No. 10-1545

IN THE

# Supreme Court of the United States

RUDINA DEMIRAJ AND REDIOL DEMIRAJ,

*Petitioners*,

v.

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,

*Respondent*.

*On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## BRIEF OF *AMICI CURIAE* IMMIGRATION LAW SCHOLARS IN SUPPORT OF PETITIONERS

WAYNE D. COLLINS
*Counsel of Record*
Matthew Jennejohn
Paige Berges
Alexis Berkowitz
Sheila Jain
Paul Johnson
Geoffrey L. Rawle
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, NY 10022
(212) 848-4000

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## QUESTION PRESENTED

Is an innocent person, who demonstrated a well-founded fear of being persecuted in retaliation for a family member's act—here, assisting the U.S. government in a criminal investigation—a "refugee" within the meaning of the Immigration and Nationality Act?

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*Amici*, who are listed in the Appendix, are professors and other legal scholars who have researched and written extensively on United States immigration law and policy, including asylum law and policy.

Amici submit this brief to express their view that the decision below creates a serious conflict within the circuit courts of appeal on a fundamental legal question of refugee eligibility grounded on family-based persecution, that the issue is an important and recurring one deserving this Court's attention, and that this case is an excellent vehicle for resolving the circuit split.[1]

## INTRODUCTION AND SUMMARY

Congress created the asylum provisions of our immigration law to protect individuals who are threatened with persecution because of characteristics that they either cannot change or should not be required to change. The Immigration and Nationality Act ("INA") gives the Attorney General and Secretary of Homeland Security discretion to grant asylum if the person meets the definition of "refugee." 8 U.S.C.

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[1] This amicus brief is filed with the parties' consent. Petitioner has filed a letter with the Clerk of the Court consenting to the filing of amicus briefs, and respondent's letter of consent is being filed with the Clerk of the Court together with this brief. No party's counsel wrote this brief (in whole or in part), and no person other than amici and their counsel contributed monetarily to this brief's preparation or submission.

§ 1158(b)(1)(A). In relevant part, the INA defines a refugee to be:

> any person who is outside any country of such person's nationality . . . 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 . . . .

*Id.* at § 1101(a)(42)(A).

The issue below was "whether the facts as found by the IJ [Immigration Judge] constitute, as a matter of law, proof of persecution 'on account of' Mrs. Demiraj's membership in the Demiraj family or not." *Demiraj v. Holder*, 631 F.3d 194, 198 (5th Cir. 2011).

The facts here are not in dispute.[2] Petitioners Rudina Demiraj and her son, Rediol Demiraj, are Albanian nationals who are the wife and son, respectively, of Edmond Demiraj, a material witness in the United States' prosecution of Bill Bedini for human smuggling. Before Mr. Demiraj could testify, Mr. Bedini fled to Albania. Because Mr. Demiraj's assistance was no longer necessary, he was deported.

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[2] The facts in this section are taken from the majority and dissenting opinions in the Court of Appeals. The IJ below accepted all of Mr. and Mrs. Demiraj's testimony with respect to the relevant facts and the Board of Immigration Appeals (BIA) accepted that determination. *Demiraj*, 631 F.3d at 196 n.2.

He eventually returned to Albania, where Mr. Bedini kidnapped, beat and shot him because of his cooperation with the United States. In further retaliation for Mr. Demiraj's cooperation, Mr. Bedini and his associates kidnapped and beat Mr. Demiraj's brother and kidnapped three of Mr. Demiraj's teenage nieces and trafficked them to Western Europe to be prostitutes. Mr. Demiraj and his nieces each eventually escaped to the United States, where Mr. Demiraj was granted withholding of removal and his nieces were granted asylum. Mr. Demiraj's brother fled to Greece. Mr. Demiraj's parents, who were also threatened by Mr. Bedini, have gone into hiding. Mr. Bedini had no personal grudge or animosity against Mr. Demiraj's brother, his nieces, or his parents, and the only reason he harmed or threatened them was because of their familial relationship to Mr. Demiraj.

