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Gender & Refugee
STUDIES

Amicus Brief Filed by CGRS in *S-B-*

Overview of the Attached Brief

The attached amicus brief was filed by the Center for Gender & Refugee Studies (CGRS or Center) to the United States Court of Appeals for the Second Circuit on April 22, 2008 in the matter of *S-B-*. Identifying information has been redacted in accordance with the wishes of the applicant. The brief addresses past female genital cutting (FGC) as a basis for asylum.

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Nos. [redacted]-ag, [redacted]-ag, [redacted]-ag

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[redacted]

Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL,
Respondent,

[redacted],

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,
Respondent,

[redacted]

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,
Respondent.

BRIEF FOR *AMICUS CURIAE* ON BEHALF OF THE CENTER FOR GENDER AND REFUGEE STUDIES

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INTEREST OF *AMICUS CURIAE*

Amicus Center for Gender & Refugee Studies ("*Amicus*"), at the University of California, Hastings College of the Law, has a direct and serious interest in the development of the law pertaining to the protection of women under the Refugee Act. Through its scholarship, expert consultations, and litigation, *amicus* has played a central role in the development of law and policy related to gender persecution. *Amicus* has filed briefs regarding female genital mutilation, domestic violence, forced marriage, and other gender-based forms of persecution in the Second, Fourth, Fifth, Sixth, Eighth and Ninth Circuits.

INTRODUCTION

Petitioners appeal rulings of the Board of Immigration Appeals ("BIA") denying them asylum and withholding of removal to Guinea. By Order dated March 14, 2008, this Court invited *Amicus* to address the following question: "whether the BIA properly denied [petitioners'] applications for withholding of removal on the grounds that they had already been subjected to female genital mutilation and could therefore no longer show a fear of future persecution." Order at 2. The Center is grateful for the opportunity to respond as follows.

The BIA made three fundamental errors of law and logic in its interpretation of the applicable regulation, 8 C.F.R. § 1208.16 (2007). Each is an independent

basis for reversal.[1]

The first error: The BIA erroneously reversed the burdens of proof.

Petitioners were victims of female genital mutilation, a form of persecution, because of their membership in a particular social group—Guinean females of Fulani ethnicity. Thus, pursuant to 8 C.F.R. § 1208.16(b)(1)(i) (2007), they were entitled to a presumption that their lives or freedom would be threatened if returned to Guinea. It then became the Government's burden to rebut that presumption by showing, *inter alia*, "a fundamental change in circumstances," such that their lives or freedom would no longer be threatened on account of a statutorily protected ground. 8 C.F.R. § 1208.16(b)(1)(i)(A). That much is undisputed.

The question is whether § 1208.16 can be read to allow female genital mutilation, or any other persecution that (allegedly) is incapable of repetition, to simultaneously both create and destroy the presumption of a future threat to life or freedom. The answer is straightforward: no. Section 1208.16's plain terms do not permit such a result. The BIA interpreted § 1208.16 as limiting the presumption only to future "identical" persecution. This flawed interpretation, which finds no support in the language of the regulation, improperly relieved the Government of

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[1] *Amicus* addresses the BIA's decision with respect to withholding of removal. After the *A-T-* decision, the BIA held that female genital mutilation is a basis for a humanitarian grant of asylum. *See In re S-A-K- & H-A-H-*, 24 I.&N. Dec. 464 (BIA 2008). A humanitarian grant of relief is not available for withholding of removal.

its burden to rebut the explicit presumption of future "threat to life or freedom"—an indisputably broader concept. It also denied petitioners the individualized review of their claims to which they were entitled.

The undisputed record documents that among petitioners' social group, the injurious and pervasive female genital mutilation to which petitioners were subjected is only one part—and usually just the beginning—of an extended course of threats to life or freedom that women who have been victimized by the act can expect to face. The BIA's decisions here placed the burden on the petitioners to establish the related threats, even though § 1208.16 expressly put the burden on the Government to rebut them. This error warrants reversal. *See infra* Part I.

The second error: Without any explanation, the BIA, in these decisions flatly contradicted its prior interpretation of § 1208.16. In *In re A-T-*, 24 I.&N. Dec. 296 (BIA 2007) ("*A-T-*"), the BIA held, as it did here, that past infliction of female genital mutilation automatically rebuts the presumption of a threat to life or freedom. *A-T-*, and the petitions under review, represent a radical departure from the Board's numerous prior holdings that female genital mutilation cannot be the fundamental change in circumstance that rebuts the presumption of future harm. As just one example, the BIA held in 2005 that a victim of female genital mutilation from Guinea was entitled to withholding of removal because "the presumption of future harm has not been automatically rebutted simply because the

procedure may not be repeated on the respondent." (BJA[2] 14-15). The BIA's inconsistent application of part 1208 has resulted in arbitrarily disparate treatment of similarly situated applicants. *See infra* Part II.

