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

In the Matter of:	)	
Lesly Yajayra PERDOMO	)	File No.: **A077-845-685**
In Removal Proceedings	)	

REQUEST TO APPEAR AS *AMICUS CURIAE*

AND

BRIEF OF THE NATIONAL IMMIGRANT JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

REQUEST TO APPEAR AS *AMICUS CURIAE*

The National Immigrant Justice Center ("NIJC") hereby requests permission from the Board of Immigration Appeals ("Board" or "BIA") to appear as *amicus curiae* in the above-captioned matter. The Board may grant permission to *amicus curiae* to appear, on a case-by-case basis, if the public interest will be served thereby. 8 C.F.R. § 1292.1(d).

NIJC, a program of the Heartland Alliance for Human Needs and Human Rights, is a Chicago-based not-for-profit organization that provides legal representation and consultation to immigrants, refugees and asylum-seekers of low-income backgrounds. Each year, NIJC represents hundreds of asylum-seekers before the immigration courts, BIA, the Courts of Appeals and the Supreme Court of the United States through its legal staff and a network of over 1000 *pro bono* attorneys.

Because NIJC represents a large number of asylum-seekers, it has a weighty interest in rational, consistent and just decision-making by the Executive Office for Immigration Review. In particular, NIJC frequently provides representation to individuals seeking protection based on their membership in a particular social group due to gender-based persecution. Agency precedent on this issue will impact many of the clients NIJC serves. Because of NIJC's work in this area, NIJC has subject matter expertise concerning social group and nexus issues in asylum that it believes can assist the Board in its consideration of the present appeal, thereby serving the public interest.

NIJC therefore respectfully asks for leave to appear as *amicus curiae* and file the following brief.

NOTICE OF REQUEST TO APPEAR AS *AMICUS CURIAE* IN SIMILAR CASE CURRENTLY PENDING BEFORE THE BOARD

NIJC anticipates submitting a request to appear as *amicus curiae* in another matter currently pending before the Board. That case is *Catalina Luisa Rodriguez-Perez,* A088-135-036 (BIA January 28, 2010), which was remanded to the Board by the Court of Appeals for the Eighth Circuit. Because the present case and *Catalina Luisa Rodriguez-Perez* raise similar issues regarding defining gender as a particular social group and recognition of type of harm as indicative of nexus, Amicus urges the Board to consider these cases in concert. So doing will promote consistent decision-making by the agency.

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SUMMARY OF ARGUMENT

Amicus writes in support of Respondent's position in this case to address two points: (1) defining "women in Guatemala" as a particular social group; and (2) the appropriateness of considering the type and context of harm feared by an asylum-seeker as indicative of nexus between the harm and protected ground.

In its decision dismissing Respondent's appeal of the immigration judge's denial of her asylum claim, the Board rejected Respondent's claim because her proposed social group of "all women in Guatemala" was purportedly too "broad" and a "mere demographic division." This reasoning contravenes the Board's precedential decision in *Matter of Acosta,* 19 I&N Dec. 211 (BIA 1985), as the Ninth Circuit discussed in its decision remanding this case. *Perdomo v. Holder,* 611 F.3d 662 (9th Cir. 2010). Rejecting social group definitions due to the breadth of the group is inconsistent with the other protected grounds for asylum (such as race, religion, nationality, and political opinion) which are determined by the shared immutable trait and not limited by number. Moreover, finding a proposed social group fails on account of being too large makes moot other elements of asylum; leaving portions of the refugee definition with no work to do. A successful claim for asylum requires not only that an applicant establish classification under one of the five protected grounds, but also that she posses a well founded fear of persecution, that the persecution is perpetrated by the government or an entity the government is unwilling or unable to control, that the persecution is on account of a protected ground, that the applicant merits a favorable exercise of

discretion and that none of the statutory bars to asylum apply. *See* INA §§ 101(a)(42)(A), 208; 8 C.F.R. § 208. Amicus urges the Board to apply the law as clearly articulated in *Acosta* and recognize "women in Guatemala" as constituting a particular social group for purposes of asylum.

The Board should also consider how the type of harm Respondent fears, coupled with the evidence of widespread, systemic violence against women in Guatemala, can support her contention that the persecution she faces will be on account of her gender. Just as women from particular societies where female genital mutilation (FGM) is widespread can establish that they would face FGM because of their gender, women from societies where sexual violence against women is a documented, systemic type of harm can establish they face persecution because of their gender.