Petitioners applied for asylum because they feared future persecution due to their membership in a particular social group—the Demiraj family.[3] The Court of Appeals accepted the factual findings below that (1) Petitioners have a well-founded fear of persecution by Mr. Bedini if they are forced to return to Albania, (2) the Albanian authorities are either unable or unwilling to provide protection to Petitioners from this threatened persecution, (3) any

[3] Petitioners also applied for withholding of removal under 8 U.S.C. § 1231(b)(3)(A) and protection under the Convention Against Torture. To simplify this brief's exposition, we address only refugee eligibility, although the extension to withholding of removal is straightforward. The Convention Against Torture is not a subject of the Petition.

persecution by Mr. Bedini would result, not from any animus or desire for revenge against the Petitioners themselves, but rather from an attack on them as members of Mr. Demiraj's family in retaliation for Mr. Demiraj's cooperation with the U.S. Government in Mr. Bedini's prosecution, and (4) the Demiraj family, of which Petitioners are members, qualifies—consistent with long-standing case law—as a "particular social group" within the meaning of the asylum provisions of the INA.

Notwithstanding these facts, the Fifth Circuit, in a split decision, held that Petitioners were not statutorily eligible for asylum. Indeed, the Court of Appeals held that these facts, *as a matter of law*, precluded Petitioners from refugee status because the threat of persecution was not, in the words of the statute, "on account of" membership in a family group. Over a vigorous dissent, the Court of Appeals held that persecution "on account of" membership in a family group requires that the applicant be "targeted for her membership in the Demiraj family *as such*." *Demiraj*, 631 F.3d at 199 (emphasis in original). Under the Fifth Circuit's reading, persecution "on account of" membership in a family group requires not only that the membership be a material cause of the persecution but also that the persecution be motivated by an animus directed toward some attribute or characteristic inherent to the social group in addition to mere family ties. *Id.* Where the motivation for the persecution of family members is personal to a particular family member—here, retaliation for the acts of the family member—innocent family members cannot qualify for refugee status regardless of how serious the threat of harm to

them, how many family members have already suffered, or how closely family ties are linked to the persecution of family members.

The Fifth Circuit's novel rule stands in stark contrast to the rules in the other circuits that have addressed persecution based on a particular social group in general and the family group in particular. The First, Fourth, Seventh, and Ninth Circuits have held—as the dissent would have held in the instant case—that persecution of an individual in retaliation for another family member's acts is persecution "on account of . . . membership in a particular social group," without any further limitation.

The view in these circuits reflects the more general rule that innocent victims threatened with harm because of characteristics that they either cannot change or should not be required to change deserve protection under our asylum laws. Family ties are a paradigmatic example of just such a group characteristic. An innocent person targeted for persecution because of her family ties is a refugee under our asylum laws just as she would have been if the persecutor had targeted her because of an animus directed toward any other immutable characteristic.

The Fifth Circuit's rule is a dramatic cutback in the scope of refugee eligibility based on membership in a particular social group. The rule is antithetical to the plain language of the statute, inconsistent with the statutory scheme of asylum law, created without regard or analysis of prior judicial decisions, and contrary to the public policy manifest in the legislative history of the asylum laws and the

international treaties to which the United States is a signatory.

The circuit split created by the Fifth Circuit deserves this Court's attention. The question of whether an innocent person who fears persecution as a family member in retaliation for another family member's acts is a "refugee" and hence eligible for discretionary asylum is a fundamental one. The threat to harm innocent family members as a means of retaliation or coercion is all too pervasive. The tactic is found in a wide variety of circumstances, including retaliation for a family member's cooperation with U.S. forces in foreign countries (notably Afghanistan and Iraq) or with government law enforcement activities; punishing or deterring political activists acting against the ruling regime, openly supporting U.S. foreign policy, or assisting local or foreign news media; forcing a relative to reveal the whereabouts of a close family member who will be harmed once found; forcing family members to join the militia or other armed groups; and coercing cooperation with foreign despots, terrorists, human traffickers, or drug cartels.

This Court should grant the Petition in order to resolve the circuit split and provide for a uniform law of refugee status based on family persecution. This case, which was decided on the merits and has no relevant facts in dispute, provides an excellent vehicle for resolving the circuit split on this fundamental question of asylum law.

