No. 18-60115

In the United States Court of Appeals for the Fifth Circuit

WENDY YESSENIA CANTARERO LAGOS & HENRY OMAR BONILLA CANTARERO,

Petitioners,

v.

JEFFERSON B. SESSIONS, III, UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals, BIA Nos. A206-773-719 & A206-773-720

AMICI CURIAE BRIEF OF RETIRED IMMIGRATION JUDGES AND FORMER MEMBERS OF THE BOARD OF IMMIGRATION APPEALS IN SUPPORT OF PETITIONERS AND VACATUR AND REMAND

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae are retired Immigration Judges and former members of the Board of Immigration Appeals with substantial combined years of service and intimate knowledge of the U.S. immigration system.[2] *Amici* seek to illuminate for this Court the widespread practice among Immigration Judges and Board Members of clarifying an applicant's proposed particular social group ("PSG"). The Board of Immigration Appeals disregarded this practice in its decision below when it concluded that it "generally will not address a newly articulated particular social group that was not advanced before the Immigration Judge." (AR 3)

Amici attest that while they served on the bench, they regularly assisted applicants in the process of clarifying their proposed PSG, as well as evaluated PSG proposals that applicants had revised for their

[1] No party's counsel authored this brief in whole or in part. No party, or party's counsel, made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made such a monetary contribution. All parties have either consented to the filing of this brief, or taken no position on the filing of this brief.

[2] *See* Appendix for a*mici*'s biographies.

appeal. This practice has existed for several decades and is evidenced by the decisions highlighted in this brief. *See, e.g.*, *Hernandez-Navarro v. Lynch*, 605 Fed. Appx. 419, 419-20 (5th Cir. 2015) (noting that the applicant proposed a different PSG to the Board than the one she presented to the Immigration Judge, and that the Board addressed her withholding of removal claim based on the new PSG); *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996) (adopting a PSG that the Board itself formulated based on the parties' suggested definitions). The decision below jeopardizes this continued judicial practice. Specifically, the decision below may (1) encourage Immigration Judges to be intolerant of efforts by applicants before them to revise their PSGs and (2) enable the Board of Immigration Appeals to issue boilerplate decisions that affirm the denial of asylum and withholding of removal. This would undermine an applicant's ability to seek meaningful judicial review and relief based on a revised PSG, which is already undermined by the complexity of PSG jurisprudence and various access-to-justice barriers.

Amici are invested in the resolution of this case because they have dedicated their careers to improving the fairness and efficiency of the

U.S. immigration system. Given *amici*'s familiarity with the procedures and realities of immigration court, *amici* respectfully submit that this Court should vacate the Board of Immigration Appeals' decision and remand the case so that the Board may consider the revised PSG that petitioner Wendy Yessenia Cantarero Lagos offered on her appeal.

ARGUMENT

In their decades of experience on the bench, *amici* regularly assisted applicants in the process of clarifying their proposed PSGs. *Amici* also allowed applicants to present revised PSGs during their administrative appeals. This judicial practice has afforded Board Members the flexibility to engage in an independent, meaningful review of the evidentiary record and provide appropriate relief to applicants based on revised PSGs. *See, e.g.*, *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996) (granting the applicant asylum based on a revised PSG that the Board itself formulated). In light of the complexity of PSG jurisprudence and the various access-to-justice barriers that applicants must navigate in immigration court, it is essential that the judicial practice of clarifying PSGs is not chilled by the decision below. *See, e.g.*, *Ardestani v. INS*, 502 U.S. 129, 138 (1991) (noting "the complexity of

immigration procedures, and the enormity of the interests at stake . . . .").

Because PSG cognizability is a legal determination, *amici* believe that Immigration Judges and Board Members are obligated to consider any potential PSG that is supported by the factual record—even if the PSG is being proposed for the first time on appeal. PSG clarification is consistent with the requirement that administrative immigration decisions "must reflect meaningful consideration of the relevant substantial evidence supporting the alien's claims." *Abdel-Masieh v. I.N.S.*, 73 F.3d 579, 585 (5th Cir. 1996) (internal quotations and citations omitted); *see also Matter of A-R-C-G-*, 26 I&N Dec. 388, 390-91 (BIA 2014) ("The question whether a group is a 'particular social group' within the meaning of the Act is a question of law that we review de novo."). In this way, the judicial practice of clarifying an applicant's PSG to match the evidentiary record falls squarely within the traditional roles of impartial administrative immigration tribunals. *See* UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 16 (2011) ("It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared . .

. .”); *Matter of S-M-J-*, 21 I&N Dec. 722, 723 (BIA 1997) (“Although we recognize that the burden of proof in asylum and withholding of [removal] cases is on the applicant, we do have certain obligations under international law to extend refuge to those who qualify for such relief.”). Importantly, *Amici* did not receive reproach from the Board for clarifying proposed PSGs. Nor were *amici* overturned by circuit courts on the basis that the Board should not consider newly revised PSGs on appeal.

Amici believe that the decision below, *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018), if affirmed by this Court, will constitute a significant departure from the current judicial practice of PSG clarification. The Board held that it “generally will not address a newly articulated particular social group that was not advanced before the Immigration Judge.” (AR 3) This decision completely ignores an important reality of the immigration court system: that Immigration Judges and Board Members have frequently clarified applicants’ proposed PSGs.

