CENTER FOR
Gender & Refugee
STUDIES

Amicus Brief Filed by CGRS in *Matter of K-C-*

Overview of the Attached Brief

The attached amicus brief was filed by the Center for Gender & Refugee Studies (CGRS) to the Board of Immigration Appeals (BIA) on October 17, 2011 in the matter of *Matter of K-C-*. All identifying information has been redacted in accordance with the wishes of the applicant. The brief addresses domestic violence as a basis for asylum and the Board's authority to affirm a grant of an immigration judge without remand.

Organizational Overview

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

Technical Assistance Provided by CGRS

As part of our core programs, CGRS engages in technical assistance and country conditions research for attorneys with gender-based, LGBTI, and child asylum claims. We provide free invaluable resources: legal consultation, country conditions information, practice advisories, unpublished immigration judge and Board of Immigration Appeals decisions, sample briefs, and expert witness affidavits developed by leading authorities in their fields in collaboration with CGRS. CGRS appears as amicus counsel or co-counsel in high impact cases. **To request assistance from CGRS, please visit our website at http://cgrs.uchastings.edu/assistance/.**

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CGRS continuously updates and adds to our database of more than 7,000 case records involving gender-based, LGBT, and child asylum claims in the United States. In addition to tracking developments in individual cases, the database helps us monitor trends in refugee adjudication across the country, enabling us to hold decision makers accountable to their obligations under domestic and international law and to provide greater transparency in the asylum system. Our ability to track cases and monitor patterns informs CGRS appellate and policy advocacy, and this in turn further informs our technical assistance. **To report the outcome in gender-based, LGBT and child asylum claims, please email the Center at cgrs@uchastings.edu.**

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

In the Matter of: [redacted]	**FILE No.:** [redacted]
In Removal Proceedings	

BRIEF OF AMICUS CURIAE

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I. INTEREST OF AMICI.

Amicus Center for Gender & Refugee Studies ("CGRS"), based at the University of California, Hastings College of the Law, has a direct and serious interest in the development of immigration law and in the issues under consideration in this case. Founded in 1999, CGRS provides legal expertise and resources to attorneys representing women asylum-seekers fleeing gender-related harm. CGRS attorneys are recognized experts on asylum law in general, and women's asylum cases in particular, and have a strong interest in the development of United States jurisprudence consistent with relevant law. This case implicates matters of great consequence to *amicus*, because it involves a standard of appellate review that, if applied incorrectly, will have the undesired effect of wasting judicial resources, delaying resolution of asylum cases, and resulting in erroneous lower court decisions.

II. INTRODUCTION AND SUMMARY OF ARGUMENT.

The Board of Immigration Appeals ("BIA" or "the Board") should affirm the Immigration Judge's ("IJ") grant of asylum to K-C-. In doing so, the Board should conclude that K-C- was persecuted on account of her membership in the particular social group of "Guatemalan women" or "Guatemalan women who are unable to leave their domestic relationships." In other words, the BIA should define K-C-'s social group based on her gender, nationality, status in a domestic partnership, inability to leave her relationship, or some combination of those characteristics. This proposed formulation of her social group differs only slightly from the social groups articulated by the IJ.

Under well-settled law, the Board reviews *de novo* the formulation of K-C-'s social

group, and may affirm the grant of asylum on the basis of a formulation that varies from the group articulated by the IJ. Once the Board has articulated a social group cognizable under applicable law, it may conclude without remand that K-C- is a member of that social group because (1) all of the facts necessary for making that determination are in the record and are undisputed; and (2) K-C- properly raised the social group issue before the IJ. Accordingly, the Board *can*—and *should*—modify K-C-'s particular social group and affirm the IJ's grant of asylum without remand.

