

No. 12-72800

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YESENIA MARISOL MALDONADO LOPEZ,
PETITIONER,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
RESPONDENT.

ON PETITION FOR REVIEW
OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

**BRIEF AS *AMICI CURIAE* ON BEHALF OF CENTER FOR GENDER &
REFUGEE STUDIES, EAST BAY COMMUNITY LAW CENTER, EAST BAY
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CENTER FOR LESBIAN RIGHTS, HUMAN RIGHTS CENTER,
INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION,
INTERNATIONAL WOMEN'S HUMAN RIGHTS CLINIC, AND MADRE
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*

Amici curiae are nonprofit organizations and law school clinics with expertise in gender and sexual orientation-based violence and refugee and human rights law. *Amici* include authors of scholarly works regarding asylum and gender and sexuality related violence, experts who advise other attorneys representing asylum seekers, and practicing attorneys who represent asylum seekers including within the Ninth Circuit. *Amici* have an interest in the questions under consideration in this appeal as they implicate fundamental principles of jurisprudence and statutory construction related to the definition of a “refugee,” in particular the term “persecution,” a subject of *amici*’s research and practice and matter of great consequence for those served by *amici*. Further, having investigated conditions for individuals facing gender and sexual orientation-based violence in El Salvador, *amici* have subject matter expertise directly related to the claims presented here. The issues involved have broad implications for the equitable and just administration of refugee law and the protection of individuals fleeing gender and sexual orientation-based persecution in accordance with domestic and international refugee and human rights law. *Amici* thus offer this brief under FED. R. APP. P. 29.¹

¹ *Amici* represent that Petitioner consents to the filing of this brief, while Respondent has taken no position on its filing, and that no person or entity other than *amici* authored or provided any funding related to its preparing or filing.

SUMMARY OF ARGUMENT

Forced marriage violates the most fundamental rights of the individuals subjected to it. Victims of forced marriage are denied the right to choose whether and with whom to enter into marriage. They often are forced into domestic servitude and thus deprived of their right to liberty. And, they frequently are raped, beaten, and subjected to other forms of domestic violence, which denies them their right to personal autonomy and physical integrity. Marriages to children are always forced, because a child cannot give free and full consent.

Lesbians face a particularly high risk of forced marriage intended to change their sexual orientation and nonconforming gender identities or behavior, which are considered an affront to the deeply rooted patriarchy and its rigidly defined gender roles that persists in many societies. This is especially true in El Salvador, which the State Department condemns for its tolerance of widespread violence and discrimination against women and the lesbian, gay, bisexual and transgender (LGBT) community.

Petitioner Yesenia Marisol Maldonado Lopez testified that, at the age of fourteen, her parents forced her to marry a sixty-eight year old man to “cure” her of her lesbianism and masculine appearance and behavior. As a child, she did not have the physical, emotional or financial means to resist. Nor did she have the legal capacity to consent to the marriage under the law in El Salvador, her country

of origin, which sets the minimum age to marry at eighteen. During the marriage, her husband raped her on multiple occasions. As a result, Ms. Maldonado bore two children, one when she was only fifteen years old.

Despite these undisputed facts and contrary to law, the Board of Immigration Appeals (BIA) concluded that Ms. Maldonado failed to establish that the harms she suffered constitute past persecution and denied her request for withholding of removal under Immigration and Nationality Act (INA) § 241(b)(3), 8 U.S.C. § 1231(b)(3). This holding is in error for three reasons. First, in concluding that Ms. Maldonado did not suffer persecution, the BIA distorted and ignored the overwhelming record evidence demonstrating that Ms. Maldonado's marriage and ensuing sexual relationship with the man she was coerced into marrying were forced upon her against her consent. Second, the BIA erred by failing to recognize that such grave violations of human rights – rape and forced marriage – constitute persecution under well-established jurisprudence. Finally, the BIA applied the wrong legal standard when considering whether the harms inflicted on Ms. Maldonado rise to the level of persecution, because it failed to analyze these harms from the perspective of a child, as United States law requires.²

² The Board also erred in concluding that the attack Ms. Maldonado suffered in 2011 at the hands of four women in her neighborhood did not rise to the level of persecution. This brief, however, will focus on the forced marriage and its attendant harms endured by Ms. Maldonado as a child. *Amici* incorporate herein

Amici therefore urge this Court to hold that forced marriage constitutes persecution *per se*, to conclude that the BIA erred in finding that Ms. Maldonado did not suffer past persecution, and to remand for further proceedings.

