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## Gender-Based Persecution, Protection, and Particularity: The Case for Returning to *Acosta*

Meg Keiser†

### Introduction

Waiting for her chance in Mexico to cross the border into the United States, a Honduran woman, Karen Paz, remarked that “[h]itting a woman for a man is as normal as eating a tortilla from a food stand on the way to work,” referring to the high prevalence of gender-based and domestic violence in Honduras.<sup>1</sup> Ms. Paz revealed a scar on her shoulder—the result of her husband burning her with a hot pan containing boiling butter.<sup>2</sup> Despite reporting this attack to the police, Ms. Paz’s husband was detained for only twenty-four hours before being released.<sup>3</sup> Wanting to protect her daughter from violence and fearing that her husband would kill her the next time she was attacked, Ms. Paz left San Pedro Sula, Honduras in search of safety and a new start in the United States.<sup>4</sup> She planned to apply for asylum.

Ms. Paz’s story mirrors that of many women in Honduras. Though domestic violence is the leading crime reported in Honduras, domestic violence complaints rarely result in a conviction for perpetrators.<sup>5</sup> From 2012–2014, out of 4,992 domestic

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1. Federica Valabrega, *I’m a Survivor of Violence: Portraits of Women Waiting in Mexico for U.S. Asylum*, NAT’L PUB. RADIO (Jan. 16, 2019, 5:51 PM), <https://www.npr.org/sections/pictureshow/2019/01/16/684812592/i-m-a-survivor-of-violence-portraits-of-women-waiting-in-mexico-for-u-s-asylum> [<https://perma.cc/Z7G7-W7CH>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

violence complaints, there were only 134 convictions.<sup>6</sup> Honduras also claims one of the highest rates of femicide in the world.<sup>7</sup> Ms. Paz's experience is representative of a greater theme of women fleeing gender-based persecution in hopes of being granted asylum in the United States.

However, fleeing this persecution is unfortunately only one part of the equation. Asylum seekers like Ms. Paz must navigate through the U.S. immigration system and the dense, ever-changing asylum law it applies to have a chance at a meritorious claim. To be granted asylum, among other requirements, applicants must meet the statutorily defined definition of a refugee in the Immigration and Nationality Act (INA): someone who has faced persecution or has a fear of persecution "on account of [their] race, religion, nationality, membership in a particular social group (PSG), or political opinion . . ."<sup>8</sup> With the grounds of race, religion, nationality, and political opinion being rather straightforward, the remaining category, membership in a PSG, allows for breadth in claims, and many asylum seekers must default to this protected ground should their persecution not fit within any other category.<sup>9</sup> For individuals like Ms. Paz who have experienced gender-based persecution, the PSG protected ground is the only category she could tie her domestic violence-based asylum claim to.

PSG is not defined under the INA and is thus reliant on case law for interpretation.<sup>10</sup> Persecution on the basis of a PSG was first interpreted by the Board of Immigration Appeals (BIA) in the 1985 decision *Matter of Acosta* to mean persecution directed at a member of a group whose persons all share a common, immutable characteristic, and all PSGs are to be subject to case-by-case analysis.<sup>11</sup> However, more recently, there has been a departure from the *Acosta* framework, with more limitations and constraints being placed on PSGs, such as adding "particularity" and "social distinction" requirements.<sup>12</sup> This more stringent approach to the

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6. *Id.*

7. *Id.*

8. Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101.

9. See *Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985); see also Mattie L. Stevens, *Reorganizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category*, 3 CORNELL J.L. & PUB. POL'Y 179, 190–91 (1993) ("The Ninth Circuit also recognizes that 'the 'social group' category is a flexible one which extends broadly to encompass many groups who do not otherwise fall within the other categories of race, nationality, religion, or political opinion.'") (citing *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986)).

10. *Acosta*, 19 I. & N. Dec. at 232.

11. *Id.* at 233.

12. M-E-V-G-, 26 I. & N. Dec. 227, 228 (B.I.A. 2014).

PSG category has led to less frequent success in gender-based asylum claims.<sup>13</sup> Although case law does provide some guidance for PSG classifications, there remains a significant lack of consensus regarding this protected ground.

Due to the breadth of this protected category and lack of a concrete definition of PSG, as well as different applications and interpretations of the PSG category in federal circuit courts, many immigration advocates have found that PSG asylum claim adjudications related to gender-based persecution are inadequate and inconsistent, and they have criticized this protected ground.<sup>14</sup> This issue has motivated advocacy to amend the INA to include a sixth protected category: gender.<sup>15</sup> On its face, this solution appears to be an apt method to address the apparent gap in the INA in the context of gender-based asylum claims. However, scholar Karen Musalo claims that “[a]dding a sixth ground may ‘fix’ the problem for one category of asylum seekers, but it will leave out in the cold all the others who rely on the particular social group ground for their claims . . . .”<sup>16</sup>

Though there is merit to the argument that a sixth category should be added to the INA, this Note posits that this is not the solution to address gender-based asylum claims. Rather than add an additional category and remain in the ever-changing and ever-constraining modern PSG framework, recent case law reflecting a return to the *Acosta* framework suggests that the law as it currently stands is sufficient to successfully capture asylum claims based on gender-based persecution.<sup>17</sup>

Part I of this Note provides background on U.S. asylum law and the development of the PSG protected ground and how it has applied to gender-based asylum claims. First, this Note investigates the evolution of PSG jurisprudence by the BIA, and then focuses on applications in the U.S. Courts of Appeals. Part II discusses the suggestion of adding a sixth protected ground, gender, to the INA and highlights why this is not the correct solution for the future of PSG jurisprudence. This Note argues and advocates for a return to the *Acosta* framework to simplify the PSG cognizability analysis,

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13. See *e.g.*, *Valle-Montes v. Att’y Gen.*, 342 Fed App’x. 854, 857 (3d Cir. 2009).

14. See *e.g.*, *Stevens*, *supra* note 9, at 191–207.

15. *Id.* at 215.

