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

In the Matter of:

M---- A----- S----- H-----

In removal proceedings

File No.: A--- ---

REQUEST TO APPEAR AS *AMICUS CURIAE*

March 10, 2020

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

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REQUEST TO APPEAR AS *AMICUS CURIAE*

The Catholic Legal Immigration Network, Inc., (CLINIC) requests permission from the Board of Immigration Appeals (“Board”) to appear as *amicus curiae* in this matter. The Board may permit an organization represented by an attorney to appear as *amicus curiae* if the appearance is in the public interest. 8 C.F.R. § 1292.1(d).

CLINIC is the nation’s largest network of nonprofit immigration legal services providers, with more than 370 programs in 49 states and the District of Columbia. Agencies in CLINIC’s network employ approximately 2,300 attorneys and accredited representatives who, in turn, serve hundreds of thousands of low-income immigrants each year. CLINIC’s promotion of the dignity and rights of immigrants is informed by Catholic Social Teaching and rooted in the Gospel value of welcoming the stranger.

CLINIC and its affiliates provide direct representation in asylum matters before the immigration court, the Board, and federal courts of appeals. CLINIC attorneys are recognized national experts on asylum-related issues, especially in analysis of particular social group issues under asylum law. CLINIC staff has developed numerous resources for immigrants and immigration law practitioners, including a practice advisory on potential asylum eligibility for LGBT DACA recipients and a practice advisory on formulation of particular social groups following the Attorney General's *Matter of L-E-A-* decision. CLINIC has a significant interest in the outcome of this case because the decision may hinge on the Board's application of the definition of the particular social group definition to transgender women in Honduras.

Therefore, it is in the public interest for CLINIC to appear as *amicus curiae* in this matter, and the Board should grant this request and consider the contemporaneously filed amicus brief in adjudicating this appeal.

Dated: March 11, 2020

Respectfully submitted,

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**BRIEF OF THE CATHOLIC LEGAL IMMIGRATION NETWORK, INC. (CLINIC) AS
AMICUS CURIAE IN SUPPORT OF THE RESPONDENT**

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INTRODUCTION

The modern concept of asylum and refugee law stems from the systematic persecution of the Jewish population in Nazi-occupied Europe. *See* United States Holocaust Memorial Museum, *United States Immigration and Refugee Law, 1921-1980*, <https://encyclopedia.ushmm.org/content/en/article/united-states-immigration-and-refugee-law-1921-1980>. “After World War II and the Holocaust, the United States and the international community recognized that refugees and displaced persons merited special consideration and should be dealt with separately from immigrants, who are moving to a new country to seek a better life.” *Id.* The United Nations Refugee Convention, therefore, sought to ensure the adequate treatment of refugees and protection of human rights, affirming that human beings shall enjoy fundamental rights and freedoms. *See* United Nations High Commission for Refugees, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, prmb1, <https://www.unhcr.org/4d934f5f9.pdf> (specifically referencing the Charter of the United Nations and Universal Declarations of Human Rights).

In addition to Jewish people, members of the Lesbian, Gay, Bisexual, and Transgender (LGBT) community were likewise singled out and subjected to concentration camps and death during the Nazi regime. One of the first Nazi targets was the Hirschfeld Institute of Sexual Science in Berlin, “which housed the first full archive of modern sexology, including some of the first modern lesbian, homosexual, bisexual, transgender, and intersex collections.” Heike Bauer, *The Hirschfeld Archives: Violence, Death, and Modern Queer Culture*, 92 (2017) (available at <https://www.oapen.org/search?identifier=628406>). The books, objects, and materials of the Institute were destroyed in 1933 in the first of many Nazi book burnings. *Id.* The attack on the

Institute began a period of persecution for LGBT individuals, including the forced castration of homosexual men and the incarceration of LGBT people in concentration camps. *Id.*

Unfortunately, LGBT people continue to suffer violence, sexual assault, and even death throughout the world simply because of who they are. In many countries, transgender people are particularly at risk for life-threatening violence and rape. In fact, in this case, Ms. S-H- was raped by a gang and forced to engage in sex work, based on her particular vulnerability as a transgender woman in Honduras.

In her oral decision, the immigration judge stated “it is clear from the documents that the particular social group in this case is LGBTI, or more specifically, transgender individuals in Honduras.” Immigration Judge Decision (hereinafter I.J.) at 7. Likewise, during the Merits Hearing, the judge and the DHS attorney concluded the following exchange:

[DHS] to Judge: --seems to indicate that he’s [sic] being targeted because of his [sic] transgender lifestyle and who he [sic] identifies with. Or, sorry. Identifies as. Forgive me. Obviously, being transgender would be a particular social group. I definitely think the Court would agree with that.

Judge to [DHS]: It is.

Tr. at 69: 18-24. Thus, DHS conceded that the Respondent’s transgender identity could form the basis of a cognizable particular social group.