Petitioner Wendy Cantarero Lagos was deprived of meaningful review of her revised PSG on appeal. Ms. Cantarero is a native and

citizen of Honduras who sought refuge in the United States with her minor son, Henry Bonilla Cantarero, because she feared persecution from local Honduran gangs and her father. (AR 32, 64, 124, 178-84) Specifically, Ms. Cantarero received threats of kidnapping and robbery from gang members. (AR 32, 64, 178-80) Ms. Cantarero also testified about an extremely traumatic experience where her father attempted to rape her when she was a teenager. (AR 64, 124, 182-84) Because she fears future harm from both Honduran gang members and her father, Ms. Cantarero sought asylum and withholding of removal. (AR 63, 123)

During her initial immigration proceedings, Ms. Cantarero argued that she was entitled to asylum as a member of the PSG, "[s]ingle Honduran women age 14 to 30 who are victims of sexual abuse within the family and who cannot turn to the government." (AR 66, 123) The Immigration Judge concluded "there [was] no particularity" because the PSG "[was] an extremely vague and amorphous definition." (AR 125) "There was [also] zero evidence that this definition enjoys social distinction within Honduras." *Id.* Finally, the Immigration Judge determined that "the group [was] defined by the persecution suffered,

which is something that the Board has said cannot be done." *Id.*; *see also Matter of W-G-R*, 26 I&N Dec. 208, 215 (BIA 2014).

On appeal, Ms. Cantarero articulated a revised PSG, "Honduran women and girls who cannot sever family ties." (AR 73, 295) Although this PSG was not proposed prior to the appeal, it was based on—and supported by—the factual record developed before the Immigration Judge. Despite this, the Board refused to evaluate Ms. Cantarero's revised PSG. (AR 4-7) The Board reasoned that "[b]ecause this group was not advanced below, the Immigration Judge did not have the opportunity to make the underlying findings of fact that are necessary to our analysis of the respondent's eligibility for asylum and withholding of removal, and we cannot make these findings for the first time on appeal." (AR 6) This reasoning ignores the possibility that the factual record was already sufficiently developed so that the Board could grant relief to Ms. Cantarero based on her revised PSG.

Additionally, the Board concluded that it "generally" will not consider PSGs that are "substantially different" than the one(s) articulated prior to appeal. (AR 3, 4, 6) Without further clarification, this vague, general statement may lead to inconsistent application of

the decision in the future—which is already a serious problem for asylum claims based on PSG membership. *See, e.g.*, Gabriela Corrales, *Justice Delayed is Justice Denied: The Real Significance of Matter of A-R-C-G-*, 26 Berkeley La Raza L. J. 71, 89 (2016) (noting that "the particularity and social-distinction requirements in the particular-social-group framework create a path for varying degrees of harshness or ambiguity in real life applications . . . . This creates judge-dependent disparities.").

Amici respectfully submit that the Board of Immigration Appeals did not consider the longstanding judicial practice of clarifying proposed PSGs and should have evaluated the PSG that Ms. Cantarero revised for appeal. The Board's decision may ultimately (1) encourage Immigration Judges to be intolerant of efforts by applicants before them to revise their PSGs and (2) enable the Board of Immigration Appeals to issue boilerplate decisions that affirm the denial of asylum and withholding of removal. Therefore, this Court should vacate the decision below and remand Ms. Cantarero's case so that the Board may consider her revised PSG.

I. Because particular social group jurisprudence is unduly complex and applicants face various access-to-justice barriers, Immigration Judges and Board Members will frequently clarify an applicant's proposed particular social group

The judicial practice of clarifying a proposed PSG is an important responsibility for Immigration Judges and Board Members in light of the complexity of PSG jurisprudence and the many access-to-justice barriers that applicants must navigate in immigration court. *See, e.g.*, Nat'l Immigrant Justice Ctr., *Particular Social Group Practice Advisory: Applying for Asylum After Matter of M-E-V-G- and Matter of W-G-R* 6 (2016), https://www.immigrantjustice.org/sites/default/files/PSG%2520Practice%2520Advisory%2520and%2520Appendices-Final-1.22.16.pdf ("[A] former child soldier who fears persecution in her home country because of that former affiliation will not know the duration of membership necessary to formulate a PSG—she only knows that people in her country wish to harm her for something she cannot change."); UNHCR, *supra*, at 15-16 ("Often the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyze his case to such an extent as to identify the reasons in detail.").

This practice has afforded Board Members the flexibility to engage in an independent, meaningful review of the evidentiary record and provide relief to applicants who have introduced sufficient factual evidence.

Immigration court proceedings have frequently been compared to a complex labyrinth for both *pro se* applicants and seasoned legal practitioners. *See Baltazar-Alcazar v. I.N.S.*, 386 F.3d 940, 948 (9th Cir. 2004) ("[T]he immigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth."); *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003) ("This case vividly illustrates the labyrinthine character of modern immigration law—a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike."); *Lok v. I.N.S.*, 548 F.2d 37, 38 (2d Cir. 1997) (noting that the Immigration and Nationality Act bears a "striking resemblance . . . [to] King Minos's labyrinth in ancient Crete"). The complexity of immigration court proceedings is perfectly illustrated by the evolution of PSG jurisprudence, which has been rife with ambiguities, inconsistent applications, and circuit splits. *See, e.g.*,

