

Interim Decision #3918

UNITED STATES DEPARTMENT OF JUSTICE

IN THE MATTER OF A-B-

**CORRECTED BRIEF OF TAHIRIH JUSTICE CENTER, THE ASIAN
PACIFIC INSTITUTE ON GENDER-BASED VIOLENCE, ASISTA
IMMIGRATION ASSISTANCE, AND CASA DE ESPERANZA AS *AMICI
CURIAE* IN SUPPORT OF RESPONDENT A-B-**

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STATEMENT OF INTEREST

Tahirih Justice Center is the largest multi-city direct services and policy advocacy organization specializing in assisting immigrant women and girls who survive gender-based violence. In five cities across the country, Tahirih offers legal and social services to women and girls fleeing all forms of gender-based violence, including human trafficking, forced labor, domestic violence, rape and sexual assault, and female genital cutting/mutilation. Since its beginning in 1997, Tahirih has provided free legal assistance to more than 20,000 individuals, many of whom have experienced the significant psychological and neurobiological effects of that trauma. Through direct legal and social services, policy advocacy, and training and education, Tahirih protects immigrant women and girls and promotes a world where they can live in safety and dignity. Tahirih amicus briefs have been accepted in numerous federal courts across the country, and Tahirih seeks to address here questions raised by the Attorney General.

The Asian Pacific Institute on Gender-Based Violence (formerly, Asian & Pacific Islander Institute on Domestic Violence) is a national resource center on domestic violence, sexual violence, trafficking, and other forms of gender-based violence in Asian and Pacific Islander communities. The Institute serves a national network of advocates and community-based service programs that work with Asian and Pacific Islander and immigrant survivors, and is a leader on providing

analysis on critical issues facing victims of gender-based violence in the Asian and Pacific Islander and in immigrant communities. The Institute leads by: promoting culturally relevant intervention and prevention, expert consultation, technical assistance and training; conducting and disseminating critical research; and informing public policy.

ASISTA Immigration Assistance worked with Congress to create and expand routes to secure immigration status for survivors of domestic violence, sexual assault, and other crimes, which were incorporated in the 1994 Violence Against Women Act (VAWA) and its progeny. ASISTA also trains and provides technical support to local law enforcement officials, civil and criminal court judges, domestic violence and sexual assault advocates, legal services, and non-profit, pro bono, and private attorneys working with immigrant crime survivors. ASISTA has previously filed amicus briefs to the Supreme Court and to the Second, Seventh, Eighth, and Ninth Circuits.

Casa de Esperanza was founded in 1982 in Minnesota to provide emergency shelter for women and children experiencing domestic violence. In 2009, Casa de Esperanza launched the National Latin@ Network for Healthy Families and Communities, which is a national resource center focused on research, training, and technical assistance, and policy advocacy focused on preventing and addressing domestic violence in Latino and immigrant communities.

INTRODUCTION

In many corners of the world, women are treated as property: they are regarded as possessing little to no inherent value and as second-class citizens. They are trafficked, literally bought and sold for sex or labor. Their bodies are mutilated in order to perpetuate notions of female sexuality as vile and uncontrollable. They are forced into marriages, lifetimes of subordination. And they are wooed, duped, and coerced into relationships with violent men, eventually so fearful and effectively silenced that they continue to share their beds with men who use sexual, verbal, emotional, and physical abuse to establish power and control over them.

These acts of brutality occur because societies and states allow them to and, in fact, are complicit in them. In these cultures, women are viewed as subordinate to men and in turn, the state affords them few legal protections or safety nets. Even if acts of violence against women are outlawed, police and prosecutors scoff at women who try to use the law to protect themselves, refuse to believe their claims, and harass and even rape them in these moments of extreme vulnerability.

Over the course of more than two decades, the Courts of Appeals and Board of Immigration Appeals (“BIA”) have held that survivors of gender-based violence, just like those fleeing religious or political persecution, are eligible for asylum if they meet the statutory criteria that establish them as refugees. This legal

precedent considers the social, economic, and legal reality that these women face. It recognizes that these women are survivors of violence brought about by a public code of conduct that allows them to be victimized because they are women. In a 1996 precedent-setting case that first established gender-based persecution as grounds for asylum, the BIA granted 17-year-old Fauziya Kassindja asylum after she fled a forced, polygamous marriage and female genital mutilation. *In re Kasinga*, 21 I. & N. Dec. 357 (BIA 1996). To escape guaranteed, life-long, physical, sexual, and psychological harm, Ms. Kassindja fled her country and found refuge in the United States. In the decades since that case, the United States has provided asylum to women and girls fleeing other forms of gender-based persecution, including human trafficking, forced marriage, severe domestic abuse, rape and sexual violence (including as a weapon of war), so-called “honor” crimes and killings, acid burnings, dowry deaths, and widow rituals.

Now, however, the Attorney General contemplates a sea change in this long-settled law. This case involves a survivor of severe domestic violence from El Salvador. As the BIA found, this victim demonstrated that the violence she endured rises to the level of persecution, that she belongs to a cognizable social group under established legal precedent, and that she meets all other statutory requirements for a grant of asylum. Ignoring the long history of asylum decisions holding that gender-based violence, including domestic violence, is motivated by

societal norms that persist with public acquiescence and complicity, the Attorney General now asks

[w]hether, and under what circumstances, being a victim of a private criminal activity constitutes a cognizable “Particular Social Group” (PSG) for purposes of an application for asylum or withholding of removal.

Matter of A-B-, 27 I. & N. Dec. 227 (AG 2018).¹ As set forth more fully in this brief, there are multiple problems with this question.

