



**Practice Advisory:
Considerations in Asylum Claims for Transgender People¹
June 2, 2025**

I. Introduction

Asylum claims based on gender identity are clearly established by decades of law in the United States, and transgender asylum seekers have long been successful in claims for humanitarian protection. The authors are legal service providers who regularly represent LGBTQ² people seeking asylum. Due to recent transphobic Executive Orders³ that attempt to illegally strip rights

¹ This practice advisory was written by Immigration Equality, the National Immigration Project, Oasis Legal Services, and the National Immigrant Justice Center.

² We use “LGBTQ” as an umbrella term for people with diverse sexual orientations or gender identities, including people who identify as gay, lesbian, bisexual, transgender, queer, intersex, asexual, non-binary, and gender non-conforming. Nonetheless, the focus of this practice advisory is on transgender claims and claims that overlap with trans identity.

³ See [Exec. Order No. 14,168](#), “Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government,” 90 Fed. Reg. 8615 (Jan. 20, 2025) (hereinafter the “Anti-Trans Executive Order”); see also [Exec. Order 14,183](#), “Prioritizing Military Excellence and Readiness,” 90 Fed. Reg. 8757 (Jan. 27, 2025); [Exec. Order 14,201](#), “Keeping Men Out of Women’s Sports,” 90 Fed. Reg. 9279 (Feb. 5, 2025). While all three of these

away from transgender⁴ people, we are concerned that the Trump administration may also seek to illegally limit asylum claims for trans people. However, as discussed herein, asylum claims based on gender identity are clearly cognizable under the Immigration and Nationality Act (“INA”), settled case law, administrative guidance, and international standards.

That said, given the Trump administration’s aggressive targeting of the transgender community, practitioners should take practical steps to anticipate any efforts to undermine trans asylum claims. Below we:

- 1) briefly outline the legal framework for transgender asylum claims,
- 2) provide practical advice on how to articulate protected grounds,
- 3) address common one-year filing deadline issues, and
- 4) provide guidance on how to answer questions related to names and sex⁵ on application forms.

There are other elements an asylum seeker must prove to prevail on their claim. This practice advisory does not address those other elements which include, persecution, nexus, government involvement or inability or unwillingness to protect, and bars to asylum (other than the one-year filing deadline). Instead, this practice advisory focuses only on the elements of asylum most likely to be affected by the Anti-Trans Executive Order. Before filing for relief, asylum seekers and their counsel must determine whether the applicant meets all of the other elements of asylum.⁶

II. Legal Framework of the Protected Characteristic

To be eligible for asylum, an applicant must meet the definition of a refugee set forth in the INA:

Any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person habitually resided, and who is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-

executive orders seek to normalize discrimination and infringe on the rights of trans people, this practice advisory will primarily cite to the Anti-Trans Executive Order, which is most relevant to the issues discussed herein.

⁴ For simplicity, throughout this memo, we use “transgender” and “trans” as umbrella terms to describe transgender women/girls, transgender men/boys, nonbinary individuals (i.e., people who may identify as a gender other than a woman/girl or a man/boy), and any individual who articulates a gender identity different from societal expectations based on their sex assigned at birth.

⁵ We refer to sex here because USCIS recently updated its [policy manual](#) and various immigration forms to remove the term gender and replace it with sex pursuant to the Anti-Trans Executive Order. See Section VI.b below for guidance on how to approach answering questions about an applicant’s “sex.”

⁶ For general information on LGBTQ asylum, see, Immigration Equality’s website at <https://immigrationequality.org/legal/legal-help/asylum/>.

founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁷

Most asylum claims brought by transgender people are based on the applicant's membership in a particular social group (or "PSG"), although there are sometimes overlapping protected grounds, such as political opinion and religion.

a. Particular Social Group

In order to prove a well-founded fear of persecution based on membership in a PSG, an applicant must establish that: (1) they are a member, or perceived member, of the group, (2) that the past or feared persecution is on account of the membership in the group,⁸ and (3) that the group is "cognizable."⁹ Pursuant to the governing legal standards, to be legally cognizable, PSGs must be:

- (1) composed of members who share a common immutable characteristic,¹⁰
- (2) defined with particularity, and
- (3) socially distinct within the society in question.¹¹

The current controlling cases discussing PSGs are the companion decisions of *Matter of M-E-V-G-* and *Matter of W-G-R-*.¹² Every circuit to have ruled on the issue, except for the Seventh Circuit, has upheld the three-prong test.¹³

Case law requires adjudicators to engage in a case-by-case analysis of a proposed PSG's cognizability.¹⁴ Nonetheless, since early precedent-setting decisions in *Matter of Toboso-Alfonso*¹⁵ and *Hernandez-Montiel v. INS*,¹⁶ LGBTQ-based social groups have routinely been deemed cognizable and such PSGs have rarely been challenged.

⁷ Immigration and Nationality Act (INA) § 101(a)(42), 8 U.S.C. § 1101(a)(42).

⁸ Pursuant to INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i), which codified the Real ID Act, the applicant must demonstrate that the protected characteristic "was or will be at least one central reason for persecuting the applicant."

⁹ See, e.g., *Lwin v. INS*, 144 F.3d 505, 510 (7th Cir. 1998).

¹⁰ The term "immutable" has been interpreted since *Matter of Acosta*, to encompass characteristics "that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 231 (BIA 2014), citing *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985).

¹¹ *Matter of M-E-V-G-*, 26 I&N Dec. at 237.

¹² *Id.*; *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014).

¹³ The Seventh Circuit continues to apply the test set forth in *Matter of Acosta* without the additional requirements of particularity and social distinction. See, e.g., *Cece v. Holder*, 733 F.3d 662, 669 (7th Cir. 2013).

¹⁴ E.g., *Matter of M-E-V-G-*, 26 I&N Dec. at 237, 242, 251.

¹⁵ *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822 (BIA 1990).

¹⁶ *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005), *vacated*, 547 U.S. 1613 (2006).

i. Common, immutable characteristic

The test for determining whether a characteristic is immutable under U.S. asylum law was originally articulated in *Matter of Acosta* where the Board of Immigration Appeals (the “Board”) explained that:

The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership.... [W]hatever the common characteristic... it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.¹⁷

Although the Board later added two more requirements for PSG cognizability—particularity and social distinction—a common immutable characteristic remains an essential prong in the analysis.

ii. Trans identity is an immutable and fundamental characteristic under well-settled law and agency guidance

Since 1994, when Attorney General Janet Reno designated *Matter of Toboso-Alfonso* as precedent, there have been scores of federal court decisions recognizing trans and other LGBTQ identities as PSGs.¹⁸ However, few of these cases contain analysis of the immutable and fundamental nature of gender identity or sexual orientation—most likely because the proposition is so self-evident.

Given that transgender identity is a widely accepted PSG, many advocates have not included analysis of the immutable/fundamental characteristic prong in legal arguments beyond perhaps a citation to a precedential case and/or agency guidance. While this is understandable given that immutability has not generally been challenged, the authors now strongly recommend including an analysis in line with the court’s reasoning in *Hernandez-Montiel*, one of the few cases to analyze the issue, in order to counter any arguments that the government may make challenging immutability.

¹⁷ *Matter of Acosta*, 19 I&N Dec. at 211, 233.

¹⁸ E.g., *Matter of Toboso-Alfonso*, 20 I&N Dec. at 822 (recognizing “homosexuality” as an immutable characteristic); see also, e.g., *Matter of C–G–T–*, 28 I&N Dec. 740, 745 (BIA 2023) (“[s]exual orientation, like other protected grounds, is ‘a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.’” (quoting *Matter of Acosta*, 19 I&N Dec. at 212); *Matter of M–E–V–G–*, 26 I&N Dec. at 240, 243, 245 (recognizing sexual orientation as an immutable or fundamental characteristic); *Cece v. Holder*, 733 F.3d 662, 669 (7th Cir. 2013) (same); *Hernandez-Montiel*, 225 F.3d at 1093 (“sexual identity is immutable because it is inherent in [petitioner’s] identity; in any event, [petitioner] should not be required to change it”).