Cordoba v. Holder, 726 F.3d 1106, 1114 (9th Cir. 2013) ("We have recognized that the phrase 'particular social group' is ambiguous.") (citing *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1083 (9th Cir. 2013) (en banc)); *Rojas-Pérez v. Holder*, 699 F.3d 74, 81-82 (1st Cir. 2012) (noting a "growing circuit split on the" social visibility requirement for articulating a valid PSG); *Fatin v. I.N.S.*, 12 F.3d 1233, 1238 (3d Cir. 1993) ("Both courts and commentators have struggled to define 'particular social group.' Read in its broadest literal sense, the phrase is almost completely open-ended."); Bernardo M. Velasco, *Who Are the Real Refugees? Labels as Evidence of a "Particular Social Group,"* 59 Az. L. Rev. 235, 235 & 252 (2017) ("PSG doctrine is unnecessarily complicated and inconsistent . . . . Perhaps courts are simply incapable of reliably making PSG determinations—at least following the current approach.").

The test for articulating a cognizable PSG began as a relatively straightforward standard. In *Matter of Acosta*, the Board held that members of a particular social group must possess a "common, immutable characteristic." *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985). This characteristic may be "an innate one such as sex, color,

kinship ties" or "a shared past experience, such as former military leadership or land ownership." *Id.* The Board stressed that the immutable characteristic must be something that members of the group "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Id.*

Courts applied the *Acosta* test for two decades and recognized a variety of new PSGs that qualified applicants for asylum. *See, e.g.*, *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) ("Thus, to the extent that our case-law has been unclear, we affirm that *all* alien homosexuals are members of a 'particular social group.'") (emphasis in original). In 2006, the Board added two elements to the PSG standard: particularity and social visibility. *See Matter of C-A-*, 23 I&N Dec. 951, 957, 959-61 (BIA 2006). Under the new PSG standard, a cognizable PSG must have "particular and well-defined boundaries" so that the PSG "can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons." *Matter of S-E-G-*, 24 I&N Dec. 579, 582-84 (BIA 2008). In addition, "the shared characteristic of the group should generally be recognizable by others in the community." *Id.* at 586. The

Board later renamed social visibility to "social distinction" "[i]n order to clarify that the 'social visibility' element . . . does not mean literal or 'ocular' visibility." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 227 (BIA 2014).

Both scholars and practitioners have criticized the Board for requiring particularity and social distinction to establish a cognizable PSG. *See, e.g.*, Jillian Blake, *Getting to Group Under U.S. Asylum Law*, 90 Notre Dame L. Rev. Online 167, 168 (2015) (arguing that "the new [Board] PSG standards are unworkable" and therefore "courts should defer to the standard established in the 1985 [Board]decision, *Matter of Acosta*."); Nicholas R. Bednar, Note, *Social Group Semantics: The Evidentiary Requirements of "Particularity" and "Social Distinction" in Pro Se Asylum Adjudications*, 100 Minn. L. Rev. 355, 358 (2015) ("Scholars and immigrant rights activists contend that the most effective way to reduce prejudice to *pro se* applicants is to eliminate the elements of particularity and social distinction from the particular social group standard."). For example, several post-*Acosta* decisions have been criticized for requiring particularity and social distinction because they "further confuse this already complex area of law," as well

as "carry the risk of excluding valid claims to PSG protection and rely upon criteria that cannot be applied consistently." Blake, *supra*, at 168.

In addition, "[t]he apparent failure of the [Board] to articulate a uniform test for adjudicating asylum cases has led to confusion for attorneys when advocating on behalf of their asylum-seeking clients and to inconsistent rulings within the circuit courts." 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, 122 (2015). While some circuits have adopted the Board's particularity and social distinction requirements, the Third and Seventh Circuits have rejected the social distinction requirement. *See, e.g.*, *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 604 (3d Cir. 2011) (concluding that "the 'social visibility' requirement is inconsistent with past [Board] decisions, [so] it is an unreasonable addition to the requirements for establishing refugee status where that status turns upon persecution on account of membership in a [PSG]."); *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (holding that the requirement of social visibility "makes no sense" and that the Board has not "attempted, in this or any other case, to explain the reasoning

behind the criterion of social visibility."); *see also Rojas-Pérez*, 699 F.3d at 80 (appreciating "the cogency and persuasiveness of both the reasoning and the outcomes of the Seventh and Third Circuits' decisions" in *Gatimi* and *Valdiviezo-Galdamez*, but concluding that the court "is bound by its own precedent regarding the reasonableness of the [Board's] social visibility requirement.").

The complexity of PSG jurisprudence is particularly concerning in light of the wide array of pre-existing access-to-justice barriers that *pro se* and represented applicants must navigate in immigration court proceedings. Without access to counsel, a *pro se* applicant must develop her own legal arguments for relief eligibility; gather evidence that is often located in her country of origin and accessible only there; complete application forms and court filings in English; and present a thorough and compelling case to the Immigration Judge. This process can be particularly difficult for applicants whose native language is not English, as well as for applicants who are suffering from physical and/or psychological harm. *See* Exec. Office for Immigration Review, *FY 2016 Statistics Yearbook* at E-1, Figure 9 (2017), https://www.justice.gov/eoir/page/file/fysb16/download (stating that

approximately 90 percent of immigrants in removal proceedings do not have a sufficient grasp of the English language and require a translator to participate in their proceedings); Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention,* 65 Hastings L. J. 363, 368 (2014) (noting that "[t]he social isolation and uncertain duration of mandatory immigration detention cause well-documented psychological and physical harm").