Amicus urges the Board to honor and affirm the rule that the type of harm feared by a respondent coupled with country conditions can constitute circumstantial evidence of a persecutor's reasons for harming a respondent on account of a protected ground. The Board has already applied such a rule in claims involving fears of FGM in societies where FGM is a systemic practice. As such, the rule Amicus urges be applied here is not unprecedented. Amicus notes that simply showing a protected ground and meeting the nexus requirement does not automatically entitle an applicant to asylum, as the remaining asylum elements must also be satisfied. On this point, Amicus suggests that the proper course is for the Board to remand this case to the immigration judge for further fact-finding on circumstantial evidence of persecution of women in Guatemala. 8 C.F.R. § 1003.10.

ARGUMENT

I. Gender Constitutes a Particular Social Group in the Refugee Definition

The Board's decision in Respondent's case rejected the proposed social group of "all women in Guatemala" finding the group is too broad and a mere demographic division. As addressed by the Ninth Circuit and discussed below, this position is not supported by law. *Perdomo v. Holder,* 611 F.3d at 662. The Board should make a finding that "Guatemalan women" constitutes a particular social group for purposes of asylum.

a. *Matter of Acosta* is the Starting Point for Particular Social Group Analysis

To qualify for asylum, an applicant must meet the multi-pronged definition of a refugee. INA § 101(a)(42)(A). Meeting only one of the multiple prongs does not render one a refugee. *See e.g., Guillen-Hernandez v. Holder*, 592 F.3d 883, 887-88 (8th Cir. 2010) (dismissing Respondent's claim even accepting *arguendo* the proposed social group, one of the required prongs, for failing to meet the "on account of" prong); *see also Matter of Acosta*, 19 I&N Dec. at 219, 236 (noting that "[8 U.S.C. § 1101(a)(42)(A)] creates four separate elements that must be satisfied before an alien qualifies as a refugee" and finding that the applicant did not qualify for asylum because he failed to show "three of the four elements in the statutory definition of a refugee.").

Among the criteria an applicant must satisfy in order to be considered a refugee is that of possessing a protected characteristic. To establish eligibility for asylum, one must demonstrate persecution on account of "race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42)(A).

The Board has long recognized gender as a particular social group. *Matter of Acosta,* 19 I&N Dec. at 232.[1] In *Acosta,* the Board established a rule for determining whether an asylum applicant has demonstrated membership in a particular social group. Relying on the doctrine of *ejusdem generis*, "of the same kind," the Board construed the term in comparison to the other grounds for protection within the refugee definition (i.e. race, religion, nationality and political opinion). The Board concluded that the commonality shared by all five protected grounds is the fact that they encompass innate characteristics (like race and nationality) or characteristics one should not be required to change (like religion or political opinion). *Acosta* at 233. To be a protected ground, social group membership can be based either on a shared characteristic members cannot change (like gender or sexual orientation) or a characteristic they should not be required to change (like being an uncircumcised female). See *id*. (listing gender as an immutable characteristic); *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990) (recognizing homosexuality as an immutable characteristic); *Matter of Kasinga*, 21 I&N Dec. 357, 366 (BIA 1996) (recognizing the status of being an uncircumcised woman as a characteristic one should not be required to change).

Federal courts of appeals have endorsed the *Acosta* standard for discerning particular social groups as a valid interpretation of the statute. The *Acosta* test - or a

[1] The U.S. refugee definition mirrors that contained in the 1967 United Nations Protocol Relating to the Status of Refugees (1967 UN Refugee Protocol), Jan. 31, 1967, 19 U.S.T. 6223 (Nov. 1, 1968 date in force); *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the [1967 UN Refugee Protocol]… to which the United States acceded in 1968.")

variation of it - has governed the analysis of social group claims for decades. [2] *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005); *Castellano-Chacon v. INS*, 341 F.3d 533, 546-48 (6th Cir. 2003); *Lwin v. INS*, 144 F.3d 505, 511 (7th Cir. 1998); *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993) (Alito, J.); *Alvarez-Flores v. INS*, 909 F.2d 1, 7 (1st Cir. 1990); *see also Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994) (citing with approval the *Acosta* formulation).

