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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the matter of:	)
	)
Amicus Invitation No. 16-01-11	)
	)
	)
	)

BRIEF OF AMICI CURIAE, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., (CLINIC) AND NATIONAL JUSTICE FOR OUR NEIGHBORS (JFON)

ORAL ARGUMENT REQUESTED

INTRODUCTION

As advocates for asylum seekers, *Amici* frequently encounter variations of the following scenarios: An asylum applicant – who does not fear harm on account of her race, religion, nationality, or political opinion – faces harm because she is the Sister (S) of Brother (B). Conversely, Brother (B) has no independent basis for asylum because XYZ criminal enterprise targeted him for simple extortion or gang recruitment, reasons not recognized as protected characteristics.

In the above scenario, Sister (S) will occasionally construct her particular social group as "family (or nuclear family) members of Brother (B)." Other times, the social group will be described as "family (or nuclear family) members of those who have resisted extortion efforts of XYZ criminal enterprise." For purposes of this brief, we are describing the former particular social group articulation (*i.e.*, "family members of Brother (B)") as a "family-alone" group. The latter group articulation (*i.e.*, "family members of those who have resisted extortion efforts of XYZ criminal enterprise"), we are describing as a "derivative-family" group.

Finally, an alternative scenario is one in which Brother (B) is being targeted on account of a protected characteristic (*e.g.*, his religion), and Sister (S) is facing harm due to her relationship to Brother (B). We describe this group as a "family-plus" group because it is not based upon "family-alone," but is a "family-plus-religion" group.

In this brief, we describe why an applicant is eligible for protection as a refugee when "family-alone" is at least one central reason for why she has or will be persecuted. We also show that "derivative-family" groups are substantively synonymous with "family-alone" groups and, accordingly, should be viewed through a "family-alone" lens regardless of how they are asserted.

We urge the Board to decline to create any new requirement that family claims be articulated as a "family-plus" group.

ISSUES PRESENTED

Where an asylum applicant has demonstrated persecution because of his or her membership in a particular social group comprised of the applicant's family (*i.e.*, "family-alone"), has he or she satisfied the nexus requirement without further analysis? Or does the family constitute a particular social group only if the defining family member also was targeted on account of another protected ground (*i.e.*, "family-plus")?

SUMMARY OF ARGUMENT

An asylum applicant has satisfied the nexus requirement when she has demonstrated persecution on account of her membership in a particular social group comprised of family-alone. Family-alone must constitute a particular social group regardless of whether the defining family member was targeted on account of another protected ground. *Amici* submit that the BIA should resolve any variation in circuit authority accordingly.

Family, the building block of social life, is fundamental to one's identity, socially distinct, and clearly delineated. The Board should continue to recognize that people targeted for violence due to kinship ties are refugees entitled to protection consistent with the Board's three requirements for a particular social group.

Virtually every court of appeals to squarely and properly address the issue has held that family-alone is a particular social group. Adopting this construction of the statute is the best way to harmonize the circuit authority.

ARGUMENT

I. FAMILY-ALONE GROUPS ARE PROTOTYPICAL EXAMPLES OF VIABLE PARTICULAR SOCIAL GROUPS AND THE BOARD SHOULD NOT DEPART FROM THAT POSITION NOR UNNECESSARILY ADD REQUIREMENTS TO THE EXISTING PARADIGM.

A person's birth into a particular family, just like one's birth into a particular race or nationality, is completely beyond one's control. When "addressing the question of who is deserving of protection under the asylum law,"[1] there is no principled reason for holding that race and nationality entitle one to protection, but that family-alone does not. Rather, the principle of *ejusdem generis* would counsel the Board in favor of treating these three protected characteristics consistent with one another. *See Matter of Acosta*, 19 I&N. Dec. 211, 233 (BIA 1985) *overruled on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). Just as there is no "race-plus" or "nationality-plus" protected characteristics, there should be no "plus" requirement for family-based particular social groups. *See, e.g.*, *Matter of C-A-*, 23 I&N Dec. 960 (BIA 2006) (noting that "*clan* membership is a highly recognizable, immutable characteristic that is *acquired at birth* and is *inextricably linked to family ties*") (emphasis added).

This conclusion is amply supported by the Board's precedent. For over three decades, since its seminal decision in *Acosta*, the Board has cited kinship ties,[2] or family, as a prototypical example of what is meant by a particular social group under the Immigration and Nationality Act ("INA" or "Act"). Additionally, family, as societies' foundational group, fits comfortably within the Board's immutability, social distinction, and particularity requirements. *See Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014). Requiring an applicant fleeing persecution on account of her family ties to also show that other members of that family are facing harm on account of some

[1] *See Matter of C-A-*, 23 I&N Dec. 951, 959 (BIA 2006).
[2] "One's relatives; family… [a] relative by blood, marriage, or adoption…" *Black's Law Dictionary* 874 (7th Ed. 1999).

other protected characteristic adds a requirement neither justified by the Act nor the Board's precedent.

A. For Over Thirty Years, the Board Has Affirmed that Kinship Ties Are an Archetypal Example of a Particular Social Group.

In 1985, the Board held in *Matter of Acosta* that "any characteristic that defines a particular social group must be immutable, meaning it must be a characteristic that the members of the group either cannot change or should not be required to change because it is *fundamental to their individual identities*..." 19 I&N Dec. 211, 233 (BIA 1985) (emphasis added). Since the Board first announced the immutability test, "kinship ties" have been cited as the quintessential particular social group. *Id.*; *see also Matter of W-G-R-*, 26 I&N Dec. 208, 216 (BIA 2014).

