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Gender & Refugee
STUDIES

Amicus Brief Filed by CGRS in *L-P-*

Overview of the Attached Brief

The attached amicus brief was filed by the Center for Gender & Refugee Studies (CGRS or Center) to the Board of Immigration Appeals (BIA) on June 28, 2011 in the matter of *L-P-*. Identifying information has been redacted in accordance with the wishes of the applicant. The brief argues that the group of “Guatemalan women” is a particular social group under U.S. law.

Organizational Overview

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Amicus Curiae in Support of Respondent [REDACTED]

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

In the Matter of)
)
 [REDACTED])
)
 In Removal Proceedings)
)

File No.: [REDACTED]

**THE CENTER FOR GENDER & REFUGEE STUDIES BRIEF AS AMICUS CURIAE IN
SUPPORT OF RESPONDENT [REDACTED]**

[REDACTED]

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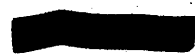
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I. STATEMENT OF AMICUS CURIAE

The Center for Gender & Refugee Studies (CGRS) has a direct and serious interest in the development of immigration and refugee law, including the issues under consideration. CGRS was founded in 1999 by Professor Karen Musalo, who is internationally recognized for her theoretical and practical contributions to the development of the jurisprudence of gender asylum. She has written and lectured widely on the issue, and has litigated several of the most significant gender asylum cases of the last 15 years, including *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996), and *Matter of R-A-*, 22 I. & N. Dec. 906 (BIA 1999) (en banc), *vacated* (A.G. 2001), *remanded by Matter of R-A-*, 23 I. & N. Dec. 694 (BIA 2005), *stay lifted and remanded by Matter of R-A-*, 24 I. & N. Dec. 629 (BIA 2008). The Center is the nation's leading organization providing training and expert consultation to attorneys representing women asylum-seekers fleeing gender related harm. Through its scholarship, expert consultations, advocacy, and appellate litigation, CGRS has played a central role in the development of refugee law and policy related to gender persecution, including the application of the refugee definition to claims based on membership in a particular social group. Each year, CGRS advises hundreds of attorneys representing women asylum-seekers with claims based on membership in a particular social group, and participates in appellate litigation regarding the definition and application of the term. Ensuring the proper analysis of social group claims consistent with domestic jurisprudence and international guidance implicates a matter of great consequence to CGRS.

II. SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals has instructed the Board of Immigration Appeals (BIA) to review Petitioner ██████████'s asylum claim and apply the two-pronged test of *Hernandez-Montiel v. INS* to determine whether Ms. ██████████ is a member of a particular social group within the meaning of the Immigration and Nationalization Act (INA). *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (citing *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1091 (9th Cir. 2000)). The BIA erroneously held that "Guatemalan women" do not constitute a legally cognizable social group, when such a group is recognizable under both Ninth Circuit and BIA precedent.

Ms. ██████████ is afraid to return to Guatemala because of the overwhelming incidence of gender violence committed with impunity in that country. Her fear is based on well-documented facts, including: (1) the increasingly high rates of violence against women; (2) the escalating number of gender-motivated murders of women (referred to as "femicides") which are committed with extreme brutality; and (3) the impunity for the perpetrators of violence against and murder of women. This gender-based violence, committed with impunity reflects deeply entrenched societal norms which accord women a subordinate position, and which considers violence against them to be normal and acceptable.

Ms. ██████████'s particular social group is defined by the immutable characteristics of gender and nationality. As the BIA itself held more than twenty-five years ago, gender is an immutable characteristic. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).¹ In its 1996 decision in *Matter of Kasinga*, the BIA went on to hold that gender, in combination with other characteristics, can define a particular social group. *Matter of Kasinga*, 21 I. & N. Dec. 357, 366 (BIA 1996). In the following decades, numerous circuit courts, including the Ninth Circuit, have affirmed this approach, finding social groups defined by gender alone, or gender in combination

¹ The BIA used the term "sex" rather than "gender" in *Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

with characteristics such as nationality. *See, e.g., Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (finding that Somali women constitute a particular social group); *Fatin v. INS*, 12 F.3d 1233, 1240-41 (3rd Cir. 1993); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007); *Yadegar-Sargis v. INS*, 297 F.3d 596, 603 (7th Cir. 2002); *Niang v. Gonzales*, 422 F.3d 1187, 1199-1200 (10th Cir. 2005); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008); *Bi Xia Qu v. Holder*, 618 F.3d 602, 607 (6th Cir. 2010). Recent jurisprudence requiring social groups to be socially visible and particular does not meaningfully affect the principle that gender-defined social groups are cognizable under the law, and Ms. [REDACTED]'s social group easily meets these additional requirements. As discussed below, the social group of "Guatemalan women" is indisputably cognizable under Ninth Circuit and BIA jurisprudence.

III. STATEMENT OF THE CASE

Ms. [REDACTED]'s claims for asylum, withholding of removal, and relief under the Convention Against Torture were initially heard by an immigration judge (IJ) on January 11, 2005. Before the IJ, Ms. [REDACTED]'s attorney argued that she feared persecution on account of membership in the particular social group "Guatemalan women between the ages of 14 and 40[.]" I.J. Decision at 4 (Jan. 11, 2005).² The IJ denied Ms. [REDACTED]'s application, ruling that *inter alia* "Guatemalan women between the ages of 14 and 40" was not a cognizable social group, but failing to articulate the underlying reasoning for this decision. I.J. Decision at 5 (Jan.

² During testimony at the IJ level Ms. [REDACTED]'s attorney suggested that Ms. [REDACTED] might also fear persecution on account of her Pentecostal religion, but the IJ determined that "[n]o other evidence was introduced with respect to any persecution of members of the Pentecostal church in Guatemala." This argument was not raised on appeal to the BIA.

11, 2005).³ Ms. [REDACTED] filed a timely appeal to the BIA in February of 2005. Notice of Appeal from a Decision of an Immigration Judge (filed Feb. 2, 2005).

On appeal to the BIA, Ms. [REDACTED]'s attorney argued that her fear of persecution was based on her membership in the particular social group of "all women in Guatemala." Brief for the Respondent at 3, [REDACTED] (BIA April 13, 2006). He argued that the increasing number of systemic and brutal murders of women in Guatemala amounts to persecution of that particular social group, and that the Guatemalan government is either unwilling or unable to control such persecution. *Id.*

The BIA upheld the IJ's decision on March 6, 2006, finding Ms. [REDACTED] had failed to demonstrate a well-founded fear of persecution on account of her membership in a particular social group. In rejecting the particular social group "Guatemalan women," the BIA relied on *Sanchez-Trujillo*, a Ninth Circuit decision issued in 1986. *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986). The BIA cited to *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1091 (9th Cir. 2000), which had modified the court's approach in *Sanchez-Trujillo*, but then utterly failed to apply it. Instead, the BIA exclusively applied *Sanchez-Trujillo*, noting that it required members of a particular social group to have a voluntary associational relationship, and that the Ninth Circuit had ruled that a social group could not be defined by a "sweeping demographic division" of members with "a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings." [REDACTED] (BIA April 13, 2006) at 1-2 [hereinafter *Perdomo* (BIA April 13, 2006)] (quoting *Sanchez-Trujillo*, 801 F.3d at 1577). Relying on, and citing to *Sanchez-Trujillo*, the BIA held that "all the women in Guatemala" was too broad to constitute a particular social group. [REDACTED] at 2 (BIA

³ "The court is not in a position to make a finding that women between the ages of 14 and 40 who are Guatemalan ... form a particular social group which would entitle her to relief."