III. BACKGROUND.

The Department of Homeland Security ("DHS") commenced removal proceedings against K-C- with the service of a Notice to Appear ("NTA"), alleging that she was removable as "[a]n alien present in the United States without being admitted or paroled" under Immigration and Nationality Act ("INA") §212(a)(6)(A). Exhibit ("Exh.") 1 (*Notice to Appear*). K-C- conceded removability and applied for asylum and withholding of removal. *See* Transcript ("Tr.") at 7, 49; Exh. 5A2 (I-589 *Application for Asylum and for Withholding of Removal*). She argued that she suffered past persecution on account of her membership in the particular social group of "Guatemalan women who have been intimately involved with abusive Guatemalan male companions and are unable to leave the violent relationship." Respondent's Brief at 20; Tr. at 133; Decision and Order of the Immigration Judge ("IJ Decision") at 4. In her brief to the IJ, K-C- again argued that gender, nationality, and status in a relationship were immutable characteristics that defined her social group. *See* Respondent's Brief at 21. During oral argument, in response to a question by the IJ, Respondent's counsel further clarified that he was not

defining K-C-'s proffered social group by the harm to it, and that the group existed independent of the persecution it suffered.[1] He asserted that "a combination of characteristics," including K-C-'s gender and relationship status, made her part of a cognizable social group. *Id.* at 135.

The IJ granted K-C-'s application for asylum on the basis of her well-founded fear of persecution as a member of a particular social group. *See* IJ Decision at 8. The IJ recognized that a particular social group "'must exist independently of the persecution suffered by the applicant for asylum,'" such that the group "'existed before the persecution began.'" *Id.* at 4-5 (quoting *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003)). He further explained that a cognizable social group is "a 'group of persons all of whom share a common immutable 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.'" *Id.* at 4 (quoting *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993)).

The IJ recognized that, under existing case law, gender and "domestic status" may constitute such immutable characteristics. *Id.* at 4, 7. In particular, the IJ noted that the "record evidence . . . clearly establishes that women as a class are victims of domestic and sexual violence to a high degree in Guatemala," and highlighted a number of exhibits that discussed the prevalence of domestic violence and gender-based violence in

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[1]The IJ asked "does your group exist without being persecuted?" Tr. at 134. Respondent's counsel responded, "Yes, it does." *Id.*

Guatemala. *Id.* at 5-6. He cited to evidence in the record that Guatemalan culture "'embraces the subjugation of women and celebrates the man's right to dominate,'" and concluded that the "'superior-subordinate' position within respondent's relationship, to a great extent, is a fundamental part of Guatemalan society and culture requiring subservience and which forms the foundation upon which she suffered repeated infliction of physical and mental abuses." *Id.* at 6. In the end, he determined that respondent's "domestic status" is an "*immutable characteristic* which she shares with others similarly situated who are viewed as subordinates by Guatemalan society and which creates the context which abusive males may inflict violence upon their spouses, daughters, and girlfriends, largely with impunity." *Id.* at 7 (emphasis in original).

The IJ discussed both gender and "domestic status" as immutable characteristics, and stated in the concluding paragraph of his opinion that K-C- should be granted asylum as a member of a particular social group comprised of "women who suffer domestic violence." *Id.* at 8. The DHS appealed the IJ's decision, arguing that "[t]he respondent and the IJ essentially defined the group by the harm that the respondent fears," and that "domestic violence victims" do not constitute a cognizable social group. DHS Case Appeal Brief at 20-21. The Board sought supplemental briefing in this matter, and this *amicus* brief follows.

IV. ARGUMENT.

A. THE BOARD SHOULD AFFIRM THE IMMIGRATION JUDGE'S GRANT OF ASYLUM WITHOUT REMAND.

1. Applicable Regulations Vest The Board With *De Novo* Review Of Pure Legal Questions And Mixed Questions Of Law And Fact.

The Board "may review questions of law, discretion, and judgment and all other issues in appeal from decisions of the immigration judge de novo." 8 C.F.R. §1003.1(d)(3). However, "the Board will not engage in factfinding in the course of deciding appeals." *Id.* In other words, under applicable regulations, "IJ decisions that are purely factual in nature receive clear error review," but "[*a*]*ll other decisions* are reviewed de novo." *Huang v. Att'y Gen.*, 620 F.3d 372, 383-84 (3d Cir. 2010) (internal citations omitted) (emphasis added); *see also Yusupov v. Att'y Gen.*, 650 F.3d 968, 979 (3d Cir. 2011) ("Where the BIA reviews a mixed question of law and fact . . . now referred to as a discretionary decision, it should defer to the factual findings of the immigration judge unless clearly erroneous, but it retains independent judgment and discretion, subject to the applicable governing standards, regarding the review of pure questions of law and the application of the standard of law to those facts") (internal quotation marks omitted).

