

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAR 29 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NORA FLORES RODRIGUEZ,

Petitioner,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 22-170

Agency No. A208-746-443

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted March 9, 2023
San Francisco, California

Before: FRIEDLAND and R. NELSON, Circuit Judges, and KATZMANN**,
Judge.

Dissent by Judge R. NELSON.

Nora Flores Rodriguez, a native and citizen of El Salvador, petitions for review of an order of the Board of Immigration Appeals (“BIA”) affirming the decision of an immigration judge (“IJ”) denying her application for asylum and

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Gary S. Katzmann, Judge for the U.S. Court of International Trade, sitting by designation.

withholding of removal. We grant the petition in part and remand her withholding of removal claim.

Flores Rodriguez's application described her experiences of harm at the hands of two abusers in El Salvador: a man who sexually abused her when she was a child and a gang member who sexually harassed and threatened her with rape when she was a young adult. The BIA concluded that there was no nexus between this harm and Flores Rodriguez's proposed particular social group ("PSG") of "Salvadoran women." Instead, the agency determined that the child abuse was motivated by sexual deviancy and the gang member's behavior was just a random "criminal action" that could be attributed to her unwillingness to agree to be the gang member's girlfriend.

Because there is no evidence in the record of the child abuser's motives, the lack-of-nexus determination as to that harm was appropriate, but substantial evidence does not support the lack-of-nexus determination with respect to the gang member's harm. The record compels the conclusion that Flores Rodriguez's identity as a Salvadoran woman was at least *a* reason for the gang member's abuse.¹

¹ Flores Rodriguez identified her proposed PSG as "Salvadoran women" but used that term seemingly synonymously with "women in El Salvador." Consistent with this, the IJ recognized that Flores Rodriguez was really making a primarily gender-based argument and that "Salvadoran women" was being used essentially

as a synonym for “women in El Salvador.” The IJ then rejected her asylum and withholding claims because the IJ concluded that the group lacked particularity and because Flores Rodriguez did not demonstrate that the gang member “wanted to persecute females.”

The dissent parses the PSG definition into two separate grounds that it argues independently require a nexus to the gang member’s abuse. It quotes a sentence fragment from Flores Rodriguez’s brief to support its interpretation of her PSG. The quoted comment was made in response to the IJ’s misunderstanding that her proposed PSG could encompass all women throughout the world. Flores Rodriguez’s full sentence read: “Also, the IJ’s contention that the PSG would constitute half of the world’s population ignores the fact that the PSG is defined not by the physical presence of a women in El Salvador, but rather her identity as a woman and her nationality, Salvadoran.” In this statement, Flores Rodriguez was clarifying that her proposed PSG was not boundless; she was referring to the specific set of women who live in El Salvador (*i.e.*, Salvadoran women)—not suggesting that “any female who happens to be visiting or vacationing in El Salvador” would be included, as the IJ had apparently interpreted it. This clarification did not change the proposed PSG; the proper nexus analysis is whether Flores Rodriguez faces persecution “on account of” her membership in this PSG, as a “Salvadoran woman” or “woman in El Salvador.” 8 U.S.C. § 1101(a)(42)(A).

To the extent that the IJ also parsed the definition into two elements (gender and nationality) and required an independent showing of animus for each, this was erroneous. By the IJ’s admission and other record evidence, it is clear that Flores Rodriguez’s “nationality” is offered as one of the elements defining the immutable characteristic of the PSG, not as a separate protected ground. At the nexus stage, the IJ was not being asked to conduct two independent inquiries as to whether the harm occurred because Flores Rodriguez “was from El Salvador” and also because she was a woman. Rather, the inquiry required by the statute is whether she faced persecution because “she was a Salvadoran woman,” as a member of the proposed PSG. *See id.* Accordingly, it is fashioning two separate grounds of “Salvadorans” and “women,” even though the PSG has been specifically argued by Flores Rodriguez as “Salvadoran women” that would, in the dissent’s words, “wrongly reframe[]” the definition. Instead, the two elements should be treated as the two sides of a coin creating a single definition of the PSG. Given this interpretation, the record compels the conclusion that the persecution was motivated at least in part by Flores Rodriguez’s membership in this group of “Salvadoran women,” as explained herein.