In 2000, relying on the reasoning in *Toboso-Alfonso*,¹⁹ the Ninth Circuit decided *Hernandez-Montiel v. INS*, the first federal precedential case involving gender identity.²⁰ In the decision below, the immigration judge (“IJ”) denied Hernandez-Montiel’s asylum claim on the grounds that “homosexual males who wish to dress as a woman” do not constitute a PSG.²¹ The Board then denied the appeal holding that Hernandez-Montiel did not meet the burden of “establishing that the abuse he suffered was because of his membership in a particular social group,” which the Board articulated as “homosexual males who dress as females.”²² The Board found that persecution was not established on the basis of Hernandez Montiel’s “homosexuality,” but on the “basis of the way he dressed.”²³ The Board reasoned that the “tenor of [Hernandez-Montiel]’s claim is that he was mistreated because of the way he dressed (as a male prostitute) and not because he is a homosexual,” and found that Hernandez-Montiel failed to show that “his decision to dress as a female was an immutable characteristic.”²⁴

The Ninth Circuit overturned the Board’s decision, holding that “gay men with female sexual identities in Mexico constitute a ‘particular social group.’”²⁵ The panel rejected the argument that the petitioner’s female identity was volitional, concluding that the petitioner’s “female sexual identity is immutable because it is inherent in his identity” and “in any event, he should not be required to change it.”²⁶ The panel cited to social and behavioral science to support its finding that “sexual orientation and sexual identity are immutable” and that “they are so fundamental to one’s identity that a person should not be required to abandon them.”²⁷

In the decades since, the fundamental, immutable nature of transgender identity has been recognized by immigration courts through the grant of asylum and withholding of removal in innumerable cases. Appellate courts addressing trans asylum claims have implicitly accepted transgender identity as a cognizable particular social group, while addressing other elements on appeal, such as nexus to past harm, or whether the applicant can establish a pattern and practice of persecution against transgender people in the applicant’s country of origin.²⁸

¹⁹ In *Matter of Toboso-Alfonso*, the Board found that “homosexuals” are members of a particular social group for purposes of asylum and withholding of removal. Notably, the government did not challenge “the Immigration Judge’s finding that homosexuality is an ‘immutable’ characteristic.” *Matter of Toboso-Alfonso*, 20 I&N Dec. at 822.

²⁰ *Hernandez-Montiel*, 225 F.3d at 1093 (recognizing sexual identity as immutable).

²¹ *Id.* at 1089.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 1089-90.

²⁵ *Id.* at 1087. The language used to describe transgender applicants has evolved since the decision in *Hernandez-Montiel* and is more in line with the current terminology used by the LGBTQ and social and medical science communities, and society at large. Compare *Hernandez-Montiel*, 225 F.3d at 1087 (“gay men with female sexual identities in Mexico”) and *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 785 (9th Cir. 2004) (“homosexual male with a female sexual identity”) with *Santos-Zacaria v. Garland*, 126 F.4th 363, 366 (5th Cir. 2025) (“transgender woman attracted to men”).

²⁶ *Hernandez-Montiel*, 225 F.3d at 1087.

²⁷ *Id.* at 1093-94.

²⁸ See, e.g., *Santos-Zacaria v. Garland*, 126 F.4th 363, 366 (5th Cir. Jan. 14, 2025) (acknowledging an applicant’s “transgender identity” constitutes membership in a particular social group); *Alvarez-Rodriguez v. Garland*, 89 F.4th

USCIS agency guidance has also long recognized the fundamental and immutable nature of gender identity. The USCIS asylum office training module on LGBTI claims, first published in 2011, and subsequently updated,²⁹ cites to *Hernandez-Montiel* for the proposition that transgender PSGs are cognizable specifically stating that:

Sexual orientation, gender identity, and having an intersex condition can be classified as immutable. They are characteristics that an individual cannot change about him or herself or should not be required to change. Even if these traits can 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.³⁰

754 (9th Cir. 2023) (finding a transgender woman living with HIV to be prima facie eligible for withholding of removal); *Aguilar v. Garland*, 29 F.4th 1208 (10th Cir. 2022) (finding a pattern and practice of persecution against transgender women in Honduras); *K.Y. v. United States Att'y Gen.*, 43 F.4th 1175, 1182–83 (11th Cir. 2022) (considering whether a transgender woman would face torture in Guyana on account of her transgender status); *Doe v. Att'y Gen. of the United States*, 956 F.3d 135, 142 (3d Cir. 2020) (positively citing *Hernandez-Montiel* for the proposition “that transgender individuals may be classified into a ‘particular social group’”); *Jeune v. United States Att'y Gen.*, 810 F.3d 792, 802–03 (11th Cir. 2016) (noting that that while petitioner forfeited the argument below, acknowledges petitioner could have argued transgender status as a PSG); *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1075 (9th Cir. 2015) (noting an immigration judge and the BIA wrongly conflated transgender identity and sexual orientation and granting CAT relief to a transgender woman); *Pangilinan v. Holder*, 568 F.3d 708, 710 (9th Cir. 2009) (remanding the case of a *pro se* transgender applicant because she was not given opportunity to properly describe past persecution as a transgender person); *Morales v. Gonzalez*, 472 F.3d 689 (9th Cir. 2007) (noting the immigration judge properly found transgender woman could be eligible for asylum and remanding for reconsideration); *Ornelas Chavez v. Gonzalez*, 458 F.3d 1052 (9th Cir. 2006) (noting under *Hernandez-Montiel* “female sexual identity” can constitute a particular social group); see also *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 612–13 (4th Cir. 2020) (trans discrimination case finding “transgender people constitute a discrete group with immutable characteristics . . . being transgender is not a choice. Rather, it is as natural and immutable as being cisgender”); *Talbott v. Trump*, No. 1:25-cv-00240, 54 (D.D.C. Jan. 18, 2025) (order granting preliminary injunction) (case involving trans military ban finding “transgender persons constitute a discrete group with immutable characteristics”). But see *L. W. v. Skrmetti*, 73 F.4th 408, 34 (6th Cir. 2023) (granting emergency motion for stay of preliminary injunction pending appeal) (in non-immigration, discrimination context finding “[i]t is difficult to see, at least at this stage of the case, how transgender [people]” “exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group.”).

²⁹ USCIS, [RAIO Directorate Combined Training Course: Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, And Intersex \(LGBTI\) Refugee and Asylum Claims](#) (2019), 16 [hereinafter 2019 Training Module]. It is unclear whether USCIS is still using any version of the training module as guidance for asylum and refugee officers. The authors believe that the training module was last updated in 2019 and, until recently, the 2019 version was accessible on the USCIS website. However, it appears to have been removed. The 2011 version of the training module is still available [here](#) on the USCIS website. While the 2019 Training Module was issued by USCIS and is, therefore, not binding on immigration judges, it has still provided persuasive authority which practitioners can cite in immigration court. Further, even without citing directly to the 2019 Training Module, its reasoning is useful.

³⁰ *Id.* at 16.

iii. Medical and social science conclude that transgender identities are fundamental and immutable.

