National Immigrant Justice Center

Gender-Based Asylum under Trump 2.0:
A Resource for Pro Bono Attorneys

Introduction

This practice advisory is intended for attorneys representing asylum seekers in the Seventh Circuit, but may be useful to attorneys nationwide. Practitioners newer to asylum law may benefit from also reviewing NIJC's practice advisories on particular social groups and Matter of A-B-. During the first Trump administration, the Department of Justice sought to curtail access to protection for survivors of gender violence by issuing two precedential decisions, Matter of A-B- I and Matter of A-B- II, that purported to largely foreclose particular social groups based on gender. Those decisions were overruled, and the Board of Immigration Appeals (BIA) precedential decision that holds some women in relationships they are unable to leave qualify for asylum (Matter of A-R-C-G-) was reinstated by Matter of A-B- III.

In 2025, the Trump administration has taken two new steps to once again seek to prevent survivors of gender violence from accessing protection. The administration first issued a policy memorandum purporting to authorize judges to ignore Matter of A-R-C-G-. Next, they issued a BIA decision, Matter of K-E-S-G-, that finds particular social groups based solely on gender, or gender and nationality, are not cognizable. As with the efforts of the first Trump term, these measures are legally flawed. And as with the first term efforts, these efforts fall especially short in the Seventh Circuit, where the test to determine whether a particular social group is legally viable does not include the "particularity" factor, on which Matter of K-E-S-G- rests. What follows is analysis of the policy memo and the new decision that attorneys in the Seventh Circuit may wish to use in their arguments against these measures, including practice pointers and sample language for inclusion in briefing.

PM 25-34

On July 3, 2025, the Acting Director of the Executive Office for Immigration (EOIR) issued Policy Memoranda 25-34 titled "Conflicting Precedents of the Board of Immigration Appeals." The Memo avers that "[t]he Board of Immigration Appeals (Board) does not have a prior-panel-precedent rule per se, but applicable regulations have established a functional equivalent" to the rule that "the earlier of the decisions in conflict is the one that controls." *Id.* at 1. Thus, "the Board cannot silently or without express acknowledgment overrule a prior precedent even if the decision is an en banc decision." *Id.*

The Memo recognizes that it "does not—and cannot—direct adjudicators to apply any particular precedent to any particular case." *Id.* at 2. It nevertheless "attempt[s] to provide guidance as to how

Immigration Judges (IJs) may approach" allegedly conflicting BIA precedent relating to (1) Administrative Closure, and (2) Protection Claims Based on Allegations of Domestic Violence. *Id.* at 2.

Summary of PM 25-34

The Memo offers an inaccurate interpretation of asylum law, conflating two elements of the asylum definition that must be analyzed separately: (1) whether the asylum seeker has presented a legally recognizable protected ground, and (2) whether the asylum seeker was persecuted, or will be prosecuted, on account of that protected ground, commonly known as "nexus." While the Memo identifies a superficial similarity between two cases that happen to address harm by a husband against a wife, one case deals with nexus[1] while the other deals with a protected ground (in this case, particular social group). This is the fundamental error of the Memo; it purports to identify a legal contradiction between two published BIA cases when there is none.

In arguing that there is a conflict in BIA precedent, the Memo relies on 50-year-old, three-page decision called *Matter of Pierre*, 15 I.&N. Dec. 461 (BIA 1975). The Memo describes *Pierre* as holding a noncitizen "claiming a fear of harm from her husband and alleging that the authorities in Haiti would not protect her because of her husband's position in the government had not established a cognizable basis for protection under then-section 243(h) of the [INA]." PM 25-34 at 2–3 (quoting *id.* at 461). The Memo adds that "the Board has repeatedly held that 'purely personal matters' are not cognizable bases for asylum" and that "it is a relatively well-established proposition that '[a]sylum is not available to [a noncitizen] who fears retribution solely over personal matters.'" *Id.* at 3 (quoting *Matter of Y-G-*, 20 I.&N. Dec. 794, 799 (BIA 1994), *Zoroab v. Mukasey*, 524 F.3d 777, 781 (6th Cir. 2008)). On account of which reasons the asylum seeker in *Pierre* was persecuted, specifically whether because of a protected ground,[2] *Matter of Pierre* does not ask the question of whether a particular social group based on domestic violence may be cognizable, and it certainly does not answer it.

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[1] The prior case may also be understood to contend with the "government unwilling or unable" element of asylum, discussed *infra*.

[2] Practitioners should be on alert for improper assertions that harm is "personal harm," as that term has no legal meaning. The question in the asylum analysis is whether the harm – personal or not – occurred on account of a protected ground. When Hutus murdered Tutsis during the Rwandan genocide of 1994, they did so on account of race and ethnicity. It is neither here nor there whether the Hutus doing the killing *also* had personal grievances with their Tutsi neighbors and would not have diminished the nexus to the race/ethnicity protected ground if they had. Similarly, a Nazi sympathizer may hold the personal belief that Jewish people deserve harm, but that does not convert harm he takes against Jewish populations from harm on account of religion to mere personal harm. The mixed motives doctrine addresses scenarios where a persecutor has multiple reasons for committing harm. Discussion of the mixed motives doctrine is largely beyond the scope of this advisory but is discussed briefly *infra*.

