbc.com/news/world-africa-13431486 ("The extremist ethnic Hutu regime in office in 1994 appeared genuinely to believe that the only way it could hang on to power was by wiping out the ethnic Tutsis completely.").

[6] The statutory standard for nexus in a withholding of removal claim is the less-demanding "a reason" standard, as recognized by the Sixth and Ninth Circuits. 8 U.S.C. § 1231(b)(3)(C); *Guzman-Vazquez v. Barr*, 959 F.3d 253, 274 (6th Cir. 2020); *Barajas-Romero v. Lynch*, 846 F.3d 351, 358-60 (9th Cir. 2017). While this Court has not addressed this issue, Congress intended that the lower "a reason" nexus standard would apply to Ms. P[redacted] and J.G.P.'s claims for withholding of removal.

membership is one central reason for persecution designed to punish one family member for the actions of another.

In one recent case, the court addressed nexus in the context of the applicant's particular social group "nuclear family of her husband." *Arita-Deras v. Wilkinson*, 990 F.3d 350, 354 (4th Cir. 2021). As in this case, the gang had mixed motives for targeting the petitioner, including a desire to force her husband to return to Honduras, but also the petitioner's membership in her husband's family. *Id.* at 360-61. In reversing the Board's rejection of the group "nuclear family of [petitioner's] husband," the Fourth Circuit explained that the "actions described in [petitioner's] testimony and the affidavits conclusively established that [she] received threats of violence and death because of her relationship with [her husband] Pineda-Vidal. *If she were not married to Pineda-Vidal, she would not have been targeted with these threats*." *Id.* at 361 (emphasis added).

Likewise, in *Hernandez-Avalos*, the Fourth Circuit recognized nexus between the persecution and the applicant's membership in a family-based group where a mother sought asylum after she was persecuted by a gang for refusing to allow her son to join. 784 F.3d at 950. As the court explained, Ms. Hernandez's familial "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 had specifically sought to "leverage[] her maternal authority to control her son's activities." *Id.*; *see*

also Salgado-Sosa v. Sessions, 882 F.3d 451, 458 (4th Cir. 2018) (when gangs engage in "revenge on the *family*" for one family member's resistance to the gang's demands, that fact alone "compels the conclusion that [petitioner's] kinship ties are a central reason for the harm").[7]

The Eleventh Circuit has also provided instructive analysis in a mixed motives case where family group membership was one of the central reasons for harm. In *Perez-Sanchez v. U.S. Attorney General*, a Mexican cartel targeted Mr. Perez-Sanchez based on his familial relationship to his father-in-law, with whom the cartel was seeking to settle a debt. 935 F.3d 1148, 1150-51, 1158 (11th Cir. 2019). Although Mr. Perez-Sanchez did not know his father-in-law's whereabouts, the cartel beat him, threatened his life, and eventually determined that Mr. Perez-Sanchez himself would be responsible for repaying his family member's debt. *Id.* at 1151. Mr. Perez-Sanchez began making payments to stay safe until he ran out of

---

[7] In *Orellana-Recinos v. Garland*, No. 19-9596 (10th Cir. Apr. 5, 2021), this Court held that to the extent *Hernandez-Avalos* suggested a gang's threats to persuade a mother to encourage her son to join the gang necessarily established nexus to membership in a family-based group, it was unpersuasive. Slip op. at 13. The analyses in *Orellana-Recinos* and *Hernandez-Avalos* were fact-specific and neither controls the outcome of this case. The record here supports nexus to the petitioners' family-based social groups, without requiring the Court to adopt a bright-line rule. *See infra* Part III.C. Whereas the Court may not have found *Hernandez-Avalos* persuasive in establishing a general rule, the *Orellana-Recinos* decision did not address the abundant additional authority from the Fourth, Seventh, Ninth, and Eleventh Circuits cited herein.

money and fled to the United States. *Id.* In this mixed-motives case, even recognizing the gang's financial interests, the Eleventh Circuit held that it was "impossible to disentangle [the petitioner's] relationship to his father-in-law from the Gulf Cartel's pecuniary motives" and that but for their familial relationship, the petitioner never would have been targeted by the persecutor. *Id.* at 1158-59 (reversing the Board's finding of no nexus).