FACTUAL BACKGROUND

I. FORCED MARRIAGE IS DISTINCT FROM ARRANGED MARRIAGE.

The U.S. Department of State has observed the distinction between forced marriage and arranged marriage: Unlike in an arranged marriage, “[in] a forced marriage, at least one party does not consent or is unable to give informed consent to the marriage, and some element of duress is generally present.” U.S. DEP’T OF STATE FOREIGN AFFAIRS MANUAL (FAM) VOL. 7, 7 FAM 1450, at 9 (2005); *see also* U.K. HOME OFFICE, MULTI-AGENCY PRACTICE GUIDELINES: HANDLING CASES OF FORCED MARRIAGE 8 (2009) (hereinafter U.K. Guidelines) (defining forced marriage as “a marriage in which one or both spouses do not . . . consent to the marriage and duress is involved,” and noting that duress “can include physical, psychological, financial, sexual and emotional pressure”); U.S. CITIZENSHIP AND IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING COURSE: FEMALE ASYLUM APPLICATIONS AND GENDER-RELATED CLAIMS 14-15 (2009) (hereinafter AOBTC Female Asylum Applications) (defining forced marriage as a marriage “that is

by reference arguments made by Petitioner with regard to the 2011 attack as additional evidence of past persecution.

enforced against the victim’s wishes” and without full and free consent of both parties).³ Typically, in an arranged marriage, the families of both spouses take a leading role in facilitating the marriage (which can include the presentation of several potential spouses), but “the choice of whether to ultimately solemnize the proposed arrangement rests with the proposed bride and groom and can be exercised at any time.” Kim Thuy Seelinger, *Forced Marriage and Asylum: Perceiving the Invisible Harm*, 42 COLUM. HUM. RTS. L. REV. 55, 61 (2010).

Forced marriage is a violation of basic human rights, whereas arranged marriage is not. *See, e.g.*, 7 FAM 1450, at 9 (noting that the U.S. State Department “considers a forced marriage to be a violation of basic human rights”). Forced marriage violates the fundamental right to enter marriage with full and free consent as recognized by numerous international human rights laws. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) at 74 (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 23, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Covenant on Economic Social and Cultural Rights art. 10(1), *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); Convention on the Elimination of All Forms of Discrimination against

³ The term forced marriage refers not only to marriages officially recognized in civil registries or religious ceremonies, but also to unregistered traditional or common law marriages.

Women art. 16, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) (hereinafter CEDAW); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 1, *opened for signature* Sept. 7, 1956, 18 U.S.T. 3201, 226 U.N.T.S. 3 (entered into force Apr. 30, 1957).⁴

Once a woman is forced into marriage, she is often subjected to a range of other grave rights violations, including rape and other forms of sexual abuse, restrictions on her freedom of movement, and physical, emotional, and economic abuse. *See Seelinger, Forced Marriage and Asylum: Perceiving the Invisible Harm*, 42 COLUM. HUM. RTS. L. REV. at 62-63. Indeed, forced marriage is especially egregious where only one party is a child because, as the State Department has noted, “the child will presumably be subjected to non-consensual sex.” U.S. DEP’T OF STATE FOREIGN AFFAIRS MANUAL VOL. 7, 7 FAM 1740, at 1 (2005). Research shows that in cases of sexual assault where the victim is a child – as in the case of Ms. Maldonado, who was raped by her husband beginning at the age of fourteen – the effects of the abuse can be particularly severe and long lasting. *See, e.g., Debra*

⁴ The Special Court for Sierra Leone found forced marriage (distinct from sexual slavery) to be a crime against humanity for the first time in international law in 2009. *See Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Judgment, ¶ 2306 (Mar. 2, 2009).

Rose Wilson, *Health Consequences of Childhood Sexual Abuse*, 46 PERSP. IN PSYCHIATRIC CARE 56 (2010).

The U.S. Senate has recognized that child marriages, where one or both parties is below the legal age of consent to marry, are by definition forced marriages and that such marriages are “a harmful traditional practice that deprives girls of their dignity and human rights.” International Protecting Girls by Preventing Child Marriage Act of 2011, S. 414, 112th Cong. § 2(1) (passed Senate without amendment, May 24, 2012); *see also* CEDAW art. 16(2) (“[t]he betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage”). Eighteen is the minimum age of consent to marry in El Salvador, which is consistent with the recommendation of the United Nations Convention on the Rights of the Child. *See* Código de Familia [Family Code], Decreto [Decree] No. 677, art. 14 (1993) (El Sal.) (hereinafter Family Code);⁵ Convention on the Rights of the Child art. 16, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990). United States law is also consistent with the Convention: The presumptive age of marital

⁵ Salvadoran law allows for marriage of minors under eighteen only if they, “having reached puberty, already have a child together, or if the woman is pregnant.” Family Code, art. 14(3). The Committee on the Rights of the Child has criticized these exceptions that implicitly condone the rape of minors and has recommended their repeal. *See* U.N. Comm. on the Rights of the Child, *Concluding observations: El Salvador*, ¶ 25-26, U.N. Doc. CRC/C/SLV/CO/3-4 (Feb. 17, 2010).