It is also extremely difficult for detained *pro se* applicants to learn about possible claims for relief because the law libraries at detention facilities often have inadequate legal resources that are not up-to-date and have not been translated into the immigrant's native language. *See, e.g.*, Penn State Law Ctr. for Immigrants' Rights Clinic, *Imprisoned Justice: Inside Two Georgia Immigrant Detention Centers* 25 (2017), http://projectsouth.org/wp-content/uploads/2017/06/Imprisoned_Justice_Report-1.pdf ("At Stewart [Detention Center], many of the detained immigrants expressed that the law library was not useful because all of the materials were in English and they cannot read English. At Irwin [County Detention

Center] and Stewart, detained immigrants reported that they do not have access to the internet.”).

Applicants who do secure legal representation may nonetheless have this relationship jeopardized by a variety of conditions when they are remotely detained. Attorneys may be unable to make regular visits to remote detention facilities, and applicants constantly face the possibility of being transferred from one detention facility to another. *See, e.g.*, Nat’l Immigrant Justice Ctr., *Report: “What Kind of Miracle . . .” - The Systematic Violation of Immigrants’ Right to Counsel at the Cibola County Correctional Center* (Nov. 29, 2017), https://www.immigrantjustice.org/research-items/report-what-kind-miracle-systematic-violation-immigrants-right-counsel-cibola-county (quoting an immigration attorney who stated that “it was infeasible to regularly travel five hours to the Cibola prison from the organization’s office in Las Cruces”); *Chhoeun v. Marin*, No. SACV 17-01898-CJC(GJSx), 2018 U.S. Dist. LEXIS 13539 at *20-21 (C.D. Cal. Jan. 25, 2018) (noting that “[a]ttorneys’ attempts to maintain communication with their clients have been further frustrated by the constant relocation of Petitioners to different detention centers . . . These

transfers have made it difficult for attorneys to contact, or even locate, their clients."); *Hamama v. Adducci*, 261 F. Supp. 3d 820, 837 (E.D. Mich. 2017) (recounting one attorney's experience of "making the four-hour drive from Detroit to the Youngstown, Ohio facility, [and being] twice denied an opportunity to meet with her clients"); *Nunez v. Boldin*, 537 F. Supp. 578, 582 (S.D. Tex. 1982) ("Considering the remoteness of the Los Fresnos detention facility, prohibiting attorneys from visiting with their clients after 3:30 p.m. is unduly restrictive.").

Both *pro se* and represented applicants also lack adequate access to telephones in detention facilities. *See, e.g.*, Dep't of Homeland Security Office of Inspector General, *Management Alert on Issues Requiring Immediate Action at the Theo Lacy Facility in Orange, California* 7 (2017) (identifying "telephone problems [at one detention facility that included] low volume and inoperable phones"). For example, detention facilities may charge per-minute fees or require detainees to purchase pre-paid phone cards—both of which are "prohibitively expensive" for many detainees. *See, e.g.*, *id.*; *Hamama*, 261 F. Supp. 3d at 827-28 (noting that an Arizona detention facility charges twenty-five cents per minute and that some petitioners are not

permitted to call out-of-state legal services providers for free). Detention facilities may also require "positive acceptance" from the call recipient, which undermines immigrants' ability to communicate with attorneys who have automated phone systems. *See* S. Poverty Law Ctr. et al., *Shadow Prisons: Immigrant Detention in the South* 47 (2016), https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf ("I can't call [my attorney] with my phone card because a person has to accept the call and my lawyer has an automated system.").

Finally, represented applicants may be deprived of quality legal representation if their attorney lacks expertise in the nuances of immigration law and is unable to put forth the best arguments and evidence for the applicant. *See, e.g.*, Peter L. Markowitz et al., *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings: New York Immigrant Representation Study Report: Part 1*, 33 Cardozo L. Rev. 357, 364 (2011) ("New York immigration judges rated nearly half of all legal representatives as less than adequate in terms of overall performance; 33% were rated as inadequate and an

additional 14% were rated as grossly inadequate. The epicenter of the quality problem is in the private bar, which accounts for 91% of all representation and, according to the immigration judges surveyed, is of significantly lower quality than pro bono, nonprofit, and law school–clinic providers."). One survey found that "[judges] agreed that immigration was the area in which the quality of representation was lowest." Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 Stan. L. Rev. 317, 330 (2011).

In the present case, Ms. Cantarero may have been deprived of quality legal representation before the Immigration Judge because her attorney failed to articulate a cognizable PSG. (AR 199-201) Ms. Cantarero's attorney did not revise the proposed PSG in response to the Immigration Judge's repeated concerns about whether the Honduran government had actually failed to protect Ms. Cantarero. *See* AR 200 ("Judge to Ms. Lu: Wait a second. You're saying the government refused to protect her. That means she asked for their protection and they said no. Did she ask for their protection? . . . I mean, you could define [the PSG] any way you want to, but I don't see how you can say they refused to protect her if she—for understandable reasons she kept quiet . . . .").

By failing to adapt the PSG in light of these inquiries, Ms. Cantarero's attorney failed to satisfy the unduly ambiguous tests for social distinction and particularity.