The agency erred in failing to consider the country conditions evidence submitted by Flores Rodriguez, which depicts a high prevalence of sexual violence against and mistreatment of women attributable to women’s subordination in Salvadoran society. *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1096-97 (9th Cir. 2000), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005) (en banc) (indicating that evidence of cultural norms and widespread harm against a particular group in the country can help establish a persecutor’s motives). Flores Rodriguez submitted expert testimony explaining that men in El Salvador—and gang members, in particular—view women as property, and that sexual violence is used as a mechanism to subjugate and punish women for disobedience. These behaviors are reinforced by legal and social impunity for violence against women.

The behavior of the gang member who abused Flores Rodriguez reflects a

In any event, because the BIA did not explicitly address the definition of the proposed PSG, nor the question whether such a group is a cognizable protected ground, we need not review this issue. *See Garcia v. Wilkinson*, 988 F.3d 1136, 1143 (9th Cir. 2021) (reviewing nexus as the “only . . . grounds relied upon by th[e] agency” when BIA determines that petitioner failed to establish nexus, without explicitly deciding whether proposed particular group is cognizable). The BIA decided only the nexus issue, and as explained herein, repeated the IJ’s error in concluding that being a Salvadoran woman was not even “a” reason for the attempted rape and other sexual harassment Flores Rodriguez faced. *See Barajas-Romero v. Lynch*, 846 F.3d 351, 360 (9th Cir. 2017). Moreover, we have held that “women in a particular country . . . could form a particular social group.” *See Perdomo v. Holder*, 611 F.3d 662, 667 (9th Cir. 2010).

motivation consistent with this country conditions evidence. The gang member's threats that he would "make [her] his in a bad way" and that she would "pay the consequences if [she] was not his," coupled with his persistent stalking and attempt to physically assault her, indicate an intent to punish her for being a Salvadoran woman who defied the cultural perception of his dominance. *See Garcia v. Wilkinson*, 988 F.3d 1136, 1143-45 (9th Cir. 2021) (holding that statements by the persecutor can serve as circumstantial evidence of a persecutor's motives). The agency's conclusion that he wanted to sexually assault her because "he liked her, and she was not willing to agree to be his girlfriend" and *not* because of her status as a woman in Salvadoran society makes no sense. It not only ignores the clear, insidious implications of the gang member's comments but also misunderstands the nature of sexual violence. He abused her at least in part because she was a Salvadoran woman over whom he wanted to—and considered himself entitled to—exert control. *Cf. Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076 (9th Cir. 2004) (recognizing that sexual violence is not driven by poor self-control or sexual attraction but rather motivated by a desire for domination and rejecting the argument that attraction to a woman can defeat a nexus to a protected ground in a case where the persecution is rape). We therefore remand Flores Rodriguez's withholding of removal claim for further consideration. *See Barajas-Romero v. Lynch*, 846 F.3d 351, 360 (9th Cir. 2017) (holding that an applicant need only

demonstrate that a protected ground was “a reason”—at least one among many reasons—for the persecution for a withholding of removal claim).

We do not remand Flores Rodriguez’s asylum claim, however, because her identity as a Salvadoran woman may have been one of several reasons for her abuser’s behavior, and the record does not compel the conclusion that it was “central” to his motivation. *See Garcia*, 988 F.3d at 1143.

**PETITION GRANTED IN PART, DENIED IN PART, AND
REMANDED.**

Flores Rodriguez v. Garland, No. 22-170

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R. NELSON, Circuit Judge, dissenting:

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I respectfully dissent from the majority’s decision to grant the petition in part. The majority properly denies all relief based on Nora Flores Rodriguez’s childhood abuse and asylum relief based on a gang member’s harassment later in her life. But the majority errs in relying on that same evidence of gang member harassment to remand as to her withholding-of-removal claim. I would deny the petition.