As noted above, the court in *Hernandez-Montiel* relied on social and behavioral science evidence to support the fact that “sexual orientation and sexual identity are immutable” characteristics.³¹ A review of current social and medical science summarized briefly below compels the same conclusion. Since transgender identity has been generally accepted as a PSG for many years, it may not have been previously necessary to include this type of evidence to prove the existence and/or immutability of specific gender identities. Given the language of the Anti-Trans Executive Order, however, practitioners should consider how to counter arguments that the government may raise that transgender identity is not immutable or fundamental, including through the use of medical and social science evidence.

The term “gender identity” is a well-established concept in medical and social science and refers to a person’s basic internal sense of being a man, woman, and/or another gender.³² Transgender identity refers to people whose “sex assigned at birth does not match their gender identity.”³³ Transgender individuals have “a deeply felt, inherent sense of their gender,” which

³¹ *Hernandez-Montiel*, 225 F.3d at 1093.

³² See AM. MED. ASS’N, [Issue Brief: Sex and gender in medical education](#) (May 2023) (describing gender identity as “someone’s inner sense of being a woman, a man, another gender or genders, or no gender at all”); AM. PSYCHOL. ASS’N, [Understanding transgender people, gender identity, and gender expression](#) (July 2024) (describing gender identity as “a person’s internal sense of being male, female or something else”); THE AM. ACADEMY OF PEDIATRICS, [Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents](#) (October 2018) (defining gender identity as “[a] person’s deep internal sense of being female, male, a combination of both, somewhere in between, or neither, resulting from a multifaceted interaction of biological traits, environmental factors, self-understanding, and cultural expectations.”); U.N. HIGH COMM’R FOR REFUGEES, [Protecting Persons with Diverse Sexual Orientations and Gender Identities](#) (Dec. 2015) (“[t]ransgender describes people whose gender identity and/or gender expression differs from the sex they were assigned at birth.”); WORLD HEALTH ORG., [Gender and health](#) (“[g]ender identity refers to a person’s deeply felt, internal and individual experience of gender, which may or may not correspond to the person’s physiology or designated sex at birth.”). See also “Gender Identity,” *Merriam-Webster’s Unabridged Dictionary* (online ed.) (“a person’s internal sense of being male, female, some combination of male and female, or neither male nor female”).

³³ See AM. MED. ASS’N, [Issue Brief: Sex and gender in medical education](#) (May 2023) (describing someone as transgender when “they identify their gender as fully or partially different from the sex category they were assigned at birth”); AM. PSYCHOL. ASS’N, [Understanding transgender people, gender identity, and gender expression](#) (July 2024) (“[t]ransgender is an umbrella term for 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”); THE AM. ACADEMY OF PEDIATRICS, [Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents](#) (October 2018) (defining transgender as when a person’s “gender identity does not match their assigned sex and generally remains persistent, consistent, and insistent over time”); U.N. HIGH COMM’R FOR REFUGEES, [Protecting Persons with Diverse Sexual Orientations and Gender Identities](#) (Dec. 2015) (“[t]ransgender describes people whose gender identity and/or gender expression differs from the sex they were assigned at birth.”); WORLD HEALTH ORG., [Gender and health](#) (describing transgender as “an umbrella term for people whose gender identity and expression does not conform to the norms and expectations traditionally associated with the sex assigned to them at birth”). See also “Transgender,” *Merriam-Webster’s Unabridged Dictionary* (online ed.) (“of, or relating to, or being a person whose gender identity differs from the sex the person was identified as having at birth”); “Transgender,” *Black’s Law Dictionary* (12th ed. 2024) (“[a] person whose physical sex at birth differs from the sex

“cannot be altered voluntarily.”³⁴ “Empirical evidence has demonstrated that trans and non-binary gender identities are normal variations of human identity and expression,” and “[e]very major medical association in the United States recognizes the medical necessity of transition-related care for improving the physical and mental health of transgender people.”³⁵ Studies show that there is likely a biological component to transgender identity which also evidences the immutable nature of the characteristic.³⁶

Transgender people often face extreme distress when their gender identity does not match their sex assigned at birth, a diagnosis known as gender dysphoria.³⁷ Significantly, forcing a transgender person to change or abandon their gender identity subjects them to psychological trauma, resulting in greater instances of severe psychological distress, suicidal ideation, and suicide attempts.³⁸ It can also lead to higher rates of depression and anxiety disorder.³⁹ Conversely, access to support and gender affirming care results in dramatically positive health outcomes.⁴⁰

with which the person later identifies”). In the January 20, 2025, Executive Order, the Trump administration recognized gender identity as distinct from sex defining it as “a fully internal and subjective sense of self, disconnected from biological reality and sex and existing on an infinite continuum, that does not provide a meaningful basis for identification and cannot be recognized as a replacement for sex.” While recognizing gender identity, the definition provided by the Trump administration is an outlier and a departure from the widely used and accepted definitions used by virtually all leading medical and social scientists as well common dictionary definitions set forth above. Notably, the Executive Order is subject to ongoing litigation. *See, e.g., Doe v. McHenry*, No. 1:25-cv-00286 (D.D.C. Jan. 30, 2025) (regarding transfer of transgender people in federal custody); *PFLAG, Inc. v. Trump*, No. 8:25-cv-00337 (D. Md. Feb. 4, 2025) (regarding gendering affirming care for minors); *Orr v. Trump*, No. 1:25-cv-10313 (D. Mass Feb. 7, 2025) (regarding gender markers on passports).

³⁴ Brief for the Am. Med. Ass’n, et al. as Amici Curiae Supporting the Employees, *Bostock v. Clayton Cnty.* 590 U.S. 644 (2020) (Nos. 17-1618, 17-1623 & 18-107) (citing Colt Meier & Julie Harris, AM. PSYCHOL. ASS’N, [Fact Sheet: Gender Diversity and Transgender Identity in Children](#) 1 (2014); AM. ACADEMY OF PEDIATRICS, [Gender Identity Development in Children](#) (2015)); *see also Talbott*, No. 1:25-cv-00240 at 55 (“no available research indicates that change efforts are effective in altering gender identity”).

³⁵ [Letter from James Madara, MD, CEO & Exec. Vice Pres., Am. Med. Ass’n, to Bill McBride, Exec. Dir., Nat’l Governors Ass’n](#) (Apr. 26, 2021) [hereinafter Letter from AMA to Nat’l Governors Ass’n].

³⁶ *Talbott*, No. 1:25-cv-00240 at 54 (noting “biology likely plays a role shaping a person’s transgender identity” as support of immutable nature of trans identity).

³⁷ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 452–53 (5th ed. 2013).

³⁸ *See* Jack L. Turban, et al., [Association Between Recalled Exposure to Gender Identity Conversion Efforts and Psychological Distress and Suicide Attempts Among Transgender Adults](#), JAMA PSYCHIATRY, Jan. 2020 at 68. *See also* Nguyen K. Tran et al., [Conversion practice recall and mental health symptoms in sexual and gender minority adults in the USA: a cross-sectional study](#), LANCET PSYCHIATRY, Nov. 2024 at 879; Tonia Poteat, et al., [Standards of Care for the Health of Transgender and Gender Diverse People](#), JAMA, June 2023 at 1872, 1873 (“efforts to change a transgender or gender diverse person’s gender identity . . . have been associated with major adverse outcomes. Participants exposed to these types of gender identity change efforts had twice the odds of attempted suicide compared with those who had not been exposed. Among transgender and gender diverse adults exposed to these efforts before the age of 10 years, the odds of suicide attempt were increased 4-fold.”) (internal citations omitted).

³⁹ Gia Chodzen, et al., [Minority Stress Factors Associated With Depression and Anxiety Among Transgender and Gender-Nonconforming Youth](#), J. OF ADOLESCENT HEALTH, Apr. 2019 at 467.