First, the question assumes its own answer. In many countries, domestic violence is emboldened by government inaction. The Attorney General’s question suggests a categorical rule that would declare all domestic violence “private criminal activity” and outside the bounds of asylum protection. But, as Section I argues, such a categorical rule is arbitrary and finds no support in current law for four reasons:

¹ Although asked by both parties to clarify the question, the Attorney General refused to do so. See *Matter of A-B-*, 27 I. & N. Dec. 247 (AG Mar. 7, 2018). Instead, he proposes rewriting asylum law to exclude victims of “private criminal activity” on the ground that being such a victim does not qualify one to be in a particular social group (“PSG”). This misses the point. *Amici* are unaware of any case in which applicants for asylum have claimed that victims of private criminal activity constitute a freestanding PSG. Instead, in domestic violence cases, applicants are granted asylum because they establish that they are persecuted and that the persecution is on account of their membership in another PSG.

- It ignores evidence demonstrating that in several countries, public social norms, political structures, and religious dynamics allow gender-based violence to occur without penalty or protection;
- It impermissibly carves out gender-based domestic violence from the statutory definition of persecution;
- It incorrectly prevents domestic violence survivors from showing that their persecution is “on account of” membership in a particular social group (“PSG”); and
- It flouts the basic rule that the PSG inquiry is fact-based and requires case-by-case adjudication. *See Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 251 (BIA 2014) (“Social group determinations are made on a case-by-case basis.” (citing *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985))).

For these reasons, the Attorney General should not categorically bar domestic violence survivors from seeking asylum in the United States.

Second, the Attorney General’s question implies that if persecution results from “private criminal activity,” that fact can preclude the establishment of a PSG. As Section II argues, it cannot. Whether persecution is “private” or “public”—and whether it constitutes a crime or not—has no bearing on PSG validity or membership. While PSGs are not formed *because* one is a victim of domestic or gender-based violence, certain PSGs can and do logically include those victims. Thus, an applicant who suffered severe physical abuse from her husband was a member of the PSG that comprised “married women in Guatemala who are unable to leave their relationship.” *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 389 (BIA 2014). Whether the abuse was private and/or criminal simply plays no logical role in determining the PSG.

For these reasons, the Attorney General should affirm the BIA's order.

ARGUMENT

To qualify for asylum, an applicant must be a “refugee” under 8 U.S.C. § 1101(a)(42). The applicant can establish herself as a “refugee” by demonstrating that “‘she has suffered from past persecution or that she has a well-founded fear of future persecution’ on account of . . . membership in a particular social group.” *Mulyani v. Holder*, 771 F.3d 190, 198 (4th Cir. 2014) (quoting *Mirisawo v. Holder*, 599 F.3d 391, 396 (4th Cir. 2010)).

Among other things, persecution can “involve[] the infliction or threat of death, torture, or injury to one’s person or freedom, on account of one of the enumerated grounds in the refugee definition.” *Id.* (quoting *Li v. Gonzales*, 405 F.3d 171, 177 (4th Cir. 2005)). Persecution also includes “actions less severe than threats to life or freedom,” and applicants who have been “severely physically abused” meet the persecution requirement. *Id.* (quoting *Li*, 405 F.3d at 177). “An applicant who establishes past persecution on the basis of a protected factor benefits from a rebuttable presumption that she has a well-founded fear of future persecution.” *Id.* (citations omitted). Finally, the persecution need not be directly at the hands of the government. *See, e.g., Oliva v. Lynch*, 807 F.3d 53, 59 (4th Cir. 2015).

The applicant's persecution must also be "on account of" her membership in a PSG. This element is met if her membership "serves as at least one central reason for" the persecution. *Pacas-Renderos v. Sessions*, 691 F. App'x 796, 802 (4th Cir. 2017) (quoting *Crespin-Valladares v. Holder*, 632 F.3d 117, 127 (4th Cir. 2011)) (internal quotation marks omitted). Her membership "need not be the central reason or even a dominant central reason for persecution," but "it must be more than an incidental, tangential, superficial, or subordinate reason." *Id.* (quoting *Cordova v. Holder*, 759 F.3d 332, 337 (4th Cir. 2014)).

As to what constitutes a PSG, the BIA and circuit courts hold that a PSG is valid if it is "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." *Pacas-Renderos*, 691 F. App'x at 804 (quoting *Oliva*, 807 F.3d at 61).

For decades, the BIA has held that survivors of gender-based violence *can* meet all three criteria. In other words, while domestic violence victimhood or gender-based victimhood may not itself define a freestanding PSG, survivors of gender-based and domestic violence can be members of certain PSGs. This is not to say that *every* such victim may qualify for asylum in the United States. Such a categorical rule would run afoul of congressional intent and upset decades of settled law. *See Acosta*, 19 I. & N. Dec. at 233 (establishing current asylum

framework) (subsequent history omitted). Instead, *amici* argue that just as a categorical rule admitting *every* gender-based violence survivor into the United States is overbroad, so, too, is a rule categorically *excluding* them. For the reasons set forth below, any rule excluding domestic violence victims from receiving asylum would be overbroad and arbitrary, upturning years of precedent.

I. DOMESTIC VIOLENCE CAN CONSTITUTE PERSECUTION UNDER THE INA

In some countries, women have no recourse to escape from or seek justice for rapes, beatings, and other abuse because cultural, social, and religious norms foster views that women are subservient to—or even property of—men. And, in many of those places, governments are unwilling or unable to control private actors who engage in domestic violence.