The third error: An ongoing act of persecution cannot rebut the presumption of a future threat to life or freedom. The BIA has interpreted part 1208 as providing that the presumption of future threat to life or freedom cannot be overcome by an act of past persecution that is "permanent and continuing." *In re Y-T-L-*, 23 I.&N. Dec. 601, 610 (BIA 2003) ("*Y-T-L-*") (reviewing claim of forced sterilization). By definition, when the persecution is ongoing, it cannot be characterized as the "fundamental change in circumstances" that rebuts the presumption of future threat to life or freedom. As with forced sterilization, female genital mutilation leads to permanent and continuing physical and psychological harm, and thus, as the BIA has recognized, is ongoing persecution. The BIA nonetheless denied the petitions here because it concluded that § 1208.16 somehow applies differently to claims of female genital mutilation. That conclusion cannot be reconciled with the regulation's language, which, on its face, does not permit for differential treatment of various forms of persecution. *See infra* Part III.

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[2] Hereinafter, "[redacted] 07-175ag; [redacted] 07-1994ag; and "[redacted], 07-2120ag.

STANDARD OF REVIEW

This Court applies the *Chevron* analysis to the BIA's published interpretation of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1231(b)(3) (2000 & Supp. V 2005). *See Shi Liang Lin v. U.S. DOJ*, 494 F.3d 296, 304 (2d Cir. 2007) (en banc).[3] If the intent of Congress is clear, the Court "'must give effect to the unambiguously expressed intent of Congress.'" *Id.* (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). If the statute is silent or ambiguous, the Court asks "whether the BIA's interpretation constitutes 'a permissible construction of the statute.'" *Id.* (quoting *Chevron*, 467 U.S. at 843).

This Court reviews the BIA's interpretation of its own regulations with "substantial deference." *Zhen Nan Lin v. U.S. D.O.J.*, 459 F.3d 255, 262 (2d Cir. 2006). The BIA is not entitled to substantial deference, however, if its interpretation is inconsistent with the plain meaning of the regulation. *See id.* at 262. Nor is it entitled to such deference, even if there is ambiguity, where the BIA's interpretation is inconsistent with its prior interpretations of the same language and the BIA fails adequately to explain that change. *See id.* at 264-65; *cf. National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981

[3] Unpublished BIA decisions that do not have the force of law are not reviewed under *Chevron*. *See Mizrahi v. Gonzales*, 492 F.3d 156, 158 (2d Cir. 2007). *A-T-*, a published decision, is reviewed under *Chevron* as set forth herein.

(2005) ("if the agency adequately explains the reasons for a reversal of policy, change is not invalidating" under *Chevron* (emphasis added)).

The decisions on appeal represent a complete, unexplained change of course from the BIA's prior interpretations of § 1208.16. Thus, its interpretation of § 1208.16 cannot be given substantial deference even if this Court were to find the regulation to be ambiguous (which, as explained below, is not the case).

ARGUMENT

I. THE BIA'S FAILURE TO HOLD THE GOVERNMENT TO ITS BURDEN OF PROOF WAS PLAIN ERROR.

The BIA's decisions here rest on the premise that female genital mutilation simultaneously both creates and destroys the presumption of a future threat to life or freedom contemplated by 8 C.F.R. § 1208.16(b)(1)(i). It cannot. In implementing this flawed approach, the BIA failed to shift the burden of proof to the Government to rebut the presumption that the petitioners faced a future threat to life or freedom. This constituted plain error and merits reversal.

A. The Burden-Shifting Regulatory Scheme and Female Genital Mutilation.

The INA prohibits the removal of an alien to a country if the "Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's ... membership in a particular social group." 8 U.S.C. § 1231(b)(3)(A). An "applicant who is determined to have suffered past persecution ... on account of ... membership in a particular social group ... shall

be presumed" to face a threat to her "life or freedom … on the basis of the original claim." 8 C.F.R. § 1208.16(b)(1) (2007). Thus, past persecution on account of one's membership in a particular social group creates a presumption of future threats to life or freedom.

There is no dispute that female genital mutilation is a brutal type of persecution. *See In re S-A-K- and H-A-H-*, 24 I.&N. Dec. 464 (BIA 2008); *In re Kasinga*, 21 I.&N. Dec. 357, 361 (BIA 1996). The "mildest form" of female genital mutilation, clitoridectomy, "is anatomically equivalent to amputation of the penis." Nahid Toubia, *Female Circumcision as a Public Health Issue*, 331 New Eng. J. Med. 712, 712 (1994). The Secretary of State has found that: "female genital mutilation … threatens the health and violates the human rights of women. It also hinders economic and social development. It can have serious health consequences, leading to life-long pain and suffering or, at times, even death." U.S. Dep't of State, Report on Female Genital Mutilation (2001), *available at* http://www.state.gov/documents/organization/9424.pdf.

Each petitioner is a victim of female genital mutilation (HDJA 2, 25-27; MDJA 3, 17-20; BJA 3, 98-99, 289-89), which was inflicted on account of her membership in a particular social group defined by her gender, Guinean nationality

and Fulani ethnicity[4] (HDJA 25, MDJA 2, BJA 288). Based on that mutilation each petitioner was entitled to a regulatory presumption of a future threat to life or freedom if returned to Guinea, on account of her social group membership. *See* 8 C.F.R. § 1208.16(b)(1)(i).