Flores Rodriguez has consistently defined the proposed particular social group as “Salvadoran women”—a group Flores Rodriguez noted was expressly defined by both gender and nationality. Flores Rodriguez’s briefing emphasizes this point repeatedly, making clear that her proposed group “is defined not by the physical presence of a wom[a]n in El Salvador, but rather her identity as a wom[a]n and her nationality, Salvadoran.”¹ So based on Flores Rodriguez’s own framing, the inquiry should be whether the harassment was motivated in part by her gender *and* her nationality. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (“[T]he statute makes motive critical.”).

¹ These are not simply semantics; the narrowing was purposeful because Flores Rodriguez must also show that her proposed social group is “particular.” *See Reyes v. Lynch*, 842 F.3d 1125, 1135 (9th Cir. 2016) (explaining that the “particularity” requirement “distinguish[es] between social groups that are discrete and those that are amorphous”).

Given Flores Rodriguez's express framing of the issue, the IJ and the BIA properly conducted a nexus analysis based on both gender and nationality. The incidents occurred "without any mention" of nationality, and "the record reveals no causal connection between this characteristic" and the gang member's harassment. *See Parussimova v. Mukasey*, 555 F.3d 734, 742 (9th Cir. 2009). Rather, as the IJ noted, Flores Rodriguez has not even "attempted to connect or show that [her harms] would have only arisen because she was from El Salvador as opposed to having her be a female from a different place or different country." Neither the IJ nor the BIA can be found to err in properly rejecting the very arguments raised by Flores Rodriguez below.

The majority reframes Flores Rodriguez's particular social group as focusing on culture, rather than nationality. And then it concludes that remand is proper because the gang member's harassment was "consistent with" El Salvador's apparent culture of violence against and mistreatment of women. Yet even assuming culture is a useful proxy for nationality, Flores Rodriguez's harms flowed from the gang member's culture, not her culture as the victim. *Cf. Elias-Zacarias*, 502 U.S. at 482 (explaining that there is only protection for "persecution on account of the *victim's* political opinion, not the persecutor's"). Though the incidents of harassment were extremely unfortunate, there is no evidence that they were motivated by Flores Rodriguez's own nationality, citizenship, or cultural heritage.

Moreover, the majority’s conclusions are far from “compelled” by the record as the substantial evidence standard requires. *Singh v. Garland*, 57 F.4th 643, 651 (9th Cir. 2022). Flores Rodriguez did not testify, so the only case-specific evidence of nexus comes from four paragraphs in an affidavit describing a handful of incidents in 2015. There, Flores Rodriguez recounts briefly how the gang member harassed, threatened, and grabbed her. But unlike other cases in which we have granted petitions for review, the limited record lacks any overt statements of motivation or bias showing a nexus to a protected ground—and especially not a protected ground advanced by Flores Rodriguez. *Cf. Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073 (9th Cir. 2017) (en banc). The affidavit says only that the gang member expressed that he “liked” her and thought she “was pretty.”

The majority instead relies heavily on themes from country reports to conclude that the gang member possessed “an intent to punish her for being a Salvadoran woman who defied the cultural perception of his dominance.” That the gang member was attempting to enforce unique Salvadoran cultural norms is one possible reading of the record. But it is not the only reasonable reading; one can easily imagine the same unfortunate incidents taking place in a country lacking the Salvadoran *machismo* culture. Indeed, the agency found that the incidents occurred for personal, not cultural, reasons: the gang member “liked her” and harassed her when “she was not willing to agree to be his girlfriend.” The record seems at least

equally amenable to such a reading, and so we are required to defer to it. *See Singh v. Barr*, 935 F.3d 822, 826–27 (9th Cir. 2019) (per curiam) (deferring to agency determination where evidence “could perhaps suggest” political animus but “could just as easily indicate” another motivation).

In sum, the majority compounds several errors. It overturns the proper analysis of the IJ and BIA below in rejecting the particular social group advanced by Flores Rodriguez. It wrongly reframes the particular social group and then errs in its nexus analysis even under this newly reframed particular social group. Finally, it errs in applying our substantial evidence standard. I would deny the petition and therefore respectfully dissent.