Under the *Acosta* formulation, the Board has likewise repeatedly described family as a paradigmatic example of a valid particular social group. *See Matter of H-*, 21 I&N Dec. 337, 342 (BIA 1996) (*en banc*) (noting that "clan membership … is inextricably linked to *family* ties") (emphasis added); *Matter of Kasinga*, 21 I&N Dec. 357, 365-66 (BIA 1996) (*en banc*) (citing *Matter of H-* for the proposition that "identifiable shared ties of kinship warrant characterization as a social group"); *Matter of V-T-S-*, 21 I&N Dec. 792, 798 (BIA 1997) (*en banc*) (analogizing the group "Filipino[s] of mixed Filipino-Chinese ancestry" to "kinship ties"); *Matter of R-A-*, 22 I&N Dec. 906, 932 (BIA 1999) (*en banc*) (Guendelsberger, dissenting) *vacated by* 22 I&N Dec. 906 (A.G. 2001) (noting that in both *Kasinga* and *R-A-* there was "persecution inflicted … upon *family* members") (emphasis added); *Matter of C-A-*, 23 I&N Dec. 951, 959 (BIA 2006) (stating that "[s]ocial groups based on … *family* relationship are generally easily recognizable and understood by others to constitute social groups") (emphasis added); *Matter of A-R-C-G-*, 26 I&N Dec. 388, 392 (BIA 2014) (recognizing "*married* women … unable to leave their *relationship*" as a particular social group) (emphasis added); *Matter of M-E-V-G-*, 26 I&N Dec. 227, 240 (BIA

2014) (noting that the social group in *H-* was "inextricably linked to *family* ties") (emphasis added); *Matter of W-G-R-*, 26 I&N Dec. 208, 216 (BIA 2014) (same).

Moreover, the Board has held that even extended "kinship ties" can constitute a particular social group in some societies. *See Matter of H-*, 21 I&N Dec. 337, 345-46 (BIA 1996) (*en banc*); *Matter of C-A-*, 23 I&N. Dec. at 959-60; *see also* Asylum Officer Basic Training Course, Asylum Eligibility Part III: Nexus and the Five Protected Characteristics 23, 33 (March 12, 2009), *available at* http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asyum/Asylum/AOBTC%20Lesson%20Plans/Nexus-the-five-Protected-Characteristics-31aug10.pdf (hereinafter "AOBTC, Nexus") (explaining that "[i]n most societies … the nuclear family would qualify as a particular social group," and that in some "societies… [even] *extended family groupings* may have great social significance, such that they could meet the requirement of social 'visibility' or 'distinction.'") (emphasis added).

Indeed, in *Matter of H-*, the Board held that the Marehan subclan in Somalia, a country where the entire population is traditionally divided into six major clans, constituted a valid particular social group. *See* 21 I&N Dec. at 342; Federal Research Division, Library of Congress, *Somalia: A Country Study* xiv (Helen Chapin Metz, ed., 4th ed. 1993) *available at* https://archive.org/details/somaliacountryst00metz_0 (enumerating Somalia's six clans). There, the Board recognized this particular social group for the reason that "clan membership is a highly recognizable, immutable characteristic that is acquired at birth and is *inextricably linked to family ties*." 21 I&N Dec. at 342 (emphasis added). This formulation has been repeatedly reaffirmed by the Board. *See Matter of Kasinga*, 21 I&N Dec. 357, 365-66 (BIA 1996) (*en banc*); *Matter of V-T-S-*, 21 I&N Dec. 792, 798 (BIA 1997) (*en banc*); *Matter of M-E-V-G-*, 26 I&N Dec. 227, 240 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208, 216 (BIA 2014).

The Board must develop its approach to family-alone asylum claims in conformity with this long history of approvingly discussing asylum claims based on family ties.

B. Family-Alone Particular Social Groups Satisfy the Three-part Test of *M-E-V-G-* because They are Immutable, Socially Distinct, and Delineated.

In addition to the Board's longstanding recognition of family ties as a valid social group, family-alone groups satisfy each of the Board's three refined criteria for particular social groups. *See Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014). In *M-E-V-G-*, the Board clarified that:

> [A]n applicant for asylum or withholding of removal seeking relief based on "membership in a particular social group" must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.

M-E-V-G-, 26 I&N Dec. at 237. Family, in and of itself, unequivocally fulfills each of these requirements.

1. Family Membership Is an Immutable Characteristic.

First, the Board has conclusively settled that family membership *per se* is an immutable characteristic. *See Acosta*, 19 I&N Dec. at 233 ("The shared characteristic might be an innate one such as … kinship ties..."). It is beyond dispute that family membership "cannot [be] change[d] … [and] is fundamental to [its members'] individual identities..." *See Matter of W-G-R-*, 26 I&N Dec. 210 (citing *Acosta*, 19 I&N Dec. at 233).

2. Family Membership Is Socially Distinct.

Second, family is universally recognized as socially distinct. The Board has held that to be socially distinct, a proposed group must be "perceived as a group by society;" that is, it must be "set apart, or distinct, from other persons within the society in some significant way." *Matter of S-E-G-*, 24 I&N Dec. 579, 586 (BIA 2008) (quoting *Matter of C-A-*, 23 I&N Dec. 951, 956 (BIA

2006)); *Matter of M-E-V-G-*, 26 I&N Dec. at 238. The Board also explained that "members of a particular social group will generally understand their own affiliation with the group[]," as will other members of society. *Matter of M-E-V-G-*, 26 I&N Dec. at 238.

A common-sense understanding of a group comprised of family satisfies this test. Both members within and without a particular family are clearly able to recognize one another's affiliation with the group. *Matter of C-A-*, 23 I&N Dec. 951, 959 (BIA 2006) (stating that "[s]ocial groups based on … family relationship are generally easily recognizable and understood by others to constitute social groups."); *see also* AOBTC, Nexus (explaining that in some "societies… [even] extended family groupings … could meet the requirement of … 'distinction.'")

Additionally, the family unit has been long-recognized as a universal and fundamental building block upon which society rests. *See Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) ("[T]he traditional relation of the family …[is] a relation as old and as fundamental as our entire civilization."); *Obergefell v. Hodges*, 135 S.Ct. 2584, 2594 (2015) ("Since the dawn of history, marriage has transformed strangers into relatives, *binding families and societies* together.") (emphasis added); *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) ("[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. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural*.") (emphasis added); *DeBurgh v. DeBurgh*, 250 P.2d 598, 601 (Cal. 1952) ("The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people."); Cicero,

De Officiis 57 (W. Miller transl. 1913) ("The first bond of society is marriage; next, children; and then the *family*.") (emphasis added); Aristotle, *Politics* Part II (Benjamin Jowett, trans.) *available at* http://classics.mit.edu/Aristotle/politics.1.one.html ("But when several *families* are united, … the first *society* to be formed is the village.") (emphasis added). Indeed, in the Universal Declaration of Human Rights, every country came together to affirm the distinction of families within society, stating that "family is the *natural and fundamental group unit of society* and is entitled to protection by *society* and the State." Universal Declaration of Human Rights, G.A. Res. 217 (III) A, Art. 16(3), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) *available at* http://www.ohchr.org/EN/UDHR/ Documents/UDHR_Translations/eng.pdf (emphasis added).