April 13, 2006) . The BIA stated that if “Guatemalan women between the ages of 14 and 40” was not a particular social group, then the larger group “women in Guatemala” certainly could not be a particular social group. *Id.*

On March 31, 2006, following the BIA decision, [REDACTED] filed a Petition for Review to the Ninth Circuit. In her Opening Brief, filed on September 20, 2006, Ms. Perdomo argued, *inter alia*, that she feared persecution on account of her membership in the social group “women in Guatemala.” Petitioner’s Opening Brief at 11-12, *Perdomo v. Gonzales*, 611 F.3d 662 (9th Cir. Sept. 20, 2006) (No. 06-71652). The Ninth Circuit granted the Petition and remanded the case to the BIA, clearly stating in its decision that Ninth Circuit jurisprudence could support a finding that “Guatemalan women” is a particular social group within the meaning of the INA.⁴

The court ruled that the BIA failed to apply *Hernandez-Montiel v. INS*, which had modified the Ninth Circuit’s approach to defining a particular social group. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1091 (9th Cir. 2000). Finding that “members of some social groups do not associate by choice” the court in *Hernandez-Montiel* ruled that a social group could be defined either by a “voluntary associational relationship,” or by immutable or fundamental characteristics. *Id.* The BIA erred in solely applying the voluntary associational relationship test.

The court also found that the BIA’s rejection of the proposed social group of “women in Guatemala” as being overly broad was inconsistent with Ninth Circuit precedent. Numerous Ninth Circuit decisions have found relatively large or broad collections of individuals to be valid social groups. *Perdomo v. Holder*, 611 F.3d at 668 (citing *Karouni v. Gonzales*, 399 F.3d 1163,

⁴ The Ninth Circuit decision noted that the BIA had “dismissed [REDACTED]’s appeal solely on the ground that ‘all women in Guatemala’ could not constitute a cognizable social group, without reaching the question of whether [REDACTED] had demonstrated a nexus between her membership in that group and her fear of persecution.” Therefore, under *Andia v. Ashcroft*, which stated that a federal court only can consider those grounds relied on by the agency, the Ninth Circuit limited its analysis to the question of whether “women in Guatemala” could constitute a particular social group and did not address the question of nexus. See *Perdomo v. Holder*, 611 F.3d 662, 667-68 (9th Cir. 2010) (citing *Andia v. Ashcroft*, 359 F.3d 1181, 1184 (9th Cir. 2004) (per curiam).

1172 (9th Cir. 2005) (holding that “all alien homosexuals are members of a ‘particular social group’”); *Mihalev v. Ashcroft*, 388 F.3d 722, 726 (9th Cir.2004) (concluding that “[t]here is no question that Gypsies are an identifiable ethnic group and that being a Gypsy is a protected ground [for asylum]”); *see also Singh v. INS*, 94 F.3d 1353, 1359 (9th Cir. 1996) (“reject[ing] the notion that an applicant is ineligible for asylum merely because all members of a persecuted group might be eligible for asylum.”). The court noted that decisions such as *Ochoa v. Gonzales* and *Delgado-Ortiz v. Holder* – which rejected broadly defined social groups – did so not because of their breadth, but because they lacked any unifying characteristic. *Perdomo v. Holder*, 611 F.3d at 668 (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1171 (9th Cir. 2005); *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1151-52 (9th Cir. 2010).

Finally, the court concluded that the BIA’s decision was “inconsistent with its own opinions in *Matter of Acosta*, and *Matter of C-A-*,” both of which recognize gender as an immutable characteristic which may define social group membership. *Perdomo v. Holder*, 611 F.3d at 669 (citing *Matter of Acosta*, 19 I. & N. Dec. 211, 233-34 (BIA 1985); *Matter of C-A-*, 23 I. & N. Dec. 951, 955 (BIA 2006).

In its decision in the current case, the Ninth Circuit ruled that “women in a particular country . . . could constitute a particular social group.” *Perdomo v. Holder*, 611 F.3d at 667. The court remanded under *Gonzales v. Thomas* “for the BIA to correctly apply Ninth Circuit precedent, in particular *Hernandez-Montiel*, to determine in the first instance whether women in Guatemala constitutes a particular social group, and, if so, whether Ms. [REDACTED] demonstrated a fear of persecution “on account of” her membership in such a group.” *Perdomo v. Holder*, 611 F.3d at 669 (citing *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006).

IV. ARGUMENT

An applicant qualifies for asylum under the INA if she demonstrates that she is “unable or unwilling 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.” 8 U.S.C. § 1101(a)(42)(A). The BIA, the Ninth Circuit and other circuit courts, the Department of Homeland Security (DHS), and the United Nations High Commissioner for Refugees (UNHCR) have all concluded that gender can be a defining characteristic of a particular social group. Ms. [REDACTED]’s proposed social group, Guatemalan women, is cognizable pursuant to controlling BIA and Ninth Circuit jurisprudence. The characteristics defining the group – gender and nationality – are immutable, and the group is socially visible and sufficiently particular. The BIA erred in ruling that that “Guatemalan women” do not constitute a particular social group.

A. BIA AND NINTH CIRCUIT PRECEDENT ON THE MEANING OF “PARTICULAR SOCIAL GROUP”

The BIA first defined “particular social group” in its landmark 1985 decision *Matter of Acosta*. 19 I. & N. Dec. 211 (BIA 1985). The Board stated that the meaning of particular social group must be derived from an examination of the other four enumerated grounds. It observed that the other grounds protected by the Refugee Act, i.e., race, religion, nationality, and political opinion, each “describe[] persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.” *Id.* at 233. Applying the doctrine of *ejusdem generis*, the BIA ruled that a “particular social group” is “a group of persons all of whom share a common, immutable characteristic. . . . one that the members of the group either

cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.” *Id.* It listed sex, color, and kinship ties as examples of immutable characteristics. *Id.* With the exception of the Ninth Circuit, every circuit court to address the issue upheld *Acosta*’s immutable or fundamental characteristics approach. *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993); *Fatin v. INS*, 12 F.3d 1233, 1239-40 (3rd Cir. 1993); *Argueta-Rodriguez v. U.S. INS*, 129 F.3d 116, 118 (4th Cir. 1997)(unpublished disposition); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir. 2002); *Castellano-Chacon v. INS*, 341 F.3d 533, 547 (6th Cir. 2003); *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998); *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994), *superseded by statute on other grounds as recognized by Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008); *Niang v. Gonzales*, 422 F.3d 1187, 1198-99 (10th Cir. 2005); *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190, 1196-97 (11th Cir. 2006). As discussed in Section III *supra*, the Ninth Circuit subsequently adopted the *Acosta* approach in its decision in *Hernandez-Montiel*. *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000). Foreign jurisdictions cited *Acosta* with approval,⁵ and the UNHCR adopted this approach as the primary one for determining social group membership.⁶

⁵ *Matter of Acosta* has since been cited in dozens of cases in Australia, Canada, New Zealand, and the United Kingdom. In Australia, it is referenced in over one-hundred decisions of the Refugee Review Tribunal of Australia (RRT). Some cases are influenced by *Acosta* despite not directly citing the case itself. This is most apparent when a country adopts the *Acosta* formulation of “particular social group” in a given decision, and then that decision is cited in later cases. For example, *Ward v. Canada* quoted *Acosta* at length before articulating a “three-pronged interpretation” of particular social group. The court states “The tests proposed in *Mayers, supra, Cheung, supra, and Matter of Acosta, supra* ... identify three possible categories: (1) groups defined by an innate or unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.” *Ward v. Canada (Minister of Citizenship and Immigration)*, [1993] 2 S.C.R. 689 (Can.). In a later case, *Bojaj v. Canada*, the court quotes nearly all of the above language but cuts out the references to *Mayers, Cheung, and Acosta*. *Bojaj v. Canada (Minister of Citizenship and Immigration)*, [2000] 194 F.T.R. 315 (Can.) In this manner the impact of *Acosta* and other US cases is obscured.