consent is now eighteen in all states but two, one of which sets the age higher at nineteen. See Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. REV. 1817, 1832 (2012); see also African Charter on the Rights and Welfare of the Child art. 21(2), adopted July 11, 1990, OAU Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1999) (“[c]hild marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years”); Eur. Parl. Ass., Res. 1468 Forced Marriages and Child Marriages 2 (Oct. 5, 2005) (“stress[ing] the need to take the requisite legislative measures to prohibit child marriage by making 18 years the minimum marriageable age”).

Arranged marriage and forced marriage are two completely different phenomena, and any analysis of an asylum claim on the basis of forced marriage must take this clear distinction into consideration.

II. LESBIANS, LIKE MS. MALDONADO, ARE OFTEN SUBJECTED TO FORCED MARRIAGE ON ACCOUNT OF THEIR SEXUAL ORIENTATION AND/OR GENDER IDENTITY.

In many societies, homosexuality, bisexuality, and transgenderism are not accepted, and it is common for family members and other community members to attempt to “cure” LGBT individuals of their sexual orientation and/or gender identity. See U.N. High Comm’r for Refugees, *Guidelines on International*

Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, ¶ 21, U.N. Doc.

HCR/GIP/12/09 (Oct. 23, 2012) (hereinafter UNHCR Sexual Orientation Guidelines) (observing that many societies in the world “continue to view homosexuality, bisexuality, and/or transgender behavior or persons, as variously reflecting a disease, a mental illness or moral failing,” and they continue to “deploy various measures to try to change or alter someone’s sexual orientation and/or gender identity”). Such attempts include forced electroshock and drug therapies, as well as harms directed at women such as forced marriage, forced pregnancy and rape (including marital rape). *Id.* at ¶¶ 20, 21, 23; *see also Pitcherskaia v. INS*, 118 F.3d 641, 644 (9th Cir. 1997) (asylum case involving a Russian lesbian who was subjected to measures to “cure” her of her lesbianism).⁶

Lesbians are “especially at risk” for these repressive measures because of the confluence of sexual orientation discrimination and deep-rooted gender

⁶ Conversion practices have been largely discredited as harmful and ineffective. *See, e.g.,* Pan Am. Health Org., “Cures” for an Illness that Does Not Exist: Purported Therapies Aimed at Changing Sexual Orientation Lack Medical Justification and Are Ethically Unacceptable 2 (May 17, 2012) (taking the position that forced reparative interventions to alter an individual’s sexual orientation or gender identity “violate the dignity and human rights of the affected persons, independently of the fact that their ‘therapeutic’ effect is nil or even counterproductive”).

discrimination and inequalities “that restrict autonomy in decision-making about sexuality, reproduction and family life.”⁷ U.N. Human Rights Council, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity: Rep. of the U.N. High Comm’r for Human Rights*, ¶ 66, U.N. Doc. A/HRC/19/41 (Nov. 17 2011). Gender-specific harms of forced marriage, forced pregnancy, and rape in marriage have been “enacted as forms of punishment for assumed or actual sexual orientation or behaviour” that target lesbian women. *Id.* at ¶ 67; *see also* UNHCR Sexual Orientation Guidelines at ¶ 23 (“[I]esbians, bisexual women and transgender persons are at particular risk of [forced or underage marriage, forced pregnancy and/or marital rape] owing to pervasive gender inequalities that restrict autonomy in decision-making about sexuality, reproduction and family life”). Parents who force their lesbian daughters into marriage do so with a desire to control unwanted “behaviour and sexuality of women.” U.K. Guidelines at 11.

This reality is especially true for lesbians in El Salvador, which according to the State Department is a country “in which traditional social values [exhibiting cultural bias against homosexuality] predominate.” Certified Administrative

⁷ Discrimination against women is manifest in myriad laws in El Salvador and other countries, for example, in laws that allow for marriage of minors where the girl is pregnant, that exonerate a rapist if he offers to marry his victim and she accepts, or that prohibit property ownership and/or inheritance.

Record (AR) 278. “Because of their gender status,” an established LGBT rights organization in the country reports, “lesbian women are placed in a situation of extreme vulnerability.” AR 223. Salvadoran lesbians “have been obstructed from attending school and forced to work, and they are customarily victims of rape,” AR 223, including at the hands of police officers, AR 226. The Salvadoran government has failed to prevent and investigate violations against lesbians and “lesbian women feel intimidated to report these violations,” which leaves the perpetrators “completely unpunished.” AR 223.

