

[REDACTED]

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

[REDACTED]

Petitioners,

vs.

MATTHEW G. WHITAKER, ACTING ATTORNEY GENERAL,

Respondent.

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

**BRIEF OF THE TAHIRIH JUSTICE CENTER *ET AL.*
AS *AMICI CURIAE* IN SUPPORT OF
PETITIONERS' PETITION FOR REVIEW**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to the Local Rules of the United States Court of Appeals for the Fourth Circuit, *amici curiae* submit the following corporate disclosure statements:

- The Tahirih Justice Center is a private, non-profit organization. It has no parent company, and no publicly held company holds more than 10% of its stock or has a direct financial interest in the outcome of the litigation.
- The Asian Pacific Institute on Gender-Based Violence is a private, non-profit organization. It has no parent company, and no publicly held company holds more than 10% of its stock or has a direct financial interest in the outcome of the litigation.
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STATEMENT OF INTEREST¹

The Tahirih Justice Center (“Tahirih”) is the largest multi-city direct services and policy advocacy organization specializing in assisting immigrant women and girls who survive gender-based violence. In five cities across the country, Tahirih offers legal and social services to women and girls fleeing all forms of gender-based violence, including human trafficking, forced labor, domestic violence, rape and sexual assault, and female genital cutting/mutilation. Since its beginning in 1997, Tahirih has provided free legal assistance to more than 25,000 individuals, many of whom have experienced the significant psychological and neurobiological effects of that trauma. Through direct legal and social services, policy advocacy, and training and education, Tahirih protects immigrant women and girls and promotes a world where they can live in safety and dignity. Tahirih

¹ No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amici*, their members, or their counsel made such a monetary contribution. See Fed. R. App. P. 29(a)(4)(E).

amicus briefs have been accepted in numerous federal courts across the country.

The Asian Pacific Institute on Gender-Based Violence is a national resource center on domestic violence, sexual violence, trafficking, and other forms of gender-based violence in Asian and Pacific Islander communities. The Institute serves a national network of advocates and community-based service programs that work with Asian and Pacific Islander and immigrant survivors, and is a leader in providing analysis on critical issues facing victims of gender-based violence in the Asian and Pacific Islander and in immigrant communities. The Institute leads by: promoting culturally relevant intervention and prevention, expert consultation, technical assistance and training; conducting and disseminating critical research; and informing public policy.

ASISTA Immigration Assistance's mission is to advance the dignity, rights and liberty of immigrant survivors of violence. ASISTA worked with Congress to create and expand routes to secure immigration status for survivors of domestic violence, sexual assault,

and other crimes, which were incorporated in the 1994 Violence Against Women Act (VAWA) and its progeny. ASISTA also trains and provides technical support to local law enforcement officials, civil and criminal court judges, domestic violence and sexual assault advocates, legal services, and nonprofit, pro bono, and private attorneys working with immigrant crime survivors. ASISTA has previously filed amicus briefs in numerous Circuit Courts of Appeals.

Ayuda is a non-profit agency that provides legal, social, and language services to immigrants in Virginia, the District of Columbia, and Maryland, allowing them to access justice and transform their lives. Ayuda has served more than 100,000 low-income immigrants since 1973. Ayuda's legal department includes specialized programs serving survivors of domestic violence, human trafficking, and other forms of gender-based violence in asylum and other legal matters. Although Ayuda serves immigrants from across the world, Ayuda also has long specialized in providing culturally-specific and trauma-informed services.

INTRODUCTION

The Immigration Judge (the “IJ”) and the Board of Immigration Appeals (the “BIA”), below, denied [REDACTED] [REDACTED] asylum application by applying the incorrect legal standard and ignoring the undisputed factual record.

The IJ and BIA ignored the undisputed record developed by [REDACTED] that Honduran culture and social norms promote significant gender inequality. The *machismo* that defines Honduran culture denies women agency, allowing men in domestic relationships with them to view them as their property. As a consequence, women in such relationships often suffer significant violence at the hands of their husbands or domestic partners. And it is a violence that they cannot escape by trying to terminate their relationships or relocating within Honduras.

Honduran authorities are both unwilling and unable to provide protection to victims of domestic violence. The legal framework of protections is weak. Many authorities do not effectively enforce those few laws that exist. And, in fact, many exacerbate the situation by

continuing to deny women agency by responding to reports of domestic violence with the refrain that these complaints are private matters to be resolved through their submission to their husbands or domestic partners. All of this leads many victims to decline to report abuse to authorities as they realize doing so could prove, at best, futile, and, at worst, more dangerous than the status quo.