Particular social group viability is precisely the question asked and answered in *Matter of A-R-C-G-*, 26 I. &N. Dec. 388 (BIA 2014). Yet the Memo contends *Matter of A-R-C-G-*, a particular social group case, is in "conflict with" *Pierre*, a nexus case, because *A-R-C-G-* "held . . . that [noncitizens] whose claims were rooted in personal matters such as domestic violence could establish a claim for protection under the INA." *Id.* The Memo inaccurately describes *A-R-C-G-* as "effectively [seeking] to overrule prior Board precedent *sub silento* contrary to fundamental principles of administrative law." *Id.* at 4. It then states that IJs "confronted with protection claims rooted in personal matters such as domestic violence must determine whether [*A-R-C-G-*] or the earlier line of cases appropriately governs." *Id.* The guidance presents a false conflict and is a clear effort to end asylum for victims of domestic violence. It offers only disingenuous and legally defective reasons for ignoring *Matter of A-R-C-G-*.

Analysis of PM 25-34

The Memo mischaracterizes A-R-C-G-'s analysis and holding.

The causal link between harm ad a protected ground is a question of nexus, not a question of PSG cognizability. A-R-C-G- rests on the notion that one experiencing domestic violence may be a member of a cognizable particular social group in a context and culture that allows and empowers harm to women. ("[A] married woman's inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation." Id. at 393.)

The holding in *A-R-C-G-* is not an unacknowledged change in precedent. The *A-R-C-G-* court conducted an in-depth analysis of the BIA's precedential decisions regarding the definition of a particular social group—including *Matter of Acosta*, 19 I.&N. Dec. 211, 233–34 (BIA 1985), *Matter of M-E-V-G-,* 26 I.&N. Dec. 227 (BIA 2014), and *Matter of W-G-R-,* 26 I.&N. Dec. 208 (BIA 2014)—to conclude that "[t]he DHS's position regarding the existence of such a particular social group in Guatemala under the facts presented in this case comports with our recent precedents clarifying the meaning of the term 'particular social group.'" *See A-R-C-G-*, 26 I.&N. Dec. at 392–95 (concluding that the group in question "share[s] [an] immutable characteristic," is "defined with particularity," and is "socially distinct within the society in question."). *Matter of A-R-C-G-* does not address *Pierre*, nor should it, since *Pierre* is not a particular social group case and is not disturbed by *A-R-C-G-*.

It is important to note what *A-R-C-G-* does *not* hold. *A-R-C-G-* does not opine on nexus—in fact, it states only that "the issue of nexus will depend on the facts and circumstances of an individual claim." *Id.* at 395. The decision also does not address the state-actor requirement for protection-based claims, which is addressed in *Pierre*. The *A-R-C-G-* court expressly notes that the respondent "must demonstrate that the Guatemalan government was unwilling or unable to control the 'private' actor" to be eligible for asylum on remand. *Id.* It goes no further into that question and therefore does not contradict *Pierre* in that regard.

Pierre does not address the particular social group element of asylum.

In contrast to *A-R-C-G-*'s extensive analysis of the particular-social-group requirements, *Pierre* is entirely silent on that question. The word "cognizable" appears nowhere in the opinion, and there is no discussion of any concepts that could plausibly suggest a particular social group analysis (as is only logical, given that *Pierre* predates by a decade *Matter of Acosta*, the first seminal particular-social-group opinion). *See generally Pierre*, 15 I.&N. Dec. 461. In fact, the decision mentions the words "particular social group" exactly once, and that was a passing reference as it recited the five protected grounds under section 243(h). *Id.* at 462.

The BIA decided *Pierre* in 1975, five years before Congress passed the Refugee Act of 1980, Pub. Law 96-212, 94 Stat. 102. The Refugee Act established the modern definition of "refugee," which is incorporated into the "asylee" definition at issue in *A-R-C-G-*. *Pierre* interpreted the now-defunct standard for withholding of removal under then-INA 243(h). This statutory language arguably afforded the executive more discretion in determining the likelihood of persecution: "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which *in his opinion* the alien would be subject to persecution on account of race, religion or political opinion and for such period of time as he deems to be necessary for such reason. Immigration and Nationality Act of 1952, § 243(h), 8 U.S.C. § 1253(h) (1975) (amended 1965) (emphasis added); *see also* Paul H. Ode Jr., S*ection 243(h) of the Immigration and Nationality Act of 1952 as Amended by the Refugee Act of 1980: A Prognosis and a Proposal*, 13 Columbia Int'l L.J., 291, 296-97 (1980). It also represented an early period of protection-based case law, where the concept of persecution was only starting to be defined by the courts. *See id.* at 299 ("Precisely what constituted 'persecution' under prior law was unclear."). Since *Pierre*, Congress has legislated a new standard for asylum and related relief, and the BIA has spent decades interpreting this new standard. The Memo completely fails to address how this intervening legislation and administrative action affect the precedential status of *Pierre*.

Pierre did not set binding precedent on domestic violence-based asylum claims.

While *A-R-C-G-* conducted an independent analysis of whether a party's (in that case, DHS's) concession "comport[ed] with [the BIA]'s recent precedents" on the issue, 26 I.&N. Dec. at 392, *Pierre* did no such thing. *Pierre* did not address or analyze PSG cognizability and did not address or analyze the viability of asylum claims based on domestic violence. Indeed, the decision does not classify the harm experienced by the asylum seeker in Pierre as domestic violence or engage with any possible gender-dynamics present in that case beyond identifying the persecutor as the husband, and the victim as the wife. This does not *ipso facto* render *Pierre* a domestic violence case or import a particular social group inquiry where there is none. As such, to the extent Pierre sets precedent, that precedent is not contradicted by *Matter of A-R-C-G-*. Given that panels are not bound, even under the prior-panel-precedent rule, "to follow [] dicta in a prior case in which the point now at issue was not fully debated," *Central Va. Community College v. Katz*, 546 U.S.

356, 363 (2006), *Pierre* cannot have bound *A-R-C-G-* on these issues, nor does it bind any subsequent panel.