Following *Matter of A-B-*, 27 I&N Dec. 316, 331 (A.G. 2018), and *Matter of L-E-A-*, 27 I&N Dec. 581, 583-584 (A.G. 2019), it is unclear whether “concessions” by DHS in recognizing a particular social group as viable can be upheld on appeal.¹ Because in both of those opinions

¹ In *Matter of A-B-*, the Attorney General criticized the Board for “accepting DHS’s concession that this proposed particular social group [in *Matter of A-R-C-G-*] was defined with particularity” *Matter of A-B-*, 27 I&N Dec. at 335. Likewise, in *Matter of L-E-A-*, the Attorney General chastised the Board for accepting that DHS had “stipulate[d] that the immediate family unit of the Respondent’s father qualifies as a cognizable particular social group.” *Matter of L-E-A-*, 27 I&N Dec. at 584. While amicus curiae strongly disagrees with the premise that DHS cannot stipulate to elements of the case with Respondent’s counsel, amicus acknowledges that these precedents are binding upon the Board and that as a result of these decisions every asylum seeker must present evidence on each element of the particular social group definition.

the immigration judges accepted the particular social group as cognizable, and respondents therefore did not need to provide extensive analysis on the cognizability of their proposed particular social groups, the only detailed analysis of the groups was performed on appeal by the Attorneys General.

It would not be appropriate for the Board to now engage in fact-finding in the first instance on appeal, *see Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002), and the Board has recently held that determining whether a particular social group is viable is “inherently factual,” *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018). Nonetheless, we submit this amicus brief in the event the Board intends to focus on the applicant’s particular social group formulation in this case, and to clarify for the Board why the particular social group of “transgender women in Honduras” constitutes a cognizable particular social group under the three-prong test for viability laid out in *Matter of M-E-V-G-*, 26 I&N 227, 237 (BIA 2014). This brief will therefore focus exclusively on the issue of the cognizability of the Respondent’s particular social group to assist the Board in its decision-making.

For the reasons stated in the primary brief by Respondent’s counsel, the Board should reverse the Immigration Judge’s denial of the Respondent’s application for asylum, withholding of removal, and protection under the Convention Against Torture and grant relief or remand to the immigration judge for further proceedings.

INTEREST OF AMICUS CURIAE

Pursuant to 8 C.F.R. § 1292.1(d), CLINIC submits this brief as *amicus curiae* in support of the Respondent, Ms. S-H-. CLINIC is the nation’s largest network of nonprofit immigration legal services providers, with more than 370 programs in 49 states and the District of Columbia. Agencies in CLINIC’s network employ approximately 2,300 attorneys and accredited

representatives who, in turn, serve hundreds of thousands of low-income immigrants each year. CLINIC’s promotion of the dignity and rights of immigrants is informed by Catholic Social Teaching and rooted in the Gospel value of welcoming the stranger.

CLINIC and its affiliates provide direct representation in asylum matters before the immigration court, the Board, and federal courts of appeals. CLINIC attorneys are recognized national experts on asylum-related issues, especially in analysis of particular social group issues under asylum law. CLINIC has a significant interest in the outcome of this case because the decision may hinge on the Board’s application of the definition of the particular social group definition to transgender women in Honduras and CLINIC believes its expertise in this area will help the Board in considering the case at bar and in clarifying that transgender women in Honduras comprise a cognizable particular social group under the definition of “refugee” in INA §101(a)(42).

ARGUMENT

I. Respondent’s Proposed Particular Social Group—Transgender Women In Honduras—Is Cognizable Under the Immigration and Nationality Act and Board of Immigration Appeals and Attorney General Precedent

The Refugee Act of 1980—with a commitment to human rights and humanitarian concerns—provides for grants of asylum and withholding of removal to those who meet the definition of “refugee” within the meaning of Immigration and Nationality Act (INA) §101(a)(42). The term refugee includes any individual “who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” *Id.* While Congress did not define

the meaning of “particular social group,” the Board, the Attorney General, and federal courts have provided guidance on the term’s meaning.

In *Matter of M-E-V-G-*, the Board set forth the present standard for analyzing a particular social group. “[A]n applicant for asylum or withholding of removal seeking relief based on ‘membership in a particular social group’ must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.” 26 I&N Dec. 227, 237 (BIA 2014). Within this framework, the Board and courts favor a case-by-case determination of the particular social group characteristics that qualify for asylum protection. As described below, transgender women in Honduras meet the requirements of a cognizable particular social group. Two recent decisions by attorneys general, *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) and *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019), have reiterated the need for a case-by-case review of the proposed particular social group in every asylum adjudication. This brief details why transgender women in Honduras unequivocally meet the three-prong particular social group test.

A. Transgender identity is an immutable characteristic—one which is a fundamental aspect of an individual’s identity—that can neither be changed nor expected to be changed under recognized principles of the Refugee Act of 1980.

The particular social group of transgender women in Honduras is comprised of members, who share the common immutable characteristic of having a gender identity which does not match their biological sex at birth.

The Board, in *Matter of Acosta*, first addressed immutability and established that a particular social group is comprised of members who share an innate characteristic, such as race or nationality, or characteristics one should not be required to change, like religion or political opinion. 19 I&N Dec. 211, 233 (BIA 1985). Although the Board’s standard for discerning

particular social groups later expanded to include the elements of particularity and social distinction, a common immutable characteristic remains an essential component in the particular social group analysis. *See Matter of M-E-V-G-*, 26 I&N at 237. The common characteristic defining the group “must be one that the member of the group *either* cannot change *or* should not be required to change because it is fundamental to their individual identities or consciences.” *Id.* (emphasis added) (listing gender as an immutable characteristic); *see also Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822 (BIA 1990) (recognizing homosexuality as an immutable characteristic).

