No. 20-73081

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARACELY GONZALEZ GRANADOS, J.T.N.G., and J.E.Z.G.,

Petitioners,

v.

ROBERT M. WILKINSON, Acting Attorney General,

Respondent.

AMICUS CURIAE BRIEF OF PROFESSOR BRIAN SOUCEK
IN SUPPORT OF PETITIONERS

Brian Soucek
University of California, Davis
School of Law
400 Mrak Hall Drive
Davis, CA 95616
Telephone: (530) 752-4932
Email: bsoucek@ucdavis.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Regulations

TABLE OF AUTHORITIES
(continued)

Other **Page**

STATEMENT OF AMICUS CURIAE[1]

Brian Soucek is Professor of Law and Chancellor's Fellow at the University of California, Davis School of Law.[2] Professor Soucek is a scholar of asylum law, civil procedure, and the law of sexual orientation and gender identity. He offers this brief to argue that this Court's cases about categorical versus case-by-case adjudication in asylum law are internally consistent but unfaithfully followed by immigration judges and the Board of Immigration Appeals—as the present case demonstrates.

Professor Soucek files this brief with the consent of all parties.

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus* states that no counsel for a party authored this brief in whole or in part or made a monetary contribution to the preparation and submission of this brief, and no person other than the *amicus* made such a contribution.

[2] Institutional affiliation is provided for identification purposes only.

INTRODUCTION

Generally, college applicants don't get admitted to Stanford. But that is hardly a *reason* for Stanford's admissions office to reject any individual applicant. Nor does it mean that applicants *categorically* don't get admitted. Were it otherwise, Stanford would quickly go from having a highly selective class of students to no class at all.

Just last year, this Court made much the same point in regard to asylum and withholding of removal claims. In *Matter of A-B-*, the Attorney General had written that "generally," claims "pertaining to domestic violence . . . will not qualify" for relief. 27 I. & N. Dec. 316, 320 (A.G. 2018). In *Diaz-Reynoso v. Barr*, 968 F.3d 1070 (9th Cir. 2020), this Court rejected the notion that *Matter of A-B-* had created a categorical bar on domestic violence claims. "Generally," after all, does not mean "categorically." To make a descriptive claim about success rates is not to make a prescriptive instruction, or provide a reason for rejecting any individual claim. *Id.* at 1080. To the contrary, it makes it all the more important to determine what makes certain claims successful and to decide which individuals deserve to succeed. The lesson this Court drew from *Matter of A-B-*, and the condition of this Court's deference to that decision, was that the Board of Immigration Appeals must always "conduct the proper particular social group analysis on a case-by-case basis." *Id.* at 1080.

The Board's treatment of Ms. Gonzalez Granados' claim in the present case shows how it is flouting this Court's holding. Ignoring the lesson of *Diaz-Reynoso*, the Board continues to treat victims of domestic violence as categorically barred from asylum in the United States.

This brief makes three points. First, even after *Diaz-Reynoso*, the BIA continues to invoke *Matter of A-B-* as a categorical bar on asylum claims related to domestic violence. Second, this legal error was the sole basis for the Board's refusal to correct several of the serious due process violations that occurred in Ms. Gonzalez Granados' case. Third, this Court's insistence on individualized consideration in domestic violence cases is not at odds with its prior holdings that persecution based on sexual orientation and gender identity—which Ms. Gonzalez Granados also alleges—are categorically cognizable bases for asylum claims.

ARGUMENT

I. THE BIA TREATS *MATTER OF A-B-* AS A CATEGORICAL BAR ON DOMESTIC VIOLENCE CLAIMS.

The Attorney General says that *Matter of A-B-* was not a categorical bar on asylum claims based around domestic violence. This Court has held that *Matter of A-B-* was not a categorical bar on asylum claims based around domestic violence. And yet the Board of Immigration Appeals continues to cite *Matter of A-B-* as if it categorically bars asylum claims based around domestic violence.

Fifteen years after first considering whether "victims of domestic violence can establish membership in a particular social group," the Board decided in 2014 in *Matter of A-R-C-G-* that "married women in Guatemala who are unable to leave their relationship" had been shown to comprise a particular social group, one of the five statutory grounds for asylum. 26 I. & N. Dec. 388, 391–92 (BIA 2014); *cf. Matter of R-A-*, 22 I. & N. Dec. 906 (BIA 1999). Four years later, in 2018, the Attorney General overruled *A-R-C-G-*, holding in *Matter of A-B-* that the Board had simply accepted, "with little or no analysis," the Department of Homeland Security's concession in *A-R-C-G-* that the social group in question was cognizable. *See Matter of A-B-*, 27 I. & N. Dec. at 339–40. Along the way, the Attorney General added cautionary dicta in *Matter of A–B-*, predicting that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Id.* at 320.