Whereas any categorical bar against domestic-violence protection claims is unsupported by the actual language of *Pierre*, the rule that asylum claims based on membership in a particular social group must be evaluated on a case-by-case basis—which, in the DOJ's own words, is "crystal clear"—has been reiterated by multiple BIA decisions and widely affirmed by the federal courts of appeals. *See, e.g.*, *Espinoza-Ochoa v. Garland*, 89 F.4th 222, 232 (1st Cir. 2023) (citing *M-E-V-G-*, 26 I.&N. Dec. at 237); *Azmen v. Barr*, 965 F.3d 128, 135 (2d Cir. 2020) (citing *W-G-R-*, 26 I.&N. Dec at 221); *Bi Xia Qu v. Holder*, 618 F.3d 602, 606–07 (6th Cir. 2010) (citing *Acosta*, 19 I.&N. Dec. at 233–34); *Orejuela v. Gonzales*, 423 F.3d 666, 672 (7th Cir. 2005) (same); *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1080 (9th Cir. 2020) (same); *see also Matter of A-B-*, 28 I.&N. Dec. 307 (A.G. 2021) (vacating *Matter of A-B-*, 27 I.&N. Dec. 316 (A.G. 2018) in large part because its "broad language [that] could be read to create a strong presumption against asylum claims based on private conduct . . . threaten[ed] to cause confusion and discourage careful case-by-case adjudication").

It is therefore the Memo itself, not *A-R-C-G-,* that seeks to "effectively overrule prior Board precedent *sub silento* contrary to fundamental principles of administrative law," Memo at 3, to the extent that it attempts to manufacture a categorical bar against domestic-violence protection claims. Yet, the Acting Director of EOIR has no authority to issue new precedent. *See* 8 CFR § 1003.0(c) (providing that the Director normally has "no authority to adjudicate cases arising under the Act or regulations or to direct the result of an adjudication"). As the BIA has affirmed *after the Memo was issued*, *A-R-C-G-* remains binding precedent. Matter of K-E-S-G-, 29 I.&N. Dec. 145, 146n.4 (BIA 2025).

- ***Practice Pointer: Separately Analyze Each Element of Asylum***

By conflating the analysis of whether a particular social group is cognizable with the analysis of whether the harm occurred – or would occur in the future – on account of the asylum seeker's membership in a particular social group ("nexus"), the Memo highlights the lawyer's obligation to separately establish each element of asylum. Any asylum pre-hearing briefing should include individual sections arguing that (1) the past harm suffered by the client, or future harm the asylum seeker fears, constitutes persecution, (2) the harm was or would be perpetrated by a the government or an actor the government cannot or will not control, (3) the client belongs to a cognizable particular social group, (4) and the persecution occurred or will occur on account of the client's membership in the cognizable particular social group.

An explanation for why a persecutor targeted or would target an asylum seeker should remain within the nexus section of the brief. Including such information in the section on the cognizability of a particular social group serves to conflate the two elements, thereby confusing the adjudicator and undermining the asylum claim.

In arguing that an asylum seeker belongs to a cognizable particular social group in a domestic violence claim, explain that *A-R-C-G-* is good law, undisturbed by *Pierre*. NIJC recommends including the following language within your brief:

> Policy Memoranda 25-34, dated July 3, 2025, and titled "Conflicting Precedent of the Board of Immigration Appeals," does not affect the viability of the particular social groups in the instant case. The Memo presents two cases, *Matter of Pierre*, 15 I. & N. Dec. 461 (BIA 1975) and *Matter of A-R-C-G-*, 26 I.&N. Dec. 388 (BIA 2014), as contradictory. However, *Pierre* does nothing to disturb the precedential value of *A-R-C-G-*, which supports a finding of cognizability in this case. The decision in *Pierre* results from a finding on nexus, that the harm perpetrated by a husband towards his wife did not occur on account of a protected ground, when the court's analysis neglected to engage with any evidence on nexus related to domestic violence. On the other hand, *A-R-C-G-* involves a detailed analysis of the question of whether a particular social group is cognizable, finding that a particular social group based on domestic violence can be viable when there is evidence that the society at issue permits and empowers violence against women.
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> Thus, *Pierre*, unlike *A-R-C-G-*, does not address viability of domestic violence claims, and does not negate the application of *A-R-C-G-* here. Furthermore, unlike in *Pierre*, in this case there is ample evidence in the record establishing that the persecutor harmed the respondent on account of her particular social group membership. Here, a case-by-case and fact specific analysis, as required in the adjudication of asylum cases, negates the applicability of *Pierre*. *Orejuela v. Gonzales*, 423 F. 3d 666 (7th Cir. 2005); see also *Matter of A-B-*, 28 I.&N. Dec. 307 (A.G. 2021) (vacating *Matter of A-B-*, 27 I.&N. Dec. 316 (A.G. 2018) in large part because its "broad language [that] could be read to create a strong presumption against asylum claims based on private conduct . . . threaten[ed] to cause confusion and discourage careful case-by-case adjudication").

Any conclusion that domestic-violence claims (or other claims "rooted in personal matters") are categorically ineligible for relief is wrong as a matter of law.

Even if *Pierre* had announced a rule that claims based on domestic violence or other "personal matters" categorically lack a nexus to a protected ground, such a rule is wrong as a matter of law. The Memo may find some legal support for the assertion that "[a]sylum is not available to [a noncitizen] who fears retribution over solely personal matters," (quoting *Zoroab v. Mukasey*, 524 F.3d 777, 781 (6th Cir. 2008)), but there is no legal basis—and indeed, the Memo cites none—for its assumption that "protection claims rooted in personal matters such as domestic violence" are necessarily disputes over "purely personal matters." Memo at 3.

