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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

Board Of Immigration Appeals

IN THE MATTER OF

K-C-,

A***-***-408

Respondent.

Appeal from an Immigration Judge decision

**BRIEF OF AMICUS, AMERICAN IMMIGRATION
LAWYERS ASSOCIATION**

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Introduction

Domestic violence victims may be eligible for asylum, withholding of removal, and other forms of refugee protection incorporated into U.S. law with the Refugee Act of 1980.¹ The Refugee Act implemented the United States' international obligations under the 1951 United Nations Convention relating to the Status of Refugees and the 1967 United Nations Protocol relating to the Status of Refugees (collectively "UN Refugee Convention"). U.S. law defines a "refugee," who is eligible for asylum, as someone outside his or her country of nationality who is unable or unwilling to return because of past persecution, or a well-founded fear of future persecution, on account of race, religion, nationality, membership in a particular social group ("PSG") or political opinion. All of these elements must be met for an applicant to be eligible for asylum. As is widely recognized by

¹ This *amicus* brief focuses only on asylum, but the arguments within are equally applicable to withholding of removal claims. The burden of proof is higher in withholding of removal claims, but eligibility for withholding of removal requires proof of the same elements as asylum claims. See *INS v. Stevic*, 467 U.S. 407, 424, 430 (1984).

experts and international and U.S. authorities, domestic violence may be a form of persecution that is perpetrated because of a woman's gender, which is an immutable characteristic that can define a PSG.

Serious forms of violence that occur in the domestic relationship context (e.g., rape, sexual assault, beatings, and violent threats) may be persecutory. Where domestic violence victims are not afforded state protection, such harm constitutes persecution. Conversely, isolated instances of lesser cruelty in a domestic relationship may not rise to the level of persecutory harm. International and domestic authorities overwhelmingly recognize that when a man perpetrates violence against a woman in a domestic relationship it is for reasons of gender; he is exercising power over *his* woman because he feels that women are subordinate and *his* woman is *his* property. Therefore, a survivor of domestic violence may be a member of a PSG defined by the applicant's gender. As addressed in detail below, gender *per se* may define such a PSG.

A gender-defined PSG is appropriate because gender is the

type of immutable characteristic that can define a PSG.² Pursuant to longstanding Board precedent, a PSG is defined by an innate or immutable characteristic. In its historic 1985 decision, *Matter of Acosta*, the Board specifically recognized "sex" as an example of an innate or immutable characteristic that can define a PSG. The Board's PSG test has been widely accepted and applied in both foreign and domestic immigration tribunals. In recent cases based on domestic violence, DHS has applied the Board's PSG test to recognize gender-defined PSGs when gender is combined with nationality, marital or domestic relationship status, and the inability to leave that relationship. While DHS's proffered PSGs are valid, combining gender with other factors is not necessary. If misapplied, these other factors could invite a circular PSG formulation. Therefore, *amicus* urges the Board to issue a decision recognizing a PSG defined based on gender *per se*.

² Gender may also factor into other statutorily protected grounds, such as religion, race, political opinion, and nationality. See Deborah E. Anker, *Law of Asylum in the United States* § 5:48 (4th ed. 2011) (hereinafter "Anker §x:xx"). This *amicus* brief will only focus on gender as it relates to PSG formulation.

The recognition that gender is an immutable characteristic is logical from the language and seminal Board interpretation of the PSG ground. Allowing women to obtain protection based on their gender is not an expansion of asylum law, but simply an honoring of principles of fair treatment, equality, and non-discrimination fundamental to U.S. and international law. This recognition of gender in asylum law reflects growing awareness over the past two decades that, as stated in the U.S. Gender Asylum Guidelines, "women's rights are human rights and that women's rights are universal."

Concerns about all women being eligible for asylum if a PSG is defined by gender alone are unfounded and have confused the development of PSG jurisprudence. Simply being a member of a cognizable PSG, without more, is not enough to warrant a grant of asylum. PSGs, as well as groups defined by other protected grounds (*e.g.*, race, religion, nationality, and political opinion) may be numerically large, but to successfully advance an asylum claim the member of a PSG must meet all the elements of the refugee definition. These elements act as important filters for

determining which members of a PSG may be eligible for asylum after a case-specific inquiry. Each element requires a distinct inquiry; these elements should not be amalgamated or confused. For example, an applicant must show that he or she has been targeted or is otherwise at a particularized, specific risk of future persecution, or has experienced harm in the past that constitutes persecution giving rise to a rebuttable presumption of a well-founded fear.³

In the instant case, the Immigration Judge ("IJ") held that the Respondent suffered past persecution because of her membership in a gender-defined PSG. (Decision and Order, *Matter of K-C*, at 5.) (hereinafter "IJ Dec. at []".) The persecutor and the Respondent were in a domestic relationship and held

³ The well-founded fear of future persecution can be rebutted by the government in instances where a fundamental change in circumstances affects the applicant's risk of persecution, which no longer makes the applicant's fear reasonable, or when internal relocation is reasonable. 8 C.F.R. §§ 208.13(b)(1)(i)(A), (B) (2011). For example, a formal change of regime in the applicant's home country may constitute changed circumstances. *See Matter of N-M-A-*, 22 I&N Dec. 312, 321 (BIA 1998). The Board has held that the removal of a persecuting government and substantial changes in underlying human rights conditions are necessary for finding a fundamental change in circumstances. *See Matter of Chen*, 20 I&N Dec. 16, 19-21 (BIA 1989).

themselves out to their community as husband and wife. (IJ Dec. at 1.) Specifically, the IJ concluded that the Respondent endured violence in the domestic setting because of her membership in a gender-defined PSG ("women who suffer domestic violence") and that "the [Guatemalan] government is woefully inadequate in protecting its female citizens from such violence." (IJ Dec. at 5, 8.)

The IJ's definition of the Respondent's PSG conflates multiple elements of the refugee definition. Efforts to narrowly define a PSG because of concerns about it being too "amorphous" or overly broad are without merit and, as in this case, can lead to circular PSG formations. The Respondent's partner did not abuse her because she was a woman who suffered domestic violence; he abused her because she was a woman, a woman in a relationship with him. Therefore, the proper PSG should be defined based on the Respondent's gender.

While the PSG in the instant case was not properly defined, the IJ correctly recognized that violence in the domestic context is perpetrated for reasons of gender. (IJ Dec. at 5-6.) Studies, cited *infra*, have shown that, in some instances, men who inflict serious

harm upon their domestic partners do so as a way to exert control and dominance because they regard "their women" as subordinate due to their gender. International administrative bodies and tribunals have specifically acknowledged violence in the domestic context as gender-specific and as a human rights violation and have recognized a duty of states to protect women from such violence. However, in some cases, the state may not take reasonable steps to protect an applicant, or an applicant may not have reasonable access to existing state protection. Consequently, refugee protection has been extended to victims of domestic violence both internationally and in the United States.