16. Karen Musalo, *Guest Post: The Wrong Answer to the Right Question: How to Address the Failure of Protection for Gender-Based Claims*, IMMIGRATIONPROF BLOG (Mar. 9, 2021), [https://lawprofessors.typepad.com/immigration/2021/03/guest-post-the-wrong-answer-to-the-right-question-how-to-address-the-failure-of-protection-for-gende.html#google\\_vignette](https://lawprofessors.typepad.com/immigration/2021/03/guest-post-the-wrong-answer-to-the-right-question-how-to-address-the-failure-of-protection-for-gende.html#google_vignette) [<https://perma.cc/UTS7-94H2>].

17. See *De Pena-Paniagua v. Barr*, 957 F.3d 88, 95–96 (1st Cir. 2020).

which benefits not just those with gender-based asylum claims, but all asylum-seekers applying within the PSG classification.

### I. A Primer on Asylum Law and the Particular Social Group Protected Ground

There is an international obligation to assist individuals who meet the definition of a refugee as established by the 1951 United Nations Convention Relating to the Status of Refugees (1951 Convention).<sup>18</sup> The 1951 Convention serves as a “realistic” guide “to be framed in such a way as to secure as universal application as possible.”<sup>19</sup> Asylum is not an option for everyone in a difficult situation, but rather for individuals who have faced persecution tied to a specific protected ground: race, religion, nationality, membership in a PSG, or political opinion.<sup>20</sup> All protected categories have some flexibility, but PSG stands out as being the least concrete, and the jurisprudential evolution of the category has only solidified this reputation.<sup>21</sup>

To qualify for asylum in the U.S., an individual must meet the definition of a refugee:

[Someone] who is outside any country of such person’s nationality . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .<sup>22</sup>

In other words, an asylum applicant must be able to tie their claim to one of the five protected grounds defined by the INA.<sup>23</sup> Asylum claims are either adjudicated affirmatively through the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS), or defensively in removal proceedings by the Department of Justice Executive Office for

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18. Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 150.

19. Irial Glynn, *The Genesis and Development of Article 1 of the 1951 Refugee Convention*, 25 J. REFUGEE STUD. 134, 136–37 (2012).

20. Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

21. NAT’L IMMIGRANT JUST. CTR., PARTICULAR SOCIAL GROUP PRACTICE ADVISORY: APPLYING FOR ASYLUM BASED ON MEMBERSHIP IN A PARTICULAR SOCIAL GROUP 6–7 (2021), <https://immigrantjustice.org/for-attorneys/legal-resources/file/practice-advisory-applying-asylum-based-membership-particular> [https://perma.cc/EQ7F-R3AZ].

22. 8 U.S.C. § 1101(a)(42)(A).

23. *Id.*

Immigration Review (EOIR).<sup>24</sup> The body of case law regarding asylum comes from asserting asylum as a defense in removal proceedings.<sup>25</sup>

A. *Agency Interpretations of Membership in a Particular Social Group*

The BIA first interpreted the 1951 Convention’s “membership in a particular social group” in *Matter of Acosta*.<sup>26</sup> Due to the lack of clear legislative intent, the BIA relied on the statutory interpretation tool of ejusdem generis, meaning “of the same kind.”<sup>27</sup> Interpreting membership in a PSG in relation to the other four categories—race, religion, nationality, and political opinion—the BIA concluded that all of the protected grounds encompassed characteristics that were innate and could not be changed, or had a characteristic that should not have to be changed.<sup>28</sup> *Acosta* specifically pointed out that “sex”<sup>29</sup> could be a PSG due to the common, immutable characteristic that members of this group share.<sup>30</sup>

Following *Acosta* was the BIA’s landmark 1996 decision in *Matter of Kasinga*, which was one of the first cases to address a gender-based PSG.<sup>31</sup> *Kasinga* held that female genital mutilation (FGM) was persecution and was based on the respondent’s nexus to a particular social group involving her gender: “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”<sup>32</sup> *Kasinga* opened the door to more PSG jurisprudence, and led many stakeholders to believe

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24. *Asylum in the United States*, AM. IMMIGR. COUNCIL (Jan. 15, 2024), <https://www.americanimmigrationcouncil.org/research/asylum-united-states> [https://perma.cc/5EH5-63QA].

25. *Id.*

26. *Acosta*, 19 I. & N. Dec. 211, 232 (B.I.A. 1985).

27. *Id.* at 233.

28. *Id.*

29. Though we understand “sex” and “gender” as two distinct concepts as definitions, immigration law often conflates these words. As such, some decisions use “gender” verbiage, while others use “sex.” See Elaine Wood, *Advancing Gender and Sex Equality in Asylum Protections*, AM. IMMIGR. LAWS. ASS’N. (Dec. 21, 2023), <https://www.aila.org/blog/advancing-gender-and-sex-equality-in-asylum-protections#:~:text=In%20asylum%20cases%2C%20the%20distinction,sexism%20within%20U.S.%20immigration%20law> [https://perma.cc/29WD-Q6N6].

30. *Acosta*, 19 I. & N. Dec at 233.

31. See *Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996).

32. *Id.* at 358.

that the gender-based PSG body of law would expand and adapt to protect asylum seekers facing gender-based persecution.<sup>33</sup>

Although *Acosta* remained the key case governing PSG asylum claims for decades, and still remains a highly precedential decision, the guidance provided by *Acosta* also sparked a fear of the so-called floodgates opening—an overwhelming increase of asylum applications and grants—and many cases with a PSG nexus arising, especially pertaining to claims involving gender-based persecution.<sup>34</sup> This led courts to narrow the PSG protected ground in an attempt to limit PSG asylum claims.<sup>35</sup>

Despite its broad relation to *Kasinga*, the BIA was previously silent on asylum claims relating to domestic violence.<sup>36</sup> In 1999, the gender-based PSG landscape changed drastically when the BIA decided *Matter of R-A*.<sup>37</sup> The Guatemalan respondent in *R-A* suffered domestic violence and persecution at the hands of her husband, and was not offered protection by the government.<sup>38</sup> The BIA even admitted: “[w]e struggle to describe how deplorable we find the husband’s conduct to have been.”<sup>39</sup> Despite recognition that Ms. R-A’s treatment was cruel and inhumane, she was denied asylum.<sup>40</sup> The BIA determined that the PSG Ms. R-A identified was not, in fact, a PSG: “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”<sup>41</sup> The BIA took issue with the idea that this was not a cognizable group within Guatemalan society:

[T]he group is defined largely in the abstract . . . for the group to be viable for asylum purposes . . . there must also be some showing of how the characteristic is understood in the [noncitizen]’s society, such that we . . . may understand that the potential persecutors in fact see persons sharing the characteristic as warranting suppression or the infliction of harm.<sup>42</sup>

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33. See Musalo, *supra* note 16.

