

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
BOARD OF IMMIGRATION APPEALS  
FALLS CHURCH, VIRGINIA

In the Matter of: )  
 )  
 Aruna VALLABHANENI, ) IN REMOVAL PROCEEDINGS  
 )  
 Respondent )  
 )  
 A76 724 694 )  
\_\_\_\_\_)

AMICUS BRIEF

**Introduction**

This brief is submitted by *amici curiae* in support of the appeal by Aruna C. Vallabhaneni of the decision of the Immigration Judge denying her application for political asylum despite an undisputed record of years of severe domestic violence and her inability to obtain protection from the government of India. The record before the judge established that Ms. Vallabhaneni was persecuted in the past and that she has a well-founded fear that she will continue to be persecuted in the future by her husband if she is forced to return to India, that the persecution she experienced and which she fears was inflicted because of her membership in a particular social group defined in whole or in part by her gender, and that she is not able to obtain protection from her government.<sup>1</sup> The Immigration Judge's decision should be reversed and Ms. Vallabhaneni's application for asylum should be granted.

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1. In addition to her claim under the particular social group category, Ms. Vallabhaneni has raised an asylum claim based on her political opinion. This brief does not address that aspect of Ms. Vallabhaneni's asylum claim.

### **Statement of Interest of the *Amici Curiae***

This brief is submitted on behalf of the following coalition of organizations who have experience as legal advocates and scholars in the immigration and domestic violence fields:

The American Immigration Lawyers Association (AILA) is a national non-profit association of immigration and nationality lawyers. Founded in 1946, AILA is an affiliated organization of the American Bar Association. It now has more than 6,000 members organized in 34 chapters across the United States and in Canada. AILA's members clients are directly affected by the decision in this case.

The American Immigration Law Foundation (AILF) is a non-profit organization established in 1987 to increase public understanding of immigration law and policy, to promote public service and professional excellence, and to advance fundamental fairness, due process, and basic constitutional and human rights in immigration law and administration.

The Center for Gender & Refugee Studies (CGRS), founded in 1999, is based at University of California's Hastings College of the Law. CGRS provides legal expertise and resources to attorneys representing women asylum-seekers fleeing gender related harm. CGRS also works to coordinate legal and public policy advocacy efforts, tracks decisions and engages in public education in order to inform decision makers and the public and contribute to the formulation of national and international policy and practice. CGRS director Karen Musalo has written and lectured widely on the jurisprudence of asylum and gender asylum, and she was lead counsel in Matter of Kasinga, 21 I. & N. Dec. 357 (BIA 1996). CGRS has an interest in the development of gender jurisprudence consistent with relevant domestic and international refugee and human rights law.

The Immigrant and Refugee Rights Clinic (IRRC) at the City University of New York School of Law (CUNY) was founded in 1987 and is part of the third year clinical program at CUNY Law School. In addition to serving as an educational program for third year law students to learn and practice immigration and asylum law, the IRRC also provides legal expertise and resources to attorneys and community organizations representing women asylum seekers fleeing gender-based persecution. Pamela Goldberg, the law professor who conducts the IRRC, specializes in addressing issues of gender-based persecution. She has written and lectured nationally and internationally on the developing jurisprudence of gender-based claims and human rights. The IRRC has an interest in the development of jurisprudence concerning asylum eligibility of women and girls consistent with international and domestic principles of human rights and refugee law.

The Family Violence Prevention Fund (“FUND”) is a non-profit tax exempt organization founded in 1980. The FUND, a national organization based in San Francisco, focuses on domestic violence education, prevention and public policy reform. Throughout its history, the FUND has developed pioneering prevention strategies in the justice, public education, and health fields. One of the FUND’s programs is its Battered Immigrant Women’s Rights Project. This multi-dimensional work expands victim’s access to legal assistance and culturally appropriate services. Through this project, the FUND has worked to ensure that domestic violence programs become accessible to battered immigrant women. The FUND has provided training and technical assistance to domestic violence shelters, legal assistance workers, and other service providers on issues facing battered immigrant women.

NOW Legal Defense and Education Fund (“NOW Legal Defense”) is the leading national civil rights organization that performs a broad range of legal and educational services in

support of women's efforts to eliminate sex-based discrimination and to secure equal rights. NOW Legal Defense was founded as an independent organization in 1970 by leaders of the National Organization for Women. NOW Legal Defense has been engaged on many fronts in efforts to eliminate gender-motivated violence. Furthermore, NOW Legal Defense's Immigrant Women Program ("IWP") co-chairs the National Network on Behalf of Battered Immigrant Women and is responsible for the Network's Washington-based advocacy efforts to enhance legal protections and access to services for battered immigrant women and their children. The IWP is actively involved in policy efforts to promote greater legal protections for battered immigrant women. NOW Legal Defense has participated as amicus curiae in numerous cases in support of the rights of women who have been the victims of sexual assault, domestic violence and other gender-motivated violence.

The National Immigration Project of the National Lawyers Guild is a national organization of attorneys, law students and legal workers engaged in legal projects of public and social concern to promote the fair and humane administration of justice relating to immigration, nationality and refugee law. Its goal is to enable noncitizens to exercise their civil and constitutional rights, regardless of race, religion, nationality, gender or economic position. The National Immigration Project co-founded and co-coordinates the National Network on Behalf of Battered Immigrant Women, and provides technical assistance on immigration relief for battered noncitizens to attorneys and service providers throughout the United States.

The Refugee Law Center (“RLC”) provides advice, support, documentation resources and related backup services to academic and policy researchers and to advocates representing immigrant women before the INS Asylum Office, the Executive Office for Immigration Review (“EOIR”) and federal courts. In addition, the RLC provides periodic research papers on relevant issues of law and policy and maintains a database of unpublished decisions in gender-related asylum cases. The staff of the RLC has been involved in training advocates and adjudicators in issues involving gender-related asylum. In 1998, the RLC published *The Law of Asylum in the United States*, the leading treatise on U.S. asylum law. In 1999, the RLC published *Gender Asylum Law in Different Countries: Decisions and Guidelines*. The RLC has a particular focus on the claims of women asylum seekers and an interest in ensuring the development of the law of asylum in women’s cases in a manner consistent with relevant principles of asylum and human rights law.

The Women Refugees Project of the Harvard Law School Immigration and Refugee Clinic and Greater Boston Legal Services, Inc. (formerly of Cambridge and Somerville Legal Services, Inc.) has worked with hundreds of women from around the world since its founding in 1992. It combines representation of individual women asylum applicants with the development of theories, policy and national advocacy. The Project participated in developing the *Considerations for Asylum Officers Adjudicating the Asylum Claims of Women* issued by the Immigration and Naturalization Service (“INS”) in May 1995, and has been engaged by the Justice Department in the training of immigration judges, asylum officers and supervisors on women’s asylum claims. In addition, the Project provides advice, support and backup services to advocates around the United States representing women seeking asylum. The Project has an interest in the proper application and development of the law in this area, so that claims by

women for asylum protection receive fair and proper consideration under existing standards of law.

Members, staff and volunteers associated with *amici* have practiced in all districts of the Immigration and Naturalization Service and before the Executive Office for Immigration Review. *Amici* also litigate matters involving immigration, nationality and naturalization before the federal district courts and federal circuit courts, and argue cases before the Supreme Court of the United States.

#### The Facts of the Case

The material facts of this case are not in dispute. The Immigration Judge found that Ms. Vallabhaneni entered into an arranged marriage in March of 1983, and that, over the course of the next fourteen years, her husband subjected to ongoing and brutal domestic abuse. On two occasions, Ms. Vallabhaneni's husband attempted to kill her, once by leaving the gas stove on knowing that she was unable to smell the gas because of a previous injury he had inflicted which caused her to lose her sense of smell. Over the course of the marriage, Ms. Vallabhaneni's husband routinely subjected her to sexual abuse and beat her, bruising her ribs, inflicting nerve damage which caused her to lose her sense of smell, and requiring her to receive stitches on her face and to undergo a hysterectomy.

Ms. Vallabhaneni tried on two occasions to leave her husband, going to other states within India, but her husband was able to find her and bring her back. *See Handwritten letter of Ms. Vallabhaneni to Immigration Court* at p. 4. On one occasion in 1997, after fourteen years of

abuse, Ms. Vallabhaneni attempted to obtain protection from her government by reporting her husband to the police. The police arrested her husband and took him to the police station. Her husband contacted her father who arranged for his release and cancelled the complaint she had filed, sending her home with her husband, because “he’s your husband” Tr. 34. When Ms. Vallabhaneni’s husband was released, he beat her so severely that she was hospitalized for two days. Despite the fact that Ms. Vallabhaneni’s parents were aware of the abuse, they prevented her from taking any protective action, telling her that if she reported the abuse she would destroy the reputation of the family’s name and they would kill themselves. They told her that their deaths would be her fault. Ms. Vallabhaneni testified that her parents are from an orthodox Hindu family and that it is very important to them that she remains married and that no one learns of the problems between her and her husband. In addition to the threats made by her family, Ms. Vallabhaneni also received threats from her husband. If she reported the abuse again, he would take the children and do something to them. TR 40. Ms. Vallabhaneni never attempted to gain protection again, fearing the consequences within her family, the harm her husband would inflict on her and her children, and that, even if she were able to obtain protection from her husband, she would be harmed by his friends.