2. Articulation Of K-C-'s Particular Social Group Is A Mixed Question Of Law And Fact Reviewed *De Novo.*

The Board retains *de novo* review over the articulation of K-C-'s particular social group because the inquiry, which requires application of a legal standard to undisputed facts, is a mixed question of law and fact. In cases where the Board's overall inquiry can be divided into smaller inquiries that are either factual or legal in nature, the Board must

"break down the inquiry into parts and apply the correct standard of review to the respective components." *Kaplun v. Att'y Gen.*, 602 F.3d 260, 271 (3d Cir. 2010).

The Board's initial inquiry into "what happened" to the respondent is a factual inquiry, but subsequent inquiries involving application of law and assessment of facts within a given legal definition or framework are considered legal issues subject to *de novo* review.[2] *See Yusupov*, 650 F.3d 968 (in determining whether an asylum applicant is a danger to the U.S., the underlying circumstances are factual issues, but whether the circumstances give rise to a reasonable belief an applicant is a danger to national security is a mixed question of law and fact); *Huang*, 620 F.3d 372 (determination of what is likely to happen to petitioner upon removal is a factual question, but whether those predicted events meet the legal definition of persecution and give rise to a well-founded fear of persecution are legal issues); *Kaplun*, 602 F.3d 260 (determination of what is likely to happen to the petitioner upon removal is a factual question, but whether what is likely to happen rises to the level of torture is a legal question); *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2010) (whether a fabrication is knowing or deliberate is a factual question, but materiality of the fabrication is a mixed question of fact and law, and whether an IJ

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[2]Put another way, "[q]uestions of law . . . are those which are concerned with . . . the inquiry whether there be any such rule or standard, the determination of the exact meaning and scope of it, in the mode of its enactment, with the requirements of a written constitution." Brown, Ray A., *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899, 901 (1943). In contrast, "[t]he questions of fact in a given controversy are those questions which may be determined without reference to any rule or standard prescribed by the state—that is, without reference to law. They are those phenomena in the universe which do not depend upon organized political society." *Id.*

properly applied the regulatory framework is a question of law).

Accordingly, the Board has in the past readily modified social groups proffered on appeal without remand to the IJ to formulate the group in the first instance. For example, in *In re Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996), each party "advanced several formulations of the 'particular social group' at issue," but "urge[d] the Board to adopt only that definition of social group necessary to decide th[e] individual case." Then, without remand to the IJ, "[the Board] f[ou]nd the particular social group to be . . . young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice," and granted the applicant asylum on the record before the Board. *Id.* at 365.

The BIA's decision in *In re H-*, 21 I&N Dec. 337, 348 (BIA 1996), provides another example of its authority to articulate a proper legal standard *de novo* and apply it to undisputed facts. In *In re H-*, the IJ found that the harm the applicant suffered was not persecution on account of an enumerated ground. *Id.* at 338. The BIA reversed, holding that a particular social group could be defined by clan membership, and finding, on the basis of the undisputed facts, that the applicant had suffered past persecution on account of his clan membership. *Id.* at 343-46. The BIA remanded to the IJ for the limited purpose of determining other "factors relevant to the ultimate disposition," which included whether the presumption of a well-founded fear arising from past persecution could be rebutted. *Id.* at 349. In remanding, the BIA observed that it would have better served the interest of "fair and efficient" adjudication if all the "relevant issues" had been determined by the IJ in the first instance to "avoid the necessity for remand" once the

BIA carried out its *de novo* review. *Id.* at 348.

