CENTER FOR
Gender & Refugee
STUDIES

Amicus Brief in *Matter of A-T-*

Overview of the Attached Brief

The attached amicus brief was filed by the law firm of Williams & Connolly LLP on behalf of immigration professors and non-profit organizations representing refugees and immigrants to the United States Court of Appeals for the Fourth Circuit on April 14, 2008 in *Matter* of *A-T-*. All identifying information has been redacted in accordance with the wishes of the applicant. The brief addresses past female genital cutting (FGC) as a basis for asylum.

Organizational Overview

The Center is one of the leading organizations in the United States protecting the fundamental human rights of refugee women, children and LGBT individuals fleeing gender-based persecution. We seek to advance sound asylum laws and policies, helping advocates successfully represent refugees who need protection, while at the same time mitigating the conditions that force individuals to flee their home countries.

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Case No. [redacted]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[redacted],

Petitioner,

v.

MICHAEL B. MUKASEY,
U.S. ATTORNEY GENERAL,

Respondent.

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

BRIEF FOR AMICI CURIAE IN SUPPORT OF PETITIONER ON BEHALF OF IMMIGRATION LAW PROFESSORS AND NON-PROFIT ORGANIZATIONS REPRESENTING IMMIGRANTS AND REFUGEES (AMICI LISTED INSIDE)

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INTEREST OF AMICI CURIAE

Amici are a broad coalition of law school professors and non-profit organizations who have a direct interest in the development of U.S. refugee law, including gender-related persecution, and in the particular issues under consideration in this case. *Amici* include authors of scholarly works regarding international law and asylum, experts who provide legal advice to attorneys representing asylum-seekers fleeing gender-related harm, and practicing attorneys who represent asylum-seekers in gender-based claims. Many are recognized experts in the field who have a long-standing and well-known interest in the development of U.S. jurisprudence consistent with relevant domestic and international refugee and human rights law. The questions under consideration in this appeal implicate matters of great consequence on which *amici* have focused their research. They involve important principles of jurisprudence, statutory construction and human rights. These issues also have broad ramifications for the equitable and just administration of the laws.

INTRODUCTION

Petitioner [redacted] appeals a ruling of the Board of Immigration Appeals ("BIA") in *In re A-T-*, 24 I. & N. Dec. 296 (B.I.A. 2007) ("*A-T-*") denying her asylum and withholding of removal to Mali. The BIA reasoned that because Ms. [redacted]'s genitalia had already been mutilated when she was a child, she has no

basis for fearing future persecution related to that mutilation if returned to Mali. This reasoning is based on the incorrect view that female genital mutilation is an isolated, discrete type of persecution. It ignores the undisputed record establishing that in Mali, the unfortunately common female genital mutilation to which Ms. [redacted] was subjected is only one part—and usually only the beginning—of an extended course of persecution that women who have been victimized by the act can expect to face. It also ignores the evidence that Ms. [redacted] is slated to be forced into a marriage—just one of these related acts of persecution—if returned to Mali.

The BIA erred in any one of the following three ways:

First, there is no dispute that female genital mutilation is a form of past persecution and that Ms. [redacted] is a victim of female genital mutilation. Nor is there any dispute that a victim of past persecution is entitled to a regulatory presumption of future persecution and that it is the government's burden to rebut it by showing, *inter alia*, changed circumstances. The only question is whether the BIA erred in finding that the presumption is rebutted here because Ms. [redacted] cannot, according to the BIA, be inflicted with the "identical" form of her past persecution again. The answer is straightforward: the BIA erred. For good reason, the BIA has never in any other context furthered the view that being subjected to persecution is itself the changed circumstance that makes one

ineligible for refugee status. Moreover, the BIA's position as applied here ignores the stark reality that female genital mutilation is only the first in what will be a series of persecutory acts Ms. [redacted] can expect to suffer on account of her social group membership if she is returned to Mali. Considering female genital mutilation in isolation ignores the documented evidence about other harms women who are victimized by this practice can expect to face in Mali and Ms. [redacted] has expressed fear of other harms consistent with these country conditions. *See infra* Part I.

Second, even if, *arguendo*, an applicant must fear the "identical" form of persecution in the future to avoid a finding of changed circumstances, the decision should be reversed. The BIA's "continuing harm" doctrine, which it first articulated in *In re Y-T-L-*, 23 I. & N. Dec. 601 (B.I.A. 2003) ("*Y-T-L-*"), provides that an act of persecution that is permanent and continuing can make one eligible for asylum and withholding of removal. It reflects common sense, that there can be no "change of circumstances" rebutting the presumption of a well-founded fear of future persecution when the persecution is ongoing. Female genital mutilation leads to permanent and continuing physical and psychological harm. The BIA nonetheless refused to apply the continuing harm doctrine because, in its view, that doctrine is limited to claims of forced sterilization. This conclusion, however, was based on the BIA's verifiably wrong conclusion that forced sterilization is to be

treated differently than other forms of persecution under the asylum laws. When this false premise is taken out of the equation, it becomes plain that the BIA erred in not applying the continuing persecution analysis to this case. *See infra* Part II.