b. Under *Acosta*, "Women in Guatemala" Constitutes a Particular Social Group

In *Acosta*, the Board listed gender as a paradigmatic example of an innate characteristic that would qualify as a "particular social group." *Acosta* at 233. Subsequently, various courts of appeals that have examined gender-based persecution claims have likewise either implicitly or explicitly recognized the immutable nature of gender in approving claims based on membership in a particular social group. *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007); *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005); *Niang* at 1199.[3]

The Court of Appeals for the Ninth Circuit remanded the present case for the Board to determine in the first instance whether gender qualifies as a particular social

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[2] The Board recently expanded upon *Acosta* to require that in addition to possessing an immutable characteristic, or a characteristic that one cannot or should not be required to change, a particular social group must also demonstrate "social visibility" and "particularity." *Matter of S-E-G-*, 24 I&N Dec. 579, 582-88 (BIA 2008.) (The Board had previously incorporated these two factors into the particular social group analysis only in instances when a proposed social group did *not* meet the *Acosta* formulation, *Matter of C-A-*, 23 I & N Dec. 951 (BIA 2006).) The *S-E-G-* formulation is controversial and has been rejected by some courts, *see e.g., Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009). Even assuming the applicability of the social visibility and particularity tests in this case, gender would nonetheless constitute a particular social group.

[3] Courts that have rejected social groups based on gender have done so by doing what Amicus urges the Board not to do here: defining the social group in relation to severity of persecution. *See Safaie v. INS*, 25 F.3d 636 (8th Cir. 1994).

group. *Perdomo v. Holder,* 611 F.3d at 669. The Ninth Circuit strongly suggested that based on Board and Ninth Circuit precedent, "women in Guatemala" does indeed constitute a particular social group for asylum purposes. In an earlier decision, the Ninth Circuit opined, "[a]lthough we have not previously expressly recognized females as a social group…the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application of our law." *Mohammed v. Gonzales*, 400 F.3d at 797.

In *Niang v. Gonzales*, the Tenth Circuit applied the *Acosta* test to conclude that "the female members of a tribe would be a social group. Both gender and tribal membership are immutable characteristics…[i]ndeed Acosta itself identified sex and kinship ties as characteristics that can define a social group." *Niang* at 1199 (*citing Acosta* at 233). Similarly, the Court of Appeals for the Eighth Circuit found that "Somali women" constitutes a particular social group, acknowledging the "immutable trait of being female." *Hassan v. Gonzales*, 484 F.3d at 518.

The Court of Appeals for the Third Circuit addressed gender as a social group in *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (Alito, J.). In that case, the Court held that gender was a cognizable social group. However, the asylum seeker was ultimately denied asylum for failing to meet the separate asylum element requiring nexus between the persecution and the protected ground.

> [T]he Board specifically mentioned "sex" as an innate characteristic that could link the members of a "particular social group." Thus, to the extent that the Respondent in this case suggests that she would be persecuted or has a well-founded fear that she would be persecuted in Iran simply because she is a woman, she has satisfied

> the first of the three elements that we have noted. She has not, however, satisfied the third element; that is, she has not shown that she would suffer or that she has a well-founded fear of suffering "persecution" based solely on her gender.

Id. at 1240.

The notion of gender as a particular social group also finds support from tribunals in Canada, Australia and the United Kingdom. [4] The Canadian Immigration and Refugee Board has recognized gender as a social group since 1993. Its guidelines acknowledge, "There is increasing international support for the application of the particular social group ground to the claims of women who allege a fear of persecution solely by reason of their gender." *See*, Canadian Immigration and Refugee Board, Guideline 4: Women Refugee Claimants Fearing Gender Related Persecution, available at:

http://www.irbisr.gc.ca/Eng/brdcom/references/pol/guidir/Pages/women.aspx#AII (last accessed May 14, 2011).

c. There is No Requirement That Social Groups Be Narrowly Defined

There is no requirement in INA § 101(a)(42)(A) that a particular social group be narrowly defined.[5] *Acosta*'s reliance on the principle of *ejusdem generis* shows why the

[4] *See Minister for Immigration & Multicultural Affairs v. Khawar* (2002) 76 A.L.J.R. 667; *Higbogun v. Canada*, [2010] F.C. 445 (describing Gender Guidelines); *Islam v. Sec'y of State for the Home Dep't*, 2 All E.R. 546 (1999).