Recognizing this reality, based on evidence of specific country conditions, the BIA and the federal courts have long and unanimously held that survivors of domestic violence can meet the statutory requirement of persecution if they can show the harm they suffered at the hands of a non-governmental actor was sufficiently severe, and if they can show their home government’s “unwillingness or inability to control private conduct.” *Aldana-Ramos v. Holder*, 757 F.3d 9, 17

(1st Cir. 2014), *as amended* (Aug. 8, 2014).² Applicants can also satisfy this “persecution” element by showing that their home governments are unwilling or unable to protect them from private acts of persecution. *See Matter of S-A-*, 22 I. & N. Dec. 1328, 1335 (BIA 2000) (persecution found when Moroccan father had “unfettered” power over daughter, and it was futile to report criminal acts to the police); *Sarhan v. Holder*, 658 F.3d 649, 658 (7th Cir. 2011) (persecution found when home country recognized honor killing as a crime, but punished it with “little more than a slap on the wrist”); *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005).

Nor does the United States stand alone in recognizing that domestic violence can, and often does, arise from social, cultural, and religious norms that allow rapes and beatings to occur without deterrence because governments are unwilling to prevent them or punish the perpetrators. Indeed, far from considering domestic and gender-based violence a “private criminal matter,” international organizations

² *See also Malu v. Att’y Gen.*, 764 F.3d 1282, 1291 (11th Cir. 2014); *Paloka v. Holder*, 762 F.3d 191, 195 (2d Cir. 2014); *R.R.D. v. Holder*, 746 F.3d 807, 809 (7th Cir. 2014); *Constanza-Martinez v. Holder*, 739 F.3d 1100, 1102 (8th Cir. 2014); *Doe v. Holder*, 736 F.3d 871, 877–78 (9th Cir. 2013); *Karki v. Holder*, 715 F.3d 792, 801 (10th Cir. 2013); *Garcia v. Att’y Gen.*, 665 F.3d 496, 503 (3d Cir. 2011), *as amended* (Jan. 13, 2012); *Kante v. Holder*, 634 F.3d 321, 325 (6th Cir. 2011); *Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011); *Tesfamichael v. Gonzales*, 469 F.3d 109, 113 (5th Cir. 2006).

have regularly investigated and reported on countries where public conditions allow that conduct to flourish. As the United Nations Report on the World's Women in 2010 summarized:

Violence against women throughout their life cycle is a manifestation of the historically unequal power relations between women and men. It is perpetuated by traditional and customary practices that accord women lower status in the family, workplace, community and society, and it is exacerbated by social pressures. These include the shame surrounding and hence difficulty of denouncing certain acts against women; women's lack of access to legal information, aid or protection; a dearth of laws that effectively prohibit violence against women; [and] inadequate efforts on the part of public authorities to promote awareness of and enforce existing laws

United Nations Secretariat Department of Economic and Social Affairs, *The World's Women 2010*, at 127.³ These reports contain ample evidence that domestic gender-based violence is not always appropriately characterized as “private criminal conduct.” Therefore, any new interpretation of “refugee” must account for this evidence.

³https://unstats.un.org/unsd/demographic/products/Worldswomen/WW2010%20Report_by%20chapter%28pdf%29/Violence%20against%20women.pdf.

A. Any rule excluding victims of domestic violence from asylum as “private criminal conduct” would ignore substantial evidence that in many places, domestic violence arises from and is allowed to continue by public cultural, social, and religious norms

Overwhelming evidence, much of it from the U.S. government, shows that domestic violence and other forms of gender-based violence permeate some countries’ cultural and social landscapes. For example, evidence shows that the social and cultural conditions in places as different as Guatemala, Afghanistan, and around the world, allow domestic and other gender-based violence to occur.⁴ At the same time, institutionalized acceptance of domestic violence prohibits victims from obtaining protection or recourse. Widely available research about these countries shows that violence against women is often deeply ingrained in the culture, and explicitly condoned by the state.

1. Evidence shows that cultural, religious, and economic conditions in some countries create widespread gender-based and domestic violence

As the United States itself has recognized, patriarchal cultures, attitudes of *machismo*, legacies of violence, and the economic marginalization of women allow domestic violence to permeate society. Indeed, the State Department recently acknowledged that domestic violence is a “serious problem” in Guatemala. U.S.

⁴ Conditions in El Salvador, the country at issue in this case, are described in the Respondent’s opening brief and evidentiary submissions.

Dep't of State, *Guatemala 2016 Human Rights Report* 15 (2016).⁵ It is similarly a widespread concern in dozens of other countries, including Kenya, Russia, Burma, Cameroon, and Haiti. U.S. Dep't of State, *Kenya 2016 Human Rights Report* 35 (2016);⁶ U.S. Dep't of State, *Russia 2016 Human Rights Report* 56 (2016);⁷ U.S. Dep't of State, *Burma 2016 Human Rights Report* 38 (2016);⁸ U.S. Dep't of State, *Cameroon 2017 Human Rights Report* 26 (2017);⁹ U.S. Dep't of State, *Haiti 2016 Human Rights Report* 21 (2016).¹⁰ The State Department also recognized that in Afghanistan, “hundreds of thousands of women continued to suffer abuse at the hands of their husbands, fathers, brothers, in-laws, armed individuals, parallel legal systems, and institutions of the state, such as the police and justice system.” U.S. Dep't of State, *Afghanistan 2016 Human Rights Report* 35 (2016).¹¹ And in Saudi Arabia, domestic violence is believed to be “widespread” and “seriously underreported.” U.S. Dep't of State, *Saudi Arabia 2016 Human Rights Report* 41 (2016).¹²

⁵ <https://www.state.gov/documents/organization/265802.pdf>.

⁶ <https://www.state.gov/documents/organization/265478.pdf>.

⁷ <https://www.state.gov/documents/organization/265678.pdf>.