The Ninth and Seventh Circuits have also recently considered whether an asylum seeker had demonstrated nexus to a family-based social group in cases that are factually similar to the one here. In *Garcia v. Wilkinson*, 988 F.3d 1136 (9th Cir. 2021), the Ninth Circuit found that where the applicant showed via "uncontradicted testimony that persecutors 'specifically sought out the "particular social group" of [the petitioner's husband's] family,'" it was error for the Board to dismiss the harm she had suffered as "purely personal retribution." *Id.* at 1145. In *Gonzalez Ruano v. Barr*, 922 F.3d 346 (7th Cir. 2019), the court reversed the Board's no-nexus finding in the case of a man who had been targeted. *Id.* at 357. The court held: "We confess that [the government's] argument—[that the gang] targeted Gonzalez Ruano because they wanted his wife, not because he is her husband—draws a finer distinction than we can discern. . . . [The petitioner's] relationship to his wife was the reason he, and not someone else, was targeted." *Id.* at 355-56.

The thread that runs through all of these cases is that to properly conduct an analysis of "one central reason" where a persecutor may have mixed motives, the Board cannot find nexus to the familial social group lacking simply because the persecutor may have an unprotected motive in addition to the family relationship. Central to the concept of mixed motives is the fact that there is some motivation in addition to the protected characteristic in the case. But in the case before the Court, the Board erroneously determined that the cartel's threats against Ms. P[redacted] were "levied because the cartel members wanted to fill their ranks" by recruiting her son, which he resisted, and not on account of her familial relationship to her son. AR 4. Here the Board illogically grafted the reasons why the gang targeted Ms. P[redacted]'s son onto the reasons why the gang targeted her. But the Board never addressed the fundamental reason that Ms. P[redacted] was targeted: if she had not been her son's mother, she would not have been targeted by the gang. *See Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1739 (2020) ("In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.").

In each of the courts of appeals cases discussed above, the persecutor had reasons to target the non-applicant family member beyond the family relationship. In *Arita-Deras*, the gang wanted the applicant's husband to return to Honduras; in *Hernandez-Avalos,* the gang wanted to recruit the applicant's son; in *Perez-*

Sanchez, the cartel wanted the applicant to pay his family member's debt; in *Garcia*, the applicant was targeted for helping her son to escape gang recruitment; and in *Gonzalez Ruano*, the cartel leader wanted the applicant's wife as his property. In each of these cases, it is possible that the non-applicant family member—the one who fled, who owed a debt, or who escaped recruitment—would not have a nexus to a protected characteristic himself. However, that fact is not determinative of whether the family member applicant seeking asylum was targeted on account of his or her own membership in the family group of that individual.

Likewise, the Board erred in characterizing the harm that Ms. P[redacted] fears as "[g]eneral criminal activity." AR 4. First, it is beyond dispute that most private actor harm that rises to the level of persecution—beatings, kidnapping, rape, death threats—is "criminal" in virtually every society because it violates criminal laws. Second, while a fear of general criminal violence standing alone does not have the required nexus to a protected characteristic, the fact that "criminal activity" is a significant problem in El Salvador does not negate the Petitioners' claims. "Congress no doubt anticipated that citizens of countries rife with general violence and civil disorder would seek asylum in the United States. If it had intended to deny refugee status to applicants from such countries, who also feared persecution based on one of the five statutorily protected beliefs and

characteristics, it would have presumably stated so." *Eduard v. Ashcroft*, 379 F.3d 182, 190 (5th Cir. 2004).

This Court has issued several instructive unpublished decisions that clarify when a family relationship was merely "incidental" to the harm and therefore did not meet the legal nexus standard. In *Lopez*, 773 F. App'x 459, Ms. Lopez fled Mexico because her sister's ex-partner threatened Ms. Lopez after she had provided shelter to her sister and her niece. The Court held that that the familial relationship was merely incidental because the persecutor wanted to punish Ms. Lopez for providing shelter, not because she was in a family unit with her sister; the persecutor would have harmed anyone who had similarly sought to hide his ex-partner from him. *Id.* at 462. Likewise, in *Saucedo-Miranda v. Barr*, 785 F. App'x 586 (10th Cir. 2019), although several of the applicant's family members had suffered serious harm from cartels, there was no indication that the family relationship played a central role in the crimes to which the family members fell victim. *Id.* at 589 ("The Immigration Judge did not clearly err in concluding that the individuals and alleged entities—some identified, others not—that harmed [Mr. Saucedo-Miranda's] family members would have done so irrespective of the familial relationship."). In *Saucedo-Miranda*, while the harm suffered by several

family members was severe, there was simply no evidence in the case that anyone was targeted because they were in the same family.[8]