[5] Nor is there anything in international treaties recognized as the basis of United States asylum law, or in the history of their negotiations that supports a requirement that a particular social group be defined narrowly. *See* 1951 Convention relating to the Status of Refugees, July 28, 1951, 10 U.S.T. 6259, 189 U.N.T.S. 150 (1951 Refugee Convention); United Nations High Commissioner for Refugees (UNHCR) *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1992). As the Supreme Court has noted, it is indeed appropriate to consider international law in construing the asylum statute, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 fn. 22 (1987) (stating that the UNHCR Handbook provides instructive

breadth of a group is not an obstacle to a social group definition. Moreover, "fears of 'opening the floodgates'…apply equally to other grounds – especially race and nationality, which by definition encompass numerically large groups." Deborah E. Anker, *Membership in a Particular Social Group: Developments in U.S. Law*, 1566 PLI/Corp 195 (2006); *see also* Deborah E. Anker, *Law Of Asylum In The United States*, §5:42 et seq, §5:47-55 (2011 ed.). Indeed, if breadth were a disqualifier, those persecuted on account of political opinion would be ineligible for asylum in situations where a dictatorial regime oppresses the majority, such as in Poland under the communist regime. Such a result would be illogical.

The Board articulated this point in *Matter of H-*, a case involving clan-based persecution in Somalia. 21 I&N Dec. 337, 343 – 44 (BIA 1996). In that case, the Board observed, "[T]he fact that almost all Somalis can claim clan membership and that interclan conflict is prevalent should not create undue concern that virtually all Somalis would qualify for refugee status, as an applicant must establish he is being persecuted on account of that membership. *Id*. This guidance comports with *Cardoza-Fonseca*, which noted, "Congress has assigned to the Attorney General and his delegates the task of making these hard *individualized* decisions; although Congress could have crafted a narrower definition, it chose to authorize the Attorney General to determine which, if

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guidance on claims for protection in accordance with the United Nations Protocol Relating to the Status of Refugees, "which provided the motivation for the enactment of the Refugee Act of 1980.")

any, eligible refugees should be denied asylum." *INS v. Cardoza-Fonseca*, 480 US 421, 444-45 (1987)(emphasis added).[6]

The fact that a particular social group may be broad says little about the number of people who might ultimately qualify for asylum under that definition because the refugee definition and other statutory and regulatory provisions include other requirements which filter who can ultimately receive protection in the United States. [7] Most significantly, even where a claimant is a member of a cognizable social group, the applicant must still show she would be persecuted on account of that membership, in addition to establishing the other asylum elements, to receive asylum. In *Niang v. Gonzales*, the Tenth Circuit explained why fears of over breadth in the gender context were misplaced in light of the requirement of a nexus showing:

> There may be understandable concern in using gender as a group-defining characteristic. One may be reluctant to permit, for example, half a nation's residents to obtain asylum on the ground that women are persecuted there. *See*

[6] As noted by the Department of Homeland Security in previous briefing before the Board, in the years following Canada's recognition of gender-based asylum claims, that country did not experience an increase in gender-based asylum claims. *See* David A. Martin, *Department of Homeland Security's Supplemental Brief*, unknown A number, 13 n 10, April 13, 2009. Moreover, The United States has not experienced a significant increase in asylum claims based on FGM despite recognizing social groups based on the status of being an uncircumcised woman since 1999. See Tahirih Justice Center, *Precarious Protection: How Unsettled Policy and Current Laws Harm Women and Girls Fleeing Persecution* (2009) at 42 - 43.

[7] For example, a grant of asylum is at the discretion of the Attorney General. *See* INA § 208(b)(1)(A); *INS v. Stevic*, 467 U.S. 407, 423 (1984); *INS v. Cardoza-Fonseca*, 480 U.S. at 441; *see also Benitez-Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009). For applicants who have not suffered persecution in the past but rather base their claims on a fear of future persecution, the regulations require that the applicant prove that it would not be reasonable for her to relocate in the country of feared persecution, unless the persecution is by the government or government-sponsored. *See* 8 C.F.R. § 208.13(b)(3)(i). Even where an applicant triggers a presumption of future persecution based on past persecution suffered, the presumption may be overcome by the government. *See* 8 C.F.R. § 208.13(b)(3)(ii). Finally, the statute bars individuals from asylum and withholding of removal based on criminal and national security grounds. INA § 208(b)(2)(A); INA § 241(b)(3)(B).