The burden then shifted to the Government to rebut that presumed threat by a preponderance of the evidence. *See* 8 C.F.R. § 1208.16(b)(1)(ii). The Government could rebut it by establishing, *inter alia*, that "[t]here ha[d] been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of" her membership in a particular social group. 8 C.F.R. § 1208.16(b)(1)(i)(A).

B. Section 1208.16 Does Not Limit the Presumption Only to Cases of "Identical" Future Persecution.

In petitioners' cases and in *A-T-*, the BIA asserted that because female genital mutilation is "generally performed only once ... [it] eliminat[es] the risk of identical future persecution." *A-T-*, 24 I.&N. Dec. at 299 (emphasis added); (MDJA at 3; HDJA at 2; BJA at 4). It then interpreted § 1208.16 as requiring that the applicant have a fear of future female genital mutilation, the "identical" form of her past persecution, in order for the presumption of future persecution to hold.

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[4] *See, e.g.*, *Mohammed v. Gonzales*, 400 F.3d 785, 800 (9th Cir. 2005) (female genital mutilation victim is member of protected group of young women of Benadiri clan); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005) (female genital mutilation victim is member of protected group of female members of Tukulor Fulani tribe).

Based on that interpretation, the BIA denied petitioners withholding of removal on the basis that they failed to meet their burden of establishing future threats to life or freedom. *A-T-*, 24 I.&N. Dec. at 305; (MDJA at 3; HDJA at 2; BJA at 4).

The BIA misapplied the plain language of § 1208.16. That regulation's terms do not limit the association between past and future threats to "identical" persecution. To the contrary, the underlying logic of the regulation is that an individual singled out for persecution in a particular country will likely be subject to future persecution absent changed circumstances. It is the Government's burden to prove those changed circumstances, and the fact that the petitioner cannot be subject to the identical form of persecution is irrelevant in terms of this burden-shifting.

The BIA held that "[a]ny presumption of future FGM persecution is [] rebutted by the fundamental change in the respondent's situation arising from the reprehensible, but one-time, infliction of FGM upon her." *A-T-*, 24 I.&N. Dec. at 299. As a factual matter, this is incorrect, as discussed *infra*. Even so, the question was not whether a presumed threat of "future FGM persecution" has been rebutted, but whether the presumption of future threat to "life or freedom" had been. Nothing in the BIA's analysis, or in the Government's proof, rebutted a future threat to life or freedom.

The BIA's interpretation of § 1208.16 has no limiting principle, and would

render the protection afforded under the withholding of removal regulations virtually meaningless. The presumption of future threat to life or freedom would never attach for past persecution involving any act incapable of repetition, such as the severing of one's tongue, or the intentional blinding of an individual. The Government could argue the presumption was rebutted simply because the victim's tongue could not be severed again or the individual blinded once more, even though other acts threatening life or freedom could of course be inflicted on account of the same statutory ground. Thus, under the BIA's interpretation, the most severe and permanent forms of persecution would merit the least protection for withholding of removal.

Indeed, since the purpose of the past persecution finding is to protect victims of past persecution from future harm and to shift the burden of proof to the Government, the BIA's interpretation would impermissibly render § 1208.16(b)(1)(i) superfluous. *See State St. Bank and Trust Co. v. Salovaara*, 326 F.3d 130, 139 (2d Cir. 2003) ("It is well-settled that courts should avoid statutory interpretations that render provisions superfluous."); *Resnik v. Swartz*, 303 F.3d 147, 152 (2d Cir. 2002) (statutory construction rules apply to interpretations of regulations).

In *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007), the Eighth Circuit held that past female genital mutilation was a basis for asylum eligibility. It rejected the

Government's contention—the same one it proffers here—that the presumption of future harm was rebutted because female genital mutilation (allegedly) cannot be repeated. "We have never held that a petitioner must fear the repetition of the exact harm that she has suffered in the past. Our definition of persecution is not that narrow." *Id.* at 518 (emphasis added); *see also Mohammed v. Gonzales*, 400 F.3d 785, 800 (9th Cir. 2005) (victim of female genital mutilation is susceptible to future gender-based violence related on account of her social group membership).

C. Female Genital Mutilation is Only One of Many Gender-Based Harms Inflicted on Account of Social Group Membership.

Female genital mutilation is not a discrete type of persecution in the societies where it is practiced, but rather one of myriad related manifestations of gender-based persecution. (BJA at 339). The BIA has recognized that female genital mutilation is inflicted, in significant part, to manipulate "women's sexuality in order to assure male dominance and exploitation." *Kasinga*, 21 I.&N. Dec. at 366 (internal quotation omitted). Its completion is not a sign that persecution has ended—to the contrary, it is the beginning of a long series of acts of gender violence.