The IJ and the BIA further ignored the extensive record developed by [REDACTED] documenting the existence of her membership in two particular social groups (“PSGs”) comprising “Honduran women who are unable to leave a domestic relationship” and “Honduran women who are viewed as property by their domestic partners.” Instead of considering all of this evidence, the IJ and the BIA focused on [REDACTED] marital status. But even this superficial assessment ignored the record that, in Honduran society, marriage is not the sole determinant of the existence of a domestic relationship or a domestic partnership. Rather, in Honduran culture, many other factors, including non-marriage consensual unions, cohabitation and children in common evidence a domestic relationship.

██████████ demonstrated these factors in her relationship with ██████████. Moreover, she showed she was effectively unable to leave this relationship because, each time she tried, ██████████ ██████████ perpetrated or threatened further violence against her because he viewed her as his property. It is for this reason that she sought asylum in the United States.

Finally, the BIA appears to have applied a “general rule” recently announced by the Attorney General in *Matter of A-B-*, 27 I. & N. Dec. 316 (AG 2018), that victims of domestic violence by non-governmental actors will generally not qualify for asylum. This “rule” is unreasonable, contrary to law, and arbitrary and capricious. It is entitled to no deference because it overturns decades of settled law and contains no reasonable, supported explanation. Therefore, this Court should reject it.

ARGUMENT

I. HONDURAN CULTURE AND SOCIAL NORMS PROMOTE GENDER INEQUALITY THAT PERMITS DOMESTIC VIOLENCE AGAINST WOMEN THAT THE GOVERNMENT IS UNWILLING AND UNABLE TO PREVENT

Honduran culture and social norms create and reinforce endemic gender inequality. The *machismo* that defines Honduran culture denies women agency, especially in domestic relationships. Women, therefore, suffer significant domestic violence, violence that they cannot escape in Honduras, at the hands of their partners. Honduran authorities are unwilling and unable to provide protection to victims of this domestic violence. The society acquiesces to perpetrators, the laws are weak and the authorities are ineffectual (or worse). As a consequence, many victims suffer the indignities and harms of domestic violence in silence.

A. Honduran Culture and Social Norms Reflect Vast Gender Inequality

As the evidence in this case demonstrates, Honduran society is a patriarchal society. *See, e.g.*, A.R. 33. Sadly, this condition is neither novel nor episodic. Rather, as identified in numerous studies, the gender inequality afflicting Honduran women is systemic. *See, e.g.*,

A.R. 381–88, 404–12, 516–34, 537–41. These studies not only corroborate [REDACTED] testimony and her arguments before the IJ and the BIA, but also reveal the all-too-uncomfortable truth that Honduran women face trauma and persecution daily.

Honduran culture is defined by *machismo*.² A United Nations report in 2015 on violence against women in Honduras identified “deeply rooted patriarchal attitudes and . . . pervasiveness of a *machista* culture.” A.R. 526. The pervasive *machismo* “teaches that women are property of their intimate partners or fathers, that women are second-class citizens, and that women are to be dealt with as seen fit by the masculine sectors of society.” A.R. 355. Indeed, it is men who decide “when women become pregnant, how many children they have, what their daily chores are, and how far their education goes.” A.R. 597. Similarly, Hondurans’ notion of paternity “is conceived by respondents in biological terms, encompassing the idea that the man’s role is that of indisputable family head and responsible—as the

² “*Machista*,” also commonly referred to as “*machismo*,” is a Spanish term that refers to sexist and chauvinistic attitudes and actions. A.R. 321 n.12.

material provider—for the welfare of the family.” A.R. 341–42. Further, Honduran “[w]omen are seen as below men and incapable of doing jobs other than housework or raising a family.” A.R. 341. *Machismo* “leads to minimizing or downplaying the rights of women and girls” and “often limits the ability of women (and men) to participate in a more equitable social and family environment.”³ The Honduran patriarchal society continues to “leave[] women behind.” A.R. 335.

As the ultimate consequence of *machismo*, “Honduran women live in a culture of violence, fear, and repression, where they cannot escape the discriminatory cultural attitudes that bind them.” A.R. 355. For example, one study noted that, although the Constitution of Honduras maintains “[e]quality and non-discrimination principles[,] . . . there is still considerable de facto gender inequality in the civil, political, economic and social spheres, which preclude the full enjoyment of human rights by women and girls.” A.R. 528; *see also* A.R.

³ U.S. Gov’t’s Global Hunger & Food Sec. Initiative *Feed the Future: Change Makers* (2017) https://global.ifas.ufl.edu/media/globalifasufledu/ING-Success-Story-2017_07-Tackling-Machismo-in-Honduras-Colverson.pdf.