## ARGUMENT

### I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A FUNDAMENTAL CIRCUIT SPLIT ON WHETHER AN INNOCENT PERSON WHO FEARS PERSECUTION AS A FAMILY MEMBER IN RETALIATION FOR ANOTHER FAMILY MEMBER'S ACTS IS A "REFUGEE"

#### A. The First, Fourth, Seventh, and Ninth Circuits Have Held that Such an Alien Is a Refugee Because Membership in the Family Group is a Material Cause of the Threatened Persecution

As noted above, Congress created the asylum provisions of our immigration law to protect individuals threatened with persecution because of characteristics that they either cannot change or should not be required to change. *See Arteaga v. Mukasey*, 511 F.3d 940, 944-45 (9th Cir. 2007); *Mwembie v. Gonzales*, 443 F.3d 405, 414-15 (5th Cir. 2006); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th. Cir. 2000); *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998); *Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir. 1993); *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

A "particular social group" within the meaning of the INA is an identifiable group of individuals with one or more of these characteristics, and a family group is a quintessential example of a "particular social group" because kinship relationships are "paradigmatically immutable." *Crespin-Valladares v. Holder*, 632 F.3d 117, 124-25 (4th Cir. 2011).

Accordingly, the BIA and every circuit until now to have considered the question have held that sufficiently close family ties can create a "particular social group" with the meaning of the INA. *See Crespin-Valladares*, 632 F.3d 117 at 125; *Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009); *Ayele v. Holder*, 564 F.3d 862, 869 (7th Cir. 2009); *Lin v. Ashcroft*, 377 F.3d 1014, 1028 (9th Cir. 2004); *Chen v. Ashcroft*, 289 F.3d 1113 (9th Cir.), *vacated*, 314 F.3d 995 (9th Cir. 2002); *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986); *Acosta*, 19 I. & N. Dec. at 233.[4]

Of course, mere membership in a family group is not enough by itself to qualify an individual for refugee status. The petitioner's past or threatened persecution also must be "on account of" her membership in the family group. 8 U.S.C. § 1101(a)(42)(A). In other words, to be a refugee within the meaning of the INA there must be a causal nexus between the threatened persecution and the petitioner's family group membership.

Four circuits hold that a petitioner qualifies as a refugee under the INA "on account of" membership in a particular social group—the family—where a petitioner fears being persecuted in her home country in retaliation for another family member's acts. To assess the causal nexus between persecution and the petitioner's family membership, these circuits ask

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[4] A separate question is how close these family ties must be with a qualifying family group, but that question is not presented here.

only whether membership in a family unit is a material cause of the threatened persecution. In these circuits, it does not matter if the persecutor is persecuting a family member because of her family ties as a means of punishing or coercing another family member or if the persecutor is motivated by some animus against some other characteristic shared by family members. In either case, where innocent individuals are threatened with harm because of their family membership, prior courts have found the requisite causal nexus to satisfy the INA's "on account of" element.

The leading case is *Gebremichael v. INS*, 10 F.3d 28 (1st Cir. 1993). There, Ethiopian authorities interrogated and tortured Gebremichael to find the whereabouts of his brother, who had been imprisoned for his political and religious views but later escaped. The BIA, which found that Gebremichael was not persecuted because of his own political or religious beliefs, held the petitioner was not statutorily eligible for asylum because he was merely a vehicle for the persecution of his brother. *Id.* at 35. The First Circuit rejected this reading of the statute, holding that "[a]n applicant qualifies as a 'refugee' under the INA if membership in a social group is 'at the root of persecution,' such that membership itself generates a 'specific threat to the [applicant].'" *Id.* (citation omitted). The court of appeals observed that there can be "no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family," *id.* at 36, and found that the "link between family membership and persecution is manifest" because "the Ethiopian security forces applied to petitioner the time-honored

theory of *cherchez la famille* ('look for the family')" to extract information about petitioner's brother or force the brother to come forward. *Id.* On these facts, the First Circuit held that "this is a clear case of '[past] persecution on account of . . . membership in a particular social group' " that qualified the petitioner for refugee status. *Id.* (citing 8 U.S.C. § 1101(a)(42)(A)).

The Ninth Circuit considered whether petitioner's threatened persecution was "on account of " family membership in two recent cases. In *Chen v. Ashcroft*, 289 F.3d 1113 (9th Cir. 2002), the Chinese government had threatened to imprison the petitioner's entire family for a debt owed by Chen's mother that could not be repaid. On appeal from the BIA's rejection of his asylum claim, the Ninth Circuit noted that "the question of law to be resolved is whether punishment of a family member for a crime committed by Chen's mother is punishment for the crime or is punishment 'on account of ' membership in the family." *Id.* at 1116. The court of appeals concluded that a "principal reason" for Chen's persecution was his membership in the family, Chen qualified as a refugee within the meaning of the INA.[5]

The Ninth Circuit reached a similar conclusion in *Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004), where