This brief advances two critical arguments: that domestic violence is about gender; and that the PSG jurisprudence supports the principle that, in the domestic violence context, gender *per se* can define a PSG. Part I of this brief will explain that when a man inflicts serious harm upon a woman in a domestic relationship it is because of her gender. Part II will address why gender, as the Board specifically recognized, can define a PSG in the context of an asylum claim based on "domestic violence." Part

III of the brief will explain the nature of asylum protection, which requires a particularized inquiry, and separate consideration of each element of the refugee definition to determine whether applicants are eligible for asylum. Therefore, the Board should issue a decision recognizing the PSG in this case as "Guatemalan women."⁴

Argument

To qualify for asylum, an applicant must meet the multi-pronged definition of a refugee. *See* Immigration Nationality Act ("INA") § 101(a)(42)(A) (1952) (codified at 8 U.S.C. § 1101(a)(42)(A) (2011)). An applicant must establish that (1) he or she was harmed in the past or has a well-founded fear of harm in the future, (2) the harm experienced or feared is serious enough to rise to the level of persecution, (3) when the harm is not committed by the government of the country that the applicant is fleeing, that

⁴ In the alternative, the Board may consider PSG definitions based on DHS's analysis, which is further described below, as "domestic partners in Guatemala who are unable to leave the relationship" or "domestic partners in Guatemala who are viewed as property by virtue of that relationship." While these PSGs may fit within the jurisprudence, defining PSGs based on numerous characteristics can create confusing PSG formulations and invites circularity.

the government was or is unable or unwilling to protect the applicant from the harm, and (4) the harm experienced or feared is for reasons of a statutorily protected ground. *Id.* A successful asylum claim must satisfy all of these elements -- simply establishing membership in a protected group is insufficient. *See e.g., Fatin v. INS*, 12 F.3d 1233, 1240-42 (3d Cir. 1993) (Alito, J.) (recognizing two distinct gender-defined PSGs, but holding that the applicant failed to show that she was a member of one PSG, and failed to show that she had a well-founded fear on account of her membership in the other PSG); *Matter of Acosta*, 19 I&N Dec. 211, 219, 236 (BIA 1985), *overruled in part on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987) (noting that "[8 U.S.C. § 1101(a)(42)(A) (2011)] creates four separate elements that must be satisfied before an alien qualifies as a refugee").

As noted, the fourth element of the refugee definition requires an applicant to demonstrate that he or she possesses a protected characteristic or belief. *See* § 101(a)(42)(A) of the Act. Protected characteristics include "race, religion, nationality, membership in a particular social group, [and] political opinion."

Id. Here, the specific evidence presented supports a finding that the Respondent endured serious harm that constitutes persecution, and that she has a well-founded fear of a particularized risk of future harm based on her membership in a gender-defined PSG.

I. Domestic Violence May Rise To The Level Of Persecution And Is Inflicted For Reasons Related To Gender.

This section of the brief will explain that: (1) harm in the domestic relationship context may rise to the level of persecution; (2) violence in a heterosexual domestic relationship is inflicted for reasons of gender; and (3) gender has been internationally and domestically recognized as a defining characteristic of a PSG.

A. Violence in the domestic context can rise to the level of persecution.

"Domestic violence" can, depending on the circumstances, include types of harm that are serious enough to rise to the level of persecution. For example, women can be raped, beaten, and subjected to other severe physical or non-physical, protracted harms that rise to the level of persecution. *See, e.g., Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987), *overruled on other*

grounds by Fisher v. INS, 79 F.3d 955 (9th Cir. 1996) (recognizing rape in the context of an intimate relationship as a harm that can constitute persecution); *Uwais v. U.S. Att'y Gen.*, 478 F.3d 513, 518 (2d Cir. 2007) (finding that an asylum applicant who was assaulted, beaten, and raped suffered harm that can constitute past persecution); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1036-37 (8th Cir. 2008) (reasoning that "non-physical" harm in the domestic context, such as demands from the family of a widow-applicant's deceased spouse to marry her brother-in-law, demands to pay back a "bride's price" for marriage, or threats to take the widow-applicant's children may constitute persecution); Asylum Officer Basic Training Course, *Female Asylum Applicants and Gender-Related Claims* 10, 22 (Mar. 12, 2009) (hereinafter "AOBTC: *Female Asylum Applicants*") (recognizing that rape, as well as the social ostracism to which an applicant may be subjected after being raped, can constitute persecution); Memorandum from Phyllis Coven, INS Office of International Affairs, to All INS Asylum Officers and HQASM Coordinators, *Considerations for Asylum Officers Adjudicating Asylum Claims*

From Women 9 (May 26, 1995) (hereinafter "U.S. Gender Guidelines"); Anker §§ 4:14, 4:15. The fact that "domestic violence" occurs in the domestic relationship context and that the harm is inflicted by a non-state actor does not mean that it cannot be serious enough to be embraced within the definition of persecution.⁵ This type of harm is generally inflicted for reasons of gender.

B. Various experts on domestic violence and

⁵ Harm from non-state actors can be considered persecution where the state fails to protect against such harm. *See generally* Anker § 4:10. The United Nations High Commissioner for Refugees ("UNHCR") makes clear that seemingly private acts of violence, such as domestic violence, "can be considered persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection." UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ¶ 65, U.N. Doc. HCR/IP/4/Eng/REV.1 (1979, rev. 1992). The United States Citizenship and Immigration Services ("USCIS") has likewise stated that persecution can be at the hands of non-state actors when the government is not able or willing to protect others from the non-state actor's harm. *See* Asylum Officer Basic Training Course ("AOBTC"), *Asylum Eligibility Part II: Well-Founded Fear* 6 (Sept. 14, 2006). In the instant case, the harm occurred at the hands of the Respondent's domestic partner, but the IJ noted that the "largely apathetic local police" and the Guatemalan government have woefully failed to protect women and girls who are victims of domestic violence. (IJ Dec. at 5.)

international authorities have recognized that violence within a domestic relationship may be inflicted for reasons of gender.

Various expert bodies have analyzed violence in the domestic context as a husband's, or partner's, belief that his wife or partner occupies a subordinate position within their domestic relationship and can be controlled through violence as a consequence of that subordination.⁶ See Anker § 5:52. For example, an American

⁶ Although domestic violence is largely directed at women in intimate or marital relationships with men, the targeting of women is based on their gender; gender relates to a male or female's role or status in a society or relationship, while sex simply refers to a biological trait. See UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* ¶ 1 (HCR/GIP/02/01) (May 7, 2002) (hereinafter "UNHCR Gender Guidelines") ("Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination."). Therefore, domestic violence may likewise occur in same-sex relationships in which the victim of domestic violence may be a member of a PSG that is not defined by the victim's sex, but by his or her gender role or another immutable or fundamental characteristic, such as sexual orientation (due to internalized homophobia) or degree of "outness." See Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 Harv. Hum. Rts. J. 133, 138 n.27 (2002); see generally *Intimate Partner Violence in LGBTQ Lives* (Janice L. Ristock, ed., 2011) (recognizing multiple layers of oppression that contribute to violence in same-sex relationships, including sexism and homophobia). Similarly, AILA

Psychological Association ("APA") study notes that "[e]xperts generally agree that in an abusive family situation, the abuser uses physical, sexual, or psychological coercion or intimidation for the purpose of achieving power and control over family members or to punish them for not meeting the abuser's needs." APA, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* 11 (1996) (hereinafter "APA Report"). The APA Report discusses the relationship between gender subordination and family violence: "Men, for example, receive the false message that they have a right and a mandate to control the women and children in their families. That belief contributes significantly to men's continued use of violence to maintain power and control." APA Report at 112. Therefore, the actions of a typical abuser may be fueled by stereotypical gender expectations of "his woman." APA Report at 82. The APA Report goes so far as to conclude that "[t]he strongest

acknowledges the fact that men and children may also be victims of domestic violence. An in-depth analysis of PSGs in cases involving same-sex violence, men, or children is beyond the scope of this brief.

risk factor for being a victim of partner violence is being female."

APA Report at 19 (emphasis in original).