It is no coincidence that in Guinea, where female genital mutilation is widely practiced, violence against women and girls is tolerated, women are discriminated against in the workplace, women and girls are forced into marriage and prostitution, polygamy is a common practice, and, *inter alia*, allegations of rape are

not vigorously investigated. (BJA 205, 213, 301, 324, 339). In Guinea, female genital mutilation is rooted in traditional beliefs concerning "women's social role, and the belief FGM will suppress and control the sexual behavior of women and girls," and is "increasingly view[ed] as a way to control and subjugate women." (BJA 307). It is practiced in order to maintain power inequalities between the sexes and to ensure the compliance of women to the dictates of their communities. (BJA 324, 339).

The BIA ultimately conceded this point in its denial of the *A-T-* petitioner's motion for reconsideration, holding, "we do not dispute that an asylum applicant could present a successful claim on the theory that FGM is a single type of harm in a series of injuries inflicted on account of one's membership in a particular social group." Tab 1 at 5. It continued, however, "we are unable to conclude on this particular record that the respondent has met her burden of proof for such a claim." *Id.* (emphasis added). The fundamental error in that analysis is that § 1208.16 unambiguously places the burden of proof on the Government to rebut the presumption of future harm, not on the petitioners to establish it.

The *Hassan* court reasoned that the BIA's position, "erroneously assumes that FGM is the only form of persecution in Somalia and that having undergone the procedure, Hassan, as a Somali woman, is no longer at risk of other prevalent forms of persecution." 484 F.3d 513, 518 (8th Cir. 2007). The burden was on the

Government to rebut the presumption that she was at risk of these other forms of persecution, and the BIA's failure to put it to this burden warranted remand. *Id.* at 518-19.

Once an applicant establishes that she has been persecuted (by whatever means) based on her membership in a particular social group, the fact that other injuries will be inflicted "on the basis of the original claim" is presumed. 8 C.F.R. § 1216(b)(1). Keeping the burden at all times on the applicant, as the BIA did here, is in direct contravention of the burden shifting required by § 1208.16(i).

D. The Record is Clear that the BIA Failed To Shift the Burden of Proof from Petitioners to the Government.

In these cases, the Government was not forced to rebut the presumption that after the infliction of female genital mutilation, women of the Fulani ethnic group in Guinea would be subject to additional threats to life or freedom. The Government presented no evidence of changed circumstances. More troubling still, assuming, *arguendo*, the Government's burden were limited to showing that petitioners could not again be subjected to the identical form of persecution, it was not even put to that burden. The BIA simply—and erroneously—presumed it to be a truism that the petitioners could not be subject to being mutilated again. The record does not support this presumption. The original mutilation may make sexual penetration "difficult or even impossible, and at times, re-cutting has to take place." (BJA 329). Thus, even under the Government's unduly limited view of

future persecution, the decisions below should be reversed.

Notwithstanding the burden-shifting provisions of § 1208.16(b)(1)(ii), or the record evidence establishing that female genital mutilation is only one part of gender-related persecution, the BIA expressly placed the burden on the petitioners to establish other acts of gender-related persecution. (MDJA at 3) (emphasis added); (HDJA at 2); (BJA at 4). It did so by bypassing § 1208.16(b)(1)(ii) and relying instead on 8 C.F.R. § 1208.16(b)(1)(iii) for its denial. (MDJA at 3); *A-T-*, 24 I.&N. Dec. at 304.[5] That regulation provides: "[i]f the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm." 8 C.F.R. § 1208.16(b)(1)(iii). The BIA erred in applying it here.

Subsection (iii) does not relieve the Government of its burden of proof under subsections (i) and (ii). Subsection (iii) applies only if the petitioner has established past persecution and the Government has rebutted the presumption of future persecution based on the original claim: "If the DHS rebuts the presumption, the asylum application will be denied unless the applicant demonstrates [*inter alia*] 'a reasonable possibility that he or she may suffer other

[5] Relying on this same provision, the BIA found *Hassan* "to be at odds with the regulatory structure" for withholding of removal. *A-T-*, 24 I.&N. Dec. at 304. As stated herein, the BIA's interpretation is at odds with the regulatory scheme.

serious harm upon removal to that country.'" *In re D-I-M-*, 24 I&N Dec. 448, 450 (2008) (quoting 8 C.F.R. § 1208.13(b)(1)(iii)(B)).[6] The BIA's inexplicable contrary reading of § 1208.16 here imposes a burden of proof on the petitioner that §§ 1208.16(b)(1)(i) and (ii) unequivocally decline to impose. *Id.* (remanding because immigration judge made a finding of past persecution but failed to shift the burden to the Government to rebut that presumption).