Federal Courts of Appeals, including the Third Circuit, are in agreement. They recognize that "[w]hether an applicant's proffered 'particular social group' is cognizable under INA §101(a)(42)(A) is a question of law, and is therefore subject to de novo review." *Gomez-Zuluga v. Att'y Gen.*, 527 F.3d 330, 339 (3d Cir. 2008); *see also Ayala v. Holder*, 640 F.3d 1095, 1096-97 (9th Cir. 2011) ("We review de novo questions of law, including whether a group constitutes a 'particular social group' under the Immigration and Nationality Act (INA)."); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1033 (8th Cir. 2008) (holding that whether a proffered social group is cognizable is a question of law subject to *de novo* review); *Elien v. Ash*croft, 364 F.3d 392, 396 (1st Cir. 2004) ("As the scope of the statutory term 'particular social group' presents a pure issue of law, we review the BIA decision *de novo*.").

Here, the Board should review the proffered social group *de novo*, as it did in Kasinga and *In re H-*, modify the applicable social group accordingly, and affirm the IJ's determination that K-C- has a well-founded fear of persecution on the basis of her membership in that particular social group, because the only inquiry that remains involves application of law to uncontested facts. As in *Kaplun*, *Huang*, and *Yusupov*, the Board's resolution of K-C-'s claim begins with a factual inquiry into what happened.[3] Then the Board must determine, as a matter of law, the existence of a cognizable social group within that factual context. *See Gomez-Zuluga*, 527 F.3d at 339. Finally, the

[3]As explained in Part IV(A)(3), *infra*, the relevant facts are undisputed in this case.

Board must determine, as a matter of law and fact, if K-C- was a member of that group, and whether she was persecuted on account of her membership in it. Accordingly, the Board retains *de novo* review over the remaining issues in this case.

3. The Board May Conclude, Without Remand, That K-C- Is Entitled To Asylum, Because The Facts Material To That Determination Are In The Record And Are Undisputed.

K-C-, *amicus* the American Immigration Lawyers' Association, and the undersigned urge the Board to conclude that she belongs to a social group defined by her gender, nationality, relationship status, inability to leave her relationship, or some combination of those characteristics. If the Board adopts such a social group formulation—or any other formulation that differs somewhat from that of the IJ[4]—it should nonetheless affirm the IJ's grant of asylum without remand because the following facts material to this determination, as found by the IJ, are both in the record and undisputed:

- K-C- is a native and citizen of Guatemala. Exh. 5A1 (*Affidavit*) at ¶1; Tr. at 60.
- While in Guatemala, K-C- was involved in a domestic relationship with L-G-. IJ Decision at 5-8; Exh. 5A1 (*Affidavit*) at ¶3; Tr. at 61.
- The relationship began in 2000 and continued until K-C- fled Guatemala in 2007. Tr. at 62; Exh. 5A1 (*Affidavit*) ¶¶12-45.

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[4]The IJ, in his conclusion, found that K-C- belonged to the social group "women who suffered domestic violence." IJ Decision at 8. Elsewhere in his opinion, as stated *supra*, the IJ found that K-C-'s gender and domestic status were immutable characteristics.

- The couple referred to each other as "husband" and "wife." Exh. 5A1 (*Affidavit*) at ¶7; Tr. at 63; *see also* IJ Decision at 1.
- "[M]any people in [their] community called [the couple] 'esposos,'" or "spouses," and individuals who submitted letters to support K-C-'s asylum claim referred to K-C- as L-G-'s "wife," and L-G- as her "husband." Exh. 5A1 (*Affidavit*) at ¶7; Exh. 5A5 (*Supporting Letter*); Exh. 5A6 (*Supporting Letter*).
- L-G- brutally beat, tortured, and raped K-C-on multiple occasions. IJ Decision at 8; Exh. 5A1 (*Affidavit*) at ¶¶12-31; Tr. at 61-78; Exh. 5A3 (*Affidavit of K-C-'s Mother*); Exh. 5A4 (*Supporting Letter*); Exh. 5A5 (*Supporting Letter*); Exh. 5A6 (*Supporting Letter*); Exh. 5B3 (*Medical Certificate*).
- K-C- repeatedly sought help from the police to end the abuse. IJ Decision at 6-7 (the record evidence "verifies that she filed repeated complaints"); Exh. 5A1 (*Affidavit*) at ¶32. On the first occasion, the police told her "to return when [she] had a visible mark." Exh. 5A1 (*Affidavit*) at ¶32; *see also* Tr. at 78. When K-C- returned to the police station with a black eye sustained from the abuse, the police told her that she "must have provoked [her abuser]." Exh. 5A1 (*Affidavit*) at ¶32; *see also* Tr. at 78. Though K-C- reported her abuser to the police on four separate occasions, the police never took action. *See* Exh. 5A1 (Affidavit) at ¶32; Tr. at 78-79.
- K-C- endured the violence because she could not leave her relationship. *See* Exh. 5A1 (*Affidavit*) ¶29; IJ Decision at 7 (finding "respondent's domestic status