Similarly, a study by the National Institute of Justice on batterer intervention programs found that "studies have documented the sense of *entitlement* batterers feel in controlling their partners' behavior and in justifying violence if these women deviate from the female sex role," and that "[i]n practice, regardless of their primary perspective, most [batterer intervention] programs . . . view sexual inequality and masculine role expectations of dominance as core issues to address." Kerry Healey, Christine Smith & Chris O'Sullivan, *Batterer Intervention: Program Approaches and Criminal Justice Strategies*, 18-19, 28 (1998) (emphasis in original). Experts in programs aimed at intervening to combat such violence have recognized the importance of socially and culturally reinforced beliefs such as the "cultural expectation that men should be dominant and successful, . . . and the role of sexism in the media and in society [in] provid[ing] models of social support for abusing

and degrading women." *Id.* at 21, 26.⁷

International authorities have similarly addressed the gendered nature of such violence. For example, the U.N. Declaration on the Elimination of Violence Against Women, which was unanimously adopted by the U.N. General Assembly, specifically recognizes domestic violence as a "manifestation of historically unequal power relationships between men and women," and condemns it as one of the "crucial social mechanisms by which women are forced into a subordinate position compared with men." G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/48/49, at 217 (Dec. 20, 1993). The U.N. Special Rapporteur on Violence Against Women ("Special Rapporteur") has similarly commented on the use of domestic violence as a tool

⁷ See also Isabel Marcus, *Reframing "Domestic Violence": Terrorism in the Home*, in *The Public Nature of Violence* 11, 23 (1994) (describing statements made by batterers in court-mandated educational programs that "speak to well developed notions of sex-based power, control, and hierarchy"); James Ptacek, *Why Do Men Batter Their Wives*, in *Feminist Perspectives on Wife Abuse* 133, 147-49 (Kersti Yllö & Michelle Bograd eds, 1988) (describing how batterers who had participated in a counseling program often justified their violence by seeing themselves as "punishing the woman for her failure to be a good wife").

of oppression against women:

At its most complex, domestic violence exists as a powerful tool of oppression. Violence against women in general, and domestic violence in particular, serve as essential components in societies which oppress women, since violence against women not only derives from but also sustains the dominant gender stereotypes and is used to control women in the one space traditionally dominated by women, the home.

UNHCR, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, Radhika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 1995/85, ¶ 27, U.N. Doc. E/CN.4/1996/53 (Feb. 5, 1996) (hereinafter "*1996 Report of the Special Rapporteur on Violence Against Women*").⁸

The United Nations has addressed in detail how violence in

⁸ See also UNHCR, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, Radhika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 1995/85, ¶ 9, U.N. Doc. E/CN.4/1999/68 (Mar. 10, 1999) (hereinafter "*1999 Report of the Special Rapporteur on Violence Against Women*") ("The culturally-specific, ideologically dominant family form in any given society . . . serves as the standard against which individual women are judged and, in many cases, demonized for failing to ascribe to moral and legal dictates with respect to family and sexuality" and "legitimizes violence against women in the form of sexual harassment, rape, domestic violence, female genital mutilation, forced marriages, honor killings and other forms of femicide.").

the domestic context can be a means for trying to subordinate women. See "Violence Against Women in the Family," U.N. Doc. ST/CSDHA/2, U.N. Sales No. E.89.IV.5 (1989) (hereinafter the "U.N. Report"). In discussing the limitations of various theories or explanations concerning the causes of violence against women in the home, the report states that "it is perhaps best to conclude that violence against wives is a function of the belief . . . that men are superior and that the women they live with are their possessions or chattels that they can treat as they wish and as they consider appropriate." *Id.* at 33. The U.N. Report continues: "Any explanation [of violence against women in the home] must, however, be seen against a background of gender inequality . . . wherein the structures of society — be they economic, political or legal — act to confirm this inequality."⁹ *Id.* at 33, 105 ("Violence

⁹ The United States and the international community have taken substantial steps toward recognizing the gravity of gender-specific persecution and have specifically recognized that domestic violence can be a basis for an asylum claim. A critical element in the development of women's human rights has been the acknowledgement that the serious harms women typically suffer are the result of cultural or customary practices and that these harms are often imposed by the hands of members of the woman's family or community. See generally Anker §§ 4:14, 4:15, 4:23;

against women is the product of the subordination of women.").

Various documents and international tribunal decisions indicate the international community's recognition of "domestic violence" as a central human rights issue.¹⁰ For example, in her 1996 report concerning violence against women, the Special Rapporteur recommended that refugee and asylum laws be interpreted "to include gender-based claims of persecution,

Deborah Anker, Lauren Gilbert & Nancy Kelly, *Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify As Refugees Under United States Asylum Law*, 11 Geo. Immigr. L.J. 709 (1997); Pamela Goldberg, *Anyplace but Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 Cornell Int'l L.J. 565 (1993); Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 Cornell Int'l L. J. 625 (1993); Jacqueline Greatbatch, *The Gender Difference: Feminist Critiques of Refugee Discourse*, 1 Int'l J. Refugee L. 518 (1989).

¹⁰ International human rights documents have begun to recognize women's rights. See, e.g., *Vienna Declaration and Programme of Action*, World Conference on Human Rights, Vienna, 14-25 June 1993, U.N. Doc. A/CONF.157/23 (July 12, 1993); *Beijing Declaration and Platform for Action*, Fourth World Conference on Women, 15 September 1995, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995) and A/CONF.177/20/Add.1 (Oct. 27, 1995); Organization of American States, *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*, June 9, 1994, 33 I.L.M. 1534.

including domestic violence." ¹¹ *1996 Report of the Special Rapporteur on Violence Against Women* ¶ 142(o). As the Special Rapporteur observed, "[d]espite the apparent neutrality of the term, domestic violence is nearly always a gender-specific crime, perpetrated by men against women" and "is directed primarily at women with the intention of depriving them of a range of rights and maintaining their subordination as a group." *Id.* ¶¶ 23, 53. States Parties to the 1951 U.N. Refugee Convention (from which United States asylum law is derived) ¹² have recognized that members of gender-defined PSGs may be able to establish viable

¹¹ *Accord Report of the Expert Group Meeting on Gender-Based Persecution*, United Nations Division for the Advancement of Women, ¶ 46, U.N. Doc. EGM/GBP/1997/Report (1997) ("[W]omen are often persecuted, mainly, partly or solely because they are women."); *see generally* *1999 Report of the Special Rapporteur on Violence Against Women*.

¹² "[O]ne of Congress' primary purposes' in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, T.I.A.S. No. 6577 (1968), to which the United States acceded in 1968. The Protocol incorporates by reference Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951)." *INS v. Aguirre-Aguirre*, 119 S. Ct. 1439, 1446 (1999) (citation omitted).

asylum claims based on domestic violence.¹³

C. International and domestic authorities have long recognized that gender can define a PSG.

The recognition of gender as the defining characteristic of a PSG in the international arena is longstanding. In 1985, the UNHCR's Executive Committee first recognized that women may qualify for asylum based on membership in gender-based social

¹³ See, e.g., U97-01917 (Immigration and Refugee Board of Canada, Convention Refugee Determination Division, Nov. 10, 1997), *reprinted in Gender Asylum Law in Different Countries Decisions and Guidelines* 454 (Refugee Law Center, Inc. ed., 1999) (hereinafter "*Gender Asylum Law in Different Countries*") (granting refugee protection based on the particular social group of Nigerian women who are victims of domestic violence); U96-02325 (Immigration and Refugee Board of Canada, Convention Refugee Determination Division, Dec. 20, 1996), *reprinted in Gender Asylum Law in Different Countries* 407 (granting refugee protection based on the particular social group of women subjected to domestic violence in Ghana); *Islam (A.P.) v. Secretary of State for the Home Department, Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah*, 2 A11 E.R. 545 (H.L. 1999) (women subject to state-tolerated domestic violence constitute a "particular social group"). Most recently, States Parties to the Council of Europe Convention on prevention and combating violence against women and domestic violence vowed to take legislative actions to ensure that gender-specific violence may be recognized as a form of persecution under the Refugee Convention. Council of Europe, *Gender-related claims for asylum*, Doc. 12687, ¶ 4 (July 18, 2011) (referring to Article 60 of the Council of Europe Convention on prevention and combating violence against women and domestic violence which was recently opened for signature on May 11, 2011).

groups,¹⁴ and it adopted a series of conclusions, throughout the late 1980s and early 1990s, aimed at affording more meaningful protection to women fleeing persecution in their home countries.¹⁵ In 2002, UNHCR issued Gender Guidelines, which clearly state that sex can define a social group that may qualify for refugee protection. UNHCR Gender Guidelines ¶ 12. UNHCR reiterated this position in its 2009 guidelines on female genital mutilation. See UNHCR, *Guidance Note on Refugee Claims Relating to Female Genital Mutilation* ¶¶ 23-24 (May 2009). The Special Rapporteur

¹⁴ *Refugee Women and International Protection*, UNHCR Programme Executive Committee, 36th Sess., No. 39 ¶ (k) (Oct. 18, 1985), available at <<http://www.unhcr.org/refworld/docid/3ae68c43a8.html>>.