To support a contrary argument, the Government relies, as did the BIA in *A-T-*, on *N-M-A-*, 22 I.&N. Dec. 312 (BIA 1998). *See* [redacted] Resp. Br. at 31. That reliance is misplaced. In fact, *N-M-A-* supports the precise reading of the regulations furthered by petitioners. There, an applicant from Afghanistan claimed to have been persecuted by the KHAD, a communist group. The BIA made a straightforward application of the burden shifting regulations. It held that the applicant was entitled to the presumption of future harm, but that that presumption was rebutted by the Government's proof of changed circumstances showing that the communist regime had been toppled. The applicant did not dispute that the Government had met its burden but argued that he was nonetheless entitled to a presumption of future harm from sources other than the communists. The BIA rejected that analysis, ruling that the presumption only applies to threats from the

[6] 8 C.F.R. § 1208.13(b)(1)(iii)(b) places "the same burden on the applicant," as does § 1208.16(b)(1)(iii). *A-T-*, 24 I.&N. Dec. at 307.

original persecutor, *i.e.*, the communists.

In the petitions under review, the Government did not even attempt to meet its burden of proving changed circumstances, such that petitioners—Guinean women of Fulani ethnicity—no longer face a threat to life or freedom in Guinea.[7] The decisions under review should be reversed on this basis.

II. THE BIA FAILED TO EXPLAIN ITS COMPLETE REVERSAL IN ITS APPLICATION OF PART 1208 TO CLAIMS OF PAST FEMALE GENITAL MUTILATION.

The Government contends here that *A-T-* "reaffirms the Board's longstanding, routine construction of the past-persecution presumption set forth in 1998 in *Matter of N-M-A-*." [redacted] Resp. Br. at 31-32. Not so. *A-T-*, and the cases under review, represent an abrupt, radical departure from the Board's longstanding finding that female genital mutilation cannot be the fundamental change in circumstance that rebuts the presumption of future harm.

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[7] Requiring the Government to satisfy the burden of rebuttal prescribed under 8 C.F.R. § 1208.16(b)(1)(ii) will not open the floodgates to claims for asylum or withholding of removal based on female genital mutilation. As the agency has recognized, "[a]lthough genital mutilation is practiced on many women around the world," the *Kasinga* decision has not resulted in "an appreciable increase in the number of claims based on FGM." Q&A: The R-A- Rule, Immigration and Naturalization Services (Dec. 7, 2000). This stands to reason, since women persecuted abroad face many practical obstacles to emigration. For example, women subject to gender-based persecution often have little control over family resources and may be unable to procure the funds to flee. In addition, primary caretakers may choose to endure persecution at home rather than abandon their charges. *See* Karen Musalo, *Protecting Victims of Gendered Persecution*, 14 Va. J. Soc. Pol'y & Law 119, 131-34 (2007).

When the BIA reached diametrically opposed results on similar facts and without explanation, it committed reversible error, for "[a]n agency cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along." *Henry v. INS*, 74 F.3d 1, 6 (1st Cir. 1996).

A. The BIA's Decisions in These Cases Flatly Contradict Its Prior Holdings.

The BIA has repeatedly held that an applicant may be eligible for asylum and withholding of removal based on the past infliction of female genital mutilation. In one such case, the BIA expressly "reject[ed]" the argument that the act of female genital mutilation can itself rebut the presumption of future harm as an unjustifiably "narrow outlook." *In re Anon.*, 27 Immig. Rptr. B1-93 (BIA May 23, 2003) (Tab 2); *see also In re Anon.* (BIA Nov. 7, 2005) (Tab 4).[8] Yet that rejected argument is now, inexplicably, the linchpin of the BIA's decisions in these cases and in *A-T-*.

The BIA has also held that past female genital mutilation can be a basis for asylum and withholding of removal because that particular type of persecution constitutes "continuing and permanent" harm that cannot rebut the presumption of future persecution or threat to life or freedom. In these cases, the BIA typically relied on its prior decision in *Y-T-L-*, 23 I.&N. Dec. at 605. There, the BIA held

[8] In these two cases, the BIA did not reach withholding of removal because it found that the applicant was entitled to asylum under § 1208.13.

that forced sterilization, an act of persecution generally incapable of repetition, did not rebut the presumption. *Id.* It held that reaching an opposite conclusion would lead to an "anomalous" result—namely, that the persecution itself would constitute the act that made one ineligible for asylum. *Id.*

Here and in *A-T-*, the BIA refused to apply *Y-T-L-* to past female genital mutilation claims by characterizing *Y-T-L-* as "a unique departure from the ordinarily applicable principles regarding asylum and withholding of removal." *A-T-*, 24 I.&N. Dec. at 299 (emphasis added). To the contrary, in an earlier case, the BIA expressly relied on the continuing harm framework of *Y-T-L-* to hold that past female genital mutilation served as a sufficient basis for asylum:

> The Immigration Judge noted that there was no indication that the effects of her persecution would dissipate and may be taken as permanent... . We find that the Immigration Judge's observations are fully consistent with our decision in Matter of Y-T-L-, 23 I&N Dec. 601 (BIA 2003) ...

In re Anon. at 2 (BIA Nov. 7, 2005) (Tab 4) (emphasis added).

