No. 20-[redacted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[redacted]

Agency File No. [redacted]
Petitioner,
v.

WILLIAM P. BARR, U.S. Attorney General,
Respondent.

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

BRIEF OF *AMICI CURIAE* IMMIGRATION AND REFUGEE CLINICS, LEGAL SERVICES, AND ADVOCACY ORGANIZATIONS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(a) and Local Rule 29.1, the Harvard Immigration and Refugee Clinical Program, Bronx Defenders, Brooklyn Defender Services, Catholic Legal Immigration Network, Center for Gender & Refugee Studies, Central American Legal Assistance, Lutheran Social Services of New York, and UnLocal, Inc. submit this brief as *amici curiae*.[1]

The **Harvard Immigration and Refugee Clinical Program** ("HIRC") has been a leader in the field of refugee and asylum law for over 35 years and has a direct interest and extensive expertise in the proper development and application of immigration and asylum law, so that claims for protection receive fair and full consideration under existing standards of law. HIRC has worked with thousands of immigrants and refugees from around the world since its founding in 1984. It combines representation of individual applicants for asylum and related relief with appellate litigation and policy advocacy. HIRC attorneys are recognized experts in asylum law, including asylum cases involving gender. HIRC has filed briefs as *amicus curiae* in cases before the U.S. Supreme Court, the federal courts of appeals,

[1] Petitioner consents to this filing and Respondent does not oppose this filing. *Amici* state that no counsel for the party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than *Amici* and their counsel contributed money that was intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E). *Amici* will seek to participate in oral argument, should this Court deem it necessary or otherwise useful for deciding this case.

including the Second Circuit, the Board of Immigration Appeals, and various international tribunals. Among HIRC's clients are survivors of human rights abuses from all over the world, including women from Guatemala, applying for refugee protection.

The **Bronx Defenders** is a nonprofit provider of innovative, holistic, and client-centered criminal defense, removal defense, family defense, social work support, and other civil legal services and advocacy to indigent Bronx residents. It represents individuals in over 20,000 cases each year and reaches hundreds more through outreach programs and community legal education. The Immigration Practice of The Bronx Defenders provides removal defense services to detained New Yorkers as part of the New York Immigrant Family Unity Project at the Varick Street Immigration Court and also represents non-detained immigrants in removal proceedings. The Bronx Defenders' removal defense practice extends to motions to reopen, appeals and motions before the BIA, and petitions for review.

Brooklyn Defender Services ("BDS") is a public defender organization that represents nearly 30,000 low-income residents of Brooklyn and elsewhere each year in criminal, family, civil, and immigration proceedings, providing interdisciplinary legal and social services since 1996. Since 2009, BDS has counseled or represented more than 15,000 clients in immigration matters, including deportation defense, affirmative applications, advisals, and immigration consequence consultations in

Brooklyn's criminal court system. BDS has represented hundreds of asylum seekers, including those who face persecution because of their gender and related characteristics.

The **Catholic Legal Immigration Network, Inc.** ("CLINIC") is an immigration-focused nonprofit that assists low-income immigrants in their claims for immigration relief. CLINIC partners with a network of nonprofit immigration legal services programs to protect the rights of asylum seekers. CLINIC's network includes nearly 400 diocesan and other affiliated immigration programs around the country. CLINIC supports the work of our affiliates through training, technical assistance, and litigation on behalf of the immigrant communities they serve. CLINIC regularly represents asylum seekers through its Board of Immigration Appeals Pro Bono Project, its motions to reopen project, and its formerly separated families project.

