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## *Perdomo v. Holder*: A Step Forward in Recognizing Gender as a "Particular Social Group" Per Se

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# PERDOMO V. HOLDER: A STEP FORWARD IN RECOGNIZING GENDER AS A “PARTICULAR SOCIAL GROUP” PER SE

**Abstract:** On July 12, 2010, the Ninth Circuit Court of Appeals, in *Perdomo v. Holder*, ruled that the Board of Immigration Appeals had erred in finding that an asylum applicant failed to establish membership in a “particular social group” under the Immigration and Nationality Act when she defined the social group as “all Guatemalan women.” This Comment argues that the BIA should use *Perdomo* as an opportunity to establish gender as a “particular social group” per se in order to address the inconsistency with which courts have defined this category in asylum cases involving gender-based persecution.

## INTRODUCTION

Individuals seeking asylum in the United States who have suffered gender-based persecution have faced substantial difficulties in navigating an asylum system that does not explicitly recognize gender-related persecution as grounds for political asylum.<sup>1</sup> Immigration laws afford the Attorney General the discretion to grant political asylum.<sup>2</sup> In order to qualify for this protection, however, an applicant must be a refugee under the Immigration and Nationality Act (INA).<sup>3</sup> To qualify as a refugee, an asylum seeker must show that (1) she has suffered persecution or has a well-founded fear of persecution, (2) on account of race, religion, nationality, membership in a particular social group, or political opinion, and (3) is unable or unwilling to escape this persecution.<sup>4</sup>

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<sup>1</sup> See Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 781–83 (2002); Bret Thiele, *Persecution on Account of Gender: A Need for Refugee Law Reform*, 11 HASTINGS WOMEN’S L.J. 221, 221–22 (2000).

<sup>2</sup> Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(A) (2006).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* § 1101(a)(42)(A). The relevant language in the INA defines a refugee as

any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion . . . .

Gender is not a recognized ground under which applicants may receive protection within this definition.<sup>5</sup> Asylum seekers who have suffered gender-based persecution must fit their applications within one of the statutorily recognized categories.<sup>6</sup> Such asylum seekers generally use the “membership in a particular social group” category.<sup>7</sup> Unfortunately, the legislature has declined to define the scope of this term, and courts have been reluctant to include gender under this category for fear of inundating immigration courts with asylum claims.<sup>8</sup> In response, asylum seekers who have suffered gender-based persecution have begun to base their applications on membership in very narrow social groups in order to increase their chances of a favorable outcome.<sup>9</sup> This method has allowed courts to extend protection to those individuals who have presented valid claims for political asylum without the fear of opening the floodgates to immigration.<sup>10</sup>

The narrow approach of defining a “particular social group” is problematic, however, for victims who suffer persecution solely on the basis of their gender.<sup>11</sup> This Comment addresses one such case, *Perdomo v. Holder*, a 2010 decision by the U.S. Court of Appeals for the Ninth Circuit Court involving a petitioner’s attempt to define “all women in Guatemala” as a “particular social group.”<sup>12</sup> Part I provides a brief background of the case, including the facts of the petitioner’s asylum appli-

*Id.*

<sup>5</sup> See *id.*

<sup>6</sup> See *id.*; Jenny-Brooke Condon, *Asylum Law’s Gender Paradox*, 33 SETON HALL L. REV. 207, 249 (2002) (discussing the 1951 Geneva Convention on the Status of Refugees’ definition of refugee, adopted by the United States in the INA, and its failure to include a gender category, which has forced applicants who have suffered gender-based persecution to base their claims on one of the other recognized categories); Allison W. Reimann, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199, 1232 (2008).

<sup>7</sup> Condon, *supra* note 6, at 211; see Reimann, *supra* note 6, at 1232; Thiele, *supra* note 1, at 224–27.

<sup>8</sup> See *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005); Reimann, *supra* note 6, at 1258.