34. See Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL’Y. L. 119, 132 (2007).

35. NAT’L IMMIGRANT JUST. CTR., *supra* note 21.

36. *Id.* at 3.

37. See *R-A*, 22 I. & N. Dec. 906, 945–46 (B.I.A. 1999).

38. *Id.* at 908–09.

39. *Id.* at 910.

40. *Id.* at 927.

41. *Id.* at 911.

42. *Id.* at 918.

The BIA found that Ms. R-A's identified PSG was too amorphous to qualify for asylum and did not meet its newly invented test of determining cognizability.<sup>43</sup>

In *Matter of R-A*, the BIA also reiterated the idea that not all "social ills" classify as persecution warranting an asylum grant. The BIA stated: "Congress did not intend the 'social group' category to be an all-encompassing residual category for persons facing genuine social ills that governments do not remedy. The solution to the respondent's plight does not lie in our asylum laws as they are currently formulated."<sup>44</sup> Though vacated in 2001, *R-A* symbolized a shift from the more straightforward *Acosta* standard to a more stringent approach towards PSG asylum claims.<sup>45</sup>

Beginning in 2006, the BIA began to reference the terms "social visibility" and "particularity" in reference to determining PSG.<sup>46</sup> In 2007, the BIA mentioned these terms again, conflating particularity and social visibility with the *Acosta* framework, despite these terms not being a binding part of the PSG test.<sup>47</sup> In response to a large wave of Central American asylum seekers with gang-related PSG claims in 2008, the BIA issued two precedential decisions, *Matter of S-E-G* and *Matter of E-A-G*, making particularity and social visibility requirements for PSG asylum claims.<sup>48</sup> Now, asylum seekers with PSG claims would have to satisfy the following criteria: the group must be composed of members who share a common, immutable characteristic *and* it must be defined with particularity and be socially distinct.<sup>49</sup>

In an attempt to "provide guidance to courts and those seeking asylum," the BIA echoed its holdings in 2008 from *S-E-G* and *E-A-G* with its 2014 decisions in *Matter of M-E-V-G* and *Matter of W-G-R*.<sup>50</sup> These decisions reaffirmed the 2008 precedent in adding additional requirements to PSG.<sup>51</sup> Under this new precedent, asylum seekers with a PSG nexus must demonstrate that the group is: "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially

43. R-A, 22 I. & N. Dec. 906, 918 (B.I.A. 1999).

44. *Id.* at 928.

45. See Musalo, *supra* note 16.

46. C-A, 23 I. & N. Dec. 951, 957, 959 (B.I.A. 2006).

47. A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 74, 76 (B.I.A. 2007).

48. S-E-G-, 24 I. & N. Dec. 579, 582-83 (B.I.A. 2008); E-A-G-, 24 I. & N. Dec. 591, 593-94 (B.I.A. 2008).

49. *Id.*

50. M-E-V-G, 26 I. & N. Dec. 227 (B.I.A. 2014); W-G-R, 26 I. & N. Dec., 208 (B.I.A. 2014).

51. M-E-V-G, 26 I. & N. Dec. 227 (B.I.A. 2014).



distinct within the society in question.”<sup>52</sup> Though social visibility does not mean literal ocular visibility, the PSG must be recognized as distinct in society.<sup>53</sup> The “particularity” requirement relates to the group’s boundaries and “the need to put ‘outer limits’ on the definition of a ‘particular social group.’”<sup>54</sup> While these decisions intended to provide clarity, the PSG category was left more confusing and unclear than ever.

Also in 2014, the BIA issued its decision in *Matter of A-R-C-G-* holding that asylum was still a possibility for individuals with PSG claims who were fleeing domestic violence.<sup>55</sup> *A-R-C-G-* held that, depending on the circumstances of the case, “married women in Guatemala who are unable to leave their relationship” can constitute a cognizable PSG for an asylum claim.<sup>56</sup> While this decision provided clarity in that domestic violence survivors could be eligible for asylum, *A-R-C-G-* also contributed to the overall confusion regarding PSGs.<sup>57</sup> The PSG analysis remained inconsistent with BIA precedent, calling into question what the true PSG test was.<sup>58</sup> *A-R-C-G-* held that the PSG in question was socially distinct and defined with particularity.<sup>59</sup> Somewhat contradictory to *S-E-G-* and *E-A-G-*, *A-R-C-G-* attempted to distinguish itself by remarking that everything must be analyzed on a case-by-case basis: “[i]n some circumstances, the terms can combine to create a group with discrete and definable boundaries.”<sup>60</sup> The PSG category and definition remained in flux.

The most drastic shift in the PSG framework came in 2018 during the Trump Administration when Attorney General Sessions certified *Matter of A-B-* to himself and imposed severe limitations on PSG jurisprudence, especially pertaining to asylum claims relating to domestic violence.<sup>61</sup> Overruling *A-R-C-G-*, Sessions established a new test for determining whether a PSG claim was valid or not—the strictest iteration yet.<sup>62</sup> Under *A-B-*, a PSG-based asylum claim must demonstrate: (1) membership in a PSG composed of members who share a common immutable

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52. *Id.* at 237.

53. *Id.* at 240–41.

54. *Id.* at 238.

55. *A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014).

56. *Id.* at 389.