⁴⁰ Letter from AMA to Nat’l Governors Ass’n, *supra* note 35 (“[s]tudies suggest that improved body satisfaction and self-esteem following the receipt of gender-affirming care is protective against poorer mental health and supports

Given the resultant harm caused by forcing an individual to abandon their gender identity, all leading U.S. medical professional organizations have explicitly rejected therapies designed to force the “conversion” of transgender identity to conform with sex assigned at birth as harmful and unethical.⁴¹ Leading experts in the international health sphere have similarly rejected the practices.⁴² Experts at the United Nations have opined that conversion therapy can amount to torture and should be banned.⁴³

The above data, including the degree of trauma and severe negative health outcomes for transgender people when forced to alter or deny their gender identity, establishes that gender identity is an immutable characteristic. However, should the government assert that gender identity is not immutable, these facts also support the alternative argument that gender identity is so fundamental to one’s conscience that no one should be required to change it, even if it could be altered. A sample brief outlining how to succinctly frame such evidence for a trans claim is available upon request by registering here: <https://nipnl.org/work/resources/practice-advisory-considerations-asylum-claims-transgender-people>

b. Defined with particularity

The second prong of the governing test is the “particularity” requirement.⁴⁴ “Particularity chiefly addresses the ‘outer limits’ of a group’s boundaries and is definitional in nature.”⁴⁵ In order to meet this element, the “terms used to describe the group have commonly accepted definitions in the society of which the group is a part”⁴⁶ and “[t]he group must be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective.”⁴⁷ “A

healthy relationships with parents and peers. Studies also demonstrate dramatic reductions in suicide attempts, as well as decreased rates of depression and anxiety. Other studies show that a majority of patients report improved mental health and function after receipt of gender-affirming care.”)

⁴¹ AM. MED. ASS’N, [Health Care Needs of Lesbian, Gay, Bisexual, Transgender and Queer Populations](#), Policy H-160.991 (2024) (noting the AMA opposes “the use of ‘reparative’ or ‘conversion’ therapy for . . . gender identity”); AM. PSYCHOL. ASS’N, [Opposing conversion therapy](#) (October 10, 2023); [Letter from Sandra Hassink, Pres., Am. Academy of Pediatrics to Rep. Ted Lieu](#) (May 19, 2015) (describing conversion therapy as “unfair” and “deceptive”); AM. PSYCHIATRIC ASS’N, [Position Statement on Conversion Therapy and LGBTQ+ Patients](#) (July 2024) (“APA opposes the practice of ‘reparative’ or conversion therapies”). See also [United States Joint Statement Against Conversion Efforts](#) (August 23, 2023) (signed by 28 major medical and psychological professional associations).

⁴² See WORLD PSYCHIATRIC ASS’N, [WPA Position Statement on Gender Identity and Same-Sex Orientation, Attraction and Behaviours](#), WORLD PSYCHIATRY, Oct. 2016 at 299 (acknowledging the “lack of scientific efficacy” of conversion treatments); PAN AM. HEALTH ORG., [“Therapies” to change sexual orientation lack medical justification and threaten health](#) (May 17, 2012).

⁴³ Rep. of the Indep. Expert on protection against violence and discrimination based on sexual orientation and gender identity, [Practices of so-called “conversion therapy”](#), ¶¶ 62, 83, U.N. Doc. A/HRC/44/53 (May 1, 2020).

⁴⁴ *Matter of M–E–V–G–*, 26 I&N Dec. at 241.

⁴⁵ *Id.* at 238.

⁴⁶ *Matter of W–G–R–*, 26 I&N Dec. at 214.

⁴⁷ *Matter of M–E–V–G–*, 26 I&N Dec. at 239.

particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group.”⁴⁸ 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.”⁴⁹

In *Matter of W-G-R-*, the Board used the PSG of “homosexuals in Cuba” to illustrate the concept, stating that the “group had sufficient particularity because it was discreet and readily definable.”⁵⁰ The same reasoning holds true when analyzing PSGs for transgender applicants; transgender people from a particular society in question are a discrete and readily definable group.⁵¹

According to established authorities in the fields of social and medical science, the term “transgender” generally 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.”⁵² Although there is variation in the precise way such terms are defined among authorities worldwide, regardless of the precise wording or contours of the definition, transgender people are a discreet and readily definable group in every society. The mere fact that definitions of gender identity and transgender people are so widely available, proves the point that transgender people are a definable group. In short, it is clear who is part of the group and who is not, regardless of variations in definitions.

Notably, despite the fact that definitions of gender identity and transgender people used by the Trump Administration in recently issued executive orders are not in line with prevailing social science authorities, transgender people as a group, are still readily definable for purposes of the orders. For example, through the Trump administration’s efforts to ban transgender women from women’s sports,⁵³ and efforts to ban transgender people from military service,⁵⁴ the group that is being targeted is clearly definable.

This clear recognition holds true in societies throughout the world. Transgender and gender non-conforming people are part of a group that comprises a discrete and definable segment of

⁴⁸ *Id.*, 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).

⁴⁹ *Matter of S-E-G-*, 24 I&N Dec. 579, 584 (BIA 2008) (*overruled on other grounds by Matter of W-G-R-*, 26 I&N Dec. at 208).

⁵⁰ *Matter of W-G-R-*, 26 I&N Dec. at 219; see also *Matter of M-E-V-G-*, 26 I&N Dec. at 246.

⁵¹ See e.g., *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1081–82 (9th Cir. 2015).

⁵² AM. PSYCHOL. ASS’N, [Understanding transgender people, gender identity, and gender expression](#) (July 2024); see also Brief for the Am. Med. Ass’n, et al. as Amici Curiae Supporting the Employees, *Bostock v. Clayton Cnty.* 590 U.S. 644 (2020) (Nos. 17-1618, 17-1623 & 18-107) (citing Colt Meier & Julie Harris, AM. PSYCHOL. ASS’N, [Fact Sheet: Gender Diversity and Transgender Identity in Children](#) 1 (2014) (a transgender individual’s identity is deeply felt, and an inherent sense of their gender cannot be altered voluntarily)).

⁵³ [Exec. Order 14,201](#), “Keeping Men Out of Women’s Sports,” 90 Fed. Reg. 9279 (Feb. 5, 2025).

⁵⁴ [Exec. Order 14,183](#), “Prioritizing Military Excellence and Readiness,” 90 Fed. Reg. 8757 (Jan. 27, 2025).

the population. They are, therefore, unlike the type of diffuse groups that have not been found to evince the required “particularity” such as “persons resistant to gang violence” which was rejected in *Costanza v. Holder* as lacking particularity.⁵⁵

It is also important to note that the relevant inquiry is whether the society in question recognizes the group as discrete and commonly definable.⁵⁶ Evidence “such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like” can be used to establish that a PSG is sufficiently particular.⁵⁷

c. Social distinction

The social distinction prong of the PSG test refers to whether a group is perceived and recognized as a distinct entity by the society in question.⁵⁸ More specifically, an adjudicator “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.”⁵⁹ “The members of a particular social group will generally understand their own affiliation with the grouping, as will other people in the particular society,” but “[l]iteral or ‘ocular’ visibility is not, and never has been, a prerequisite for a viable particular social group.”⁶⁰ Moreover, social distinction is based upon society’s perception and not an actual or potential persecutor’s.⁶¹

Although the social distinction inquiry requires a case-by-case analysis of the society in question, LGBTQ identities easily meet this prong. In fact, the Board in *Matter of W–G–R–* used the PSG of “homosexuals in Cuba” to exemplify the quintessential socially distinct group, noting that:

[The] Cuban Government classified homosexuals as a group and criminalized homosexuality. It also maintained files on them and required them to register and periodically appear for a hearing and physical exam...The Union of Communist Youth held a protest against homosexuals... For these reasons, it was apparent that Cuban society perceived homosexuals as a distinct group.⁶²

⁵⁵ *Costanza v. Holder*, 647 F.3d 749, 753-54 (8th Cir. 2011).