<sup>9</sup> See, e.g., *Fatin v. INS*, 12 F.3d 1233, 1237 (3d Cir. 1993) (defining “particular social group” as “the social group of the upper class of Iranian women who supported the Shah of Iran, a group of educated Westernized free-thinking individuals”); *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996) (defining “particular social group” as “young women of the Tchamba-Kunsuntu Tribe who have not had [female genital mutilation], as practiced by that tribe, and who oppose the practice”).

<sup>10</sup> See, e.g., *In re Kasinga*, 21 I. & N. Dec. at 358.

<sup>11</sup> See Tanya Domenica Bosi, *Yadegar-Sargis v. INS: Unveiling the Discriminatory World of U.S. Asylum Laws: The Necessity to Recognize a Gender Category*, 48 N.Y.L. SCH. L. REV. 777, 791–92 (2003); Thiele, *supra* note 1, at 224–26.

<sup>12</sup> See 611 F.3d 662, 663 (9th Cir. 2010).

cation that make her claim particularly relevant to the issue of gender-related persecution.<sup>13</sup> Part II discusses the Ninth Circuit's argument for the expansive definition of "particular social group," which illuminates the inconsistency with which courts have applied this term.<sup>14</sup> Finally, Part III argues that, in light of these inconsistencies, the Board of Immigration Appeals (BIA or "Board") should use *Perdomo* as an opportunity to expressly qualify gender as a "particular social group" per se.<sup>15</sup> Such an expansion will likely raise concerns of inundating immigration courts with asylum claims, but the framework of political asylum law itself provides a practical limit to the extension of asylum.<sup>16</sup>

### I. GENDER IN *PERDOMO V. HOLDER*

In *Perdomo*, the Ninth Circuit rejected a narrow interpretation of "particular social group" and called for an expansive definition that would accommodate a group defined exclusively by gender.<sup>17</sup> *Perdomo* presented the case of Lesley Perdomo, a Guatemalan woman who faced deportation after living continuously in the United States since 1991.<sup>18</sup> In response to a removal order, Perdomo requested asylum based on her fear of persecution as a member of the "particular social group" of "all women in Guatemala."<sup>19</sup> She based her persecution claim on the high incidence of murder of women in Guatemala.<sup>20</sup> Perdomo presented various reports describing these "femicides," including documentation of their brutality, their prevalence, and the Guatemalan government's lack of responsiveness.<sup>21</sup> The immigration judge denied her

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<sup>13</sup> See *infra* notes 17–25 and accompanying text.

<sup>14</sup> See *infra* notes 26–60 and accompanying text.

<sup>15</sup> See *infra* notes 61–85 and accompanying text.

<sup>16</sup> See Condon, *supra* note 6, at 229–30; Reimann, *supra* note 6, at 1258–59; *infra* notes 61–85 and accompanying text.

<sup>17</sup> See 611 F.3d 662, 663, 666–69 (9th Cir. 2010).

<sup>18</sup> *Id.* at 664. Perdomo entered the United States without inspection in 1991, at age fifteen. *Id.* She attended high school in Reno, Nevada, and until she received her removal notice, she worked as a Medicaid account executive at a medical facility in Reno. *Id.* In April 2003, she received a Notice to Appear, which charged her as removable for unlawfully entering the United States. *Id.*

<sup>19</sup> *Id.* Perdomo first defined the social group as "women between the ages of fourteen and forty who are Guatemalan and live in the United States," but later revised this group to include "all women in Guatemala." *Id.* at 665. She gave no reason for the revision, but the characterization of the first social group suggests she had first attempted to identify herself with a very narrow class of women, a common method for asylum seekers whose claims are based on gender-related persecution. See *id.*; Bosi, *supra* note 11, at 791–92.

<sup>20</sup> *Perdomo*, 611 F.3d at 664.