57. NAT’L IMMIGRANT JUST. CTR., *supra* note 21.

58. *Id.*

59. *A-R-C-G-*, 26 I. & N. Dec. at 393.

60. *Id.*

61. *A-B-*, 27 I. & N. Dec. 316 (Att’y Gen. 2018).

62. *Id.* at 320.

characteristic, is defined with particularity, and is socially distinct within society; (2) membership in the PSG is a central reason for their persecution; and (3) the alleged harm is inflicted by the government or by an actor the government is unable or unwilling to control.<sup>63</sup> The decision goes as far as to explicitly state that:

Generally, claims by [noncitizens] pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum . . . . [I]n practice such claims are unlikely to satisfy the statutory grounds . . . . The mere fact that a country may have problems effectively policing certain crimes . . . cannot itself establish an asylum claim.<sup>64</sup>

This decision was highly criticized by immigration and feminist advocates.<sup>65</sup>

When the Biden Administration took office in 2021, Attorney General Merrick Garland issued a decision vacating *A-B*.<sup>66</sup> Attorney General Garland argued that vacating *A-B* would increase the Department of Homeland Security's flexibility in the rulemaking process, as well as encourage the case-by-case analysis of asylum claims by not imposing a categorical bar on certain PSGs.<sup>67</sup> Attorney General Garland returned PSG jurisprudence to pre-Trump Administration practices while simultaneously reducing, though not eliminating, uncertainty in PSG asylum claim adjudications and expanded eligibility for asylum for survivors of domestic violence.<sup>68</sup>

With seemingly countless and ever-changing agency decision defining PSGs in asylum cases, there is an overwhelming lack of clarity for PSG asylum claims. From the humble, straightforward origins of PSG jurisprudence in *Acosta*, to increasing specificity of PSGs in *Kasinga*, to applying various tests and factors in *M-E-V-G-*, and most recently an attack on survivors of domestic violence seeking asylum in *A-B* (now vacated), the PSG boundaries continue to create more confusion, often disadvantaging asylum seekers with gender-based claims. Because of this lack of clarity, the advocacy for a sixth protected ground, gender, emerged.

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63. *Id.*

64. *Id.*

65. *AG Garland Vacates Asylum Precedent That Harmed Victims of Violence*, AM. IMMIGR. L. ASS'N: AILA PUBLIC STATEMENTS, PRESS RELEASES (June 16, 2021), <https://www.aila.org/library/ag-garland-vacates-asylum-precedents> [<https://perma.cc/9YJM-6RYY>].

66. *A-B-III*, 28 I. & N. Dec. 307 (Att'y Gen. 2021).

67. *Id.* at 308–09.

68. *Recent Case*, *Matter of A-B-*, 28 I. & N. Dec. 307 (A.G. 2021), 135 HARV. L. REV. 1174, 1180 (2022).

B. *U.S. Courts of Appeals Interpretations of Membership in a Particular Social Group*

While binding for the BIA and immigration judges, federal U.S. Courts of Appeals are not bound to BIA precedent.<sup>69</sup> As such, different jurisdictions have handled the issue of PSG jurisprudence, especially relating to gender-based persecution claims, differently. The different circuits have toyed with how specific or narrow a PSG must be to qualify for asylum, and standards set by the BIA are not binding on courts of appeals.<sup>70</sup> The circuit split among courts of appeals has led to inconsistent adjudication of PSG asylum claims. As such, the success of an asylum applicant's gender-based PSG claim can heavily depend on the jurisdiction in which the claim is processed.

A prime example of a circuit court straying from the BIA precedent in a gender-based persecution PSG claim is the Seventh Circuit's 2013 holding in *Cece v. Holder*.<sup>71</sup> The Seventh Circuit had not adopted the "particularity" and "socially distinct" criteria imposed by the BIA in 2008, and thus applied *Acosta* in *Cece*.<sup>72</sup> *Cece* was a young Albanian woman who was being targeted for forced prostitution.<sup>73</sup> The Seventh Circuit recognized her PSG as "young Albanian women who live alone."<sup>74</sup> Noting that members of this PSG cannot alter their "age, gender, nationality, or living situation . . . [t]hese characteristics qualify *Cece*'s proposed group as a protectable social group under asylum law."<sup>75</sup> The Court also remarked that PSGs can be defined in part by shared persecution, but this cannot be the only common immutable characteristic.<sup>76</sup>

Another example out of the Ninth Circuit is *Perdomo v. Holder*.<sup>77</sup> With high rates of young Guatemalan women being murdered with impunity, petitioner Lesly Yajayra Perdomo sought asylum in the U.S.<sup>78</sup> Perdomo filed her asylum application based on

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69. See e.g., *Cece v. Holder*, 733 F.3d 662, 669 (7th Cir. 2013) (describing the BIA's decision determining *Cece*'s social group was not cognizable as "not a reasoned conclusion"); *Perdomo v. Holder*, 611 F.3d 662, 664 (9th Cir. 2010) (finding the BIA's decision inconsistent and remanding for further proceedings).

70. See *Cece*, 733 F.3d at 669; *Perdomo*, 611 F.3d at 664.

71. *Cece*, 733 F.3d at 673.

72. See S-E-G-, 24 I. & N. Dec. 579 (B.I.A. 2008); E-A-G-, 24 I. & N. Dec. 591 (B.I.A. 2008); *Cece*, 733 F.3d at 669.

73. *Cece*, 733 F.3d at 666.

74. *Id.* at 673.

75. *Id.*

76. *Id.* at 672.

77. *Perdomo v. Holder*, 611 F.3d 662, 663 (9th Cir. 2010).