Matter of M-E-V-G- incorporated the common immutable characteristic standards of *Acosta* recognizing the significant harm members of a particular social group would suffer if asked to give up their group affiliation “either because it would be virtually impossible to do so or because the basis of affiliation is fundamental to the members’ identities or consciences.” *Matter of M-E-V-G-*, 26 I&N Dec. at 233. This is consistent with the Refugee Convention’s protection of “core” human rights, the exercise of which must be free from persecution. *See* Rodger Haines, *The Intersection of Human Rights Law and Refugee Law: On or Off the Map? The Challenge of Locating Appellant S395/2002*, 3, Int’l Ass’n of Refugee Law Judges, Australia/New Zealand, Chapter Meeting, Sydney, June 9, 2004, *available at* <https://www.refugee.org.nz/Sydney04.html>. The U.S. Citizenship and Immigration Services (USCIS) Training Module on LGBTI asylum claims echoes this reasoning and identifies transgender identity as innate and fundamental, explaining:

In the case of a transgender person, he or she either cannot change or should not be required to ignore the inner feelings that his or her gender identity does not match his or her biological sex at birth. Even if these traits could somehow be changed, they are traits that are so fundamental to a person’s identity that he or she should not be required to change them.

See Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Refugee and Asylum Claims: Training Module, at 16, U.S. Citizenship and Immigration Services (Dec. 28, 2011) <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf> [hereinafter *USCIS LGBTI Guidance*].

Ms. S-H-'s internal sense of gender identity cannot be changed, and she should not be required to change as a matter of conscience, even if it would be possible for her to do so. *See Matter of Acosta*, 19 I&N Dec. at 223. The present case exemplifies how fundamental transgender identity is to transgender women like Ms. S-H-. Contrary to the odd language in the Immigration Judge's Oral Decision, which implies that gender identity might be a choice,² Ms. S-H-'s transgender identity is innate and immutable.

Ms. S-H- has identified as female since she was a child, and despite having suffered severe and repeated harm at the hands of the Honduran police and members of the M-18 gang, her transgender identity has been unwavering. *See* Tr. at 52: 1-13; Tr. at 51: 10-25, 52: 1-6. She has identified and expressed her female identity since the age of twelve. Tr. at 52: 9-13 (pointing to earlier photos where she was dressed as a female). Ms. S-H- was aware of the discrimination, stigma, and harassment associated with being transgender, yet because her identity is fundamental she cannot change it. Tr. at 52: 14-18 (answering the Immigration Judge's question about gang targeting, "they singled me out for being transgender"). In her Merits Hearing, Ms. S-H- requested the Immigration Judge to address her as female. Tr. at 35: 4-7 (answering "Yes. As a female," when the Immigration Judge asked how she would rather be addressed). In addition to her consistent identification, she also explained the importance of her transgender identity after

² I.J. at 3 (stating that "when she [Ms. S- H-] was very young, she had always *wanted* to be trans...").

her reported assault and persecution. I.J. at 3. Her identity is so fundamental to her being that she cannot change, nor should she be required to.

The American Psychological Association (APA) guidelines define “gender” as the attitudes, feelings, and behaviors that a given culture associates with a person’s biological sex. *See* American Psychological Association, Guidelines for Psychological Practice with Transgender and Gender Nonconforming People. *American Psychologist*, 70(9), 860-862 (2015), available at <https://www.apa.org/practice/guidelines/transgender.pdf> (hereinafter *Am. Psychol. Ass’n Guidelines*). “Transgender” identity refers to persons whose assigned biological sex does not match their gender identity. *Id.* “[T]rans[gender] people, like the general population, are also represented across sexualities: transgender people may identify as straight, gay, [or] bisexual.” Laurie Berg & Jenni Millbank, *Developing a Jurisprudence of Transgender Particular Social Group*, in *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* 121 (Thomas Spijkerboer ed. 2013). Sexual orientation and gender identity are thus distinct characteristics, and conflation of the two can lead to a fundamental misunderstanding of what it means to be transgender. Nonetheless, transgender people are often part of the larger community of sexual minorities which comprise the LGBT community. *See e.g., USCIS LGBTI Guidance*, at 12 (“For purposes of this module, the term “sexual minorities” and the acronym “LGBTI” are used interchangeably as umbrella terms to refer to issues involving sexual orientation, gender identity, and intersex condition.”).