The BIA applied the continuing harm doctrine to other past female genital mutilation cases. *See In re Anon.* (BIA May 23, 2003) (Tab 2); *In re Anon.* (BIA Sept. 1, 2005) (Tab 3). It has rejected the suggestion that "the fundamental 'change' in circumstances should be viewed solely from the perspective of whether the respondent is at risk of being forced to undergo female genital mutilation [again]." *In re Anon.* at 2 (BIA May 23, 2003). The "better position," the BIA

held, is to view forced female genital mutilation "as a permanent and continuing act of persecution that has permanently removed from a woman a physical part of her body, deprived her of the chance for sexual enjoyment as a result of such removal, and has forced her to potential medical problems [sic] relating to this removal." *Id.* It highlighted: "[t]he profound and permanent nature of such harm has rarely, if ever, been doubted." *Id.* (emphasis added). The BIA concluded, "[g]iven the pervasive nature of female genital mutilation ... the presumption of a well-founded fear of persecution is not rebutted by simply averring that the respondent cannot have further female genital mutilation performed upon her." *Id.* (emphasis added).

The BIA also previously made the same ruling in a withholding of removal claim. In 2005, the BIA granted withholding of removal to a Guinean woman who was a victim of female genital mutilation. *In re Anon.* at 1-2 (BIA Sept. 1, 2005) (Tab 3). It held, "[t]he persecution resulting from FGM is [] continuing and permanent. Considering the continuing effects of such persecution, we find that the presumption of future harm has not been adequately rebutted simply because the procedure may not be repeated on the respondent." *Id.* For this straightforward proposition, the BIA cited *Y-T-L-*. *Id.*

In 2006, the BIA again highlighted that past female genital mutilation was a basis for asylum and withholding of removal. *See In re Anon.* (BIA Aug. 8, 2006)

(Tab 5). Of note, there the BIA cited favorably to *Mohammed*—the decision it declined to follow in the cases under review and in *A-T-*:

> [T]he respondent was forcibly subjected to female genital mutilation …, a procedure she neither wanted nor supported. [] *See generally Mohammed v. Gonzales*, 400 F.3d 785, 800 (9th Cir. 2005) (noting that "in addition to the physical and psychological trauma that is common to many forms of persecution, female genital mutilation involves drastic and emotionally painful consequences that are unending").

Id. at 2.

Here and in *A-T-*, the BIA rejected the same positions it had repeatedly taken earlier—unequivocally treating identical legal issues differently in different cases. Indeed, the September 2005 case is striking—it involved a woman from Guinea, who was the victim of female genital mutilation and applied for withholding of removal. The BIA granted her withholding—but not these petitioners—even though the parties were all similarly situated.

B. The BIA's Failure To Explain the Reversal of Its Prior Interpretation Is Arbitrary and Warrants Reversal.

In changing course in such a fashion, and without explanation, the BIA acted arbitrarily. "Patently inconsistent application of agency standards to similar situations lacks rationality and is arbitrary." *Vargas v. INS*, 938 F.2d 358, 362 (2d Cir. 1991) (internal quotation omitted). "The present sometimes-yes, sometimes-no, sometimes-maybe policy … cannot [] be squared with our obligation to preclude arbitrary and capricious management of the [BIA's] mandate." *Id.*

(internal quotation omitted); *see Perez-Vargas v. Gonzales*, 478 F.3d 191, 193 n.3 (4th Cir. 2007) ("[W]hen an agency fails to present a reasoned basis for departing from a previous decision, it may be deemed to have acted arbitrarily.")

Explanation of departure from prior decisions is necessary because "the Rule of Law requires that agencies apply the same basic standard of conduct to all parties appearing before them." *Miner v. FCC,* 663 F.2d 152, 157 (D.C. Cir. 1980). Inconsistent decision-making "raises precisely the kinds of concerns about arbitrary agency action that the consistency doctrine addresses." *Davila-Bardales v. INS*, 27 F.3d 1, 5-6 (1st Cir. 1994).

In denying the petitioner's motion for reconsideration in *A-T-*, the BIA's only response to this patent inconsistency was to note that *A-T-* was its first opportunity to address this question in a published decision, *i.e.*, that its prior decisions were not published. *See* Tab 1 at 3. This is not sufficient. *See Vargas*, 938 F.2d at 362 (remanding where BIA's position was a change from prior unpublished decisions). The decision whether to publish an opinion is separate from the principle that agencies act in consistent and non-arbitrary ways. Thus, circuit courts have repeatedly held that where the BIA changes course, without explanation, it has acted arbitrarily even if its original course was set forth in unpublished decisions. "[W]e note that courts typically look askance at an agency's unexplained deviation from a prior decision, even when the prior decision

is unpublished." *Perez-Vargas*, 478 F.3d at 193 n.3. "[W]e see no earthly reason why the mere fact of nonpublication should permit [the BIA] to take a view of the law in one case that is flatly contrary to the view it set out in [the] earlier ... cases, without explaining why it is doing so." *Davila-Bardales*, 27 F.3d at 5-6. "[R]egardless whether the [BIA] decision is precedential, by reaching an exactly contrary decision on a materially indistinguishable set of facts, the [BIA] acted arbitrarily." *Shardar v. Attorney Gen. of U.S.*, 503 F.3d 308, 315 (3d Cir. 2007); *see also Cruz v. Attorney Gen. of U.S.*, 452 F.3d 240, 249 (3d Cir. 2006) (same).