⁶ In its Guidelines on International Protection relating to particular social group determinations, the UNHCR adopted *Acosta*’s “immutable characteristic” formulation into its definition of “particular social group” which states, “a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.” U.N. High Comm’r for Refugees, *Guidelines on International Protection: “Membership of a particular social*

For over twenty years, the BIA continued to analyze particular social groups based on the immutable or fundamental characteristics approach set out in *Acosta*. Under *Acosta*, the BIA has recognized a variety of particular social groups analogous to the one advanced in the instant case, including: “young women of the Tchamba-Kunsuntu Tribe who have not had [female genital cutting], as practiced by that tribe, and who oppose the practice;” *Matter of Kasinga*, 21 I. & N. Dec. 357, 358 (BIA 1996); homosexuals in Cuba; *Matter of Toboso-Alfonso*, 20 I. & N. Dec 819, 820 (BIA 1994); Filipinos of mixed Chinese-Filipino ancestry; *Matter of V-T-S-*, 21 I. & N. Dec. 792, 798 (BIA 1997); and members of a Somali clan; *Matter of H-*, 21 I. & N. Dec. 337, 342 (BIA 1996).

In 2006, in *Matter of C-A-*, the BIA imposed the additional requirements of social visibility and particularity to the long-standing *Acosta* immutable/fundamental criteria. To demonstrate social visibility, it must be established that “the shared characteristic of the group ... be recognizable by others in the community,” that “the members of a group are perceived as a group by society,” or that members are treated “substantially different[ly]” or are subjected to “more violence or human rights violations” than the general population. *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74 (BIA 2007) (citing *Matter of C-A-*, 23 I. & N. Dec. 951, 956 (BIA 2006), *aff’d Castillo-Arias v. U.S. Attorney General*, 446 F.3d 1190 (11th Cir. 2006), *cert. denied sub nom. Castillo-Arias v. Gonzales*, 549 U.S. 1115 (2007) (internal quotations omitted); *Matter of C-A-*, 23 I. & N. Dec. 951, 960 (BIA 2006). Particularity requires that the group be described in a manner “sufficiently distinct” that it “would be recognized, in the society in question, as a discrete class of persons.” *Matter of S-E-G-*, 24 I. & N. Dec. 579, 584 (BIA 2008).

group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees at ¶11, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) available at <http://www.unhcr.org/3d58de2da.pdf>.

To be “particular,” a group must not be “loosely defined” or “too amorphous to provide an adequate benchmark for determining group membership.” *Id.* at 74-76.

The BIA attributed the social visibility requirement to the United Nations High Commissioner for Refugees (UNHCR) social group guidelines. As UNHCR itself has stated, and as discussed in Section IV-D *infra*, this is an incorrect reading of the UNHCR guidelines. The UNHCR does not require a group to be socially visible. It does, however, accept a “social perception” approach to defining a social group, but this is an alternate approach to defining social group, rather than a requirement in addition to establishing immutable or fundamental characteristics.⁷ The Ninth Circuit treats social visibility and particularity as “factors to consider” in determining social group membership. *Perdomo*, 611 F.3d at 667; *but c.f. Ramos-Lopez v. Holder*, 563 F.3d 855, 860-61 (9th Cir. 2009).⁸

B. THE SOCIAL GROUP OF “GUATEMALAN WOMEN” IS COGNIZABLE UNDER BIA AND FEDERAL JURISPRUDENCE

The BIA and numerous federal courts have ruled that a particular social group can be defined by gender.

1. THE SOCIAL GROUP “GUATEMALAN WOMEN” IS DEFINED BY IMMUTABLE CHARACTERISTICS AND IS ANALOGOUS TO GROUPS THAT HAVE BEEN APPROVED BY BIA AND FEDERAL PRECEDENT

⁷ See section IV(D) *infra*. The UNHCR has clarified its position that there is no requirement that a particular social group be socially visible. See, e.g., Brief of the UNHCR as *Amicus Curiae* in Support of the Petitioner at 11, *Valdiviezo-Galdamez v. Att’y Gen. of the U.S.*, 502 F.3d 285 (3rd Cir. 2007) (No. 08-4564). Nonetheless, the BIA continues to require social visibility.

⁸ In *Ramos-Lopez* the Court seemed to adopt the BIA’s social visibility and particularity requirements, but more recently has identified them as factors to consider when making social group determinations.

BIA, Ninth Circuit and other circuit court precedent support the finding of a social group based on gender and nationality, such as “Guatemalan women.” As early as its 1985 decision in *Matter of Acosta*, the BIA recognized “sex” as a prototypical example of an immutable characteristic that could define a social group. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). Relying in part on *Acosta* and *Hernandez-Montiel*, the Ninth Circuit found in *Mohammed v. Gonzales* that “the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application of our law.” *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005). It applied the “innate characteristic” prong of the *Hernandez-Montiel* test, and noted that “[f]ew would argue that sex or gender, combined with clan membership or nationality, is not an ‘innate characteristic,’ ‘fundamental to individual identit[y].’” *Id.*

The petitioner in *Mohammed* was a young woman subjected to female genital cutting (FGC) as a child. The court stated that Ms. Mohammed could be a member of two cognizable social groups: “young girls in the Benadiri clan,” a group defined by gender, age, and tribal membership, and “Somalian [*sic*] females,” a group defined by gender and nationality alone. *Id.* at 796-97. Consequently, gender and nationality were sufficient to define the particular social group. The Ninth Circuit decision in the instant case cited to *Mohammed*, reiterating that “women in a particular country, regardless of ethnicity or clan membership, could form a particular social group.” *Perdomo v. Holder*, 611 F.3d at 667 (citing *Mohammed*, 400 F.3d at 798). As in *Mohammed*, Ms. [REDACTED]’s gender and Guatemalan nationality suffice to define a social group.

The *Mohammed* decision also relied on the Third Circuit’s decision in *Fatin v INS*, and the BIA’s decision in *Matter of Kasinga*. *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993); *Matter of*

Kasinga, 21 I. & N. Dec. 357 (BIA 1996). In *Fatin*, the Third Circuit ruled that gender alone could constitute a particular social group. *Fatin v. INS*, 12 F.3d 1233, 1240 (3rd Cir. 1993). The Third Circuit noted that under *Acosta*, “sex’ [is] an innate characteristic that could link the members of a ‘particular social group;’” therefore “to the extent that the petitioner 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 [identified a cognizable particular social group].” *Id.*⁹

Subsequent to *Acosta* and *Fatin*, the BIA granted asylum in *Matter of Kasinga* on the basis of membership in a gender-defined particular social group. *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996). Ms. Kassindja¹⁰ feared that she would be forced to undergo FGC if she were returned to Togo. The BIA held that Ms. Kassindja belonged to the social group of “[y]oung women of the Tchamba-Kunsuntu Tribe who have not had [FGC], as practiced by the tribe, and who oppose the practice.” *Id.* at 365. The BIA found gender, nationality, and tribal membership to be immutable characteristics, and it recognized that Ms. Kassindja's intact genitalia and beliefs about female genital cutting were fundamental characteristics she should not have to change. Furthermore, it stated that its reasoning was consistent with the Third Circuit's decision in *Fatin*. *Id.* at 365-66 (citing *Fatin v. INS*, 12 F.3d at 1241).