ARGUMENT

I. THE BIA ERRED AS A MATTER OF LAW AND FACT IN FINDING THAT THE HARM MS. MALDONADO SUFFERED DOES NOT CONSTITUTE PERSECUTION.

The BIA’s determination that the marriage of a fourteen-year-old lesbian girl to a sixty-eight-year old man was a consensual, “arranged” relationship rather than a “forced” one distorts the record and ignores the undisputed facts of this case. It is clear from the record that Ms. Maldonado did not want to live with or engage in a sexual relationship with the man she was forced to marry. Moreover, as a child, she could not legally consent and did not have the capacity to resist. The BIA’s determination that such harms do not constitute persecution is contrary to law. The Board erred both in failing to recognize that rape and forced marriage constitute persecution under established law and in failing to consider whether the harms that

Ms. Maldonado suffered during her marriage are persecution when viewed from her perspective as a child.⁸

A. The BIA Misunderstood and Misconstrued the Record When It Found that Ms. Maldonado’s Marriage was “Arranged” Rather than “Forced.”

With scant analysis, the Board summed up its understanding of Ms. Maldonado’s claim: “We note that the record reflects that the applicant remained married to her husband for about 13 years, until his death in 2009, and they had two children together. We conclude that this arranged marriage was not past persecution.” AR 4.

The record contains no evidence (let alone substantial evidence) to support the BIA’s finding that Ms. Maldonado consented to marriage or that her parents or future husband were even willing to consider her consent or her opposition.⁹ To

⁸ The meaning of persecution, including whether particular acts constitute persecution, is a legal question over which this Court has *de novo* review. The BIA’s factual findings as to the existence of persecution are reviewed for substantial evidence. *See Mendoza-Alvarez v. Holder*, No. 08-74386, 2013 WL 1846616 (9th Cir. May 3, 2013); *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088 (9th Cir. 2005).

⁹ Ms. Maldonado referred to her marriage at one point during her testimony as “arranged” rather than “forced.” AR 153. However, Ms. Maldonado appeared *pro se* before the immigration judge (IJ) and cannot be faulted for her lack of detailed legal knowledge regarding the widely accepted definitions of forced versus arranged marriages (with the key distinguishing element of consent) described above. It was the duty of the IJ to “scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts” regarding eligibility. *Dent v. Holder*, 627 F.3d 365, 374 (9th Cir. 2010) (internal quotation marks and citations

the contrary, the record shows that Ms. Maldonado did resist by escaping and being with her girlfriend. Her husband tricked her into coming back to the house to see her daughter where he drugged and raped her, impregnating her as a result. AR 312-13 (written determination of reasonable fear); AR 322 (reasonable fear questions and answers). The BIA did not consider these facts. Moreover, when considering whether she consented, the BIA made no mention of Ms. Maldonado's same-sex sexual orientation and masculine appearance and behavior, of which she and her family were well aware at the time. *See* AR 153 ("I had problems with my family back then because of my sexual orientation. . . . Since I was little, they didn't accept me. A lot of my mannerisms were very boyish and when I was 14 years old they made me be with a person . . ."); AR 158 ("I've always been a masculine type"). If the Board had considered Ms. Maldonado's sexual orientation and the record regarding her attempt to escape her husband and subsequent rape, it is unfathomable that it would have considered the marriage and ongoing relationship to be consensual.

Furthermore, the BIA did not consider that Ms. Maldonado lacked capacity under Salvadoran law both to consent to marry the man her parents chose for her and to consent to have sex with him while a minor. El Salvador's Family Code,

omitted); *see also id.* at 373-74 (pro se litigants cannot be expected to have the legal knowledge necessary "to navigate their way successfully through the morass of immigration law" (internal quotation marks and citations omitted)).

enacted in 1993, sets eighteen as the minimum age for marriage in line with international best practices as described above. *See* Family Code, art. 14. Ms. Maldonado was fourteen and thus below the minimum age.¹⁰ The Penal Code also in effect at the time of the marriage in 1996 classified statutory rape as sexual relations with a minor, like Ms. Maldonado, between the ages of twelve and sixteen. *See* Código Penal [Penal Code], Decreto [Decree] No. 270, art. 197 (1973) (El Sal.). A conviction of statutory rape resulted in a sentence of six months to a year. *See id.*¹¹ A spousal relationship is not a defense to the crime of rape in El Salvador. *See* AR 256 (State Department reporting that although not explicitly codified in Salvadoran law, “spousal rape may be considered a crime if the actions meet the criminal code definition of rape”); *see also* Ley Contra Violencia Intrafamiliar [Law Against Intrafamilial Violence or LVI], *as amended*, Decreto [Decree] No. 902, art. 1, 3 (1996) (El. Sal.) (defining domestic violence to include

¹⁰ The exceptions allowing for marriage of individuals under the age of eighteen in El Salvador, *see supra* note 5, did not apply to Ms. Maldonado at the time she was forced into her marriage.