to be an *immutable characteristic* which she shares with others similarly situated who are viewed as subordinates by Guatemalan society and which created the context which abusive males may inflict violence upon their spouses, daughters, and girlfriends, largely with impunity"). When K-C- attempted to leave, her abuser brandished a knife at her and told her that she "could not leave him." Exh. 5A1 (*Affidavit*) ¶29. L-G- even managed to find K-C- after she fled to a city three or four hours' drive away. *See id.* at ¶¶42-43. When he found her, he "threatened to burn down the house" where she was staying "if [she] did not come with him." *Id.*

- Gender-based violence is ubiquitous in Guatemala. IJ Decision at 5 ("The record evidence . . . clearly establishes that women as a class are victims of domestic and sexual violence to a high degree in Guatemala and that the government is woefully inadequate in protecting its female citizens from such violence"); *see also* Exh. 5A7 (*Affidavit of Norma Cruz*) at A43; Exh. 5C4 (*Guatemala, Documentation in Support of Asylum Applicants Based on Domestic Violence and Femicides*); Exh. 5C5 (*Killings of Women Rising in Guatemala*); Exh. 5C7 (*Three Thousand and Counting: A Report on Violence Against Women in Guatemala*); Exh. 5C8 (*No protection, no justice: killings of women*); Exh. 5C12 (*Hidden in Plain Sight: Violence Against Women in Mexico and Guatemala*); Exh. 5C14 (*Profiles of Femicide Cases in Guatemala*); Exh. 5C15 (*Guatemala's Epidemic of Killing*).
- In Guatemala, "[t]he root cause of the abuse [of women] stems from a culture

that embraces the subjugation of women and celebrates the man's right to dominate." Exh. 5A8 (*Affidavit of Hilda Morales Trujillo*) at A62. "Women are expected to withstand the abuse because it is assumed to be part of the culture." *Id.*

- It is "extreme[ly] difficult[]" for women to escape their abusers, for "[w]hen an abuser tracks his partner down, he is often even more enraged that she attempted to escape him, and the violence is extreme." Exh. 5A8 (*Affidavit of Hilda Morales Trujillo*) at A66.
- "[V]iolence committed against women operates on several levels: in the home by the abuser; perpetuation through societal attitudes; and an unresponsive and ineffective legal system that is unwilling to protect women." *Id.*; *see also* Exh. 5C11 (*The Myth of Machismo: An Everyday Reality for Latin American Women*) at C138 ("Violence in a Latin American woman's life is simply a part of the submissive role women are assigned in a patriarchal culture."); Exh. 5C15 (*Guatemala's Epidemic of Killing*) at C186 ("'The only explanation we can find for the use of extreme violence is as an expression of misogyny, of hate towards women.'").