Because applicants must navigate complex PSG jurisprudence and endure a variety of access-to-justice obstacles, *amici* have frequently allowed applicants to revise their PSGs in their initial proceedings and on appeal. This practice affords Immigration Judges and Board Members the flexibility to grant appropriate relief that the applicant would otherwise effectively waive at the outset because of a poorly phrased PSG definition. The decision below neglects this difficult reality of immigration court proceedings.

II. The decision below disregards prior precedent in which Immigration Judges and Board Members have clarified an applicant's proposed particular social group or allowed an applicant to present a revised particular social group on appeal

The decision below constitutes a significant departure from prior decisions because the Board concluded that it "generally will not address a newly articulated particular social group that was not advanced before the Immigration Judge." (AR 3) In fact, the Board and

various circuit courts have allowed Immigration Judges and Board Members to revise proposed PSGs for several decades.

The seminal decision *Matter of Kasinga* is particularly instructive here because the Board granted asylum relief to an applicant based on a new PSG definition that the Board itself fashioned. *See Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996) (adopting a PSG definition that was "very similar to the formulations suggested by the parties."). Over the course of the case, each party was allowed to "advance[e] several formulations of the particular social group at issue." *Id.* (internal quotations omitted). On appeal, the applicant defined the PSG as "young women . . . of the Tchamba-Kunsuntu tribe *who resist FGM* and *who do not have protection against it*." Brief for Respondent at 31, *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (emphasis added), https://www.justice.gov/sites/default/files/eoir/legacy/2000/03/28/kasinga2.pdf. The government conceded that "it may well be possible" for the applicant to establish persecution based on a slightly different PSG, "young women of the Tchamba Kunsuntu people who *have not been circumcised in accordance with tribal custom*." Brief for Government at 21, *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (emphasis added),

https://www.justice.gov/sites/default/files/eoir/legacy/2000/03/28/kasinga3.pdf.

Rather than rejecting the applicant's PSG outright based on its technical construction, the Board essentially merged the applicant's and the government's two definitions into a slightly more nuanced PSG, "young women of the Tchamba-Kunsuntu Tribe *who have not had FGM, as practiced by that trib*e, and *who oppose the practice*." *Matter of Kasinga*, 21 I&N Dec. at 365 (emphasis added). This PSG clarification was consistent with the evidentiary record and allowed the Board to grant relief to the applicant.[3]

Since *Matter of Kasinga*, the Board has issued other decisions in which it did not outright reject a PSG that was revised on appeal. *See, e.g.*, *Reina Elizabeth Medrano-Serrano*, AXXX XXX 928 (BIA Apr. 27,

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[3] *Amici* also note that *Matter of Kasinga* illustrates how pressure to reach consensus among Board Members often times necessitates PSG clarification. Three *amici* who served on the en banc panel for *Matter of Kasinga* believe that the Board Members had to revise the PSG in order to overcome certain objections and reach a compromise on the appropriate ruling. The undersigned Honorable Paul Schmidt authored the majority opinion for *Matter of Kasinga* and he was joined by the undersigned Honorable Gustavo D. Villageliu. The undersigned Honorable Lory Rosenberg wrote a concurring opinion.

2018), *2 (unpublished) (noting that the applicant proposed a revised PSG on appeal and "[f]or the sake of argument, [the Board] accept[ed] the respondent's construction of the social group on appeal as cognizable."); *Matter of M-E-V-G-*, 26 I&N Dec. at 252 (remanding the case for further fact-finding in part because "the respondent's proposed particular social group has evolved during the pendency of his appeal."). The Board has also acknowledged that Immigration Judges often have a hand in PSG clarification. *Matter of S-V-C-*, AXXX XXX 431 (BIA Nov. 1, 2016), n.2 (noting that the Immigration Judge had previously revised the PSG to "Salvadoran women who cannot leave an *abusive* relationship"; remanding the case to consider the applicant's eligibility for asylum relief based on an earlier version of the PSG, "Salvadoran women unable to leave a *domestic* relationship") (emphasis added). The Board's outright rejection of Ms. Cantarero's revised PSG constitutes a stark departure from these decisions.

Additionally, circuit courts have acknowledged an applicant's ability to revise her proposed PSG during the course of her immigration proceedings. *See, e.g.*, *Paloka v. Holder*, 762 F.3d 191, 198-99 (2d Cir. 2014) ("A final reason for remand is that Paloka has refined her

particular social group during her appeal . . . . the petitioner has refined the contours of her proposed social group during the proceedings to include a specific age range of 15 to 25, a range that finds support in the evidence.") (citing *Matter of M-E-V-G-* for support)); *Chen v. Holder*, 448 Fed. Appx. 610, 611 (7th Cir. 2011) ("In his appeal to the Board, Chen revised his social-group claim to argue that he was persecuted for being a 'government cooperator'" and the Board evaluated the merits of the new PSG).

For example, in *Hernandez-Navarro v. Lynch*, the Board allowed the applicant to assert a completely different PSG on appeal than the one she presented to the Immigration Judge. *See Hernandez-Navarro*, 605 Fed. Appx. at 419-20. Her initial PSG was "[i]ndividuals in fear of the violence and gangs in Mexico," but before the Board she asserted persecution on account of her membership in "her family in Mexico." *Id.* at 419. Rather than reject this new PSG outright, the Board addressed her claims based on her membership in her family. *Id.* at 419-20. This Court did not reverse the Board for this course of action. *Id.* (concluding that "because the [Board] addressed her withholding-of-removal claim based on membership in her family, we will consider it.").