<sup>21</sup> *Id.* These murders have been termed "femicides" because they are gender-based and are often associated with brutality and sexual violence. See Reimann, *supra* note 6, at 1209.

application, and the BIA affirmed on the grounds that she had failed to prove that she was a member of a “particular social group” under the Immigration and Nationality Act.<sup>22</sup>

On appeal, the Ninth Circuit rejected the BIA’s reasoning and remanded the case for a determination of whether the group “all women in Guatemala” constitutes a “particular social group.”<sup>23</sup> In remanding the case, the Ninth Circuit acknowledged that it did not have the power to make this decision itself and that this determination must be left to the BIA in the first instance.<sup>24</sup> The court nonetheless advocated for an expansive definition of “particular social group,” which would include groups characterized by gender alone.<sup>25</sup>

## II. PROPOSED EXPANSION IN DEFINING A “PARTICULAR SOCIAL GROUP”

The Ninth Circuit advocated for an expansive definition of “particular social group” in three ways.<sup>26</sup> First, by concluding that the BIA’s decision in *Perdomo* was in opposition to the Board’s own precedent in the 1985 decision in *Matter of Acosta*, the Ninth Circuit implied that the BIA’s definition of “particular social group” in *Acosta* should be read expansively.<sup>27</sup> Second, the court pointed to its own decisions as presenting a trend towards explicitly recognizing groups unified solely by gender as “particular social groups.”<sup>28</sup> Third, the court expressly rejected the notion that a group may not constitute a “particular social group” merely because all of its group members may qualify for asylum.<sup>29</sup> Using its 1996 decision, *Singh v. INS*, the Ninth Circuit addressed the fear of inundating immigration courts with asylum claims and implied that

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<sup>22</sup> *Perdomo*, 611 F.3d at 665.

<sup>23</sup> *Id.* at 669.

<sup>24</sup> *Id.* (citing *Gonzales v. Thomas*, 547 U.S. 183, 185–87 (2005)).

<sup>25</sup> *Id.* at 665–69. Although *Perdomo* defined her “particular social group” as “all Guatemalan women,” the characteristic that defines her social group is her gender and not her nationality. *See id.* at 665–67. *Perdomo*’s proposed fear of persecution rested on her status as a woman based on the prevalence of violence in Guatemala against women in general, rather than violence against Guatemalan women in particular. *See id.* Her suggested “particular social group,” therefore, is characterized on the basis of her gender rather than her nationality. *See id.* In support of such a characterization, the Ninth Circuit stated that although it has not expressly held that “females, without other defining characteristics” comprise a “particular social group,” it has acknowledged that such a group, regardless of other specific characteristics, *could* constitute a “particular social group.” *Id.* at 667 (citing *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005)).

<sup>26</sup> *Id.*

<sup>27</sup> *See id.* (citing *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985)).

<sup>28</sup> *See Perdomo*, 611 F.3d at 666–67.

<sup>29</sup> *Id.* at 669.

this should not be an issue of central concern in deciding whether a group qualifies as a “particular social group.”<sup>30</sup>

#### A. *An Expansive Reading of Matter of Acosta*

In *Acosta*, the BIA used the doctrine of *ejusdem generis*<sup>31</sup> to define “particular social group” as one whose members share a common, immutable characteristic.<sup>32</sup> The Board reasoned that the specific grounds of persecution listed in the INA—race, religion, nationality, and political opinion—are forms of persecution targeted at immutable characteristics, characteristics that an individual cannot change or that are so fundamental to individual identity that such a change should not be required.<sup>33</sup> Requiring individuals in a particular social group to possess this type of characteristic ensures that asylum is extended only to individuals who are either unable to, or should not be required to, avoid persecution.<sup>34</sup> Such a characteristic could be innate, such as gender or family ties, or acquired through shared experiences.<sup>35</sup> The Board qualified this definition, however, with the caveat that the kinds of shared characteristics qualifying individuals as members of a particular social group would have to be examined on a case-by-case basis.<sup>36</sup>

Courts have interpreted the holding in *Acosta* in two ways.<sup>37</sup> Some courts have interpreted the Board’s “case-by-case” language as requiring that individuals share an additional characteristic besides gender to qualify as members of a particular social group.<sup>38</sup> Other courts have adopted an expansive reading of *Acosta* and concluded that gender

<sup>30</sup> *See id.*

<sup>31</sup> *See* BLACK’S LAW DICTIONARY 594 (9th ed. 2009) (explaining that, under the doctrine of *ejusdem generis*, when general words follow a list of specific words, the general words should be construed to be consistent with the specific words).