Moreover, many of the world's religious traditions agree that family relationships are distinct, and to be treated with respect and honor. *See Exodus* 20:12 ("Honor your father and your mother, so that you may live long in the land the LORD your God is giving you."); *Ephesians* 6:1-4 ("Children, obey your parents in the Lord: for this is right."); The Quran, An-Nur 24:22 *available at* www.quran.com/24/22 ("And let not those of virtue among you and wealth swear not to give [aid] to their relatives … for the cause of Allah… ."); Confucius, *Analects of Confucius* Part 2 *available at* http://classics.mit.edu/Confucius/analects.1.1.html ("[P]arents, when alive, [are to] be served according to propriety; [and]… when dead, they should be buried according to propriety").

Family is socially distinct, foundational, and universally perceived as a social unit. Accordingly, the Board should find that family-based groups satisfy the second requirement of the particular social group analysis.

3. Family Relationships Provide a Clear Benchmark for Determining Who Is Included within the Social Group.

Lastly, family-based groups have sufficient particularity to qualify as a particular social group without need for any further qualifiers. The purpose of the particularity test is to ensure that

there is "a clear benchmark for determining who falls within the group." *Matter of M-E-V-G-*, 26 I&N Dec. at 239 (quoting *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2007)). A sufficiently particular group is described by terms with "commonly accepted definitions in the society of which the group is a part." *Id.*

In the context of family-alone claims, the requisite particularity is provided by well-defined and commonly accepted family relationships. The Board has already recognized that the status of being "married" is sufficiently particular to form the basis of a valid social group. *See Matter of A-R-C-G-*, 26 I&N Dec. 388, 393 (BIA 2014). Likewise, whether someone is a father, mother, sibling, uncle, aunt, niece, nephew, grandparent or cousin, is just as easily established by evidence of births and marriages within a family.[3]

In fact, the Supreme Court has used these same categories as a sufficiently precise benchmark for the enumeration of constitutional rights. *See Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977) ("Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.").

Additionally, as discussed above, the Board has held that even extremely attenuated kinship ties in some societies can be sufficiently delineated and socially distinct to constitute a particular social group. *See Matter of H-*, 21 I&N Dec. at 342 (holding that the Marehan subclan in Somalia –a country where the entire population is divided into six major clans– is a valid social

[3] *Cf. Matter of S-E-G-*, 24 I&N Dec. 579, 585 (BIA 2008). As described in further detail below, the Board held that "family members of those who have resisted gang recruitment" was not particular. The Board's conclusion stems from its holding that the principal group was amorphous and a logic that viewed the derivative-family group only as an extension of the rejected group. We argue below that had the Board properly analyzed the claim through a "family-alone" lens, the outcome would have been different. The Board in *S-E-G-* expressly reserved the question as to whether family alone is a valid particular social group. *Id.* at 585 n.2.

group because it is a "highly recognizable, immutable characteristic that is acquired at birth and is *inextricably linked to family ties*.") (emphasis added). If a clan comprised of thousands of people is sufficiently delineated to constitute a particular social group, it follows that a narrower family grouping defined by universally recognized terms, such as fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents and cousins, contains sufficiently clear benchmarks for determining group membership. The Board should expressly ratify this core group of family as universally satisfying the particularity test, even if it feels necessary to leave open the question of whether more extended family relationships[4] are sufficiently particular in a given society.

C. Family-Based Groups Satisfy the Board's Particular Social Group Requirements, *S-E-G-* Notwithstanding.

In *Matter of S-E-G-*, the Board held that neither "Salvadoran youth who have been subjected to recruitment efforts by MS-13 … who have rejected or resisted membership in the gang …" nor "*family members of such Salvadoran youth*" were particular social groups. 24 I&N Dec. 579, 581 (BIA 2008) (emphasis added). The Board rejected these groups as lacking particularity and social visibility (or social distinction). *Id.* at 584-88; *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014) (refining social visibility and renaming it social distinction).

However, *S-E-G-* cannot possibly be read as barring family-alone particular social groups. Rather, at most, *S-E-G-* rejected derivative-family groupings, *i.e.* groups which, as articulated, premise their validity on their relation to an independent class of persons. *S-E-G-* expressly

[4] There may be claims that present questions which require some evidentiary showing that a particular family relationship, such as godparents, distant relatives within a clan-based or tribal society, or romantic relationships short of marriage, has a "commonly accepted definition" within the relevant society. *Cf. Matter of M-E-V-G-*, 26 I&N Dec. at 239. However, there is a core group of family relationships that universally provide a clear benchmark for delineating membership in a family. *See* AOBTC, Nexus (explaining that "[i]n most societies … the nuclear family would qualify as a particular social group," and in some "societies… [even] extended family groupings may have great social significance, such that they could meet the requirement of social 'visibility' or 'distinction.").

reserved the question of whether "family alone" can qualify as a particular social group, only resolving the question of whether the specific derivative articulation advanced ("family members *of such Salvadoran youth*") was cognizable. 24 I&N Dec. at 585, n.2 (emphasis added). The Board's reservation of the issue now presented permits it to continue to adhere to the lessons of *Acosta* and *H-* and to apply its three-prong social group analysis in a straightforward manner to family-alone groups. Had the Board analyzed the proposed family based social group in *S-E-G-* through a family-alone lens instead of "teas[ing] out one component of [the] group's characteristics to defeat the definition of social group[,]" the outcome would have been different. *Cf. Cece v. Holder*, 733 F.3d 662, 673 (7th Cir. 2013). This case provides the Board an opportunity to withdraw from those statements in *Matter of S-E-G-* that are in tension with the rest of its social group and nexus jurisprudence and to provide meaningful guidance to the immigration courts and courts of appeals.

1. *S-E-G-* Did Not Reach the Question of Whether Family-Alone Is a Valid Particular Social Group within the Facts of That Case.

In *S-E-G-*, the Board explicitly stated that it did not "address the question of whether *'family' alone* is a social group under the circumstances" of that case. 24 I&N Dec. 579, 585 n. 2 (emphasis added). Instead, the Board *only* considered and rejected a social group that included "family" as it related to "Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang." *See id.* at 585. Put another way, the Board in *S-E-G-* only considered family as a derivative group of a separate group the Board rejected as nonviable. *Id.* at 585 n.2.