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⁹ <https://www.state.gov/documents/organization/277223.pdf>.

¹⁰ <https://www.state.gov/documents/organization/265806.pdf>.

¹¹ <https://www.state.gov/documents/organization/265742.pdf>.

¹² <https://www.state.gov/documents/organization/265730.pdf>.

In these and other countries, the high rate of domestic violence is attributable to the social and cultural norms that render women second-class citizens. Women are subordinate to their partners and fathers and are considered “objects owned by men.” Comisión Internacional Contra la Impunidad en Guatemala, *Human Trafficking for Sexual Exploitation Purposes in Guatemala* 30 (2016).¹³

In this way, some cultures and governments normalize domestic violence against women. For example, domestic violence is condoned by authorities in Afghanistan who “attribute the abuse to a woman’s alleged disobedience of her husband.” *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Mission to Afghanistan* 5 (May 12, 2015).¹⁴ As a result, domestic violence is often not a crime. *Id.* The same holds true in other countries like Burma, Cameroon, and Haiti, where domestic violence is not specifically criminalized. *See Burma 2016 Human Rights Report* 38; *Cameroon 2017 Human Rights Report* 26; *Haiti 2016 Human Rights Report* 21. Furthermore, last year, Russia decriminalized domestic violence for first time offenders. *See Russia 2016 Human Rights Report* 56.

¹³http://www.cicig.org/uploads/documents/2016/Trata_Ing_978_9929_40_829_6.pdf.

¹⁴ http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/29/27/Add.3.

2. *Evidence shows that in some countries, public religious norms support and foster domestic gender-based violence*

The legal regimes in some countries are intertwined with religious customs that favor the repression of women. In other countries, the formal legal regime is ignored in favor of religious and cultural custom meted out by tribal or community tribunals. This allows gender-based violence to flourish. For example, Article 130 of the Afghani constitution allows courts to apply Hanafi jurisprudence, a form of sharia law, to rule on matters not specifically covered by the constitution or other laws. *Afghanistan 2016 Human Rights Report* 9. As a result, Afghan courts have charged women with crimes of “immorality” or “running away from home” when they attempt to leave their abusers. *Id.* Many women who try to leave their home are charged with “attempted *zina*”—engaging in extramarital sexual relations—for being outside the home and in the presence of nonrelated men. *Id.*

3. *Evidence shows that in some countries, women know that reporting domestic violence is futile*

Despite its prevalence, domestic violence is still underreported around the world. Victims may not report because of familial pressure, economic dependency on the abuser, fear of retaliation, poor resources, or lack of support in the legal system. *See* United Nations High Commissioner for Refugees (“UNHCR”), *Eligibility Guidelines for Assessing the International Protection Needs of Asylum*

Seekers from Guatemala 34 (Jan. 2018);¹⁵ *Saudi Arabia 2016 Human Rights Report* 41 (rape is underreported because of “societal and familial reprisal, including diminished marriage opportunities, criminal sanctions up to imprisonment or accusations of adultery or sexual relations outside of marriage”). For example, the State Department recognized that in Armenia, “[r]ape, spousal abuse, and domestic violence was underreported due to social stigma, the absence of female police officers and investigators, and at times police reluctance to act.” U.S. Dep’t of State, *Armenia 2016 Human Rights Report* 30 (2016).¹⁶ The process of addressing violence against women also deters women from reporting it, and in some countries, police may not even bother to respond to allegations of violence because it is regarded as a “family matter.” See *Kenya 2016 Human Rights Report* 37. Ultimately, women are less likely to report domestic violence knowing that society condones it and the state is unable or unwilling to protect them from it.

4. *Evidence shows that some states are unable or unwilling to provide protection for victims of gender-based violence*

In many countries, domestic violence is not criminal. Even where it is, those laws are often not enforced. For example, although Guatemala, Afghanistan, and

¹⁵ <http://www.refworld.org/docid/5a5e03e96.html>.

¹⁶ <https://www.state.gov/documents/organization/265604.pdf>.

Saudi Arabia have laws in place that theoretically make domestic violence illegal,¹⁷ these laws are rarely enforced. Even those theoretical laws do not provide adequate protection. For example, in Saudi Arabia and Afghanistan, the law does not recognize spousal rape as a crime. *See Saudi Arabia 2016 Human Rights Report* 41; *Afghanistan 2016 Human Rights Report* 33. In Afghanistan, some judges and prosecutors even reported that they did not know that a law prohibiting domestic violence existed. *Afghanistan 2016 Human Rights Report* 34. Those authorities who knew of the law prohibiting domestic violence failed to enforce it. *Id.* at 33. Indeed, in Afghanistan, the law criminalizing violence against women is viewed unfavorably by some as “un-Islamic.” *Id.* In these countries, as well as others, the lack of comprehensive domestic violence laws—and poor enforcement of existing laws—allows perpetrators to abuse with impunity.

Often, police minimize the significance of domestic violence, believing it is a personal matter that the partners should resolve themselves. Indeed, in Saudi Arabia, investigators sometimes hesitate to enter homes of domestic violence victims without the approval of the head of household, who in many cases is also

¹⁷ *See e.g.*, Law Against Femicide and Other Forms of Violence Against Women, Ley Contra el Femicidio y Otras Formas de Violencia Contra la Mujer, Decreto 22-2008, Apr. 9, 2008 (Guatemala); Elimination of Violence Against Women Law, 2009 (Presidential Decree No. 91, July 20 2009) (Afghanistan); Protection from Abuse Act 2013 (Saudi Arabia).

the abuser. *Saudi Arabia 2016 Human Rights Report* 41–42. Additionally, investigators encourage victims to reconcile with their abusers to keep the family intact or simply return a woman directly to her abuser, who often is her legal guardian. *Id.* at 42. In Afghanistan, the police response to domestic violence is “limited” due in part to “sympathy towards perpetrators.” *Afghanistan 2016 Human Rights Report* 35. As a result, reporting domestic violence to police forces most often does not provide any real protection to victims and even puts them into more danger.