Third, the BIA's decision in this case should also be reversed because it is in conflict with past decisions of both this Circuit and the BIA. This Court found in *Barry v. Gonzales*, 445 F.3d 741 (4th Cir. 2006), that a woman who established that she was a victim of female genital mutilation, "made out a prima facie case of persecution that would have entitled her to asylum . . ." *Id.* at 745. The BIA has repeatedly held that a woman who has suffered female genital mutilation in the ***past*** is eligible for asylum and withholding of removal. The BIA does not provide any reasoned basis for its departure from these prior cases. Its failure to do so, which has led the BIA to treat similarly situated applicants differently, is an independent basis for reversal. *See infra* Part III.

STANDARD OF REVIEW

Although courts defer to an agency's reasonable interpretation of an ambiguous statute or regulation, courts owe no deference to an agency's interpretation that contradicts the plain language of the statute or regulation. *See INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (BIA interpretation of unambiguous provision of INA not entitled to deference). Even where a statute or regulation is ambiguous: "[a]n agency interpretation of a relevant provision which conflicts

with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (*quoting Watt v. Alaska*, 451 U.S. 259, 273 (1981)) (rejecting BIA interpretation); *see also Brock v. Int'l Org. of Masters, Mates and Pilots*, 842 F.2d 70, 72 (4th Cir. 1988) (same); *Wise v. Ruffin*, 914 F.2d 570, 580 (4th Cir. 1990) (same).

ARGUMENT

I. THE BIA ERRED IN REQUIRING THAT THE PETITIONER FEAR THE IDENTICAL PERSECUTION SHE SUFFERED IN THE PAST.

The Immigration and Nationality Act ("INA") permits the Attorney General to grant asylum to any "refugee." 8 U.S.C. § 1158(b) (2000 & Supp. IV 2004). A refugee is a person unable to return to her country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" there. 8 U.S.C. § 1101(a)(42) (2000). An applicant who has "established . . . past persecution shall [] be presumed to have a well-founded fear of persecution on the basis of the original claim." 8 C.F.R. §§ 1208.13(b)(1) (2007) (asylum) & 1208.16(b)(1) (2007) (withholding of removal, presumption that "applicant's life or freedom

would be threatened in the future").[1] If that presumption is not rebutted, the applicant is entitled to remain in the United States as a refugee.[2]

There is no dispute that female genital mutilation is a brutal type of persecution. *See In re S-A-K- and H-A-H-*, 24 I. & N. Dec. 464 (B.I.A. 2008); *In re Kasinga*, 21 I. & N. Dec. 357, 361 (1996). In its "mildest form, clitoridectomy," female genital mutilation "is anatomically equivalent to amputation of the penis." Nahid Toubia, M.D., *Female Circumcision as a Public Health Issue*, 331 New Eng. J. Med. 712 (1994). The Secretary of State described its effects as follows: "[f]emale genital mutilation threatens the health and violates the human rights of women. It also hinders economic and social development. It can have serious health consequences, leading to life-long pain and suffering or, at times, even

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[1] *Amici* concur with Ms. [redacted] that the BIA erred in determining that she had not timely filed her asylum application. *See* Br. of Pet'r, at 43-55. The arguments made herein apply with equal force to her claims for asylum and withholding of removal, as the regulatory framework concerning a presumption of future persecution based on past persecution applies to each. *See* 8 C.F.R. §§ 1208.13(b)(1) (asylum) & 1208.16(b)(1) (withholding of removal).

In the case of asylum, even where the presumption has been rebutted, an applicant may receive humanitarian asylum in the case of severe past persecution. *See* 8 C.F.R. § 1208.13(b)(1)(iii); *see S-A-K- and H-A-H-*, 24 I & N Dec. 464 (B.I.A. 2008) (past female genital mutilation basis for humanitarian grant of asylum). The BIA did not consider this alternative ground of asylum here because it erroneously concluded that the application was time-barred.

[2] If the presumption is not rebutted, asylum is routinely granted to individuals who merit a favorable exercise of discretion. *See* 8 U.S.C. § 1158(b)(1) (2000).

death." U.S. Dep't of State, Report on Female Genital Mutilation as required by H.R. No. 106-997, 4 (2001), *available at* http://www.state.gov/documents/organization/9424.pdf (last visited Apr. 9, 2008). Thus, an applicant who has suffered female genital mutilation is entitled to a regulatory presumption of future persecution as well as a threat to life or freedom, qualifying her for asylum and withholding of removal. 8 C.F.R. §§ 1208.13(b)(1) (asylum) & 1208.16(b)(1) (withholding of removal).

The record demonstrates that Ms. [redacted] is a victim of female genital mutilation. (A126, A182). A gynecological examination revealed that she was subjected to Type II female genital mutilation, involving the complete excision of her clitoris and vulva. (A182); *see* World Health Organization, *et al.*, "Eliminating Female Genital Mutilation: An Interagency Statement" (2008) <available at http://www.who.int/reproductive-health/publications/fgm/fgm_statement_2008.pdf> ("WHO Report") at 4.