Indeed, the Board's analysis focused primarily on the social visibility and particularity of the group of "youth rejecting gang recruitment efforts." The derivative-group (*i.e.*, family of those individuals) is given exceptionally little analysis and is always mentioned within the larger context

of the nonviable group.[5] For example, the Board states that "[t]here is little … to indicate that Salvadoran youth who are recruited by gangs but refuse to join (*or their family members*) would be "perceived as a group" by society. *Id.* at 587 (emphasis added). Elsewhere, the Board asserts that the "risk of harm is not limited to young males who have resisted recruitment, *or their family members*, but affects all segments of the population." *Id.* (emphasis added).

Because *S-E-G-* limited itself to considering family merely as a derivative of a separate nonviable group, it has no application at all to the question of whether family-alone is a particular social group. The Board should thus remain faithful to the long-standing rule of *Acosta* and its progeny, which have clearly held that family-alone groups are based on "highly recognizable, immutable characteristic[s] that [are] acquired at birth" and are easily "understood by others to constitute social groups." *Matter of H-*, 21 I&N Dec. at 342; *Matter of C-A-*, 23 I&N Dec. at 959.

2. The Board's Conclusion in *S-E-G-* that Family Is Too Amorphous Was Predicated upon One of Two Significant Errors.

In *S-E-G-*, the Board asserted that "'family members,' which could include fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins, and others is … too amorphous." 24 I&N Dec. at 585. The Board justified its conclusion by reasoning that "gang members attempted to recruit all the young males in their neighborhood" and that the applicants did not claim that the gang "targeted *only* their family." *Matter of S-E-G-*, 24 I&N Dec. at 585 n.2 (emphasis in original). Later, the Board stated that "the purported social groups … lack particularity [because] … the motivation of gang members … could arise … *quite apart from any perception that* [they]… were *members of a class*." *Id.* (emphasis added).

[5] Whether the recruitment-based social group articulated in *S-E-G-* remains nonviable in light of subsequent case law is unsettled. *Cf. Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014) (remanding a recruitment-based social group to the Immigration Judge in light of developments in case law). However, because family-alone social groups should be recognized apart from their derivative connection to an independent class of persons, the Board need not reach that question to resolve the instant matter.

The Board's reasoning is irreconcilable with its own precedents in at least one of two ways. Either the Board improperly conflated two distinct aspects of the refugee definition, the particular social group analysis and the nexus analysis, or else it failed to properly apply the rules relating to the mixed-motive nexus analysis. *See* INA § 208(b)(1)(B)(i); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007); *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014). Because the above assertions in *S-E-G-* do not conform to the Board's other social group and nexus precedents, and because they sow confusion among the immigration courts, the Board should take this opportunity to withdraw from them.

i. It Is Error to Conflate the Analysis of Nexus and Particular Social Group.

To the first point, it is paramount that the elements of the particular social group analysis not be conflated with the nexus analysis. *See* Deborah Anker, *Law of Asylum in the United States*, § 5:43 (2015 Edition); *Matter of W-G-R-*, 26 I&N Dec. 208, 218 (BIA 2014). The Board put the matter very plainly when it explained that:

> [I]t is important to distinguish between the inquiry into whether a group is a "particular social group" and the question whether a person is persecuted "on account of" membership in a particular social group. … [W]e must separate the assessment [of] whether the applicant has established the existence of one of the enumerated grounds (religion, political opinion, race, ethnicity, and particular social group) from the issue of nexus. The structure of the Act supports preserving this distinction, which should not be blurred…

Matter of W-G-R-, 26 I&N De. At 218. However, the Board in *S-E-G-* failed to distinctly analyze the particular social group of "family members" separately from the issue of nexus.[6] 24 I&N Dec. 584-88.

[6] While it is possible that the Board did not intend to mix nexus with particular social group, but merely reached the issue of nexus in the sections entitled "particularity" and "social visibility," this would not save the Board's analysis in *S-E-G-*. This is so because the Board's reasoning there is inconsistent with the mixed-motives analysis discussed below insofar as the Board suggests that family must be the exclusive cause for the persecution.

As explained above, the touchstone of particularity is delineation. *See W-G-R-*, 26 I&N Dec. 208, 214 (BIA 2014) (the group must "be defined by characteristics that provide a clear benchmark for determining who falls within the group" by using a "commonly accepted definition[] in the society" in which it exists); *cf. Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2007) (holding that wealthy Guatemalans lack requisite particularity).

However, in *S-E-G-*, the Board fails to properly apply this test by blurring the line between delineation and nexus. Indeed, by concluding that family is too amorphous because the "gang members" did not "target[] *only* their family," and suggesting that other motivations might have been at play,[7] the Board improperly infused nexus concepts into the particularity analysis and allowed the persecutor's perception to control the social group analysis. *Matter of S-E-G-*, 24 I&N Dec. at 585 n.2; *cf. Matter of M-E-V-G-*, 26 I&N Dec. at 242 (clarifying "that a group's recognition for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor"). Whether the applicants in *S-E-G-* were going to be targeted *on account of* their membership in that family should have been a wholly separate question from whether family is sufficiently delineated. *Matter of W-G-R-*, 26 I&N Dec. at 218.

The same error is on display in the Board's social distinction analysis where it holds that the family group is not socially visible[8] because its members do not "suffer from *a higher incidence of crimes than the rest of the population*" and because "the *risk of harm is not limited to* [those] who have resisted recruitment, or their *family members*, but affects *all* segments of the

[7] The Board stated that "the purported social groups … lack particularity [because] … the motivation of gang members … *could* arise … *quite apart from any perception that* [they]… were *members of a class*." *Matter of S-E-G-*, 24 I&N Dec. at 585 (emphasis added).

[8] This claim as applied to family is in direct conflict with the Board's conclusion in *Matter of C-A-* that "[s]ocial groups based on innate characteristics such as … family relationship are generally easily recognizable and understood by others to constitute social groups." 23 I&N Dec. at 959.

population."[9] 24 I. & N. Dec at 587 (emphasis added). Again, these assertions, whether they are true or false, have no bearing on whether families are distinct segments of society; rather, they are relevant, at most, to the analysis of whether the gang members were motivated by the applicant's membership in her family.