78. *Id.*

her fear of being murdered due to her membership in the PSG of women between the ages of fourteen and forty who are Guatemalan and live in the U.S.<sup>79</sup> She later revised her PSG to “all women in Guatemala.”<sup>80</sup> The BIA affirmed the immigration judge’s decision that this group is too broad to qualify as a protected social group.<sup>81</sup> The BIA reasoned that the PSG “Guatemalan women” is internally diverse and a demographic division rather than a PSG.<sup>82</sup> The Ninth Circuit has recognized that gender is an “innate characteristic” that is “fundamental to [one’s] identit[y] . . .”<sup>83</sup> Further, the Ninth Circuit “reject[ed] the notion that an applicant is ineligible for asylum merely because all members of a persecuted group might be eligible for asylum.”<sup>84</sup> However, in 2010, the court remanded to the BIA to determine whether Guatemalan women constitute a PSG.<sup>85</sup>

The body of law regarding gender-based asylum claims has continued to grow, with a major victory coming out of the First Circuit in the 2020 decision *De Pena-Paniagua v. Barr*.<sup>86</sup> Ms. De Pena-Paniagua’s case mirrors the cases of many women who have come before her—she was a woman escaping domestic violence by seeking asylum in the U.S.<sup>87</sup> In the Dominican Republic, Ms. De Pena-Paniagua experienced abuse at the hands of her partner, including verbal, physical, and sexual abuse.<sup>88</sup> Despite reporting the abuse to the police, Ms. De Pena-Paniagua’s abuser was not arrested.<sup>89</sup> Ms. De Pena-Paniagua applied for asylum based on the persecution she faced as a member of the PSG “Dominican women unable to leave a domestic relationship,” which was subsequently denied by an immigration judge.<sup>90</sup> The immigration judge, *inter alia*, found that Ms. De Pena-Paniagua’s PSG “d[id] not meet the requirements under the law.”<sup>91</sup>

Ms. De Pena-Paniagua appealed the immigration judge’s decision to the BIA, which affirmed the decision, specifically relying on *Matter of A-B-*, the 2018 Trump-era decision stating that PSGs

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79. *Id.* at 664.

80. *Id.* at 663.

81. *Id.* at 665.

82. *Id.* at 669.

83. *Id.* at 669 (citing *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005)).

84. *Id.* at 674 (citing *Singh v. INS*, 94 F.3d 1353, 1359 (9th Cir. 1996)).

85. *Id.*

86. *De-Pena-Paniagua v. Barr*, 957 F.3d 88 (1st Cir. 2020).

87. *Id.* at 89.

88. *Id.* at 89–90.

89. *Id.* at 90.

90. *Id.* at 91–92.

91. *Id.* at 92.

defined by domestic violence are often ineligible for asylum.<sup>92</sup> The First Circuit criticized the BIA's conclusion in *Ms. De Pena-Paniagua's* case that she was automatically ineligible for asylum based on her PSG.<sup>93</sup> While *A-B-* does not view domestic violence-based PSGs favorably and notes that most will be ineligible for asylum, the First Circuit noted that there was no categorical bar on these groups for asylum, though their success may be limited or unlikely.<sup>94</sup> In its analysis, the First Circuit tackled the argument that gender-based PSGs, such as "Dominican women" are too broad.<sup>95</sup> The court noted that "it is difficult to think of a country in which women are not viewed as 'distinct' from other members of society . . . [G]ender serves as a principal, basic differentiation for assigning social and political status and rights . . ."<sup>96</sup> However, referencing *Acosta*, the court reasoned that the shared characteristics for protected grounds (race, religion, nationality, and political opinion) may "refer to large classes of persons," so it is unsurprising that a PSG could do the same.<sup>97</sup> Despite the court's conclusion, it was obligated to remand to the immigration judge to determine if the PSG "Dominican women" was cognizable.<sup>98</sup>

There has been similar case law out of the Second, Eighth, and Ninth Circuits, rejecting the notion that gender-based PSGs are categorically ineligible for asylum.<sup>99</sup> This rejection of the heightened requirements for PSGs attempts to address the lack of clarity coming from the BIA.<sup>100</sup> This type of jurisprudence advocating for a return to the more scaled-back and less restrictive PSG approach as put forth in *Acosta*, like the opinion in *De Pena-Paniagua*, is certainly a step in the right direction for adjudicating PSG asylum claims. However, without uniform guidance and application, Courts of Appeals decisions often only further

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92. *De-Pena-Paniagua v. Barr*, 957 F.3d 88, 92–93 (1st Cir. 2020); *A-B-*, 27 I. & N. Dec. 316, 320 (Att'y Gen. 2018).

93. *De Pena-Paniagua*, 957 F.3d at 93–94.

94. *Id.* at 92–93; *See also A-B-*, 27 I. & N. Dec. at 335–36 (holding that "there is significant room for doubt" that victims of domestic abuse constitute a particular social group).

95. *De Pena-Paniagua*, 957 F.3d at 96–98.

96. *Id.* at 96.

97. *Id.*

98. *Id.* at 98.

99. *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1074–79 (9th Cir. 2020); *Ticas-Guillen v. Whitaker*, 744 F. App'x 410, 410 (9th Cir. 2018); *Paloka v. Holder*, 762 F.3d 191, 192–93 (2d Cir. 2014); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007).

100. Harv. L. Rev. Ass'n, *Recent Case: Asylum Law – Particular Social Group – First Circuit Indicates Receptiveness to Gender Per Se Social Groups - De Pena-Paniagua v. Barr*, 957 F.3d 88 (1st Cir. 2020), 134 HARV. L. REV. 2574, 2574 (2021) [<https://perma.cc/72JV-U55Q>].

contribute to the murkiness of the PSG asylum claim. Once again, this lack of clarity and uniformity in applying PSG law has sparked renewed calls to add gender as a protected ground for asylum claims.<sup>101</sup>

## II. The Solution? A Return to *Acosta*

A return to the *Acosta* framework would ensure more clarity and uniformity within PSG jurisprudence. With all of the confusion and evolution of case law surrounding PSG asylum claims, some feminist scholars and immigration attorneys have advocated for the addition of a sixth protected ground in addition to race, religion, nationality, political opinion, and membership in a PSG.<sup>102</sup> For instance, many advocates believe that “[o]nly a new category can ensure that the refugee definition will cover harms specific to women—like female genital mutilation, rape, and gender-based discrimination—and will recognize these harms as persecution.”<sup>103</sup> It is understandable why this proposal of a sixth protected ground has gained popularity, especially in the wake of decisions such as *Matter of A-B*.