Asylum applicants who survive rape, sexual assault, severe beatings, female genital mutilation, forced marriage, and other forms of persecution that may constitute “private criminal activity” can offer ample evidence to support their applications. This persecution occurs and festers because governments are unwilling or unable to control it. Under the INA, where governments are unwilling or unable to provide protection from persecution by a non-government actor, asylum is appropriate. *Aldana-Ramos*, 757 F.3d at 17. Any rule that seeks to exclude domestic violence survivors from asylum eligibility would disregard substantial evidence of conditions of countries in which domestic violence is not a private criminal matter.

B. A new rule that asylum applicants cannot establish “persecution” when the persecutor is a private criminal actor is contrary to long-settled law

To obtain asylum in the United States, an applicant must demonstrate a “well-founded fear of persecution.” 8 U.S.C. § 1101(a)(42)(A). She must show a “genuine subjective fear of persecution” and demonstrate that “a reasonable person in like circumstances would fear persecution.” *Crespin-Valladares*, 632 F.3d at 126 (quoting *Chen v. INS*, 195 F.3d 198, 201–02 (4th Cir. 1999)).

What constitutes persecution is also well-settled. For instance, the Fourth Circuit has consistently held that persecution can include physical harm and the “threat of death.” *Id.* The BIA has held that persecution can include beatings and rape. *See A-R-C-G-*, 26 I. & N. Dec. at 389; *S-A-*, 22 I. & N. Dec. at 1335, 1337; *see also Kone v. Holder*, 596 F.3d 141, 149 (2d Cir. 2010) (applicant subjected to genital mutilation had well-founded fear of persecution); *Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987) (recognizing rape as persecution), *overruled on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996).

Courts have long and unanimously held that under the INA, acts of persecution may well be carried out by private actors. *See Al-Ghorbani v. Holder*, 585 F.3d 980, 998–99 (6th Cir. 2009) (Yemeni government unwilling or unable to protect petitioners against death threats made by military officer); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1116–18 (8th Cir. 2007) (family-arranged rape

constitutes persecution); *Mohammed v. Gonzales*, 400 F.3d 785, 798 n.19 (9th Cir. 2005) (mutilation by “family members or fellow clan members” constitutes persecution); *Ali v. Ashcroft*, 394 F.3d 780, 785–87 (9th Cir. 2005) (persecution “need not be directly at the hands of the government”). In short, any holding that criminal acts committed by a private actor *cannot* constitute persecution under the INA is contrary to decades of settled law. *See, e.g., Hernandez-Avalos v. Lynch*, 784 F.3d 944, 950–53 (4th Cir. 2015); *S-A-*, 22 I. & N. Dec. 1328; *Acosta*, 19 I. & N. Dec. at 222–23; *see also* UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* ¶ 65 (1979, rev. 1992); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438–39 (1987).

C. A rule that asylum applicants cannot show that persecution from a private criminal actor was “on account of” a PSG would be contrary to the INA

Like every other asylum applicant, a gender-based violence survivor must demonstrate that her membership in a PSG (or other protected ground) “was or will be at least one central reason for” her persecution. 8 U.S.C. § 1158(b)(1)(B)(i). One way to show that nexus, for example, is to show that the home country’s social norms allow and condone the conduct because of the group an applicant is in, especially where the state refuses to protect her from abuse. *See Velihaj v. Att’y Gen.*, 336 F. App’x 193, 195 (3d Cir. 2009) (upholding asylum claim because government failed to protect petitioner “on account of” a protected ground);

Ndayshimiye v. Att’y Gen., 557 F.3d at 129. The applicant “need not disprove every [other] possible motive” for the persecution. *Vata v. Gonzalez*, 243 F. App’x 930, 940 (6th Cir. 2007); *see also id.* at 940–41; *see also Marroquin-Ochoma v. Holder*, 574 F.3d 574, 579 (8th Cir. 2009).

That the abuser or the abuse is “private” (or “criminal”) is irrelevant to showing nexus. “[I]f there is a nexus between the persecution and the membership in a particular social group, the simultaneous existence of a personal dispute does not eliminate that nexus.” *Qu v. Holder*, 618 F.3d 602, 608 (6th Cir. 2010); *see also Sarhan*, 658 F.3d at 655–57 (although a man’s honor killing of his sister “may have a personal motivation,” honor killings have “broader social significance,” and the killing of the applicant would be “on account of” membership in PSG comprising “women in Jordan who have (allegedly) flouted repressive moral norms, and thus who face a high risk of honor killing”); *Aldana-Ramos*, 757 F.3d at 18–19. Thus, an applicant whose husband regularly beats her for leaving home against his orders (but does not beat his son, brother, or sister for doing the same) may well be able to show that she belongs to a PSG and that the beatings are, at least in part, on account of that PSG membership. The fact that the abuse may also have involved personal or “private” anger or that it was criminal does not defeat the nexus. Thus, there is no logical basis for holding that “private criminal conduct” somehow bars the showing of nexus. Where statutory language and logic

do not exclude the category of domestic violence victims, there is no basis for the Attorney General to carve out domestic violence victims from the asylum authorized by Congress.