At the time of her hearing, Ms. Vallabhaneni was not represented by counsel.

At the hearing, the Service submitted two Reports from the U.S. Department of State regarding conditions within India. These reports confirm the subordinate position of women within Indian society. They report that murder of women as a result of dowry disputes is a serious problem within India, and that, although there is an elaborate system of laws to protect the rights of women, the government often is unable to enforce these laws. The Country Report

on Human Rights Practices for 1996 indicates that registered cases of violence against women--including molestation, rape, kidnaping, and wife murder (dowry deaths)--numbered 83,964 in 1993, 98,948 in 1994 and 100,846 in 1995 and that higher female mortality at all age levels, including female infanticide, accounts for a decline in the ratio of females to males down to 927 per 1,000 in 1991, having been 955 per 1,000 in 1981 and 972 per 1,000 at the turn of the century.

While the Immigration and Naturalization Service has no material disagreement with these facts, *see Brief of INS* at pp. 7-8, the Service argues that the case should be remanded to the Immigration Judge for further testimony and submission of additional documentation. In its brief, the Service makes reference to two additional country profiles of India prepared by the Home Office of the United Kingdom and the Research Directorate of the Immigration and Refugee Board of Canada. These documents contain substantial information which is more than sufficient to establish a well-founded fear, supporting Ms. Vallabhaneni's claim to asylum, including the following:

- Marriage is considered a social necessity for women of all religions in India and most marriages are still arranged.
- When a woman in India leaves her home to live with her husband or her husband's family, she subordinates herself to men and older women in his family and is expected to be submissive.
- Wifebeating is widespread in India and is a problem that cuts across all castes, classes, religions and education levels. In one report, 46 % of the men interviewed had either physically or sexually assaulted their wives.



- It is customary in India for a bride's family to provide a dowry to the husband and his family. Abuse is often used as a means of coercing women into paying a larger dowry. There are consequently many deaths attributed to kitchen fires which are actually murders related to dowry disputes.

- Although the Hindu Marriage Act allows for the legal dissolution of a marriage, divorce remains unacceptable; women are often ostracized by their communities or family for seeking divorce, a woman who leaves her husband, will often receive no help from her parents, will not have many opportunities to remarry and will face widespread social opprobrium.

- Parents will frequently discourage a women from leaving an abusive husband and may send her back to the abusive home.

- Women within Indian society occupy a lower social status than men as a result of Hindu tradition. As a result, they suffer disparate treatment throughout the economic, social and political spheres. Women and girls are in a disadvantaged position with regard to nutritional and health benefits (resulting in disparity in mortality rates), access to education and employment.

- The low social status of women in India is most starkly illustrated by the practice of female feticide and infanticide.

On appeal, Ms. Vallabhaneni, represented by counsel, submitted a supplemental affidavit in which she elaborated on the abuse to which she testified at her hearing and the reasons she

was unable to obtain protection from her government. In her supplemental affidavit she stated that, in addition to the abuse considered by the Immigration Judge, her husband forced her to have sex on many occasions, that he kicked her in the stomach one week after her hysterectomy, and that she had been hospitalized more than ten times as a result of beatings by her husband. She also stated that, when her husband learned that she was pregnant with her daughter, he became angry with her because he wanted a son. He hit her during the pregnancy, and when she had complications, he refused to take her to the hospital. When her daughter was born, her husband refused to come to see her for five days. In addition, Ms. Vallabhaneni stated that one reason she did not seek further protection from the police was that she feared that they would harm her:

Also in India, the police are not trustworthy. They often harm people who are in their custody. My parents also told me not to go to the police station again. When I was growing up, my mother often told me that I should not trust the police. There were movies in India, which showed police mistreating woman (sic). When we would see these movies, my mother would say to me, "See, you should not trust the police." I believe that my parents also feared that the police might do something to me if I went to report my husband again.

*Supplemental Affidavit of Aruna Vallabhaneni*, para. 10.

The Affidavit of Sujata Warriar, an expert on the treatment of women and domestic violence in India, (attached hereto), confirms the subordinate status of women in Indian society. Consistent with the position taken by the Service in its brief on appeal, she confirms that women in almost all parts of India, across religious and caste affiliations, occupy a secondary position to that of men, and that the lower position of women and girls within the natal home results in a high female infant mortality and female infanticide rate in India. *Warriar Aff.*, para.8.a. She also confirms that families in India are patriarchal, patrilineal and patrilocal. *Id.* at para. 8.c.

Arranged marriages, with the payment of a dowry by the parents of the bride, is the usual form of marriage in India. *Id.*, para. 8.c. “While the original intent was to give the daughter a share in the natal family property in movable goods, the transaction has materialized, and the price parents have to pay in order to remove the burden of having female children. *Id.*, para. 8. e. Abuse of women in the affinal home is not recognized as abuse in either the Secular Law or Hindu Personal Law. *Id.*, para. 8.f. While some laws exist to provide protection to women, their enforcement is erratic and there is little real protection available to women. *Id.*, para. 8.g. The Hindu Personal Law and Hindu Marriages Act make it difficult for women to obtain a divorce. *Id.*, para. 8.h. Women who are able to obtain a divorce are shunned by society, and even if the woman is not the one who initiates the divorce, she will be blamed for bringing shame and dishonor to her family. *Id.*, para. 8.i. “Natal families will do everything to discourage the women from seeking a divorce including threats of ex-communication and suicide to stop the process. *Id.*, para. 8.i. In some cases, she is also subject to hostile persecution by her own family through “honor” killings.” *Id.*, para. 8. i.

### **The Decision of the Immigration Judge**

The Immigration Judge recognized that domestic violence has been found to be persecution and that gender can be a basis, in whole or in part, for an asylum claim based on membership in a particular social group. *IJ Dec.* at 6. Nonetheless, the Immigration Judge denied Ms. Vallabhaneni’s asylum claim, finding that she had failed to establish that her government was unable or unwilling to protect her from domestic violence. The Immigration Judge found that Ms. Vallabhaneni was apparently free to obtain protection from the Indian government and that, “out of her own volition and the desire not to upset her parents, Ms.

Vallabhaneni chose not to report further abuse she suffered by her ex-husband to the authorities.”

*IJ Decision* at 7.

The decision of the Immigration Judge demonstrates a complete lack of understanding of the social and political reality of women in India and of the individual circumstances which made it impossible for Ms. Vallabhaneni to obtain protection in her country.

### **Issues Addressed**

The *amici* submit this brief to address the questions posed to the parties by Board Member Rosenberg in a letter to the parties dated May 1, 2001. The letter sets forth the following questions:

1. What effect, if any, should be given in this case to the December 7, 2000, Proposed Rule on the meaning of “membership in a particular social group”, published at Fed. Reg. 76588?
2. What grounds of asylum are being claimed in this case and if one of the grounds is membership in a particular social group, what is the group in which the applicant is claiming membership?
3. How does the requirement that an asylum applicant show that she be unwilling or unable to avail herself of the protection of the government affect this case?
4. Any other issues pertinent to this case.

### **ARGUMENT**

I. **The Board of Immigration Appeals Should Not Remand this Case to the Immigration Court.**

In its brief, the Service takes the position that the case should be remanded to the Immigration Judge for the presentation of further testimony and evidence in support of Ms. Vallabhaneni's claim. A remand is neither necessary nor appropriate in this case. The Board is not bound by the analysis and conclusions of the Immigration Judge, but has the authority to review the record *de novo* and to make its own independent determinations of law and fact. *Matter of Lok*, 18 I&N Dec. 101 (July 1981)(citing to *Matter of Bacerra-Miranda*, 12 I&N Dec. 358 (BIA 1967) and *Matter of Vilanova-Gonzalez*, 13 I&N Dec. 399 (BIA 1969)). Because the Board has full power to make both factual and legal determinations, "it may consider new evidence not presented to the Immigration Judge." *Hazard v. INS*, 951 F.2d 435, 440 (1<sup>st</sup> Cir. 1991). The Board has the discretionary power to consider new evidence on appeal. *See also Goncalves v. INS*, 6 F3d 830 (1<sup>st</sup> Cir. 1993); *Yepes-Prado v. INS* (9<sup>th</sup> Cir. 1993).