A transgender individual's identity is deeply felt, and an inherent sense of their gender cannot be altered voluntarily. *See* Colt Meier & Julie Harris, *Am. Psychol. Ass’n, Fact Sheet: Gender Diversity and Transgender Identity in Children* 1, <https://www.apadivisions.org/>

division-44/ resources/advocacy/transgender-children.pdf. Transgender children, like adults, “consistently, persistently, and insistentlly” identify as a gender different than the sex they were assigned at birth. *Id.* Transgender individuals “may become aware that their gender identity is not in full alignment with sex assigned at birth in childhood, adolescence, or adulthood.” *See Am. Psychol. Ass’n Guidelines, supra* at 841. After decades of harmful attempts to force the “conversion” of transgender identity to conform with assigned birth sex,³ the World Professional Association for Transgender Health (“WPATH”) has condemned such efforts as unethical. *Id.* at 842 (APA quoting from WPATH Standards of Care). All leading U.S. medical professional organizations that have considered the issue have also explicitly rejected such “reparative” or “conversion” therapy.⁴ WPATH addresses the extreme distress a transgender individual may face as a result of the difference between a person’s gender identity and the person’s sex assigned at birth. *See* WPATH: “Standards of Care for the Health of Transsexuals, Transgender, and Gender Nonconforming People” 96 (7th version, 2011) (characterizing a diagnosis of such suffering as Gender Dysphoria). *See also* Am. Psychiatric Ass’n, *Diagnostic and Statistical manual of Mental Disorders* 451-53 (5th ed. 2013). Significantly, transgender children often

³ Substance abuse and Mental Health Servs. Admin., *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth* 13, 25 (2015), <https://store.samhsa.gov/system/files/sma15-4928.pdf>.

⁴ *See* Am. Med. Ass’n, Policy Number h-160.991, *Health Care Needs of Lesbian, Gay, Bisexual, and Transgender Populations* (rev. 2016), <https://policysearch.ama-assn.org/policyfinder/detail/Conversion%20therapy?uri=%2FAMADoc%2FHOD.xml-0-805.xml> (the American Medical Association (AMA) “opposes the use of “reparative” or “conversion” therapy for sexual orientation or gender identity”); Hilary Daniel et al., *Lesbian, Gay, Bisexual, and Transgender Health Disparities: Executive Summary of a Policy Position Paper from the American College of Physicians*, 163 *Annals Internal Med.* 135, 136 (2015) (the American College of Physicians “opposes the use of ‘conversion,’ ‘reorientation,’ or ‘reparative’ therapy for the treatment of LGBT persons”); Am. Psychoanalytic Ass’n, *Position Statement on Attempts to Change Sexual Orientation, Gender Identity, or Gender Expression* (2012) available <https://apsa.org/content/2012-position-statement-attempts-change-sexual-orientation-gender-identity-or-gender> (the American Psychoanalytic Association finds such efforts are “against fundamental principles of psychoanalytic treatment and often result in substantial psychological pain . . .”)

experience mental distress as the hormonal and anatomical changes of puberty further diverge their bodies from their gender identity. See Am. Psychol. Ass’n, *Report of the APA Task Force on Gender Identity and Gender Variance*, 45 (2008); Diane Ehrensaft, *From Gender Identity Disorder to Gender Identity Creativity True Gender Self Child Therapy*, 59 J. Homosexuality 337, 345 (2012) (for some, puberty “manifests as a sudden trauma that forces to consciousness the horror that they are living in a body that is totally at odds with the gender they know themselves to be”). It would be unconscionable to suggest a transgender person change or abandon their gender identity, subjecting them to the associated psychological trauma of hiding their fundamental identity, depriving them of the right to be free from inhuman treatment. See United Nations General Assembly, *Declaration on the Elimination of Violence Against Women: Report of the Secretary-General*, 48/104 (20 Dec. 1993) available at <https://www.ohchr.org/en/professionalinterest/pages/violenceagainstwomen.aspx> (recognizing that gender-based violence prevents one’s enjoyment of basic human rights and fundamental freedoms).

The Board should recognize Ms. S-H-’s transgender identity as a fundamental aspect of who she is under U.S. law, international law, and based on the accepted norms of health care professionals. For these reasons, Ms. S-H-’s identity as a transgender woman from Honduras is immutable or so fundamental that she should not be required to change it.

B. Transgender women in Honduras meet the requirements for particularity as defined by *Matter of M-E-V-G-*.

In addition to immutability, the Board focuses on “particularity” when it interprets the phrase “particular social group.” See *Matter of M-E-V-G-*, 26 I&N Dec. at 241. “Particularity chiefly addresses the ‘outer limits’ of a group’s boundaries and is definitional in nature.” *Id.* at 238. In order to meet the particularity requirement, “[t]he group must be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective.” *Id.* at 239;

Matter of A-B-, 27 I&N Dec. at 335; *see also Ochoa v. Gonzales*, 406 F.3d 1166, 1170-71 (9th Cir. 2005) (stating that a particular social group must be narrowly defined as opposed to a major segment of society). The defining characteristic of the particular social group of transgender women in Honduras is that its members are assigned a male gender at birth but identify as female. As described below, this group is discrete with definable boundaries, not amorphous, overbroad, diffuse, or subjective.

In *Matter of S-E-G-*, the Board defined the “particularity” requirement as “whether the proposed group 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.” 24 I&N Dec. 579, 584 (BIA 2008) (*overruled* on other grounds by *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014)); *Matter of A-B-*, 27 I&N Dec. at 330.

