

No. 10-3225

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Y.V.Z.,
PETITIONER,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
RESPONDENT.

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

**UNOPPOSED MOTION FOR LEAVE
TO FILE BRIEF OF *AMICI CURIAE*
CENTER FOR GENDER & REFUGEE STUDIES,
CALIFORNIA PARTNERSHIP TO END DOMESTIC VIOLENCE,
AND NATIONAL IMMIGRANT JUSTICE CENTER
IN SUPPORT OF PETITIONER'S
PETITION FOR PANEL REHEARING**

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1. Pursuant to Federal Rule of Appellate Procedure 29, the Center for Gender & Refugee Studies, at the University of California, Hastings College of the Law (CGRS), the California Partnership to End Domestic Violence (CA Partnership), and the National Immigrant Justice Center (NIJC), respectfully seek leave to file an *amici curiae* brief in support of Petitioner in this matter.

2. Petitioner seeks reversal of a panel decision, *Y.V.Z. v. Att’y Gen.*, No. 10-3225, denying a petition for review of the Board of Immigration Appeals (BIA) decision denying her application for asylum and withholding of removal. The BIA affirmed the denial of the Petitioner’s application principally on the ground that she failed to establish a nexus between the persecution she suffered and a protected ground, namely her membership in a “particular social group” defined in-part by her gender. The BIA also affirmed the denial of Petitioner’s application for relief under the Convention Against Torture (CAT) for failure to show that the torture feared would be inflicted with the acquiescence of a government official.

3. Proposed *amici curiae* are experts on gender-based violence, including domestic violence, and refugee and human rights law. *Amici* include authors of scholarly works regarding asylum and gender-based violence, experts who advise other attorneys representing asylum-seekers and domestic violence survivors, and practicing attorneys who represent the same. *Amici* have particular interest in the instant case because the issues involved have broad implications for

the equitable and just administration of refugee law and in the development of norms consistent with international refugee and human rights law pertaining to the protection of women under the Refugee Act of 1980 and the CAT.

4. Through its scholarship, expert consultations, and litigation, proposed *amicus* CGRS, which coordinated the preparation of the accompanying brief, has played a central role in the development of law and policy related to gender-based asylum claims, in particular claims involving domestic violence. CGRS was counsel of record in *Matter of R-A-*, 22 I. & N. Dec. 906 (BIA 1999), *vacated and remanded to stay reconsideration* (A.G. 2001) – the only published decision on domestic violence from the immigration agency – and is involved in the *amicus* briefing of several domestic violence asylum claims currently pending at the BIA.¹ In addition, CGRS has assisted attorneys representing victims of domestic violence in more than 2,000 asylum proceedings, providing technical assistance to attorneys

¹ Following *vacatur* of the BIA’s decision in *R-A-*, the cases of Rody Alvarado and many other women fleeing abuse at the hands of their boyfriends, partners and husbands were held in legal limbo. See Lisa Frydman, *Recent Developments in Domestic-Violence Based Asylum Claims*, 2009 EMERGING ISSUES 4075 (2009). The U.S. Attorney General lifted the stay in *R-A-* in 2008, *Matter of R-A-*, 24 I. & N. Dec. 629 (A.G. 2008). In 2009, after a ten-year protracted legal battle, Ms. Alvarado was granted asylum by the immigration judge at the stipulation of the parties. See Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly be Inching Towards Recognition of Women’s Claims*, 29 REFUGEE SURV. Q. 46 (2010). The Board now has pending before it several hundred cases that raise the questions of whether, and under what circumstances, domestic violence can form the basis for asylum or withholding. The BIA has solicited *amicus* briefing in at least seven of these cases during the last year.

in at least 80 cases where individuals sought asylum from Peru, at least 60 of which involved claims that the applicant feared domestic violence and/or rape or other sexual violence if returned to Peru. CGRS has published several papers on the topic of violence against women and impunity in Latin America. Moreover, CGRS has filed briefs, both as *amicus* and as counsel of record, regarding asylum and CAT claims based on domestic violence, forced marriage, rape, human trafficking, female genital cutting, and other gender-based forms of persecution before the BIA and in the Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits.

5. Proposed *amicus* CA Partnership is the federally recognized State Domestic Violence Coalition for California. It has been in existence for more than three decades, during which it has been integrally involved in the passage of over one hundred pieces of legislation to ensure safety and justice for domestic violence survivors. The CA Partnership works with immigrant survivors of domestic violence, including asylum seekers, and conducts policy and advocacy around the intersection of domestic violence and immigration policy. The CA Partnership regularly appears as *amicus curiae* in U.S. state and federal court.