Documentary material, including the Affidavit of Sujata Warriar, has been offered to the Board as background evidence to elaborate on the situation of women in India and to provide a context within which to evaluate the facts of Ms. Vallabhaneni's case.<sup>2</sup> In addition to the material offered by Ms. Vallabhaneni and the *Amici*, the Service has highlighted two very informative reports prepared by the Home Office of the United Kingdom and the Research Directorate of the Immigration and Refugee Board of Canada for use by adjudicators deciding claims in those countries. The Board has the discretionary authority to consider this additional evidence, and it is appropriate in this instance to do so. Ms. Vallabhaneni's hearing was

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2. In addition, Ms. Vallabhaneni has offered a supplemental affidavit to elaborate on certain points in her original testimony.

conducted without the benefit of counsel. She expressed her desire for an attorney and attempted to find someone who could represent her in her hearing. *Tr.* at 4-6. When she was not able to appear with an attorney at her June 1, 1998 hearing, the Immigration Judge proceeded with the hearing. Despite the fact that she was unrepresented and testifying in a language that was not her native language, Ms. Vallabhaneni was able to express the material facts of her asylum claim. Those facts were accepted by the Immigration Judge. The rendition of those facts set forth by the Service in its brief is sufficient to establish her eligibility for asylum. In its recitation of the facts, the Service concedes that the record establishes that Ms. Vallabhaneni's husband seriously abused her on a daily basis over a period of fourteen years and that the abuse included two attempts to kill her and resulted in many serious injuries including nerve damage that left her unable to smell, bruised ribs, and a hysterectomy necessitated by blows to her stomach. *See INS Brief at 7.*

Although Ms. Vallabhaneni was able to present the facts of her individual claim, she was not in a position to provide background information which would assist the court in evaluating her claim within the context of India. The documentary evidence being offered at this time provides the Board with a context within which to evaluate the facts presented by Ms. Vallabhaneni before the Immigration Judge. The evidence consists largely of articles concerning the treatment of women in India. Ms. Warrier's affidavit is consistent with the information contained in those articles. There would be little to be gained by a remand to the Immigration Court. On the contrary, a remand would cause substantial delay in the resolution of Ms. Vallabhaneni's case and hardship to her and her children. Ms. Vallabhaneni first applied for asylum in October of 1997. Her case has now been pending for approximately three and one half

years. During this time, she has been separated from her children who remain in India, and she is frightened for their safety in light of the fact that her husband made threats to harm them.

Should the Board find that it is not appropriate to consider additional evidence at this stage of the proceedings, the evidence which was before the Immigration Judge provides more than sufficient evidence to find that Ms. Vallabhaneni is eligible for asylum under the well-founded fear standard. State Department Reports submitted by the Service at the hearing confirm that women in India are placed in a subordinate role, subject to marriages arranged by their families, that domestic violence is prevalent at all levels of society, and that, while some protections exist under the law, the government is often unable to enforce the laws that exist.

**II The Proposed Rule on the Meaning of “Membership in a Particular Social Group” is an Expression of the Understanding of the Department of Justice of Current Law Regarding the Refugee Definition.**

The Board has inquired as to what effect, if any, the Proposed Rule published in 65 Federal Register 76588 on December 7, 2000, should have on this case. Specifically, the Board expressed interest in counsels’ views on the applicability of the meaning of “membership in a particular social group” as defined in the proposed rule to the instant case. *Amici* state that the proposed rule is not in effect and therefore is not binding on the decision of this Board. Rather, the *amici* agree with the Service that the proposed rule regarding the meaning of “membership in a particular social group” is an expression of the Department of Justice’s most current understanding and interpretation of the refugee definition, and that the absence of a final rule does not limit the ability of the Board to make a decision in this case. In making its decision, the Board should take into account the *interpretation* presented in the proposed rule and its preamble insofar as it is consistent with current law.

That the proposed rule is not binding is underscored by the statement, “This rule, *once final*, will apply to all cases currently pending before the asylum office, the immigration courts and the Board of Immigration Appeals.” 65 *Fed. Reg.* 76596 (emphasis added). It is clear that the Department of Justice did not intend for these regulations to go into effect at the time of the publication of the proposed rule. Had the Department sought to have the regulations go into operation immediately, it had the option of promulgating interim rules, whose purpose is explicitly to allow rules to take effect immediately, even while the notice and comment period generally afforded the rule-making process runs its course. The Department did not choose to exercise this option. Rather, it chose to withhold finalizing and implementing the rule until it had the opportunity to receive and consider comments from interested parties. This will allow the Department to reconsider its position on certain points, and to incorporate changes or refinements which may be brought to its attention through the comments submitted.

The Proposed Rule clarifies the Service’s understanding of current law on several points relevant to this case.<sup>3</sup>

- a) The proposed rule acknowledges that the “immutable characteristic test” set forth in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), rev’d on other grounds by *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987) is the appropriate test to be applied in evaluating the existence of a particular social group within the meaning of the “refugee” definition and acknowledges that “gender” is “clearly such an immutable characteristic.” 65 *Fed. Reg.* 76593. In addition, the preamble and proposed rule indicate that “there may be circumstances in which an applicant’s

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3. This should not be read by the Board as an endorsement of the proposed rule in its entirety as the *amici* have concerns regarding several aspects of the proposed rule, including possible misinterpretation of the



marital status could be considered immutable.” The proposed rule effectively addresses longstanding confusion in this area brought about by the Ninth Circuit’s decision in *Sanchez Trujillo v. INS*, 801 F.2d 1571 (9<sup>th</sup> Cir. 1986 ), by adopting the clarification set out by that court in *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9<sup>th</sup> Cir. 2000) and reconciling the Ninth Circuit’s interpretation with *Acosta*. This interpretation is consistent with U.S. case law and with the established international understanding of the particular social group ground in the UN Refugee Convention. See e.g. *Fatin v. INS*, 12 F3d 1233 (3d Cir. 1993); *In re Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (SC; Can); *R.V. Immigration Appeal Tribunal and another, Ex parte Shah* [1999] 2 A11 E.R. 545, [1999] 2 A.C. 629; *Refugee Appeal No. 1312/93* [1998] I.N.L.R. 387, *Refugee Appeal No. 71427/99* [2000] N.Z.A.R. 545.

- b) The preamble and the proposed rule acknowledge that an asylum claim can be based on domestic violence. The preamble states, “This proposed rule removes certain barriers that the *In re R-A-* decision seems to pose to claims that domestic violence, against which a government is either unwilling or unable to provide protection, rises to the level of persecution of a person on account of membership in a particular social group.” 65 *Fed. Reg.* 76589. The preamble to the proposed rule also acknowledges that domestic violence centers on power and control over the victim and recognizes that such patterns of violence are not private matters, but rather should be found to be persecution when they are supported by a legal system or social norms that condone or perpetuate domestic violence.

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significance of the six factors enumerated in Section 208.15 (c)(3).

- c) The proposed rule provides that “in evaluating whether a government is unwilling or unable to control the infliction of harm or suffering, the immigration judge or asylum officer should consider whether the government takes reasonable steps to control the infliction of harm or suffering and whether the applicant has reasonable access to state protection that exists.” In explaining factors to consider in determining whether an individual has reasonable access to state protection, the preamble to the rule instructs that the adjudicator should consider “what kind of access the individual applicant has to whatever protection is available and any steps the individual applicant has taken to seek such protection.” As an example of a situation in which an individual’s circumstances may prevent her from obtaining access to available state protection, the preamble provides, “(I)n some countries a female victim of spousal abuse may be able to obtain state protection if she has the support of her family of origin in seeking it, but her access to such protection may be more limited without such support.” *Id.* at 76591. The preamble instructs that in each case, all factors relevant to the availability of and access to state protection should be examined in determining whether the government of the country in question is unwilling or unable to protect the applicant from a non-state persecutor. *Id.* at 76591.
- d) The preamble to the proposed rule acknowledges that a persecutor may in fact target an individual victim because of a shared social group characteristic, even though the persecutor does not act against others who possess the same characteristic.” *Id.* at 76592-3. “(I)n some cases involving domestic violence, an applicant may be able to establish that the abuser is motivated to harm her because of her gender or

because of her status in a domestic relationship. This may be a characteristic which she shares with other women in her society, some of whom are at risk of harm from their partners on account of this shared characteristic..” *Id.* at 76593.

- e) The preamble to the proposed rule acknowledges that both direct and circumstantial evidence are relevant to a determination of the motivation of the persecutor. “As in any asylum or withholding case, evidence about the persecutor’s statements and actions will be considered. In addition, evidence about patterns of violence in the society against individuals similarly situated to the applicant may also be relevant to the “on account of” determination. For example, in the domestic violence context, an adjudicator would consider any evidence that the abuser uses violence to enforce power and control over the applicant because of the social status that a woman may acquire when she enters into a domestic relationship” *Id.* at 76593.
- f) The preamble to the proposed rule acknowledges that “many cultures have a variety of ways in which they condone and perpetuate domestic violence,” and that “both nationally and internationally, domestic violence centers on power and control over the victim and that, as a result of these factors, a woman’s attempts to leave her abusive partner “typically increases the abuser’s motivation to locate and harm her.” *Id.* at 76595.

These provisions, while not legally binding on the Board, reflect the views and policies of the Service. In particular, the preamble is an expression of how Service understands and views the issues addressed in the proposed rule, what are the policy intentions, and what are the purposes and goals of the proposed rules. They provide useful instruction about the significance

of domestic violence, the contextual nature of social group, and the need for the Board to approach Ms. Vallabhaneni's claim incorporating these important factors to its understanding of nexus between her social group membership, the persecution inflicted on her and her inability to obtain meaningful protection from that persecution.