¹⁵ For example, in July 1991, the UNHCR issued its *Guidelines on the Protection of Refugee Women* which encouraged States to consider women who face severe violence for violating social mores governing the role of women as a "social group," in order to ensure protection as refugees. Office of the United Nations High Commissioner for Refugees, ¶ 54, U.N. Doc. ES/SCP/67 (1991); see also *Conclusion on Refugee Protection and Sexual Violence*, UNHCR Programme Executive Committee, 44th Sess., No. 73 (Oct. 3, 1993), available at <<http://www.unhcr.org/refworld/docid/3ae68c6810.html>>; *Refugee Women*, UNHCR Programme Executive Committee, 39th Sess., No. 54 (Oct. 10, 1988) available at <<http://www.unhcr.org/refworld/docid/3ae68c4370.html>>; *General Conclusion on International Protection*, UNHCR Programme Executive Committee, 38th Sess., No. 46 (Oct. 12, 1987), available at <<http://www.unhcr.org/refworld/docid/3ae68c95c.html>>.

has likewise expressed her support for the view that gender should be recognized as a "particular social group" for purposes of adjudicating asylum claims. UNHCR, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, Radhika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 1997/44, § III.B.1, U.N. Doc. E/CN.4/1998/54 (Jan. 26, 1998). International courts have similarly defined PSGs based on gender. *See id.* § III.B.1-2.

The United States' recognition of gender as a definitive characteristic of a PSG is also longstanding. In a landmark 1985 decision, the Board specifically recognized "sex" as an example of an innate or immutable characteristic that can define a PSG. *Matter of Acosta*, 19 I&N Dec. at 233. In 1995, the legacy Immigration and Naturalization Service ("INS") Office of International Affairs issued Gender Guidelines, making the United States the second country to do so after Canada. *See generally* U.S. Gender Guidelines (elaborating on substantive law and procedures for determining gender-based asylum claims). The U.S. Gender Guidelines explicitly state that "the evaluation of

gender-based claims must be viewed within the framework provided by existing international human rights instruments and the interpretation of those instruments by international organizations." *Id.* at 2. With the U.S. Gender Guidelines, the legacy INS expressly recognized that women often experience types of persecution different from men and that "domestic violence" is among the types of persecution that are "particular to . . . gender" and can serve as a basis for asylum. *Id.* at 4.

The U.S. Gender Guidelines and USCIS asylum officer training materials also recognize that gender can define a PSG in asylum claims based on domestic violence. *See* U.S. Gender Guidelines at 13-15; *see also* AOBTC: *Female Asylum Applicants* at 6-7. "In many cases [the particular social group ground] is appropriate where a claimant fears persecution because she is a woman, where gender is the trait that gives rise to a differential risk of harm." Anker § 5:48. Furthermore, in domestic violence based claims, USCIS instructs asylum officers that "violence against mothers, sisters and daughters, like other forms of violence against women, is often related to the historically more

powerful position of men in the family and in society, the perceived inferiority of women and unequal status granted by laws and societal norms." AOBTC: *Female Asylum Applicants* at 15; *see also* Anker § 5:52.

II. Gender Is An Immutable Characteristic That Can Define A Particular Social Group Within The Refugee Definition.

"Gender-based PSG claims encompass those in which the applicant's gender is the defining, or one of the defining, fundamental characteristics giving rise to his or her past or future fear of persecution." Anker § 5:48. Gender is an immutable characteristic that meets the longstanding PSG test defined by the Board in *Matter of Acosta*. Here, "Guatemalan women," is a cognizable PSG within the meaning of the INA, federal regulations, court decisions, guidance from the UNHCR, DHS policies and legal arguments, and scholarly articles.

A. *Matter of Acosta* is the starting point for particular social group analysis.

Over twenty-five years ago, the Board decided the seminal case articulating the particular social group test—*Matter of Acosta*—and it remains the standard today. In *Acosta*, the Board

held that a PSG is defined by the group members' sharing of a "common, immutable characteristic" that members cannot, or should not, be required to change. *Matter of Acosta*, 19 I&N Dec. at 233. The Board specifically identified "sex" as an example of an immutable characteristic that could define a PSG. *Id.* ("We interpret the phrase 'persecution on account of membership in a particular social group of persons' to mean persecution that is directed toward an individual who is a member of a group of persons who share a common, immutable characteristic. . . . [S]uch as sex . . .").

The Board concluded that immutability should be the defining framework of the PSG test based on the doctrine of *ejusdem generis* ("of the same kind").¹⁶ *Matter of Acosta*, 19 I&N Dec. at 233. Examining the refugee definition, the Board

¹⁶ The doctrine states that the specific words in a statute must be construed "consistent with" the general words. *Matter of Acosta*, 19 I&N at 233 (citing *Cleveland v. United States*, 329 U.S. 14 (1946) and 2 1A C. Sands, *Sutherland on Statutory Construction* § 47.17 (4th ed. 1972)); see also Sutherland on Statutory Construction § 46.16 (7th ed. 2009) ("If the legislative intent or meaning of a statute is not clear, the meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases.").

interpreted the meaning of "particular social group" in comparison with the other protected grounds (*i.e.*, race, religion, nationality, and political opinion). *Id.* The Board concluded that all of the protected grounds encompass either innate characteristics or characteristics one should not be required to change.¹⁷ *Id.* As noted above, the Board listed "sex" as a classic innate characteristic that can define a PSG. *Id.*

B. *Acosta's* particular social group test is internationally accepted.

The *Acosta* PSG test has been widely accepted and adopted by other States Parties to the UN Refugee Convention¹⁸ and by

¹⁷ Each of the five protected grounds are similar in that they are all derived from a "quality of 'difference' in the victim that will not be 'tolerated' and invites 'oppression' by the persecutor." Anker § 5:43 (quoting *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985)); *see also* *Kotas v. INS*, 31 F3d 847, 853 (9th Cir. 1994) ("[T]he Refugee Act's bases for asylum eligibility refer almost exclusively to groups. . . . Proof that the government or other persecutor has discriminated against a group to which the petitioner belongs is, accordingly, always relevant to an asylum claim.").

¹⁸ *See, e.g., Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 739 (adopting the *Acosta* formulation of particular social group); *Shah and Islam v. Secretary of State for the Home Department*, [1999] 2 AC 629 (UK) (finding that the recognition of "women in Pakistan" as a particular social group "is simply a logical application of the seminal reasoning in *Acosta's* case"); *Re ZWD*, Refugee Appeal No. 3/91 (New Zealand Refugee Review

the UNHCR. See UNHCR Gender Guidelines ¶ 30.¹⁹ The international community's adoption of *Acosta's* test is likely explained by its focus on immutable and fundamental characteristics, which recognize the principles of non-discrimination and the protection of fundamental human rights as the underlying purposes of the UN Refugee Convention.²⁰

Board) 92; *Applicant S v. Minister for Immigration & Multicultural Affairs*, [2004] HCA 25, 217 C.L.R. 387 ¶ 16 (H.C. Austl. 2004).

¹⁹ The Supreme Court has acknowledged that it is important to consult this source of international law, among others, when construing the asylum statute. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) (stating that the UNHCR Handbook provides instructive guidance on claims for protection in accordance with the United Nations Protocol Relating to the Status of Refugees, "which provided the motivation for the enactment of the Refugee Act of 1980").