The **Center for Gender & Refugee Studies** ("CGRS") has played a central role in the development of United States law and policy related to gender persecution through its litigation, scholarship, and development of policy recommendations. It also provides technical assistance and expert consultation for attorneys representing asylum seekers across the country in a wide range of cases. In 2019, it assisted in over 8,313 unique asylum cases at all levels of the immigration and federal court system, including cases before the asylum office, immigration courts, and federal

courts. Many of those cases raise claims involving gender-based persecution. As recognized experts on issues regarding gender persecution, CGRS has an interest in the protection of women and girls in the United States, in accordance with international refugee and human rights law. CGRS has submitted briefs, as an amicus party and/or as counsel of record, regarding asylum and related claims in nearly every Court of Appeals, including the Second Circuit. CGRS has 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," a subject of CGRS's research and practice and in furtherance of its core mission to advance the human rights of refugees and broaden asylum protections under U.S. law.

Central American Legal Assistance ("CALA") is a Brooklyn based non-profit organization that has been representing immigrants in removal proceedings since 1986. CALA's client population is comprised primarily of trauma survivors from Central and South America who are applying for asylum and other humanitarian relief. CALA represents several hundred asylum seekers in removal proceedings each year, many of whom have experienced severe gender-based persecution.

Lutheran Social Services of New York provides 7,000 New Yorkers each day with a wide range of social services. The Immigration Legal Program ("LSSNY-

ILP") provides community-based direct immigration legal services to under-served populations in the New York City metropolitan area. Since 1995, the program has represented thousands of clients seeking asylum, family-based immigration status, citizenship, and other forms of immigration relief. LSSNY-ILP has developed particular expertise in working with asylum seekers, especially women and children fleeing violence in Central and South America. Attorneys from the program regularly appear on behalf of clients before United States Citizenship and Immigration Services, the Executive Office for Immigration Review, and the federal courts.

UnLocal, Inc. provides free representation to undocumented immigrants who may be eligible to obtain lawful status, most of whom are in removal proceedings. UnLocal clients include hundreds of asylum seekers, many of whom flee gender-based persecution committed by private actors. *Matter of A-B-* has had a devastating impact on their lives and long-term safety and security.

Amici have a direct interest in the outcome of this action and respectfully submit this brief in support of Petitioner.

INTRODUCTION

The Board of Immigration Appeals ("Board") erred when it summarily rejected [redacted] "Petitioner's") proposed particular social groups—"Guatemalan women,"

"Guatemalan women who lack familiar support or protection," "Guatemalan women unable to leave a relationship," "women unable to leave a domestic relationship," and "women unable to leave an intimate partner relationship"—as either overbroad or otherwise not cognizable in light of *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018). That conclusion is inconsistent both with longstanding precedent and with the narrow holding in *Matter of A-B-*, which is not applicable to [redacted]'s case. Since *A-B-*, courts and the Board itself have repeatedly reaffirmed that gender or gender along with another immutable characteristic, such as nationality, can constitute a cognizable social group, depending on the evidence presented in each case.

Matter of A-B- affirmed the reasoning of *Matter of Acosta*, the seminal decision in which the Board explicitly recognized "sex" as a quintessential example of a cognizable particular social group ("PSG"). *See Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). The Attorney General in *A-B-* reiterated a key aspect of *Acosta*'s holding, emphasizing that "persecution . . . directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic" constitutes "persecution on account of membership in a particular social group." *A-B-*, 27 I. & N. Dec. at 328.

Gender-based particular social groups, including gender itself or gender along with another immutable characteristic, such as nationality, also satisfy the

requirements of particularity and social distinction announced in Board decisions since *Acosta.* Indeed, after *A-B-*, numerous decisions by immigration judges and the Board have recognized that such groups can satisfy both requirements. In failing to recognize that Ms. [redacted] proposed a cognizable PSG under *Acosta* and more recent decisions, the Board in this case overlooked what courts have long recognized both nationally and internationally: The Refugee Convention provides protection to survivors of gender-based violence on account of their gender.

For these reasons, the Board erred when it categorically rejected as non-cognizable the particular social group of "Guatemalan women." As that plain legal error was the sole basis discussed by the Board in its denial of Petitioner's appeal, this Court should correct that error and vacate the Board's decision.