**II      Ms. Vallabhaneni Has Established Past Persecution and a Well-Founded Fear of Persecution on Account of Her Membership in a Gender-Based Social Group.**

In order to qualify for refugee status, a claimant must show that he or she has suffered past persecution or has a well-founded fear of future persecution “on account of race, religion, nationality, political opinion, or membership in a particular social group.” 8 U.S.C. § 1101(a)(42)(A). The record of this case plainly establishes that Ms. Vallabhaneni was subjected to, and reasonably fears being further subjected to, domestic violence “on account of” her membership in a social group characterized by her gender, either standing alone or in combination with her marital relationship or her refusal to conform to her husband's socially sanctioned gender stereotypes<sup>4</sup>.

**A.      Gender Properly Can Be the Defining Characteristic of a Particular Social Group.**

In *Matter of Acosta*, its earliest and most often cited case construing the phrase “particular social group,” the Board ruled that a “particular social group” should be defined by common characteristics that its individual members either cannot or should not be expected to

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<sup>4</sup>In addition, Ms. Vallabhaneni was persecuted in the past and reasonably fears that she will be persecuted in the future because of her expression of her political opinion regarding her right to her own

change.<sup>5</sup> Gender plainly meets this definition, as *Acosta* itself acknowledged in stating that “sex” is an example of an immutable characteristic that defines a social group.<sup>6</sup>

In analyzing the meaning of the phrase “particular social group,” the Board in *Acosta* examined the nature of the protection afforded by the other four bases enumerated in the refugee definition and, applying the principle of *ejusdem generis*, reasoned that the general words “particular social group” should be read in a manner consistent with the more specific words contained in the definition: race, religion, nationality, and political opinion. Observing that each of the four specific grounds concerned an immutable characteristic that individuals are “unable by their own actions, or as a matter of conscience should not be required” to change, the Board established a similar “immutable characteristic” test to guide interpretation of the particular social group category.<sup>7</sup> Thus, the common characteristic defining a “particular social group” must be one that “the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or conscience.”<sup>8</sup> This definition

includes within the notion of social group (1) groups defined by an innate, unalterable characteristic; (2) groups defined by their past temporary or voluntary status, since their history or experience is not within their current power to change; and (3) existing groups defined by volition, so long as the purpose of the association is so fundamental to their human dignity that they ought not to be required to abandon it. Excluded, therefore, are groups defined by a characteristic which is changeable or from which dissociation is possible, so long as neither option requires renunciation of basic human rights.<sup>9</sup>

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autonomy as a woman and as a human being. This argument is not addressed in this brief.

5. *Matter of Acosta*, 19 I. & N. Dec. 211, 233-34 (BIA 1985).

6. *Id.* at 233.

7. *Id.* at 233-34.

8. *Id.* at 233.

9. James C. Hathaway, *The Law of Refugee Status* 161 (1991).

The Board's analysis in *Acosta* has been widely endorsed by commentators and has been applied in numerous Board<sup>10</sup> and federal court decisions.<sup>11</sup> In *Lwin v. INS* 144 F.3d 505 (7<sup>th</sup> Cir. 1998), the Seventh Circuit embraced the formulation proposed by *Acosta* as the "best approach" to determination of particular social groups as it "preserves the concept that refugee status is restricted to "individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution." *Id.* , quoting *Acosta*.

In *Hernandez Montiel*, the Ninth Circuit took steps to resolve long-standing confusion in the proper interpretation of the words "membership in a particular social group" caused by its earlier decision in *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9<sup>th</sup> Cir. 1986).

The *Sanchez-Trujillo* court held that the class of working class, urban males of military age who maintained political neutrality in El Salvador did not constitute a 'particular social group' for which the immigration laws provide protection from persecution.....

We are the only circuit to suggest a "voluntary associational relationship" requirement. *Id.* at 1576. The Seventh Circuit has noted that this requirement "read literally, conflicts with *Acosta*'s immutability requirement. *Lwin*, 144 F.3d at 512. Moreover, in *Sanchez-Trujillo*, we recognized a group of family members as a 'prototypical example' of a "particular social group." (footnote omitted) . Yet, biological relationship are far from "voluntary." We cannot, therefore, interpret *Sanchez-Trujillo*'s "central concern" of a voluntary associational relationship strictly as applying to every qualifying "particular social group." For, as *Sanchez-Trujillo* itself recognizes, in some particular social groups, members of the group are not voluntarily associated by choice. (footnote omitted).

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10. See e.g. *Kasinga*, 21 I&N Dec.357 (BIA 1996); *In re H-*, Int Dec. 3276 (BIA 1996) (recognizing members of a particular clan or subclan as members of a particular social group).

11. See e.g. *Fatin v. INS*, 12 F3d 1233 (3d Cir. 1993) (recognizing Iranian women and a subgroup of Iranian feminists who refuse to conform to the government's gender-specific laws and social norms as particular social groups under the *Acosta* standard); *Ananeh-Firempong v. INS*, 766 F2d 621 (1<sup>st</sup> Cr. 1985) (applying *Acosta* standard and finding that family relations can be the basis of a "particular social group"); *Lwin v. INS*, 144 F.3d 505, 511-112 (7<sup>th</sup> Cir. 1998)(recognizing parents of Burmese student dissidents as part of a social group because they share a "common, immutable characteristic"). *Hernandez Montiel v. INS*, 225 F.3d 1084 (9<sup>th</sup> Cir. 2000) (recognizing particular social group of men with female sexual identities in Mexico as a particular social group applying the *Acosta* standard); *Aguirre-Cervantes v. INS*, 242 F3d 1169 (2001) (finding that members of a family constitute a particular social group as they share a common immutable characteristic).

We thus hold that a “particular social group” is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it. (footnote omitted).

*Hernandez-Montiel*, 225 F3d at 10478-79. The *Acosta* standard has most recently been incorporated by the Department of Justice into its proposed rule on the meaning of “particular social group.” 65 *Fed. Reg.* 76593; *see* Section II, *supra*.

This position is consistent with now well established interpretation of the term “particular social group” applied by adjudicatory bodies of other countries.<sup>12</sup> As these authorities have recognized, the *Acosta* definition addresses qualities that relate directly to the underlying purpose of refugee law, which is grounded in values similar to the non-discrimination principle embodied in human rights law and which seeks to protect those persons who are fundamentally marginalized within their societies and unable to seek protection from their own government because of characteristics that should be protected as basic rights or over which they have no control.<sup>13</sup> “The anti-discrimination orientation of the refugee definition implies that, like other grounds of persecution, a particular social group is also characterized by a marginalized or

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12. *See, e.g. Ex parte Shah*, 2 A11 E.R. 545 (finding Pakistani women subject to state-tolerated domestic violence to constitute a “particular social group”); *Ward*, 2 S.C.R. 689 (agreeing with and elaborating on *Acosta*’s social group definition); *Refugee Appeal* No. 1312/93 [1998] I.N.L.R. 387 (New Zealand Refugee Status Appeals Authority, Aug. 30, 1995) *reprinted in Gender Asylum Law in Different Countries* (2000) at 547 (granting refugee protection to a man from Iran based on his membership in the banned Tudeh Party and his sexual orientation); Hathaway, *The Law of Refugee Status*, *supra* note 9 at 161; Anker, *Law of Asylum in the United States* (1999) at 376 -78. *Minister for Immigr. And Multicultural Affairs v. Khawar* [2000] F.C.A. 1130 (*Khawar* II); *Khawar v. Minister*, [1999] F.C.A. 1529, [1999] 168 A.L.R. 190 (*Khawar* I); *Refugee Appeal* No. 1312/93 [1998] I.N.L.R. 387; *Refugee Appeal* No. 71427/99 [2000] N.Z.A.R. 545.

13. *See* Hathaway, *The Law of Refugee Status*, *supra* note 9 at 135-41.

disadvantaged status in society which makes [the group] vulnerable to oppression, including (but not limited to) the actual persecution feared by the claimant.”<sup>14</sup>

Underlying the Convention is the international community’s commitment to the assurance of basic human rights without discrimination. *Ward* 733. This theme outlines the boundaries of the objectives sought to be achieved and consented to by the delegates who negotiated the terms of the Convention. It sets out, in a general fashion, the intention of the drafters and thereby provide an inherent limit to the cases embraced by the Convention. In distilling the content of the head of “particular social group”, therefore, it is appropriate to find inspiration in discrimination concepts. The manner in which groups are distinguished for the purposes of discrimination law can be appropriately imported into this area of refugee law. *Ward* 735. In short, the meaning assigned to ‘particular social group’ should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis of international refugee protection: *Ward* 739. See also *Applicant A* at 232 & 257 and *Saha* at 639 C-D, 651A-D, 656E, 658H.

*Refugee Appeal* No. 1312/93 [1998] I.N.L.R. at 39-40.

Gender is unquestionably a characteristic that satisfies the *Acosta* standard because it is both immutable and fundamental to an individual’s identity. Moreover, it is often the distinguishing characteristic that is the basis for a disadvantaged political or civil status and a lack of state protection. Thus, in addition to the Board itself in *Acosta*,<sup>15</sup> the Third Circuit in *Fatin*,<sup>16</sup> the INS in its *INS Guidelines*,<sup>17</sup> and, interpreting the Refugee Convention, the British House of Lords,<sup>18</sup> the Canadian Supreme Court,<sup>19</sup> the Canadian Immigration and Refugee

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14. Audrey Macklin, *Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims*, 13 *Geo. Immigr. L.J.* 25, 63 (1998) (“Macklin, *Cross-Border Shopping for Ideas*”); see also Hathaway, *The Law of Refugee Status*, *supra* note 9 at 135-41; Anker, *Law of Asylum in the United States*, *supra* note 12 at 377.