517 (“A climate of fear . . . and a lack of accountability for violations of human rights of women are the norm[.]”). Examples of inequality include stigmatizing women for living alone, A.R. 363, and not permitting women to enter the workforce, A.R. 340 (“Honduran women have on average a much lower participation in the work force than Latin American women.”). As a result, “Honduran men believe that they can abuse and rape their wives with impunity because these women ‘belong’ to them and, like pieces of property, the men can do what they wish with a woman.” A.R. 355. The consequence is that discriminatory attitudes toward women pervade “all levels of Honduran society,” A.R. 347, and every aspect of women’s daily lives.

B. Gender Inequality in Honduras Promotes Violence Against Women

Social norms in Honduras encourage violence against women, and perpetrators of gender-based violence are not condemned within their community. A.R. 347. Indeed, violence against women is seen as normal and acceptable. The fact that women are the victims of domestic violence is not incidental or tangential. Women are attacked *because they are women*. A.R. 555–58.

The *machismo* that permeates Honduran culture foment violence against women. These deep patriarchal attitudes go beyond mere inequality, leading to domestic violence and often crossing into femicide—*i.e.*, killing of a woman for gender-related reasons. A.R. 357. One study highlighted Honduras’ alarming increase in femicide, noting that between 2003 and 2010 roughly 1,464 women were killed and that, in 2010 alone, 300 women died “violent deaths.” A.R. 314.

The U.S. government, in fact, has reached a similar conclusion—*machismo* leads to violence against women. Country condition reports routinely find that Honduran women in intimate relationships are at heightened risk of violence by their partners, regardless of their marriage status. A U.S. State Department report in 2014 found that “[d]omestic and intimate partner violence continued to be widespread and affected all aspects of society. In November, police discovered the bodies of Miss Honduras, Maria Jose Alvarado Munoz, and her sister, Sofia Trinidad Alvarado Munoz, whom they suspected Sofia’s boyfriend killed in a fit of jealousy.” Bureau of Democracy, Human Rights, & Labor, U.S. Dep’t of State, *Honduras 2014 Human*

Rights Report 21 (2014), <https://www.state.gov/documents/organization/236910.pdf>. In a 2016 report, the State Department reported, “Violence between domestic and intimate partners continued to be widespread.” Bureau of Democracy, Human Rights, & Labor, U.S. Dep’t of State, *Honduras 2016 Human Rights Report* 25 (2016), <https://www.state.gov/documents/organization/265808.pdf>.

In addition, these social norms result in a culture in which perpetrators of gender-based violence are not condemned within their community. A.R. 347. Indeed, violence against women is seen as acceptable. A.R. 355 (“The [domestic violence] problem is compounded because domestic violence is so widely accepted that neighbors, family members, teachers, and doctors do not report violence to the authorities.”). This cultural normalization of gender-based violence obviously affects women’s ability to obtain appropriate assistance in addressing such violence. A.R. 355.

This violence against women is so pervasive that neither termination of a relationship nor physical relocation within Honduras is an adequate means of escape. *E.g.*, A.R. 362 (“[I]t is not possible for a

woman to secure protection by trying to relocate within the country.”); A.R. 547 (“Fleeing to another part of Honduras often provides no relief.”). When victims flee, perpetrators often track them down much like ██████████ tracked down ██████████. *Compare* A.R. 547–48 (providing examples of abusers tracking down their victims), *with* A.R. 568–69 (explaining how ██████████ kept tracking down ██████████ ██████████ after she fled). Termination of a relationship is often not a viable option for victims of domestic violence because social norms stigmatize women who live alone. A.R. 363. More importantly, termination of a relationship can be ineffective because men, who view women as property lacking agency, often simply refuse to accept that the relationship has ended. A.R. 355; *see also* A.R. 362–63 (highlighting a woman’s account of trying to flee her abuser and having to flee the country with her children).

C. The Honduran Government Is Unwilling and Unable to Control Gender-Based Violence

Honduran government units and officials do little to prevent or punish violence against women. The laws are weak. The institutions

are insufficient. And the individuals tasked with enforcement often ignore the violence.