In *Diaz-Reynoso v. Barr*, the petitioner argued to this Court that the language above from *Matter of A-B-* "'amounts to a categorical ban on claims based on being a domestic violence victim'"—to which the Government emphatically responded:

> *Matter of A-B-* does not prohibit persecution claims involving domestic violence—rather, the decision instructs the agency to perform a case-by-case evaluation of whether the standards for an asylum or withholding claim are met, including a rigorous, case-specific application of particular social group standards.

Resp't Answering Br. at 30–31, *Diaz-Reynoso v. Barr*, No. 18-72833 (9th Cir. Nov. 19, 2019).

This Court took the Government at its word, holding in *Diaz-Reynoso* that "[f]ar from endorsing a categorical bar, the Attorney General emphasized [in *Matter of A-B-*] that the BIA must conduct the 'rigorous analysis' set forth in the BIA's precedents." 968 F.3d at 1079. The fact that "the Attorney General did not announce a new categorical exception for victims of domestic violence or other private criminal activity" was the basis for this Court's deference to the Attorney General's decision in *A-B-*. *See id*. Other courts of appeals have reached the same conclusion. *See Gonzales-Veliz v. Barr*, 938 F. 3d 219, 232 (5th Cir. 2019); *Grace v. Barr*, 965 F.3d 883, 906 (D.C. Cir. 2020).

And yet a month after this Court's decision in *Diaz-Reynoso*, the Board invoked *Matter of A-B-* in precisely the way *Diaz-Reynoso*—and other courts, and the Government's own lawyers—had so clearly rejected. Where this Court had held that "*Matter of A-B- plainly* does not endorse any sort of categorical exception," *Diaz-Reynoso*, 968 F.3d at 1079 (emphasis added), the Board subjected Ms. Gonzalez Granados' claim to a categorical exception. Repeating *A-B-*'s "generally" language almost verbatim, the Board offered no analysis at all as to why Ms. Gonzalez Granados' claims should be lumped with those that "generally . . . will not qualify" rather than those, perhaps less common, that do qualify. AR 3. In doing so,

the BIA mistakenly treated a prediction about outcomes as a reason for bringing that outcome about. This is legal error.

Without the "rigorous," "intensive case-by-case analysis" that *Diaz-Reynoso* read *Matter of A-B-* as demanding, *see* 968 F.3d at 1079–80, there is nothing that separates a generalized prediction from a categorical bar. And no one could fairly categorize the Board's analysis in this case as "rigorous" or "intensive." *See* AR 2–3.

II. THE BOARD'S MISREADING OF *MATTER OF A-B-* IS THE SOLE BASIS FOR ITS REFUSAL TO CORRECT THE SERIOUS DUE PROCESS VIOLATIONS IN THIS CASE.

The Board's refusal to offer Ms. Gonzalez Granados and her sons a new hearing—one free of the due process violations of their original hearing—had one single basis: the Board's categorical insistence that "claims pertaining to domestic violence" cannot succeed.

Consider how the Board reacted to the Immigration Judge's failure to comply with the regulatory requirement that a "judge shall inquire whether the alien requests" a closed hearing. 8 C.F.R. § 1240.11(c)(3)(i). The Board writes: "As the respondent has not shown that she was prejudiced by not having a closed hearing, we find no reason to remand for a new hearing." AR 3. Prejudice, according to this Court's case law rightly cited by the Board, means that the "outcome of the

proceeding *may have been* affected by the alleged violation." *Id.* (citing *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000)) (emphasis added). In other words, to find no prejudice is to find that the outcome of the proceeding could not have been otherwise.

Why did the Board think Ms. Gonzalez Granados' case was doomed to fail regardless of the process afforded her? Here is its reasoning in full: the Immigration Judge's error "is not shown to have caused prejudice to the respondent inasmuch as generally, claims pertaining to domestic violence and gang violence perpetrated by non-governmental actors will not qualify for asylum." *Id.* (citing *Matter of A-B-*, 27 I. & N. Dec. at 320). The outcome of Ms. Gonzalez Granados' case could not have been otherwise, the Board is saying, because generally claims like hers fail. This is a logical howler—unless you read "generally" to mean "categorically," as the Board continues to do even after *Diaz-Reynoso.* "Because the BIA avoided the case-specific inquiry demanded by *Matter of A-B-* and the BIA's precedents," this Court should remand Ms. Gonzalez Granados' claim, just as it did in *Diaz-Reynoso*. 968 F.3d at 1088.