A prime example of PSG jurisprudence failing an asylum-eligible woman is seen in *Valle-Montes v. Attorney General*.<sup>104</sup> Ms. Valle-Montes, a Salvadoran woman, was approached by gang members who threatened and raped her.<sup>105</sup> Despite her real fear of returning to El Salvador based on this gender-based harm, the Third Circuit denied her asylum claim: “[e]ven if gender, standing alone, would be a cognizable particular social group, criminal activity, such as rape, does not constitute persecution when it is not motivated by a protected ground.”<sup>106</sup> The court found that it was not clear if the rape was motivated based on her gender.<sup>107</sup> Though this

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101. Michelle Shapiro, *Revitalizing and Reforming International Asylum Law: A Proposal to Add Gender to the Refugee Definition*, 36 GEO. IMMIGR. L.J. 795, 797–98 (2022).

102. See, e.g., Stevens, *supra* note 9, at 179 (suggesting that a sixth category for asylum “is the only viable remedy to the inequities in the United States’ current refugee definition”); Nathan Schneider, *The Sixth Ground: Why Adding Gender/Sexuality to the Grounds for Asylum Would Better Serve the Needs of LGBT Asylum Seekers*, 38 GEO. IMMIGR. L.J. 89, 91 (2023) (advocating that a gender category could support LGBT asylum applicants); Shapiro, *supra* note 101 (arguing that a sixth ground would offer more uniformity among international asylum law and provide greater protections to women and girls feeling gender-based violence).

103. Stevens, *supra* note 9, at 179.

104. See *Valle-Montes v. Att’y Gen.*, 342 Fed. Appx. 854, 854 (3rd Cir. 2009).

105. *Id.* at 855.

106. *Id.* at 857.

107. *Id.*

case demonstrates a denial on the basis of nexus, it is easy to see the disconnect that often arises with gender-based PSGs and nexus to persecution.<sup>108</sup> The U.S. immigration system failed Ms. Valle-Montes, and it is cases like hers that have driven advocacy for a sixth protected ground to ensure individuals who have experienced gender-based harm receive the protection they need and are eligible for.

In addition to the near impossibility of passing comprehensive immigration reform in Congress,<sup>109</sup> what this perspective fails to consider is that, if the law were applied correctly under the *Acosta* framework, an additional protected ground would not be necessary.<sup>110</sup> While well-intentioned, proponents of a sixth category based on gender fail to “diagnose the illness”—*why* our immigration system is failing asylum seekers with gender-based claims.<sup>111</sup> When PSG jurisprudence came about in the 1985 *Acosta* decision, determining a cognizable PSG was relatively simple: members of the PSG should share a common, immutable characteristic.<sup>112</sup> The BIA then applied this straightforward test in *Matter of Kasinga*, finding a gender-based PSG to be cognizable: “young women of the Tchamba-Kunsuntu Tribe who have not had [female genital mutilation], as practiced by that tribe, and who oppose the practice.”<sup>113</sup> It was only in *Matter of R-A-* that the BIA began to hint at a more stringent approach to PSG cognizability, noting that a common immutable characteristic may not be sufficient in and of itself.<sup>114</sup>

From the BIA’s 1999 decision in *R-A-*, the elements of particularity and social distinction were introduced.<sup>115</sup> However, neither particularity nor social distinction have any basis in the INA, the 1951 Convention, or United Nations High Commissioner for Refugees (UNHCR) guidance.<sup>116</sup> Many advocates saw hope in the 2014 *Matter of A-R-C-G-* decision, but when President Trump

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108. *Id.*

109. See William A. Galston, *The Collapse of Bipartisan Immigration Reform: A Guide for the Perplexed*, BROOKINGS INST. (Feb. 8, 2024), <https://www.brookings.edu/articles/the-collapse-of-bipartisan-immigration-reform-a-guide-for-the-perplexed/> [<https://perma.cc/WH9D-D3M3>].

110. See Musalo, *supra* note 16.

111. *Id.*

112. *Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

113. *Kasinga*, 21 I. & N. Dec. 357, 358 (B.I.A. 1996).

114. *R-A-*, 22 I. & N. Dec. 906, 918 (B.I.A. 2001).

115. *S-E-G-*, 24 I. & N. Dec. 579, 579 (B.I.A. 2008); *E-A-G-*, 24 I. & N. Dec. 591, 591 (B.I.A. 2008); *M-E-V-G-*, 26 I. & N. Dec. 227, 227 (B.I.A. 2014); *W-G-R-*, 26 I. & N. Dec., 208, 208 (B.I.A. 2014).

116. See Musalo, *supra* note 16.

entered office, the administration began to dismantle the more favorable framework for gender-based PSGs.<sup>117</sup> With *Matter of A-B* vacated, PSG jurisprudence is closer to its pre-2018 iterations, but the category as a whole remains in flux. It is within this context that the advocacy for a sixth category has gained traction, but the addition of a sixth category is not the answer needed to solve the challenges that come with the PSG category. Rather, a return to the *Acosta* framework would suffice.

*A. The Addition of “Gender” Fails to Protect Non-Gender-Based PSGs and is Contrary to International Law*

PSG is an intentionally broad category meant to redress claims that do not fall within race, nationality, religion, or political opinion. Adding gender as a sixth category may “fix” the PSG challenges and asylum outcomes for individuals with specific gender-based claims.<sup>118</sup> However, this viewpoint has narrowed in on gender-based asylum claims and has forgotten about the myriad of other individuals utilizing the PSG ground for their cases.<sup>119</sup> “[B]e they young men fleeing gangs, street children, individuals with physical or mental incapacity . . . [t]hey will continue to be impacted by the BIA’s departure from *Acosta*, and the addition of particularity and social distinction.”<sup>120</sup> As a whole, we should be advocating for a return to the PSG guidelines set forth in *Matter of Acosta*. Though seemingly counterintuitive, adding a sixth category would keep the PSG category underinclusive, as it would retain its stringent requirements, such as social distinction and particularity.<sup>121</sup> The addition of a sixth category for gender-based claims may be beneficial for many but may come at the expense of PSG jurisprudence remaining complex and underinclusive.