D. The Fourth Circuit’s decision in *Velasquez v. Sessions* does not alter this result

In the present case, the IJ took the unusual step of refusing to implement the BIA’s order and instead seeking to certify the decision for reconsideration in light of the Fourth Circuit’s decision in *Velasquez v. Sessions*, 866 F.3d 188 (4th Cir. 2017). Likewise, in his certification, the Attorney General states that “several Federal Article III courts have recently questioned whether victims of *private violence* may qualify for asylum under section 208(b)(1)(B)(i) of the Immigration and Nationality Act based on their claim that they were persecuted because of their membership in a particular social group.” *Matter of A-B-*, 27 I. & N. Dec. 247, 249 (AG Mar. 7, 2018) (emphasis added).

The BIA and the federal courts have long recognized what the statutory language requires: that in some cases, acts of private or non-State actors can certainly constitute persecution on account of a protected basis. *See Ivanov v. Holder*, 736 F.3d 5 (1st Cir. 2013) (religion); *Aliyev v. Mukasey*, 549 F.3d 111 (2d Cir. 2008) (nationality); *A-R-C-G-*, 26 I. & N. Dec. at 389 (PSG membership). To be sure, in some cases, courts have held that acts of private violence *do not* constitute persecution on account of a protected basis. But *amici* are unaware of

any case suggesting the outcome the Attorney General suggests here: that victims of private-actor violence suffered on account of PSG membership are *not* eligible for the relief that is otherwise available to victims of private-actor violence on account of race, religion, nationality, or political opinion. Indeed, such a suggestion is contrary to the INA, which applies the same test to all the listed protected groups.

Velasquez does not suggest a different outcome. In that case, the Fourth Circuit denied asylum to a Honduran applicant and her son who fled Honduras after her mother-in-law repeatedly kidnapped the son and threatened the applicant's life. 866 F.3d at 191–92. While the applicant and her son were in custody in the United States, the son's uncle murdered the applicant's sister, having mistaken her for the applicant. *Id.* at 192. The applicant claimed refugee status as a persecuted member of a PSG, which, she argued, was her nuclear family. *Id.* The IJ found that *Velasquez* was not eligible for asylum, and the BIA affirmed. *Id.* at 192–93. She appealed on the ground that the BIA erred in finding that she was not persecuted “on account of” her membership in a PSG.

The Fourth Circuit agreed with the IJ and BIA that while “membership in a nuclear family qualifies as a protected ground for asylum purposes,” *id.* at 194 (citing *Crespin–Valladares*, 632 F.3d at 125), the applicant could not show that the persecution was *on account of* her membership in the nuclear family. Instead, the

applicant's fears arose only from what the court characterized as her "purely personal" custody dispute with her mother-in-law. *Id.* at 196. The court found that the mother-in-law's threats "were not motivated by Velasquez' family status but by a personal desire to obtain custody over" the son. *Id.* at 195. Put another way, the mother-in-law harmed Velasquez not due to Velasquez's family status, but rather because the mother-in-law wanted custody of her grandson. Velasquez's status as her son's mother, based on the factual record developed in that case, was only an "incidental . . . reason for [her] persecution." *Hernandez-Avalos*, 784 F.3d at 949.

Velasquez did *not* hold that private criminal action barred the applicant from establishing a PSG. To the contrary, the Court recognized a nuclear family as a PSG. Instead, the Court there considered whether, on the factual record before it, the applicant had established nexus. That case is simply inapposite here, as the Attorney General has announced he is reviewing issues of PSG membership. Moreover, nowhere in *Velasquez* did the Court consider whether the fact that the mother-in-law was a "private criminal actor" would preclude asylum.

Likewise, the nexus at issue there did not involve gender-based social norms or evidence of state inaction. Here, in contrast, the gender-based violence arose in a *machismo* culture in which men generally regard their wives as under their control. And even when the applicant tried to leave her husband and obtained a divorce in 2013, the violence continued uncontrolled. *See Matter of A-B-*, Slip Op.

at 2–3 (BIA Aug. 18, 2017). When the applicant’s ex-husband raped her in 2014, *id.* at 3, the two were not even members of the same household. Finally, the applicant presented evidence that the government was unable or unwilling to protect her when she showed that her ex-husband’s brother—a local police officer—threatened her. *Id.*

Unlike *Velasquez*, this case offers an excellent example of how gender-based domestic violence by a private criminal actor can certainly be “on account of” membership in a particular social group. Here, the persecution was motivated by a vision of the applicant as the persecutor’s property, a notion that society reinforced by treating the victim as property and doing nothing to prevent the continued abuse. In this case, the domestic violence victim met the nexus requirement, reasonably fearing future persecution as a result of her membership in a PSG.

II. THE CHARACTERIZATION OF GENDER-BASED VIOLENCE AS “PRIVATE ACTION” IS NOT RELEVANT TO WHETHER AN APPLICANT CAN ESTABLISH A PSG

Another problem with the Attorney General’s question is that it creates an artificial dichotomy between “private” and “public” actors. This dichotomy is nowhere in the asylum statute. Indeed, whether the persecution is carried out by a private (non-State) actor or not simply does not affect the ultimate question: whether the applicant is a member of a PSG.

For an applicant seeking asylum, she must establish that her PSG is “(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.” *M-E-V-G-*, 26 I. & N. Dec. at 237. These requirements are referred to as (1) immutability, (2) particularity, and (3) social distinctness. The inquiry is fact-based and requires a case-by-case adjudication system. *Id.* at 251; *see also Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014). But none of these factors turn on whether the persecutor is a public or private actor.

A. Whether persecution is carried out by a private (non-State) actor has no bearing on immutability

To satisfy the immutability requirement, an applicant must demonstrate that a proposed PSG has a characteristic 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.” *Acosta*, 19 I. & N. Dec. at 233; *see also Matter of W-G-R-*, 26 I. & N. Dec. 208, 213 (BIA 2014).