<sup>32</sup> *See* 19 I. & N. Dec. at 233, *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

<sup>33</sup> *See id.* (discussing 8 U.S.C. § 1101(a)(42)(A) (2006)).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (listing former military leadership and land ownership as examples of shared past experiences that could qualify for membership in a particular social group).

<sup>36</sup> *Id.*

<sup>37</sup> *See* Crystal Doyle, *Isn’t Persecution Enough? Redefining the Refugee Definition to Provide Greater Asylum Protection to Victims of Gender-Based Persecution*, 15 WASH. & LEE J. CIVIL. RTS. & SOC. JUST. 519, 537–38 (2008); Thiele, *supra* note 1, at 228.

<sup>38</sup> *See, e.g., Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991).

alone can identify members of a particular social group because gender is a shared characteristic that group members cannot change.<sup>39</sup>

In *Perdomo*, the BIA had denied Lesley Perdomo's application for asylum solely on the grounds that "all women in Guatemala" was not recognized as a "particular social group" under the INA.<sup>40</sup> In remanding the case and concluding that the BIA had ruled against its own precedent in *Acosta*, the Ninth Circuit implied that *Acosta* should be read expansively, to allow "particular social group" to be defined exclusively by gender.<sup>41</sup>

### B. Support in the Ninth Circuit's Precedent

The Ninth Circuit next pointed to its own case law to support an expansive interpretation of "particular social group."<sup>42</sup> In its 1986 decision in *Sanchez-Trujillo v. INS*, the Ninth Circuit, motivated by a fear of allowing too many people to qualify for asylum, defined the particular social group category based only on a voluntary association that united the group members.<sup>43</sup> Recognizing that it was the only circuit to adopt such a narrow definition, the Ninth Circuit amended this test in a 2000 case, *Hernandez-Montiel v. INS*, to include the BIA's reasoning from *Acosta*.<sup>44</sup> In *Hernandez-Montiel*, the Ninth Circuit adopted a two-pronged test that recognized groups whose members are united by *either* a voluntary association *or* an innate characteristic that is so fundamental to the identities of the group members that they cannot or should not be required to change it.<sup>45</sup> This test reflected the combination of the Ninth Circuit's own reasoning in *Sanchez-Trujillo* with the BIA's reasoning in *Acosta*.<sup>46</sup> In adopting the two-pronged approach outlined in *Hernandez-Montiel*, the Ninth Circuit effectively abandoned the narrow interpreta-

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<sup>39</sup> See, e.g., *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (recognizing "Somalian females" as a particular social group); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (recognizing Iranian women as a particular social group).

<sup>40</sup> 611 F.3d at 667. In its analysis, the Board never reached the other requirements of a claim for political asylum under the INA. *Id.* These requirements include: (1) whether the harm stated amounted to persecution, and (2) whether the persecution was on account of Perdomo's membership in the stated "particular social group" or whether she was unable or unwilling to avoid such persecution. See 8 U.S.C. § 1101(a)(42)(A) (2006); *Perdomo*, 611 F.3d at 664, 667.

<sup>41</sup> See *Perdomo*, 611 F.3d at 669.

<sup>42</sup> See *id.* at 666 (citing *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092–93 (9th Cir. 2000); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986)).

<sup>43</sup> 801 F.2d at 1576.

<sup>44</sup> *Hernandez-Montiel*, 225 F.3d at 1092–93; *Acosta*, 19 I. & N. Dec. at 233.

<sup>45</sup> 225 F.3d at 1093.