The BIA acted arbitrarily here by not even attempting to explain its abrupt and radical departure from its prior holdings applying the *Y-T-L-* framework to claims of past female genital mutilation.

III. THE BIA INDEPENDENTLY ERRED IN REFUSING TO APPLY ITS OWN CONTINUING HARM ANALYSIS TO THESE PETITIONS.

There is an independent basis to hold that the BIA erred. Specifically, contrary to its prior holdings applying the "continuing harm" doctrine to female genital mutilation, *see supra* Part II, the BIA refused to interpret § 1208.16 here under the continuing harm analysis.

A. Persecution That Has Not Ended Cannot be the Change in Circumstance that Rebuts the Presumption of Future Threat to Life or Freedom.

Prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), the BIA had held that forced sterilization was not a ground for asylum because its victims were not persecuted "on account of a ground protected by the Act." *In re Chang*, 20 I.&N. Dec. 38, 43-44 (BIA 1989). This decision generated controversy and Congress amended section 101(a)(42) of the INA as part of IIRIRA to provide that persons who had been forced to undergo involuntary sterilization or other coercive population control methods were "deemed to have been persecuted on account of political opinion." Pub. L. No. 104-208, § 601, 110 Stat. 3009-546, 3009-689 (1996) (emphasis added).

In *Y-T-L-*, the BIA considered what it construed to be Congress's intent to extend asylum protection to past victims of forced sterilization, as manifested in IIRIRA (the amendment of 8 U.S.C. § 1101(a)(42) (2000)). *See id.* at 606. It ultimately applied the regulatory framework set forth in 8 C.F.R. § 1208.13 (2007),[9] holding that a victim of forced sterilization is entitled to a presumption of future persecution and that presumption is not rebutted by the act of persecution itself. *Id. Y-T-L-* reflects the BIA's appreciation that there are certain egregious

[9] Section 1208.13 applies to asylum, § 1208.16 applies to withholding of removal. Both contain the same burden-shifting paradigm. With asylum, a victim of past persecution is presumed to have a "well-founded fear of future persecution." 8 C.F.R. § 1208.13(b)(1).

kinds of persecution—such as reproductive sterilization—that affect the desired result on an ongoing, life-long basis. In such circumstances, one cannot speak of a "change in circumstances" such that the applicant no longer faces a threat to life or freedom as that phrase is used in 8 C.F.R. § 1208.16, because the persecution endures permanently. "Because the persecution is ongoing, ... it is not possible, as a matter of law, for conditions to change or relocation to occur that would eliminate a well-founded fear of persecution." *Qu v. Gonzales*, 399 F.3d 1195, 1203 (9th Cir. 2005) (discussing forced sterilization).

Like forced sterilization, female genital mutilation entails permanent and continuous harm. In *Kasinga,* the BIA found that female genital mutilation is "extremely painful," "can result in permanent loss of genital sensation and ... adversely affect sexual and erotic functions," and "permanently disfigures the female genitalia, [and] exposes the girl or woman to the risk of serious, potentially life-threatening complications." 21 I.&N. Dec. at 361 (emphasis added); *see also S-A-K- & H-A-H-*, 24 I.&N. Dec. 464 (BIA 2008); *In re Anon.* (BIA May 23, 2003); *In re Anon.* (BIA Sept. 1, 2005); *In re Anon.* (BIA Nov. 7, 2005); (BJA 14-15).

Section 1208.16 cannot be properly interpreted to permit ongoing acts of persecution to rebut the presumption of a threat to life or freedom. If the act of persecution is ongoing, it cannot be a "fundamental change in circumstance,"

because the circumstance remains the same.

B. Congress Did Not Consider Whether an Act of Persecution Could Itself Be a Changed Circumstance.

The BIA purported to distinguish *Y-T-L-* on the basis that "persons who suffered [forced sterilization] have been singled out by Congress as having a basis for asylum in the 'refugee' definition of Section 101(a)(42) of the Act on the strength of the past harm alone." *A-T-*, 24 I.&N. Dec. at 300 (emphasis added); (MDJA 4; HDJA 3; BJA 4).[10] Congress had no reason, in enacting IIRIRA, to address the question of whether an act of past persecution—*e.g.*, forced sterilization or abortion—would constitute a "fundamental change in circumstances" sufficient to rebut the presumption of a threat to life or freedom. The regulations in effect at the time provided that only a change in country conditions could rebut the presumption of a threat to life or freedom. *See* 8 C.F.R. § 1208.13 (1996). The Department of Justice did not propose amending that regulation to include other changes in circumstance generally until 1998, and did not actually amend it until 2000, well after enactment of IIRIRA. *See* 63 Fed. Reg. 31,945 (1998) (proposed rule); 65 Fed. Reg. 76,121 (2000) (final action); *see also*

[10] When Congress took up IIRIRA in the fall of 1996, the BIA had just held, in *Kasinga*, that asylum was available for women who would be subjected to female genital mutilation. To the extent Congress was required to act then, it did so, criminalizing the practice of female genital mutilation on minors. *See* IIRIRA § 645, 110 Stat. at 3009-709.