In the context of gender-based violence, a PSG’s immutable trait is often gender. For example, the BIA has held that married women who are incapable of leaving their husbands because of societal or religious norms precluding divorce share immutable characteristics. *See A-B-*, Slip Op. at 3 (citing *A-R-C-G-*, 26 I. & N. Dec. at 390, 392–95). Similarly, in *Matter of A-R-C-G*, while the applicant was a survivor of domestic violence, her PSG’s immutable characteristics were

gender and an inability to leave a marriage, not being the victim of a past crime. 26 I. & N. Dec. at 392–93. A subgroup of women can constitute a PSG defined with more particularity than simply “women” and can fulfill the immutability requirement simply by comprising only women.

B. Whether persecution is carried out by a private (non-State) actor has no bearing on particularity

“The ‘particularity’ requirement relates to the group’s boundaries or . . . the need to put ‘outer limits’ on the definition of a ‘particular social group.’” *M-E-V-G-*, 26 I. & N. Dec. at 238 (citation omitted). To be sufficiently particular, a PSG must have “particular and well-defined boundaries.” *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582 (BIA 2008). This requirement helps define the outer limits of the definition of a PSG. *See Castellano-Chacon v. I.N.S.*, 341 F.3d 533, 549 (6th Cir. 2003), *holding modified by Almuhtaseb v. Gonzales*, 453 F.3d 743 (6th Cir. 2006). This assessment must be done in the context of the applicant’s home society. *Id.*¹⁸

Whether the persecution at issue was “private criminal activity” has no bearing on whether the group is sufficiently particular. While it is difficult for *amici* to predict what may constitute “private criminal activity,” the BIA and courts

¹⁸ While *amici* address these elements because it is current law, we note that many circuit courts have not decided whether these elements are valid. *Amici*’s position on these issues is that the current PSG requirements are problematic as a matter of law. We do not intend by this briefing to endorse these requirements.

have found some PSGs including victims of persecution by non-state actors sufficiently particular. For instance, in *Qu v. Holder*, the Sixth Circuit recognized a PSG comprising “women in China who have been subjected to forced marriage and involuntary servitude.” 618 F.3d at 607. Cases like *Qu* reflect the fact that the purpose of the particularity inquiry—to ensure that a given group’s parameters are clear and definite—has nothing to do with the private or public nature of the persecution or the persecutor.

C. Whether persecution is “private criminal activity” has no bearing on social distinctness¹⁹

The PSG inquiry’s final element, “social distinctness,” sometimes referred to as “social visibility,” requires that the society in the particular area view the group as distinct. *M-E-V-G-*, 26 I. & N. Dec. at 243. Distinctness is evaluated from the perspective of society in a country or region of a country, not from the perspective of an assailant. *Id.* (citation omitted). Social distinctness does not require that the distinguishing characteristic be immediately recognizable to others. *See W-G-R-*, 26 I. & N. Dec. at 216; *see also Temu v. Holder*, 740 F.3d 887, 892 (4th Cir. 2014). Attempts by group members to hide the distinguishing characteristic do not negate

¹⁹ Some courts have questioned the validity of the social-distinctness requirement. *See, e.g., Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009); *Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582, 604 (3d Cir. 2011).

the social distinctness of the group. *Id.* at 217. The key to social distinction is that the group is perceived as a group by society. *Matter of C-A-*, 23 I. & N. Dec. 951, 956–57 (BIA 2006); *see also Temu*, 740 F.3d at 892 (citing *C-A-*, 23 I. & N. Dec. at 959).

As with the first two factors, nothing about the social-distinctness requirement invites analysis about whether the applicant was a victim of a private or public crime. Courts and the BIA have consistently found, based on evidence presented, that victims of domestic violence, forced marriage, trafficking, and female genital mutilation can be members of PSGs that are socially distinct. For instance, in *A-R-C-G-*, the BIA held that “married women in Guatemala who are unable to leave their relationship” are socially distinct. 26 I. & N. Dec. at 393–95. The BIA relied on evidence of Guatemala’s “culture of ‘machismo and family violence.’” *Id.* at 394 (citation omitted). This evidence showed that the relevant society “makes meaningful distinctions based on the common immutable characteristics of being a married woman in a domestic relationship that she cannot leave.” *Id.*; *see also Temu*, 740 F.3d at 893. While social distinctness requires a social consensus based on a PSG’s characteristics, private acts constituting persecution do not negate or otherwise affect whether the applicant can show social distinctiveness.

For these reasons, whether persecution happens through “private criminal activity” simply cannot bar an applicant from establishing a PSG or demonstrating the required nexus. Accordingly, any blanket rule that a victim of private-actor gender-based violence cannot establish a PSG is inconsistent with the INA and the existing PSG analysis.

III. THE ATTORNEY GENERAL SHOULD REJECT DHS’S ARGUMENT THAT VICTIMS OF GENDER-BASED VIOLENCE MUST SATISFY ADDITIONAL EVIDENTIARY BURDENS

In its brief, DHS strongly and properly urges the Attorney General not to abrogate *A-R-C-G-*, 26 I. & N. Dec. 388. *See A-B-*, DHS Brief on Referral to the AG, at 20. But DHS also seeks to impose extensive documentation requirements in asylum claims raising domestic violence issues, requirements that do not apply in other asylum cases. These requirements and would undermine the protections for domestic violence survivors recognized in *A-R-C-G-*. Specifically, DHS seeks to require such applicants to disclose “specific information about the putative persecutor” and specific personal information about her domestic and intimate relationships. *Id.* at 24. These requirements do not apply in non-domestic violence asylum cases, and extend beyond the statutory requirements. DHS’s requirements are ill-advised for two fundamental reasons.