²⁰ The basic framework of international refugee law is to protect persons who are marginalized within their own societies based on personal characteristics of which they have no control, or based on characteristics deserving protection as a basic human right. See generally United Nations Convention relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; United Nations Protocol relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; see also *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at 672-73 ("In distilling the contents of the head of 'particular social group,' account should be taken of the general underlying themes of the defence of human rights and anti-

High tribunals of States Parties to the UN Refugee Convention have also adopted the *Acosta* test in recognizing gender as a characteristic that can define, in whole or in part, a PSG. Canada, Australia, United Kingdom, Ireland, Sweden, and numerous other countries have also issued immigration policies, developed guidelines, and enacted legislation recognizing that gender may define a PSG.²¹ For example, the Supreme Court of

discrimination that form the basis for the international refugee protection initiative.").

²¹ See generally Anker §§ 5:44, 5:48. See also Immigration & Refugee Board of Canada, *Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution* (Mar. 9, 1993); Immigration & Refugee Board of Canada, *Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act, Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution: Update* (Feb. 2003). Since the issuance of the original Canadian guidelines in 1993, other nations have issued guidelines that also address gender-related protection under the Refugee Convention. See Australian Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers* (July 1996). See also Immigration Appellate Authority of the United Kingdom, *Asylum Gender Guidelines* (Nov. 2000). Some States Parties also enacted legislation, recognizing gender harm and gendered reasons as bases for refugee claims. See Refugee Act §1(1) 1996 (Act. No. 17/1996) (Ir.); see also Alien Act (Svenskförfattningssamling [SFS] 2005:716) (Swed.). A comprehensive list of other countries that have adopted legislation and/or guidelines recognizing gender-based persecution and

Canada followed the Board's lead in *Acosta* in listing "gender" as a prototypical example of a characteristic that can define a PSG. *See Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (Can.).²² The UNHCR and other international organizations have likewise accepted the *Acosta* test and recognized gender as a characteristic that can define, in whole or in part, a PSG. *See*

gender-defined PSGs, including Germany, The Netherlands, Norway, South Africa, Spain, Switzerland, and the European Union can be found at the Center for Gender & Refugee Studies' website. *See* Center for Gender & Refugee Studies, *Gender Guidelines*, <http://cgrs.uchastings.edu/law/gender_guidelines.php#EU> (last visited Oct. 5, 2011).

²² The Immigration and Refugee Board of Canada has granted refugee protection to domestic violence victims based on their membership in a PSG defined by gender and nationality. *See, e.g.*, U97-01917 (Immigration and Refugee Board of Canada, Convention Refugee Determination Division, Nov. 10, 1997), *reprinted in Gender Asylum Law in Different Countries* 454 (granting refugee protection based on the PSG of Nigerian women who are victims of domestic violence). Similarly, courts in the United Kingdom have likewise recognized "women in Pakistan" and "women in Sierra Leone" as PSGs. *See, e.g., Islam and Shah v. Home Dept.*, [1999] 2 A.C. 629, 644-45 (U.K.) ("women in Pakistan"). Similarly, courts in Australia and New Zealand, respectively, have also recognized "women in Pakistan" and "Iranian women" as defining PSGs. *See Minister for Immigration and Multicultural Affairs v Khawa*, [2002] 79 A.L.J.R. 667 ¶ 32, 35 (Austl.); *Re MN*, Refugee Status Appeals Authority, No. 2039/93, [1996] ¶ 108, 119 (N.Z.).

UNHCR Gender Guidelines ¶ 30 ("Sex can properly be within the ambit of the social group category . . . defined by innate and immutable characteristics.")

C. U.S. federal courts have applied the *Acosta* test to recognize gender-defined particular social groups.

All U.S. federal courts of appeals have adopted the *Acosta* test,²³ and in many instances have specifically recognized gender as an immutable characteristic that can define a PSG.²⁴ *See, e.g.,*

²³ *See Ngengwe v. Mukasey*, 543 F.3d 1029 (8th Cir. 2008); *Bah v. Mukasey*, 529 F.3d 99, 112 (2d Cir. 2008); *Sepulveda v. Gonzales*, 464 F.3d 770, 771 (7th Cir. 2006); *Castillo-Arias v. Att'y Gen.*, 446 F.3d 1190, 1196 (11th Cir. 2006); *Niang v. Gonzales*, 422 F.3d 1187, 1198-99 (10th Cir. 2005); *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004); *Castellano-Chacon v. INS*, 341 F.3d 533, 546 (6th Cir. 2003); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir. 2002); *Ananeh-Firemping v. INS*, 766 F.2d 621, 626 (1st Cir. 1988); *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993); *but see Gomez v. INS*, 947 F.2d 660, 663-64 (2d Cir. 1991) (rejecting claim that "women who have been previously battered and raped by Salvadoran guerillas" are a PSG).

²⁴ Although gender *per se* should be sufficient to identify a cognizable PSG, asylum jurisprudence frequently combines gender with another immutable characteristic, such as nationality or tribal membership. *See, e.g., Matter of Kasinga*, 21 I&N Dec. 357, 358 (BIA 1996) (granting asylum to a woman from Togo based on her membership in a PSG of "young women of the Tchamba-Kunsuntu Tribe who have not had undergone female genital mutilation, as practiced by that tribe, and who oppose that

Ngengwe v. Mukasey, 543 F.3d at 1033-35 (finding that "Cameroonian widows" shared immutable characteristics including gender and past experience); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005) (recognizing that gender is an immutable characteristic); *Abay v. Ashcroft*, 368 F.3d 634, 638 (6th Cir. 2004) (finding that female genital mutilation "involves the infliction of grave harm constituting persecution on account of membership in a PSG"); *Fatin*, 12 F.3d at 1240 (recognizing that a woman who had a well-founded fear of being persecuted in Iran because she was a woman could meet the requirements of membership in a gender-defined PSG); *see also Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005) (recognizing gender is a "*prototypical* immutable characteristic" in the meaning of *Matter of Acosta*) (emphasis added); Anker §§ 5:48, 5:55.

practice"); *Bah v. Mukasey*, 529 F.3d at 112 (noting that "it appears to us that petitioners' gender—combined with their ethnicity, nationality, or tribal membership—satisfies the social group requirement"); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (finding that respondent "was persecuted on account of her membership in a particular social group, Somali females"); *see also Perdomo v. Holder*, 611 F.3d 662, 667 (9th Cir. 2010) (holding that the BIA erred in dismissing asylum-seeker's claim solely on the basis that "all women in Guatemala" could not constitute a particular social group).

In *Fatin v. INS*, the Third Circuit held that gender is a characteristic that could define a PSG. See 12 F.3d at 1240.

Interpreting *Acosta*, the Court reasoned:

[T]he Board specifically mentioned "sex" as an innate characteristic that could link the members of a "particular social group." Thus, to the extent that the Respondent in this case suggests that she would be persecuted or has a well-founded fear that she would be persecuted in Iran simply because she is a woman, she has satisfied the first of the three elements that we have noted [*i.e.*, membership in a cognizable PSG].

*Id.*²⁵

D. "Social visibility" and "particularity" have been imposed upon the well-defined particular social group test as additional criteria.

More recently, the Board elaborated on the *Acosta* test suggesting additional criteria of social visibility and particularity. See *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006); *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008). "Social visibility" and "particularity," if viewed as add-ons to the well-established *Acosta*

²⁵ In *Fatin*, the court upheld the denial of an asylum claim because the applicant failed to demonstrate that her fear of future harm was based on her membership in a PSG defined as Iranian women. *Id.* The Court held that the applicant failed to show "that she would suffer or that she has a well-founded fear of suffering 'persecution' based solely on her gender." *Id.* at 1241.