The term “transgender” means “persons whose gender identity, gender expression, or behavior *does not conform* to that typically associated with the sex to which they were assigned at birth.” American Psychological Association, *Answers to your questions about transgender people, gender identity, and gender expression*. available at <https://www.apa.org/topics/lgbt/transgender> (emphasis added) (last accessed Feb. 29, 2020 at 9:39 PM). Thus, transgender women are, by definition, defined with particularity in that their gender does not coincide with expectations based on biological sex assigned at birth. Although gender is a primary characteristic people use to identify and set social expectations for others, transgender individuals “do not behave in a way that conforms to traditional expectations of their gender.” Human Rights Campaign, *Transgender FAQ*, <https://www.hrc.org/resources/transgender-faq> (last accessed Mar. 10, 2020, 8:16 PM). In the “machismo” society of Honduras, “men who do not act like men face hatred and violence for their refusal to conform to normative gender

identities.” See Human Rights Watch, *Not Worth a Penny: Human Rights Abuses Against Transgender People in Honduras*, 15 (2009) [hereinafter *Human Rights Watch*] (available at <https://www.hrw.org/report/2009/05/29/not-worth-penny/human-rights-abuses-against-transgender-people-honduras>). Gender non-conformity is distinctive in Honduran society, and violence against transgender individuals who do not conform perpetuates stereotypical gender norms. *Id.*

“A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group.” *Matter of M-E-V-G-*, 26 I&N Dec. at 239; citing *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2007) (holding that wealthy Guatemalans lack the requisite particularity to be a particular social group). “It is critical that the terms used to describe the group have commonly accepted definitions in the society of which the group is a part” *Matter of A-B-*, 27 I&N Dec. at 330 (observing that the concept of wealth is too subjective to provide an adequate benchmark or defining a particular social group).

In Honduras and other Latin American countries, transgender people are often described with the term “*travesti*.” See *Human Rights Watch* at 2. “*Travesti*,” who were born biologically male at birth but identify as female, are recognized in their society as being different, and they are, therefore, extremely marginalized within their society. *Id.* at 2, 16. For example, many transgender women in Honduras have a difficult time accessing basic goods, services, and even education. *Id.* at 16. There is also a pervasive difficulty in finding and keeping a job when a transgender woman wishes to live her true identity. *Id.*

Transgender women in Honduras comprise a discrete and definable segment of the population and are therefore unlike the type of diffuse group that have not been found to evince the required “particularity” such as “persons resistant to gang violence” as in *Costanza v. Holder*,

647 F.3d 749, 753-54 (8th Cir. 2011). While it is not known exactly how many people identify as transgender in Honduras, in the United States it is estimated that anywhere from 0.3% to 0.6% of the adult population identify as transgender. See Gary G. Gates, *How Many People Are Gay, Lesbian, Bisexual, or Transgender?*, The Williams Institute (April 2011) <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>. (estimating 0.3 percent of adults identify as transgender); Jan Hoffman, *Estimate of U.S. Transgender Population Doubles to 1.4 Million Adults*, The New York Times (June 30, 2016) <https://www.nytimes.com/2016/07/01/health/transgender-population.html>. (estimating 0.6 percent of adults identify as transgender).

The particular social group consisting of transgender women in Honduras, is an individualized, yet objectively perceived one. “Since *Acosta*, the Board has emphasized that a ‘particular social group’ must be particular and socially distinct in the society at question, which itself requires a fact-specific inquiry based on the evidence in a particular case.” *Matter of L-E-A-*, 27 I&N at 591.

The Honduran government has recognized transgender women as a group that is defined with particularity and that is often subject to mistreatment. See Amnesty International, *No Safe Place: Salvadorans, Guatemalans, and Hondurans Seeking Asylum in Mexico Based on their Sexual Orientation and/or Gender Identity*, (November 2017) <https://www.amnestyusa.org/wp-content/uploads/2017/11/No-Safe-Place-Briefing-ENG-1.pdf>. Social discrimination against LGBT persons is common in Honduras. See U.S. Dep’t of State, Bureau of Democracy, Human Rights, and Labor, *Honduras Country Report on Human Rights Practices – 2018* at page 20-21, available at <https://www.state.gov/wpcontent/uploads/2019/03/HONDURAS-2018.pdf>. Further, police still use parts of Honduran law to harass and arbitrarily arrest transgender women,

Id., or, in the case of Ms. S-H-, to beat her and extort her for money from forced prostitution. Tr. at 51: 22-24; 52: 1-18.

The particular social group of “transgender women in Honduras” is defined with particularity, limited in scope, and objective in nature, rather than dependent on individual perception. *Matter of A- M- E- & J- G- U*, 24 I&N Dec. 69, 76 (BIA 2007), *modified on other grounds by Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014). For these reasons, Ms. S-H-’s identity as a transgender woman from Honduras meets the “particularity” requirement for the cognizability of her particular social group.

C. Transgender women in Honduras are socially distinct, as they are perceived by Honduran society as a distinctive identifiable group.