The presumption of future persecution and threats to life and freedom can be rebutted if, *inter alia*, the government establishes "a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality on account of race, religion,

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Withholding of removal is automatically granted if the presumption is not rebutted. *See* 8 U.S.C. § 1231(b)(3)(A) (2000).

nationality, membership in a particular social group, or political opinion." 8 C.F.R. §§ 1208.13(b)(1)(i)(A) (asylum) & 1208.16(b)(1)(i)(A) (withholding of removal). Here, the BIA held that because female genital mutilation is "generally performed only once . . . [it] eliminat[es] the risk of ***identical*** future persecution." *A-T-*, 24 I. & N. Dec. at 299 (emphasis added). On that basis, the BIA concluded that, "[a]ny presumption of future FGM persecution is . . . rebutted by the fundamental change in the respondent's situation arising from the reprehensible, but one-time, infliction of FGM upon her." *Id.*

The BIA's analysis necessarily, and incorrectly, interpreted part 1208 of the regulations as requiring that the applicant fear the "identical" form of persecution in order for the presumption of future persecution to hold. That is not the regulatory framework. The regulation's plain language does not so limit the association between past and future persecution. The question is not whether the government has rebutted the possibility of "future FGM persecution," but whether it has rebutted the possibility of "future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." Accordingly, in *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007), the Eighth Circuit held that past female genital mutilation was a basis for asylum eligibility, explaining, "We have never held that a petitioner must fear the repetition of the exact harm that she has suffered in the past. ***Our definition of persecution is not***

that narrow." *Id.* at 518 (emphasis added); *see also Mohammed v. Gonzales*, 400 F.3d 785, 800 (9th Cir. 2005) (woman subjected to past female genital mutilation is susceptible to future violence related to her past persecution on account of her social group membership); *cf. Delgado v. Mukasey*, 508 F.3d 702, 707 (2nd Cir. 2007) (in case based on well-founded fear of persecution, BIA erred in assuming that the only type of persecution petitioner feared was "the type of harm she suffered before—kidnapping").

Moreover, if, as the BIA held, the very act of persecution giving rise to the presumption simultaneously deprived the applicant of her well-founded fear of persecution and threat to life and freedom, the words "no longer" would be impermissibly read out of the regulation. *See William v. Gonzales*, 499 F.3d 329, 333 (4th Cir. 2007) (noting the principle that statutes must be construed in such a way that no word is superfluous). A finding of past persecution would become meaningless under the BIA's analysis, because the purpose that finding serves is to give rise to a presumption of a well-founded fear of future persecution or a threat to life or freedom, and then shift the burden to the government to rebut that presumption. Here, contrary to the regulation's plain language, the past persecution finding legally evaporated—it did not give rise to any presumption and the government was not put to any burden at all.

The "rationale for considering past persecution is that the 'past serves as an

evidentiary proxy for the future.'" *A-T-*, 24 I. & N. Dec. at 298 (*quoting In re N-M-A-*, 22 I. & N. Dec. 312, 318 (B.I.A. 1998)). That rationale fully supports a finding of refugee status and eligibility for withholding of removal here. The BIA's analysis stemmed from its faulty view of female genital mutilation as an isolated act of persecution. By focusing on the act, and not its motivation, the BIA failed to account for the context within which female genital mutilation is practiced. Where female genital mutilation is prevalent, myriad other forms of gender-related persecution also exist. Female genital mutilation is inflicted, in significant part, to manipulate "women's sexuality in order to assure male dominance and exploitation." *Kasinga*, 21 I. & N. Dec. at 366 (quotation marks omitted). Its completion is not a sign that persecution has ended—it is instead the first in a long series of acts of gender violence.[3]

As a female member of the Bambara tribe, Ms. [redacted] belongs to a cognizable social group[4] and suffered past persecution (in the form of female

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[3] The amicus briefs filed with this Court on behalf of medical and mental health professionals ("Br. Medical"), and the Center for Gender and Refugee Studies and International Women's Human Rights Clinic CUNY ("Br. CGRS") describe in greater detail the physical and psychological harm that women who are victimized by female genital mutilation experience and the gender violence related to that mutilation.

[4] *See, e.g.*, *Mohammed*, 400 F.3d at 800 (female genital mutilation victim is member of protected group of young women of Benadiri clan or, in the alternative, Somalian females); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005)

genital mutilation). She is also subject to future persecution—forced marriage and its attendant harms—on the basis of her social group membership. *See* Br. CGRS at 6-9. In *Hassan*, the Eighth Circuit held that the view that female genital mutilation could not be a basis for asylum because it is not capable of repetition, "erroneously assumes that FGM is the only form of persecution in Somalia and that having undergone the procedure, Hassan, as a Somali woman, is no longer at risk of other prevalent forms of persecution." 484 F.3d at 518. The BIA makes that precise error here. It is no coincidence that in Mali, where the rate of female genital mutilation among adult women is in excess of 95 percent, spousal rape is not illegal, domestic violence against women is tolerated and common, men inherit most of the family wealth, and women often live under harsh conditions, particularly in rural areas, where they perform difficult farm work and undertake most of the childrearing. (A243-250).