Numerous other circuit courts, citing to *Acosta*, *Kasinga*, and *Fatin*, have ruled that gender is an immutable characteristic, which either alone or in combination with other defining characteristics, such as nationality or ethnicity, can constitute a particular social group. *See, e.g.*,

⁹ The Court ultimately concluded that the petitioner in *Fatin* had failed to prove that she had a well-founded fear of persecution on account of being a woman, and that in either case the petitioner had argued that she was a member of a different group, “Iranian women who refuse to conform to the government's gender-specific laws and social norms.” *Id.* at 1241. The court found that this more specific group was also a cognizable social group, but that Ms. *Fatin* was not a member of it.

¹⁰ Ms. Kassindja's name was improperly transcribed as “Kasinga,” which is how it appears in the record.

Hassan v. Gonzales, 484 F.3d 513, 518 (8th Cir. 2007) (holding that Somali females constitute a particular social group); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008) (holding that “Cameroonian widows” constitute a particular social group); *Niang v. Gonzales*, 422 F.3d 1187, 1200 (10th Cir. 2005) (stating that female members of a tribe constitute a particular social group and that additional factors, such as opposition to cultural practices as in *Kasinga*, were not necessary for such a group to be valid). The Sixth and Seventh Circuits have also approved social groups defined in part by gender. *Bi Xia Qu v. Holder*, 618 F.3d 602, 607 (6th Cir. 2010) (finding a social group “women in China who have been subjected to forced marriage and involuntary servitude”); *Yadegar-Sargis v. INS*, 297 F.3d 596, 603 (7th Cir. 2002) (finding that “Christian women in Iran who do not wish to adhere to the Islamic female dress code” constitutes a particular social group); see also *Gomez-Zuluaga v. Att’y Gen. of the United States*, 527 F.3d 330, 348 (3rd Cir. 2008) (finding that “women who have escaped involuntary servitude after being abducted and confined by the FARC” constitutes a particular social group). Similarly, the BIA and several federal courts have upheld social groups defined in part by nationality, such as “Filipinos of mixed Filipino-Chinese ancestry.” *Matter of V-T-S-*, 21 I. & N. Dec. 792, 798 (BIA 1997).

Although *Acosta* and the early gender-based asylum cases such as *Fatin* and *Kasinga* arose prior to the BIA’s social visibility requirement, the BIA clearly stated in *Matter of C-A-* that gender is a highly visible characteristic that is easily recognizable in society. *Matter of C-A-*, 23 I. & N. Dec. 951, 959-60 (BIA 2006). Recent federal decisions ruling in favor of gender-defined social groups concur. In *Ngengwe*, for example, the Eighth Circuit looked to pervasive discrimination against female widows in Cameroon and found that the group “Cameroonian widows” is socially visible. *Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008). In *Bi Xia*

Qu, the Sixth Circuit, using information from the Department of State's Human Rights Report, determined that women trafficking victims are socially visible. *Bi Xia Qu v. Holder*, 618 F.3d 602, 607 (6th Cir. 2010). Consistent with the above decisions issued by the Ninth Circuit, BIA and other federal circuits, "Guatemalan women," a group defined by the immutable characteristics of gender¹¹ and nationality, is a legally cognizable social group.

2. THE SOCIAL GROUP OF GUATEMALAN WOMEN IS SOCIALLY VISIBLE

The social group of Guatemalan women is socially visible. In *Matter of C-A-*, the BIA noted that particular social groups "based on innate characteristics such as sex or family relationship," are generally "easily recognizable and understood by others to constitute social groups." *Matter of C-A-*, 23 I. & N. Dec. 951, 959 (BIA 2006), *aff'd*, *Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006). Moreover, it explained that a gender-based social group – such as the one approved in *Matter of Kasinga* – was highly recognizable and visible to others in society. *Matter of C-A-* at 960. Gender is a characteristic that is, by definition, visible, to the extent that it refers both to biological identity (i.e. sex), as well as to "the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for men and women." World Health Organization, *What do we mean by "sex" and "gender"?*, <http://www.who.int/gender/whatisgender/en/> (last visited June 22, 2011).

Furthermore, as explained in Sections IV(A) above and IV(C)(3) below, social visibility is also a question of whether the social group is treated distinctly, such as by being subject to higher rates of violence or human rights violations, or being excluded from state protection. Social visibility determinations should be made in "the context of the country of concern and the

¹¹ Gender can also be considered a characteristic that is fundamental to identity. *Mohammed v. Gonzales*, 400 F.3d 785, 797-98 (9th Cir. 2005); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000).

persecution feared,” and thus depend on the country conditions evidence in a given case. *Matter of S-E-G-*, 24 I. & N. Dec. 579, 586-87 (BIA 2008) (citing *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74 (BIA 2007)). Evidence that a specific group is targeted for persecution in a particular society may also serve as evidence of the group's visibility. *Matter of C-A-*, 23 I. & N. Dec. at 960 (“persecutory action toward a group may be a relevant factor in determining the visibility of a group in a particular society.” (citing U.N. High Comm’r for Refugees, *Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* at ¶14, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter UNHCR Guidelines on International Protection: Membership of a Particular Social Group] (emphasis added in BIA cite)); see also DHS Supplemental Brief, L.R. (redacted) at 17-18, (April 13, 2009) [hereinafter DHS L.R. Brief].¹² “This evidence may reflect a societal view, applicable at least in parts of Mexico, that the status of a woman in a domestic relationship places the woman in a segment of society that will not be accorded protection from harm inflicted by a domestic partner. In this light, the female respondent’s status by virtue of her relationship to [redacted] could indeed be the kind of important characteristic that results in a significant social distinction being drawn in terms of who will receive protection from serious physical harm.” DHS L.R. Brief.

In the specific context of Guatemala, the history of women’s inferior legal status, the alarming rates of gender-based violence, and the lack of redress available to victims of such violence all demonstrate that women in Guatemala are perceived and treated in a distinct manner and therefore are socially visible.

a. History of Subordinate Status

¹² The DHS brief in *Matter of L-R-* addressed how a gender-defined social group could meet immutable / fundamental test, as well as the recent requirements of visibility and particularity; see Section IV(C)(3)(b), *infra*.