Nexus has never been an either-or question. Rather, every single court of appeals to have addressed the issue has recognized that (1) a persecutor can have more than one reason for harming a noncitizen, and (2) a noncitizen is eligible for protection so long as one of those reasons is connected to a protected ground. *See, e.g.*, *Aldana-Ramos v. Holder*, 757 F.3d 9, 18 (1st Cir. 2014) (quoting 8 U.S.C. § 1158(b)(1)(B)(i)); *Acharya v. Holder*, 761 F.3d 289, 296–98 (2d Cir. 2014); *Ndayshimiye v. U.S. Att'y Gen.*, 557 F.3d 124, 129 (3d Cir. 2009); *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164 (4th Cir. 2009); *Sealed Petitioner v. Sealed Respondent*, 829 F.3d 379, 383 (5th Cir. 2016); *Mazariegos-Rodas v. Garland*, 122 F.4th 655, 666–67 (6th Cir. 2024); *Cece v. Holder*, 733 F.3d 662, 672–73 (7th Cir. 2013) (*en banc*); *De Brenner v. Ashcroft*, 388 F.3d 629, 636 (8th Cir. 2004); *Garcia v. Wilkinson*, 988 F.3d 1136, 1143 (9th Cir. 2021); *Orellana-Recinos v. Garland*, 993 F.3d 851, 855 (10th Cir. 2021); *Rivera v. U.S. Att'y Gen.*, 487 F.3d 815, 821 (11th Cir. 2007); *see also Matter of S-P-*, 21 I.&N. Dec. 486, 489 (BIA 1996) (instructing that "[i]n adjudicating mixed motive cases, it is important to keep in mind the fundamental humanitarian concerns of asylum," and that "[s]uch an approach is designed to afford a generous standard for protection in cases of doubt.")

The agency therefore cannot "focus[] exclusively" on a nonprotected reason for the harm, decline to engage in a "well-reasoned, documented, and complete analysis that engages the evidence [] presented," and summarily conclude that there is no nexus to a protected ground. *Gjerazi v. Gonzales*, 35 F.3d 800, 812–813 (7th Cir. 2006); *see also Sebastian-Sebastian v. Garland*, 87 F.4th 838, 848 (6th Cir. 2023) (holding that "[t]he BIA erroneously stopped short" where it "found one motive and prematurely ended its analysis there"). In fact, the Seventh Circuit has lambasted an IJ's reasoning as "radically deficient" where it "utterly fail[ed] to consider the context" of the noncitizen's situation in determining the persecutor's motivations. *Ndonyi v. Mukasey*, 541 F3.d 702, 711 (7th Cir. 2008); *see also Mohideen v. Gonzales*, 416 F.3d 567, 570–71 (7th Cir. 2005) (BIA erred in failing to consider "country reports" describing persecution of other Muslims); *Ivanov v. Gonzales*, 157 F. App'x 939, 942 (7th Cir. 2005) (BIA was wrong not to "acknowledge the possibility of mixed motives" when the record included "country reports . . . stat[ing] that Gypsies are among the poorest in Bulgarian society").

Nor can the agency simply characterize persecution as a "personal matter" as a way of shirking its duty to conduct a proper mixed-motives analysis. *See, e.g.*, *Mejia-Hernandez v. Bondi*, No. 23-1508, 2025 WL 1982306, at *19 (7th Cir. July 17, 2025) (rejecting IJ's characterization of asylum-seeker's claim as a "private dispute" and finding nexus to a family-based social group); *Mazariegos-Rodas*, 122 F.4th at 673 ("[T]he simultaneous existence of a personal dispute does not eliminate a nexus between the harm suffered and a protected ground") (citing *Bi Xia Qu*, 618 F.3d at 608). For example, in *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011), the Seventh Circuit explained at length why a Jordanian man's threats to kill his sister because he "believe[d] she has

. . . [brought] dishonor to the family" could not be dismissed as simply a "personal dispute." *Id.* at 656. The panel unanimously faulted the BIA for failing to account for "a pre-existing moral code in Jordanian society" that "causes the violence" by "brand[ing] women who flout its norms as outcasts" and "delegat[ing] to family members the task of meting out the appropriate punishment." *Id.* at 655. And because the alleged "dishonor to the family" was "simply a piece of a complex cultural construct that entitles male members of families dishonored by perceived bad acts of female relatives to kill those women," the court held that the persecution was necessarily on account of the woman's membership in the particular social group of "women in Jordan who have (allegedly) flouted repressive moral norms." *Id.* at 655–657 (noting that the court "would never say" that a "neo-Nazi who burns down the house of an African-American family" was solely motivated by a personal dispute).

Since *Sarhan*, the Seventh Circuit has rejected the "personal dispute" label in diverse situations such as (1) a single Albanian woman who was stalked and sexually assaulted by a gang leader, *Cece*, 733 F.3d at 672–73, (2) a Pakistani man who was called a "traitor" for cooperating with the government against a politician, *Mustafa v. Holder*, 707 F.3d 743, 754 (7th Cir. 2013), (3) a Salvadoran man who refused to "do favors for the gang" or disclose his brother's whereabouts, *W.G.A. v. Sessions*, 900 F.3d 957, 967 (7th Cir. 2018), and (4) a Mexican man who was targeted by a cartel member who desired the man's wife, *Gonzalez Ruano v. Barr*, 922 F.3d 346, 356 (7th Cir. 2019). Other circuits have reached similar conclusions. *See, e.g.*, *Espinoza-Ochoa*, 89 F.4th at 236–37 (even if the Guatemalan gang targeting the noncitizen were motivated by revenge, the record "is more than sufficient" to find a nexus to his status as a landowning farmer); *Uwais v. U.S. Att'y Gen.*, 478 F.3d 513, 517 (2d Cir. 2007) (a police officer's sexual assault of a Sri Lankan Tamil woman was not "solely motivated by personal aggression"); *Al-Ghorbani v. Holder*, 585 F.3d 980, 998 (6th Cir. 2009), *superseded on other grounds by statute*, 8 U.S.C. § 1252(b)(3)(B) (a Yemeni general's persecution of the noncitizen for marrying the general's daughter was not solely because of a "personal vendetta").