⁵⁶ *Matter of M–E–V–G–*, 26 I&N Dec. at 238.

⁵⁷ *Id.* at 244.

⁵⁸ *Id.* at 238 (BIA 2014); *Matter of W–G–R–*, 26 I&N Dec. 208, 215–18 (BIA 2014).

⁵⁹ *Matter of M–E–V–G–*, 26 I&N Dec. at 238.

⁶⁰ *Id.*

⁶¹ *Id.* at 242.

⁶² *Matter of W–G–R–*, 26 I&N Dec. at 219; see also *Matter of M–E–V–G–*, 26 I&N Dec. at 227.

The same reasoning holds true when analyzing PSGs for transgender people; they are perceived by the relevant societies as a distinct group.

In order to prove this element, applicants should present evidence such as social science research and/or country conditions reports that demonstrate that the relevant society recognizes the defined group as distinct.⁶³ This type of evidence is easily ascertainable in many nations from which LGBTQ people flee persecution. Transgender people face extraordinarily high levels of persecution, violence, and criminalization throughout the world for their identities. Such harm, while horrific, serves to demonstrate how these societies view this group as “distinct” or “other.” And while the Board has clarified that that a particular social group “cannot be defined exclusively by the claimed persecution,” “the perception of the applicant’s persecutors may be relevant, because it can be indicative of whether society views the group as distinct.”⁶⁴ Conversely, the existence of transgender activists and organizations working to improve transgender lives, and the community spaces created by and for the transgender community, similarly demonstrate how the group is unique and distinct.

d. International Standards

Trans-based PSGs are also well supported under international standards. Although not binding on U.S. courts or agency decisions, international law and, in particular, the guidance issued by the United Nations High Commissioner for Refugees (“UNHCR”) interpreting the Refugee Convention and Protocol,⁶⁵ can be cited as persuasive authority.⁶⁶ Indeed, U.S. courts have relied on UNHCR guidance to assess asylum claims, including claims based on gender identity and sexual orientation.⁶⁷

⁶³ *Matter of M–E–V–G–*, 26 I&N Dec. at 244 (“Evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as ‘distinct’ or ‘other’ in a particular society.”). For example, Department of State (“DOS”) Human Rights Reports through 2023 often discuss violence and discrimination against transgender people as a distinct sub-section of its LGBTI rights analysis. It is important to be aware, however, that Secretary of State Marco Rubio has already indicated his intention to remove LGBTQ issues from human rights reports so advocates should be prepared to include older DOS reports and highlight the politicization of this issue. Michael K. Lavers, [Report: State Department to remove LGBTQ information from annual human rights report](#), WASH. BLADE, Mar. 24, 2025.

⁶⁴ *Matter of M–E–V–G–*, 26 I&N Dec. at 232.

⁶⁵ Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (the “Refugee Convention”); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268 (the “Protocol”).

⁶⁶ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (finding “abundant evidence” that Congress intended to conform the definition of refugee and the asylum law of the U.S. “to the United Nation’s [sic] Protocol to which the United States has been bound since 1968” and that the UNHCR “[h]andbook provides significant guidance in construing the Protocol . . . [and] has been widely considered useful in giving content to the obligations that the Protocol establishes.”).

⁶⁷ See, e.g., *Doe v. Att’y Gen. of the United States*, 956 F.3d 135, 154 (3d Cir. 2020) (citing UNHCR Guidelines on Sexual Orientation and Gender Identity to explain that forcing an applicant “to hide or suppress a core component of one’s identity is an oxymoron”).

Under international standards, an asylum seeker “may demonstrate that their PSG is comprised of a group of persons that either shares a common characteristic (the protected characteristics approach)” or is “perceived as a distinct group by society (the social perception approach).”⁶⁸ This alternate approach is unlike the dominant U.S. approach under *Matter of M–E–V–G–* where both elements are required. UNHCR guidance recognizes that trans identities can meet the test under either approach⁶⁹ and that “there is broad acknowledgement” that “transgender persons are members of ‘particular social groups’ within the meaning of the refugee definition.”⁷⁰ UNHCR guidance explicitly states that gender identity is a “fundamental aspect[] of human identity” and is “immutable.”⁷¹ The Guidelines further emphasize that gender identity and sexual orientation are considered “characteristics so fundamental to human dignity that the person should not be compelled to forsake them,” even if they could.⁷² Due to the fundamental nature of such characteristics, attempts to change a person’s gender identity “by force or coercion may constitute torture, or inhuman and degrading treatment, and implicate other serious human rights violations.”⁷³

Given the strong support for trans-based claims, citation to UNHCR guidance interpreting the Protocol and Convention may be helpful persuasive authority to demonstrate the strength and viability of such claims under the treaty.

III. Practical considerations in framing PSGs

While transgender identity is well established as a PSG, other related PSG formulations may provide alternate yet also accurate and cognizable framings of applicable particular social groups if the government begins challenging trans-based asylum claims.

As a general matter, it is important to clearly delineate on the record during the initial asylum application the particular social group in which an asylum applicant is making a claim as the Board will not “consider newly proposed particular social groups on appeal that were not

⁶⁸ U.N. HIGH COMM’R FOR REFUGEES, [“UNHCR’s Views on Asylum Claims based on Sexual Orientation and Gender Identity: Using international law to support claims from LGBTIQ+ individuals seeking protection in the U.S.”](#) (Sept. 2022) (“2022 UNHCR Guidelines”); *see also* U.N. HIGH COMM’R FOR REFUGEES, [Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A\(2\) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees](#), U.N. Doc. HCR/GIP/02/02, ¶ 11 (May 7, 2002) (“Social Group Guidelines”).

⁶⁹ 2022 UNHCR Guidelines, *supra* note 68, at 7 (“International law recognizes alternative approaches to defining a ‘particular social group,’ and LGBTIQ+ asylum claims may be established under either.”); U.N. HIGH COMM’R FOR REFUGEES, [Guidelines for International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity](#), ¶46, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012) (“2012 UNHCR Guidelines”).

⁷⁰ 2012 UNHCR Guidelines, *supra* note 69, at ¶46.

⁷¹ *Id.* at ¶12.

⁷² *Id.* at ¶47.

⁷³ *Id.* at ¶21.

presented before the immigration judge.”⁷⁴ Accordingly, it is important that attorneys formulate PSGs carefully and with a clear understanding of the current law in their jurisdictions. Moreover, since PSG claims for transgender applicants may result in federal litigation, it is important that the strongest PSGs possible be presented and preserved at the IJ level since new PSG definitions cannot be introduced on federal appeal later.

However, given page limitations and for sake of clarity and efficiency, including a laundry list of potential PSGs, which are not meaningfully distinct from one another, is not advisable. Thus, for transgender asylum seekers, we recommend setting forth some limited variation of PSGs that encompass:

- **The applicant’s actual identity**, provided, of course, that identity is why the persecutor targeted or will target the asylum seeker. For example, “transgender women from Mexico,” or “non-binary people from Russia.”⁷⁵
- **An imputed “LGB” sexual orientation claim**, if supported by the facts. Many transgender people are targeted because of their perceived sexual orientation. There is also strong precedential case law, as well as agency policy, establishing that PSGs based on imputed sexual orientation are cognizable, for example, “individuals imputed to be lesbians in Jamaica,” or “people imputed to be gay in Ghana.”⁷⁶ Practitioners already routinely and successfully use this framing where the applicant was assumed to be gay or lesbian based on facts, including HIV-status in a society where it is viewed as a “gay disease,” or mannerisms and behaviors associated with gay, lesbian or bisexual people in a particular society. Often, the applicant is identified and targeted for persecution because of an assumed sexual orientation when in fact the applicant is a transgender person who is straight.
- **A sexual minority or LGBTQ catchall**. A catchall group like “sexual minorities” can provide the IJ or asylum officer an alternate PSG ground if adjudicators feel constrained by the Anti-Trans Executive Order from using terminology like “gender identity” or “transgender” in granting relief. “Sexual minorities” is widely used within USCIS as the preferred PSG for all LGBTQ claims, regardless of whether the

⁷⁴ *Matter of W–Y–C–*, 27 I&N Dec. 189, 191 (BIA 2018).