Violence against women in Guatemala dates back to the Spanish conquest over five hundred years ago. This period was a time of general and extreme cruelty towards women, as the Spanish conquerors subjected indigenous Guatemalan women to sexual slavery. KRISTIN SVENDSEN, POR SER MUJER: LIMITANTES DEL SISTEMA DE JUSTICIA ANTE MUERTES VIOLENTAS DE MUJERES Y VÍCTIMAS DE DELITOS SEXUALES [BEING A WOMAN: LIMITATIONS OF THE JUSTICE SYSTEM IN RESPONDING TO THE VIOLENT DEATHS OF WOMEN AND VICTIMS OF SEX CRIMES] 6 (2007). When Guatemala achieved independence in 1821, it began a period of authoritarian regimes and dictatorships. From 1821 to 1845 Guatemala had eleven constitutions, none of which afforded rights to women. KRISTIN SVENDSEN, POR SER MUJER at 6. Although women were given the right to vote in the 1945 constitution, this period was soon interrupted by a bloody civil war that proved to be even more violent for Guatemalan women. *Id.* at 6-7. For thirty-six years “[v]iolence against women, including sexual violence, was a strategy of the war.” Karen Musalo, *Crimes Without Punishment* at 181. This culture of violence against women, including “rapes, sexual slavery, forced sexual labor, forced marriages with members of the army, and amputations and mutilations of sexual organs” normalized violence against women in Guatemala. *Id.* at 182.

b. Violence against Women

The pervasiveness of violence against women in Guatemala reinforces the fact that women are perceived and treated distinctly within Guatemalan society. There are innumerable ways in which women in Guatemala endure discrimination, violence, and abuse.¹³ Violence

¹³ See Karen Musalo, Elisabeth Pellegrin & S. Shawn Roberts, *Crimes Without Punishment: Violence Against Women in Guatemala*, 21 HASTINGS WOMEN’S L. J. 161 (2010) [hereinafter Karen Musalo, *Crimes Without Punishment*] (CITING KRISTIN SVENDSEN, POR SER MUJER: LIMITANTES DEL SISTEMA DE JUSTICIA ANTE MUERTES VIOLENTAS DE MUJERES Y VÍCTIMAS DE DELITOS SEXUALES [BEING A WOMAN: LIMITATIONS OF THE JUSTICE SYSTEM IN RESPONDING TO THE VIOLENT DEATHS OF WOMEN AND VICTIMS OF SEX CRIMES] (2007); Comision Especifica Para el Abordaje del Femicidio [Special Commission to Address Femicide], *Estrategia para el Abordaje del Femicidio Una Vision desde el Estado* [Strategy for Addressing Femicide: A Vision from the State] at 18 (2006);

against women in Guatemala is so widespread that one in three women suffers from it.¹⁴ This violence occurs within the family as well as in the society at large. *Id.* at 170. It includes sexual violence, sexual harassment, domestic violence, human trafficking, and murder. Most importantly, the violence is completely normalized; it has evolved over hundreds of years to the point where it is deeply imbedded in the culture and is accepted by society and the state alike. *Id.*

Due to such normalization, women in Guatemala can expect no protection from, or redress for violence against them. The U.S. State Department has noted that “[v]iolence against women, including domestic violence, remained a common and serious problem.” U.S. DEP’T OF STATE, 2009 HUMAN RIGHTS REPORTS: GUATEMALA (2010) [hereinafter U.S. Dept of State, 2009 Human Rights Report: Guatemala] *available at* <http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136114.htm> (last visited June 21, 2011).

The law prohibits domestic abuse, provides for both the issuance of restraining orders against alleged aggressors and police protection for victims, and requires the PNC [National Civil Police] to intervene in violent situations in the home. In practice, however, the PNC often failed to respond to requests for assistance related to domestic violence. Women's groups commented that few officers were trained to deal with domestic violence or assist victims. . . . At year's end the MP [Public Ministry] reported that it received more than 31,641 complaints of violence against women and children, including domestic violence, economic violence, and sexual crimes. Of the 5,097 complaints of sexual crimes, at year's end the government reported 242 convictions. The MP did not provide data on punishment. U.S. Dept of State, 2009 Human Rights Reports: Guatemala,

The impact of normalization is most strongly evidenced by the continuing rise in *femicides* – the violent murder of women with impunity. Karen Musalo, *Crimes Without Punishment* at 171-180. “Killings of all types continued, including those with reported evidence

and European Parliament, Background Paper, Joint Public Hearing, Femicide: The Case of Mexico and Guatemala, at 12 (Apr. 19, 2006) [hereinafter European Parliament Report], available at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/fd/droi20060419_h_backgroundnote_/droi20060419_h_backgroundnote_en.pdf.

¹⁴ Karen Musalo, *Crimes Without Punishment* at 166 (citing *Comunicación e Información de la Mujer, A.C.* [Women's Communications and Information] (CIMAC), “Guatemala: Acciones ante Asesinatos de Mujeres, Exigen OSC.” [Guatemala: Action in Response to the Murders of Women, Demand the OSC] (Feb. 1, 2008).

of sexual assault, torture, and mutilation of women. The NGO Guatemalan Women's Group reported that 721 women were killed in 2009 from January to November 22. The PNC reported a total of 6,498 killings during the year [2009], including 720 killings of women, compared with 6,292 total killings, including 687 women, in 2008. There were 219 prosecutions for killings of women in Guatemala City during the year, but few prosecutions resulted in convictions.”

Although the numbers vary slightly depending on the source of the statistics, all reports indicate that the number of female victims of murder in Guatemala increases each year. U.S. DEPT OF STATE, 2009 HUMAN RIGHTS REPORT: GUATEMALA.

The rise in the murders of women cannot simply be explained as part of the overall violent nature of Guatemalan society. Murders of women have increased at a higher rate than murders of their male counterparts, and there is often no discernible motive other than the fact of the victim's gender. In addition, the murders of women are carried out with a notable brutality different from that which accompanies the murder of men. The bodies of murdered women bear signs of torture, mutilation and dismemberment, illustrating what many have characterized as a hatred of women. It is the recognition of this distinct nature that led to the enactment of the *Ley contra el Femicidio y Otras Formas de Violencia contra la Mujer* (the Law against Femicide and Other Forms of Violence against Women). *Ley contra el Femicidio y otras Formas de Violencia contra la Mujer* [Law Against Femicide and Other Forms of Violence Against Women], Decreto del Congreso [Congressional Decree] No. 22-2008 (2008) (Guat.) [hereinafter *Ley Contra el Femicidio*]. Karen Musalo, *Crimes Without Punishment* at 165. Although the existing homicide laws should have provided the basis for prosecution of the murders of women, the high levels of impunity demonstrated that such was not the case. Women's rights activists felt it necessary to advocate for passage of a new law to make the point that the murders of women are a matter of

importance and merit investigation and prosecution. Despite the *Ley contra el Femicidio*, women continue to be murdered with near total impunity,¹⁵ which is evidence of a significant societal distinction regarding who can expect protection from serious harm. See e.g. DHS Supplemental Brief, L.R. (redacted) (April 13, 2009) at 18.

c. Legal inferiority

The inferior status of women in Guatemalan society is further evidenced by the institutionalized gender discrimination that continues to exist today. Karen Musalo, *Crimes Without Punishment* at 182-184. For example, until 1998, the Guatemalan Civil Code accorded women a subordinate status to their husbands. “This attitude continues to be reflected in criminal law provisions; until recently, acts of sexual violence against women were considered “private crimes” permitting the perpetrator to be pardoned upon the woman’s agreement, and to escape prosecution for rape if he married the victim, even in cases of girls raped as young as twelve.”¹⁶

Despite a recent change to the sexual violence provision, which makes crimes of sexual violence “public crimes,” the Criminal Code was left unmodified. Karen Musalo, *Crimes Without Punishment* at 183. In cases of sexual violence, the victims hold the burden of proving their own “innocence” with the requirement that they demonstrate that they are not promiscuous. *Id.* These laws are evidence of Guatemala’s patriarchal culture, which places women in a

¹⁵ The Washington Office on Latin America “reported to its knowledge, ‘only 20 sentences have been handed down for the more than 2,500 murders [of women] over the last six years.’ This statistic calculates to a level of impunity of 98.75%” Musalo, *Crimes Without Punishment* at 184, (citing ADRIANA BELTRÁN & LAURIE FREEMAN, WASH. OFFICE ON LATIN AM., HIDDEN IN PLAIN SIGHT: VIOLENCE AGAINST WOMEN IN MEXICO AND GUATEMALA 13 (2007). The resolutions passed by the U.S. Senate and the House of Representatives in 2007 cite 2,000 murders of women between 2001 and 2006, with only 20 convictions. S. Res. 178, 110th Cong. (2007).