PSG test, have been subject to heavy criticism by commentators and federal courts.²⁶ But, if the BIA chooses to consider them, the "social visibility" and "particularity" criteria are met by the

²⁶ See e.g., Anker § 5:45; Fatma E. Marouf, *The Emerging Importance of 'Social Visibility' in Defining a 'Particular Social Group' and its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 Yale L. & Pol'y Rev. 47, 66-68 (2008) (criticizing the social visibility standard as inconsistent with domestic and international authorities, including the UNHCR's test for PSGs); *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (Posner, J.) (stating that in regards to "'social visibility' as a criterion for determining 'particular social group,' the Board has been inconsistent rather than silent. It has found groups to be 'particular social groups' without reference to social visibility"). In some cases, U.S. courts have required that a member of a social group must be visibly identifiable to meet the social visibility test. See *Scatambuli v. Holder*, 558 F.3d 53, 60 (1st Cir. 2009) ("[T]he universe of those who knew of the petitioners' identity as informants was quite small; the petitioners were not particularly visible."); *Xiang Ming Jiang v. Mukasey*, 296 Fed.Appx. 166, 168 (2d Cir. 2008) ("[N]othing in the record reflects that he possesses any characteristics that would allow others in Chinese society to recognize him as someone caught between rival gangs."); *Matter of E-A-G-*, 24 I&N Dec. 591, 594 (BIA 2008) ("Persons who resist joining gangs have not been shown to be part of a socially visible group within Honduran society, and the respondent does not allege that he possesses any characteristics that would cause others in Honduran society to recognize him as one who has refused gang recruitment."); *Matter of C-A-*, 23 I&N Dec. 951, 960 (BIA 2006) ("When considering the visibility of groups of confidential informants, the very nature of the conduct at issue is such that it is generally out of the public view. In the normal course of events, an informant against the Cali cartel intends to remain unknown and undiscovered. Recognizability or visibility is limited to those informants who are discovered.").

proposed PSG.

USCIS has explained that the social visibility requirement "can be met by showing that members of the group possess a trait or traits that make the members recognizable or *distinct* in the society in question."²⁷ See Asylum Officer Basic Training Course, *Asylum Eligibility Part III: Nexus and the Five Protected Characteristics* 25-26 (Mar. 12, 2009) (emphasis added) (hereinafter "AOBTC: *Nexus*"). Furthermore, women generally are "socially distinct" as recognized by USCIS. See generally AOBTC: *Female Asylum Applicants*. DHS has further stated that women who are not afforded police protection from domestic violence may be visible within society because they are socially distinct. See DHS's Supplemental Brief, 17-18 (Apr. 13, 2009), submitted in *Matter of L-R-*, available at <http://graphics8.nytimes.com/packages/>

²⁷ Indeed, the U.S. Department of State's Bureau of Democracy, Human Rights, and Labor has devoted an entire section of its Country Report on Human Rights Practices for Guatemala to the plight of women who suffer domestic violence in Guatemala. See, e.g., U.S. Dep't of State, Bureau of Dem., Human Rights, and Labor, *Country Report on Human Rights Practice: Guatemala*, 20-23 (2010).

pdf/us/20090716-asylum-brief> (hereinafter "DHS Supp. Brief in *Matter of L-R*").

The BIA has also explained that a proposed group should "have particular and well-defined boundaries." *Matter of S-E-G*-, 24 I&N Dec. at 582 (holding that Salvadoran youths who resist membership in the MS-13 gang do not constitute a group defined with particularity). To provide an "adequate benchmark for determining group membership," the proposed group should not be "too amorphous" or involve terms whose "mean[ings] can vary." *Id.* at 584-85. "The essence of the particularity requirement, therefore, is 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."²⁸ *Id.*

²⁸ For example, the BIA has held that a proposed group of "noncriminal informants" was "too loosely defined to meet the requirement of particularity." *Matter of C-A*-, 23 I&N Dec. 951, 957 (BIA 2006). Similarly, the BIA has rejected terms such as "wealth" and "affluence" as "too subjective, inchoate, and variable to provide the sole basis for membership in a particular social group." *Matter of A-M-E- & J-G-U*, 24 I&N Dec. 69, 76 (BIA 2007).

The Second Circuit clarified that the BIA's particularity requirement "must not mean that a group's size can itself be a sound reason for finding a lack of particularity." *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 n.2 (2d Cir. 2007). Rather, the focus remains on whether the group is "indeterminate." *Id.* Applying this reasoning, federal courts of appeals have rejected proposed group characteristics such as "secularized" and "westernized," which are insufficiently particular because they "reflect matters of degree" and "call for subjective value judgments." *Ahmed v. Holder*, 611 F.3d 90, 95 (1st Cir. 2010); *but cf. Al Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009) (finding that "young, westernized people who have defied traditional, Islamic values by marrying without paternal permission" comprise a PSG because "active opposition . . . distinguishes [this group] from an impermissibly broad category of 'young' or 'westernized' persons in Yemen").

A social group defined by gender satisfies the particularity requirement because gender is not a vague, indeterminate, or

subjective characteristic.²⁹ See *Rivera-Barrientos v. Holder*, -- F.3d --, *8 (10th Cir. 2011) (finding that "the characteristics of gender and age are . . . susceptible to easy definition" and that "El Salvadoran women between the ages of 12 and 25 who have resisted gang recruitment" satisfy the particularity requirement).

Insofar as the proposed social group is defined, in part, by involvement in a domestic partnership, this aspect of the social group also satisfies the particularity requirement. A domestic partnership is a form of family relationship, which the BIA and federal courts of appeals recognize as sufficiently particular to

²⁹ In *Perdomo v. Holder*, 611 F.3d 662, 668 (9th Cir. 2010), the court rejected the notion that "'all women in Guatemala' is overly broad and internally diverse, and constitutes 'a mere demographic division . . . rather than a particular social group.'" The court stressed that it had "focused on the innate characteristics of such broad and internally diverse social groups as homosexuals and Gypsies to conclude that they constituted particular social groups." *Id.* The court then explained that it had rejected certain social groups as too broad only "where 'there is no unifying relationship or *characteristic* to narrow th[e] diverse and disconnected group.'" *Id.* The court therefore made clear that it is inappropriate to reject a proposed social group simply because it "represent[s] too large a portion of a population to allow its members to qualify for asylum." *Id.* at 669 (citing *Singh v. INS*, 94 F.3d 1353, 1359 (9th Cir. 1996)). *Perdomo* therefore supports the argument that "Guatemalan women" satisfy the particularity requirement.

constitute a PSG.³⁰ *See, e.g., Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) ("The family unit – centered here around the relationship between an uncle and his nephew – possesses boundaries that are at least as 'particular and well-defined' as other groups whose members have qualified for asylum."); *Al Ghorbani v. Holder*, 585 F.3d at 994-95 (holding that "the Al Ghorbani family possesses several common, immutable characteristics that establish it as a particular social group"); *Ayele v. Holder*, 564 F.3d 862, 869-70 (7th Cir. 2009) ("Our circuit recognizes a family as a cognizable social group under the INA, as do our sister circuits."); *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) ("There can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of a nuclear family."); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (noting that the family provides "a prototypical example of a 'particular social group'"); *Matter of C-A-*, 23 I&N Dec. at 959 (affirming that family ties can

³⁰ The Office of the Chief Counsel of DHS has specifically recognized "domestic relationship," if appropriately tailored, as a sufficiently specific term to define a PSG. *See* DHS Supp. Brief in *Matter of L-R-* at 19.

form the basis of a particular social group); *Matter of H-*, 21 I&N Dec. 337, 342 (BIA 1996) (accepting "clan membership" as a particular social group because it is "inextricably linked to family ties").

Indeed, the proposed group of "Guatemalan women" is at least as particular and well-defined as other social groups recognized by the federal courts. *See, e.g., Urbina-Mejia v. Holder*, 597 F.3d 360, 365-66 (6th Cir. 2010) (recognizing "former gang members" as a PSG); *Tapiero de Orejuela v. Gonzales*, 425 F.3d 666, 672 (7th Cir. 2005) (recognizing "the educated, landowning class of cattle farmers" as a PSG); *Fatin*, 12 F.3d at 1241 (finding that Iranian feminists who refuse to conform to the government's gender specific laws and social norms constitute a PSG).