<sup>46</sup> *Id.* at 1093 n.6; see *Sanchez-Trujillo*, 801 F.2d at 1576; *Acosta*, 19 I. & N. Dec. at 233.

tion set out in *Sanchez-Trujillo* in favor of a more expansive definition of particular social group.<sup>47</sup>

In denying Lesley Perdomo's application for asylum, the BIA relied on dicta in *Sanchez-Trujillo*, in which the Ninth Circuit cautioned against using broad-based characteristics that identify large segments of the population to define a "particular social group."<sup>48</sup> The Ninth Circuit, in its remand, reasoned that an analysis of whether a group qualifies as a particular social group does not end with *Sanchez-Trujillo* and urged the BIA to use the more expansive test set out in *Hernandez-Montiel*.<sup>49</sup> The Ninth Circuit seemed to suggest that the "innate characteristic" prong of the *Hernandez-Montiel* test may be even more applicable than the "voluntary association" prong set out in *Sanchez-Trujillo*.<sup>50</sup> The court cited several cases in which groups have qualified as "particular social groups" based on a shared innate characteristic regardless of the groups' size.<sup>51</sup> By identifying *Hernandez-Montiel* as the relevant authority for the BIA on remand, the Ninth Circuit called for a more inclusive test that would expand the definition of "particular social group" to include groups that are defined by innate characteristics such as gender.<sup>52</sup>

### C. *Singh v. INS: A Response to the Floodgates*

The Ninth Circuit also highlighted its 1996 decision, *Singh v. INS*, to address the policy concerns raised by recognizing a "particular social group" defined only by gender.<sup>53</sup> In *Singh*, the BIA denied asylum to an applicant who based his application on past persecution of Indian citizens of Fiji.<sup>54</sup> This social group, recognized as Indo-Fijians, made up around half the population of Fiji.<sup>55</sup> The BIA denied the petitioner's application based on its finding that the harm to the petitioner did not amount to persecution because these harms were experienced by all

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<sup>47</sup> See *Hernandez-Montiel*, 225 F.3d at 1092–93; *Sanchez-Trujillo*, 801 F.2d at 1576.

<sup>48</sup> See *Perdomo*, 611 F.3d at 668 (quoting *Sanchez-Trujillo*, 801 F.2d at 1577).

<sup>49</sup> *Id.*; see *Hernandez-Montiel*, 225 F.3d at 1092–93.

<sup>50</sup> See *Perdomo*, 611 F.3d at 668; *Hernandez-Montiel*, 225 F.3d at 1092–93; *Sanchez-Trujillo*, 801 F.2d at 1576.

<sup>51</sup> See *Perdomo*, 611 F.3d at 668 (citing *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (recognizing "all alien homosexuals" as a "particular social group"); *Mihalev v. Ashcroft*, 388 F.3d 722, 726 (9th Cir. 2004) (recognizing "Gypsies" as a "particular social group"))).

<sup>52</sup> See *id.*; *Hernandez-Montiel*, 225 F.3d at 1092–93.

<sup>53</sup> *Perdomo*, 611 F.3d at 669 (citing *Singh v. INS*, 94 F.3d 1353, 1359 (9th Cir. 1996)).

<sup>54</sup> *Singh*, 94 F.3d at 1356.

<sup>55</sup> *Id.*

Indian citizens in Fiji.<sup>56</sup> On appeal, the Ninth Circuit noted that the BIA had, in effect, denied asylum on the basis that the petitioner's identified social group encompassed too large a part of the Fijian population.<sup>57</sup> The court reasoned that a group could not be denied classification as a "particular social group" solely because all of its members would qualify for asylum.<sup>58</sup> That decision implied that the size and breadth of a group should not be a basis for refusing to recognize a group as a "particular social group."<sup>59</sup> Thus, the Ninth Circuit in *Perdomo* implicitly rejected the argument that groups identified by gender alone should not be recognized as "particular social groups" because they are too large and their recognition would result in an overabundance of asylum claims.<sup>60</sup>

### III. CLOSING THE FLOODGATES

The Ninth Circuit's discussion proposing an expansive definition of "particular social group" illuminates the persistent inconsistency with which courts have applied this term in cases involving gender-based persecution.<sup>61</sup> The BIA should use *Perdomo* as an opportunity to bring clarity and consistency to the asylum process for those who have suffered gender-related persecution by allowing "particular social group" to be defined by gender per se.<sup>62</sup>

The difficulties in applying the term "particular social group" are due in large part to the lack of binding authority defining it.<sup>63</sup> Without clear legislation classifying gender as a "particular social group" per se, courts have been reluctant to make this type of ruling for fear of setting dangerous precedent and overwhelming the immigration courts with asylum claims.<sup>64</sup> This is a widely recognized problem, and various agencies have issued guidelines to assist immigration courts in adjudicating

<sup>56</sup> *Id.* at 1358.