¹¹ The Salvadoran Penal Code has since been amended. It now classifies statutory rape as sex with a minor between fifteen to *eighteen* by deception or taking advantage of a position of superiority and increases penalties for the crime. *See* Código Penal [Penal Code], *as amended*, Decreto [Decree] No. 1030, art. 163, 164, (2012) (El Sal.) (hereinafter Amended Penal Code); *see also* AR 258 (State Department report). Having sex with a minor under fifteen years of age is classified separately as rape of a minor and carries a prison sentence of fourteen to twenty years. Amended Penal Code, art. 159.

sexual violence at the hands of a spouse); Código Penal [Penal Code], *as amended*, Decreto [Decree] No. 1030, art. 200 (2012) (El Sal.) (criminalizing domestic violence as defined in the LVI); Ley Especial Integral para una Vida Libre de Violencia para las Mujeres [Special Integral Law for a Life Free of Violence for Women], Decreto [Decree] No. 520, art. 9(f) (2011) (El Sal.) (defining sexual violence as encompassing marital rape).¹²

In short, the record compels the conclusion that Ms. Maldonado was subject to forced marriage and rape within the marriage.

B. The BIA Erred in Holding that the Rapes and Forced Marriage Ms. Maldonado Endured Do Not Constitute Persecution.

Ms. Maldonado was forced into marriage and raped by her husband beginning at the age of fourteen. After she escaped, her husband drugged and raped her again. She bore two children as a result of these rapes. Under the law – defining the term “persecution” found in INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) as the “infliction of suffering or harm . . . in a way regarded as offensive,” *Fisher v.*

¹² Several U.S. states have abolished marital immunity for rape, no longer allowing the existence of a marital relationship to serve as a defense to a sexual crime as it was historically. Sexual abuse in the context of a marriage, research shows, can have even more deleterious physical or psychological impacts on the victim than in situations where the perpetrator is a stranger. *See, e.g.*, Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 NEW CRIM. L. REV. 644, 662-63 (2010).

INS, 79 F.3d 955, 961 (9th Cir. 1996) (internal quotation marks and citations omitted) – there can be no doubt that what she suffered constitutes persecution.

1. *Rape rises to the level of persecution.*

This Court has “repeatedly held that rape rises to the level of persecution.” *Ali v. Ashcroft*, 394 F.3d 780, 787 (9th Cir. 2005); *see also Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1072, 1075 (9th Cir. 2004) (rape may constitute atrocious persecution to establish eligibility for humanitarian asylum). Rape constitutes persecution including in a marriage or other domestic relationship. *See, e.g., Mohammed v. Gonzales*, 400 F.3d 785, 798 n.19 (9th Cir. 2005) (“[t]here is no exception to the asylum statute for violence from family members; if the government is unable or unwilling to control persecution, it matters not who inflicts it” (quoting *Faruk v. Ashcroft*, 378 F.3d 940, 943 (9th Cir.2004))); *Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987), *overruled on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (recognizing rape in the context of an intimate relationship as a harm that can constitute persecution); *see also* AOBTC Female Asylum Applications at 25 (noting that “[t]he persecutor may be . . . someone closely associated with the applicant, such as a father or husband”). As such, the BIA erred in finding that the rapes suffered by Ms. Maldonado do not constitute persecution.

2. *Forced marriage rises to the level of persecution.*

A violation of the right to fully and freely consent to marriage is a violation of human rights. Although this Court has not yet had occasion to rule on the issue of forced marriage as persecution, developments in both domestic and international human rights law – which inform United States courts’ analysis of the term – support a finding of forced marriage as persecution. In *Mohammed*, for example, this Court looked to international human rights standards when it held that female genital cutting is a violation of the rights of women and girls and thus persecution under U.S. law. 400 F.3d at 795 n.13; *see also Matter of Kasinga*, 21 I. & N. Dec. 357, 377 (BIA 1996) (Rosenberg, Bd. Member, concurring) (noting that courts should be guided by international human rights instruments and their interpretation in assessing whether harm amounts to persecution); U.S. Dep’t of Justice Asylum and Withholding Definitions, 65 Fed. Reg. 76588, 76590 (proposed Dec. 7, 2000) (same); U.N. High Comm’r for Refugees, *Guidelines on International Protection No. 1: 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*, ¶ 9, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) (providing that international human rights and

criminal law “can assist decision-makers to determine the persecutory nature of a particular act”).¹³

As described above, both United States and international law recognize forced marriage as a human rights violation. The BIA therefore erred in failing to recognize that a violation of Ms. Maldonado’s right to freely and fully consent to marriage constitutes persecution. This conclusion is reinforced by the fact that, during her forced marriage, Ms. Maldonado was raped and impregnated without her consent – acts that also constitute persecution under United States and international law.