Circuit courts have also acknowledged that Immigration Judges and Board Members frequently engage in PSG clarification. *See, e.g.*, *de Abarca v. Holder*, 757 F.3d 334, 336 (1st Cir. 2014) ("[T]he [Board], responding to its understanding of Constanza's claim, defined the social group at issue as the 'nuclear family,' a narrower social group than 'mother[s] of [] individual[s] who resisted gang activity,' the group cited by the [Immigration Judge]."); *Pirir-Boc v. Holder*, 750 F.3d 1077, 1080 (9th Cir. 2014) (noting that the applicant's proposed PSG was "persons taking *concrete steps* to oppose gang membership and gang authority" and the Board evaluated the PSG after revising it to "those who have taken *direct action* to oppose criminal gangs") (emphasis added); *Letran v. Holder*, 524 Fed. Appx. 723, n.3 (1st Cir. 2013) (noting that the Immigration Judge revised the applicant's proposed PSG to "members of the Association of Chemistry Students" and that the Board further revised the PSG to "involvement as a student activist in activities that included a 'protest' event with the Association of Chemistry Students in 1987") (internal quotations omitted).

Cece v. Holder is instructive here. There, the Seventh Circuit concluded that the applicant had established her membership in a

cognizable PSG after her definition had undergone several revisions by the Immigration Judge. *See Cece v. Holder*, 733 F.3d 662, 670-71 (7th Cir. 2013). Initially, the applicant proposed the PSG, "young *Orthodox* woman *living alone* in Albania," but the Immigration Judge revised the PSG to "young women *who are targeted for prostitution by traffickers* in Albania." *Id.* at 670 (internal quotations omitted) (emphasis added). The Immigration Judge revised the PSG a second time to "*women in danger* of being trafficked as prostitutes." *Id.* (internal quotations omitted) (emphasis added). When the case was remanded from the Board, the Immigration Judge revised the PSG a third time and found that the applicant's PSG characteristics were "a *young* woman from a *minority religion who has lived by herself* most of the time in Albania, and thus is vulnerable, *particularly vulnerable to traffickers* for this reason." *Id.* at 671 (internal quotations omitted) (emphasis added).

The Seventh Circuit ultimately found that the applicant had established her membership in a cognizable PSG. *Id.* at 670. The court reasoned that "in one form or another, both Cece and the immigration judge articulated the parameters of the relevant social group." *Id.* Importantly, the court stressed that even though "the description of her

social group varied from one iteration to the next," these "inconsistencies . . . do not upset the claim." *Id.* (citing *Matter of Kasinga* for support). This reasoning would have supported the Board in reviewing the merits of Ms. Cantarero's newly revised PSG on appeal.

These cases are a mere sampling that illustrates a decades-old judicial practice of clarifying proposed PSGs. By contrast, the decision below constitutes a significant departure from this judicial practice because it failed to acknowledge that it was within the Board's authority to evaluate Ms. Cantarero's newly revised PSG.

III. This Court should vacate the decision below because its ambiguous holding will encourage Immigration Judges to be intolerant of applicants' efforts to revise their PSGs and will enable the Board to issue boilerplate decisions denying relief

If affirmed, the decision below has the potential to effectively deprive applicants of meaningful judicial review that is consistent with the requirements of due process. Two aspects of the decision below are particularly ambiguous and could lead to inconsistent judicial interpretation. First, the Board concluded that it "generally" will not consider a new PSG on appeal. (AR 3, 4) This suggests that there may

be exceptional situations in which the Board *would* be willing to consider a new PSG that is raised for the first time on appeal. The Board failed to provide further clarification, however, as to when such exceptions would arise or be appropriate.

Second, the Board concluded that "the respondent has articulated a new social group that is *substantially different* from the one delineated below." (AR 6) (emphasis added). The Board failed to articulate what differentiations will be "substantially different" and what will not. Applicants and legal professionals are therefore left to ponder whether, for example, a newly added adjective or noun is sufficient to create a substantially different PSG; whether a newly added descriptor (*e.g.*, age, occupation) is sufficient to bar relief; and whether narrowing the PSG is allowed, but broadening is not. All of these questions are left unanswered in the Board's decision.

These ambiguities could encourage Immigration Judges to be intolerant of efforts by applicants before them to revise their PSGs. This in turn will lead to different interpretations of the decision below and thereby contribute to the existing problem of inconsistent immigration case outcomes. *See* Corrales, *supra*, at 89 ("Individual

judges require varying levels of proof, and varying levels of abuse in order to grant asylum claims . . . . For instance, one Miami judge accepts asylum applicants 5 percent of the time, while another Miami judge accepts applicants 88 percent of the time."); David Hausman, *The Failure of Immigration Appeals*, 164 U. Penn. L. Rev. 1177, 1178 (2016) ("In some immigration courts, the arbitrary assignment of a judge can increase or decrease an immigrant's chance of being deported by up to forty percentage points.").

Amici are also concerned about how the decision will affect the current judicial practice of clarifying proposed PSGs. Some Board Members may interpret the decision below as allowing them to issue boilerplate decisions that affirm the denial of asylum and withholding of removal. This would be particularly problematic in cases where the applicant is otherwise entitled to relief because the revised PSG is supported by the evidentiary record. In addition, some Board Members may favor the decision below as fitting into a larger effort to promote judicial economy and address the issue of overcrowded dockets. *See* TRAC Immigration, Immigration Court Backlog Tool; *available at* http://trac.syr.edu/phptools/immigration/court_backlog/ (noting that as

of March 2018, there were 629,298 cases pending in immigration court—an all-time high for case backlog). However, *amici* believe that this potential benefit is significantly outweighed by the applicant's interest in having meaningful judicial review that is consistent with the requirements of due process.