ARGUMENT

I. MEMBERSHIP IN A COGNIZABLE PARTICULAR SOCIAL GROUP MAY BE ESTABLISHED BASED ON GENDER ALONE

Following *Matter of A-B-*, several sister circuits have recognized that gender or gender plus nationality can form the basis of a cognizable PSG. In *De Pena-Paniagua v. Barr*, for example, the First Circuit explained that sex is an immutable characteristic, and emphasized the cognizability of "women" or "women in country X." 957 F.3d 88, 95–96 (1st Cir. 2020). Concordantly, the Ninth Circuit in *Silvestre-Mendoza v. Sessions* recognized "Guatemalan women" as cognizable, emphasizing that gender was "the gravamen of [the petitioner's] complaint." 729

F. App'x 597, 598 (9th Cir. 2018); *see also Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1077–80 (9th Cir. 2020) (remanding for further consideration of whether "Guatemalan indigenous women who are unable to leave their relationship" is cognizable); *Ticas-Guillen v. Whitaker*, 744 F. App'x 410 (9th Cir. 2018) (finding that "gender and nationality can form a particular social group"). So too here.

The Board and immigration judges across the country have also continued to recognize that gender-based social groups are cognizable and have granted protection on that basis. *See, e.g.*, —, (Boston Immigration Court, June 18, 2019) (unpublished) (finding "Guatemalan women" cognizable and granting asylum), Add. 21–24, 27; *C*-, (Philadelphia Immigration Court, May 15, 2019) (unpublished) (recognizing "Guatemalan women" as a valid particular social group and granting asylum), Add. 96–99, 102; *T-S-M-*, (BIA, Apr. 16, 2019) (unpublished) ("[B]eing a woman is an immutable characteristic . . . as gender is fundamental to one's individual identity or conscience."), Add. 126; *see also* —, (Newark Immigration Court, Mar. 17, 2020) (unpublished) (finding "Honduran women" cognizable and granting asylum), Add. 138, 140; —, (Arlington Immigration Court, May 1, 2020) (unpublished), Add. 152, 156 (same); —, (Hartford Immigration Court, July 17, 2019) (unpublished) (recognizing the social group of "Guatemalan women who defy gender norms" and granting asylum), Add. 58, 60; —, (Denver Immigration Court, Mar. 7, 2019) (unpublished) (finding

"Mexican women" cognizable and granting asylum), Add. 37, 43; —, (San Francisco Immigration Court, Sept. 13, 2018) (unpublished) (finding "Mexican females" cognizable and granting asylum), Add. 68–70, 82; —, (Arlington Immigration Court, 2018) (unpublished) (finding "women in Honduras" cognizable and granting asylum), Add. 6, 12.[2]

As this Court has recognized, "[t]he BIA's own precedential decisions require the agency to determine on a case-by-case basis whether a group is a particular social group for the purposes of an asylum claim." *Ordonez Azmen v. Barr*, 965 F.3d 128, 135 (2d Cir. 2020). Thus, the Board's decision must be vacated because it categorically rejected "Guatemalan women" based on *Matter of A-B-*, without conducting a case-specific factual analysis. *See Silvestre-Mendoza*, 729 F. App'x at 598; *De Pena-Paniagua*, 957 F.3d at 96; *see also Grace v. Barr*, 965 F.3d 883, 904–06 (D.C. Cir. 2020) (holding that *Matter of A-B-* did not create a general rule against claims involving domestic violence, and emphasizing the need for a case-by-case approach in analyzing membership in a particular social group); *Diaz-Reynoso*, 968 F.3d at 1079–80 (same); *Juan Antonio v. Barr*, 959 F.3d 778 n.3 (6th Cir. 2020) (emphasizing that there can be "no general rule against claims involving domestic violence as a basis for membership in a particular social group").

[2] All unpublished decisions cited herein have been included in the Addendum.