6. Proposed *amicus* NIJC is a non-profit organization that provides legal representation and consultation to refugees and asylum seekers across the country. Each year, NIJC represents hundreds of asylum seekers before the immigration

courts, BIA, the Courts of Appeals, and the Supreme Court of the United States through its legal staff and a network of more than 1,000 *pro bono* attorneys. In particular, NIJC frequently provides representation to individuals seeking protection based on their membership in a particular social group, including women fleeing gender-based violence.

7. Given the proposed *amici*'s broad expertise in gender-based violence, in particular domestic violence, and the application of this country's immigration laws, proposed *amici* believe that their written submission would assist the Court in the resolution of the issues in this case. In particular, the accompanying brief discusses how the harm suffered in this case should be viewed as domestic violence and the gender-based motivations for such abuse. It also discusses the standard for acquiescence in CAT claims, especially as applied to those involving gender-based violence.

8. Counsel for Petitioner, Mark David McPherson, has informed the undersigned that he consents to the filing of this motion. Counsel for the Respondent, Timothy G. Hayes, has informed the undersigned that he takes no position on this motion.

WHEREFORE, the Center for Gender & Refugee Studies, at the University of California, Hastings College of the Law, the California Partnership to End Domestic Violence, and the National Immigrant Justice Center, respectfully ask the Court's leave to appear as *amici curiae* in the above-captioned matter and to submit the brief accompanying this motion.

Respectfully submitted,

By: /s Blaine Bookey

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Dated: September 28, 2012

CERTIFICATE OF VIRUS SCAN

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/s Blaine Bookey

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CERTIFICATE OF SERVICE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 3d Cir. L.A.R. 26.1, no *amicus* has a parent corporation, and no publicly held corporation owns 10% or more of the stock of any *amicus*.

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INTEREST OF *AMICI CURIAE*

Amici curiae the Center for Gender & Refugee Studies, at the University of California, Hastings College of the Law, the California Partnership to End Domestic Violence, and the National Immigrant Justice Center, are non-profit organizations that have particular expertise in gender-based violence, including domestic violence, and refugee and human rights law. *Amici* have particular interest in the instant case because the Court’s holding that the abuse was “purely personal” and untethered to a protected ground, misapprehends the facts of the case and the context of domestic violence generally, and is at odds with the law of this Circuit and other Courts of Appeals as well as the Board of Immigration Appeals (BIA) recognizing gender-based persecution as a basis for asylum. This Court’s holding that Ms. Y.V.Z. did not qualify for relief under the Convention Against Torture (CAT) is also flawed, as it did not consider the record evidence that the Peruvian government is aware of rampant domestic violence, but remains willfully blind to the plight of victims. The issues involved have broad implications for the equitable and just administration of refugee law and protection of women. *Amici* thus offer this brief under Fed. R. App. P. 29, 3d Cir. L.A.R. 29.¹

¹ Pursuant to Fed. R. App. P. 29(a)(5), *amici* represent that Petitioner consents to the filing of this brief, while Respondent has taken no position on its filing. No person or entity other than *amici* authored or provided any funding related to preparing or filing this brief.

ARGUMENT

I. THE PANEL OVERLOOKED THE GENDER-BASED NATURE OF THE HARM IN THIS CASE.

A. The harm suffered by Ms. Y.V.Z. constitutes domestic violence.

The relationship between Ms. Y.V.Z. and her abuser, Marco Huamani, has the hallmarks of domestic violence – physical violence, sexual abuse, threats, jealousy and isolation, force and lack of agency, intimidation, and stalking – and should be analyzed through this lens. *See, e.g.*, KERRY HEALEY ET AL., U.S. DEP’T OF JUSTICE, BATTERER INTERVENTION: PROGRAM APPROACHES AND CRIMINAL JUSTICE STRATEGIES (1998).

The record shows that Huamani exerted control over Ms. Y.V.Z. and believes they are in a relationship despite her resistance. From the time Huamani arrived at Ms. Y.V.Z.’s home, he began sexually harassing her every time he saw her, touching her breasts, telling her that he wanted to have sexual relations, and on one occasion attempting to rape her. Certified Administrative Record (AR) 168, 172-73, 449. He levied threats of harm against Ms. Y.V.Z. and her grandmother if she failed to succumb to his demands. AR 450. When Huamani caught her speaking with a young male, he beat her up. AR 177. When Ms. YVZ’s brother attempted to protect her, Huamani’s friends beat him. AR 450. Her resistance only further enraged him and resulted in the escalation of the abuse. AR 171, 450.