Ultimately, Immigration Judges and Board Members should not be chilled from exercising flexibility when asked to review an applicant's proposed PSG. This is especially important when a proposed PSG, if slightly revised, would be an appropriate basis upon which to grant relief.

CONCLUSION

For the reasons stated above, this Court should vacate the decision below and remand Ms. Cantarero's case so that the Board of Immigration Appeals may consider her revised PSG.

Dated: May 23, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation of Rule 27(d)(2) because it contains no more than 5,897 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

I further certify that, in accordance with Fifth Circuit Rule 25.2 and the Court's ECF Filing Standards: (1) any required privacy redactions have been made; (2) the electronic submission is an exact copy of the paper document; and (3) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

Dated: May 23, 2018

/s/ Jean-Claude André
Jean-Claude André

APPENDIX

BIOGRAPHIES OF AMICI CURIAE

The **Honorable Steven R. Abrams** was appointed as an Immigration Judge in September of 1997. From 1999 to June 2005, Judge Abrams served as the Immigration Judge at the Queens Wackenhut Immigration Court at JFK Airport in Queens. He has also worked at the Immigration Courts in New York and Varick Street Detention facility. Prior to becoming an Immigration Judge, he was the Special Assistant U.S. Attorney in the Eastern District of New York in the Criminal Division in charge of immigration. Judge Abrams retired in 2013 and now lectures on immigration in North Carolina.

The **Honorable Sarah M. Burr** began serving as an Immigration Judge in New York in 1994. She was appointed Assistant Chief Immigration Judge in charge of the New York, Fishkill, Ulster, Bedford Hills, and Varick Street immigration courts in 2006. Judge Burr served in this capacity until January 2011, when she returned to the bench full-time until she retired in 2012. Prior to her appointment, she worked as a staff attorney for the Criminal Defense Division of the Legal Aid Society in its trial and appeals bureaus. She also worked as

the supervising attorney in the Legal Aid Society immigration unit. Judge Burr currently serves on the Board of Directors of the Immigrant Justice Corps.

The **Honorable Jeffrey S. Chase** served as an Immigration Judge in New York City from 1995 to 2007 and was an attorney advisor and senior legal advisor at the Board of Immigration Appeals from 2007 to 2017. He is presently in private practice as an independent consultant on immigration law, and is of counsel to the law firm of DiRaimondo & Masi in New York City. Prior to his appointment, he was a solo practitioner and volunteer staff attorney at Human Rights First. He was also the recipient of the American Immigration Lawyers Association's ("AILA") annual pro bono award in 1994 and chaired AILA's Asylum Reform Task Force.

The **Honorable George Chew** was appointed as an Immigration Judge in 1995 and served until 2017, when he retired. He also previously served as a trial attorney for the former Immigration and Naturalization Service in New York from 1979 to 1981.

The **Honorable John F. Gossart, Jr.** served as an Immigration Judge from 1982 until his retirement in 2013 and is the former

president of the National Association of Immigration Judges. At the time of his retirement, he was the third most senior immigration judge in the United States. Judge Gossart was awarded the Attorney General Medal by then Attorney General Eric Holder. From 1975 to 1982, he served in various positions with the former Immigration Naturalization Service, including as general attorney, naturalization attorney, trial attorney, and deputy assistant commissioner for naturalization. From 1997 to 2016, Judge Gossart was an adjunct professor of law and taught immigration law at the University of Baltimore School of Law and more recently at the University of Maryland School of Law. He has been a faculty member of the National Judicial College, and has guest lectured at numerous law schools, the Judicial Institute of Maryland, and the former Maryland Institute for the Continuing Education of Lawyers. Judge Gossart is a past Board member of the Immigration Law Section of the Federal Bar Association. Judge Gossart served in the United States Army from 1967 to 1969 and is a veteran of the Vietnam War.

The **Honorable William P. Joyce** served as an Immigration Judge in Boston, Massachusetts. After retiring from the bench, he became the Managing Partner of Joyce and Associates and has 1,500

active immigration cases. Prior to his appointment to the bench, he served as legal counsel to the Chief Immigration Judge. Judge Joyce also served as an Assistant U.S. Attorney for the Eastern District of Virginia, and Associate General Counsel for enforcement for INS. He is a graduate of Georgetown School of Foreign Service and Georgetown Law School.

The **Honorable Carol King** served as an Immigration Judge from 1995 to 2017 in San Francisco and was a temporary member of the Board of Immigration Appeals for six months between 2010 and 2011. Judge King previously practiced immigration law for ten years, both with the Law Offices of Marc Van Der Hout and in her own private practice. She also taught immigration law for five years at Golden Gate University School of Law and is currently on the faculty of the Stanford University Law School Trial Advocacy Program. Judge King now works as a Removal Defense Strategist, advising attorneys and assisting with research and writing related to complex removal defense issues.