Here, the immigration judge erroneously ruled that "Guatemalan women" was categorically overboard. A.R. 112. Thus, at a minimum, the Board should have remanded Petitioner's case to permit the immigration judge to assess cognizability in the first instance. The Board has followed that approach in several cases post-dating *Matter of A-B-*. *See, e.g.*, *Y-M-L-*, (BIA, Sept. 10, 2019) (unpublished) (remanding for consideration of claim based on "Guatemalan women"), Add. 120–21; *M-D-A-*, (BIA, Feb. 14, 2019) (unpublished) (remanding for further consideration of whether "women in El Salvador" constituted a cognizable particular social group), Add. 106; *Y-V-P-*, (BIA, Nov. 6, 2019) (unpublished) (same), Add. 123; *N-P-S-*, AXXX-XXX-777 (BIA, July 27, 2020) (unpublished) (remanding for consideration of "Mexican women" as cognizable PSG), Add. 117–18; *S-R-P-O-*, AXXX XXX 056 (BIA, Dec. 20, 2018) (unpublished) (same), Add 108–09; *X-Q-C-D-*, (BIA, Dec. 11, 2018) (unpublished) (same), Add. 113–15.

II. THE CONCLUSION THAT GENDER ALONE IS SUFFICIENT TO ESTABLISH MEMBERSHIP IN A PARTICULAR SOCIAL GROUP IS FAITHFUL TO THE INA, AS RECOGNIZED IN *ACOSTA*

The recognition that gender alone is sufficient to establish membership in a cognizable PSG dates back to the Board's seminal 1985 decision in *Matter of Acosta*. In that case, the Board utilized the *ejusdem generis* canon of statutory construction, which "holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words," in order to clarify the

meaning of the "membership in a particular social group" ground for asylum. *Acosta*, 19 I. & N. Dec. at 233. Looking to the other four protected grounds—race, religion, nationality, and political opinion—the Board found that each "describes persecution aimed at an immutable characteristic . . . that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed." *Id.* Based on that understanding, the Board determined that "membership in a particular social group" should be read to encompass "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic." *Id.* The Board then recognized that "[t]he shared characteristic" for purposes of establishing asylum eligibility "might be . . . s*ex*, color, or kinship ties." *Id.* (emphasis added).

This Court has embraced the *Acosta* framework and recognized gender as an immutable characteristic that—like race, religion, nationality, and political opinion—is "so fundamental to [an individual's] identity . . . that it ought not be required to be changed." *See Acosta*, 19 I. & N. Dec. at 233–34; *Paloka v. Holder*, 762 F.3d 191, 198 (2d Cir. 2014) (recognizing gender as an "immutable characteristic[] that fit[s] within the broad definition set out in *Acosta*" and remanding asylum claim based on "young Albanian women" PSG) (citing *Cece v. Holder*, 733 F.3d 662, 676 (7th Cir. 2013) (en banc)).

Sister circuits share this approach. In 1993, then-Judge Alito of the Third Circuit cited *Acosta* approvingly in *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993). In *Fatin*, the Third Circuit explained that because *Acosta* "specifically mentioned 'sex' as an innate characteristic that could link the members of a 'particular social group,'" Fatin had satisfied that requirement "to the extent that . . . [she] suggest[ed] that she would be persecuted . . . simply because she is a woman." *Id.* (recognizing "Iranian women" as a valid PSG).[3]

Likewise, the Ninth Circuit has observed that "the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application . . . [of the conclusion that] a 'particular social group' is one united by . . . an innate characteristic[.]" *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005); *see also Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (remanding the Board's

[3] *Acosta* also provided the framework for federal guidelines issued in 1995 regarding "asylum claims by women." *See generally* Memorandum from Phyllis Coven, INS Office of International Affairs, to All INS Asylum Officers and HQASM Coordinators, *Consideration for Asylum Officers Adjudicating Asylum Claims from Women* 9 (May 26, 1995) (describing *Fatin* as consistent "with the statement of the Board in *Acosta* that 'sex' might be the sort of shared characteristic that could define a particular social group"); *see also Matter of Kasinga*, 21 I. & N. Dec. 357, 377 (BIA 1996) (Rosenberg, concurring) ("Our recognition of a particular social group based upon tribal affiliation and gender is also in harmony with the guidelines for adjudicating women's asylum claims issued by [INS].").

decision that "women in Guatemala" could not constitute a particular social group because it was "inconsistent with . . . *Acosta*").