Ms. Y.V.Z.’s abuser not only had the “desire” to become Ms. Y.V.Z.’s

“boyfriend,” as mischaracterized by the Panel, but from his perspective, he had already accomplished his goal. Taking Huamani’s comments in context, there should be no doubt that he believed she was already his and that he therefore had a right to control her even after Ms. Y.V.Z. refused Huamani’s advances and her grandmother removed him from their house. AR 171 (“he told me that he was not going to stop because I was . . . the one for him,” “he was never going to leave me alone,” and “he was not going to let any other person touch me”); AR 172 (he told me that “he was never going to let me be with anyone” else). The Department of Homeland Security (DHS) has recognized that a relationship can persist even after a woman has clearly stated her intention to end the relationship and/or separated from her abuser where the abuser refuses to recognize an end to the relationship, which exists on the abuser’s terms. AR 39 (DHS’s Supp. Br. in *Matter of L-R* setting forth the agency’s official position). The same analysis should apply here.

B. Gender is at least one central, if not the central, reason for the infliction of domestic violence and was the central reason in this case.

Statistics, comparative cross-cultural studies of domestic violence, and behaviors exhibited by male batterers provide compelling evidence that gender is the principle motivating factor for domestic violence. *See, e.g.,* AM. PSYCHOLOGICAL ASS’N, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 19 (1996) (concluding that “[t]he strongest risk factor for being a victim of partner violence is being female”)

(emphasis in original); DAVID LEVINSON, FAMILY VIOLENCE IN CROSS-CULTURAL PERSPECTIVE 102-07 (1987), *reprinted in* NANCY K.D. LEMON, DOMESTIC VIOLENCE LAW 136-141 (2009).

Courts and legislatures in the United States have recognized the gender-based nature of domestic violence. *See, e.g., United States v. Morrison*, 529 U.S. 598, 605 (2000) (outlining that the purpose of the Violence Against Women Act of 1994, which covers domestic violence, was to enshrine “the right to be free from crimes of violence motivated by gender”) (quoting 42 U.S.C. § 13981(b)); Molly Dragiewicz & Yvonne Lindgren, *The Gendered Nature of Domestic Violence: Statistical Data for Lawyers Considering Equal Protection Analysis*, 17 AM. U. J. GENDER SOC. POL'Y & L. 229, 263-66 (2009) (collecting decisions and statutes recognizing domestic violence as a form of gender-based discrimination).

International tribunals and authorities have similarly addressed the gender motives underlying violence in the domestic context. *See, e.g., Islam v. Sec'y of State for the Home Dep't*, and *Regina v. Immigration Appeal Tribunal, ex parte Shah*, [1999] 2 A.C. 629 (H.L.); UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/01 (May 7, 2002); Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc.

A/48/49 (Dec. 20, 1993); Council of Europe Convention on preventing and combating violence against women and domestic violence, *opened for signature* May 11, 2011, CETS No. 210.

This Court upheld the BIA's determination that Ms. Y.V.Z. failed to prove that the harm she suffered was motivated on account of a protected ground because Huamani harmed her for “‘purely personal reasons,’ viz., his personal, aberrant desire to become Y.V.Z.'s boyfriend.” This conclusion grossly disregards ample record evidence, both direct and circumstantial, that Ms. Y.V.Z.'s membership in a particular social group – defined in part by her gender – was “at least one central reason” Huamani targeted her for abuse. *See* 8 U.S.C. §§ 1101(a), 1158(b)(1)(B); *Ndayshimiye v. Att’y Gen.*, 557 F.3d 124, 131 (3d Cir. 2009).

The fact that Huamani feels he is entitled to decide that Ms. Y.V.Z. is “his” without any indication of interest on her part (quite to the contrary) is itself a reflection of attitudes and norms regarding gender roles. Such attitudes are not “purely personal.” Rather, they reflect social norms that teach boys and men that they are superior to girls and women and thus they, the boys/men, get to decide what will happen in a relationship, including whether it will result in sex, reproduction, marriage, and in the end separation (*i.e.*, it is not over until he says it is). *See Report of the Special Rapporteur on violence against women, its causes and consequences*, ¶ 27, U.N. Doc. E/CN.4/1996/53 (Feb. 5, 1996) (“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.”).

Social norms are reinforced by the legal norms that tolerate violence against women. For example, CEDAW has lamented the absence of national legislation on equality between women and men in Peru as inhibiting efforts to combat violence against women. AR 387; *see also* AR 400 (Committee on the Rights of Child reporting that “the criminal code does not provide for adequate protection against [domestic abuse]”); AR 412-14 (Immigration and Refugee Board of Canada describing shortcomings in Peru’s legal framework).