15. 9 I. & N. Dec. at 233.

16. *Fatin v. INS*, 12 F.3d at 1240.

17. See Memorandum from Phyllis Coven, Office of International Affairs, U.S. Immigration and Naturalization Service, to all INS Asylum Officers and HQASM Coordinators, *Considerations for Asylum Officers Adjudicating Asylum Claims for Women* (May 26, 1995) at 13-15.

18. See *Ex parte Shah*, 2 A11 E.R. 545.

19. See *Ward*, 2 S.C.R. at 739.



Board,<sup>20</sup> the Australian Refugee Review Tribunal,<sup>21</sup> and the Refugee Status Appeals Authority of New Zealand<sup>22</sup> have all expressly recognized that “gender” or “sex” can serve as a shared characteristic defining a particular social group for purposes of refugee protection. Most recently, the Department of Justice has expressed its support for this position through its issuance of its proposed rules regarding the definition of “membership in a particular social group.”<sup>23</sup>

As the Australian Refugee Review Tribunal has noted, women, in addition to sharing the immutable characteristic of gender, have “shared common social characteristics” that make them cognizable as a social group. As the Tribunal explained:

That domestic violence . . . is regarded in many countries as a private problem rather than a public crime, can be directly attributed to women’s social status; to the fact that historically, in many societies, women have been, and in many instances still are, regarded as being the private property of firstly their fathers then their husbands. That women face differential treatment within the legal system, arising from their social status, is evident from the focus given to women and violence against women, in for example, the U.S. Department of State Country Reports. . . . That women share a common social status is further evidenced by the establishment of the United Nations Commission on the Status of Women and other formal mechanisms for the advancement of women’s status including the U.N. Decade for Women from 1975 to 1985. Women as a group have been specifically highlighted in the International Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Political Rights of Women, and the Convention on the Nationality of Married Women. . . .

. . . [T]here is ample evidence indicating that ‘women’ are a particular social group as, in spite of being a broad group, they are a cogni[z]able group in that they share common fundamental and social characteristics. Whilst there does

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20. See Immigration and Refugee Board of Canada, *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution: Update* (Nov. 1996) reprinted in *Gender Asylum Law in Different Countries* (1999).

21. See N93/00656 (Australian Refugee Review Tribunal, Aug. 3, 1994).

22. *Refugee Appeal* No. 1312/93 [1998] I.N.L.R. 387.

exist separation in lifestyles, values, political leanings etc., women share a defined social status and as such are differentially dealt with by society as a group.

Furthermore . . . women can face harm based on who they are as women, and therefore their membership in this particular social group. It is women's social status that often leads to the failure of state protection, and this is particularly so with regard to domestic violence.

N93/00656 (Australian Refugee Review Tribunal, Aug. 3, 1994).

The fact that large numbers of people may share particular characteristics that are immutable or fundamental to their identity is simply not relevant to whether a “particular social group” defined by such characteristics exists for purposes of refugee determination. Each of the other four grounds within the refugee definition — race, religion, nationality, political opinion — may similarly encompass large numbers of people. However, since asylum is an individual remedy, even where an applicant can show membership in a “particular social group,” she must additionally establish her individual eligibility for asylum under all of the elements of the refugee definition. These other factors will necessarily make the size of the group ultimately eligible for protection significantly smaller than the overall size of a “particular social group.”<sup>24</sup>

Thus, in addition to establishing the existence of a particular social group, the applicant must show that she is a member of that group and that she has been persecuted in the past or that she has a well-founded fear that she will be persecuted in the future because of her group characteristic. *See, e.g., Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993). To prove that her fear

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23.65 *Fed. Reg.* 76593; *see* Section II, *supra*.

24. *See, e.g., Macklin, Cross-Border Shopping for Ideas, supra note 14* at 64 (“A finding that claimant was persecuted because of her ethnicity (Tamil) is not tantamount to a finding that all Tamil people are refugees. So too with a finding that a woman had been violated because of her membership in a particular

of persecution is well founded, she must establish that (i) the persecutor is aware, or could become aware, of her social group membership, (ii) the persecutor has the capability of persecuting the applicant, and (iii) the persecutor has the inclination to persecute her. *See In re Mogharrabi*, 19 I. & N. Dec. 439, 446 (BIA 1987). A woman seeking protection must also show that her fear is reasonable under all the circumstances. Thus, a woman who has never been abused in the past and cannot articulate specific grounds for fearing that she will personally be abused in the future would not be able to establish an objective basis for her claim.<sup>25</sup> In addition, where the persecutor is a nonstate actor, as in most domestic violence cases, a woman would have to establish that her home government is unwilling or unable to provide reasonable protection from her persecutor.<sup>26</sup>

**B. The Persecution to Which Ms. Vallabhaneni was Subjected and Which She Fears on Return to India Was and Will be Inflicted on Account of her Gender.**

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social group (women)”).

25. This is born out by statistics regarding the number of women seeking and gaining protection in both the United States and Canada. “As of October, 1996, the INS had identified only approximately 75 women’s claims since the issuance of the [INS Guidelines].” Deborah Anker, Lauren Gilbert, and Nancy Kelly, *Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify As Refugees Under United States Asylum Law*, 11 Geo. Immigr. L. J. 709 at 716 (citing information from INS Asylum Office, Oct. 1996). In November 1996, Canada, which has the most voluminous jurisprudence on women’s claims, reported that since the 1993 introduction of its *Gender Guidelines*, only 1134 gender-related claims had been adjudicated and, of those, 624 had been granted. Immigration and Refugee Board of Canada, *Backgrounder: the Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution: Update* (Nov. 1996) reprinted in *Gender Asylum Law in Different Countries* (1999) at 109; see also Pamela Goldberg, *U.S. Law and Women Asylum Seekers: Where Are They and Where Are They Going?*, 73 Interpreter Releases 889, 897-98 (1996) (providing similar statistics with respect to Canada).

26. Anker *et al*, *Domestic Violence Refugees* *supra* note 25 at 730-37.

In addition to establishing that the harm suffered or feared rises to the level of persecution, a woman seeking asylum in the United States on the basis of domestic violence must show a link between the persecution and one of the enumerated statutory grounds of race, religion, nationality, membership in a particular social group, or political opinion. This “nexus” requirement is often framed in terms of motives and requires evidence that the persecutor is motivated by a cognizable ground in inflicting the harm or that the harm is directed at the applicant because of her protected characteristics. *See INS v. Elias-Zacarias*, 502 U.S. 478, 482-83 (1992); *In re S-P-*, 21 I&N Dec. 486, 6, 13 (BIA 1996).

“[A]n applicant does not bear the unreasonable burden of establishing the exact motivation of a ‘persecutor’ where different reasons for actions are possible.” *In re S-P-*, 21 I&N Dec. at 6 (quoting *In re Fuentes*, 19 I. & N. Dec. 658, 662 (BIA 1988)). In addition, “persecutory conduct may have more than one motive, and so long as one motive is one of the statutorily enumerated grounds, the requirements have been satisfied.” *Harpinder Singh v. Ilchert*, 63 F.3d 1501, 1509 (9th Cir. 1995).<sup>27</sup> Moreover, “[i]n adjudicating mixed motive cases, it is important to keep in mind the fundamental humanitarian concerns of asylum law. . . . Such an approach is designed to afford a generous standard for protection in cases of doubt.” *In re S-P-*, 21 I&N Dec. at 10. As the Board has explained:

Persecutors may have differing motives for engaging in acts of persecution, some tied to reasons protected under the Act and others not. Proving the actual, exact reason for persecution or feared persecution may be impossible in many cases. An asylum applicant is not obliged to show conclusively why persecution has occurred or may occur. Such a rigorous standard would largely

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<sup>27</sup>.*See also Borja v. INS*, 175 F.3d 732, 735 (9th Cir. 1999) (en banc) (‘persecution on account of the victim’s political opinion,’ does not mean persecution *solely* on account of the victim’s political opinion” (quoting *Osorio v. INS*, 18 F.3d 1017, 1028 (2d Cir. 1994)) (emphasis in original); *In re S-P-*, 21 I&N Dec. at 6.

render nugatory the Supreme Court's decision in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), and would be inconsistent with the "well-founded fear" standard embodied in the "refugee" definition.

*Id.* at 6.