⁷⁵ Notably, the authors are not aware of precedential cases specifically setting forth PSGs based on non-binary, gender non-conforming, or intersex identities. However, in practice, the authors are aware of applicants who have been granted relief with such PSG formulations.

⁷⁶ See, e.g., *Velasquez-Banegas v. Lynch*, 846 F.3d 258 (7th Cir. 2017); *Amanfi v. Ashcroft*, 328 F.3d 719 (3d Cir. 2003) (recognizing that an applicant from Ghana can seek asylum on the basis that he was imputed to be “homosexual”); see also 2019 Training Module, *supra* note 29, at 15 (noting that “even if a transgender applicant identifies as heterosexual, he or she may be perceived as gay or lesbian”).

claim is based on sexual orientation or gender identity.⁷⁷ According to the 2019 Training Module, sexual minority is an “umbrella term” to refer to LGBTQ people and is an “appropriate particular social group in cases where the persecutor in question perceives any sexual minority as ‘outside the norm’ but does not necessarily distinguish between orientation, gender, and sex.”⁷⁸ Often, LGBTQ asylum seekers are identified and targeted for persecution because the society in question groups LGBTQ people together as an “other” that is transgressing societal gender and sexual norms, without distinguishing between sexual orientation or gender identity.

For purposes of both the particularity and social distinction prongs, this framing provides a distinct and readily definable group. The 2019 Training Module guidance specifically recommends using sexual minority PSGs where “there are a variety of traits involved in the claim, but the persecutor’s animus toward those different traits stems from a more general animus toward all sexual minorities” reasoning that “[t]his prevents the need to analyze past and future harm for two separate groups when past and future harm are both based on the applicant’s sexual minority status.”⁷⁹ For example, the 2019 Training Module recommends using “sexual minorities in Mexico” in lieu of “transgender Mexican women perceived as homosexual Mexican men cross-dressing as women.”⁸⁰ Although there is not precedential case law specifically addressing the cognizability of “sexual minorities” in the defensive context, applicants routinely win cases where a “sexual minority” PSG is asserted and there are non-precedential decisions where courts have used this terminology and implicitly accepted the formulation as cognizable.⁸¹

Courts have also recognized the PSG of LGBTI people,⁸² which can be a helpful catchall where the applicant is recognized by society as a member of the community. This PSG can be used regardless of whether the applicant is part of the group because of their gender identity, sexual orientation, or both.

⁷⁷ Attached as Appendix I is a redacted Notice of Intent to Deny (“NOID”) an asylum application from an asylum officer. The NOID provides a helpful example of how an asylum officer may analyze a “sexual minorities” PSG under the relevant factors.

⁷⁸ 2019 USCIS Training Module, *supra* note 29, at 17.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See *Tairou v. Whitaker*, 909 F.3d 702, 705 (4th Cir. 2018) (while the applicant’s primary PSG referenced homosexuality, the court specifically noted that the applicant established a credible fear of persecution or torture as a “member of a sexual minority in Benin”). See also, *Matter of M–M–V–*, A-262 (BIA May 2, 2019) (the BIA found in an unreported opinion that an applicant was a member of a cognizable PSG comprised of “Mexican women who identify as a sexual minority (lesbian or bisexual) and who exhibit masculine or gender non-conforming characteristics.”).

⁸² See, e.g., *Doe v. Att’y Gen. of the United States*, 956 F.3d 135, 142 (3d Cir. 2020) (“Petitioner’s sexual orientation and identity as a gay man is enough to establish his membership in the lesbian, gay, bisexual, transgender and intersex (LGBTI) community in Ghana, a ‘particular social group’ within the meaning of the INA.”).

IV. Trans claims based on other protected grounds

The Heritage Foundation's Project 2025, which the Trump administration has relied on as a playbook for its policy objectives, has indicated an intent to limit or eliminate the PSG ground for asylum altogether.⁸³ Thus, despite the fact that PSG-based claims are part of Congress's statutory framework for asylum, and the fact that eliminating the PSG ground for asylum would violate treaty obligations and be unlawful, applicants should consider including claims based on other protected characteristics, such as religion and political opinion, if supported by the facts of the case.⁸⁴ For example, a trans rights activist may be viewed as defying the prevailing political or religious views and be persecuted because of those characteristics. Moreover, religion and political opinion grounds may also overlap where religious and state institutions are intertwined.

- **Political Opinion.**

Political opinion has been interpreted to encompass a broad spectrum of views that can include pro-LGBTQ opinions.⁸⁵ According to USCIS guidance, "[t]he meaning of 'political opinion' in the refugee definition 'should be understood in the broad sense, to incorporate . . . any opinion on any matter in which the machinery of state, government and police may be engaged.'"⁸⁶ For instance, "[t]he expression of a diverse sexual orientation or gender identity may be viewed as political, 'particularly in countries where such non-conformity is viewed as challenging government policy or where it is perceived as threatening prevailing social norms and values.'"⁸⁷ It is also possible to establish a claim based on imputed political views,⁸⁸ and a transgender applicant may consider arguing that pro-LGBTQ political views are imputed upon them based on their status as a sexual minority.

⁸³ HERITAGE FOUNDATION, MANDATE FOR LEADERSHIP 2025: THE CONSERVATIVE PROMISE 148 (Paul Dans & Steven Groves, eds., 2023) ("Congress should eliminate the particular social group protected ground as vague and overbroad").

⁸⁴ 2019 Training Module, *supra* note 29, at 14 ("Depending on the facts of the case, claims relating to sexual orientation and gender identity are primarily recognized under membership in a particular social group but may overlap with other grounds, in particular religion and political opinion.").

⁸⁵ See, e.g., *Sama v. United States Att'y Gen.*, 887 F.3d 1225, 1232 (11th Cir. 2018) (noting that it is "undisputed that [the applicant] expressed a political opinion" after writing about his support for LGBTQ rights in a college publication); *Pitcherskaia v. INS*, 118 F.3d 641, 643 (9th Cir. 1997) (remanding a Russian applicant's claim she faced persecution on account of her membership in the particular social group of "Russian lesbians" and her "political opinions in support of lesbian and gay civil rights in Russia.").

⁸⁶ USCIS, [RAIO Lesson Plan: Nexus and the Protected Grounds](#) (2025), 16 (hereinafter "USCIS Protected Grounds Training Module").

⁸⁷ 2022 UNHCR Guidelines, *supra* note 68, at 11 (citing 2012 UNHCR Guidelines ¶150 ("Anti-LGBTI statements could be part of a State's official rhetoric, for example, denying the existence of homosexuality in the country or claiming that gay men and lesbians are not considered part of the national identity.")).

⁸⁸ See, e.g., *Chen v. Holder*, 604 F.3d 324, 332 (7th Cir. 2010) ("it is well established in this circuit that an [applicant] may base a persecution claim on imputed political opinion"); *Kumar v. Gonzales*, 444 F.3d 1043, 1053 (9th Cir. 2006) ("[i]t is settled law that an applicant may establish a political opinion for purposes of asylum relief by showing an 'imputed political opinion.'").