Because the Board's conclusion – that family members of individuals who have resisted gang recruitment efforts was neither particular nor socially visible – was predicated upon reasoning that violated the Board's admonitions against conflating the definition of a particular social group and nexus to that social group, *S-E-G-* should not be extended to the question of whether family-alone is a viable particular social group. Further, in order to provide appropriate guidance to the immigration courts, those statements in *S-E-G-* suggesting that family is not a particular social groups should be withdrawn.[10]

[9] The Board also claims that the gangs "have directed harm against *anyone and everyone* perceived to have interfered with, or who might present a threat to, their criminal enterprise and territorial power." *Id.* (emphasis added) Thus, the Board asserts that the applicants are "not in a substantially different situation from anyone who has crossed the gang, or who is perceived to be a threat to the gang's interests." *Id.* The Board concludes this putative "social visibility" analysis by asserting that "victims of gang violence come from all segments of society, and it is difficult to conclude that any 'group' as actually perceived by the criminal gangs, is much narrower than the general population of El Salvador" and that there is no reason to believe that "general *societal perception* would be otherwise." *Id.* at 588 (emphasis added).

[10] The Board's practice of mixing nexus into the "particular social group" analysis can be traced back to when the Board first announced the social visibility requirement in *Matter of C-A-*, 23 I&N Dec. 951, 959 (BIA 2006). There, the Board, in explaining why 'noncriminal informants' was not socially visible, stated the "drug cartels have directed harm against anyone and everyone perceived to have interfered with, or who might present a threat to, their criminal enterprises." *Id.* at 960. Continuing, it claimed that "informants are not in a substantially different situation from anyone who has crossed the … cartel or who is perceived to be a threat to the cartel's interests." *Id.* Finally, the Board asserted that "it is difficult to conclude that any 'group,' as actually perceived by the cartel, is much narrower than the general population of Columbia." *Id.* at 961. As such, the Board concluded that because "the record [showed] that the … cartel retaliates against anyone perceived to have interfered with its operations," then "'noncriminal informants working against the Cali drug cartel' [do not] constitute a 'particular social group.'" The language of *S-E-G-* was directly lifted from *C-A-*. Both decisions unequivocally combine the analysis of nexus with the social visibility analysis. The Board has since clarified that the perception of the persecutor does not control, *Matter of M-E-V-G-*, 26 I&N Dec. at 242, and should take the opportunity this case presents to formally withdraw from these problematic statements.

ii. Alternatively, It Is Error to Require Family to Be the Exclusive Characteristic that Motivates the Persecutor.

As stated above, the Board in *S-E-G-* rejected a derivative articulation of families of gang resisters and did not reach the issue of whether family alone was a particular social group because there was no evidence that the gang "targeted *only* their family." 24 I&N Dec. at 585 n.2. However, the Act only requires the applicant to "establish that … membership in a particular social group… was or will be *at least one central reason* for persecuting the applicant." INA § 208(b)(1)(B)(i) (emphasis added). To the extent that the Board's decision to not reach the family-alone issue was based on the premise that membership in the applicant's family was not the *sole* motivation of the persecutor, this conclusion was manifestly contrary to law. The statute expressly contemplates that persecutors often have mixed motives, and the Board has recognized mixed-motive claims so long as the protected ground is not merely "incidental or tangential to the persecutor's motivation." *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 213 (BIA 2007); *see also Oliva v. Lynch*, 807 F.3d 53, 60 (4th Cir. 2015) ("[P]ersecution may be on account of multiple central reasons or intertwined central reasons..."); *Marroquin-Ochoma v.* Holder, 574 F.3d 574, 577 (8th Cir. 2009) (holding that persecution "need not be *solely*, or even predominantly" on account of a protected characteristic); *Bi Xia Qu v. Holder*, 618 F.3d 602, 608 (6th Cir. 2010) (holding that "if there is a nexus between the persecution and the membership in a particular social group, the simultaneous existence of a personal dispute does not eliminate that nexus")

So long as one central reason for an applicant's persecution is his or her membership in a family-based particular social group, the applicant is eligible for asylum. *See, e.g., M-E-V-G-*, 26 I&N Dec. at 251 ("[It] is clear that persecution on account of a protected ground may occur during periods of civil strife if the victim is targeted on account of a protected ground."); *Matter of Villalta*, 20 I&N Dec. 142, 147 (BIA 1990) (granting asylum because the applicant was targeted

on the basis of political opinion notwithstanding a context of broader violence). It would be error for the Board to require an applicant for asylum to show that his family membership was the exclusive reason for why he would be targeted. *See id.*

While it is beyond dispute that some persecutors will be *partially* motivated by a desire to recruit members and punish those who have interfered with their criminal enterprise, it does not follow that every such persecutor will be exclusively motivated by that. In particular, when a gang or other illicit organization seeks to harm the family member of a prospective recruit, they may be partially motivated by recruitment goals, but they may be also utilizing the "time-honored theory of *cherchez la famille* ('look for the family'), the terrorization of one family member to extract information about the location of another family member or to force the missing family member to come forward." *See Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) ("There can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family…. As a result, we are compelled to conclude that … petitioner was singled out for mistreatment *because of his relationship* to his brother.") (emphasis added).

The Board's decision in *S-E-G-* to not consider "family alone" under the circumstances of that case appears to be based on the premise (contrary to established law) that family must be the *only* reason for an applicant's persecution. Had the Board properly applied a mixed-motive analysis to a family-alone articulation of the proposed group instead of unnecessarily limiting itself to consideration of the derivatively articulated alternative, the female respondent in that case would have been granted asylum. For this reason, the Board should not extend *S-E-G-*'s rationale to the question of whether family-alone qualifies as a particular social group, and it should formally withdraw from the statement made in footnote 2 and the accompanying text.

D. Requiring Those Persecuted On Account of Their Family Relationship to Make a Connection to Another Protected Ground Is an Additional Requirement Never Before Demanded by the Board.

As stated above, family-alone groups have long been recognized as valid particular social groups. To require a family-plus social group articulation is to add a fourth, additional requirement to family-based social groups in addition to the existing requirements of immutability, particularity, and social distinction. Adding such a requirement has no basis in the statutory phrase "particular social group." *Acosta*, 19 I&N Dec. at 233 (employing the *ejusdem generis* canon of statutory interpretation to hold that a *group* shares a common, immutable characteristic); *M-E-V-G-*, 26 I&N Dec. at 239 (citing *Rivera-Barrientos v. Holder*, 666 F.3d 641, 649 (10th Cir. 2012)) (noting that the *particularity* requirement is derived from the plain language of the statute); *W-G-R-*, 26 I&N Dec. at 216 (locating the *social distinction* requirement in the Act's use of the word "social"). The Board has made clear that it intends this three-prong test to be the exclusive, sufficient standard for determining whether a proposed group is a cognizable particular social group. *See M-E-V-G-*, 26 I&N Dec. at 237.