Several Courts of Appeals have recognized forced marriage as a basis for asylum with reasoning that is persuasive here. In *Bi Xia Qu v. Holder*, for example, the Sixth Circuit considered the claim of a twenty-year-old Chinese woman who had been kidnapped and subjected to attempted rape and forced marriage by her father’s creditor who threatened to harm her and her family if she refused. 618 F.3d 602, 604-605 (6th Cir. 2010). The Court reversed the BIA’s denial of asylum, concluding that the Board erred in viewing the matter solely as a debt collection dispute rather than as persecution that was at least partly motivated by Ms. Qu’s gender-defined social group of “women in China who have been

¹³ The U.S. Supreme Court has recognized that the analysis of UNHCR provides “significant guidance” for issues of refugee law. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439-40 (1987).

subjected to forced marriage and involuntary servitude.” *Id.* at 607. Because the BIA did not make an explicit finding on whether Ms. Qu was a member of a cognizable social group, focusing instead on nexus, the Court remanded to the agency for reconsideration. *Id.* at 609. In closing, the Court stated: “If the BIA concludes that Qu is a member of a particular social group for purposes of asylum, substantial evidence on the record does not support its finding that Qu has not fulfilled the requirements for establishing asylum.” *Id.*¹⁴

Similarly, in *Ngengwe v. Mukasey*, a case involving a widow in Cameroon at risk of marriage to her late husband’s brother, the Eighth Circuit noted that “[t]he question of whether forced marriage constitutes persecution is an open issue.” 543 F.3d 1029, 1036 (8th Cir. 2008). The Court remanded to the BIA for reconsideration. *Id.* at 1037. In so doing, the Court found that the agency “offered no analysis, and cited no law, on why the choice between forced marriage, death,

¹⁴ The Second Circuit considered the issue of forced marriage in *Gao v. Gonzales*, concluding that “lifelong, involuntary marriage” constitutes persecution and that the applicant would suffer such persecution on account of her membership in a gender-defined social group. 440 F.3d 62, 70 (2d Cir. 2006) *cert. granted, judgment vacated sub nom. Keisler v. Hong Yin Gao*, 552 U.S. 801 (2007). The Supreme Court, however, vacated the decision in light of *Gonzales v. Thomas*, 547 U.S. 183 (2006), instructing that the determination whether Ms. Gao had been persecuted on account of a protected ground should be left to the BIA in the first instance. *Keisler v. Hong Yin Gao*, 552 U.S. 801 (2007).

or paying an unaffordable bride's price does not constitute persecution." *Id.* at 1036-37.¹⁵

Al-Ghorbani v. Holder is also relevant. 585 F.3d 980 (6th Cir. 2009). Yemeni brothers from a disfavored class fled their country after one of the brothers was detained and tortured following the other brother's marriage to the daughter of a prominent Yemeni family. *Id.* at 984-988. Recognizing that "[i]n this country, the right to marry is considered fundamental," the Court held that "[p]ersons who are forbidden to marry, or those who oppose discriminatory restrictions on marriage, may therefore constitute a particular social group" for purposes of refugee protection. *Id.* at 996 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (marriage is "one of the basic civil rights of man" and "fundamental to our very existence and survival" (citation and internal quotation marks omitted))). Surely if being prevented from entering the marriage of one's choice is grounds for asylum or withholding of removal, being forced into a marriage *not* of one's choice meets that same standard.

¹⁵ In other cases, courts have seemingly recognized that forced marriage can constitute persecution, but upheld denials of protection on other grounds such as lack of credibility or likelihood of future harm. *See, e.g., Manani v. Filip*, 552 F.3d 894 (8th Cir. 2009); *Pan v. Gonzales*, 445 F.3d 60 (1st Cir. 2006). Courts of Appeals have also acknowledged that forced marriage poses a significant risk of female genital cutting (a prerequisite to marriage in many societies), which is a harm that clearly constitutes persecution. *See, e.g., Uanreroro v. Gonzales*, 443 F.3d 1197 (10th Cir. 2006); *Gomis v. Holder*, 571 F.3d 353 (4th Cir. 2009).