¹⁶ Karen Musalo, *Crimes Without Punishment* at 183, (citing Angélica Cházaro & Jennifer Casey, *Getting Away with Murder: Guatemala’s Failure to Protect Women and Rodi Alvarado’s Quest for Safety*, 17 HASTINGS WOMEN’S L. J. 141, 150-53 (2006); *Declaración Jurada de Hilda Morales Trujillo* [Sworn Declaration of Hilda Morales Trujillo], at 9 (May 20, 2008) at ¶ 23; *Ley contra la Violencia Sexual, Explotacion y Trata de Personas* [Law against Sexual Violence, Exploitation, and Human Trafficking], Decreto del Congreso [Congressional Decree] No. 9-2009 (Guat.).

subordinate status; the laws also reflect broader societal perceptions about the inferior status of women.

In addition to the *de jure* inferiority of women under Guatemalan law, women in Guatemala face *de facto* discrimination as a result of a legal system which is largely indifferent to crimes against them. There is a non-responsiveness on the part of authorities, beginning with police officers who receive complaints, continuing to prosecutors who are supposed to investigate, and ending with judges who have jurisdiction over these matters. "Reports of violence against women are not taken seriously, government investigations into femicide are not thorough, and recordkeeping is often incomplete and faulty." *Id.* at 186. Furthermore, law enforcement personnel demonstrate a persistent pattern of blaming female victims of crime, assuming gang involvement or promiscuity in cases that lack any indication of either. *Id.* The disparate treatment of and discrimination towards women by Guatemala's justice system demonstrates that women are viewed as inferior to men and treated distinctly.

d. Societal Attitudes about Women

It is beyond dispute that women hold a subordinate position in Guatemalan society. Certified Administrative Record at 81, ¶¶2-3, *Perdomo v. Gonzales*, 611 F.3d 662 (9th Cir. Sept. 20, 2006) (No. 06-71652). According to Dr. Elsy Camey de Astorga of the Pan American Health Organization, "The origin of violence against women is the role women occupy in society. They are considered objects, owned by men;" *Id.* at 85. The abuse of women in Guatemala "stems from a culture that embraces the subjugation of women and celebrates a man's right to dominate." Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?* 14 VA. J. SOC. POL'Y & L. 119, 145 (2007) (quoting Guatemalan human rights expert Hilda Morales Trujillo). A woman in Guatemala is dominated first by her

father, and then, once she is married, by her husband. If she attempts to escape her pre-ordained role, she is perceived by society as a “bad woman.” Furthermore, “if a woman tries to report her abuser to the police, they treat her as if she were the criminal.” *Id.*

Women are blamed for sexual harassment if they dress in a certain way; this attitude is held even by the police, judiciary, and other government authorities. *Id.*

The cycle of violence against women cannot be eradicated when individuals whose job it is to protect women simply shirk their responsibility by blaming the woman. These attitudes are based on the idea that the man has the right to use violence against a woman as a means of exercising power and control over her. Karen Musalo, *Protecting Victims of Gendered Persecution* at 145-146.

These attitudes extend to those who attempt to challenge this social norm. *Id.*

Guatemalan women are clearly recognized as a group in society and targeted because of their inferior status and lack of access to state protection. In *Ngengwe v. Mukasey*, the Eighth Circuit looked at the pervasive discrimination against female widows in Cameroon as evidence of the visibility of the group “Cameroonian widows.” *Ngengwe v. Mukasey*, 543 F.3d at 1034-35. As in *Ngengwe*, the existence of such pervasive differential treatment of and discrimination against Guatemalan women evidences the social visibility of women in Guatemala. *Id.* See also *Matter of C-A-* at 960.

3. THE SOCIAL GROUP OF GUATEMALAN WOMEN IS PARTICULAR

The group “women in Guatemala” is particular. A social group is sufficiently particular if that 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.” *Matter of S-E-G-*, 24 I. & N. Dec. 579, 584 (BIA 2008), *remanded*, *S-E-G-* (BIA July 28, 2009). A group that is “too

amorphous to provide an adequate benchmark for determining group membership” will not have the requisite particularity. *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 76 (BIA 2007).

The BIA has stated that a proffered group’s characteristics are too amorphous if they are overly subjective, such that “people’s ideas of what those terms mean can vary.” *Matter of S-E-G-*, 24 I&N Dec. 579, 585 (BIA 2008) (citing *Davila-Mejia v. Mukasey*, 531 F.3d 624 (8th Cir. 2008)). For example, characteristics relating to apparent wealth have been found to be too amorphous for this reason. *Id.* See also *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2007). In contrast to wealth, the characteristics of gender and nationality are not amorphous, indeterminate or subjective. Whereas a group defined by characteristics relating to wealth “could vary from as little as 1 percent to as much as 20 percent of the population, or more,” gender and nationality are readily ascertainable and establish a finite group, with clear benchmarks delineating membership.

There is no requirement that a social group be narrowly defined. *Perdomo v. Holder*, 611 F.3d 662, 668 (9th Cir. 2010), (citing UNHCR Guidelines on International Protection: Membership of a Particular Social Group at ¶18).¹⁷ The other enumerated grounds in the statute – race, religion, nationality, and political opinion – are by definition, broad categories. U.N. High Comm’r for Refugees, *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* at ¶31, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) [hereinafter UNHCR

¹⁷ The UNHCR “Membership of a Particular Social Group” Guidelines state: “The size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A(2). This is true as well for cases arising under the other Convention grounds. For example, States may seek to suppress religious or political ideologies that are widely shared among members of a particular society—perhaps even by a majority of the population; the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.”

Guidelines on International Protection: Gender-Related Persecution]¹⁸ To identify a group as cognizable is not to reach a finding that all members of that group qualify for protection. The individual must meet the other stringent requirements of the refugee definition – namely establishing a well-founded fear of persecution on account of membership in that group. Conversely, relief is not foreclosed simply because all members of a group could qualify for protection. For example, in *Singh v. INS*, the Ninth Circuit found that the applicant, an Indo-Fijian man, had suffered past persecution on account of race. The court “reject[ed] the notion that an applicant is ineligible for asylum merely because all members of a persecuted group might be eligible for asylum[.]” *Perdomo v. Holder*, 611 F.3d at 669, (citing *Singh v. INS*, 94 F.3d 1353, 1359 (9th Cir. 1996)). The court explicitly noted that “*the size and breadth of a group alone does not preclude a group from qualifying as such a social group.*” *Perdomo v. Holder*, 611 F.3d at 669 (emphasis added).

In *Ochoa v. Gonzales*, the Ninth Circuit rejected the proposed social group of “Colombian business owners” because there was “no unifying relationship or characteristic to narrow the diverse and disconnected group.” *Ochoa v. Gonzales*, 406 F.3d 1166, 1171 (9th Cir. 2005). In its decision in Ms. ██████████’s case, the court distinguished *Ochoa*, noting that it had approved other broadly defined social groups whose members have a unifying characteristic or relationship. See *Perdomo v. Holder*, 611 F.3d 662, 668 (9th Cir. 2010), (citing *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (holding that “*all alien homosexuals are members of a ‘particular social group’*”); *Mihalev v. Ashcroft*, 388 F.3d 722, 726 (9th Cir. 2004) (concluding that “[t]here is no question that Gypsies are an identifiable ethnic group and that being a Gypsy is a protected ground [for asylum]”). Unlike the group in *Ochoa* (and similar to

¹⁸ The UNHCR Gender Guidelines state: “The size of the group has sometimes been used as a basis for refusing to recognise ‘women’ generally as a particular social group. This argument has no basis in fact or reason, as the other grounds are not bound by this question of size.”

other broadly defined groups approved by the court), women in Guatemala have unifying characteristics – their gender and nationality – as well as their experience as women in a society that considers them inferior, and which accepts violence against them as the normal state of affairs.