There is nothing special about family-based particular social groups that requires a fourth requirement. As described above, family-alone groups are based on immutable kinship ties that are generally defined in a manner amenable to clear delineation and are recognized as being socially distinct. Whether a family member, on account of whom an asylum applicant is placed at risk of persecution, is independently eligible for asylum, should be irrelevant. To make it relevant by requiring all family-based particular social groups to be family-plus-religion or family-plus-political opinion would be to upset more than thirty years of settled precedent. *See* Section I.A-B, *supra*. Such a dramatic departure from existing law is not justified. The Board should thus reject

any "family-plus" requirement and remain faithful to its precedent accepting family-alone groups as cognizable under the Act.

II. RECOGNIZING FAMILY AS A SOCIAL GROUP IS THE ONLY WAY FOR THE BOARD TO PROVIDE A UNIFORM RULE CAPABLE OF SURVIVING JUDICIAL REVIEW.

Both the Attorney General and this Board have recognized that when interpreting the INA, the Board should, where possible, adopt a construction that permits a uniform, nationwide application of immigration law. *See Matter of Silva-Trevino*, 26 I&N Dec. 550, 553 (A.G. 2015) (vacating the Attorney General's prior decision in view of the "disuniformity in the Board's application of immigration law" in the face of varied circuit court precedent); *Matter of Yanez*, 23 I&N Dec. 390, 396 (BIA 2002) (*en banc*) *abrogated on other grounds by Lopez v. Gonzales*, 549 U.S. 47 (2006) (abandoning a national uniformity approach only where such uniformity was "elusive"). Several circuit courts have addressed family-based asylum claims, and the weight of authority suggests that recognizing family-alone as a particular social group is not only the correct interpretation of the Immigration and Nationality Act, but also the only course of action that will prevent a circuit split.

A. Requiring A Family-Plus Social Group Articulation Would Be an Impermissible Construction of the Statute in the First, Second, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits, All of Which Have Expressly Recognized Families as Cognizable Social Groups.

The statutory phrase "membership in a particular social group" found in INA § 101(a)(42) is one that the courts of appeals have generally held to be ambiguous, and, therefore the Board's interpretation of this phrase has generally been accorded deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). *See, e.g.*, *Orellana-Monson v. Holder*, 685 F. 3d 511, 520 (5th Cir. 2012) (collecting cases). However, even under *Chevron*'s deferential standard of review, the agency's interpretation of the statute must be viewed as a "reasonable" one

in order for it to survive judicial review. 467 U.S. at 844-45. While an agency may decline to follow a judicial precedent construing an ambiguous statute within its realm of congressionally granted interpretive authority, the superseding interpretation must still be a reasonable construction. *See National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 983 (2005). The case law of the First, Second, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits has explicitly characterized family-alone as being such a fundamental example of a particular social group that an approach which would require groups to make a derivative connection to an independent ground (*i.e.*, family-plus) would be rejected as an unwarranted departure from long-standing principles and an unreasonable construction of the statute.[11]

Two circuits, the First and Ninth, have stated for over twenty years that a family-alone group is a plain or prototypical example of a particular social group.[12] The law of the First Circuit is 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." *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) (emphasis added); *accord Aldana-Ramos v. Lynch*, 757 F.3d 9, 15 (1st Cir. 2014) ("It is well established in the law of this circuit that a nuclear family can constitute a particular social group 'based on common, identifiable and immutable characteristics.'") (citations omitted); *Ruiz v. Mukasey*, 526 F.3d 31, 38 (1st Cir. 2008) ("Kinship can be a sufficiently permanent and distinct characteristic to serve as the linchpin for a protected social group within the purview of

[11]The courts of appeals will not defer to a construction of a statute that departs from the agency's own precedent "without explanation or an avowed alteration." *See, e.g., Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 608 (3d Cir. 2011) (citing *Johnson v. Ashcroft*, 286 F.3d 696, 700 (3d Cir.2002)). Largely for the same reasons articulated in Part I, *supra*, requiring a family-based asylum claim to be derived from another protected characteristic is a marked departure both from *Acosta* and its progeny as well as the three prong approach reaffirmed in *M-E-V-G-* and *W-G-R-*. That such an approach would be an arbitrary and capricious departure from settled law is another reason to reject the derivative approach.

[12] In addition to the reasons articulated below for why a family-plus requirement is irreconcilable with its law, the Fourth Circuit has also stated in *dicta* that "[t]here is no doubt under BIA or federal case law that kinship ties can serve as the basis for a particular social group. The BIA has identified 'kinship ties' as a *paradigmatic* example of a particular social group." *Temu v. Holder*, 740 F.3d 887, 894 (4th Cir. 2014) (emphasis added).

the asylum laws."). Similarly, the Ninth Circuit has held that "[p]erhaps 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." *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986); *accord Flores-Rios v. Lynch*, No. 12-72551, slip op. at *11 (Dec. 1, 2015) (holding that "family remains the quintessential particular social group" even after *M-E-V-G-*). Indeed, the Ninth Circuit has already expressly held that "there is nothing in the statute itself, nor in the BIA's interpretation of the relevant provisions, to suggest *that membership in a family* is insufficient, *standing alone*, to constitute a particular social group in the context of establishing eligibility for asylum or withholding of removal." *Thomas v. Gonzales,* 409 F.3d 1177, 1188-89 (9th Cir. 2005) (*en banc*) (emphasis added).[13] Given the plainness with which these circuits view the issue, an interpretation of the phrase particular social group which denies family-alone claims because they lack an independent connection to a protected ground would certainly be rejected by the First and Ninth Circuits even under deferential reasonableness review.

The law of the Fourth Circuit is also incompatible with the view that an applicant presenting a family based claim must connect his or her proposed social group to an independent protected ground. The Fourth Circuit first addressed this issue in *Lopez-Soto v. Ashcroft*, in which it joined several other circuits in holding that "family" is a particular social group under the Act. 383 F.3d 228, 235, 238 (4th Cir. 2004) *rehearing en banc granted*, (Jan. 13, 2005), *review withdrawn pursuant to settlement,* (July 26, 2005) (recognizing family as a social group, but

[13] The Supreme Court reversed the Ninth Circuit in *Thomas*, holding that the issue of whether the family in question presents the kind of kinship ties that constitute a particular social group had not yet been considered by the agency. *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006). However, given the Ninth Circuit's comments on the issue, there can be little doubt that it would find a contrary position to be unreasonable if it were squarely presented to them.

denying the petition for review because the petitioner's relationship with his brother was not what motivated his persecutor).