The Sixth Circuit's decision in *Sebastian-Sebastian v. Garland*, 87 F.4th 838 (6th Cir. 2023) is perhaps most relevant to the nexus analysis as it relates to domestic-violence claims. In that case, the noncitizen suffered physical and sexual violence at the hands of her late husband, and after her husband's death, threats from her mother-in-law. *Id.* at 844–47. The BIA "held that Sebastian-Sebastian was harmed by her husband and in-laws because of a personal vendetta against Sebastian-Sebastian by her mother-in-law, rather than a protected ground," *id.* at 848 (cleaned up), but the Sixth Circuit unanimously rejected that conclusion. Rather, the court held that "Sebastian-Sebastian's mother-in-law harmed her, at least in central part, *because* Sebastian-Sebastian could not leave, a characteristic that is a core aspect of two of her proposed social groups—Guatemalan Chuj women in domestic relationships who are unable to leave and who are viewed as property by virtue of their relationship." *Id.* at 849 (emphasis in original); *see*

also Rodriguez Tornes v. Garland, 993 F.3d 743, 753 (9th Cir. 2021) (holding that the domestic violence that the noncitizen experienced was not solely because of "interpersonal dynamics" between her and her male partners, but also because "she expressly asserted to [her persecutors] her political opinions that she was their equal."); *Id.* at 755–56 (Paez, J., concurring) (noting that the BIA ignored expert evidence and "decades of publicly available social science research and social policy" refuting its "outdated view of domestic violence as a quirk within a 'personal relationship'")

In none of the above cases was there any discussion of *Pierre*, or any indication that the courts of appeals (or the BIA, for that matter) interpreted that decision as holding that domestic-violence claims and other "protection claims rooted in personal matters" are categorically ineligible for asylum or withholding of removal. After all, *Pierre* is entirely silent on the mixed-motives analysis and the reality of persecutors having multiple reasons for their actions. 15 I.&N. Dec. at 462. To the extent that the Memo presumes that domestic-violence claims are solely "personal matters" that are ineligible for protection, it puts the cart before the horse and unlawfully disregards well-established precedent regarding mixed-motives analyses.

- ***Practice Pointer: Establishing Nexus Beyond "Purely Personal Matters"***

Unlike the decision in *Pierre,* which does not contextualize the harm against the asylum-seeking wife within cultural norms regarding gender dynamics, attorney briefing should establish nexus in domestic violence cases by addressing how the asylum seeker's society permits and facilitates harm to women. Draw on supporting evidence to explain how, far from a personal matter, domestic violence stems from power and control structures deeply rooted in social and cultural constructs of men's superiority and control, and women's subordination. The record should include information regarding the persecutor's attitudes about and treatment towards women generally, and how these attitudes manifested in the persecutor's specific abuse towards the asylum seeker. To do so, include in the pre-hearing filing (1) a asylum seeker's affidavit that includes statements made by the persecutor, if any, to the asylum seeker and others about his views regarding his rights, power, and control over women, (2) briefing discussing how the harm itself may be evidence of nexus because of the gendered nature of the acts of violence, and (3) country conditions evidence and expert reports explaining how female subservience operates within the specific society in question.

Pierre is of limited precedential value on the fact-intensive, necessarily case-by-case question of governmental inability or unwillingness to protect.

Even on the issues that *Pierre* does address—nexus and whether the noncitizen's country of origin would be unable or unwilling to protect her from her feared harm—the decision does little to bind IJs or subsequent panels of the BIA. As the BIA itself has noted, "[w]hether a government is unable or unwilling to protect an individual from persecution is a question of fact" and "a fact-

specific inquiry." *Matter of C-G-T-*, 28 I.&N. Dec. 740, 743 (BIA 2023); *see Medina-Seguilanda v. Garland*, 121 F.4th 316, 322–34 (1st Cir. 2024) (same); *see also Plaza-Ramirez v. Sessions*, 908 F.3d 282, 285 (7th Cir. 2018) (noting that the court "review[s] findings of fact for substantial evidence"); *Osorio-Morales v. Garland*, 72 F.4th 738, 742 (7th Cir. 2023) (applying the substantial-evidence standard to the governmental inability-or-unwillingness question).

The BIA may of course issue guidance on how to analyze or decide questions of fact, but it did not do so in *Pierre*. That decision's entire basis for rejecting the asylum seeker's argument was simply that the noncitizen "has presented no evidence to support this claim." *Pierre*, 15 I.&N. Dec. at 462.

Pierre therefore cannot have announced any categorical rule that domestic-violence claims (or other claims "rooted in personal matters") can never be successful. After all, if a precedential opinion of a court of appeals granting relief in one case "did not . . . establish an entitlement to withholding of removal for all time," *Marqus v. Barr*, 968 F.3d 583, 588 (6th Cir. 2020) (cleaned up), nor can a single BIA opinion—especially one that decided a question of fact based on a lack of evidence—foreclose eligibility for relief for all time for a wide variety of claims. The broadest reasonable reading of *Pierre* is that adjudicators can deny a protection claim if the noncitizen presented insufficient evidence.