> *Safaie,* 25 F.3d at 640 (rejecting claim that "Iranian women, by virtue of their innate characteristic (their sex) and the harsh restrictions placed upon them, are a particular social group"). *Cf. Gomez v. INS,* 947 F.2d 660, 663-64 (2d Cir.1991) (rejecting claim that "women who have been previously battered and raped by Salvadoran guerillas" are a particular social group). But the focus with respect to such 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 that one could say that they are persecuted "on account of" their membership. 8 U.S.C. § 1101(a)42(A). It may well be that only certain women-say, those who protest inequities-suffer harm severe enough to be considered persecution.

Niang v. Gonzales, 422 F.3d at 1199-1200. In the Ninth Circuit's consideration of this case, the Court similarly found that "the size and breadth of a group alone does not preclude a group from qualifying as such a social group." *Perdomo v. Holder* at 669 (*citing Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996)); *see also Benitez-Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009). The Eighth Circuit has also found concerns over the potential size of a group irrelevant to the particular social group determination. *Malonga v. Mukasey*, 546 F.3d 546, 553-54 (8th Cir. 2008).

Board and federal courts of appeals precedent require a finding in this case that gender may constitute a particular social group. Additionally, floodgates concerns are not a legally sound reason to strike down gender as a social group. For these reasons, the Board should hold that gender is an immutable characteristic that may constitute the basis of a particular social group.

II. The Type of Harm Respondent Fears, Coupled with Country Condition Documentation, is Circumstantial Evidence of Nexus

The Ninth Circuit remanded this case, in part, for consideration of whether Respondent has demonstrated a fear of persecution "on account of" her membership in

the particular social group of all women in Guatemala. *Perdomo* at 9936. This is a separate question from whether her proposed social group is viable. To resolve this aspect of the case, the Board should remand this matter for additional fact finding on the question of nexus between Respondent's particular social group and the harm she fears. On remand, the immigration judge should be instructed to assess the extent to which the nature of the persecution Respondent fears, considered in conjunction with Guatemalan country condition information, amounts to circumstantial evidence of nexus.[8]

a. Like FGM, Rape and Other Gender Specific Violence can be Indicative of the Reason Behind the Persecution

In the arena of asylum law, it is not uncommon for the nature of the persecution itself to speak to the reason behind the harm and reveal nexus. For example, in *Matter of Kasinga*, the Board recognized and cited to evidence that FGM "has been used to control women's sexuality," and is a form of "sexual oppression that is based on the manipulation of women's sexuality in order to assure male dominance and exploitation." 21 I&N Dec. at 366 (internal quotations and citations omitted). The Board observed FGM "is practiced, at least in some significant part, to overcome sexual characteristics of young women…" *Id*. at 367. In light of these understandings, to establish nexus in an FGM case, one need not establish that the entity threatening to

[8] Evidence of widespread violence against women in Guatemala is relevant to Respondent's claim, but only in proving nexus, and the other asylum requirements. Such evidence is not pertinent to the inquiry into whether Respondent has established membership in a particular social group. It is not - and should not be - the rule of this Board that a proposed social group is only cognizable as a social group if members can prove that they would in fact be persecuted. *See Catalina Luisa Rodriguez-Perez*, A088-135-036 (BIA January 28, 2010).

perform FGM verbalized a desire to overcome the victim's sexual characteristics; it is implicit in the act.

Like FGM, rape, sexual assault and femicide are types of harm inflicted on women and used to demonstrate and assert power over them. Rape, in particular, has been described as a tool of gender violence. *See* Phyllis Coven, Office of International Affairs, U.S. Dep't of Justice, Considerations for Asylum Officers Adjudicating Asylum Claims From Women, at 9 (May 26, 1995) (describing rape as one of several kinds of harm "that are unique to or more commonly befall women"); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076 (9th Cir. 2004) (asserting that "[r]ape is . . . about power and control") (internal citation omitted); *Angoucheva v. INS*, 106 F.3d 781, 793 n.2 (7th Cir. 1997) (Rovner, J., concurring) (stating that "[r]ape and sexual assault are generally understood today . . . as acts of violent aggression that stem from the perpetrator's power over and desire to harm his victim.").