Ms. [redacted]'s claim that she has been threatened with forced marriage is also consistent with the documentation indicating a correlation between forced marriage and female genital mutilation in Mali. Societies practicing female genital mutilation typically consider that women are not marriageable unless they have been cut, and that the procedure ensures that women will not leave their husbands

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(female genital mutilation victim is member of protected group of female members of Tukulor Fulani tribe).

to pursue love interests outside of marriage. *See* Br. of CGRS at 15-30. Contrary to the BIA's conclusory and flawed analysis, female genital mutilation and forced marriage are irrevocably "related." And, as detailed in the *amicus* brief submitted by women's rights groups in this appeal, forced marriage is itself a horrific type of persecution, involving, *inter alia*, spousal rape and sanctioned spousal abuse. *See id.*

Ms. [redacted] was entitled to have the government bear the burden of rebutting the presumption of her well-founded fear of future persecution. Based on reasoning that is at stark odds with the applicable statutory and regulatory scheme, the BIA denied her this right by making a blanket finding that female genital mutilation generally is a one time act and that thus generally the presumption is overcome. This approach denied her the individualized review that the asylum and withholding of removal laws require. *See* 8 C.F.R. §§ 1208.13(b)(1)(i)(A) & 1208.16(b)(1)(i)(A).[5]

[5] This Court need not be concerned that requiring the government to satisfy the burden of rebuttal prescribed under 8 C.F.R. §§ 1208.13(b)(1)(ii) (asylum) & 1208.16(b)(1)(ii) (withholding of removal) would open the floodgates to claims for asylum or withholding of removal based on female genital mutilation. As the agency itself has recognized, "[a]lthough genital mutilation is practiced on many women around the world," the *Kasinga* decision has not resulted in "an appreciable increase in the number of claims based on FGM." Questions and Answers: The R-A- Rule, Immigration and Naturalization Service (Dec. 7, 2000). Similarly, the agency has stated that it would not expect to see a large increase in gender-based claims if the United States were to recognize domestic violence as a basis for asylum. *See id.* This stands to reason, since women persecuted abroad face many

II. THE BIA INDEPENDENTLY ERRED IN REFUSING TO APPLY ITS OWN CONTINUING HARM ANALYSIS TO THIS APPLICATION.

There is an independent basis to hold that the BIA erred. Specifically, it failed to apply its "continuing harm" doctrine to past female genital mutilation. In a case involving forced sterilization, the BIA recognized that a victim of continuing and permanent persecution is eligible for asylum. The BIA refused to apply that doctrine here on the erroneous basis that forced sterilization merits special consideration under the asylum laws. That view, however, is based on a flawed understanding of the relevant statute and its history.

A. Development of the Continuing Harm Doctrine.

Prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), the BIA had held that forced sterilization was not a ground for asylum because its victims were not persecuted "on account of a ground protected by the Act." *In re Chang*, 20 I. & N. Dec. 38, 43-44 (B.I.A. 1989). This decision generated controversy, and Congress amended section 101(a)(42) of the INA as part of IIRIRA to provide that those persons who had been forced to undergo

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practical obstacles to emigration. For example, women subject to gender-based persecution in their home countries often have little control over family resources and may be unable to procure the funds to flee. In addition, women who serve as primary caretakers for their children or extended family may choose to endure persecution at home rather than abandon their charges or expose them to the risks and hardships of flight. *See* K. Musalo, *Protecting Victims of Gendered Persecution*, 14 Va. J. Soc. Pol'y & Law 119, 131-34 (Winter 2007).

involuntary sterilization or other coercive population control methods were "deemed to have been persecuted ***on account of political opinion***." Pub. L. No. 104-208, § 601, 110 Stat. 3009-546, 3009-689 (1996) (emphasis added).

Later, the BIA took up the following issue with respect to forced sterilization: what happens to the presumption of a well-founded fear of future persecution when the act of persecution creates permanent and continuing harm, but cannot be repeated? The BIA quickly recognized that the act of persecution could not itself constitute the change in circumstances that rebuts a well-founded fear of future persecution. *See Y-T-L-*, 23 I. & N. Dec. at 605. Reaching an opposite conclusion would lead to an "anomalous" result—namely, that the persecution itself would constitute the act that made one ineligible for asylum. *Id.* The BIA also considered what it construed to be Congress's intent to extend asylum protection to past victims of forced sterilization, as manifested in IIRIRA (the amendment of 8 U.S.C. § 1101(a)(42)). *See id.* at 606.

The BIA found that forced sterilization fell within the normal regulatory framework embodied in 8 C.F.R. § 1208.13(b)(1), such that the presumption question applied. *Id.* at 606-07. It then found that forced sterilization, because of its permanent nature, leads to a well-founded fear of future persecution sufficient to establish a statutory basis for asylum. *Id.* at 607.