C. Applying a Mixed Motives Analysis to Petitioners' Case Compels a Finding That Her Family Ties Were One Central Reason for Her Persecution

In the case before the Court, the Board utterly failed to apply a mixed motives analysis to the facts. Instead, it so narrowed its conception of mixed motives analysis that, having found some reason in addition to family membership for the gang to want to harm Ms. P[redacted], it concluded there was no nexus to a protected characteristic.

The Board held that because the gang had a non-protected reason to target Ms. P[redacted]'s son, the desire "to fill their ranks," AR 4, there could be no

---

[8] *Orellana-Recinos* was specific to that record and does not control the nexus analysis here. *Orellana-Recinos* moreover did not consider the viability of *L-E-A-II.* Amici have provided argument showing why the Court should reject *L-E-A- II,* which incorporates the nexus analysis of *L-E-A- I.* Even if it does not, the record here is distinct and establishes nexus. Amici further note that while evidence that a persecutor harmed other people in the applicant's group may be probative of nexus, it is not required. Nexus can be established without proof that the persecutor targeted anyone else in the social group; a contrary rule has been disavowed and would violate the statutory text, which looks to the reasons why the persecutor targeted the applicant specifically. *Sarhan v. Holder,* 658 F.3d 649, 656-57 (7th Cir. 2011); *Gomez-Saballos v. INS*, 79 F.3d 912, 916 (9th Cir. 1996). Nor must a persecutor exhibit animus to the group. *Matter of Kasinga*, 21 I. &. N Dec. 357 365 (B.I.A. 1996) ("subjective 'punitive' or 'malignant' intent is not required for harm to constitute persecution").

nexus to a protected characteristic for Ms. P[redacted]. But the gang did not seek to recruit Ms. P[redacted] herself, and the Board acknowledged that the gang's motivation for seeking to harm her was "retribution for her son's [actions]." *Id.* Seeking to harm a person as "retribution" for the actions (or inactions) of a family member clearly evidences the persecutor's intent to harm her on account of her membership in the family. Put simply, if Ms. P[redacted] were not the mother of her son, the gang would not have sought to harm her. Whether the gang may have had other motives does not negate the conclusion that her familial relationship was at least one central reason for the harm she suffered and continues to fear.

CONCLUSION

Amici urge the Court to recognize the viability of particular social groups defined by familial ties and to reject the Board's erroneous social-group and nexus analyses.

Dated: April 8, 2021

Respectfully submitted,

/s/ Blaine Bookey

Blaine Bookey
Center for Gender & Refugee Studies
UC Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102
Tel: (415) 703-8202
Email: bookeybl@uchastings.edu

Attorney for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limitation of the Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts of the document exempted by the Federal Rule of Appellate Procedure 32(f) and 10th Cir. L.R. 32(B), this document contains 6,447 words. This word count was calculated by Word for Microsoft 365, the word processing system used to prepare this brief.
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word Version 16.47 in fourteen-point Times New Roman font.

Dated: April 8, 2021

Respectfully submitted,

/s/ Blaine Bookey

Blaine Bookey
Center for Gender & Refugee Studies
UC Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102
Tel: (415) 703-8202
Email: bookeybl@uchastings.edu

Attorney for Amici Curiae

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Microsoft Defender, version 1.335.344.0 updated April 6, 2021, and according to the program are free of viruses.

Dated: April 8, 2021

Respectfully submitted,

/s/ Blaine Bookey

Blaine Bookey
Center for Gender & Refugee Studies
UC Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102
Tel: (415) 703-8202
Email: bookeybl@uchastings.edu

Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2021, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to all counsel of record, who are ECF participants.

Dated: April 8, 2021

Respectfully submitted,

/s/ Blaine Bookey

Blaine Bookey
Center for Gender & Refugee Studies
UC Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102
Tel: (415) 703-8202
Email: bookeybl@uchastings.edu

Attorney for Amici Curiae