Qu, 399 F.3d at 1200-01 (describing the amendment); *Y-T-L-*, 23 I.&N. Dec. at 604-05 (same).

Contrary to the BIA's suggestion in these cases and in *A-T-*, Congress had no reason in enacting § 601 of IIRIRA to anticipate—let alone attempt to correct—the convoluted argument that the act of persecution might itself constitute a fundamental change in circumstances depriving the victim of the presumption of a threat to life or freedom when that persecution was permanent and ongoing. The only "changes" which could rebut the presumption at the time were those of changed country conditions.

In *Mohammed*, the Ninth Circuit found that the amendment's purpose was to reverse the BIA's holdings that forced sterilization did not constitute persecution on account of a protected ground. *See Mohammed*, 400 F.3d at 799. It also found that both forced sterilization and female genital mutilation should be recognized as permanent and continuing forms of persecution: "the principle that the fact of sterilization cannot be used by the Government to rebut the fear of future harm was developed by the BIA and the courts after the legislation was enacted as a recognition of the special, continuing, and permanent nature of coercive population control. [T]he reasoning in the forced sterilization cases would appear to apply equally to the case of genital mutilation." *Id.* at n.22 (emphasis added); *Barry v. Gonzales*, 445 F.3d 741, 745 (4th Cir. 2006), *cert denied*, 127 S.Ct. 1147 (2007)

(relying on *Mohammed* to note victim of female genital mutilation would make "prima facie case of persecution" entitling her to asylum").

C. Congress Did Not Amend § 101(a)(42) To Provide Automatic Protection to Victims of Past Sterilization.

In amending § 1101(a)(42) Congress intended to ensure that persons who had been forced to undergo involuntary sterilization were "deemed to have been persecuted on account of political opinion." 8 U.S.C. § 1101(a)(42). Prior to the enactment of IIRIRA, the BIA had held that forced sterilization did not constitute persecution on account of a protected ground, and thus asylum was not available under the statute. *See supra*. The enactment of § 601 of IIRIRA marked the culmination of Congress's efforts to overturn those BIA decisions. Section 601 amended 8 U.S.C. § 1101(a)(42) to provide in relevant part that "[f]or purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization ... shall be deemed to have been persecuted on account of political opinion." *Id.* (emphasis added). The statutory text does not reflect a broader goal of changing existing rules regarding how claims of *past* persecution are to be analyzed, nor did it provide for the automatic granting of asylum to those who suffered past sterilization.

The House Judiciary Committee report underscores this: "The primary intent of section [601] is to overturn several decisions of the [BIA], principally *Matter of Chang* and *Matter of G-*." H.R. No. 104-469(I), at 173-74 (1996)

(footnote omitted); *see also* S.R. No. 104-95, at 92 (1995). Congress emphasized that asylum claims based on forced sterilization were to be treated in the same manner as those based on other forms of persecution. The amendment was not intended to enact a special rule for past persecution. *See* 142 Cong. Rec. H2589, H2634 (daily ed. Mar. 21, 1996).

Several courts have recognized that Congress amended § 1101(a)(42) to change the result of *In re Chang*. In *Shi Liang Lin*, 494 F3.d at 307-08, the *en banc* panel of this Court was presented with the question of whether § 601 covers spouses and boyfriends of women subjected to forced sterilization. It held that the language of § 601 is unambiguous and does not by its plain terms cover persons other than the direct victim of the persecution. *Id.* at 307-08. As part of that analysis, this Court highlighted that, per the amendment, "political opinion exists *de jure* rather than as a matter of fact on which the applicant bears the burden of proof." *Id.* at 307;[11] *see also, e.g., Li v. Gonzales*, 405 F.3d 171, 176 (4th Cir. 2005); *Lin v. Ashcroft*, 385 F.3d 748, 752 (7th Cir. 2004); *Chen v. Ashcroft*, 381 F.3d 221, 224-25 (3d Cir. 2004); *Li v. Ashcroft*, 356 F.3d 1153, 1157 (9th Cir. 2004) (en banc).

Thus, in light of the fact that § 1208.16 was not amended until after the

[11] *Shi Liang Lin* affirmed that the purpose of the statute was to resolve definitional issues relating to persecution and nexus, but did not rule that the statute's purpose was to create broader, special rules to confer asylum automatically on victims of forced sterilization. *See Shi Liang Lin*, 494 F3.d at 306-08.

IIRIRA amendments and that, in IIRIRA, Congress did not confer automatic protection to victims of past forced sterilization, the question remains how to apply § 1208.16 to persecution that is ongoing in nature. As discussed *supra*, there can be no change in circumstance when the act of persecution is ongoing.

CONCLUSION

Amicus respectfully submits that the BIA's rulings under review should be reversed.

Respectfully submitted,

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Dated: April 22, 2008