Both the Supreme Court and the Board have held that there need not be direct evidence of a persecutor's motives; rather, motivation may be inferred from circumstantial evidence, including the socio-cultural or political purpose of the harm.<sup>28</sup> For example, in *Kasinga*, the Board relied on expert evidence that FGM had "been used to control woman's sexuality" and "to assure male dominance and exploitation" to conclude that the practice was engaged in "on account of" membership in a gender-based social group. In addition, although the persecutor must be partly motivated by a protected characteristic or perceived characteristic, he need not have a subjective intent to punish or harm on account of that ground.<sup>29</sup>

Numerous studies of domestic violence recognize that it is "intentional behavior with a historical, culturally-sanctioned purpose, which was and is for men to keep their wives 'in their place.' . . . It cannot be understood apart from the historical and cultural context of female subordination."<sup>30</sup> Even those professionals who focus on psychological approaches to individual

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28. See *INS v. Elias-Zacarias*, 502 U.S. at 483 (proof of motive can be "direct or circumstantial"); *In re S-P-*, 21 I&N Dec. at 11-14 (examining circumstantial evidence of the social and political context of persecution in order to determine motive).

29. See *Pitcherskaia v. INS*, 118 F.3d 641, 646-48 (9th Cir. 1997) (proof of subjective and malevolent intent, or intent to punish is not required since "definition of persecution is objective, in that it turns not on the subjective intent of the persecutor but rather on what a reasonable person would deem 'offensive'"); *In re Kasinga*, 21 I&N Dec. 357, 365 (punitive intent is not necessary).

30. David Frazee, Ann M. Noel, and Andrea Brenneke, *Violence Against Women: Law and Litigation* § 1.41, at 1-45 (1998) ("Frazee, *Violence Against Women*"); see also V. Michael McKenzie, *Domestic Violence in America* 8 (1995) ("[s]pousal battery is a choice men exercise intentionally and purposefully to resolve conflict and achieve their goals of dominance, and coercive control of women"); Kimberle Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, in *The Public Nature of Private Violence: The Discovery of Domestic Abuse* 93, 93 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) ("*The Public Nature of Violence*") ("battering and rape, once seen as private (family matters) and aberrational (errant sexual aggression), are

batterers acknowledge that domestic violence is purposeful behavior intended to control and dominate an intimate female partner. For example, a recent study of the American Psychological Association (the “APA”)<sup>31</sup> observes that “[e]xperts generally agree that in an abusive family situation, the abuser uses physical, sexual, or psychological coercion or intimidation for the purpose of achieving power and control over family members or to punish them for not meeting the abuser’s needs.” APA Report at 11. More specifically, the APA concludes that one of the “principles that emerge[s] from the extensive body of psychological knowledge” concerning family violence is that “[w]hat people learn about and adopt regarding gender roles plays an important part in the development and continuation of violent behavior”:

Men, for example, receive the false message that they have a right and a mandate to control the women and children in their families. That belief contributes significantly to men’s continued use of violence to maintain power and control.

*Id.* at 112.<sup>32</sup> Thus, the “typical batterer” “use[s] violence to meet needs for power and control over others. Their actions are often fueled by stereotypical sex-role expectations for

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now largely recognized as part of a broad-scale system of domination that affects women as a class”); Murray A. Straus, *Physical Violence in American Families: Incidence Rates, Causes, and Trends*, in *Abused and Battered: Social and Legal Responses to Family Violence* 17, 17 (Dean D. Knudsen & JoAnn L. Miller eds. 1991) (family violence “is not the exclusive property of a few cruel or mentally ill parents or spouses”); R. Emerson Dobash and Russell Dobash, *Violence Against Wives* 15 (1979) (domestic violence must be understood in its “social and cultural context” as “the extension of the domination and control of husbands over their wives”).

31. *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* (1996) (the “APA Report”).

32. *See also id.* at 121 (“Violence within the family is used as a method of social control, tending to keep both women and men within rigidly-defined social roles.”); *id.* at 18 (finding that among the most significant individual “risk factors” correlated with domestic violence is “[r]igid acceptance of traditional concepts of men’s entitlement to superiority and control over family members,” and among the most significant sociocultural influences are a “[w]idespread assumption and social expectations that men are superior to women and are entitled to exert control over their family members” and “[g]ender stereotypes”).

‘their’ women.” *Id.* at 82. Moreover, as the APA finds, “[t]he strongest risk factor for being a victim of partner violence is being female.” *Id.* at 19 (emphasis in original).

Although much of this literature focuses on violence in the United States, international human rights documents and reports that have reached similar conclusions with respect to domestic violence in other countries and cultures. The United Nations General Assembly recently adopted a Declaration on the Elimination of Violence against Women that recognizes domestic violence as a “manifestation of historically unequal power relationships between men and women,” and condemns it as one of the “crucial social mechanisms by which women are forced into a subordinate position compared with men.”<sup>33</sup> Similarly, the Committee on the Elimination of Discrimination Against Women has recognized the use of domestic violence as a tool of oppression against women:

At its most complex, domestic violence exists as a powerful tool of oppression. Violence against women in general, and domestic violence in particular, serve as essential components in societies which oppress women, since violence against women not only derives from but also sustains the dominant gender stereotypes and is used to control women in the one space traditionally dominated by women, the home.

*Report of the Committee on the Elimination of Discrimination Against Women*, ¶ 26, 47th Sess., Supp. No. 38, at 8, U.N. Doc. A/47/38 (1992).<sup>34</sup>

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33.G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/48/49 (1993).

34.*See also 1999 Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, ESCOR Commission on Human Rights, 55<sup>th</sup> Sess., Provisional Agenda item 12(a), U.N. Doc. E/CN.4/1999/68 (1999) at ¶ 9 (“[t]he culturally-specific, ideologically dominant family form in any given society . . . serves as the standard against which individual women are judged and, in many cases, demonized for failing to ascribe to moral and legal dictates with respect to family and sexuality” and

This understanding of domestic violence as a means for subordinating women was spelled out in great detail in a United Nations report, *Violence Against Women in the Family* (U.N. Sales No. E.89.IV.5 (1989) (the “U.N. Report”). In discussing the limitations of various theories or explanations concerning the causes of violence against women in the home, the report states “it is perhaps best to conclude that violence against wives is a function of the belief . . . that men are superior and that the women they live with are their possessions or chattels that they can treat as they wish and as they consider appropriate.” *Id.* at 33. The U.N. Report continues:

. . . the social framework relegates the woman, none the less, to the level of a chattel. Here structures place her in a position of dependence on the man and predict that she will fulfil certain roles. This combines with the isolation of the family as an institution and the respect that is offered to it in terms of privacy and autonomy by all agents within the society, to allow violence to occur if the wife is seen to overstep her traditional role.

The collected scholarship that seeks to explain violence against women in the home indicates that the explanation is complex and certainly multi-factorial. Any explanation must, however, be seen against a background of gender inequality, wherein the victim of such violence is most often the woman and the perpetrator most often the man and wherein the structures of society — be they economic, political or legal — act to confirm this inequality.

*Id.* (emphasis added). In addressing structural causes of violence in the family, the U.N. Report concludes that “[v]iolence against women is the product of the subordination of women” and that “unless there is a fundamental change in the social and economic structures that maintain the subordination of women within marriage and within wider society,” no long-term solution will be found. *Id.* at 105.

The documentation in this case with respect to the status of women in India indicates that women play a subordinate role in virtually every aspect of life. The State Department Reports

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“legitimizes violence against women in the form of sexual harassment, rape, domestic violence, female genital mutilation, forced marriages, honor killings and other forms of femicide”).



confirm that dowry deaths cross both caste and religious lines, and that although there are laws to protect the rights of women, as a practical matter women are not able to obtain access to protection. Female bondage and forced prostitution are widespread in parts of Indian society. Government statistics show that registered cases of violence against women rose substantially between 1993 and 1995. As a result of higher female mortality at all age levels, including female infanticide, there has been a decline in the ratio of females to males in the last hundred years. Sujata Warriar's Affidavit contains a detailed account of the circumstances of women in India. She confirms that in almost all parts of India, across religious and caste affiliations, women occupy a secondary position to that of men. *Warriar Aff.*, para. 8.a. While daughters may be valued in some circumstances, male children are highly valued and are seen as being the source of economic, spiritual and social sustainers of their families. *Id.*, para. 8.a. Physical and emotional abuse of women at the hands of both the natal and affinal family is very common. *Id.*, para. 8.a. Because daughters are given a subordinate status in their natal families, "high female infant mortality and female infanticide characterize India." *Id.*, para. 8.a. Daughters are seen as a financial and emotional burden, and parents seek to marry them off to relieve themselves of that burden, often before they reach the legally permissible age of marriage. *Id.*, para. 8.b. Marriages are usually arranged, through the payment of dowry by the wife's family. *Id.*, para. Once in the marriage, a woman holds the lowest position in the home of her husband's family. *Id.*, para. Women who attempt to assert their independence by, for example, refusing an arranged marriage will lose the support of their family. *Id.*, para. 8.e. Once in a marriage, the woman is often subjected to abuse by her husband or his family, often for not bringing sufficient dowry to the marriage. *Id.*, para. 8.e. This abuse often ends in death. *Id.*, para. 8.e., 8.g. When abuse occurs, there is very little the woman's family can do to protect her. *Id.*, para. 8.e.