The facts described above and as found by the IJ establish that K-C- is a Guatemalan woman whose domestic partner subjected her to severe violence rising to the level of persecution. *See, e.g.*, *Uwais v. Att'y Gen.*, 478 F.3d 513, 518 (2d Cir. 2007) (assault, beating, and rape can constitute past persecution); *Zubeda v. Ashcroft*, 333 F.3d 463, 473 (3d Cir. 2003) (rape and sexual violence may constitute persecution and support

a grant of asylum); *Chand v. INS*, 222 F.3d 1066, 1073-74 (9th Cir. 2000) ("[p]hysical harm has consistently been treated as persecution"). Further, they demonstrate that K-C-'s abuser did not accept that she had the right to end the relationship, and they highlight the stark lack of government protection for women, or women in domestic relationships. The facts also show that K-C-'s abuser persecuted her because of her membership in the particular social group of "Guatemalan women" or "Guatemalan women who are unable to leave their domestic relationships." The DHS has submitted no evidence in rebuttal. Accordingly, K-C- is eligible for asylum under the INA as an applicant who is unable or unwilling to return to her home country "'because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.'"[5] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987) (quoting INA §101(a)(42), 8 U.S.C. §1101(a)(42)).

Remand is not necessary where, as here, the Board need not engage in fact-finding to determine that an applicant is entitled to asylum. Indeed, the Board routinely affirms an IJ's "ultimate conclusions" without adopting the IJ's legal reasoning and without further remand. *See, e.g.*, *Dale v. Holder*, 610 F.3d 294 (5th Cir. 2010) (reviewing a case where the Board affirmed the IJ's conclusion that the respondent was removable, but based its holding on a different legal argument than relied on by the IJ); *Gemechu v. Ashcroft*, 387 F.3d 944 (8th Cir. 2004) ("The BIA affirmed the IJ's credibility finding

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[5]*Amicus* does not discuss K-C-'s eligibility for asylum in great detail and directs the Board to the Respondent's briefing in this case for a more in-depth discussion.

and ultimate conclusion that Gemechu was not eligible for asylum, but declined to adopt the IJ's findings on timeliness").

The Board has explained that deciding, without remand, that an individual is entitled to asylum furthers the goals of judicial efficiency, because "[i]n cases where cognizable issues of past persecution arise, in the interest of a fair and efficient adjudication of the case, the parties should ordinarily present sufficient evidence to allow the Immigration Judge to consider and resolve all relevant issues and avoid the necessity for remand if the Board ultimately determines that the applicant has shown past persecution." *In re H-*, 21 I&N Dec. at 348; *see also* 8 C.F.R. §1003.1(e)(4) (allowing the Board in some circumstances to summarily affirm a decision of an IJ or the U.S. Citizenship and Immigration Service, without opinion, if the result reached was correct and errors in the decision were harmless or nonmaterial).

Additionally, where a Court of Appeals remands a case to the Board for reconsideration of undisputed facts under a new legal standard, the Board may decide the case without further remand. *See In re Smriko*, 22 I&N Dec. 836, 836-37 (BIA 2005) (upon Third Circuit remand, the Board addressed "whether the respondent lost his 'refugee status' when he was admitted as a lawful permanent resident" without remand to the IJ); *Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008) (upon Third Circuit remand, and without remand to the IJ, the Board addressed whether it had authority under regulations to reverse an IJ's findings below). The Board has repeatedly exercised its authority to apply law to facts where the factual record is complete and undisputed. It should do so again here, where no questions of fact relevant to K-C-'s eligibility for asylum remain.

4. The Board's Power To Grant Asylum Without Remand Is Consistent With Well-Settled Law Allowing Appellate Bodies To Affirm The Decision Of A Fact-Finder For Any Reason Supported By The Record.

The Board's authority to reformulate K-C-'s social group and affirm the IJ's grant of asylum is consistent with the practice of other appellate bodies across many areas of the law that have consistently affirmed decisions reached through faulty legal analysis and clarified the correct legal analysis.[6] *See, e.g.*, *In re Richard Rogness and Presto-X Company*, 7 E.A.D. 235, 1997 WL 406529, at *9 (E.P.A. 1997) (affirming, on a different legal basis, the final decision of the Administrative Law Judge that the appellant used a registered pesticide in a manner inconsistent with its labeling); *In re Applications of Ft. Collins Telecasters*, 60 Rad. Reg. 2d (P&F) 1401, 1986 WL 292154, at *2 (F.C.C. 1986) (affirming, on different grounds, an Administrative Law Judge's decision that awarding an applicant the right to construct a new commercial television broadcast station would be in the public's best interest); *Newgard Indus., Inc., Appellant Re: ORO Manufacturing, Co.*, SBA No. 2664, 1987 WL 93625 (S.B.A. 1987) (affirming, on alternative legal grounds, decision of a Small Business Administration Regional Office to award a procurement contract to a bidder).