U.S. asylum law is based in the 1951 Convention, but its current PSG construction does not align with international law.<sup>122</sup> U.S. courts are required to interpret statutes in a way that aligns with international law whenever possible.<sup>123</sup> The UNHCR has

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117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. See M-E-V-G-, 26 I. & N. Dec. 227, 227 (B.I.A. 2014).

122. See Sabrineh Ardalan & Deborah Anker, *Re-setting Gender-Based Asylum Law*, HARV. L. REV.: BLOG ESSAYS, (Dec. 30, 2021), <https://harvardlawreview.org/blog/2021/12/re-setting-gender-based-asylum-law/> [<https://perma.cc/UN2K-EKXM>].

123. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (noting Congress intended to conform U.S. asylum and refugee law “to the United Nation’s Protocol to



confirmed that “sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men.”<sup>124</sup> Adding gender as a sixth protected ground for asylum “would only exacerbate confusion about the meaning of the term particular social group.”<sup>125</sup> Adding a sixth category and diverging from the UNHCR guidance would only further distance U.S. asylum law from the internationally accepted refugee definition.<sup>126</sup> Congress intended to align U.S. asylum law with the UN guidelines, and the addition of a sixth ground would undermine this effort. Adding a sixth ground would create further confusion and imply that the 1951 Convention did not encapsulate gender-based claims in the PSG ground and could also have the effect of signaling to other countries that PSG rejects gender-based claims altogether.

### B. No Lawyer? No PSG Asylum Claim

Another important consideration is the practical impact of adding a sixth gender protected ground, thereby leaving PSG jurisprudence in a state of flux. One of these considerations is how an asylum seeker will represent their claim to an asylum officer or immigration judge. In the immigration court context, according to a 2016 report, only 37% of all noncitizens and 14% of detained noncitizens were represented in immigration court.<sup>127</sup> This means that most individuals in removal proceedings do not have representation from an attorney and instead represent themselves pro se throughout their case. It is also extremely difficult to win in removal proceedings—only 5% of winning cases between 2007–2012 did so without representation.<sup>128</sup> Unfortunately, without

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which the United States has been bound since 1968”).

124. See U.N. High Comm’r for Refugees, *Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, at 3, U.N. Doc. HCR/GIP/02/02 (May 7, 2002),

<https://www.unhcr.org/us/media/guidelines-international-protection-no-2-membership-particular-social-group-within-context> [<https://perma.cc/XSH5-VTYE>].

125. See Ardalan & Anker, *supra* note 121.

126. *Id.*

127. Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL (Sept. 28, 2016),

<https://www.americanimmigrationcouncil.org/research/access-counselimmigration-court> [<https://perma.cc/U2ZX-63RL>].

128. Karen Berberich & Nina Siulc, *Why Does Representation Matter? The Impact of Legal Representation in Immigration Court*, VERA INST. OF JUST. (Nov. 2018), <https://www.vera.org/downloads/publications/why-does-representation-matter.pdf> [<https://perma.cc/HTU4-73G4>].

representation, noncitizens are highly unlikely to prevail on their claims.<sup>129</sup>

While the addition of a sixth protected ground would assist individuals with gender-based asylum claims, the addition of “gender” would leave the PSG category in its unclear, technical, and ever-changing state. While “gender” would make the asylum application easier for a number of asylum seekers, it would leave a whole group of other asylum seekers with the same challenges that sparked the movement for a sixth protected group.<sup>130</sup> With the vast majority of individuals in removal proceedings representing themselves, a PSG claim is practically bound to be unsuccessful in immigration court.<sup>131</sup> A PSG’s cognizability “often makes or breaks an asylum or withholding claim” and even experienced immigration attorneys have trouble articulating the nuances required with a PSG claim.<sup>132</sup> The Fourth Circuit articulated this concern in *Quintero v. Garland*:

[W]e deem it unreasonable and fundamentally unfair to expect *pro se* asylum seekers—many of whom suffer from the effects of trauma and lack literacy, English proficiency, formal education, and relevant legal knowledge—to even understand what a particular social group is, let alone fully appreciate which facts may be relevant to their claims and articulate a legally cognizable group.<sup>133</sup>

The current PSG jurisprudence from the BIA forces an individual, often with limited resources, to articulate a highly complex legal framework.<sup>134</sup> Often, an asylum applicant’s entire case rests upon the cognizability of their PSG and requires ample evidence to support this assertion.<sup>135</sup> From there, articulating the nexus poses an additional hurdle.<sup>136</sup> Without an attorney, this

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129. *Id.*

130. See Musalo, *supra* note 16.

131. See Berberich and Siulc, *supra* note 128.

132. *Quintero v. Garland*, 998 F.3d 612, 632 (4th Cir. 2021).

133. *Id.*

134. *W-Y-C- & H-O-B-*, 27 I. & N. Dec. 189, 191–92 (B.I.A. 2018) (“[I]t is an applicant’s burden to specifically delineate her proposed social group.”).

135. See *Quintero*, 998 F.3d at 632 (“While a particular social group’s cognizability often makes or breaks an asylum or withholding claim, it is a highly technical legal issue, and [e]ven experienced immigration attorneys have difficulty articulating the contours of a [cognizable social group].”) (quoting *Cantarero-Lagos v. Barr*, 924 F.3d 145, 154 (5th Cir. 2019) (Dennis, J., concurring)).

136. In all asylum cases, applicants must establish a link, or nexus, between the harm they experienced and the protected ground they are basing their asylum claim on, such as PSG. Even if a PSG is found to be cognizable, an applicant still must articulate that this was a reason for their harm. See NAT’L IMMIGRANT JUST. CTR., *supra* note 21, at 22 (“One may clearly be a member of one or more cognizable PSGs, but if there is no nexus between that PSG and the harm experienced and/or feared,

simply is not feasible for most pro se applicants. The Seventh Circuit has argued that the substance of the claim rather than the framing of the PSG should drive the adjudicator's analysis, but this is not uniformly applied.<sup>137</sup> By adding a sixth protected ground and leaving the PSG classification in its current state—unclear and complex—pro se asylum applicants are at a disadvantage and are unlikely to prevail on their PSG asylum claims.