Respondent fears the type of harm commonly perpetrated against women in Guatemala precisely because they are women in Guatemala. To the extent the record does not clearly establish the specific harm the respondent fears in Guatemala or the likelihood that a future persecutor will inflict this harm on the respondent, Amicus encourages the Board to remand Respondent's case to the immigration court for further fact finding. 8 C.F.R. § 1003.10. If Respondent establishes a reasonable possibility that she will be subjected to gender violence, such as rape, sexual assault, or femicide in Guatemala, the adjudicator should consider the type of harm likely to befall Respondent as evidence of the persecutor's reason for inflicting harm.

b. Country Condition Evidence Provides Context in Discerning a Persecutor's Reason for Harm under *Elias-Zacarias*

Elias-Zacarias established the bedrock principal that the persecutor's reason for inflicting harm may be established through direct or circumstantial evidence. *INS v. Elias-Zacarias*, 502 U.S. 478 at 483 (1992). Persecutors rarely tell their victims the precise reason for the abuse and the law does not require it. *Id*. Rather, adjudicators must analyze the context of the abuse for evidence of the reasons behind it.

The Board recently restated the importance of drawing inferences and conclusions from evidence - including circumstantial evidence - in the asylum analysis. *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011). In *Matter of D-R-* the Board said:

> [A]n inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact that is known to exist. An inference is not impermissible as long as it is supported by record facts, or even a single fact, viewed in the light of common sense and ordinary experience. Drawing inferences from direct and circumstantial evidence is a routine and necessary task of any factfinder, and in the immigration context, the IJ is the factfinder.

Id. (internal citations and quotation marks omitted). Drawing an inference as to a persecutor's reason for inflicting harm is appropriate in cases where county condition evidence points to both the type of harm an asylum seeker is likely to face and the reason for that harm.

In *Matter of S-P-*, the Board addressed the scenario in which a persecutor's reason is not revealed through direct evidence but nonetheless may be ascertained through circumstantial evidence. 21 I&N Dec. 486 (BIA 1996). The Board stated, "[A]n unprovoked attack by unknown assailants may or may not have been for reasons

protected by the Act. Without some evidence, either direct or circumstantial, of the reasons for the attack, the applicant will fail to prove eligibility for asylum." *Id*. at 494. Of course if there is no direct or circumstantial evidence of the persecutor's reasons, the asylum claim fails. But when indicators of the reasons are present, they must be taken into account. Where the record presents evidence that a certain class of people is targeted for persecution based on a shared characteristic, the persecutor need not explicitly articulate the reason behind the persecution.

Where adjudicators have failed to consider the context of persecution when conducting a nexus analysis, the circuit courts of appeals have found legal error and cause for remand. In *Ndonyi v. Mukasey*, the Seventh Circuit vacated the removal order of an asylum-seeker after finding the immigration judge and the Board "utterly fail[ed] to consider the context of [the asylum-seeker's] arrest." 541 F.3d 702, 711 (7th Cir. 2008); *see also De Brenner v. Ashcroft*, 388 F.3d 629, 638 (8th Cir. 2004) (remanding the case where the Board's "decision to isolate the Shining Path's extortionate demands and threats from the balance of the evidence . . . led to the insupportable conclusion that the threats were non-political demands for financial and material support."); *Osorio v. INS*, 18 F.3d 1017, 1029-30 (2d Cir. 1994) (reversing the Board's decision that persecution was not on account of a political opinion where the Board "ignored the political context of the dispute" and showed "a complete lack of understanding of the political dynamics" in the country).

In the instant case, the Board must examine the harm Respondent fears within the context of the conditions in Guatemala. The torture and killing of women in

Guatemala does not occur in a vacuum. In evaluating the evidence to determine whether Respondent has established that she will be persecuted on account of her gender, the Board should consider whether the country condition evidence in the record constitutes circumstantial evidence that her persecutors will be motivated to harm her because of her gender. To the extent that the record does not contain sufficient information regarding conditions for women in Guatemala, the Board should remand this case for further fact finding.

CONCLUSION

For the foregoing reasons, Amicus respectfully urges the Board to (1) hold that the particular social group of women in Guatemala is cognizable under the law; and (2) affirm the rule that the type of harm endured or feared by a respondent coupled with country conditions can constitute circumstantial evidence of a persecutor's reasons for harming a respondent on account of a protected ground and remand this case to apply that rule accordingly.

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2011, I served the foregoing Brief for *Amicus Curiae* in Support of the Respondent, Lesly Yajaya Perdomo, by mailing two copies of the brief by USPS priority mail service to the following:

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