The Seventh Circuit’s analysis in *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011), involving “honor killing” in Jordan, is instructive. The court found that although the applicant’s brother may “have a personal motivation in the sense that he is angry that his sister has dishonored the family,” the court continued “he is killing her because society has deemed that this is a permissible . . . course of action.” *Id.* at 656; *see also* *Bi Xia Qu v. Holder*, 618 F.3d 602, 608 (6th Cir. 2010) (recognizing that the persecutor targeted the applicant for a non-protected reason, “to secure the repayment of his loan from [her] father,” but holding that this did not diminish that he also did so for protected reason, “because she is a

woman whom he could force into marriage in a place where forced marriages are accepted”). Similarly, while Huamani may be “angry” that Ms. Y.V.Z. attempted to resist his advances, he is targeting her because society permits him to do so. AR 387-88 (CEDAW noting that “the lack of enforcement measures [in Peru]. . . contribute[s] to impunity for perpetrators, and the persistence of permissive attitudes in society towards violence against women”). It is not clear to *amici* what further evidence would have persuaded the Immigration Judge, the Board, and now this Court, to consider the centrality of gender to this case.²

Historically, violations of women’s rights were seen to be “personal” or “private,” but numerous human rights instruments have rejected that characterization. *See* KAREN MUSALO ET AL., *REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH* 690-93 (4th ed. 2011). Consistent with these developments, the Third Circuit, in its seminal decision in *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993), was the first Court of Appeals case to recognize gender-based harm, there in the context of opposition to repressive social norms, as a basis for asylum. The BIA and other Courts of Appeals have followed suit, recognizing gender-motivated harms as a basis for asylum in a variety of contexts. *See, e.g., Sarhan*, 658 F.3d 649 (honor killings); *Bi Xia Qu*, 618 F.3d 608 (forced

² Even if Huamani was motivated to harm Ms. Y.V.Z. in part for a non-protected reason, which has yet to be articulated by any adjudicator and which *amici* do not concede, so long as a protected ground is “one central reason,” the nexus requirement has been fulfilled. *Ndayshimiye*, 557 F.3d at 129.

marriage); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (female genital cutting); *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (same); *Matter of Kasinga*, 21 I. & N. Dec. 357, 367 (BIA 1996) (same).³ The Panel’s decision is at odds with this expanding recognition of gender-based persecution as a basis for asylum and, *amici* respectfully submit, should be corrected.

C. The failure to exercise due diligence to prevent and punish domestic violence, as in this case, rises to the level of acquiescence.

In *Gomez-Zuluaga v. Att’y Gen.*, 527 F.3d 330, 351 (3d Cir. 2008), this court held that when considering whether a government acquiesces in torture, the agency should consider “the documentary evidence.” The evidence the court found relevant for the Board to consider on remand included evidence that the “authorities have been especially slow to end abuses against women or bring perpetrators to justice” and that “[t]here is also very little support for women who have been abused.” *Id.* In contrast, the Panel here relied only on its determination that the failure of the police to respond in one case was insufficient evidence of acquiescence. In so doing, the Court did not appear to consider the record, which supports only one conclusion: the Peruvian government does not exercise due

³ The Courts of Appeals and the Board have also recognized violence against women in the context of a domestic relationship as occurring on account of political opinion or religion – declining to dismiss the claims as merely “personally” motivated. *See, e.g., Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987); *Matter of S-A-*, 22 I. & N. Dec. 1328, 1336 (BIA 2000).

diligence to prevent and punish domestic violence, and did not do so here.⁴

The ineffectiveness of legal protections for women manifests more than individual injustices. Rather, as in Peru, it serves as *de facto* encouragement for the violence and is tantamount to acquiescence. *See, e.g.*, AR 250 (Department of State reporting that “[i]nsensitivity on the part of [Peruvian] law enforcement and judicial authorities toward female victims contributed to a societal attitude of permissiveness toward abuse”). *Amici* support Petitioner’s argument that the Court should, at a minimum, remand to the BIA for reconsideration under the proper standard. *See Ali v. Reno*, 237 F.3d 591, 598 (6th Cir. 2001) (noting that where “authorities ignore or consent to severe domestic violence, the Convention appears to compel protection for a victim”).

⁴ The United Nations Committee Against Torture has recognized that a State’s failure to exercise due diligence to prevent, investigate, and punish gender-based violence perpetrated by private actors is tantamount to a State’s consent or acquiescence. *See Rhonda Copelon*, 11 N.Y. CITY L. REV. 229 (2008).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant Ms. Y.V.Z.'s Petition for Review and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify, pursuant to 3d Cir. L.A.R. 28.3(d), that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

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