### C. *The Necessity of Clarification from the Supreme Court*

As seen throughout this Note, PSG jurisprudence and determining what makes a PSG “cognizable” is an immensely complicated area of law that is relatively new, remains changing, and is inconsistently applied in different jurisdictions. With the U.S. immigration crisis continuing, and greater number of migrants entering the country and filing for asylum (many of whom are representing themselves), it is crucial that U.S. law address this important issue of PSG cognizability.<sup>138</sup> Because BIA precedent is not binding on U.S. Courts of Appeals, and there are various iterations of PSG cognizability tests, there is inconsistent application among jurisdictions and asylum cases.<sup>139</sup> In order to resolve the murkiness of the PSG protected ground, the U.S. Supreme Court must address the issue directly and rectify the current circuit split and misapplication of PSG tests by adjudicators.<sup>140</sup>

The BIA has demonstrated its lack of willingness to create a uniform approach to the PSG protected group, demonstrated by its myriad of decisions addressing the issue.<sup>141</sup> The current so-called “guidance” from the BIA results in vast differences in who is granted asylum.<sup>142</sup> There is a current desperate need for consistency to ensure “that all applicants will be treated fairly regardless of

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the asylum claim ultimately fails.”).

137. *Cece v. Holder*, 733 F.3d 662, 672 (7th Cir. 2013).

138. See generally Valabrega, *supra* note 1 (detailing the increasing number of migrants arriving at the U.S. southern border); Eagly and Shafer, *supra* note 127 (describing the challenges in obtaining immigration representation and pro se representation).

139. See, e.g., *Perdomo v. Holder*, 611 F.3d 662, 662 (9th Cir. 2010); cf. *Valle-Montes v. Att’y Gen.*, 342 Fed. Appx. 854, 854 (3rd Cir. 2009).

140. See Kenneth Ludlum, *Defining Membership in a Particular Social Group: The Search for a Uniform Approach to Adjudicating Asylum Applications in the United States*, 77 U. PITT. L. REV. 115, 133 (2015).

141. See Liliya Paraketsova, *Why Guidance from the Supreme Court is Required in Redefining the Particular Social Group Definition in Refugee Law*, 51 U. MICH. J.L. REFORM 437, 438 (2018).

142. *Id.* at 437.

where they apply for asylum.”<sup>143</sup> This is currently not the case, and who receives asylum is often dependent on which circuit court jurisdiction they fall into.<sup>144</sup> In the interest of fairness and uniformity, the U.S. Supreme Court should return to the PSG definition proffered by *Acosta*.<sup>145</sup> The *Acosta* definition most closely aligns with the INA and international refugee law, is the simplest way to ensure uniformity across circuits and asylum adjudications, and allows the law to adapt to changing conditions and trends in migration to allow protection to people who are fleeing persecution.<sup>146</sup> Adding a gender protected ground to the INA would not address the root of the problem in the adjudication of PSG asylum claims. If the Supreme Court provided clarity and consistency for PSG jurisprudence, there would be no need for a sixth protected ground.

A source of hesitancy among courts is the floodgates argument: “that a grant of asylum will result in a deluge of claims.”<sup>147</sup> As Musalo writes, “the spectre of thousands . . . of women arriving at the borders of the United States to request asylum is raised as a reason to not recognize their legitimate claims to protection.”<sup>148</sup> However, this hesitancy is unfounded and not a legitimate reason to avoid giving clarity to PSG asylum claims. For example, after the *Acosta* framework was applied in *Kasinga*, the Immigration Service published a notice saying that it had not seen an appreciable increase in the number of claims after *Kasinga*.<sup>149</sup> Countering this concern regarding the floodgates, a firm definition of PSG and concrete factors for adjudication may actually improve efficiency and lead to faster adjudications in the immigration system. With a clear, consistent definition of PSG, case outcomes will be more accurate, and lead to less factual and legal error, thereby decreasing appeals. A decision providing clarity and consistency for the PSG category from the Supreme Court would not “open the floodgates,” and the addition of a sixth protected category is not necessary for successful adjudications of gender-based PSG claims.

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143. *Id.*

144. *Id.* at 438.

145. See *Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

146. See Lauren Cherney, *Returning to Acosta: How In re A-B Exemplifies the Need to Abolish the “Socially Distinct” and “Particularity” Requirements for a Particular Social Group*, 38 LAW & INEQ. 169, 195–96 (2020).

147. Musalo, *supra* note 34, at 120.

148. *Id.* at 132 (internal quotations omitted).

149. *Id.*

### Conclusion

The PSG protected ground allows for flexibility and breadth in asylum claims. For those fleeing gender-based persecution, their asylum claims must fit into the PSG category. *Matter of Acosta* first interpreted the PSG category to constitute a group with a common, immutable characteristic.<sup>150</sup> However, since *Acosta*, the PSG category has taken on multiple iterations, with requirements becoming more stringent for a PSG to be seen as cognizable. The application of PSG jurisprudence has been inconsistent and frequently disadvantages individuals with gender-based asylum claims. The lack of consensus and confusion within the PSG protected ground has led many advocates to desire the creation of a sixth protected ground—gender. However, the addition of gender as a sixth protected category for asylum claims is not the solution to the problem with adjudicating gender-based asylum claims. The addition of a gender category would leave the PSG jurisprudence in flux, thereby disadvantaging individuals with non-gender-based PSG claims, misaligning with international law, and limiting the success of pro se asylum applicants. The Supreme Court must provide guidance once and for all and return to the *Acosta* framework, which would eliminate the need for a sixth category. The PSG category, at its core, is sufficient to capture gender-based asylum claims without the unintended consequences associated with a sixth category.

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150. See *Acosta*, 19 I. & N. Dec. at 233.