In order to establish nexus, it is important for the applicant to include evidence of how the applicant's actual or imputed political opinion is or would become known to the persecutor. This may include corroborating evidence that the applicant has shared their political views with others and that those views are known to the applicant's persecutors.⁸⁹ Notably, there is limited case law addressing LGBTQ-based political claims because most cases are adjudicated on the basis of PSGs.

- **Religion.**

For the same reason, there is also scant case law addressing how courts and the agency will view religion claims related to LGBTQ identities. Agency and UNHCR guidance, however, are instructive. According to USCIS:

The protected ground of religion has been broadly defined to include the right to freedom of thought, conscience, and belief. Religion, as a protected ground, is not limited to familiar religious beliefs and practices. For purposes of establishing refugee and asylum eligibility, persecution suffered or feared on account of a non-traditional belief system may be considered persecution 'on account of religion.'⁹⁰

According to UNHCR, such beliefs, or a refusal to hold such beliefs, "may form the basis of an asylum claim, for example where an individual is viewed as not conforming to the teachings of a religion based on his or her actual or perceived sexual orientation or gender identity and is punished or subjected to serious harm as a consequence."⁹¹ In many cultures, religious groups and communities harm trans and other LGBTQ people in various ways, from discrimination and shaming, to physical violence and even execution.⁹² Such circumstances may give rise to a religion-based asylum claim. This is true even though the applicant still may "continue to profess adherence to a faith in which they have been subject to or threatened with harm."⁹³

If an applicant's status as a sexual minority has led them to adopt a different approach or viewpoint on their religious practices, and they are persecuted because of that different religious belief, it may also form the basis of a religion-based claim. While not LGBTQ-specific, *Matter of S-A-* provides a helpful analogy.⁹⁴ In that case, the Board found that a Moroccan Muslim woman who practiced a more-liberal form of Islam had a cognizable asylum claim after

⁸⁹ See *Uzodinma v. Barr*, 951 F.3d 960, 963 (8th Cir. 2020) (affirming a BIA finding that "there was no objective evidence" an applicant who supported LGBTQ rights "stated his political opinions to others."); see also *Nsira v. Garland*, 853 Fed. Appx. 62, 66 (9th Cir. 2021) (finding that the record did not compel a conclusion that a heterosexual applicant had been harmed for his political opinions because "[t]here is no evidence that he has publicly engaged in political activity" and "no evidence that he has ever publicly expressed support for gay rights.").

⁹⁰ USCIS Protected Grounds Training Module, *supra* note 86, at 21 (internal citation omitted).

⁹¹ 2022 UNHCR Guidelines, *supra* note 68, at 10; see also 2012 UNHCR Guidelines, *supra* note 69, at ¶¶42-43.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Matter of S-A-*, 22 I&N Dec. 1328, 1336 (BIA 2000).

she was persecuted by her more-conservative family because of her religious beliefs.⁹⁵ Similarly, if a transgender applicant practices a form of their religion that is accepting of transgender identities, they could have religion-based claim if they were persecuted because of that practice.

V. One-year filing deadline issues for transgender applicants

Asylum seekers must file for asylum within one year of entry into the United States or must meet an exception to the one-year filing deadline (“OYFD”).⁹⁶ The regulations specify that an asylum seeker may qualify for a changed circumstances exception where “activities the applicant becomes involved in outside the country of feared persecution [] place the applicant at risk.”⁹⁷

Many transgender asylum seekers who have been in the United States for more than a year have had success in the past arguing that their recent transition qualifies as a changed circumstance exception to the one-year filing deadline. Indeed, the 2019 Training Module specifically identifies several common OYFD exceptions that transgender applicants may put forward. The 2019 Training Module explains that “coming out” as lesbian, gay, bisexual, or transgender can qualify as a changed circumstance exception.⁹⁸ It also explains how taking other steps to transition may constitute a changed circumstance exception, since the change in outward appearance of the asylum seeker may make it impossible “to pass” as the sex they were assigned at birth and may therefore put them at greater risk of harm.⁹⁹

Since the issuance of the Anti-Trans Executive Order, it is less clear how to frame the OYFD exception based on transgender identity, particularly as it is unclear whether the 2019 Training Module is still in use. As discussed above in this practice advisory, transgender asylum seekers may want to frame their claim as “imputed sexual orientation,” and/or a catchall “sexual minority” in addition to “transgender identity.” However the practitioner frames the protected characteristic, here are a few suggested strategies to assert OYFD exceptions.

- Transgender applicants can still argue a “coming out” exception. Whether they have recently declared that they are LGBTQ or whether they have been “outed,” they may be at greater risk if returned to their country of origin. A transgender applicant may have a greater chance of success framing their PSG membership, and thus their coming out experience, more broadly as LGBTQ than coming out as transgender specifically, if the facts bear that out.
- Transgender applicants can argue that their appearance puts them at increased risk. Whether or not an adjudicator accepts transgender identity as a PSG, steps in transition will

⁹⁵ *Id.* at 1336 (“[w]e find that the persecution suffered by the respondent was on account of her religious beliefs, as they differed from those of her father concerning the proper role of women in Moroccan society.”) Note that transgender people may also be seen as transgressing the “proper role” of women and men in their societies.

⁹⁶ INA §§ 208(a)(2)(B), (D), 8 U.S.C. §§ 1158(a)(2)(B), (D); 8 C.F.R. §§ 208.4(a)(4)–(5).

⁹⁷ 8 C.F.R. § 208.4(a)(4)(i)(B).

⁹⁸ 2019 USCIS Training Module, *supra* note 29, at 64–65.

⁹⁹ *Id.*

likely put them at increased risk of harm in their country of origin. Even if the Anti-Trans Executive Order requires federal agencies to employ a false, binary view of sex, an adjudicator cannot ignore evidence in the record that transgender people are subjected to violence in their country of origin.

- If there are changes in the law or generally in country conditions in the country of origin that demonstrate an increased risk of harm, the applicant can argue changed country conditions pursuant to 8 C.F.R. § 208.4(a)(4)(i)(A). Even if the U.S. government seeks to suppress the applicant's status as transgender, if the country of origin would punish the applicant for being transgender, the applicant can argue the changed country conditions exception.
- The applicant could argue an extraordinary circumstances exception pursuant to 8 C.F.R. § 208.4(a)(5)(i) if they are suffering from mental or physical disabilities, including the effects of persecution or violent harm. Although this exception is not specific to transgender identity, many transgender applicants have suffered horrific violence, including potentially sexual violence, in the past. Adjudicators may be more willing to accept this exception which many asylum seekers put forward, because it may feel safer to them than an exception which is more clearly tied to transgender identity.

In short, transgender asylum seekers may continue to have strong exceptions to the OYFD. To maximize their chance of success before agency adjudicators, both at USCIS and EOIR, they may need to frame their claims differently under this administration than they would have done in the past.

VI. Practical considerations in completing the I-589 asylum application form

The Anti-Trans Executive Order and related USCIS policy updates seeking to erase transgender identity, pose practical difficulties in completing USCIS forms.¹⁰⁰ Form I-589, Application for Asylum and for Withholding of Removal, requires applicants to list their legal name, any other names used, and their "sex."¹⁰¹

a. Names

Asylum applicants have always been required to list their current, legal name in Part A.I., fields 4 – 6 of the I-589 whether that name conforms to their gender identity or not. If an applicant's name has been legally changed, they should write their legal name in fields 4-6 and include a copy of the name change order, or other documentation such as a marriage or divorce certificate.