In addition to these judicial decisions, U.S. immigration authorities have consistently recognized forced marriage as persecution, starting with agency guidelines issued in 1995. *See* Memorandum from Phyllis Coven, U.S. Dep't of Justice, Considerations for Asylum Officers Adjudicating Asylum Claims From Women 9 (May 26, 1995) (published in 72 No. 22 Interpreter Releases 771 (June 5, 1995)) (recognizing that forced marriage may constitute persecution); DEP'T OF STATE, GENDER GUIDELINES FOR OVERSEAS REFUGEE PROCESSING 5 (2000) (same); U.S. CITIZENSHIP AND IMMIGRATION SERVS., GUIDANCE FOR ADJUDICATING LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) REFUGEE AND ASYLUM CLAIMS 23 (2011) (same); AOBTC Female Asylum Applications at 14-15 (same).

In line with agency guidelines, the BIA and several U.S. immigration courts have found in unpublished opinions that the prospect of being deported to a country where an applicant faces forced marriage establishes eligibility for asylum.¹⁶ *See, e.g., Matter of X* (BIA Dec. June 2009) (Attached as Appendix A) (reversing denial of asylum where applicant feared she would face forced marriage

¹⁶ The Board has been presented with the question of forced marriage as persecution in at least two cases that resulted in published opinions. However, in one case, *Matter of A-T*, the opinion was vacated. 24 I. & N. Dec. 296 (BIA 2007), *vacated sub nom, Matter of A-T*, 24 I. & N. Dec. 617. In the other, the Board considered only the female genital cutting aspect of the claim and did not directly address the forced marriage aspect, leaving a void in the agency's jurisprudence. *See Matter of Kasinga*, 21 I. & N. Dec. 357.

and additional persecution if she failed to comply, on account of her religious beliefs, with her father's orders to marry the man he selected); *Matter of H-A-* (IJ Dec. April 25, 2011) (Attached as Appendix B) (granting asylum to twenty-year-old Pakistani woman whose father engaged her to become his creditor's second wife); *Matter of X* (IJ Dec. 2010) (Attached as Appendix C) (granting asylum to a Cameroonian woman who feared being forced to marry a polygamist chief and raped by him).

Refugee tribunals from several sister signatories to the Refugee Convention and Protocol also consider forced marriage to be a basis for refugee protection.¹⁷ These include tribunals in Australia, Belgium, Canada, the Czech Republic, France, Germany, Spain, Switzerland, and the United Kingdom. *See, e.g.*, V/96/04445 [1996] R.R.T.A. 2166 (Austl.); Conseil du Contentieux des Etranger [Council for Alien Law Litigation], April 29, 2011, Nr. 60.622 (Belg.); *Vidhani v. Canada* (Minister of Citizenship and Immigration) (T.D.), [1995] 3 F.C. 60 (Can.); Nejvyšší správní soud [NSS] [Supreme Administrative Court] R.S. proti Ministerstvu vnitra [R.S. v. Ministry of Interior], Jan. 25, 2011, 6 Azs 36/2010-274 (Czech Rep.); Cour nationale du droit d'asile [CNDA] [National Asylum Court], Apr. 23, 2008, Miss

¹⁷ *See* Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954); Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) (hereinafter 1967 Protocol).

N., No. 574495 (Fr.); Verwaltungsgericht Stuttgart [VG Stuttgart] [Stuttgart Administrative Court] Mar. 14, 2011, A 11 K 553/10 (Ger.); Tribunal Supremo [Supreme Court], May 11, 2009, No. 3155/2006 (Sp.); Entscheidungen und Mitteilungen der ARK [EMARK] [Swiss Asylum Appeal Commission] 96/16 (Switz.); *NS (Social Group-Women-Forced Marriage) Afg. v. Sec’y of State for the Home Dep’t*, CG [2004] UKIAT 00328 (U.K.).¹⁸ Opinions of sister signatories are “entitled to considerable weight” by the Court when interpreting domestic refugee provisions. *Abbott v. Abbott*, 560 U.S. 1, 130 S. Ct. 1983, 1993 (2010) (internal quotation marks and citations omitted).¹⁹

¹⁸ Government-issued gender guidelines in Australia, Canada, Sweden, and the United Kingdom also establish forced marriage as persecution. *See* AUSTL. GOV’T: MIGRATION REVIEW TRIBUNAL – REFUGEE REVIEW TRIBUNAL, GENDER GUIDELINES (2012); IMMIGRATION AND REFUGEE BOARD OF CAN., GUIDELINE 4: WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION § B (1996); SWEDISH MIGRATION BOARD, GENDER-BASED PERSECUTION: GUIDELINES FOR INVESTIGATION AND EVALUATION OF THE NEEDS OF WOMEN FOR PROTECTION (2001); U.K. IMMIGRATION APPELLATE AUTHORITY, ASYLUM GENDER GUIDELINES (2000).