<sup>57</sup> *See id.*

<sup>58</sup> *See id.* at 1359.

<sup>59</sup> *See id.*

<sup>60</sup> *See Perdomo*, 611 F.3d at 669.

<sup>61</sup> *See Perdomo v. Holder*, 611 F.3d 662, 665–69 (9th Cir. 2010); Andrea Binder, *Gender and the "Membership in a Particular Social Group" Category of the 1951 Refugee Convention*, 10 COLUM. J. GENDER & L. 167, 179–80 (2000); Doyle, *supra* note 37, at 541.

<sup>62</sup> *See generally Perdomo*, 611 F.3d 662.

<sup>63</sup> *See Doyle*, *supra* note 37, at 540–41; Reimann, *supra* note 6, at 1233 (quoting *Lwin v. INS*, 144 F.3d 505, 511 (7th Cir. 1998)).

<sup>64</sup> *See, e.g., Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005); Binder, *supra* note 61, at 179–81; Doyle, *supra* note 37, at 539–40.

asylum cases involving gender-based persecution.<sup>65</sup> These include the 1995 Memorandum from the Director of the Office of International Affairs ("INS Guidelines") and the proposed regulations on the issue released in 2000.<sup>66</sup> These documents, however, only provide guidance and are not binding authority to the courts; immigration courts still do not have a definitive answer as to whether a "particular social group" may be defined by gender alone.<sup>67</sup>

The BIA has the opportunity to provide such an answer in light of *Perdomo*.<sup>68</sup> The Supreme Court has clarified that the BIA has adjudicatory power to determine whether a proposed group qualifies as a "particular social group."<sup>69</sup> A ruling by the BIA that the group defined as "all women in Guatemala" constitutes a "particular social group" would provide clear and definite precedent for all courts deciding asylum claims.<sup>70</sup> Such a holding would resolve the discrepancies that have plagued the courts in deciding claims involving gender-based persecution.<sup>71</sup> Furthermore, the BIA would find support for such a ruling not only in the INS Guidelines, the proposed regulations, and its own case law, but also in the Ninth Circuit's opinion in *Perdomo*.<sup>72</sup>

Of course, such a ruling raises the concern of overwhelming immigration courts with asylum claims.<sup>73</sup> Scholars have noted, however, that the statutory framework of asylum law itself provides an effective limit to the extension of asylum protection.<sup>74</sup> An individual does not receive a grant of asylum merely by showing that she belongs to a category that is a recognized ground for persecution.<sup>75</sup> An asylum seeker

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<sup>65</sup> See Condon, *supra* note 6, at 215–18; Doyle, *supra* note 37, at 539–41; see e.g. Asylum and Withholding Definitions, 65 Fed. Reg. 76588 (proposed Dec. 7, 2000); Memorandum from Phyllis Coven, Office of Int'l Affairs of the U.S. Dept. of Justice, to All INS Asylum Office/rs and HQASM Coordinators (May 26, 1995), available at [http://cgrs.uchastings.edu/documents/legal/guidelines\\_us.pdf](http://cgrs.uchastings.edu/documents/legal/guidelines_us.pdf) [hereinafter INS Guidelines].

<sup>66</sup> See Asylum and Withholding Definitions, 65 Fed. Reg. 76593; INS Guidelines, *supra* note 65, at 13–14.

<sup>67</sup> See Condon, *supra* note 6, at 215–18; Doyle, *supra* note 37, at 539.

<sup>68</sup> See generally *Perdomo*, 611 F.3d 662.