In *A-T-*, the BIA was again faced with how to apply the regulatory

presumption to forms of harms that, according to the BIA, cannot be repeated. In contrast with *Y-T-L-*, however, the BIA held that female genital mutilation itself was the "change in circumstances" that rebutted the presumption of asylum eligibility. The BIA reached this anomalous conclusion by stating that the regulations are properly interpreted under the "continuing harm" doctrine only for claims of forced sterilization.

B. Congress Did Not Amend Section 101(a)(42) To Provide "Special" Protection to Victims of Sterilization.

There is no support for the BIA's position that "persons who suffered [forced sterilization] have been singled out by Congress as having a basis for asylum in the 'refugee' definition of Section 101(a)(42) of the Act ***on the strength of the past harm alone***." *A-T-*, 24 I. &N. Dec. at 300 (emphasis added). To the contrary, Congress was concerned solely with ensuring that persons who had been forced to abort a pregnancy or to undergo involuntary sterilization were "deemed to have been persecuted on account of political opinion." 8 U.S.C. § 1101(a)(42). Nowhere in the statute or its history did Congress provide that those subjected to forced sterilization were entitled to asylum due simply to the fact of their past persecution. It was only after the legislation was enacted and the regulatory presumptions were amended that the BIA and the courts developed the principle that the prior infliction of sterilization cannot be used to rebut the fear of future harm, in recognition of its permanent and continuing nature. *See, e.g., Qu v.*

Gonzales, 399 F.3d 1195, 1203 (9th Cir. 2005); *Y-T-L-*, 23 I. & N. Dec. at 601.

Prior to the enactment of IIRIRA, the BIA had held that China's forced sterilization policy did not constitute persecution ***on account of a protected ground***, and thus asylum was not available under the statute. *See supra*. The enactment of section 601 of IIRIRA marked the culmination of Congress's efforts to overturn those BIA decisions. Section 601 amended 8 U.S.C. § 1101(a)(42) to provide in relevant part that "(f)or purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization . . . ***shall be deemed to have been persecuted on account of political opinion.***" *Id.* (emphasis added). Nothing in the statutory text reflects a broader goal of automatically conferring asylum to those who had been subjected to forced sterilization.

The House Judiciary Committee report underscores this intent:

> The primary intent of section [601] is to overturn several decisions of the Board of Immigration Appeals, principally *Matter of Chang* and *Matter of G-*. These decisions . . . hold that a person who has been compelled to undergo an abortion or sterilization, or has been severely punished for refusal to submit to such a procedure, cannot be eligible on that basis for refugee or asylee status unless the alien was singled out for such treatment on account of factors such as religious belief or political opinion.

H.R. No. 104-469(I), at 173-74 (1996) (footnote omitted); *see also* S.R. No. 104-95, at 92 (1995).

Congress emphasized that asylum claims based on forced sterilization were

to be treated in the ***same manner*** as those based on other forms of persecution. The amendment was not intended to "enact a special rule for people who resist [China's] population control program." 142 Cong. Rec. H2589, H2634 (daily ed. Mar. 21, 1996).

Several circuit courts, including this one, have recognized that the purpose of amending section 1101(a)(42) was to change the result of *In re Chang*. *See Li v. Gonzales*, 405 F.3d 171, 176 (4th Cir. 2005); *see also, e.g., Lin v. Ashcroft, 385* F.3d 748, 752 (7th Cir. 2004); *Chen v. Ashcroft*, 381 F.3d 221, 224-25 (3d Cir. 2004); *Li v. Ashcroft*, 356 F.3d 1153, 1157 (9th Cir. 2004) (en banc). The BIA has acknowledged in previous cases, including in *Y-T-L-* itself, that section 1101(a)(42) was amended to establish a nexus between coercive family planning practices and the protected grounds of persecution, with the effect of overturning *Chang*. *See Y-T-L-*, 23 I. & N. at 601, 607; *In re X-P-T-*, 21 I. & N. Dec. 634, 636 (B.I.A. 1996). The BIA's contrary interpretation in *A-T-* is an inexplicable rejection of its prior holdings and federal court precedent.

The Ninth Circuit in *Mohammed v. Gonzales*, 400 F.3d at 800, reiterated these points. The *Mohammed* Court found that the amendment's purpose was to reverse the BIA's holdings that forced sterilization did not constitute persecution ***on account of a protected ground***. *See id.* It also held that both forced sterilization and female genital mutilation should be recognized as permanent and

continuing forms of persecution:

> We recognize that forced sterilization, unlike female genital mutilation, is expressly recognized as past persecution by the INA . . . However, the statute, which was enacted in order to overcome BIA rulings to the effect that forced abortions and sterilizations did not constitute persecution on account of one of the five reasons enumerated in the INA . . . does ***not*** in its text provide for automatic asylum upon a showing of ***past*** sterilization. Rather, the principle that the fact of sterilization cannot be used by the government to rebut the fear of future harm was developed by the BIA and the courts ***after*** the legislation was enacted as a recognition of the special, continuing, and permanent nature of coercive population control. Thus, . . . the reasoning in the forced sterilization cases would appear to apply ***equally to the case of genital mutilation.***

Mohammed, 400 F.3d at 799 n.22 (emphasis added) (citation omitted).