¹⁰⁰ The Department of State and U.S. Citizenship and Immigration Services (USCIS) have each issued policy guidance incorporating the Anti-Trans Executive Order. Please see Immigration Equality's FAQ on [New Considerations for U.S. Passports, Immigration Forms, and Documents for Trans, Non-binary, and Intersex People](#), which provides further guidance on how these policies impact gender markers on a variety of immigration and identification documents.

¹⁰¹ The most recent edition of the [I-589](#) now asks about "sex" rather than "gender."

In response to the subsequent field which asks for any “other names used” an applicant must list all names previously or currently in use. This includes prior legal names (“dead names”), prior married names, and informal names used even if not legally changed.

For example:

A transgender woman who has legally changed her name to be consistent with her gender identity should list her legal name in questions 4-6. She should also list her former legal name (aka “dead name”) and any other names used, whether legally changed or informally used, in the subsequent section at field 7.

A nonbinary individual who has not changed their name legally, but who goes by a more gender-affirming name, will need to list their current legal name in fields 4-6. They will then list their true and affirming name in the “other names used” section at field 7.

b. Gender/Sex

On April 2, 2025, USCIS announced that it will only recognize male or female sex designations, generally determined by what is listed on an applicant’s birth certificate issued at the time of birth or nearest the time of birth.¹⁰² If a birth certificate indicates a sex other than “male” or “female,” USCIS will base the determination of sex on secondary evidence. The USCIS guidance does not explain what secondary evidence it will consider.

In light of this guidance, applicants will need to weigh their options when filling out the I-589. To avoid the risk of their application being delayed, they are likely best positioned if they mark the sex designation that is listed on their birth certificate. The applicant can include a short statement in the additional information section (for example: “I only marked ‘female’ because this is what is listed on my birth certificate. However, I am a transgender man and ‘male’ is the correct designation for me” or “I only marked ‘male’ because this is what is listed on my birth certificate. However, I am a non-binary person and neither male nor female is an accurate designation for me.”).

If an applicant chooses to select their correct gender (rather than indicating their sex assigned at birth), their application could be delayed, or their gender selection may be disregarded. Applicants who select their accurate gender on form I-589 should include a short statement in the additional information section (for example: “I have selected male because this is my true gender. My birth certificate lists female but this is not accurate because I am a transgender man.”) If an applicant is filing at a date close to the one-year filing deadline, this approach may

¹⁰² USCIS Policy Alert, PA-2025-04, [Recognizing Male and Female Sexes in USCIS Benefit Requests Reviewal and Document Issuance](#) (Apr. 2, 2025) (“USCIS recognizes the two biological sexes, male or female, for purposes of reviewing benefit requests and USCIS-issued documents” and “USCIS considers a person’s sex to be that which is generally evidenced on the birth certificate issued at the time of birth or issued near the time of birth.”). The changes were simultaneously incorporated into the USCIS [policy manual](#).

not be recommended due to the heightened risk that the application could be rejected or take longer to be receipted.¹⁰³

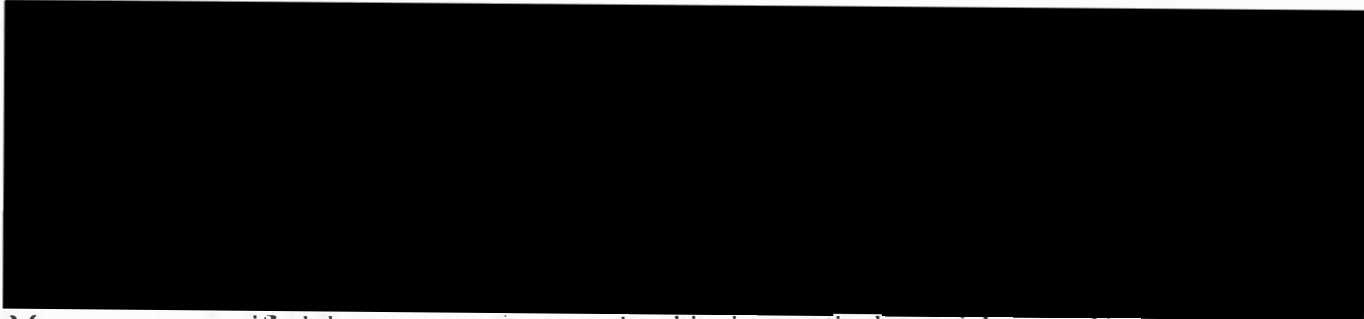
In the unlikely event that an asylum applicant was able to legally change their birth certificate to reflect their correct gender, or whose birth certificate lists neither male nor female, USCIS still instructs them to select the sex listed on the birth certificate issued at or near birth. Applicants in this position should include a short statement in the additional information section (for example: “I only marked ‘female’ because this is what was listed on the birth certificate issued at time of birth. However, I am a transgender man and ‘male’ is the correct designation for me. I attach my birth certificate which has been legally updated to reflect my true gender” or “I have selected ‘male’ because this is my true gender. The birth certificate issued at or near my time of birth listed female. However, I have attached my legally updated birth certificate which reflects my true ‘male’ gender.”).¹⁰⁴

Although the Trump administration’s transphobic executive actions and policy changes have caused confusion and concern among asylum seekers and advocates, trans-based claims remain strong under the law. Transgender asylum seekers should continue to exercise their rights to seek protection.

¹⁰³ Note, however, that one regulatory exception to the one-year filing deadline is if the “applicant filed an asylum application prior to the expiration of the 1-year deadline, but that application was rejected by the Service as not properly filed, was returned to the applicant for corrections, and was refiled within a reasonable period thereafter.” 8 C.F.R. § 208.4(a)(5).

¹⁰⁴ Please note that this practice advisory is intended for attorneys and BIA accredited representatives. Individuals should speak with an immigration attorney to discuss case-specific considerations when deciding what gender to list on their form and how to address prior sex designations.

Appendix I



Moreover, you testified that you possess a membership in a particular social group: Venezuelan sexual minorities. An applicant seeking asylum on the basis of membership in a particular social group must establish that the group is “(1) composed of members who share an immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.” *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014); see also *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985).

The particular social group put forward by you meets the prongs of this test. Your sexual orientation is a common, immutable characteristic that you possess which is so fundamental to your identity that you cannot change, and should not be required to change it. The group can be defined with particularity as only males who desire to be in intimate relationships only with people of the same gender belong to the group. Country condition information establishes that the group is social distinct.

Credible NGOs reported incidents of bias-motivated violence against lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons. See USDOS – US Department of State: Country Reports on Human Rights Practices 2018 - Venezuela, 13 March 2019 <https://www.ecoi.net/en/document/2004147.html> (accessed on 28 August 2019)ril 2018, available at: <https://www.state.gov/documents/organization/277587.pdf> [accessed 08 February 2019].

Additionally, the BIA and 2nd Circuit have recognized sexual orientation as a particular social group. See *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990); see also *Morett v. Gonzales*, 190 Fed. Appx. 47, 48 (2nd Cir. 2006) (applying *Toboso-Alfonso*) (citing the Attorney General’s recognition of sexual orientation as a protected ground under the ‘particular social group’ category of the definition of a refugee). Therefore, the applicant’s proposed particular social group of Venezuelan sexual minorities meets the requirements as articulated in *Matter of M-E-V-G*. Your own credible testimony established that you belong to the particular social group of Venezuelan sexual minorities.

The harm you described on account of your sexual orientation, however, does not rise to the level of persecution. You testified that you have suffered only verbal harm as a result of being a sexual minority. You did not testify to physical or psychological harm as a result of your membership in a particular social group as a Venezuelan sexual minority. The verbal harm, although unpleasant, does not rise to the level of persecution.

Therefore, you have not established past persecution.