Families that attempt to intervene are “treated harshly by the police, judicial system, and society.” *Id.*, para.8.e. Abuse of women in the affinal home is not recognized as abuse in either the Secular Law or Hindu Personal Law. *Id.*, para. 8.f. When women attempt to use the minimal laws that exist, the perpetrators or their families can either bribe law enforcement or use their class or social status to force the police to drop the charges. *Id.*, para. 8.f. In many cases, the woman’s natal family will collude with the husband to obtain his release. *Id.*, para. 8.f. Women who are divorced are shunned by society. *Id.*, para. 8.i. Because within Hindu tradition marriage is understood to be permanent over many lifetimes and births, breaking a marriage is regarded as undoing an important bond. *Id.*, para. 8.i. Even if the woman is not the one who initiated the divorce, the woman is blamed for bringing shame and dishonor upon both the natal and affinal families. *Id.*, para 8.i.

Clearly it was Ms. Vallabhaneni’s gender, and her completely disenfranchised status within Indian society because of her gender, which left her vulnerable to abuse by her husband with no meaningful recourse. In *Refugee Appeal* No. 71427/99 [2000] N.Z.A.R. 545, the Refugee Status Appeals Authority granted protection to a woman from Iran, finding that the persecution she feared was based on her membership in a particular social group defined simply as “women”. *Id.* at para. 107 - 109. Specifically, the Authority found, “(T)he evidence relating to Iran establishes that the overarching characteristic of those fundamentally disenfranchised and marginalised by the state is the fact that they are women. This is a shared, immutable, internal defining characteristic.” *Id.* at para. 108. Such is the case here. Because Ms. Vallabhaneni is a woman, she was involuntarily married to a man who beat and abused her over the course of fourteen years. He believed, and everyone surrounding Ms. Vallabhaneni accepted, that it was his right to do so because she was a woman and his wife. Because she is a woman, she was not

able to assert her right to protection in the face of her father's disapproval. Because she is a woman, she will be subjected to continued abuse and will possibly be killed by her husband if she is forced to return to India.

**C. The Persecution to Which Ms. Vallabhaneni Was Subjected and Which She Fears on Return to India Was and Will Be Inflicted On Account of Her Membership in a Particular Social Group Comprised of a Subgroup of Women.**

As the Board itself has acknowledged, a particular social group can also be defined by gender in combination with another characteristic.<sup>35</sup> Like many other victims of domestic violence, Ms. Vallabhaneni is a member of a cognizable social group characterized by gender in combination with either her refusal to conform to socially sanctioned norms or her marital status or intimate relationship with a man.<sup>36</sup>

One gender subgroup that has found wide acceptance within international interpretations of the refugee definition consists of women who fail to conform to societal norms.<sup>37</sup> Such a

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35. See, e.g., *In re Kasinga*, 21 I&N Dec. 357, 365-366 (BIA 1996) (recognizing under *Acosta's* immutable or fundamental standard a gender subgroup consisting of "young women of the Tchamba-Kunsuntu tribe who have not had [female genital mutilation] as practiced by that tribe, and who oppose the practice. . .").

36. Ms. Vallabhaneni's attorney has offered a particular social group defined as "Indian women, who are, or who have been married to abusive husbands, through arranged marriages". See Respondent's Supplemental Brief at pp. 9-10.

37. See, e.g., *Conclusion on Refugee Women and International Protection*, UNHCR Programme, Executive Committee, 36th Sess., No. 39(k) (1985) ("[r]ecognizing that states, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered a 'particular social group' within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention"); *UNHCR Guidelines* ¶ 54 (encouraging states to adopt this position); *Canadian Gender Guidelines* at 3 (recognizing a social group consisting of "women who fear persecution as the consequence [of] failing to conform to, or for transgressing, certain gender-discriminating religious or customary laws and practices") reprinted in *Gender Asylum Law in Different Countries* at 89; *INS Guidelines* at 14 (observing that *Fatin* is consistent with the approach of *Acosta* and the UNHCR

subgroup was recognized by the Third Circuit in *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993), where the court found that a particular social group could be comprised not only of women generally, but also of women who refused to conform to the fundamentalist laws and gender-related practices of the Iranian government even in the face of severe penalties. The Third Circuit found that failure to conform one's behavior in the face of severe penalties indicated that a woman's opposition is so fundamental that she ought not to be compelled to change those beliefs. *See Fatin*, 12 F.3d at 1241; *see also Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994) ("We agree with the Third Circuit that a group of women, who refuse to conform and whose opposition is so profound that they would choose to suffer the severe consequences of noncompliance, may well satisfy the definition.").

The record in this case demonstrates that the persecution to which Ms. Vallabhaneni. was subjected by her husband increased when she challenged him by reporting his abuse to the police and when she attempted to gain protection supports a finding that Ms. Vallabhaneni was persecuted because she would not or could not conform to the norms of behavior imposed on her as an Indian woman and wife. The fact that her father intervened to obtain the release of her husband and returned her to the marital home, indicating that he was doing so because her husband was "her husband" supports this view as well. Despite the fact that her family knew that she had been repeatedly brutalized over a period of fourteen years, they felt that it was her duty as a married women to remain with her husband and to tolerate the abuse. When she stepped outside of her expected role, by reporting her husband and attempting to gain protection, her parents threatened that they would kill themselves rather than live with the shame which they would experience if she took such a step. The additional documentation referenced by the

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Executive Committee).

Service and by the Respondent in her brief demonstrate that women in India are confined to very specific and defined roles. These roles require that women enter into marriages arranged by their families, and that they remain in those marriages regardless of the consequences to them. Societal norms bring shame on the family of a woman who steps outside her prescribed role and asserts her right to her own autonomy. The bounds of accepted behavior are such that many parents would rather see their daughter killed by her husband than to see her leave her marriage and try to live as a single woman. *See Warriar Aff.*, para. 8.g. It was these social constrictions that caused Ms. Vallabhaneni to remain in her marriage and to attempt to tolerate the abuse from her husband for fourteen years. When she could no longer tolerate her husband's treatment of her, she tried to obtain protection, but found that her family prevented her obtaining that protection and abandoned her once again to her husband's abuse. As she has now taken the step of leaving her husband, she fears that he will kill her should she be forced to return to India. Given the persecution she was subjected to in the past at the hands of her husband, the escalation of that abuse in retaliation for her attempts to assert her own rights, and her parents' support of her husband and refusal to allow her to obtain protection, her fear that her husband will be able to carry out his threats is well-founded.

Another gender-based subgroup supported by this record is the particular social group asserted by the Respondent, "Indian women, who are, or who have been married to abusive husbands, through arranged marriages." Use of this social group formulation recognizes that the persecution takes the form of domestic violence, which specifically "targets women because of

their role within th[e domestic] sphere” and “is intended to impact, directly and negatively, on women within the domestic sphere.”<sup>38</sup>

The record in this case supports a finding that Ms. Vallabhaneni’s husband abused her because she was his wife and that she was tied to that relationship because the marriage was an arranged marriage over which she had no control. Like gender generally, the status of being a wife or female intimate partner is fundamental to the identity of the individual, and often immutable. The State Department documents submitted at the asylum hearing concludes that domestic violence is common in India, with 30 percent of married men acknowledging that they physically abuse their wives. Similarly, in arranged marriages, where dowry is given, women are often murdered by their spouses or their spouse’s family when disputes concerning the adequacy of the dowry arise. In her affidavit, Sujata Warriar, addresses the situation of women in arranged marriages:

The usual form of marriage in India is an arranged one. Family members that may include aunts, uncles and distance relatives arrange marriages. This is an elaborate process by which decisions are reached and many negotiations are involved before the final arrangements are made. Marriages are seen as strengthening social, economic and political ties along caste and class affiliation. As such, the conjugal bond is seen as secondary to the family ties that are instituted. “Love” and romance are understood to be unnecessary and unwanted in family arrangements. In fact, the conjugal bond is often viewed as destructive to the extended family. Since families are patriarchal, patrilineal and patrilocal, the bride moves to the residence of the husband’s family and in some orthodox families is given a totally new name and symbolically and literally sheds all ties to her natal home. Till she produces a male heir, the young bride is seen as a threat to the integrity of the affinal family. Having no children or too many daughters can undermine the woman’s position in the family.

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38. See *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, ESCOR Commission on Human Rights, 52<sup>nd</sup> Sess., Provisional Agenda Item 9(a), U.N. Doc. E/CN.4/1996/53 (1996) at ¶ 28 (defining family violence against women). This definition includes violence against other family members and domestic workers. In an appropriate case, a social group could be defined as including women in such relationships.

*Warrier Aff.*, para 8.c. Clearly, a woman such as Ms. Vallabhaneni who has entered into a marriage arranged by her family is vulnerable to oppression by her husband by virtue of the fact that she has been placed by her family in that relationship. It is precisely in her role as spouse that she experience a “marginal or disadvantaged status in society which makes [her] vulnerable to oppression.”<sup>39</sup> Even in a situation where there has been a divorce or separation, her status as a former wife or intimate partner may serve as an immutable or past characteristic that is the basis for a well-founded fear of continuing and often heightened persecution.<sup>40</sup> Thus, even though Ms. Vallabhaneni may have obtained a divorce from her husband, she will continue to have a well-founded fear that he will seriously harm or kill her if she returns to India based on her past status as his wife.