C. Congress Was Not Faced with the Question of Whether an Act of Persecution Could Itself Be a Fundamental Change in Circumstances.

Congress had no reason, in enacting IIRIRA, to address the question of whether an act of past persecution—*e.g.*, forced sterilization or abortion—would constitute a "fundamental change in circumstances" sufficient to rebut the presumption of a well-founded fear of persecution. The regulations in effect at the time provided that only a ***change in country conditions*** could rebut a presumption of a well-founded fear of persecution based on past persecution. *See* 8 C.F.R. § 1208.13 (1996). The U.S. Department of Justice ("DOJ") did not propose amending that regulation to include other ***changes in circumstance*** until 1998, and did not actually amend it until 2000, well after enactment of IIRIRA. *See* 63 Fed.

Reg. 31,945 (1998) (proposed rule); 65 Fed. Reg. 76,121 (2000) (final action); *see also Qu*, 399 F.3d at 1200-01 (describing the amendment); *Y-T-L-*, 23 I. & N. Dec. at 604-05 (same). Thus, contrary to the BIA's suggestion, Congress had no reason in enacting section 601 of IIRIRA to anticipate—let alone attempt to correct—the convoluted argument that the act of persecution might itself constitute a fundamental change in circumstances depriving the victim of the presumption of a well-founded fear of future persecution, as well as a threat to life or freedom.[6]

D. The BIA Erred in Failing To Interpret 8 C.F.R. §§ 1208.13 and 1208.16 Pursuant to the Continuing Persecution Doctrine.

Y-T-L- reflects the BIA's appreciation that there are certain egregious kinds of persecution—such as reproductive sterilization—that effect the desired result on a permanent, life-long basis. In such circumstances, one cannot speak of a "change in circumstances such that the applicant no longer has a well-founded fear of persecution," as that term is used in 8 C.F.R. §§ 1208.13 and 1208.16, because the persecution endures permanently.

These same principles apply to female genital mutilation. Like forced sterilization, female genital mutilation entails permanent and continuous harm. *See*

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[6] When Congress took up IIRIRA in the fall of 1996, the BIA had just held, in *Kasinga*, that asylum ***was*** available for women who would be subjected to female genital mutilation. To the extent Congress was required to act, it did so. In IIRIRA, Congress criminalized the practice of female genital mutilation on minors in the United States. *See* IIRIRA § 645, 110 Stat. at 3009-709 (codified at 18 U.S.C. § 116).

Br. Medical, at 10-22. Indeed, the BIA has found that female genital mutilation, like forced sterilization, leads to permanent and continuing harm. In *In re Kasinga,* it found that it is "extremely painful," "can result ***in permanent loss of genital sensation*** and . . . adversely affect sexual and erotic functions," "***permanently disfigures the female genitalia***, [and] exposes the girl or woman to the risk of serious, potentially life-threatening complications," including "bleeding, infection, urine retention, stress, shock, psychological trauma, and damage to the urethra and anus." 21 I. & N. Dec. at 361. More recently, it reaffirmed this view in *S-A-K- and H-A-H-*, 24 I. & N. Dec. 464 (B.I.A. 2008).

As the BIA has repeatedly found, part 1208 cannot be properly interpreted to permit acts of persecution that are continuing and permanent in nature to rebut the presumption of a well-founded fear of persecution and threats to life or freedom. Thus, even assuming that an applicant must fear an "identical" form of persecution in the future, the continuing harm doctrine holds that victims of certain egregious forms of life-long persecution maintain a well-founded fear of persecution and threats to life or freedom even though the specific physical act of persecution cannot be repeated, thus rendering them eligible for asylum or withholding of removal. The BIA erred in failing to apply the doctrine—unjustifiably narrowing it to claims for forced sterilization on the wrong, and therefore arbitrary, basis that such claims are entitled to special consideration under the INA and the regulations.

III. THE BIA FAILED TO EXPLAIN ITS RADICAL DEPARTURE FROM THIS COURT'S AND THE BIA'S FINDINGS THAT PAST FEMALE GENITAL MUTILATION CAN RENDER ONE ELIGIBLE FOR ASYLUM.

In light of the nature of female genital mutilation, its integral role in facilitating women's economic and social disempowerment, and its long-lasting physical and psychological effects, this Circuit and the BIA have held that claims of ***past*** female genital mutilation are a sufficient basis for a grant of asylum and withholding of removal. The BIA's decision in *A-T-* inexplicably deviates from this case law.