First, these additional requirements place an undue burden on asylum applicants in an already complex process. The DHS requirements incorrectly

assume that survivors of domestic violence will know precise details about their abusers. But many victims do not have precise information about their abusers because their perpetrators isolate them, hiding information and controlling their environment. The most effective abuser may in fact have established enough power and control over his victim that she is unaware of the number or nature of his extramarital relationships, his trips in and out of the country, or even his criminal activities. A domestic violence survivor may not know details of an abuser's life outside the home, such as his employment, military service, or his parents' and siblings' full names—information DHS would require. Indeed, even trying to obtain this information could put the applicant in danger.

Additionally, many victims of domestic violence have experienced trauma that may hinder their ability to recall details about their abusers. The impact of trauma on the ability of the brain to remember details, including about the perpetrator himself, has been well-documented. See M. P. Koss et al., *Traumatic Memory Characteristics: A Cross-Validated Mediation Model of Response to Rape Among Employed Women*, *Journal of Abnormal Psychology*, 105 (3) *J. of Abnormal Psychol.* 421–32 (1996). Therefore, it is highly likely that a victim will either block or forget information about her abuser.

DHS's requirements would also place an undue burden on detained immigrants, who already struggle with language issues, access to legal counsel,

and understanding extraordinarily complex immigration laws. Furthermore, to the extent any information in DHS's requirements is relevant to the asylum analysis, a judge may ask for such information and consider its weight. DHS's requirements would impose an undue and unfair burden on those survivors of domestic violence who have legitimate claims to asylum.

Second, much of the information DHS wishes to compel reflects a fundamental lack of understanding of the dynamics of domestic violence. For example, DHS seeks information about the applicant's current relationships, perhaps to suggest that where a survivor is in another relationship, she should not fear continued persecution. In fact, the opposite is true: persecution often escalates when a woman leaves the abuser and especially when she tries to begin a new relationship.²⁰ For example, Aracely, an asylum recipient, recounts that when her

²⁰ See Jennifer L. Hardesty, *Separation Assault in the Context of Postdivorce Parenting: An Integrative Review of the Literature*, 8 *Violence Against Women* 597, 601 (2002) (risk of intimate femicide increases sixfold when a woman leaves an abusive partner); Jennifer L. Hardesty & Grace H. Chung, *Intimate Partner Violence, Parental Divorce, and Child Custody: Directions for Intervention and Future Research*, 55 *Family Relations* 200, 201 (2006) (“[S]eparation is a time of heightened risk for abused women. Studies indicate that violence often continues after women leave and sometimes escalates.”)

abuser found out she was in a relationship with another man, he returned to Honduras to shoot her in the head and murder her two sons.²¹

DHS's requirements would also require a victim to provide information about "direct or indirect" contact with her abuser after she arrived in the United States. However, a lack of "direct or indirect" contact after arrival in the United States cannot undermine the fear of return to persecution, given the prevalence of post-separating violence and stalking. Such a conclusion is contrary to decades of research about the nature of domestic violence.²²

There is no basis to impose additional evidentiary requirements solely on applicants who are survivors of domestic violence. Congress has provided that persecution on account of membership in a PSG qualifies one for asylum. Excluding a class of applicants who can meet those requirements is contrary to the spirit and the letter of the law.

²¹ Declaration on file with Tahirih Justice Center.

²² Research shows that domestic violence flows from the abuser's need to exercise control in his relationship with the victim. See Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Towards a New Conceptualization*, 52 *Sex Roles* 743, 743 (2005). This exercise of control necessarily prevents the victim from unilaterally ending the relationship. Peter G. Jaffee et al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, *Juvenile & Family Ct. J.* 57, 59–60 (2003) (“[S]eparation may be a signal to the perpetrator to escalate his behavior in an attempt to continue to control or punish his partner for leaving.”).

CONCLUSION

For the foregoing reasons, the Attorney General should affirm the BIA's order.

Respectfully submitted,

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APPENDIX

The following organizations, whose work focuses both nationally and internationally on domestic and gender-based violence, join the listed *amici* in this brief and urge the Attorney General to continue to recognize long-established protections for those victims of gender-based and domestic violence who meet the requirement for asylum.

National Network to End Domestic Violence (NNEDV)
1325 Massachusetts Ave. NW, 7th Floor
Washington, D.C. 20005

Futures Without Violence
100 Montgomery St., The Presidio
San Francisco, CA 94129

Jewish Women International
129 20th St. NW, Ste. 801
Washington, D.C. 20036

Her Justice
100 Broadway, 10th Floor
New York, NY 10005

National Alliance to End Sexual Violence
1875 Connecticut Ave., 10th Floor
Washington, D.C. 20009

National Domestic Violence Hotline
P.O. Box 161810
Austin, TX 78716

National Asian Pacific American Women's Forum
www.napawf.org

New York City Gay and Lesbian Anti-Violence Project
116 Nassau St., 3rd Floor
New York, NY 10038

Women's Refugee Commission
1012 14th St. NW, Ste. 1100
Washington, D.C. 20005

Michigan Immigrant Rights Center
3030 S 9th St., Ste. 1B
Kalamazoo, MI 49009

CERTIFICATE OF FILING

I certify that on April 30, 2018, a true and correct copy of this corrected brief was served upon the following counsel electronically at AGCertification@usdoj.gov and in triplicate by Federal Express to:

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I certify that on April 30, 2018, a true and correct copy of this corrected brief was served by Federal Express to:

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