PM 25-34 Conclusion

In seeking to restrict domestic-violence claims, the Memo relies on a reading of *Pierre* that is unsupported by the text of that decision and contrary to controlling precedent from the Supreme Court and federal courts of appeals. Nevertheless, hostile or results-oriented IJs may rely on the Memo to summarily deny claims involving domestic violence or other allegedly "personal" matters. NIJC thus recommends that practitioners consider raising some or all of the arguments discussed above, if for no other reason than to preserve them on appeal.

Matter of K-E-S-G-

Shortly after the Memo was issued, the BIA followed up by publishing a loosely reasoned decision purporting to limit gender-based asylum claims. This decision is *Matter of K-E-S-G-*, 29 I&N Dec. 145 (BIA 2025), issued on July 18, 2025. It rejects the particular social groups of "Salvadoran women" and "Salvadoran women viewed as property." In so doing, it questions the validity of all particular social groups based solely on nationality and/or gender.

Summary of K-E-S-G-

K-E-S-G- holds "that a particular social group defined by the [non-citizen's] sex or sex and nationality, standing alone, is overbroad and insufficiently particular." 29 I.&N. Dec. at 151. In reaching this

conclusion, the Board expressly acknowledges—as it did previously in *Matter of Acosta*, 9 I.&N. Dec. 211, 233 (BIA 1985)—"that sex is an immutable characteristic." *Id.* at 148. Nevertheless, in the Board's view, the proposed social group fails the particularity test, as it lacks "narrowing features" to confine it to smaller portion of society. *Id.* at 151. Lack of particularity is the *only* basis the Board provides for rejecting this group. *See id.* at 154 ("Because we agree with the Immigration Judge that the respondent's proposed group of Salvadoran women does not satisfy the particularity requirement, we need not address whether the proposed group satisfies the social distinction requirement."). Thus, *K-E-S-G-* only applies to the extent that a particular social group must feature "particularity," under the unclear definition that the BIA gave to that word in a series of decisions beginning with *Matter of C-A-*, 23 I.&N. Dec. 951, 957, 959–61 (BIA 2006). Prior to these decisions, the BIA had defined a particular social group under the *Acosta* standard, which requires that all group members possess a common, immutable characteristic.

In a briskly reasoned second section, the decision also rejects the particular social group of "Salvadoran women viewed as property" for lacking particularity and social distinction. Here, the BIA faults the respondent for not offering adequate country conditions evidence to establish that "viewed as property" has a commonly held definition in El Salvador (particularity) or that Salvadorans view women in this social group as a distinct segment of society (social distinction). 29 I.&N. Dec. at 154-55. Because this holding is specific to the facts of this case, this decision does not preclude a particular social group of women viewed as property under a fuller evidentiary record.

K-E-S-G- Does Not Alter Seventh Circuit Law

The holding in *K-E-S-G-* flatly conflicts with Seventh Circuit law. Its rejection of particular social groups based on gender and nationality relies solely on the agency-created requirement of *particularity*. The Seventh Circuit has repeatedly criticized this requirement and never applied it in a published decision. More specifically, *K-E-S-G-* interprets particularity in the prior decisions as a rule against overbreadth. In its decisions discussing particularity, the Seventh Circuit has been especially clear and consistent in its rejection of overbreadth as a disqualifying factor for a particular social group. Thus, the holding of *K-E-S-G-* is wholly superseded by Seventh Circuit precedent.

In the twelve years since *Matter of M-E-V-G-* was decided, the Seventh Circuit has continued to uphold the *Acosta* standard, otherwise known as the "immutable characteristic test," wherein a particular social group requires only common, immutable characteristics. *See, e.g., Lozano–Zuniga v. Lynch*, 832 F.3d 822, 827 (7th Cir. 2016) ("This circuit defines social group as a group "whose membership is defined by a characteristic that is either immutable or is so fundamental to individual identity or conscience that a person ought not be required to change."). The Attorney General expressly acknowledged in a now-vacated decision that the Seventh Circuit does *not* adhere to the particularity and social distinction requirements, providing critical clarity (even if non-binding) as to the status of the particular social group

definition in this Circuit. *Matter of L-E-A-*, 27 I.&N. Dec. 581, 590 (A.G. 2019), *vacated on other grounds by Matter of L-E-A-*, 28 I.&N. Dec. 304 (A.G. 2021). The Seventh Circuit similarly notes this divergence in *Melnik v. Sessions*:

> Many circuits deferred to the Board's addition of these requirements. We, along with our colleagues in the Third Circuit, rejected portions of the Board's further requirements. *See Cece v. Holder*, 733 F.3d 662, 668–69, 668 n.1 (7th Cir. 2013) (en banc); *Valdiviezo–Galdamez v. Att'y Gen.,* 663 F.3d 582 (3d Cir. 2011) (rejecting the Board's "particularity" and "social visibility" requirements)." 891 F.3d 278, n. 22 (7th Cir. 2018). While declining to analyze whether *Chevron* should be accorded to the BIA's particular social group requirements, the court also noted that arguments against deference due to their unreasonableness "have some force." *W.G.A.*, 900 F.3d 957, 964 n.4 (7th Cir. 2018).[3]

In its criticism of the particularity requirement, the Seventh Circuit has repeatedly rejected the idea that a group can be invalidated for being "overbroad". *See Cece v. Holder*, 733 F.3d 662, 674 (7th Cir. 2013) ("[T]he breadth of category has never been a per se bar to protected status."); *N.L.A. v. Holder*, 744 F.3d 425, 438, (7th Cir. 2014) ("We also noted that it would be antithetical to asylum law to deny refuge to a group of persecuted individuals who have valid claims merely because too many have valid claims. This would be akin to saying that the victims of widespread governmental ethnic cleansing cannot receive asylum simply because there are too many of them.") (internal citation omitted); *Salgado Gutierrez v. Lynch*, 834 F.3d 800, 805 (7th Cir. 2016) (rejecting breadth and homogeneity as requirements to establish a particular social group); *see also Iao v. Gonzales,* 400 F.3d 530, 533 (7th Cir.2005). Importantly, this rejection of "overbreadth" derives directly from the original purpose of the Refugee Act: in writing for the *en banc* Seventh Circuit, Judge Ilana Rovner—a Holocaust refugee herself—noted that "undoubtedly any of the six million Jews ultimately killed in concentration camps in Nazi-controlled Europe could have made valid claims for asylum, if only they had had that opportunity. Many of our asylum laws originated out of a need to address just such refugees from World War II." *Cece*, 733 F.3d at 674-75.