The legal regime governing domestic violence in Honduras is particularly anemic. “Honduras has specific legislation addressing domestic violence, but the law does not provide effective protection or redress from such violence.” A.R. 550. Specifically, although Honduras has ratified various international conventions which criminalize domestic violence, more entrenched structures of gender inequality have severely undermined the aims of these laws and prevented their effective implementation. One non-governmental organization found that “in general, the judicial system in Honduras is ‘weak and inefficient,’” citing “significant tensions between the national police, the prosecutor’s office, and the Ministry of Justice and Human Rights.” A.R. 540; *see also* A.R. 365 (“[A]t every level of enforcement of the laws—from community policing, to investigation following a crime, to prosecution, and judgment—Honduran women are not protected from gender-based violence.”). The result is a persistent gap between law, on the one hand, and enforcement on the other. When profound gender

inequalities are normalized (at a societal level) and institutionalized (through ineffectual and unenforced laws), a wide gap emerges between *laws on the books*, which have largely been adopted to satisfy international norms, and *laws on the ground*, which require political will. By this measure, Honduran laws regarding domestic violence are largely symbolic in nature and thus have serious limitations.

One example is Honduras' Law Against Domestic Violence, initially passed in 1997 and amended in 2006, which provides a mechanism for abused women to obtain a protective order against an abuser. A.R. 365. Notably, this law has the status of a "special law," and thus is not part of the criminal code. A.R. 365. Moreover, much of its contents reinforce the normalization of violence against women. For a first offense of domestic abuse, the only legal sanctions are community service and 24-hour preventive detention if the violator is caught in the act. Bureau of Democracy, Human Rights, & Labor, U.S. Dep't of State, *Honduras 2012 Human Rights Report (2012)*, <http://www.state.gov/documents/organization/204670.pdf>. The law likewise reflects and institutionalizes the gendered social norms

pervasive throughout Honduran culture by making distinctions between non-spousal and spousal rape. While the former is criminalized, the latter is not granted the same status. Instead, claims of spousal rape are “evaluated on a case-by-case basis.” Cecilia Menjivar & Shannon Drysdale Walsh, *The Architecture of Femicide: The State, Inequalities, and Everyday Gender Violence in Honduras*, 52(2) Latin Am. Res. Rev. 221, 236 (2017). Furthermore, despite passing laws that criminalize “intrafamilial violence, rape, and killings of women” the Honduran government has “undermined the aims of these laws by failing to implement them effectively.” *Id.* at 223; *see also* A.R. 344 (noting that despite gender discrimination laws on the books, “enforcement is low and laws are easily navigated around”); A.R. 364 (explaining that “the laws and institutions that do exist are of little effect”). Other examples abound.

Honduran institutions are likewise not up to the task of preventing domestic violence. Although “[i]nstitutional mechanisms and bureaucratic units have been created to implement laws, . . . these institutions are generally underfunded and understaffed, reflecting the

symbolic and gender violence in the law as it ignores women's lives and suffering." Menjivar & Walsh, *supra*, at 230. As such, "there are large gaps in state protection measures, including in addressing violence against women."⁴ Little hope for effective policing exists due to "high levels of corruption as well as the involvement of police and military forces in crimes and human rights violations." A.R. 395.

For example, after the Law Against Domestic Violence passed, a Special Women's Public Prosecutors Office was created and tasked with the law's enforcement. However, the office had "little power when it came to prosecuting perpetrators of domestic violence." UNFPA (United Nations Population Fund), *Programming to Address Violence against Women: 8 Case Studies Volume 2*, at 39 (2009) <https://www.unfpa.org/sites/default/files/pub-pdf/violence.pdf>.

Moreover, many of the governmental agencies charged with the enforcement of legislation aimed at protecting Honduran women were either weakened or dismantled altogether due to political upheaval.

⁴ *Honduras: Information Gathering Mission Report*, Immigr. and Refugee Board of Can. (2018), <https://irb-cisr.gc.ca/en/country-information/ndp/Pages/Honduras-2018P1.aspx#h-chap2>.

Menjivar & Walsh, *supra*, at 230–31. As a result, “Honduras often fails to submit required reports to monitoring bodies, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Follow-up Mechanism to the Belem do Para Convention (MESECVI).” *Id.*; *see also* A.R. 365. Tremendous obstacles thus exist in implementing and enforcing legislation aimed at protecting Honduran women. These obstacles reflect and exacerbate the sexism that pervades Honduran culture at-large, and within which “the police and judiciary operate.” Menjivar & Walsh, *supra*, at 231. Theoretical legal protection standing alone is not sufficient when political will and enforcement are nonexistent.