Transgender women are considered a distinct social group in Honduran society under the *M-E-V-G* analysis. In *Matter of M-E-V-G-*, the Board explains that the social distinction prong of the particular social group test “considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it.” 26 I&N Dec. at 238. The Attorney General reiterated this rule in *Matter of A-B-*, adding “[m]embers of a particular social group will generally understand their own affiliation with that group, as will other people in their country. 27 I&N Dec. at 330 (citing *M-E-V-G-*). To be socially distinct, a particular social group ‘must be perceived as a group by society.’” *Matter of A-B-* at 330. *See also, Matter of E-A-G-* 24 I&N Dec. 591, 594 (BIA 2008). (“the extent to which members of a society perceive those with the characteristic in question as members of a social group—is of particular importance in determining whether an alien is a member of a claimed particular social group.”)

Social distinction cannot be defined by the perceptions of the persecutor alone, rather the group must be distinct in the society in general. *Matter of M-E-V-G-*, 26 I&N Dec. at 242. The social group must be visible to the particular society, meaning the society is aware of the group's existence and perceives it as meaningfully "distinct" or "other." *Id.* at 242, 244. To be socially distinct, the group must be set apart in some significant way, which may typically be established through "country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like." *Id.* at 244. The court in *Matter of W-G-R-* determined that, "although the society in question need not be able to easily identify who is a member of the group, it must be commonly recognized that the shared characteristic is one that defines the group." 26 I&N Dec. at 218.

The Honduran government⁵ recognized that transgender individuals are considered socially distinct in Honduran Society when it ratified the Organization of American States' (OAS) Resolution on Human Rights, Sexual Orientation, and Gender Identity, purporting to condemn the widespread human rights abuses LGBT people. *See Human Rights, Sexual Orientation, and Gender Identity AG/Res. 2721*, Organization of American States, (adopted June 4, 2012) available at <https://www.oas.org/en/iachr/lgtbi/docs/GA%20Res%20%202721.pdf>. Yet, despite this recognition, Honduras has not actually combatted violence against LGBT persons or protected them. Instead, the police continue to abuse and harass LGBT persons. *See 2018*

⁵ The U.S. government has also recognized transgender individuals a forming a distinct group. DHS has established an immigration detention center specifically for transgender immigrant detainees. If the U.S. government is able to ascertain who falls within the category of transgender individuals for purposes of detention, then this group must be socially distinct. *See Exclusive: Serious Health Care Lapses Found in U.S. Detention Center Housing Transgender Migrants*, THE NEW YORK TIMES, Mar. 2, 2020, <https://www.nytimes.com/reuters/2020/03/02/us/02reuters-usa-immigration-transgender-exclusive.html>. Similarly, in a recent prisoner complaint lawsuit, a 9th Circuit Magistrate Judge pointed out, "transgender individuals can be discretely defined based on the disparity between the gender they identify with and the traditional gender associated with their birth sex.." *Crowder v. Diaz*, No. 2:17-CV-1657-TLN-DMC, 2019 WL 3892300, at *14 (E.D. Cal. Aug. 19, 2019), report and recommendation adopted₂, No. 217CV01657TLN-DMC, 2019 WL 5566433 (E.D. Cal. Oct. 29, 2019).

Honduras Country Report at page 20. Transgender people are constant victims of violence at the hands of police and within Honduran society. *See Human Rights Watch* at 9. The harm they suffer at the hands of the police and others further marks transgender women as “distinct” and “other” within Honduran society. *Id.*

Having a unique, distinctive identity, transgender women face grave persecution for being who they are. The USCIS’s *Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex Refugee and Asylum Claims Training Manual* states that “transgender individuals... may be viewed as transgressing societal norms more than gay men or lesbians... [and] may be subject to increased discrimination and persecution.” *USCIS LGBTI Guidance* at 24. Furthermore, the guidance states that because LGBTI people are often perceived as undermining gender norms, they have a heightened risk for sexual violence. *Id.* at 21.

In Honduran society, transgender women are considered socially distinct, and, for that, they are persecuted. The U.S. State Department emphasized in its 2018 Honduras Human Rights Report that members of the LGBT community are treated differently—that is distinctly—from others in Honduras. *2018 Honduras Country Report* at 1. That Report specifies that “[t]ransgender women were particularly vulnerable to employment and education discrimination; many could find employment only as sex workers, substantially increasing their risk of violence. Transgender individuals noted their inability to update identity documents to reflect their gender identity.” *Id.* at 21. While this 2018 Report does not provide details regarding the “risk of violence” faced by transgender women in Honduras, substantial information is available from other reliable sources.

Between 2009 and 2019 at least 350 LGBT people were murdered in Honduras, including 111 transgender individuals. *See Alert PBI Honduras: January 2020, Peace Brigades*

International. <https://pbi-honduras.org/publications/alerts-and-statements>. Among that number, ninety-five percent of crimes against the Honduran LGBT population go unpunished. *Id.*; *See also Conadeh: El 95% de crímenes contra personas LGBTI en Honduras están en la impunidad*, La Tribuna, available at <https://www.latribuna.hn/2018/05/17/conadeh-95-crimenes-personas-lgtbi-honduras-estan-la-impunidad/>. These unpunished murders are usually tainted by prejudices based on the sexual orientation, gender identity, and gender expression of the victims. Inter-Am. Comm'n H.R., *Situation of Human Rights in Honduras*, OEA/Ser.L/V/II, December 31, 2015, par. 137. Inadequate investigation and adjudication render victims without the justice they deserve, sending a message that there are no consequences for those who perpetuate violence against LGBT persons. *See* Amnesty International, Honduras, *Submission to the United Nations Human Rights Committee*, 120th Session, 3-27 July 2017 (July 2017).