The BIA often combines its criticism of the group's breadth with a claim that it is too "diffuse." It is not clear from the decision whether the BIA perceives any analytical distinction between describing a group as "too broad" or "too diffuse." In practice, there is no discernable difference. As used in K-E-S-G-, the word "diffuse" appears to bear a meaning of heterogeneous, i.e., "encompassing a diverse cross section of society of widely varying ages, socioeconomic statuses, marital statuses, family backgrounds, and lifestyles."29 I.&N. Dec. at 151. But any sufficiently large group will inevitably contain a "diverse cross

[3] This conclusion has even greater force now that *Chevron* has been overruled. *Loper Bright Enterp. v. Raimondo*, 144 S.Ct. 2244 (2024).

section of society." For example, any of the large social groups cited as examples in *Cece*—such as tens of millions of Falun Gong followers or Jews in Nazi-controlled territories—necessarily includes persons of "widely varying ages, socioeconomic statuses, marital statuses, family backgrounds, and lifestyles." The BIA does not explain why it would demand conformity across these other biographic traits after determining that the group shares a common, immutable characteristic.

- ***Practice Pointer: Remind Adjudicators that the Seventh Circuit Rejects Particularity and Social Distinction***

As the holding in *K-E-S-G-* rests entirely on the particularity requirement, it is essential to remind adjudicators that the Seventh Circuit upholds the *Acosta* standard and does not adhere to the particularity and social distinction requirements. In gender-based asylum claims, NIJC suggests using language that distinguishes the analysis in *K-E-S-G-* from the proper standard for assessing particular social groups in the Seventh Circuit. NIJC recommends using this sample language in future briefing:

> In the Seventh Circuit, the definition of "particular social group" is governed by the BIA's *Acosta* test: "a group of persons all of whom share a common, immutable characteristic" that members "cannot change, or should not be required to change." *Matter of Acosta*, 19 I.&N. Dec. 211, 233 (BIA 1985). The Seventh Circuit has repeatedly rejected the Board's particularity and social distinction requirements. In *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013), the *en banc* Seventh Circuit explicitly reaffirmed that the Seventh Circuit follows an *Acosta*-only test for establishing membership in a PSG, in which a group need only be based on an immutable characteristic in order to be a viable social group. Furthermore, in a now-vacated decision, the Attorney General expressly acknowledged that the Seventh Circuit does not adhere to the particularity and social distinction requirements. *Matter of L-E-A-*, 27 I.&N. Dec. 581, 590 (A.G. 2019), vacated by *Matter of L-E-A-*, 28 I.&N. Dec. 304 (A.G. 2021). While the holding of the earlier *L-E-A-* decision is no longer binding, the Attorney General's assertion provides critical clarity of the status of the particular social group definition in the Seventh Circuit.
>
> The Board's recent decision in *K-E-S-G-* does not affect this analysis. *K-E-S-G-* holds "that a particular social group defined by the alien's sex or sex and nationality, standing alone, is overbroad and insufficiently particular." 29 I.&N. Dec. at 151. In reaching this conclusion, the Board expressly acknowledged—as it did previously in *Matter of Acosta*, 9 I.&N. Dec. 211, 233 (BIA 1985)—"that sex is an immutable characteristic." *Id*. at 148. Nevertheless, in the Board's view, the proposed social group fails the particularity test, as it lacks "narrowing features" to confine it to smaller portion of society. *Id*. at 151. Lack of particularity is the only basis the Board provided for rejecting this group. As the particularity requirement does not apply in the Seventh Circuit, which has also flatly rejected that the breadth of a protected ground can be per se bar to asylum,

see Cece, 733 F.3d at 669, 674-75, *K-E-S-G-* is not binding in the Seventh Circuit. Even if *K-E-S-G-* did bind this court, the particular social groups presented in this case would be cognizable.

K-E-S-G- is Wrong Under the Law of Any Circuit

Practitioners outside the Seventh Circuit will often want to make and preserve the argument that *K-E-S-G-* does not apply in their case. The strength of this argument will depend on local case law and the facts of the case. Even if the argument is unlikely to succeed in immigration court, it will often be important to preserve the argument for appeal.

Of course, the contours of a challenge to *K-E-S-G-* will depend on the case law in a practitioner's local circuit. Some circuits have rejected "broadness" as a disqualifying trait for reasons similar to those given by the Seventh Circuit. Notably, in *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010), the Ninth Circuit remanded for consideration of whether "Guatemalan women" constitutes a cognizable PSG. In so deciding, the court "rejected the notion that a persecuted group may simply represent too large a portion of a population to allow its members to qualify for asylum." *Id.* at 669.[4] The Fourth Circuit similarly stated that "the size of the group has no bearing on the clarity of the group's boundaries." *Amaya v. Rosen*, 986 F.3d 424, 434, 433 n.6 (4th Cir. 2021); *see also Reyes v. Lynch*, 842 F.3d 1125, 1135 (4th Cir. 2016) ("The BIA's statement of the purpose and function of the 'particularity' requirement does not, on its face, impose a numerical limit on a proposed social group or disqualify groups that exceed specific breadth or size limitations."). Wherever circuit case law affirms the particularity requirement, but rejects a per se numerosity test, there is a strong argument that *K-E-S-G-* cannot be reconciled with controlling precedent.