And, finally, the people who operate within these institutions often turn a blind eye to domestic violence. “[W]hen women do turn to local law enforcement [for help with abuse], they receive no support.” A.R. 548. In fact, the Special Women’s Public Prosecutors Office has publicly referred to the police as “ineffective” on domestic violence enforcement. A.R. 539. Another public official observed, “[T]he police do not have the financial resources to provide effective monitoring

of security measures imposed.” A.R. 539. When the perpetrators of violence are “well-connected politically,” women do not seek aid because of “fear of retribution.” A.R. 548. Even when the perpetrators of violence are not well-connected, women simply “receive no support” from the authorities. A.R. 548. Indeed, many Honduran “[w]omen who seek help from the police are often told that the issue is a matter for her husband to decide, and that she should go home, be intimate with him, and he will forgive her. Other times, police simply tell the women to stop disobeying their husbands.” A.R. 356.

This failure of enforcement is also evidenced in [REDACTED] [REDACTED] testimony before the immigration judge. When asked why she did not report her partner to the Honduran authorities, [REDACTED] stated that “he always threaten[ed] [her] that things would be worse for [her]” if she reported his abuse. A.R. 193. The result is that “[b]ecause police are largely seen as non-responsive to women in cases involving domestic violence, women often do not report the crimes at all because they believe reporting will result in no

governmental intervention and will only serve to anger their abuser.”
A.R. 359.

As a result of each of these governmental failings, the Immigration and Refugee Board of Canada (the “IRB”) observed that “violence against women and impunity for the perpetrators continue in Honduras.” A.R. 381. (Contemporaneously, a U.N. expert “urged the Government of Honduras to address the culture of widespread impunity for crimes against women and girls.” A.R. 401.) In a follow-up study in 2018, the IRB concluded that “violence against women and girls continues to be widespread across Honduras.”⁵ Both the 2013 IRB study report and the 2018 report noted that most perpetrators commit violence with impunity.⁶

The impunity with which men perpetrate violence against women in Honduras is borne out by empirical data. Only 22 of the 300 femicides in 2010—7.3%—resulted in the perpetrators being brought to

⁵ *Honduras: Information Gathering Mission Report, supra.*

⁶ Compare A.R. 385 (noting, in 2013 report, that the special prosecutor for women called the police “ineffective”), *with Honduras: Information Gathering Mission Report, supra* (noting, in 2018 report, the continuing problem that “impunity is rampant, and that state institutions do not function effectively”).

justice. A.R. 314. Out of 463 women murdered in 2016, an abysmally low 15 cases were even investigated by authorities.⁷ The lack of investigation explains why “over 96% of femicides go unpunished.” A.R. 358.

This record leads only to the inexorable conclusion that Honduran government units and officials are both unwilling and unable to combat domestic violence against women. The failure of the IJ or the BIA to contend at all with this evidence requires reversal.

II. FORMAL MARITAL STATUS IS NOT DETERMINATIVE OF WHETHER ONE IS IN A DOMESTIC RELATIONSHIP IN HONDURAS THAT QUALIFIES AS A PARTICULAR SOCIAL GROUP

In summarily concluding that [REDACTED] was not a member of either of two PSGs comprising “Honduran women who are unable to leave a domestic relationship” or “Honduran women who are viewed as property by their domestic partners,” the BIA ignored the extensive evidence before it relating to Honduran cultural and social norms. Instead, the BIA assessed whether she was married to [REDACTED]

⁷ *Honduras on ‘Red Alert’ over Female Murders, says Activists*, BBC (2017) <https://www.bbc.com/news/world-latin-america-40518212>.

██████ under Honduran law. In addition to imposing a marriage requirement onto two PSGs which did not mention marriage, this superficial assessment assumed a basis for membership that was contrary to record evidence and to the reality of domestic relationships in Honduras. Consistent with well-established precedent, the question of whether an asylum applicant has demonstrated membership in a PSG must be evaluated *within* the applicant’s own society. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 238 (BIA 2014) (“The particular social group analysis does not occur in isolation, but rather in the context of the society out of which the claim for asylum arises.”).⁸

To have properly decided under BIA precedent whether ██████████ ██████████ adequately showed membership in her proffered PSGs, the IJ and the BIA must have assessed those groups as they are perceived *within Honduran society*. *See, e.g., Oliva v. Lynch*, 807 F.3d 53, 61 (4th Cir. 2015) (analyzing whether Salvadoran society perceived

⁸ *Amici* note that the issue of whether particularity and social distinction are required is an open question in this Circuit. *Martinez v. Holder*, 740 F.3d 902, 913 n.4 (4th Cir. 2014) (observing that the “particularity” criterion remains an open question in the Fourth Circuit and that the Court of Appeals has yet to confirm the statutory authority for the “social visibility” criterion).

the purported group as distinct). Neither the IJ nor the BIA performed this analysis. Instead, the IJ compared [REDACTED] alleged social groups to those in other BIA decisions involving different countries. For example, in concluding that [REDACTED] had failed to show immutability or particularity in her Honduran social group because she was not married, the IJ distinguished her from the applicant in *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014), *who was from Guatemala*. A.R. 110, 112. Similarly, the IJ concluded that [REDACTED] was able to leave her Honduran relationship in part because she had not established the same “social, cultural, and legal impediments” as the *Guatemalan* applicant in *A-R-C-G-*. A.R. 111. This was clear error.