The Board's error regarding prejudice also infected its reasoning about Petitioners' other due process claims, particularly those about the Immigration Judge's failure to develop the record, and to provide a list of pro bono attorneys available in Mexico. To each, the Board responded that it finds "no indications on

this record that the respondent was prevented from fully presenting her claim." AR 5; *see also id.* ("The respondent has also failed to demonstrate on appeal how the lack of legal representation during her hearings prevented her from fully presenting her case."); *id.* at 6 ("[W]e have not been able to discern any indications that the respondent was unable to fully present her case via her oral testimony.").

It is hard to know how the Board of Immigration Appeals could tell, by listening to testimony warped by the very due process errors being alleged, whether someone's case was fully presented, and thus undeserving of having those errors corrected. The record may well lack "indications" that Ms. Gonzalez Granados' claim wasn't fully presented precisely because that record arose in a public hearing where she lacked counsel and the Immigration Judge failed to draw out the relevant facts.

Ultimately, the Board treats these worries as inconsequential because even with more facts about Ms. Gonzalez Granados' persecution and the state's unwillingness or inability to help her, a more fundamental problem would remain: according to the Board, her mistreatment was not on account of a protected ground. *See* AR 5 ("These arguments are unavailing inasmuch as they seem to be based on the incorrect premise that the respondent has established a nexus between any past or future persecution in El Salvador and a protected ground.").

The only reasoning in the Board's opinion that supports this claim—the one argument given for why Ms. Gonzalez Granados has failed to show nexus to a protected ground—is the assertion we have already seen, that "generally, claims pertaining to domestic violence and gang violence . . . will not qualify for asylum." If claims like these are categorically disqualified, affording the process needed to prove them becomes futile.

Here again, the Board's error is to treat "claims pertaining to domestic violence" as categorically barred. But there is further error, in that claims pertaining to domestic violence are not the only claims Ms. Gonzalez Granados now raises—or would have raised. The new evidence she presented to the Board—evidence the Board refused to ask the Immigration Judge to consider, as it was "unable to discern how" it "would change the outcome of this case," AR 6—suggests that Ms. Gonzalez Granados has claims grounded in her sexual orientation, gender presentation, and disability. Far from being categorically barred, as the Board has erroneously treated her domestic violence-based claim, claims based on sexual orientation and gender identity are, if anything, categorically *cognizable*. *See Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) ("[T]o the extent that our case-law has been unclear, we affirm that *all* alien homosexuals are members of a 'particular social group.'").

The Board failed to see the prejudice caused by the many due process violations in this case because it erroneously treated one social group as categorically

barred, even as it erroneously failed to consider other social groups that have been categorically *accepted* as bases for seeking asylum.

III. REQUIRING CASE-BY-CASE ADJUDICATION IN DOMESTIC VIOLENCE CASES IS CONSISTENT WITH THIS COURT'S CATEGORICAL ACCEPTANCE OF OTHER PARTICULAR SOCIAL GROUPS.

It may seem inconsistent to argue both that (1) it is reversible error to treat claims related to domestic violence as categorically barred, and (2) that claims related to sexual orientation or gender identity should be deemed categorically permissible.[3] How is it possible, in other words, to reconcile this Court's insistence in *Diaz-Reynoso* that "social group determinations must be individualized and conducted on a case-by-case basis," with its italicized holding in *Karouni* that "*all* alien homosexuals are members of a 'particular social group'"? *Compare Diaz-Reynoso*, 968 F.3d at 1080, *with Karouni*, 399 F.3d at 1172.

Answering this requires a close look at exactly why this Court, the Attorney General, and even the BIA itself, have required that social group determinations be "conducted on a case-by-case basis." *Diaz-Reynoso*, 968 F.3d at 1080; *see also*

[3] To refer categorically to these claims as permissible or these groups as cognizable is not to say that they will necessarily be successful. Even once a particular social group is recognized, an applicant for asylum still needs to show persecution and establish that her group membership was one central reason for it. *See Parussimova v. Mukasey*, 555 F. 3d 734, 738–41 (9th Cir. 2008).

Matter of L-E-A-, 27 I. & N. Dec. 581, 591 (AG 2019); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 242 (BIA 2014). The requirement is not a general imperative of the Due Process Clause or the structure of federal immigration law, as is sometimes claimed. *See generally* Brian Soucek, *Categorical Confusion in Asylum Law*, 73 Fla. L. Rev. __ (forth. 2021), *available at* https://dx.doi.org/10.2139/ssrn.3712461. Rather, it stems from the substance of the particular social group test itself. And as that substantive test has changed over time, so too has the necessity of case-by-case adjudication.