Additionally, some circuits have expressed an openness to PSGs based on sex and nationality. Alongside *Perdomo*, perhaps the most notable of these cases is *Hassan v. Gonzales*, 484 F.3d 513, 515, 518 (8th Cir. 2007), where the Eighth Circuit recognized the PSG of "Somali females." The BIA attempts to distinguish the case because it involved female genital mutilation (FGM), and the BIA considers FGM cases *sui generis*. *K-E-S-G-*, 29 I.&N. Dec. at 151n.7-8, 155 n.10. Yet, the BIA does not explain how the type of harm involved could possibly affect the viability of a PSG. Indeed, it would be hard-pressed to do so, given its insistence in other cases that relying on the type of harm in a PSG definition renders the group impermissibly "circular." *See, e.g., Matter of M-E-V-G-,* 26 I.&N. Dec. 227, 243 (BIA 2014). Other circuit cases contain notable dicta on the viability of similar PSGs. *See, e.g., De Pena-Paniaugua v. Barr*, 957 F.3d 88, 96 (1st Cir. 2020) ("[I]t is not clear why a larger group defined as "women," or "women in country X"—without reference to additional limiting terms—fails either the "particularity" or "social

[4] The BIA attempted to distinguish *Perdomo* by arguing that the decision pertained to an earlier standard for PSG cognizability. *K-E-S-G-*, 29 I&N Dec. at 148. The Ninth Circuit has, however, affirmed *Perdomo* in later decisions. *See Antonio v. Garland*, 58 F.4th 1067, 1075-76 (9th Cir. 2023)

distinction" requirement."); *Fatin* v. *INS,* 12 F.3d 1233, 1240 (3d Cir. 1993) ("[T]o the extent that the petitioner in this case suggests that she would be persecuted or has a well-founded fear that she would be persecuted in Iran simply because she is a woman, she has satisfied the first of the three elements that we have noted.").

Even on its own terms, *K-E-S-G-* is arbitrary, poorly reasoned, and inconsistent with BIA precedent. The BIA previously elaborated the meaning of "particularity" in the twin decisions *M-E-V-G-*, 26 I.&N. Dec. 227 (BIA 2014), and *W-G-R-*, 26 I.&N. Dec. 208 (BIA 2014). Both decisions explain the role of particularity as one of clear, intelligible demarcation: "A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group." *W-G-R-*, 26 I.&N. Dec. at 214; *M-E-V-G-* 26 I.&N. Dec. at 239. The immutable characteristic(s) in a group definition must be "sufficiently precise" to make this determination. *Id." W-G-R-*, 26 I.&N. Dec. at 213; *M-E-V-G-* 26 I.&N. Dec. at 239. To this end, "[t]he group must also be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective." *W-G-R-*, 26 I&N Dec. at 214; *M-E-V-G-* 26 I.&N. Dec. at 239. Although *W-G-R-* does reject the proffered PSG as "too diffuse, as well as being too broad and subjective," the subsequent analysis focuses on the difficulties in determining who exactly fits within this group, its lack of a clear boundary. 26 I.&N. Dec. at 221. Both decisions also emphasize that PSGs must be evaluated within the relevant societal context and the facts of the case at hand. *W-G-R-*, 26 I.&N. Dec. at 214; *M-E-V-G-* 26 I.&N. Dec. at 238.

Yet, *K-E-S-G-* makes no claim that the group Salvadoran women is somehow imprecise or lacking clear boundaries. It does not profess any difficulty in determining who falls within the group. Nor does it engage in any analysis of Salvadoran society beyond an offhand dismissal of "respondent's . . . evidence that women in El Salvador face disproportionate levels of violence and that legislation has been enacted in that country to protect women." *K-E-S-G-*, 29 I.&N. Dec. at 153. Instead, the BIA takes the attributes "overbroad" and "diffuse" in isolation as *the* test for particularity. This reinvented concept of particularity has nothing to do with discrete and definable boundaries—the BIA seems to acknowledge *sub silentio* that the boundaries of the category "Salvadoran women" are readily understood within El Salvador. The fate of a PSG depends wholly on the number of members.

This arbitrary standard is ripe for challenge as a baseless misreading of the statute, especially now that the agency's interpretation is accorded no special deference. *See Loper Bright Enterp. v. Raimondo*, 144 S.Ct. 2244 (2024). Moreover, fundamental principles of administrative law require agencies to explain their actions. *See FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009) ("To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position."). Yet, *K-E-S-G-* nowhere acknowledges that it conflicts with, or even modifies, the framework of *M-E-V-G-* and *W-G-R-*. Put differently, *K-E-S-G-* exhibits the exact failure that the Memo (*supra*) falsely imputes to *A-R-C-G-*: the unrecognize contradiction of binding

precedent. These prominent flaws in the reasoning of *K-E-S-G-* support a strategy of preserving challenges to the decision in many cases involving gender-based persecution.

Conclusion

The Memo and *K-E-S-G-* are part of a wider effort to prevent survivors of domestic violence from gaining lawful status in the U.S. However, attorneys continue to have at their disposal myriad arguments and strategies to win asylum for survivors of gender-based harm and, when necessary, to preserve issues for appeal. The guidance in this practice advisory serves to assist attorneys in strengthening legal arguments in light of these two attempts to curtail noncitizens' ability to prevail in asylum cases involving gender-based harm.