Had the IJ and the BIA applied the law correctly, they would have assessed conditions in Honduras and, on the undisputed record, found that Honduran culture does not require formal marriage to constitute a domestic relationship.

First, the Honduran constitution itself acknowledges “de facto unions” between unmarried persons. Article 112 states that the

“[d]e facto union between persons legally able to marry is acknowledged” and further provides that “[t]he law shall regulate the conditions under which it shall produce the effects of civil marriage.” Hond. Const. art. 112.⁹ In essence, one need not formally marry to be entitled to all of the rights and protections that marriage affords; that is, one need not marry to be in a legally recognized domestic relationship.

Culturally, domestic relationships and domestic partners are identified in Honduras based on characteristics well short of formal marriage. These characteristics include, but may not be limited to, consensual unions, cohabitation and children in common. Indeed, consensual unions, not formal marriages, “have long been the dominant type of conjugal union in the region.” Teresa Castro-Martín & Antia Domínguez-Rodríguez, *Consensual Unions in Central America: Historical Continuities and New Emerging Patterns, in Cohabitation*

⁹ See also U.S. Soc. Sec. Admin., PR 82-049, *Marriage - Cohabitation And Reputation (Including Common-Law Marriage) - Honduras* (Oct. 25, 1982), <https://secure.ssa.gov/poms.nsf/lnx/1503130156> (finding that under Honduran law, the putative spouse in a de facto union with a worker has rights to certain social security benefits, worker’s compensation and death benefits).

and Marriage in the Americas 157 (A. Esteve & R.J. Lesthaeghe eds., 2016). As of 2016, consensual unions actually outnumbered formal marriages in Honduras and have experienced a “moderate rise” in recent years. *Id.* at 163, 166.

Cohabitation is also a significant indicium of a domestic relationship in Honduras because, as one study found, early onset of sexual activity in Honduras “leads to a dramatic increase in the likelihood of cohabiting with little impact on the likelihood of marrying.” See Kathryn Grace & Stuart Sweeney, *Pathways to Marriage and Cohabitation in Central America*, 30 *Demographic Res.* 187, 212 (2014), <https://www.demographic-research.org/volumes/vol30/6/30-6.pdf>; see also Maira Covre-Sussai *et al.*, *Traditional and Modern Cohabitation in Latin America: A Comparative Typology*, 32 *Demographic Res.* 873, 907 (2015), <https://core.ac.uk/download/pdf/34643570.pdf> (finding that the majority of partnered women in Honduras are in a cohabitating relationship, not marriage).

Finally, in Honduras as in other Central American countries, more children are born outside the legal framework of

marriage than within. See Castro-Martín & Domínguez-Rodríguez, *supra*, at 159; see also *id.* at 178 (finding that more than 80% of Honduran women in consensual unions have borne two or more children). Studies have shown that consensual unions indeed “constitute a usual and socially acceptable context to raise and have children,” and that childbearing in such unions does not seem to lead to formalized marriages. *Id.* at 179–80.

Similarly, Honduran culture does not require marriage for a Honduran male to feel that his domestic partner is “his woman” or “his property.” Under the Honduran culture of *machismo*, a woman in any intimate relationship—marriage or otherwise—is perceived to be “owned” and “controlled” by the male partner. The record in this case contains a detailed declaration from Claudia Herrmannsdorfer, a lawyer and expert on women’s rights in Honduras, on this very topic. She explains, “*Machismo* teaches that women are property of their intimate partners or fathers. . . . According to Honduran cultural norms, when a woman moves in with a man, the man takes over the ‘ownership’ of the woman from her father. *This is true in common law*

relationships, legal marriages, and other intimate relationships.” A.R. 355 (emphasis added); *see also* A.R. 335 (finding that Honduran culture of *machismo* “creates a patriarchal-power dynamic” that leaves women in relationships behind). In this culture, it is therefore not surprising that, as the evidence shows, women also have little ability to end a relationship simply by leaving the home. Again, as was shown in the record, “[y]oung women face domestic violence from intimate partners” and “[f]leeing to another part of Honduras often provides no relief.” A.R. 547. Other evidence in the record, discussed above, further establishes that unmarried women in domestic relationships are treated as property by their partners. *E.g.*, A.R. 355.