In *Niang v. Gonzales*, the Tenth Circuit "[a]ppl[ied] the *Acosta* definition" to find that "female members of a tribe" qualified as a PSG, observing that "[b]oth gender and tribal membership are immutable characteristics." 422 F.3d 1187, 1199–1200 (10th Cir. 2005). In *Hassan v. Gonzales*, the Eighth Circuit recognized the PSG "Somali women" based on the applicant's "possession of the immutable trait of being female." 484 F.3d 513, 518 (8th Cir. 2007). And just this year, the First Circuit reiterated that gender is an immutable characteristic and that a PSG united by gender alone or gender-plus-nationality is cognizable. *See De Pena-Paniagua*, 957 F.3d at 95–96.

Importantly, recognizing that gender alone may define a particular social group does not mean that all women around the globe are entitled to protection under the Refugee Act. The other elements of the refugee definition, including the requirements that an applicant demonstrate a legally sufficient nexus between her persecution and her protected status and a level of harm suffered or feared that rises to the level of persecution, play an important limiting role in gender-based claims. As is true in cases based on the other protected grounds (such as race or religion), the applicant must also demonstrate that she meets all elements of the refugee definition. *See* 8 U.S.C. § 1101(a)(42); *see also Niang*, 422 F.3d at 1199–200 ("[T]he

focus with respect to [gender based asylum] claims should be not on whether either gender constitutes a social group (which both certainly do) but on *whether the members of that group are sufficiently likely to be persecuted . . . 'on account of' their membership*." (emphasis added)).

III. GENDER MEETS THE CRITERIA THE BOARD HAS ADDED TO DEFINE MEMBERSHIP IN A PARTICULAR SOCIAL GROUP SINCE *ACOSTA*

In recent years, the Board "expanded the [particular social group] analysis beyond the *Acosta* test," by requiring that the social group also be "particular" and "socially distinct." *See Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (BIA 2014). With respect to social distinction, the Board has explained that asylum seekers must offer evidence that "society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group." *Matter of W-G-R-*, 26 I. & N. Dec. 208, 217 (BIA 2014). With respect to particularity, the Board has emphasized that the group "must be defined by characteristics that provide a clear benchmark for determining who falls within [it]." *Id.* at 214. A PSG of Guatemalan women satisfies these requirements. *See, e.g.*, —, (Boston Immigration Court, June 18, 2019) (unpublished) (finding "Guatemalan women" cognizable and granting asylum), Add. 22–24, 27.

Matter of A-B- did not alter the Board's approach to particularity and social distinction, both of which the Board has characterized as "fact-specific" inquiries

that require case-by-case analysis. *See Ordonez Azmen*, 965 F.3d at 134–35 (reversing the Board where it ruled entire classes of claims non-cognizable and in so doing, "failed to adhere to its own precedents disclaiming per se rules and requiring a fact-based inquiry into the views of the relevant society"); *M-E-V-G-*, 26 I. & N. Dec. at 241.

Gender meets the requirement of particularity. *See De Pena-Paniagua*, 957 F.3d at 96 ("It is . . . difficult to think of a country in which women do not form a 'particular' and 'well-defined' group of persons."); *Perdomo*, 611 F.3d at 669 (determining that the group "women in Guatemala" can be sufficiently particular to be cognizable). A PSG must have "definable boundaries" that are not "amorphous, overbroad, diffuse, or subjective." *See M-E-V-G-*, 16 I. & N. Dec. at 239. Guatemalan women are "recognized in the society in question as a discrete class of persons." *Id*. at 249. There are well-established benchmarks for determining who is a woman and who is not, and the Guatemalan government and society frequently make such determinations. *See, e.g.*, A.R. 209 (Guatemalan national ID card listing gender); *see also C-*, (Philadelphia Immigration Court, May 15, 2019) (unpublished) (explaining that gender meets the particularity requirement as follows: "the boundaries of [Guatemalan women] are identifiable: women in Guatemala are members, while men are not."), Add. 97.