E. DHS has recognized gender-defined particular social groups based on *Acosta*'s particular social group test.

DHS's U.S. Citizenship and Immigration Services ("USCIS") also recognizes gender-defined PSGs based on *Acosta*'s PSG test. *See* AOBTC: *Nexus* at 35-37; AOBTC: *Female Asylum Applicants* at 6-7, 39 (referencing *Matter of Acosta* while noting that gender can "form the basis of a particular social group" and that "[w]omen

may suffer harm solely because of their gender").

DHS's Office of the Chief Counsel ("OCC") has likewise applied *Acosta* in recognizing gender-defined PSGs within the context of domestic violence. See DHS Brief at 19, 22 (Feb. 19, 2004), submitted in *Matter of R-A-*, I&N Dec 906 (A.G. 2008, BIA 2005, A.G. 2001, BIA 1999) (hereinafter "DHS Brief in *Matter of R-A-*"). In 2004, DHS submitted a brief in *Matter of R-A-*, which stated that a PSG is best defined in light of the fact that domestic abusers often harm their partner because they believe that: (1) "women should occupy a subordinate position within a marital or intimate relationship;" (2) the abused partner should remain subordinate; (3) "abuse of women within such a relationship can therefore be tolerated;" and (4) social expectations in that society reinforce that view. *Id.* at 26-28.

Similarly, in 2009 DHS argued in its supplemental brief filed with the Board in *Matter of L-R-* that where the "domestic relationship" relates to immutable characteristics, such as "Mexican women in domestic relationships who are unable to leave" or "Mexican women who are viewed as property by virtue of

their positions within a domestic relationship," these characteristics can form cognizable PSGs. *See* DHS Supp. Brief in *Matter of L-R-*, at 14. DHS's brief in that case recognizes that in circumstances of domestic violence, the persecutor targets his female partner because of a belief that she occupies a subordinate position in the relationship. *See id.* at 15. This belief may be bolstered in a society where social expectations allow or even endorse such behavior. *See id.* An asylum-seeker's domestic relationship status can be considered an immutable characteristic in circumstances where the asylum-seeker cannot leave the abusive relationship because of "economic, social, physical or other constraints" or because the abuser simply will not let her leave. *Id.* at 16, 20-21.

In 2010, the OCC reiterated this position of recognizing gender-defined PSGs in the domestic violence context. In a written clarification to the Executive Office for Immigration Review in Los Angeles, California, the OCC stated that a PSG can be defined as "Peruvian women in domestic relationships who are viewed as property by virtue of their positions within a domestic

relationship, and who are unable to leave." DHS, *Written Clarification Regarding the Definition of "Particular Social Group,"* submitted to the Executive Office for Immigration Review, L.A. California (July 13, 2010). The OCC further explained that it "has always maintained in this matter and in others that domestic violence can be a basis for asylum." *Id.*

III. Concerns About Broadly Defined Particular Social Groups Are Meritless Because The Current Statutory And Regulatory Framework Creates An Adequate Filtering System.

The fear that recognizing a broad, gender-defined PSG (*e.g.*, "Guatemalan women") will bestow refugee status upon every woman in a specific society is meritless.³¹ *See generally* Anker §§

³¹ In *Niang v. Gonzales* the Tenth Circuit addressed why fears of "overbroad" gender-based particular social groups are without merit:

One may be reluctant to permit, for example, half a nation's residents to obtain asylum on the ground that women are persecuted there. But the focus with respect to such claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted 'on account of' their membership. It may well be that only certain women—say, those who protest inequities—suffer harm severe enough to be considered persecution.

5:43, 5:48. All the protected grounds are broad and either potentially or necessarily large in number. Concerns about defining PSGs broadly are based on a misunderstanding of the refugee definition—in particular the well-founded fear and nexus elements. The PSG ground should be interpreted consistently with the other grounds as the Board found in *Acosta* using the *ejusdem generis* analysis. See *Acosta*, 19 I&N Dec. at 233; Anker § 5:43. "[T]he PSG ground is defined by an immutable (or protected) characteristic that is like, but not synonymous with, other specific grounds" Anker § 5:43. PSGs may be as numerous as groups defined by other grounds (*e.g.*, race, religion, or nationality).³²

422 F.3d at 1199-1200 (10th Cir. 2005) (internal citations omitted). DHS has likewise stated that concerns about overwhelming numbers of asylum applicants if the relief is made available to domestic violence victims are without merit. See DHS Supp. Brief in *Matter of L-R-* n.10.

³² Indeed, there is no requirement that a PSG be narrowly defined. Nothing in international treaties, recognized as the basis of U.S. asylum law, or in the history of their negotiation supports a requirement that a particular social group be defined narrowly. See 1951 Convention Relating to the Status of Refugees, July 28, 1951, 10 U.S.T. 6259, 189 U.N.T.S. 150 (1951 Refugee Convention); United Nations High Commissioner for Refugees (UNHCR) *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1992) (UNHCR Handbook). As the

Asylum eligibility under the PSG ground is limited, as it is under all protected grounds, to those who can satisfy all the elements of the refugee definition.³³

An asylum applicant who is acknowledged to be a member of a cognizable PSG, within the meaning of the statute, must still satisfy the other elements of the statutory refugee definition to successfully advance a claim for asylum. *See, e.g., Matter of H-*, 21 I&N Dec. at 343-44 (BIA 1996) ("[T]he fact that almost all Somalis can claim clan membership and that interclan conflict is prevalent should not create undue concern that virtually all Somalis would qualify for refugee status, as an applicant must establish he is being persecuted on account of that membership."); Anker § 5:43

Supreme Court has noted, it is indeed appropriate to consider international law in construing the asylum statute. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987).

³³ As the UNHCR has advised, "[a]dopting a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled to refugee status. The refugee claimant must establish that he or she has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." UNHCR, *Guidelines on International Protection: "Membership of a particular social group" within the connect of 1A(2) of the 1951 Convention and/or its 1967 Protocol relating at the Status of Refugees* ¶ 4, U.N. Doc HCR/GIP/02/02 (May 7, 2002).

("Other criteria in the refugee definition serve a filtering function; the recognition of a particular social group is only one of the elements required for establishing asylum eligibility."). In particular, an applicant must show either: (1) that he or she has experienced past harm serious enough to rise to the level of persecution, that the state was unable or unwilling to protect him or her from that harm, and that the harm was inflicted based on the applicant's membership in a PSG, or (2) that he or she has a specific and particularized fear of future harm as evidenced, for example, by targeting of those similarly situated, that the state will not or cannot protect the applicant from that harm, and that the harm will be based on the applicant's membership in a PSG. *See* § 101(a)(42)(A) of the Act. Therefore, refugee protection based on a gender-defined PSG is limited, as it is with the other protected grounds, to those who can satisfy all elements of the refugee definition.

In addition to the elements of the refugee definition itself, an asylum applicant must meet additional requirements. Other statutory and regulatory provisions establish further

requirements for asylum eligibility, which necessarily limit those who can receive asylum protection in the United States. *See* Anker § 5:48. Even where an applicant triggers a presumption of future persecution based on the past persecution suffered, the presumption may be overcome if relocation within the country of feared persecution is reasonable and the past persecution was not committed by the government. *See* 8 C.F.R. § 208.13(b)(3)(i), (ii). The INA also bars individuals from asylum and withholding of removal based on certain criminal and national security grounds. *See* § 208(b)(2)(A); § 241(b)(3)(B) of the Act. In addition, applicants must apply for asylum within one year of entering the United States, or they will be required to meet the heightened withholding of removal standard.³⁴ *See* § 208(a)(2)(B). Finally, even if an applicant clears all these hurdles, he or she must warrant a grant of asylum as a matter of discretion. *See* § 208(b)(1)(A).

The Board, consistent with the principle of *ejusdem generis* that it embraced in *Matter of Acosta*, should not construe the

³⁴ There are limited exceptions to the one-year deadline. *See* § 208(a)(2)(D) of the Act.