C. AGENCY GUIDANCE SUPPORTS GENDER-DEFINED SOCIAL GROUPS, SUCH AS “GUATEMALAN WOMEN”

Agency guidance in the form of guidelines, proposed regulations, and legal briefs all support the principle that a particular social group may be defined by gender, or gender in combination with nationality.

1. AGENCY GENDER GUIDELINES

In 1995, the U.S. issued its *Gender Guidelines: Considerations for Asylum Officers Adjudicating Asylum Claims for Women (Guidelines)*. The *Guidelines* instruct asylum officers on issues relevant to women’s claims, and although they are not binding on immigration judges or the BIA, they set forth the Department of Justice’s earliest position on gender claims. The *Guidelines*, which have frequently been cited by the federal courts, expressly accept that a particular social group may be defined by gender, stating that persecution may be “on account of her gender or ...membership in a particular social group constituted by women.” Memorandum from the INS Office of International Affairs to All INS Asylum Officers, Considerations for Asylum Officers Adjudicating Asylum Claims From Women (May 26, 1995) [hereinafter: Agency Gender Guidelines]; *see also Perdomo v. Holder*, 611 F.3d at 667 (citing the Agency

Gender Guidelines); *Mohammad v. Gonzales*, 400 F.3d 785, 797-98 (also citing the Agency Gender Guidelines).

The *Guidelines* approvingly cite to the Third Circuit's decision in *Fatin*, where the court had accepted that "gender, either alone or as part of a combination, [is] ... a characteristic that could define a particular social group within the meaning of the INA." Agency Gender Guidelines at 14. The *Guidelines* state that *Fatin's* holding, that gender alone can constitute a particular social group, is consistent with *Acosta* and with the UNHCR Executive Committee's *Conclusions on the International Protection of Refugees*. Agency Gender Guidelines at 14, (quoting U.N. High Comm'r for Refugees [UNHCR], Executive Comm., *Conclusions on the International Protection of Refugees: Refugee Women and International Protection*, 39(k), adopted by the Executive Committee of the UNHCR, U.N. Doc. A/40/12/Add.1 (Oct. 18, 1985)).

2. DEPARTMENT OF JUSTICE PROPOSED ASYLUM REGULATIONS

In 2000, the Department of Justice (DOJ) issued proposed asylum regulations to provide "generally applicable principles to promote uniform interpretation of the relevant statutory provisions" and guidance for the resolution of gender, sexual orientation, and other "novel claims" (DOJ Proposed Regulations). Preamble to the Proposed Regulations, 65 Fed. Reg. 76, 588 (2000). The preamble to the DOJ Proposed Regulations affirms *Matter of Acosta's* immutable or fundamental characteristics approach and concludes that gender "is clearly such an immutable trait" and can define a particular social group. Membership in a Particular Social Group, 65 Fed. Reg. 76, 588 (2000). The characteristic of "sex" is incorporated directly into the proposed rule's social group definition. Definitions, 208.15(c)(1), 65 Fed. Reg. 76, 588 (2000).¹⁹

¹⁹ The proposed definition states, "[a] particular social group is composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it. ..."

3. DHS HEADQUARTERS BRIEFS

The DOJ's Proposed Regulations were issued in the midst of the high profile, ongoing litigation of *Matter of R-A*. Ms. Rody Alvarado²⁰ (*Matter of R-A-*) applied for asylum based on brutal domestic violence she suffered in Guatemala. *See, e.g.*, Editorial, *Asylum for Abused Women*, N.Y. TIMES, March 19, 2003; *Destination America: Breaking Free: A Woman's Journey*, (PBS Home Video 2006), available at http://www.pbs.org/destinationamerica/ps_ctn_01.html (last visited June 22, 2011). While an immigration judge initially granted Ms. Alvarado asylum in 1996, the BIA reversed the decision, ruling *inter alia* that Ms. Alvarado was not a member of a particular social group. Attorney General Janet Reno certified the decision for review, and vacated it in 2001, along with an order for the BIA to stay the case until the DOJ's proposed regulations of 2000 were issued in final form. *Matter of R-A-*, 22 I.&N. Dec. 906 (A.G. 2001).

In 2004, Attorney General Ashcroft certified the case and requested briefing. DHS headquarters filed a brief which accepted that Ms. Alvarado was a member of a particular social group defined by gender and nationality, along with marital status, and agreed that she met the refugee definition. Attorney General Ashcroft ultimately did not rule on the case and instead sent it back to the BIA with instructions to rule once the proposed regulations were finalized. *Matter of R-A-*, 23. I.&N. Dec. 694 (A.G. 2005). In 2008, although the regulations had not been finalized, Attorney General Mukasey certified *Matter of R-A-* and remanded it to the BIA, with an order to decide the case considering recent BIA jurisprudence.

²⁰ Ms. Alvarado's first name is "Rody," although the misspelling "Rodi" appears in the majority of her legal documents and therefore in many of the articles about her case.

Around the same time, the DHS headquarters submitted a brief in another domestic violence case that had also received significant national media, the case of a Mexican asylum seeker known as “L.R.” DHS’s brief in the L.R. case takes the position that women victims of domestic violence may qualify for asylum as members of a particular social group. In the absence of agency regulations, the DHS 2004 brief in *Matter of R-A-* and its 2009 brief in L.R. represent the official position of the agency. Both briefs address the meaning of the term particular social group in depth and clearly accept that gender alone, or in combination with characteristics such as nationality, can define a particular social group.

a. The DHS brief in *Matter R-A-*

The 2004 DHS *Matter of R-A-* Brief stated that Ms. Alvarado had “established statutory eligibility for asylum” as a member of the particular social group “married women in Guatemala who are unable to leave the relationship.” DHS’s Position on Respondent’s Eligibility for Relief at 19, 43, *Matter of R-A-*, 23 I. & N. Dec. 694 (A.G. 2005) [hereinafter DHS *Matter of R-A-* Brief]. In its analysis of the cognizability of the group, the DHS *R-A-* Brief affirms *Matter of Acosta*’s immutable or fundamental characteristics test as the correct approach to analyzing particular social groups. The DHS *R-A-* Brief notes that “gender is clearly an immutable trait” under *Acosta*, and that in *Fatin*, the Third Circuit applied *Acosta* to find that “women” are a particular social group.” *Id.* at 20-21.

A common criticism of particular social groups defined solely by gender is that such groups are too broad. The DHS *R-A-* Brief addresses this concern, stating that a group need not “be small in order to qualify as a particular social group.” DHS *Matter of R-A-* Brief at 22. As long as the characteristics which define the group are the characteristics which motivate the persecution, the group is not overly broad. For example, the group, “Jews in Europe” during the

Holocaust, would not have been overly broad, even though it would have included millions of individuals, because the characteristic of being Jewish is what motivated the persecution. In the instant case, all of the evidence demonstrates that women in Guatemala are targeted because they are women. Under these circumstances, a social group defined as Guatemalan women, is not overbroad.