Here, substantial, undisputed and credible evidence demonstrated that [REDACTED] was a member of two PSGs (women who cannot leave their domestic relationships and women viewed as property by their domestic partners), that such groups are particular social groups within Honduras and that the abuse she suffered was on account of her membership in those groups. The IJ’s and the BIA’s conclusion that being married is a necessary prerequisite

to membership in the two Honduran social groups identified by [REDACTED] [REDACTED] (even though neither one mentions marriage) lacks any evidence to sustain it and, in fact, is contrary to the unrebutted evidence in the record. This conclusion constitutes error and requires reversal.

III. THE BIA'S APPARENT RELIANCE ON *MATTER OF A-B'S* PURPORTED GENERAL RULE THAT DOMESTIC VIOLENCE CASES WILL NOT QUALIFY FOR ASYLUM SHOULD BE REJECTED AS ARBITRARY AND CAPRICIOUS

Over the course of more than two decades, U.S. Courts of Appeals and the BIA have held that survivors of gender-based violence, just like those fleeing religious or political persecution, are eligible for asylum if they meet the statutory criteria that establish them as refugees. This legal precedent considers the social, economic and legal reality these survivors face within their own cultures. It recognizes that these women are survivors of violence brought about by a public code of conduct that allows them to be victimized simply because they are women, living within various social groups that are routinely targeted for persecution.

More recently, however, in *Matter of A-B-*, 27 I. & N. Dec. 316 (AG 2018), the Attorney General attempted to corrode this settled law. The Attorney General vacated a prior BIA decision on the ground that it was insufficiently reasoned. Then, while claiming to simply reiterate and apply existing law, the Attorney General nevertheless repeatedly declared a whole new set of “general” rules. *Id.* at 320, 335. Chief among these is the announcement that claims of domestic violence will not support an asylum application. *Id.* at 320.

This general rule, though, is arbitrary and capricious because (i) it requires IJs to ignore the cultural, political and social mores that foster—and fail to protect against—gender-based violence and (ii) it allows IJs to refrain from making the particularized inquiry required by law. *E.g.*, *Rodriguez-Arias v. Whitaker*, No. 17-2211, slip op. at 10–12 (4th Cir. Feb. 2, 2019) (holding determination was reversible error when IJ and BIA fail to meaningfully engage on evidence relevant to required legal standard). Research shows that repeated violence in personal relationships often flows not from personal animosity, but from the abuser’s need to exercise control in

this relationship with the victim. *See, e.g.,* Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Towards a New Conceptualization*, 52 *Sex Roles* 743, 743 (2005). Accordingly, the vast majority of research over the past thirty years has discarded the previous idea that domestic violence is simply a private matter of personal animosity.

In the instant matter, immediately after, and apparently in support of, its conclusion that ██████████ had not established membership in a PSG, the BIA quoted the Attorney General's recently-announced "general rule [that] 'claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.'" BIA Decision at 2 (quoting *Matter of A-B-*, 27 I. & N. Dec. at 320). To the extent the BIA relied on that "general rule," it was error because such a "general rule" is contrary to law, unreasonable, and arbitrary and capricious.

First, the "general rule" articulated in *Matter of A-B-* rests on a logical fallacy. It claims that domestic violence based on "personal relationships" are *necessarily not* "on account of" one's membership in a

PSG. Indeed, as revealed in a curious criticism of the *A-R-C-G-* nexus finding, the Attorney General concluded (citing to a wholly unrelated case) that a preexisting personal relationship must be the basis for domestic violence:

Similarly, *in domestic violence cases*, like *A-R-C-G-*, the Board cited no evidence that her ex-husband attacked her because he was aware of, and hostile to, “married women in Guatemala who are unable to leave their relationship.” *Rather, he attacked her because of his preexisting personal relationship with the victim. See R-A-*, 22 I&N Dec. at 921.

Matter of A-B-, 27 I. & N. Dec. at 339 (emphasis added). Likewise, he criticized *A-R-C-G-* because “[t]he Board cited no evidence that her husband knew any such social group existed, *or that he persecuted [his] wife for reasons unrelated to their relationship.*” *Id.* at 343 (emphasis added).