#### **IV Ms. Vallabhaneni has Demonstrated Serious Harm and Failure of State Protection, Constituting Persecution.**

As the Service’s brief states, it is indisputable under international and U.S. law that the harm or suffering that an applicant experienced or fears must be inflicted either by the government of the country where the applicant fears persecution, or a person or group that the government is unable or unwilling to control. In other words, the agent of the harm “may include

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39.Macklin, *Cross-Border Shopping for Ideas*, *supra* note 14 at 63.

40.*See In re Fuentes*, 19 I. & N. Dec. at 662-63 (BIA 1988) (status as former member of national police is an immutable characteristic that can be the basis for a social group claim); *see generally* Ronet Bachman and Linda E. Saltzman, *Violence against Women: Estimates from the Redesigned Survey* 4 (1995) (Bureau of Justice Statistics show that “[a]mong victims of violence committed by an intimate, the victimization rate of women separated from their husbands [at the time of the interview] was about 3 times higher than that of divorced women and about 25 times higher than that of married women.”).

non-state entities or persons that the government is unable or unwilling to control.”<sup>41</sup> The notion of state protection is critical to the concept of persecution. A state’s legitimacy is based on its ability to protect the basic needs and rights of its population. The purpose of refugee law is the provision of alternative protection when an individual’s government has failed in its duty to safeguard basic rights.<sup>42</sup> Persecution consists of by a serious harm and a failure of state protection.<sup>43</sup> That failure of state protection may consist of the government’s inability or unwillingness to protect from serious harms and rights violations by non-state actors.

Refugee law is fundamentally humanitarian and non-judgmental. “It is important to remember that a grant of political asylum is a benefit to an individual under asylum law, not a judgment against the country in question.”<sup>44</sup> This rationale underlies the Convention’s and U.S. statute’s provision of protection both when the state is the agent of the harm, and when the state is unable or even unwilling to provide protection from the serious harm perpetrated by the non-state actor.

In the instant case, Ms. Vallabhaneni fears serious harm at the hands of her husband from which the state has not in the past, and she fears will not in the future, provide protection. The Service does not dispute that the harm she fears has both a subjective and objective basis, and that it is serious. Her testimony, uncontroverted by the Service in its brief, is that her husband tried to kill her twice; that he hit her, pushed her, and kicked her in the stomach over a period of fourteen years, all of which resulted in very substantial injuries. She also testified that in 1987 she complained to the police, who arrested and then released her husband, after her father

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41. See Anker, *Law of Asylum in the United States*, *supra* note 12 at 191.

42. Hathaway, *Law of Refugee Status*, *supra* note 9 at 125.

43. *Ex parte Shah* 2 A11 E.R. at 565 (Hoffman, L.).

44. *Matter of S-P-*, 21 I. & N. 492 (BIA 1996).



intervened on his behalf. Subsequent to his release, her husband beat her so severely that she was hospitalized for two days. Her father threatened her (including with his own suicide) if she went to the police again, and her husband threatened that if she did he would harm her children. *See Brief of INS*, at pp. 7-8.

Additional evidence in the record, including Department of State reports (Exhibit 4), supports her testimony and claim regarding the degraded status and discriminatory treatment of women in Indian society and under Indian law and the inadequate implementation of laws protecting women. The Service's brief specifically recognizes these conditions and that they are established in the record in this case. "The documentary evidence in this case indicates that India has a broad system of laws to protect women, including laws against various forms of domestic violence. The evidence also indicates that the government is often unable to enforce these laws and that the personal status laws of the religious communities discriminate against women." *Brief of INS* at 17. This evidence is fully supported by the additional evidence discussed by the Service in its brief, as well as the evidence that is attached hereto.

A key issue, addressed especially in recent case law, is the standard for assessing state protection when, as in this case, the agent of harm is a non-state actor. The Service both in its proposed regulations and in its brief in this case adopts the position that "the appropriate inquiry is whether the government takes reasonable steps to control the infliction of harm or suffering and whether the applicant has reasonable access to the state protection that exists. . . . [T]he decision-maker should consider what steps the government has taken to prevent the harm, whether the steps reduce the risk below the well-founded fear threshold, and what kind of access the individual applicant has to whatever protection is available." *Brief of INS* at 16 (emphasis added). This position is correct and is the one articulated so eloquently by Chairperson Rodger Haines in

the important decision of the New Zealand authorities, Refugee Appeal No. 71427/99, [2000] N.Z.A.R. 545. The standard for assessing the adequacy of state protection must be particularized and must evaluate the protection in light of the well-founded fear standard. The refugee definition requires recognition, and Article 33(1) requires protection, where the risk faced is that of a well-founded fear, and it is against this specific risk that the adequacy of state protection must be measured. The requirements of the Refugee Convention would be violated “by a process of interpretation which measures the sufficiency of state protection not against the absence of a real risk of persecution, but against the availability of a system for the protection of the citizen and a reasonable willingness by the state to operate that system.”<sup>45</sup> Refugee law is not concerned with abstract questions of culpability, i.e. whether the state is doing enough in general to protect its citizens. Refugee law is concerned with the very concrete question of protection in individual cases, that is, whether such a system functions in practice and in particular whether it functions to eliminate a real (well-founded) risk of harm for the applicant.<sup>46</sup>

Through the evidence currently in the record, the applicant has established that the state is generally unable to provide protection, and most importantly, that it cannot reduce the risk to her to below that of the treaty’s and statute’s well-founded fear standard. The applicant has a well-founded fear of serious harm by her husband. The state has not and cannot provide protection so as to eliminate that well-founded fear. The applicant is not required to provide perfect proof, or all the proof that could conceivably be submitted. The evidence she has submitted, and that is already part of the record, meets the well-founded fear standard. The Service’s unsupported suggestion

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45. *Refugee Appeal No. 71427/99* [2000] N.Z.A.R. 545. at para. 63.

46. Deborah Anker, *Refugee Status and Violence Against Women in the “Domestic” Sphere: The Non-*

that “more detailed information” be considered violates this fundamental standard, well-established in the case law, including by the Supreme Court, *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), and in its own argument and submissions.

A final point on the question of persecution and non-state/state agency relates to the issue of nexus or “motivation.” Chairperson Haines’s decision in *Refugee Appeal No. 71427/99* emphasizes, as did the House of Lords in *Shah*, that persecution is a bifurcated concept: persecution is constituted by both a serious harm *and* the failure of state protection. The linkage or nexus to the ground of persecution, therefore, may derive from either branch.

This means that if a refugee claimant is at real risk of serious harm at the hands of a non-state agent (e.g. husband, partner or other non-state agent) for reasons unrelated to any of the Convention grounds, but the failure of state protection is for reason of Convention grounds, the nexus requirement is satisfied. Conversely, if the risk of harm by the non-state agent is Convention related, but the failure of state protection is not, the nexus requirement is still satisfied. In either case the persecution is for reason of the admitted Convention ground.<sup>47</sup>

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*State Actor Question* (attached hereto; forthcoming Georgetown Immigration Law Journal).  
47.*Refugee Appeal* No. 71427/99 [2000] N.Z.A.R. at para. 112.

The applicant has established a well-founded fear of persecution if she can demonstrate that *either* the failure of state protection *or* the serious harm for the non-state actor (her husband) is for reasons of one of the grounds. In this case, the applicant has established *both*, certainly adequately to meet the well-founded fear standard of proof. First, she has established that the failure of state protection is because of her gender. As the Service notes, the evidence in the record shows serious state discrimination against women, and denial of protection to them. In *Ex parte Shah*, the House of Lords found that the state's failure to protect, which placed the applicants at risk from their husbands, the non-state agents, was discriminatory for reason of their gender and this was sufficient to meet the nexus requirement of the refugee definition. "The evidence was that the state would not assist them because they were women. It denied them a protection against violence which it would have given to men. These two elements [the threat of violence from the husbands and the discriminatory denial of protection from the State] have to be combined to constitute persecution within the meaning of the convention."<sup>48</sup>

Second, the applicant has adequately shown that the harm from her husband was for a convention reason. Domestic violence is purposeful behavior intended to control and dominate an intimate female partner. It serves a "historical, culturally sanctioned purpose, which was and is for men to keep their wives 'in their place.'"<sup>49</sup> Studies of batterers have observed that "the typical batterer" uses violence "to meet needs for power and control over others. Their actions are often fueled by stereotypical sex-role expectations for 'their' women."<sup>50</sup> It is no coincidence that, "The

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48. *Ex parte Shah* 2 All E.R. at 564-65 (Hoffman, L.).

49. David Frazee et al., *Violence Against Women: Law and Litigation*, supra note 30, § 1:41 (1998)

50. American Psychological Association, *Violence and the Family*, supra note 30 .

strongest risk factor for being a victim of partner violence is being female.”<sup>51</sup> The Proposed Rule adopts a similar understanding of domestic violence as gender-motivated.<sup>52</sup>

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51. *Id.* at 19.

52. *See Proposed Rules*, 65 *Fed. Reg.* 76595.

## Conclusion

For the reasons set forth above, the *amici curiae* respectfully request that the Board of Immigration Appeals reverse the decision of the Immigration Judge and grant Ms. Vallabhaneni's application for asylum.

Respectfully Submitted,

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