The DHS *R-A*- Brief also underscores the fact that finding a group to be cognizable does not necessarily result in according relief to all members of the group. By way of example, DHS notes that “Catholicism is undoubtedly a religion” but that “[c]learly, not all Catholics are at risk of persecution[.]” *Id.* at 23. Applying this same approach, it is clear that a finding that “Guatemalan women” are a cognizable social group does not result in protection for all Guatemalan women, but only for those who can also establish a well-founded fear of persecution on account of their membership in that social group.

b. The DHS Brief in L.R.

The DHS brief in *R-A*- did not address the social visibility or particularity of a gender-defined social group because in 2004 when it was submitted, these criteria were not clear requirements in the law. The DHS brief in L.R. addresses how a gender-defined social group can fulfill *Acosta*'s immutable/fundamental characteristics approach, as well as the more recent social visibility and particularity requirements. DHS L.R. Brief at 8.

The DHS L.R. Brief states that a group defined by gender, nationality, and status in a domestic relationship is cognizable under the law. DHS L.R. Brief at 14-15. The characteristics defining such a group –gender and nationality – are clearly immutable, The DHS Brief points out that status in a relationship, or inability to leave a relationship, may also be immutable where the

male domestic partner refuses to accept that the woman has the right to terminate the relationship. *Id.* at 16.

According to the DHS L-R- Brief, social visibility is a question of whether the group is perceived as a group by society and treated distinctly. *Id.* at 14. Discrimination against a group, and the failure to provide protection to group members from abuse is evidence of the type of social distinction relevant to a determination of social visibility. In its brief, the DHS noted the widespread existence of societal discrimination against women in Mexico, and found this discrimination to be evidence of a societal view of women's subordinate status as "a segment of society that will not be accorded protection from harm . . ." *Id.* at 18. The toleration and acceptance of abuse of group members is itself evidence of social visibility. *Id.* at 14. Accordingly, the evidence of societal discrimination against Guatemalan women and lack of protection available for violence against women, discussed in Section IV(B)(2), *supra*, clearly establishes that "Guatemalan women" have social visibility..

The DHS L.R. Brief also addresses particularity, stating that it requires that the proposed social group be delineated clearly enough to enable the "fact finder to determine with clarity whether an applicant is or is not a member of the group." *Id.* at 19. The social group defined as "Guatemalan women" meets those requirements since it is abundantly clear who is in such a described group.

Both the 2004 DHS *R-A-* Brief and 2009 DHS L.R. Brief accept the legal cognizability of gender-defined particular social groups. Both briefs affirm the patently obviously position that gender is an immutable characteristic, and the DHS L.R. Brief clearly states that a gender-defined social group can meet the social visibility and particularity requirements.

D. "GUATEMALAN WOMEN" IS A COGNIZABLE SOCIAL GROUP UNDER UNHCR'S GENDER AND PARTICULAR SOCIAL GROUP GUIDELINES

The UNHCR offers critical guidance in the application of the U.S. refugee definition.

The U.S. Supreme Court in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) noted that Congress enacted the 1980 Refugee Act to bring the U.S. into compliance with the obligations it undertook when it ratified the 1967 United Nations Protocol Relating to the Status of Refugees, and that the UNHCR is a significant source of guidance in the application of the Protocol. (*Cardoza-Fonseca* at 424, 438-439) UNHCR's Social Group and Gender Guidelines, which have been cited in numerous BIA and circuit court opinions, both recommend that a particular social group can be defined by gender. *See e.g. Matter of C-A-* at 956; *Mohammed v. Gonzales*, 400 F.3d at 798; *Matter of S-E-G-*, 24 I.&N. Dec. at 586; *Perdomo v. Holder*, 611 F.3d at 668.

UNHCR sets forth two approaches to defining a particular social group – the “protected characteristics” and “social perception” approaches. The protected characteristics approach, which is similar to the *Acosta* formulation, looks to whether the group members “share a common characteristic” which is “innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.” UNHCR Guidelines on International Protection: Membership of a Particular Social Group at ¶11. UNHCR notes that a social group defined by sex or gender is cognizable, “with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men.” *Id.* at ¶12.

Groups which do not meet the “protected characteristic” approach may still be recognized as a social group under UNHCR’s alternative “social perception” approach, which considers whether the defined group is “perceived as a cognizable group in that society.” *Id.* at ¶¶13, 11.

By way of example, UNHCR notes that the characteristic of working in a certain occupation or profession may not be immutable or fundamental, but a “shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognized as a group which sets them apart.” *Id.* at ¶13.

UNHCR’s 2002 Gender Guidelines reiterate that a particular social group can be defined by gender. U.N. High Comm’r for Refugees, *Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1(A)(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, ¶30, U.N. Doc. HCR/GIP/02/01 (May 7, 2002). They also dismiss the erroneous perception that “women” cannot constitute a particular group because the group would be too large: “This argument has no basis in fact or reason, as the other grounds are not bound by this question of size.” *Id.* at ¶31.

E. RULING THAT GUATEMALAN WOMEN IS A PARTICULAR SOCIAL GROUP DOES NOT CONFER ASYLUM ELIGIBILITY ON ALL GUATEMALAN WOMEN

As noted earlier in sections IV(B)(3) and IV(C)(3)(a), *supra*, the recognition that Guatemalan women may constitute a particular social group does not mean that all Guatemalan women meet the legal standard for asylum. All that it means is that the group is cognizable under the law. Any particular Guatemalan woman applying for relief would still have to establish that she meets each and every one of the other requirements for eligibility – that she suffered past persecution or has a well-founded fear of future persecution, that the persecution was or would be motivated by her membership in the group, that the government was or would be unable or unwilling to protect her, and that there is no reasonable relocation alternative. Each applicant

must also demonstrate that she is not statutorily barred from asylum and must be found to merit asylum in the exercise of discretion. The protected ground is only one of the elements that must be proven.²¹

The recognition of Guatemalan women as a social group is no different than the recognition that Catholicism is a religion, or that being black is a racial identity (i.e., race) – those identities without more do not qualify one for relief. The burden of proving all of the elements of the refugee definition, in addition to establishing membership in a cognizable social group, is precisely why the Third Circuit denied the Petition for Review in *Fatin v. INS*. Specifically, the court concluded that “to the extent that the petitioner 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 [social group membership].” *Fatin v. INS*, 12 F.3d at 1240. Despite this conclusion, the court engaged in an analysis of the additional elements, ultimately concluding that members of such a group were not at risk of persecution, and denying the petition accordingly. *Id.* at 1241; *see also* Agency Gender Guidelines at 14.

V. CONCLUSION

There can be no doubt that a social group defined by gender and nationality is cognizable under Ninth Circuit, BIA, and other circuit court precedent. The characteristics of gender and nationality are immutable. Furthermore, country conditions overwhelmingly establish that women in Guatemala are accorded differential treatment from men and that their abuse is

²¹ Indeed, the DHS recognized these additional elements when, in its Supplemental Brief in *Matter of L-R-*, it noted that “[a]s with any asylum claim, the full range of generally applicable requirements for asylum must be satisfied. DHS L.R. Brief at 12, (citing *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985) and *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc).

tolerated and accepted by the legal system, as well as the society at large, showing the group's social visibility. Finally, the group meets the particularity requirement –it is patently clear who is included, and who is excluded from a group defined as “Guatemalan women.” Therefore, Amicus respectfully urges the BIA to find that “Guatemalan women” constitute a particular social group within the meaning of the refugee definition as defined by domestic law, and informed by international guidance.

Dated: June __, 2011

Respectfully submitted,

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