In *Crespin-Valladares v. Holder*, the Fourth Circuit returned to the issue, rejecting the Board's reliance on the argument articulated in *Matter of S-E-G-* that if a class of persons is not particularly defined, family members of that class must also lack particularity. 632 F. 3d 117, 125 (4th Cir. 2011) ("Indeed, the Crespins' proposed group *excludes* persons who *merely testify* against MS-13; the Crespins' group instead encompasses only the relatives of such witnesses, testifying against MS-13, who suffer persecution on account of their family ties."). Finally, dispelling any notion that an applicant must put forward a family-plus articulation, the Fourth Circuit recently held that a mother who is persecuted on account of her son's refusal to join a gang is entitled to asylum because at least one of the persecutor's motivations was the family relationship. *See Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015).

The First, Fourth, and Ninth Circuits have affirmatively indicated that not only is *Amici*'s construction the *best* interpretation of the statute, but that departing from this interpretation is *unreasonable* and not entitled to deference. *Cf. Brand X*, 545 U.S. at 980. Additionally, the Second, Sixth, Seventh, and Eighth Circuits have all understood the Board's social group case law to include family-alone, without any additional showing that the family is at risk of harm on account of another protected ground. *See 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."); *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."); *Ayele v. Holder*, 564 F. 3d 862, 869 (7th Cir. 2009) ("Our circuit recognizes a family as a cognizable social group under the INA."); *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..."). [14]

The law of the remaining circuits also supports the conclusion that family is a particular social group. Each remaining circuit has approvingly cited the *Acosta* formulation, including its reference to "kinship ties." *See Fatin v. INS*, 12 F. 3d 1233, 1239-40 (3d Cir. 1993); *Ontunez-Tursios v. Ashcroft*, 303 F. 3d 341, 362 (5th Cir. 2002); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 648 (10th Cir. 2012); *Castillo-Arias v. US Att'y Gen.*, 446 F.3d 1190, 1193 (11th Cir. 2006).

In short, the courts of appeals have uniformly held that family, without more, is a particular social group under the INA. Should the Board hold otherwise, not only will it adopt an erroneous construction of the Act, but it will also invite precisely the sort of "disuniformity" which the Attorney General has instructed it to avoid. *Cf. Silva-Trevino*, 26 I&N Dec. at 553.

B. The Few Denials of Family-Based Claims in the Courts of Appeals Do Not Bind the Board.

The invitation to which *Amici* are responding directs us to address the circuit split on family-based particular social group claims. *See* Amicus Invitation No. 16-01-11. However, the circuits are not split regarding whether family, without more, qualifies as a particular social group.

[14] The Eighth Circuit joins the circuits which have expressly recognized family as a particular social group because *Bernal-Rendon* holds that "a nuclear family can constitute a social group." 419 F.3d at 881. Though in *Constanza v. Holder*, 647 F.3d 749, 753-54 (8th Cir. 2011) and *Aguianda-Lopez v. Lynch*, __ F.3d __, 2016 WL 711438 (8th Cir. Feb. 23, 2016), the Eighth Circuit rejected family-based social groups under certain circumstances, these decisions do not undermine *Bernal-Rendon*'s holding because they make the same error present in *S-E-G-* (discussed in Section I.C.2.i.) and corrected by the Board in *M-E-V-G-* and *W-G-R-*, *i.e.* they make statements about the persecutor's motivations and then impermissibly relate those statements to the separate issues of visibility and particularity. *Compare Constanza* 647 F.3d at 753-54 ("[T]here is no evidence … indicating that the gang specifically targeted Constanza's family as a group… Thus, Constanza's family lacks the visibility and particularity required to constitute a social group.") *and Gathungu v. Holder*, 725 F.3d 900, 908 (8th Cir. 2013) ("The 'central' question [in determining social visibility] is whether the applicant's status as a member of a particular social group is *the reason for that individual's persecution*.") (emphasis added) *with Matter of M-E-V-G-*, 26 I&N Dec. at 242 ("[W]e clarify that a group's recognition for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor.") *and Matter of W-G-R-*, 26 I&N Dec. at 218 ("[W]e must separate the assessment whether the applicant has established the existence of one of the enumerated grounds … from the issue of nexus."). *Constanza* is in tension with *Bernal-Rendon*'s clear holding and rests on principles rejected by the Board in *M-E-V-G-* and *W-G-R-*; therefore, it cannot now support an argument that family-alone is not a particular social group.

Most of the cases in which a court of appeals has denied a petition for review presenting a family-based asylum claim have not considered whether family-alone is a cognizable group, but rather have limited their analysis to the separate, factual question of the actual motivations of the persecutor.

The lone denial that does consider whether a family is a particular social group, *Orellana-Monson v. Holder*, 685 F.3d 511 (5th Cir. 2012), expressly employed the same limited derivative analysis present in *Matter of S-E-G-*. The *Orellana-Monson* Court *only* considered family as a group insofar as it was derived from an independent nonviable group, and did not consider the circumstances under which family-alone may be sufficient. It therefore did not answer the question presented in this case. Even if *Orellana-Monson* did create a circuit split (which it does not), the Fifth Circuit would almost certainly defer to the Board if it invoked *Brand X* to articulate a rule that family, without more, qualifies as a particular social group.

1. Several Cases Merely Affirm the Board's Finding That the Persecutor's Motivation was Unrelated to the Protected Characteristic of Family.

None of the cases cited by the Board in its *amicus* invitation as creating a circuit split address whether a family is a cognizable particular social group. Instead, in each of these cases, the court of appeals was content to affirm the Board's factual finding about the persecutor's actual motivations. As stated above, the Board has emphasized that:

> [I]t is important to distinguish between the inquiry into whether a group is a "particular social group" and the question whether a person is persecuted "on account of" membership in a particular social group. In other words, we must separate the assessment whether the applicant has established the existence of one of the enumerated grounds (religion, political opinion, race, ethnicity, and particular social group) from the issue of nexus.