A. The Fourth Circuit Has Found that Past Female Genital Mutilation Can Be a Sufficient Basis To Warrant Asylum.

Barry v. Gonzales presented this Circuit with the issue of whether a victim of female genital mutilation could reopen her asylum petition based on the ineffective assistance of counsel who failed to raise the issue of this persecution with the BIA. 445 F.3d 741 (4th Cir. 2006). This Circuit first found that, on the basis of her past female genital mutilation, the petitioner would have been eligible for asylum: "[T]o the extent that Barry presented credible evidence that she was subjected to female genital mutilation . . . Barry has made out a prima facie case of persecution that would have entitled her to asylum . . . ." *Id.* at 745.[7] In reaching

[7] The Court did not reach the issue of withholding of removal. The Court noted as an aside that the petitioner's daughter would likely be subjected to female genital mutilation if deported. This Circuit subsequently held in *Niang v. Gonzales*, 492

this conclusion, the Court relied on *Mohammed*, 400 F.3d at 795, in which the Ninth Circuit held that claims based on past female genital mutilation can warrant asylum under a theory of continuing persecution. *Barry*, 445 F.3d at 745. It rejected, however, the ineffective assistance of counsel claim because evidence of this persecution could have been discovered prior to her deportation hearing. *Id.*

Here, the BIA dismissed the *Barry* decision's reliance on *Mohammed*—but not *Barry*'s holding—by arguing that this Circuit Court cited *Mohammed* "only for the proposition that female genital mutilation is persecution and did not address the merits of the Ninth Circuit's continuing persecution theory. As such *Barry* represents mere dicta and is not binding on us here." *A-T-*, 24 I. & N. Dec. at 301, n.3. That analysis is flatly contradicted by the explicit language in *Barry*. The *Barry* court did not "only" cite *Mohammed* for the proposition that female genital mutilation is "persecution"; it cited *Mohammed* in the context of a ***past*** persecution claim, and relied on that portion of *Mohammed* that specifically addressed the issue of ***past*** persecution. Indeed, the Fourth Circuit quoted the precise portion of *Mohammed* that the BIA rejected in *A-T-*: "'***Persecution in the form of female***

Continued ...
F.3d 505, 510 (4th Cir. 2007), that an applicant cannot rely solely on the fact that her child may be subjected to female genital mutilation as a basis for withholding of removal. That decision is not in tension with *Barry*; in *Niang* the petitioner did not make any claim that she herself had been persecuted. Thus, *Barry*'s holding that past female genital mutilation is a basis for asylum remains.

genital mutilation is similar to forced sterilization and, like that other persecutory technique, must be considered a continuing harm that renders a petitioner eligible for asylum, without more.'" *Barry*, 445 F.3d at 745 (quoting *Mohammed*, 400 F.3d at 795) (emphasis added).

With respect, this panel should follow *Barry*'s reasoning and reverse the *A-T-* decision. *Cf. Busby v. Crown Supply Inc.*, 896 F.2d 833, 840-41 (4th Cir. 1990) (a panel considers itself bound by the prior decision of another panel).

B. The BIA Arbitrarily Departed from Its Previous Holdings that Past Female Genital Mutilation Can Warrant Asylum.

The BIA has repeatedly held that an applicant may be eligible for asylum based on the ***past*** infliction of female genital mutilation. In one such case, the BIA expressly "reject[ed]" the argument that the act of female genital mutilation can itself rebut the presumption of future harm as an unjustifiably "narrow outlook." *In re Anon.*, 27 Immig. Rptr. B1-93 (B.I.A. May 23, 2003) (Tab 1); *see also In re Anon.* (B.I.A. Nov. 7, 2005) (Tab 2).[8] Yet that rejected argument is now, inexplicably, the linchpin of the BIA's decision in *A-T-*. By reversing itself without explanation, the BIA committed reversible error, for "[a]n agency cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along." *Henry v. INS*, 74 F.3d 1, 6 (1st Cir. 1996).

[8] In these two cases, the BIA did not reach withholding of removal because it found that the applicant was entitled to asylum under section 1208.13.

In *A-T-*, the BIA refused to apply *Y-T-L-* to past female genital mutilation claims by characterizing *Y-T-L-* as "a ***unique*** departure from the ordinarily applicable principles regarding asylum and withholding of removal." *A-T-*, 24 I. & N. Dec. at 299 (emphasis added). Not so. In a prior case, the BIA expressly relied on the continuing harm framework of *Y-T-L-* to hold that past female genital mutilation served as a sufficient basis for asylum:

> The Immigration Judge noted that there was no indication that the effects of her persecution would dissipate and may be taken as permanent. . . . We find that ***the Immigration Judge's observations are fully consistent with our decision in*** **Matter of Y-T-L-**, 23 I&N Dec. 601 (BIA 2003) (where an alien establishes past persecution based on the forced sterilization of his spouse, the fact that, owing to such sterilization, the alien and his spouse face no further threat of forced sterilization or abortion does not constitute a fundamental change in circumstances sufficient to meet the standards for a discretionary denial of asylum under 8 C.F.R. § 1208.13(b)(1)(i)(A)).

In re Anon. at 2 (B.I.A. Nov. 7, 2005).