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[5] *Chen* was later vacated and remanded to the BIA because the BIA had decided to grant Chen asylum. *See Chen v. Ashcroft*, 314 F.3d 995 (9th Cir.), *vacating* 289 F.3d 1113 (9th Cir. 2002). Although this case is not precedential, the facts and outcome remain instructive.

a Chinese petitioner was targeted by provincial authorities because his parents violated the government's "one-child" policy. Lin's asylum claim based on family persecution had been denied by the IJ and the BIA. In considering a petition to reopen the record on the grounds of ineffective assistance of counsel, the court of appeals observed that the expanded record developed for the appeal by new counsel "suggests that the Chinese government was inclined to go to extraordinary lengths to punish Lin's family, that it had identified him personally and directed at least some part of the punishment at him personally, that Lin was separated from his parents as a child as a result of this government activity, that he was threatened personally when his mother's house was ransacked, and that he was in personal danger of further punishment." *Id.* at 1029. The Ninth Circuit held that these facts, if credited in an evidentiary proceeding, would create a plausible claim for refugee status because Lin was threatened with persecution "on account of" his family status if he returned to China and so granted the petition to reopen the record. *Id.* at 1029.

In the Seventh Circuit in *Torres v. Mukasey*, 551 F.3d 616 (7th Cir. 2008), Torres testified in his asylum hearing that Honduran military officers had physically abused him in retaliation for the desertion of three of his older brothers and the refusal of the fourth to commit unlawful acts of aggression. *Id.* at 623-24. The IJ denied Torres' asylum based on his lack of credibility and the BIA summarily affirmed. In vacating and remanding the decisions below, the Seventh Circuit found among other things that Torres had established the requisite nexus between

his persecution and his relationship with his brothers to qualify him as a refugee:

> Torres's testimony is rife with examples that provide his family's history as the nexus for his mistreatment. Throughout the hearing, Torres noted the numerous occasions on which Colonel Martinez, his primary persecutor, referenced Torres's family while inflicting harm on Torres. In at least one instance when Martinez placed an unloaded pistol to Torres's head and pulled the trigger, Torres testified that Martinez said, "You are going to pay for your brothers' desertion. You are going to pay for his escape because you are the last one that you we [sic] have."

*Id.* at 630.

In the Fourth Circuit in *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011), Crespin claimed asylum on the grounds that he and his family were subjected to "targeted and persistent threats" in retaliation for his uncle's cooperation with the Salvadoran government in an investigation against a number of gang members. *Id.* at 127. The IJ found that Crespin qualified as a refugee because he had demonstrated that "[a]t least one central reason why the gang members targeted [Crespin] was because of his uncle's cooperation with the Salvadoran government." *Id.* The BIA, without analysis, rejected this finding and vacated the IJ's grant of asylum. The Fourth Circuit, in granting a petition for review and remanding, held among other things that the family unit, "centered here around the relationship between

an uncle and his nephew," qualified as a particular social group. *Id.* at 125. The court of appeals also held that the proper standard of the causal "on account of" nexus is whether the protected ground serves as "at least one central reason for" the threatened persecution, *id.* at 127, and remanded to the BIA for review for clear error of the IJ's finding that Crespin's persecution was "on account of" his family ties. *Id.* at 129.

In each of these cases, the persecutors targeted the petitioners in retaliation against one of the petitioners' family members. Far from finding retaliatory persecution against a family for the acts of another family member to disqualify a petitioner from refugee status, each circuit found these facts provided the very causal nexus required to make petitioner's threatened persecution "on account of" his or her membership in a particular social group and so qualified the petitioner as a refugee.

### B. The Fifth Circuit's Decision Below Creates a Conflict by Adding an Improper Limitation on Family-Based Persecution that Removes Retaliation against Family Members as a Basis for Refugee Status

In a fundamental departure from prior cases in other circuits, the Fifth Circuit held that even if membership in a family group is the sole cause of threatened persecution, that is not enough to make the petitioner's actual or threatened persecution "on account of" family group membership. Rather, over a vigorous dissent, the majority held that persecution "on account of" membership in a family group requires

that the applicant be "targeted for her membership in the Demiraj family *as such*." 631 F.3d at 199 (emphasis in original). To the *Demiraj* majority, the "on account of" requirement demands, in addition to the simple causal nexus required in the other circuits, that the persecution be motivated by an animus toward some attribute or characteristic inherent to the social group apart from family ties. *Id.*

Since Mr. Bedini's motivation to persecute Petitioners was dependent *only* on Petitioners' family ties, Petitioners could not satisfy the majority's novel test. As a result, on the facts presented Petitioners were precluded as a matter of law from refugee status notwithstanding the uncontroverted seriousness of the threatened persecution they faced or the multiple family members who already had been harmed for the same reason.