To ground an asylum claim, a particular social group must be based around an immutable trait—something group members either cannot or should not be expected to change; be defined non-circularly (*i.e.*, independently of the harm asserted) and with particularity; and it must have social distinction in the society the asylum applicant has fled. *See Diaz-Reynoso*, 968 F.3d at 1076-77, 1080-81. Some of these criteria—especially social distinction and circularity—are fact-bound inquiries that every individual applicant deserves a chance to satisfy. For those criteria, case-by-case adjudication is necessary so that an applicant who, for example, can marshal the facts to show that her group is seen as a group within her home country, thereby satisfying the social distinction test, isn't bound by previous asylum applicants' failure to present those facts and make that showing. *See, e.g.*, *Matter of M-E-V-G-*, 26 I. & N. Dec. at 251 (emphasizing that previous cases that

found gang-resisters not to be a socially distinct group in El Salvador "should not be read as a blanket rejection of all factual scenarios involving gangs").

The immutability criterion operates differently, however. That one's sexual orientation, gender, or gender identity are traits that someone either cannot change, or should not be expected to, is a legal determination that can be made categorically—as this Court did in regard to sexual orientation in *Karouni*. 388 F.3d at 1172. At the time *Karouni* was decided, immutability was sufficient to establish a particular social group; the social distinction and particularity tests had not yet been added. Particular social groups could thus be deemed cognizable, or not, on a categorical basis. *See* Soucek, *Categorical Confusion* at *9-10 (providing examples in both directions).

Now, of course, groups like Cuban homosexuals, *see Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990), or transgender women in Mexico, *see Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000), formally need to meet not only the immutability requirement, but the social distinction, circularity, and particularity tests as well. The fact that they satisfy those tests so easily means that, as a practical matter, courts continue to treat social groups like those as categorically cognizable. For other groups, like former gang members in El Salvador, social distinction is more hotly contested, and the need for individualized, case-by-case consideration receives greater emphasis. *See, e.g.*, *Reyes v. Lynch*, 842 F.3d 1125,

1132, 1138 (9th Cir. 2016) (affirming the BIA's finding that the evidence presented *in that particular case* did not "compel the conclusion that Salvadoran society considers former gang members as a distinct social group").

For all social groups, however, it is the social distinction and circularity[4] criteria that, when put in issue, require individualized analysis, while the immutability and (often) the particularity[5] criteria can be determined categorically. In claims related to domestic violence and gangs, social distinction and circularity have generally been the contested elements. Because those are heavily fact-based inquires, individualized, case-by-case consideration of each factual record is required. But unless and until a group's social distinction, or the circularity of its definition, were to be questioned, groups based on gender, gender identity, and sexual orientation can continue to be *categorically* accepted as cognizable particular social groups for purposes of asylum. *See Perdomo v. Holder*, 611 F.3d 662 (9th Cir.

---

[4] *Diaz-Reynoso* shows why circularity requires case-by-case adjudication: "women who are unable to leave their relationship" may or may not be circularly defined in terms of their persecution; the answer depends on whether the facts in a given case establish that the women's inability to leave is solely "attributable to domestic violence" or whether "economic, societal, and cultural factors" also serve as barriers. 968 F.3d at 1087.

[5] Particularity can usually be decided categorically so long as it is properly understood to refer to a social group's well-defined boundaries rather than its size or heterogeneity. *See* Soucek, *Categorical Confusion* at *48-53; *cf.* Reyes, 842 F.3d at 1135 (finding the particularity criterion reasonable so long as it "distinguish[es] between social groups that are discrete and those that are amorphous" rather than placing limits on groups' size or diversity).

2010) (gender); *Hernandez-Montiel*, 225 F.3d 1084 (gender identity); *Karouni*, 399 F.3d 1163 (sexual orientation).

CONCLUSION

For these reasons, and the reasons offered in Petitioner's brief, this Court should grant the petition for review and remand to the Board of Immigration Appeals for appropriately individualized consideration of Ms. Gonzalez Granados' claims.

Date: February 24, 2021

Respectfully Submitted,

By: */s/ Brian Soucek*

Brian Soucek
University of California, Davis
School of Law
400 Mrak Hall Drive
Davis, CA 95616

CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

1. The foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B). The brief is printed in proportionally spaced 14-point type, and there are 3,105 words in the brief according to the word count of the word-processing system used to prepare the brief (excluding the parts of the brief exempted by Fed. R. App. P. 32(f)).

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and with the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

February 24, 2021 By: s/ Brian Soucek

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2021, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

February 24, 2021 By: s/ Brian Soucek