The BIA applied the continuing harm doctrine to another case in which it held that past female genital mutilation constitutes a basis for asylum because of its "permanent and continuing" nature. *See In re Anon.* (B.I.A. May 23, 2003). There, the BIA rejected the suggestion that "the fundamental 'change' in circumstances should be viewed solely from the perspective of whether this respondent [is] at risk of being forced to undergo [female genital mutilation] again." *Id.* at 2. The "better" position, the BIA held, is to view forced female genital mutilation "as a ***permanent and continuing act of persecution*** that has

permanently removed from a woman a physical part of her body, deprived her of the chance for sexual enjoyment as a result of such removal, and has forced her to potential medical problems [sic] relating to this removal." *Id.* (emphasis added). It highlighted that "***[t]he profound and permanent nature of such harm has rarely, if ever, been doubted***." *Id.* (emphasis added). The BIA concluded, "[g]iven the pervasive nature of [female genital mutilation] . . . ***the presumption of a well-founded fear of persecution is not rebutted by simply averring that the respondent cannot have further [female genital mutilation] performed upon her.***" *Id.* (emphasis added).

In 2006, the BIA highlighted that past female genital mutilation, accompanied in that case by the type of forced marriage that Ms [redacted] fears if returned to Mali, was a basis for asylum and withholding of removal. *See In re Anon.* (B.I.A. Aug. 8, 2006) (Tab 3).[9] Of note in the 2006 decision is the BIA's favorable citation to *Mohammed*—the same decision that the BIA declined to follow in *A-T-*:

> After first being forced to submit to an arranged marriage at the age of 15, the respondent was forcibly subjected to female genital mutilation . . . , a procedure she neither wanted nor supported. *See* Tr. at 12, 14, 37-41. *See generally Mohammed v. Gonzales*, 400 F.3d 785, 800 (9th Cir. 2005) (noting that "in addition to the physical and psychological trauma that is common to many forms of persecution, [female genital mutilation] involves drastic and emotionally painful consequences

[9] The BIA first addressed withholding of removal and found that, because the petitioner was eligible for withholding of removal and the Immigration Judge erred in finding the asylum claim was time-barred, she was also eligible for asylum.

that are unending.") (internal quotation marks omitted).

Id. at 2.

The realities of female genital mutilation, and the context in which it is performed, further support the BIA's holding in these cases. *See* Br. Medical, at 7-29; Br. CGRS, at 6-9. Because female genital mutilation is part of a larger societal structure which oppresses and persecutes women, there are no medical or social systems in place in countries where it is performed to help women cope with the harm inflicted by the act. *Id.*

In *A-T-*, the BIA rejected the same positions it had repeatedly taken earlier—unequivocally treating identical legal issues differently in different cases. The BIA so ruled without any explanation for its departure from these prior cases, and in doing so acted arbitrarily. *See Perez-Vargas v. Gonzales*, 478 F.3d 191, 193 n.3 (4th Cir. 2007) ("[W]hen an agency fails to present a reasoned basis for departing from a previous decision, '***it may be deemed to have acted arbitrarily***.'" (emphasis added) (*quoting Baltimore Gas and Elec. Co. v. Heintz*, 760 F.2d 1408, 1419 (4th Cir. 1985)). Explanation of departure from prior decisions is necessary because "the Rule of Law requires that agencies apply the same basic standard of conduct to all parties appearing before them." *Miner v. FCC,* 663 F.2d 152, 157 (D.C. Cir. 1980). Inconsistent decision-making "raises precisely the kinds of concerns about arbitrary agency action that the consistency doctrine addresses." *Davila-Bardales*

v. I.N.S., 27 F.3d 1, 5-6 (1st Cir. 1994).

Although the BIA had not published these earlier opinions, the decision whether to publish an opinion is separate from the principle that agencies act in consistent and non-arbitrary ways. Thus, circuit courts have repeatedly emphasized that where the BIA changes course, without explanation, it has acted arbitrarily even if its original course was set forth in unpublished decisions. "[W]e note that courts typically look askance at an agency's unexplained deviation from a prior decision, ***even when the prior decision is unpublished***." *Perez-Vargas*, 478 F.3d at 193 n.3 (emphasis added). "[W]e see no earthly reason why the mere fact of nonpublication should permit [the BIA] to take a view of the law in one case that is flatly contrary to the view it set out in [the] earlier . . . cases, without explaining why it is doing so." *Davila-Bardales*, 27 F.3d at 5-6. "[R]egardless whether the [unpublished BIA] decision is precedential, by reaching an exactly contrary decision on a materially indistinguishable set of facts, the Board [of Immigration Appeals] acted arbitrarily." *Shardar v. Attorney Gen. of U.S.*, 503 F.3d 308, 314 (3d Cir. 2007); *see also Cruz v. Attorney Gen. of U.S.*, 452 F.3d 240, 249 (3d Cir. 2006) (same).

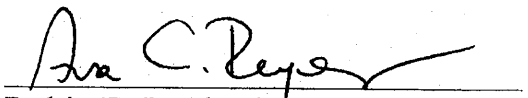
The BIA acted arbitrarily in *A-T-* by not even attempting to explain its abrupt and radical departure from its prior holdings applying the *Y-T-L-* framework to claims of past female genital mutilation. Here, no explanation could adequately

justify such a departure, as the BIA's position in its prior decisions was well grounded in the statutory framework for asylum and withholding of removal.

CONCLUSION

With respect, the BIA's decision should be reversed.

Respectfully submitted,

By: 

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