<sup>69</sup> See *Gonzales v. Thomas*, 547 U.S. 183, 185–87 (2005).

<sup>70</sup> See *Lwin v. INS*, 144 F.3d 505, 511 (7th Cir. 1998) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (holding that an agency's interpretation of statutory terms is entitled to deference by the courts)).

<sup>71</sup> See *Perdomo*, 611 F.3d at 665–69; Doyle, *supra* note 37, at 541.

<sup>72</sup> See *Perdomo*, 611 F.3d at 666–69; Asylum and Withholding Definitions, 65 Fed. Reg. 76593 (Dec. 7, 2000); INS Guidelines, *supra* note 65, at 13–14.

<sup>73</sup> See *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005); Reimann, *supra* note 6, at 1258.

<sup>74</sup> See 8 U.S.C. § 1101 (a) (42) (A) (2006); Condon, *supra* note 6, at 229–30.

<sup>75</sup> See 8 U.S.C. § 1101 (a) (42) (A); Condon, *supra* note 6, at 229–30.

who bases her claim on gender-related persecution has the burden of proving (1) she has suffered or has a “well-founded” fear of suffering harm that rises to the level of “persecution,” (2) on account of her membership in a protected group, and (3) that she is unable or unwilling to escape this persecution.<sup>76</sup> This burden provides an effective limit not only to grants of asylum, but also to the number of claims filed.<sup>77</sup>

Furthermore, asylum law aims to protect those who are unable to protect themselves from persecution.<sup>78</sup> An analysis of asylum claims should therefore focus primarily on the potential of persecution rather than the number of potential applicants.<sup>79</sup> The INA was enacted to establish a comprehensive refugee policy that would comply with the 1967 United Nations Protocol Relating to the Status of Refugees.<sup>80</sup> This Protocol reflects a refugee definition drafted during the 1951 Refugee Convention to address the effects of World War II and the refugee crises that took place in Europe during the war.<sup>81</sup> Thus, political asylum aims to protect those who suffer persecution and cannot or should not be required to change when their governments have failed to provide adequate protection.<sup>82</sup> Based on this rationale for asylum law, a situation could arise in which a majority of a country’s population is subjected to persecution, from which it has no protection, based on some immutable characteristic.<sup>83</sup> It would be irrational to conclude that asylum laws should not extend protection to a group of individuals merely because they would comprise too large a segment of their country’s population.<sup>84</sup> Likewise, it would be irrational to deny asylum to female members of a nation’s population merely because a gender-based social group represents too large a segment of the population.<sup>85</sup>

## CONCLUSION

Although the BIA has established that a “particular social group” includes groups whose members share a common, immutable characteristic, courts have been reluctant to recognize gender as a “particular

<sup>76</sup> See 8 U.S.C. §§ 1011 (a)(42)(A), 1158(b)(1); Bosi, *supra* note 11, at 804.

<sup>77</sup> See Condon, *supra* note 6, at 229–30; Reimann, *supra* note 6, at 1259.

<sup>78</sup> See *Niang*, 422 F.3d at 1199–1200; Bosi, *supra* note 11, at 810–12.

<sup>79</sup> See *Niang*, 422 F.3d at 1199–1200; Bosi, *supra* note 11, at 810–12.

<sup>80</sup> Doyle, *supra* note 37, at 535; Thiele, *supra* note 1, at 222.

<sup>81</sup> Binder, *supra* note 61, at 169; Thiele, *supra* note 1, at 223.

<sup>82</sup> See Thiele, *supra* note 1, at 223; Matter of Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

<sup>83</sup> See Reimann, *supra* note 6, at 1260.

<sup>84</sup> See *id.*

<sup>85</sup> See *id.*

social group” per se. This hesitancy has led to inconsistent interpretation of that phrase in asylum cases involving gender-based persecution. In remanding *Perdomo* to the BIA, the Ninth Circuit used its opinion to advocate for the express recognition of “particular social groups” defined exclusively by gender. The Board should use *Perdomo* as an opportunity to address the inconsistencies in interpreting this category by establishing gender as a “particular social group” per se.

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