"membership in a particular social group" protected ground differently from the other protected grounds, which may also encompass large groups—especially race, religion, and nationality. See Deborah Anker, *Membership in a Particular Social Group: Developments in U.S. Law*, 1566 PLI/Corp 195 (2006). Indeed, if the numerical size of a group were to disqualify it from consideration as a PSG, those persecuted because of their political opinion would be ineligible for asylum in situations where a dictatorial regime oppresses the majority of people in a country.

Federal courts of appeals have recognized that such a result would be illogical. See, e.g., *Malonga v. Mukasey*, 546 F.3d 546, 553 (8th Cir. 2008) (reversing the Immigration Judge's finding that the Lari ethnic group of the Kongo tribe could not be a PSG because the Kongo tribe constituted 48 percent of the population of Congo; the court held that the Immigration Judge erred in basing his conclusion solely on the numerical size of the group, and that he should have applied the "immutable characteristics" test laid down by the Board in *Acosta*); *Ucelo-Gomez*, 509 F.3d at 73 n.2 (2d Cir. 2007) (affirming that "a large group can be a

'particular social group,'" and interpreting the Board's objections to the proposed group of "affluent Guatemalans" as necessarily referring to the group's indeterminacy, rather than its size); *Gao v. Gonzales*, 440 F.3d 62, 67 (2d Cir. 2006) (noting acceptance of *Acosta*'s interpretation that a particular social group, "however populous," is defined by immutable characteristics), *vacated on other grounds*, 128 S. Ct. 345 (2007).³⁵

³⁵ See also *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) ("[T]he size and breadth of a group alone does not preclude a group from qualifying as such a social group.") (citing *Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996)); James C. Hathaway & Michelle Foster, *Development: Membership of a Particular Social Group*, 15 Int'l J. Refugee L. 477, 478-79 (2003) (identifying as an international "point[] of consensus" that a particular social group "may include large numbers of persons" and that "[t]he size of the purported social group is not a relevant criterion in determining whether a particular social group exists"). Karen Musalo points out that since the legacy INS adopted gender guidelines, the Board recognized gender as an immutable characteristic in *Acosta*, and the Board's landmark decision in *Matter of Kasinga*, the United States has not been "flooded" with gender-based asylum claims. See Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 Va. J. Soc. Pol'y & L. 199, 132-33 (2007). Musalo further comments on the filtering functions of the other elements of the refugee definition in conjunction with other factors that often limit a woman's ability to flee her country of persecution. These other factors may include restrictions related to: (1) travel from countries that afford women limited or no rights; (2) adequate means from family resources that women may be prevented from

IV. The Requirement Of Nexus Is Satisfied If The Respondent Can Demonstrate That At Least One Central Reason For The Persecution Was Gender Or Status In A Marital Or Intimate Relationship That The Respondent Is Unable To Leave.

Direct or circumstantial evidence surrounding the violence within a domestic relationship can indicate a persecutor's reasons for the infliction of harm. *See* Anker § 5:52; DHS Brief in *Matter of R-A-* at 27. To establish his or her eligibility for asylum, the applicant must also demonstrate the required nexus between his or her membership in a PSG and the persecution he or she has experienced or fears experiencing. The REAL ID Act of 2005 clarifies the requirement of nexus: the Act states, in relevant part, that an applicant must "establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant." *See* § 208(b)(1)(B)(i) (emphasis added). As codified by the REAL

accessing; or (3) caretaker obligations to children or extended family. *Id.* at 133. Indeed, in its Supplemental Brief in *Matter of L-R* DHS noted that in the years following Canada's recognition of asylum claims based on domestic violence Canada did not see a large increase in gender-related asylum claims. *See* DHS Supp. Brief in *Matter of L-R* at 13 n.10 ("Canada received a total of 315 gender-related asylum claims in 1995 . . . 270 such claims in 1996, 182 in 1997, 218 in 1998, and 175 in 1999.").

ID Act, an objective "reasons" test rather than a subjective "motives" test should govern the nexus inquiry. *See* Anker §§5:11, 5:12; *cf.* AOBTC: *Nexus* at 11. Thus, the applicant need only show that his or her membership in a protected group was one of the "central reasons" for the persecution—he or she need not prove that it was the dominant or most important reason. *Ndayshimiye v. Att'y Gen.*, 557 F.3d 124, 129 (3d Cir. 2009). The Third Circuit held that a persecutor may have more than one central reason for his or her actions, and that "whether one of those central reasons is more or less important than another is irrelevant." *Id.* Therefore, gender need only be one central reason for the harm inflicted in cases involving a gender-defined PSG. *Id.*; *see generally* Anker § 5:13.

It will not always be possible, nor is it necessary, for an applicant to establish with certainty the exact reasons for the persecutor's actions. The Board held that adjudication of asylum applications requires examination of the "totality of the circumstances," and that, to establish the required nexus between the persecution and a protected ground, the applicant "need not

disprove every [other] possible motive" for the persecution. *Vata v. Gonzalez*, 243 Fed. Appx. 930, 941 (6th Cir. 2007) (unpublished); *see also Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988) (holding that it is sufficient to establish facts "on which a reasonable person would fear that the danger arises on account of" one of the protected grounds); Anker § 5:09.

The persecutor's reasons for harming the applicant can be established through direct or circumstantial evidence. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992). Persecutors rarely tell their victims the precise reason for the abuse, and the law does not require direct proof of the persecutor's reasons. *See id*; Anker §§ 5:5, 5:7. The Board recently restated the importance of drawing inferences and conclusions from evidence, including circumstantial evidence, in the asylum analysis. *Matter of D-R*-, 25 I &N Dec. 445 (BIA 2011); *see also* DHS Brief in *Matter of R-A*- at 35-36 (reasoning that circumstantial evidence related to a persecutor's reasons for inflicting harm in the domestic context may include evidence of impunity in the home country for such harm and social norms that condone such harm). Where

adjudicators have failed to consider the context of persecution when conducting a nexus analysis, federal appellate courts have found legal error and cause for remand.³⁶

In the instant case, the IJ found that a nexus existed between the Respondent's gender-defined PSG and the persecution she endured in Guatemala. The IJ gave great weight to the evidence in the record concerning the conditions for women in Guatemala. (IJ Dec. at 5.) In particular, the IJ referenced numerous country condition reports illuminating the peril faced by Guatemalan women who endure violence in the domestic context, the state's lack of protection, and the "culture of impunity." (IJ Dec. at 5.) The IJ also took into account expert

³⁶ For example, in *Ndonyi v. Mukasey*, the Seventh Circuit vacated the removal order of an asylum-seeker after finding that the immigration judge and the Board "utterly fail[ed] to consider the context of [the asylum-seeker's] arrest." 541 F.3d 702, 711 (7th Cir. 2008); *see also De Brenner v. Ashcroft*, 388 F.3d 629, 638 (8th Cir. 2004) (remanding the case where the Board's "decision to isolate the Shining Path's extortionate demands and threats from the balance of the evidence . . . led to the insupportable conclusion that the threats were non-political demands for financial and material support"); *Osorio v. INS*, 18 F.3d 1017, 1029-30 (2d Cir. 1994) (reversing the Board's decision that persecution was not on account of a political opinion where the Board "ignored the political context of the dispute" and showed "a complete lack of understanding of the political dynamics" in the country).

testimony stating that the social and political norms in Guatemala "embrace[] the subjugation of women and celebrate[] the man's right to dominate," and that "[w]omen are expected to withstand the abuse because it is assumed to be part of the culture." (IJ Dec. at 6.) These reports and testimony illustrate a close link between the prevailing cultural attitudes towards gender roles in Guatemala and the prevalence of violence against women in that country. Based on this and other reasoning, the IJ held that at least one central reason for the Respondent's persecution was her gender.

Conclusion

The Board should issue a decision recognizing the PSG in this case as "Guatemalan women."

Respectfully submitted,

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Certificate of Service

I, Stephen W Manning, certify that on October 18, 2011, I served a true and correct copy of the attached brief on the parties below by first class regular mail.

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