This attempt to isolate a motive applicable to all domestic violence, however, is neither legal nor logical, as the Second Circuit has explained. In *Osorio v. INS*, 18 F.3d 1017 (2d Cir. 1994), the court reversed a decision in which the BIA found that a union leader from Guatemala was targeted by the government because of his economic

beliefs *rather* than for political reasons. *Id.* at 1028. The Second Circuit concluded that the issue was not so clear cut, explaining that “the conclusion that a cause of persecution is economic does not necessarily imply that there cannot exist other causes of the persecution.” *Id.* In the same way, the fact that an abuser beats his partner for ostensibly disobeying him does not necessarily mean that there cannot exist other causes of the persecution. Indeed, a PSG referencing domestic relationships plainly pre-supposes that the relationship has some bearing on the persecution. To require that the BIA must find persecution “unrelated to the relationship” to support asylum in a domestic violence matter is simply contrary to law. *See Cece v. Holder*, 733 F.3d, 662, 671 (7th Cir. 2013) (“[T]he Board of Immigration Appeals has never required complete independence of any relationship to the persecutor.”). There is simply no basis in logic or law to sustain a general rule that all domestic violence stems only from pre-existing personal relationships, and not from any other cause.

Second, the Attorney General’s “general rule” appears to equate domestic violence with general—or what he calls “private”—

criminal activity.¹⁰ He then opined that because general crime is not a basis for asylum, neither is domestic violence. *Id.* at 346. Again, upon examination, this conclusion is untenable.

Nearly any harm sufficient to establish persecution will constitute “criminal” activity. A gang of thugs who demanded an asylum applicant’s furniture business and who brutally beat him when he refused were certainly engaged in general criminal conduct and acting out of greed. But where the attack was based in part on greed and in part on the attackers’ belief that people of other ethnic backgrounds, like the applicant, should not live or thrive in their area, that attack was also on account of his membership in a PSG. *Aliyev v. Mukasey*, 549 F.3d 111, 117–18 (2d Cir. 2008). Categorizing activity as “criminal,” therefore, cannot be dispositive. Instead, the question is whether the asylum applicant can show that the criminal conduct was, at least in part, on account of membership in the PSG. Thus, asylum applicants who survive rape, sexual assault, severe beatings, female

¹⁰ The question he posed for certification was: “whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable ‘particular social group.’” *Matter of A-B-*, 27 I. & N. Dec. at 317.

genital mutilation, forced marriage and other forms of persecution that may fall under the rubric of “private criminal activity” *may also* satisfy the statutory requirements for asylum or withholding of removal. *Sarhan v. Holder*, 658 F.3d 649, 658 (7th Cir. 2011) (finding persecution when honor killing was carried out by family member).

Third, the “general rule” is invalid because it lacks any evidentiary basis. In *Matter of A-B-*, the Attorney General held, without citation to any evidence, that domestic abuse against women occurs in “highly individualized circumstances” and not as “members of a distinct group” in Guatemala. 27 I. & N. Dec. at 336. He cited to no evidence in the decision. Nor did he reckon in the slightest with the significant evidence presented in Ms. A-B-’s case in chief (including more than 600 pages of material at the certification stage) and in the multiple amicus briefs submitted at his invitation. *Grace v. Sessions*, No. 1:18-cv-01853-EGS, (D.D.C. 2018) (Dkt. 41), <https://ecf.dcd.uscourts.gov/doc1/04516746775>. Instead, his unsupported factual assumption reflects a foreordained, result-oriented failure to grapple with more than three decades of mounting evidence

demonstrating the pervasive and one-sided nature of domestic violence. *E.g.*, Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 Colum. Hum. Rts. L. Rev. 291, 305 (1994). As Ms. Copelon notes, “[d]omestic violence is not gender-neutral.” *Id.* at 303. Women in intimate relationships are subjected to a high risk of violence from their male partners, and in many countries, a majority of the violence against women had been perpetrated by their intimate partners.¹¹ The Attorney General, however, failed to recognize, reflect on or counter any of this evidence.

The Court should reverse the decision below because it appears that the unreasonable, arbitrary and capricious “general rule” purportedly established in *Matter of A-B-* had influence in the BIA’s conclusion.

CONCLUSION

The Court should grant [REDACTED] petition for review, vacate the BIA’s decision, and remand this case for

¹¹ Claudia García-Moreno et al., WHO, *WHO Multi-Country Study on Women’s Health and Domestic Violence Against Women: Summary Report* 1, 43 (2005), <https://www.who.int/reproductivehealth/publications/violence/24159358X/en/>.

consideration of her asylum claims under the appropriate legal standards.

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Dated: February 14, 2019

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I certify that on February 14, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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