Matter of W-G-R-, 26 I&N Dec. 208, 218 (BIA 2014). Each of the cases identified by the Board as contributing to a putative circuit split addresses only the issue of nexus and not the issue of whether the group itself is cognizable under the law. *See Ramirez-Mejia v. Lynch*, 794 F. 3d 485,

492 (5th Cir. 2015) ("Referring to individuals by name indicates little, and certainly does not, in and of itself, evince intent to persecute on the basis of membership within a family."); *Lin v. Holder*, 411 F. App'x 901, No. 10-1760, slip op. at *5 (7th Cir. Mar. 7, 2011) ("Lin has not demonstrated that his family ties *motivated* the alleged persecution.") (emphasis added); *Malonga v. Holder*, 621 F. 3d 757, 767 (8th Cir. 2010) ("The record contains little other objective description of the 1994 conflicts, and none that supports Malonga's claims as to who destroyed his home and *why*."). (emphasis added)

Other courts have also disposed of family-based claims on nexus grounds while declining to address the question of whether a family based social group is cognizable under the Act. *See, e.g., Santos-Lemus v. Mukasey*, 542 F. 3d 738, 742-44 (9th Cir. 2008) *overruled on other grounds by Henriquez-Rivas v. Holder*, 707 F. 3d 1081 (9th Cir. 2013) *(en banc*) (holding that substantial evidence supported the Board's factual finding that petitioner would not be persecuted on account of his family); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235, 238 (4th Cir. 2004) *rehearing en banc granted*, (Jan. 13, 2005), *review withdrawn pursuant to settlement*, (July 26, 2005) (same); *Bernal-Rendon v. Gonzales*, 419 F. 3d 877, 881 (8th Cir. 2005) ("While petitioners correctly contend that a nuclear family can constitute a social group, petitioners fail to prove that a specific threat exists to their family as a social group."). Because the question before the Board assumes that the applicant is persecuted on account of family, none of these cases provides any guidance as to how the Board should resolve this question.

2. The Fifth Circuit's Decision in *Orellana-Monson v. Holder* Did Not Address the Question Presented Here and is Not Binding on the Board.

The only case of which *Amici* are aware that squarely rejects a family based social group is the Fifth Circuit's decision in *Orellana-Monson v. Holder*, 685 F. 3d 511 (5th Cir. 2012). In *Orellana-Monson*, the court considered the asylum claims of two brothers, one who was fleeing

gang recruitment, and the other who feared harm if the primary petitioner refused. *Id.* at 521. The court rejected both social groups, the primary one on the basis of particularity and social visibility, and the family based claim based on particularity. *Id.* at 521-22.

Like *S-E-G-*, *Orellana-Monson* only addressed the family group as it related to and was derived from the group of youth who had resisted gang recruitment efforts. *Id.* at 522 ("Here the membership in a particular family is derivative of Jose's claim which we have already determined to lack particularity. It stands to reason that if Jose's claim is too amorphous since it encompasses a wide swath of society crossing many political orientations, lifestyles, and identifying factors, then a group consisting of all family members of that already large segment, is even less particularized and therefore does not meet the particularity requirement.") The Fifth Circuit did not actually consider whether the petitioner's family, standing alone, satisfied the particularity test. While the petitioners in *Orellana-Monson* presented the court with a group comprised of "family members of Jose," *id.* at 516, and the court claimed to consider his "membership in a particular family," *id.* at 522, the group it actually rejected as amorphous was "all family members of that already large segment [*i.e.*, men who were recruited but refused to join Mara 18]," *id.* The court uses the family relationship only to *extend* the scope of a group it already rejected. *See id.* If it would have properly considered the group comprised of "family members of Jose" or "brothers of Jose," a clear benchmark was present. There is no ambiguity as to whether one is or is not the brother of Jose Orellana-Monson. The *Orellana-Monson* court offers no reason for why it only considered family in this derivative fashion rather than simply apply the well-established rule that family-alone is a recognized social group. *See id.* at 521-22.

Because *Orellana-Monson* confined itself to a derivative-family analysis and failed to properly analyze family-alone as a particular social group, it did not resolve the question that the

Board now asks *Amici* to address and is not binding on the Board. Indeed, the Fifth Circuit has recently suggested that the question remains open. *See Ramirez-Mejia v. Lynch*, 794 F. 3d 485, 492 (5th Cir. 2015) *reh'g en banc denied* No. 14-60546 (5th Cir. Feb. 11, 2016) ("We … do not address whether her family was a particular social group."). However, should the Board interpret *Orellana-Monson* to mean that an applicant fearing persecution on account of her family ties must also show that her family belongs to a class of people independently meriting asylum, such a holding by the court of appeals would yield to a countervailing agency interpretation under *Brand X*.

Orellana-Monson is a decision that is particularly susceptible to being superseded by the agency because the court was engaged in interpreting agency precedent and deferring to it. The animating principle of *Orellana-Monson* is that the Fifth Circuit gives *Chevron* deference to the Board's interpretation of the phrase "particular social group" as requiring the elements of "particularity" and "social visibility". 685 F. 3d at 519-20. A precedential decision by the Board clarifying that family-alone claims do, in fact, fall within the three-prong framework articulated by *M-E-V-G-* is likely to receive similar deference. In contrast, a decision by the Board to require family-plus claims will likely be viewed by other circuits as an attempt to add a special, fourth prong to the *M-E-V-G-* analysis that is not warranted by previous case law or the statute. *See* Section I.B, *supra*.

In summary, there is no circuit split, and even if there were, the weight of authority and principles of national uniformity would counsel the Board to hold that family-alone qualifies as a particular social group under its existing standards. The First, Second, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits have all held that family is a particular social group, and none have required a family-plus articulation. Three of those circuits have held that family is a "prototypical,"

"plain[]," or "paradigmatic" social group. The Fifth Circuit's lone decision rejecting a family based social group using a derivative analysis does not answer the question presented in this case, and, even if it did, it answered it using a rationale that indicates that it would defer to the Board if it held differently. Further, as stated previously in this brief, recognizing family as a social group without any additional criteria is the disposition of this issue that is most consistent with the Board's previous treatment of family-based groups in *Matter of Acosta* and *Matter of H-* as well as within the framework for particular social groups more generally articulated in *Matter of M-E-V-G-* and *Matter of W-G-R-*.

CONCLUSION

Amici respectfully request that the Board of Immigration Appeals issue a precedent decision finding that family-alone is sufficient to meet the existing requirements for a particular social group and nexus without further analysis.

Respectfully Submitted,

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