Transgender women in Honduras are not only recognized as a distinct social group by the people who persecute them, and by the general public which disapproves of them. They are also recognized as a distinct group by each other and by their friends. In her merits hearing, Ms. S-H- described herself and other transgender women based on their transgender identity and distinguished transgender women from the other women she knew. Tr. 51: 22-25; 52:1-6; 65:25; 66:1-2. (She self-identifies as transgender when recounting police mistreatment of herself and other members of her particular social group, stating “Because there are several of us. There are several of us Transgenders. And I include myself.”); Tr. at 52: 1-2; I.J. at 4. (Ms. S-H- “did testify as to being transgender” and “that she and other transgender individuals needed to pay” police, who expect it because they are corrupt); *see also* Tr. at 51 22-24 (“Because for us the police is corrupt. If we didn’t pay, they would beat us. They would beat us. They would mistreat us and they would run us out of the place where we were working.”)

In Honduras, there are a few organizations that work on transgender rights, including LGBT Association Arcoiris, Cozumel Trans, CATTRACHAS, and Colectivo Unidad Color Rosa; however, the activists from these organizations are targets of assaults, harassment, threats, and assassination. *See* Mirte Postema, *Amidst Violence, Hondurans March for Pride*, Human Rights Watch, available at <https://www.hrw.org/news/2019/09/09/amidst-violence-hondurans-march-pride#>. In January 2020, two transgender rights activists were shot at while traveling home. *Alert PBI Honduras: January 2020*. In 2019, one transgender rights defender was assassinated. *Id.* The existence of these organizations and the direct targeting of trans-activists further highlights transgender individuals as distinct, and as targeted for persecution, in Honduran society.

The Inter-American Commission on Human Rights (IACHR) has determined that in Honduras violence against LGBT people is widespread and constitutes a clear human rights violation. O.A.S., *IACHR Has Concluded its Visit to Honduras and Presents its Preliminary Observations*, (August 3, 2018) https://www.oas.org/en/iachr/media_center/PReleases/2018/171.asp. In addition to recognition by the IACHR, the United Nations High Commissioner for Refugees (UNCHR), and the U.S. State Department, that transgender individuals are subject to severe private threats and violence in Honduras, the 2018 State Department Report points out that LGBT human rights organizations allege the Military Police for Public Order and other security forces have harassed and abused LGBT persons. *2018 Honduras Country Report* at 22. This is consistent with the account of Ms. S-H- regarding the extortion and other abuses she faced at the hands of law enforcement and other officials. Tr. at 51: 22-24; 52: 1-18

The IACHR recently issued a report on the merits in the case of Vicky Hernández, a transgender woman who was murdered and left on the street during the 2009 coup d'état by

security forces personnel. Inter-Am. Comm'n H.R., *Report No. 157/18, Case 13.051*, Merits, Vicky Hernández and Family Honduras, December 7, 2018. The IACHR determined that Honduras violated multiple Articles of the American Convention of Human Rights regarding Ms. Hernández's murder. *Id.* This violation includes the fact that the State refused to fully investigate her death, having not even registered her death in the National Civil Records Office until 2013, due to their prejudicial views on transgender women. *Id.* at 2. Vicky Hernández's death was the result of extreme prejudice against her for being transgender. Hers is just one highly publicized example of what can happen to any transgender woman in Honduras, especially if she lives openly as transgender. The IACHR also found that "the Honduran government was aware of the existence of the context of historical discrimination against LGBT people, particularly against trans persons, which has resulted in violence motivated by prejudice in Honduras, as has been documented over the past several years by civil society organizations and by the United Nations." *Id.* para. 76.

While a group's "social distinction" should not be based solely on the perception of a particular persecutor, *Matter of M-E-V-G-*, 26 I&N Dec. at 242, hundreds of murders and other incidences of persecution against a group, such as transgender women in Honduras, constitutes evidence that transgender women are perceived as "distinct" or "other" within Honduran society in general. That social distinction also is demonstrated through the mistreatment of transgender individuals by local police, Military Police for Public Order, and members of the public ministry. Although their work is limited by the threats, harassment, and murder they have encountered, the existence of local non-governmental organizations working on transgender rights, also indicates recognition of transgender individuals as a "discrete" group in Honduras.