Similarly, Courts of Appeals and other adjudicatory bodies have affirmed decisions of fact-finders below as long as the judgment is supported by the record. *See, e.g.*,

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[6] *Amicus* does not argue that the BIA has the power to announce a different standard than the one the IJ applied and then *reverse* an IJ's grant of asylum. Rather, *amicus* asserts—in accordance with well-established precedent across a number of fields—that the BIA can *affirm a grant* of asylum on any basis supported by the record.

Helvering v. Gowran, 302 U.S. 238, 245-46 (1937) ("In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason") (internal citations omitted); *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) ("we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason") (internal citations and quotations omitted); *Storey v. Burns Intern. Sec. Servs.*, 390 F.3d 760, 761 n.1 (3d Cir. 2004) (affirming lower court's decision to dismiss appellant's Title VII complaint, but on the ground that he failed to state a claim upon which relief can be granted rather than finding, as the District Court did, that appellant's expression of his belief was not essential to maintaining a sincerely held religious belief); *In re Alam*, 359 B.R. 142, 151 (6th Cir. B.A.P. 2006) (the Bankruptcy Appellate Panel "may affirm the decision of the bankruptcy court if it is correct for any reason, including one not considered by the bankruptcy court."); *In re Shubov*, 253 B.R. 540, 547 (9th Cir. B.A.P. 2000) (Bankruptcy Appellate Panel can affirm sanctions order of bankruptcy court for any reason supported by the record).

The Board should not stray from the long-established appellate practice of affirming decisions of fact-finders on any ground supported by the record where, as here, all of the relevant facts are undisputed. "The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate." *Chenery*, 318 U.S. at 88. Indeed, the

Board itself has explicitly acknowledged, in the asylum context, that the interests of fairness and efficiency are served by avoiding a remand when the facts are undisputed. *In re H-*, 21 I&N Dec. at 348.

The inefficiencies that result from an unnecessary remand would be especially detrimental to asylum seekers such as K-C-. Remand would significantly delay the resolution of meritorious asylum claims and prevent applicants from reuniting with their families through the filing of Forms I-730 (Refugee/Asylee Relative Petition).[7] The delay in the processing of asylum claims could also prevent certain applicants from obtaining work authorization. *See* 8 C.F.R. §208.7(a)(1) ("An applicant whose asylum application has been denied by an asylum officer or by an immigration judge within the 150-day period shall not be eligible to apply for employment authorization"). Finally, CGRS's tracking of cases indicates that the lack of clear precedent regarding domestic violence-based asylum claims has resulted in contradictory and arbitrary outcomes and a failure of protection.[8] Accordingly, the Board should rearticulate the particular social group in this case and affirm the IJ's grant of asylum.

B. K-C- Properly Raised The Particular Social Group Issue Below.

The Board also should conclude that K-C- belongs to a social group defined by

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[7]The delay in processing I-730s would be especially detrimental in this case because L-G-, the persecutor, continues to threaten K-C-'s daughter, who still lives in Guatemala. *See* Exh. 5A3 (*Affidavit of K-C-'s Mother*) at ¶21.