The **Honorable Lory D. Rosenberg** served on the Board of Immigration Appeals from 1995 to 2002. She then served as Director of the Defending Immigrants Partnership of the National Legal Aid &

Defender Association from 2002 until 2004. Prior to her appointment to the Board, she worked from 1991-1995 as Director of the Legal Action Center at the American Immigration Law Foundation, was in private practice, and was the 1982 co-founder of the asylum and legal program at Centro Presente in Cambridge, Massachusetts. She is the author of *Immigration Law and Crimes*, and was an adjunct professor of law and taught immigration law at American University Washington College of Law between 1997 and 2004. An excerpt from one of Judge Rosenberg's separate opinions was quoted by the United States Supreme Court in its 2001 decision in *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001). Judge Rosenberg has served as a member of the International Association of Refugee Law Judges, an elected member of the Board of Governors of AILA, a Board Member of the Federal Bar Association, Immigration Law Section. She also frequently lectures and trains immigration attorneys on current topics of complexity, including asylum and refugee law, human rights, and the intersection of criminal and immigration law. Judge Rosenberg is the founder of the Immigration Defense and Expert Advocacy Solutions (IDEAS) Consulting and Coaching, LLC, where she provides legal mentoring, consulting, and personal and

business coaching for immigration lawyers. She currently serves as Senior Attorney and Advisor for the Immigrant Defenders Law Group, PLLC.

The **Honorable Susan Roy** started her legal career as a Staff Attorney at the Board of Immigration Appeals, a position she received through the Attorney General's Honors Program. She served as Assistant Chief Counsel, National Security Attorney, and Senior Attorney for the Department of Homeland Security Office of Chief Counsel in Newark, New Jersey. She then became an Immigration Judge in Newark, New Jersey. Judge Roy has been in private practice for nearly five years, and two years ago she opened her own immigration law firm. She also currently serves as the New Jersey Chapter Liaison to the Executive Office for Immigration Review for AILA and the Vice Chair of the Immigration Law Section of the New Jersey State Bar Association. In 2016, Judge Roy was awarded the Outstanding Pro Bono Attorney of the Year by the New Jersey Chapter of the Federal Bar Association.

The **Honorable Paul W. Schmidt** served as an Immigration Judge from 2003 to 2016 in Arlington, Virginia. He previously served

as Chairman of the Board of Immigration Appeals from 1995 to 2001, and as a Board Member from 2001 to 2003. Judge Schmidt authored the landmark decision *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1995), which extended asylum protection to victims of female genital mutilation. He served in various positions with the former Immigration Naturalization Service, including Acting General Counsel (1986-1987, 1979-1981) and Deputy General Counsel (1978-1987). He also worked as the managing partner of the Washington, D.C. office of Fragomen, DelRey & Bernsen from 1993 to 1995. Judge Schmidt practiced business immigration law with the Washington, D.C. office of Jones, Day, Reavis and Pogue from 1987 to 1992 and was a partner at the firm from 1990 to 1992. Judge Schmidt served as an adjunct professor of law at George Mason University School of Law in 1989 and at Georgetown University Law Center from 2012 to 2014 and 2017 to present. He was a founding member of the International Association of Refugee Law Judges and presently serves as Americas Vice President. He also serves on the Advisory Board of AYUDA, a nonprofit that provides direct legal services to immigrant communities in Washington, D.C. and Maryland. Judge Schmidt assists the National Immigrant Justice

Center/Heartland Alliance on various projects, as well as writes and lectures on immigration law topics at various forums throughout the country. Judge Schmidt created immigrationcourtside.com, an immigration law blog.

The **Honorable Gustavo D. Villageliu** served as a Board of Immigration Appeals Member from July 1995 to April 2003. He then served as Senior Associate General Counsel for the Executive Office for Immigration Review and helped manage FOIA, Privacy, and Security as EOIR Records Manager until he retired in 2011. Before becoming a Board Member, Villageliu was an Immigration Judge in Miami and oversaw both detained and non-detained dockets, as well as the Florida Northern Region Institutional Criminal Alien Hearing Docket from 1990 to 1995. Mr. Villageliu was a member of the Iowa, Florida, and District of Columbia Bars. He graduated from the University of Iowa College of Law in 1977. After working as a Johnson County Attorney prosecutor intern in Iowa City, he joined the Board of Immigration Appeals as a staff attorney in January 1978 and specialized in war criminal, investor, and criminal alien cases.

The **Honorable Polly Webber** served as an Immigration Judge from 1995 to 2016 in San Francisco, with details in facilities in Tacoma, Port Isabel, Boise, Houston, Atlanta, Philadelphia, and Orlando. Previously, Judge Webber practiced immigration law from 1980 to 1995 in her own private practice in San Jose. She was a national officer in AILA from 1985 to 1991 and served as National President of AILA from 1989 to 1990. Judge Webber also taught immigration and nationality law at both Santa Clara University School of Law and Lincoln Law School.

The **Honorable Robert D. Weisel** served as an Immigration Judge in the New York Immigration Court from 1989 until his retirement at the end of 2016. Judge Weisel was an Assistant Chief Immigration Judge, supervising court operations both in New York City and New Jersey. He was also in charge of the nationwide Immigration Court mentoring program for both Immigration Judges and Judicial Law Clerks. During his tenure as Assistant Chief Immigration Judge, the New York court initiated the first assigned counsel system within the Immigration Court's nationwide Institutional Hearing Program.

CERTIFICATE OF SERVICE

I certify that, on May 23, 2018, a true and correct copy of this brief has been served via the Court's CM/ECF system on all counsel of record.

/s/ Jean-Claude André
Jean-Claude André