Courts have "rejected the notion that a persecuted group may simply represent too large a portion of the population to allow its members to qualify for asylum." *See Perdomo*, 611 F.3d at 669; *Alvarez Lagos v. Barr*, 927 F.3d 236, 253 (4th Cir. 2019) (noting that a PSG need not be small to satisfy the particularity requirement); *see also M-D-A-*, (BIA, Feb. 14, 2019) (unpublished) (rejecting proposition that a social group may be too large to be particular and remanding claim based on membership in "women in El Salvador"), Add. 106; —, (Arlington Immigration Court, 2018) (unpublished) (finding that "women in Honduras" is a cognizable PSG "even though it is large"), Add. 8–10.

In *Ordonez Azmen*, this Court reversed the Board for applying "a general rule, untied to any specific country or society," in evaluating the particularity of a proffered PSG. 965 F.3d at 135. The Board made the same sort of categorical error in the case below. *See* A.R. 025. As this Court has explained, the Board must "consider whether the record evidence demonstrated that Guatemalans actually share a common definition" of the proffered PSG. And although Guatemalans clearly do share such a definition of "women," the Board's decision below lacks any analysis considering "the views of the relevant society." *See Ordonez Azmen*, 965 F.3d at 135.

"Guatemalan women" also satisfies the social distinction requirement. "To be socially distinct, a group need not be seen by society; rather, it must be perceived as

a group by society." *Paloka*, 762 F.3d at 196 (quoting *M-E-V-G-*, 26 I. & N. Dec. at 240) (internal quotation marks omitted). "[S]ocial distinction considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way." *Diaz-Reynoso*, 968 F.3d at 1077 (quoting *M-E-V-G-*, 26 I. & N. at 238) (internal quotation marks omitted).

Guatemalan women are "perceived as a group by society." *See Paloka*, 762 F.3d at 196. Legislation addressing a specific group is among the best "evidence that a society recognizes a particular class of individuals as uniquely vulnerable." *See Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1092 (9th Cir. 2013) (en banc); *Guzman Orellana v. Att'y Gen.*, 956 F.3d 171, 179–80 (3d Cir. 2020) (citing the Special Law for the Protection of Victims and Witnesses in El Salvador in support of a finding that "witnesses who have publicly provided assistance to law enforcement against major Salvadoran gangs" is a socially distinct group in Salvadoran society).

In another case decided after *A-B-* wherein an asylum applicant advanced "Guatemalan women" as her PSG, the Board reversed the immigration judge's denial of asylum application and remanded, explaining that the determination as to "whether [Guatemalan women] is cognizable requires a detailed review of the background evidence, laws addressing crimes against women in Guatemala, and the enforcement of those laws." *Y-M-L-*, (BIA, Sept. 10, 2019) (unpublished), Add. 120–21; *see also* —, (Boston Immigration Court, June 18, 2019) (unpublished) (finding

that "Guatemalan women" was a cognizable PSG and citing the enactment of legislation to combat crimes against women as an indicator that "Guatemalan society views women as a separate and distinct group"), Add. 23–25. The Board engaged in no such analysis here.

Numerous laws and government programs framed as, but failing to, combat violence against women illustrate Guatemalan society's conception of "Guatemalan women" as a vulnerable and socially-distinct class. *See, e.g.*, A.R. 244 (discussing Guatemala's "Law Against Femicide and Other Violence Against Women (Femicide Law)"); A.R. 250–51 (reporting that Guatemala established a "special prosecutor for femicide," and "specialized courts for violence against women" in some departments, but noting "femicide remained a significant problem"); A.R. 273 (demonstrating that the Guatemalan government and local NGOs calculate high levels of femicide and violent crimes committed against women, specifically); *see also* Guatemala's Constitution of 1985 with Amendments through 1993, Art. XVIII ("The death penalty may not be imposed . . . on women."), *available at* https://www.constituteproject.org/constitution/Guatemala_1993.pdf.