[8]Musalo, Karen, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claims*, 29 REFUGEE SURV. Q. 46, at 62 (2010).

gender, nationality, status in a domestic partnership, and inability to leave the relationship, or some combination of those factors, because K-C- properly raised the social group issue before the IJ. Only when a respondent altogether fails to raise a claim or lodge an objection before the IJ can the Board refuse to consider the argument on appeal. *See Matter of J-Y-C-*, 24 I&N Dec. 260, 261 n.1 (BIA 2007) (finding waiver of forced sterilization asylum claim on appeal where the only asylum claim considered below was based on applicant's religious persecution as a Christian); *Matter of R-S-H-*, 23 I&N Dec. 629, 638 (BIA 2003) (failure to object to presence of DOJ attorneys at hearing waived issue on appeal); *Joseph v. Att'y Gen.*, 465 F.3d 123 (3d Cir. 2006) (an applicant "need not do much to alert the Board that he is raising an issue"). Courts

> will not ignore the ultimate objective of [an] appeal . . . by parsing [an appellant's] brief's language in a hyper technical manner. Just as deportation statutes must be construed in favor of the alien because deportation is a harsh measure . . . all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country, the briefs of aliens seeking refugee status must be reviewed with lenity and any ambiguities must be resolved in their favor.

Mamouzian v. Ashcroft, 390 F.3d 1129, 1136 (9th Cir. 2004) (internal quotations and citations omitted); *see also Haxhiu v. Mukasey*, 519 F.3d 685, 691-92 (7th Cir. 2008) ("Because we can identify an articulable basis for error in his brief, we conclude that Haxhiu has not waived the argument that the Albanian government bore responsibility for his treatment. Even if waiver were found in this case, such a conclusion would work a manifest injustice given Haxhiu's claim that he may be assassinated upon return to Albania, a claim that the IJ found credible. We may review issues not adequately briefed

in this court if failure to do so would result in manifest injustice").

Manani v. Filip, 552 F.3d 894 (8th Cir. 2009), is instructive. There, the respondent had proffered the social group of "widowed Mkisii women subjected to 'wife inheritance'" during proceedings before the IJ. *Manani*, 552 F.3d at 897. On appeal to the BIA, however, she characterized the relevant social group as "Kenyan widows opposed to wife inheritance and to the performance of FGM on her daughters." *Id.* at 898-99. Despite the fact that the applicant proffered a new social group based on her opposition to FGM, the Board nonetheless considered, and decided, the issue of future persecution based on her membership in that newly-formulated social group. *See id.* at 899.

Here, K-C- properly raised an asylum claim below based on her membership in the particular social group of "Guatemalan women who have been intimately involved with abusive Guatemalan male companions and are unable to leave the violent relationship." Respondent's Brief at 20; Tr. at 133; IJ Decision at 4. She articulated a particular social group that was based on her gender and her involvement in a relationship that she could not leave, because neither her abuser nor Guatemalan society recognized her right to terminate it, and she asserted that she faces significant danger if removed. As in *Manani*, the same essential elements of the social group articulated by the respondent below are now proffered on appeal. Accordingly, it would be manifestly unfair for the Board to refuse to consider slightly altered versions of that proposed social group. *See Mamouzian*, 390 F.3d at 1136; *Haxhiu*, 519 F.3d at 691-92. The Board therefore should consider whether K-C- is a member of the social group "Guatemalan women" or

"Guatemalan women who are unable to leave their relationships," or a similar social group articulation as urged by *amicus*.

V. CONCLUSION.

The Board should affirm the IJ's grant of asylum on the basis that K-C- was persecuted on account of her membership in a particular social group defined by her gender, nationality, status in a domestic partnership, inability to leave her relationship, or some combination of those characteristics. To the extent necessary, the Board should modify the particular social group found by the IJ (Guatemalan "women who suffer domestic violence"), and affirm the IJ's grant of asylum without remand, because (1) all facts material to the re-formulation of K-C-'s social group are undisputed, and the only issues that remain are issues over which the Board retains *de novo* review; and (2) K-C- properly raised the particular social group issue below.

DATED: October 17, 2011.

Respectfully submitted,

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By: _____
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PROOF OF SERVICE

I, Bonnie Hastings, declare:

I am a resident of the State of California and over the age of eighteen years and not a party to the within-entitled action; my business address is Three Embarcadero Center, Seventh Floor, San Francisco, California 94111-4024. On October 17, 2011, I served the following document(s) described as **BRIEF *AMICUS CURIAE***:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California on October 17, 2011.

Bonnie Hastings