II. The Ninth Circuit Court of Appeals Has Long Recognized Transgender Identity as a Particular Social Group Under the Refugee Definition

Building off of Board precedent in *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822 (BIA 1990), *adopted as precedent in all future proceedings*, Att’y Gen. Order. No. 1895-94 (June 19, 1994), finding gay men to constitute a particular social group, federal courts of appeals have recognized transgender women as a particular social group for two decades. Twenty years ago, the Ninth Circuit Court of Appeals, the circuit in which this case arises, issued a landmark decision, *Hernandez-Montiel v. INS*, 225 F.3d at 1094 . In *Hernandez-Montiel v. INS*, the Ninth Circuit granted relief to a transgender Mexican woman escaping persecution, recognizing “gay men with female sexual identities in Mexico” as a cognizable social group. Thereafter, the Ninth Circuit has consistently found transgender identity to be a protected characteristic for purposes of asylum and related relief. *See Medina v. Sessions*, 734 F. App’x 479, 482 (9th Cir. 2018) (unpublished)(remanding where “the BIA erred because it failed to consider Flores’s transgender identity”); *Ramos v. Lynch*, 636 F. App’x 710, 711 (9th Cir. 2016), (unpublished) as amended (Feb. 18, 2016)(remanding case because the immigration judge “improperly conflated Ramos’s gender identity and sexual orientation.”); *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, at 1082 (9th Cir. 2015)(remanding case because “the unique identities and vulnerabilities of transgender individuals must be considered in evaluating a transgender applicant’s asylum, withholding of removal, or CAT claim.”); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, at 1054 (9th Cir. 2006) (recognizing an applicant’s homosexuality and her “female sexual identity.”); *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 785 (9th Cir. 2004) (recognizing a transgender female from El Salvador as having a “deep female identity”).

The Ninth Circuit, in *Avendano-Hernandez*, acknowledged the particular and distinct harm faced by transgender women, regardless of their sexual orientation. *See Avendano-*

Hernandez, 800 F.3d at 1081. While the Court found her ineligible for withholding of removal based on her commission of a particularly serious crime, it remanded the case to the Board for further consideration of her claim for protection under the Convention against Torture. In its decision, the 9th Circuit addressed the complex interplay between gender identity and sexual orientation, recognizing that the two are distinct, and that “transgender persons are often especially visible, and vulnerable to harassment and persecution due to their often public nonconformance with normative gender roles.” *Id.* (citing DHS guidelines designed to protect transgender individuals held in immigration detention). *Id.* n. 4. The court concluded that the “unique identities and vulnerabilities of transgender individuals must be considered in evaluating a transgender applicant’s asylum, withholding of removal or CAT claim.” *Id.* at 1082.

The unique inquiry required in cases involving transgender applicants calls for clear recognition of transgender identity as an independent basis for a cognizable particular social group. This case arises in the Ninth Circuit Court of Appeals and the Board must follow longstanding, binding precedent which recognizes transgender identity as a particular social group. While earlier cases articulated transgender identity differently, including as “gay men with female sexual identities,” *see Hernandez-Montiel*, 225 F.3d at 1094, individuals, like Ms. S-H-, who were assigned a different gender at birth from the one with which they identify, are entitled to protection from persecution and torture based on this fundamental element of their identity.

Likewise, the United Nations High Commissioner for Refugees (UNHCR), has recognized transgender identity as forming a basis for asylum protection. “[D]epending on the particular circumstances of the case, UNCHR considers that individuals of diverse sexual orientations and/or gender identities may be in need of international refugee protection on the

basis of their membership of a particular social group” and it recognizes that transgender women may be at particular risk of violence. *UNHCR’s Views on Asylum Claims based on Sexual Orientation and/or Gender Identity Using international law to support claims from LGBTI individuals seeking protection in the U.S.*, UNHCR Asylum Lawyers Project, November 2016, <https://www.unhcr.org/5829e36f4.pdf>. Additionally, the UNHCR urges that “[i]t is important to ensure that LGBTI asylum-seekers are afforded access to a fair and efficient assessment of their claims for refugee status and that their dignity is upheld throughout the refugee status determination.” See UNHCR, *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR’s Efforts to Protect Lesbian, Gay, Bisexual, Transgender and Intersex Asylum Seekers and Refugees* 37 (2015).

CONCLUSION

Pope Francis has compared governments that have spoken out against homosexuality to the Nazi regime stating, “With the persecution of Jews, gypsies, and people with homosexual tendencies, today these actions are typical (and) represent ‘par excellence’ a culture of waste and hate. That is what was done in those days and today it is happening again.” Philip Pullella, *Pope Compares Politicians Who Rage Against Gays to Hitler*, REUTERS WORLD NEWS, Nov. 15, 2019, <https://www.reuters.com/article/us-pope-lgbt-hitler/pope-compares-politicians-who-rage-against-gays-to-hitler-idUSKBN1XP1MM>. It is precisely this type of harm—based on fundamental identity—from which the U.S. asylum system was created to provide protection. It would be legally and morally wrong for the United States to back away from its obligations to provide protections to LGBT people. Transgender women in Honduras clearly comprise a cognizable particular social group, and Ms. S-H-’s case for asylum should be granted.

Respectfully submitted this 11th day of March 2020,

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CERTIFICATE OF SERVICE

I, Scott Titshaw, certify that on March 11, 2020, I mailed via UPS a true and complete copy of this Brief of CLINIC as *Amicus Curiae* in Support of Respondent and any attached pages to the following addresses:

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