Cultural and legal norms permitting widespread violence against women can also demonstrate that women are "set apart" in society and are therefore "socially distinct." *See* —, (Boston Immigration Court, June 18, 2019) (unpublished) (pointing to State Department reports documenting marginalization of and violence

against "Guatemalan women" in assessing socially distinction), Add. 23–25; —, (Denver Immigration Court, Mar. 7, 2019) (unpublished) (finding that evidence of violence towards women, strict gender roles, and gender inequality showed that "Mexican women" are a socially distinct group), Add. 35–36; —, (Arlington Immigration Court, 2018) (unpublished) (finding that "women in Honduras" was socially distinct based on reports by the State Department and United Nations bodies showing marginalization, discrimination, and pervasive violence against women, as well as impunity for perpetrators), Add. 7–9.

Femicide rates in Guatemala are among the highest in the world, and Ms. [redacted] submitted evidence from Amnesty International indicating that Guatemala systematically failed to address the issue. *See* A.R. 273–74 (Amnesty International report). Likewise, the U.S. State Department has explained that Guatemala's National Civil Police "often fail[s] to respond to requests for assistance related to domestic violence" and that "few officers receive[] training to deal with domestic violence." A.R. 251. Further, lethal acts of violence against women remain endemic in Guatemala and laws prohibiting rape and domestic violence are under-enforced and ineffective. A.R. 250–53. As Amnesty International documented, between 80% and 97% of violent crimes against women in Guatemala are unpunished, reflecting impunity. A.R. 273.

IV. OTHER SIGNATORIES TO THE REFUGEE CONVENTION AND INTERNATIONAL BODIES HAVE ALSO RECOGNIZED GENDER ALONE AS A COGNIZABLE SOCIAL GROUP

Both the *Acosta* framework and the conclusion that gender alone may define a particular social group are firmly established within the jurisprudence of other signatories to the Refugee Convention and 1967 Protocol to the Convention.[4.] The views of other signatories are directly relevant to the proper interpretation of the INA, given that "the definition of 'refugee' that Congress adopted is virtually identical to the one" in the Refugee Convention. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437 (1987) (noting that "one of Congress' primary purposes [in passing the Refugee Act of 1980] was to bring United States refugee law into conformance with the [1967 Protocol relating to the Status of Refugees]" (internal quotation marks omitted)); *see also Negusie v. Holder*, 555 U.S. 511, 537 (2009) ("When we interpret treaties, we consider the interpretations of the courts of other nations, and we should do the same when Congress asks us to interpret a statute in light of a treaty's language." (Stevens, J., concurring in part and dissenting in part)).

The Supreme Court of Canada, for example, relied upon *Acosta* in its seminal decision *Canada (Attorney General) v. Ward*, finding that particular social group

[4] The United States is a signatory to the 1967 Protocol relating to the Status of Refugees, which incorporated most of the provisions of the 1951 Convention, while removing certain temporal and geographical limitations. *See* Protocol relating to the Status of Refugees, adopted Jan. 31, 1967, entered into force Oct. 4, 1967, 606 UNTS 267; Convention relating to the Status of Refugees, adopted July 28, 1951, entered into force Apr. 22, 1954, 189 UNTS 137.

"would embrace individuals fearing persecution on such bases as gender," an "immutable characteristic." [1993] 2 S.C.R. 689, 75, 79 (Can., S.C.C.); *see also Josile v. Canada (Minister of Citizenship & Immigration)*, [2011] 382 FTR 188 (Can. FC, Jan. 17, 2011), at [10], [28]-[30] ("Haitian women"); *Kn v. Canada (Minister of Citizenship & Immigration)*, (2011) 391 FTR 108 (Can. FC, June 13, 2011), at [30] ("women in the [Democratic Republic of Congo]"), cited in James C. Hathaway & Michelle Foster, *The Law of Refugee Status* § 5.9.1 (2d ed. 2014) (collecting these and other cases). Canada also adopted gender asylum guidelines in 1993, updated in 1996, which recognized that gender is the type of innate characteristic that may define a particular social group. Immigration & Refugee Board of Canada, *Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act* (Mar. 9, 1993) (updated on Nov. 13, 1996).