¹⁹ The refugee definition in INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), incorporates the 1967 Protocol to which the United States is party. *See Cardoza-Fonseca*, 480 U.S. at 436-37. As such, general rules of treaty interpretation, including examination of the interpretation of other states parties, apply to interpretation of the Act’s refugee provisions, including whether harms rise to the level of persecution. *See, e.g., Negusie v. Holder*, 555 U.S. 511, 537 (2009) (Stevens, J., joined by Breyer, J., concurring in part and dissenting in part) (examining the language of the Refugee Convention and the practice of other states parties in interpreting the “persecutor bar”); *Delgado v. Holder*, 648 F.3d 1095, 1109 n.2 (9th Cir. 2011) (Reinhardt, J., concurring in part and in the judgment) (interpreting the

On the basis of this domestic and international law precedent, this Court should hold that Ms. Maldonado’s marriage that was indisputably forced upon her by her parents and husband and its attendant harms, including rape, constitute persecution.²⁰

C. The BIA Failed to Analyze Whether the Harms Ms. Maldonado Suffered Constitute Persecution from the Perspective of a Child.

A growing body of United States law, rooted in international principles, directs adjudicators to assess asylum claims involving persecution of children by a different standard from that applied in cases involving adults. This legal change stems from recognition that children are not adults in miniature: They experience harm differently, are more susceptible to coercion, have limited understanding of the context in which their persecution occurs, and are dependent on adults to help them access the protection of the government. Accordingly, every element of the definition of a refugee should be assessed taking the applicant’s status as a child into account and determinations as to whether the harm suffered constitutes persecution must be assessed through the eyes of a child. *See* U.S. CITIZENSHIP

“particularly serious crime” bar in a manner consistent with the Refugee Convention’s language and practice of other states parties).

²⁰ Because Ms. Maldonado established past persecution on account of her sexual orientation and/or gender identity, she was entitled to a presumption of future threat to life or freedom on the same basis. *See* 8 C.F.R. § 1208.16(b)(1)(i). The attack Ms. Maldonado suffered in 2011 and the continued “problems” that she has

AND IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING COURSE: GUIDELINES FOR CHILDREN’S ASYLUM CLAIMS (2009); Memorandum from Jeff Weiss, U.S. Dep’t of Justice, Guidelines for Children’s Asylum Claims 14 (Dec. 10, 1998) (1998 WL 34032561); U.N. High Comm’r for Refugees, *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, ¶¶ 15-16, U.N. Doc. HCR/GIP/09/08 (Dec. 22, 2009).

Particularly relevant here is the recognition that, in the case of a child, the level of harm may be less than for an adult but still qualify as persecution. This Court has found legal error where the agency failed to evaluate whether harms amount to persecution in light of the applicant’s status as a child. *See Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1313-14 (9th Cir. 2012) (reversing the BIA’s holding that the applicant did not suffer persecution as a child where it failed to consider injuries to family members as evidence of persecution, given that a child’s reaction to injuries to his family may be different from an adult’s); *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045-46 (9th Cir. 2007) (reversing the agency’s determination that the applicants did not suffer persecution where the immigration judge “did not look at the events from their perspective, nor measure the degree of

with her family, AR 157, viewed in tandem with the country conditions evidence of record, demonstrate her continued risk of harm.

their injuries by their impact on children of their ages” and thus “committed legal error”); *see also Kholiyavskiy v. Mukasey*, 540 F.3d 555, 571 (7th Cir. 2008) (reversing the BIA’s determination that the child applicant did not suffer from past persecution where it did not consider the applicant’s age “at the time these events occurred—a factor that, we have noted, may bear heavily on the question of whether an applicant was persecuted”); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006) (concluding that the immigration judge committed legal error in failing “to address the harms Jorge-Tzoc and his family incurred cumulatively and from the perspective of a small child”).

Had the BIA considered the harms from the perspective of a fourteen year old child who was forced to marry a man fifty-four years her senior, and who was raped and gave birth at the age of fifteen, it necessarily would have concluded that the harms suffered by Ms. Maldonado constitute serious human rights violations and persecution. The BIA’s failure to apply the correct standard for persecution claims involving a child provides yet another basis for reversal.

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to FED. R. APP. P. 32 and Ninth Circuit Rule 29, that the foregoing Brief of *Amici Curiae* is proportionally spaced, has a typeface of 14 points, and is 6,646 words per the word count feature of Microsoft Word.

s/ Karen Musalo

Karen Musalo

Dated: June 6, 2013

APPENDIX

Appendix A: *Matter of X* (BIA Dec. June 2009)

Appendix B: *Matter of H-A-* (IJ Dec. April 25, 2011)

Appendix C: *Matter of X* (IJ Dec. 2010)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 6, 2013. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Blaine Bookey

Blaine Bookey

Dated: June 6, 2013