The United Kingdom House of Lords similarly relied on *Acosta* to recognize "women in Pakistan" as a particular social group, observing that its conclusion was "neither novel nor heterodox," but "simply logical application of the seminal reasoning in *Acosta*." *Islam & Shah v. Sec'y of State Home Dep't*, [1999] 2 AC 629, 644–45 (U.K.); *see Fornah (FC) v. Sec'y of State for Home Dep't*, [2006] UKHL 46, para. 31 (Lord Cornhill) (identifying "women in Sierra Leone" as "a group of persons sharing a common characteristic which, without a fundamental change in

social mores is unchangeable, namely a position of social inferiority compared with men"); *see also* Immigration Appellate Authority of the United Kingdom, *Asylum Gender Guidelines* 41 (Nov. 2000) ("Particular social groups can be identified by reference to innate or unchangeable characteristics or characteristics that a woman should not be expected to change," including "gender.").

Tribunals in New Zealand and Australia have similarly noted that "it is indisputable that sex and gender can be the defining characteristic of a social group and that 'women' may be a particular social group." *Refugee Appeal No. 76044* para. 92 (NZ RSAA, 2008); *accord Minister for Immigration & Multicultural Affairs v. Khawar* (2002) 76 A.L.J.R. 667 (Aust.) (recognizing "women in Pakistan" as a cognizable social group). Australia has also adopted guidelines recognizing that "whilst being a broad category, women nonetheless have both immutable characteristics and shared common social characteristics which may make them cognizable as a group and which may attract persecution." Australian Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers* § 4.33 (July 1996).

The United Nations High Commissioner for Refugees ("UNHCR") provides further support for the view that gender alone may establish membership in a particular social group. As part of its supervisory responsibilities, UNHCR issues interpretive guidance on the provisions of the 1951 Convention and 1967 Protocol

relating to the Status of Refugees. In 2002, for example, UNHCR published gender guidelines that adopted *Acosta*'s *ejusdem generis* analysis and found that "sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics." *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*, U.N. Doc. HCR/GIP/02/01 (May 7, 2002); *see also* UNHCR, *Guidelines on International Protection: Membership of a Particular Social Group within the context of Article 1(A)(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/02 at 4 (May 7, 2002) ("[W]omen may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic.").

This UNHCR guidance constitutes "persuasive authority in interpreting the scope of refugee status under domestic asylum law." *See, e.g.*, *Cardoza-Fonseca*, 480 U.S. at 439 n.22 (noting that UNHCR "provides significant guidance" in the interpretation of the Protocol to the Refugee Convention, upon which U.S. asylum law is based); *Hernandez v. Sessions*, 884 F.3d 107, 113 (2d Cir. 2018) (Droney, J., concurring) (citing *Cardoza-Fonseca* and noting that "federal courts have often used [the UNHCR Handbook] to interpret the Protocol" to the Refugee Convention).

CONCLUSION

For the foregoing reasons, the Board thus erred in its ruling that "Guatemalan women" was not a cognizable social group and had been categorically foreclosed by *Matter of A-B-*. Therefore, this Court should correct that error, vacate the Board's decision, and affirm the cognizability of "Guatemalan women" in this case.

Dated: Oct. 9, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Sabrineh Ardalan, certify that this brief contains approximately 5,400 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6) and Cir. R. 32.1.

I certify that this brief is an amicus brief and complies with the word limit of Fed. R. App. P. 29(a) and Cir. R. 29.1, which in this case is 7,000 words.

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CERTIFICATE OF SERVICE

I, Zachary Albun, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. 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.

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