The split in the circuits is manifest. If the *Demiraj* rule applied in the First, Fourth, Seventh, or Ninth Circuits, none of the cases discussed in Argument I.A. would have been decided the way they were. Instead, in each case the petitioners would have failed, as a matter of law, to qualify for refugee status, since the threat of persecution arose only because of family ties. *See Gebremichael*, 10 F.3d 28 (finding petitioner qualified as a refugee because he was persecuted in retaliation for the acts of his brother); *Chen*, 289 F.3d 1113 (finding that Chen was a refugee because he was threatened with persecution because of the acts of his mother); *Lin*, 377 F.3d 1014 (holding that a child persecuted by Chinese authorities for his parents' violation of the "one-child" rule as part of a scheme to obtain compliance for the rule was a

refugee); *Torres*, 551 F.3d 616 (finding petitioner qualified as refugee because he was persecuted in retaliation for the acts of his brothers); *Crespin-Valladares*, 632 F.3d 117 (finding petitioner qualified as a refugee if the record supported the IJ's finding that "one central reason" for the threat of persecution was in retaliation for his uncle's cooperation with a government persecution).

## II. THE ISSUE IS AN IMPORTANT AND RECURRING ONE DESERVING THIS COURT'S ATTENTION

Our asylum laws embody a humanitarian policy of providing protection to individuals outside their country of nationality who are threatened with persecution because of their race, religion, nationality, political opinion, or, as here, membership in a particular social group whose members "share a common, immutable characteristic" that they "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Acosta*, 19 I. & N. Dec. at 233 (interpreting 8 U.S.C. § 1101(a)(42)(A)). Every circuit that has addressed the question has adopted the *Acosta* formulation and held that close family ties satisfy this requirement. *See Crespin-Valladares*, 632 F.3d at 124-25; *Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009); *Ayele v. Holder*, 564 F.3d 862, 869 (7th Cir. 2009); *Lin*, 377 F.3d at 1028; *Gebremichael*, 10 F.3d at 36; *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986); *Acosta*, 19 I. & N. Dec. at 233.

The *Demiraj* rule dramatically reduces the scope of asylum protection to family members subject to family-based persecution by adding to the nexus element an additional requirement that the persecution be motivated by an animus directed toward some attribute or characteristic inherent to the social group in addition to family ties. As we noted above, *supra* p. 6, persecution of innocent family members as a means of retaliation against or coercion of another family member remains a long-standing, tragic, and all too pervasive form of persecution.

Under the Fifth Circuit rule of *stare decisis*, the *Demiraj* rule now applies to all cases in the Fifth Circuit unless and until it is overruled by the Fifth Circuit sitting *en banc* or by the Supreme Court or until there is some intervening change in the law. *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008). Moreover, since the BIA was the source of the rule originally, the BIA may be expected to apply the rule in its venues in the seven circuits that have not addressed the question of persecution based on family ties as well as to all applicants applying outside the United States. As a result, more than half of asylum claimants already in the United States will be subject to the *Demiraj* rule.[6]

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[6] *See* U.S. Dep't of Justice, Executive Office for Immigration Review, *FY 2010 Statistical Year Book* I3 (providing statistics on asylum receipts and completions). *Amici* are unaware of any statistics that give refugee status claims by each of the five protected grounds in the statute. There should be no floodgates problem by rejecting *Demiraj* rule, since this would only align the law with the preexisting approach of the other circuits.

The *Demiraj* rule acts arbitrarily to preclude refugee status to those gravely persecuted because of family membership when the persecutor lacks the specific motivation for animus against the family "as such." Since *Demiraj* construes the "on account of" prong of the INA's refugee definition, which applies to all five protected grounds, the rule could readily extend to preclude refugee status to any individual whose threatened persecution arises from her group ties and not from her possession of the particular characteristic that is the subject of the persecutor's animus. For example, suppose a persecutor's animus is against a particular extreme view held by some members of a religious sect but he seeks to indiscriminately persecute all members of the sect. The logic of the *Demiraj* limitation would hold that the nonextreme members, who are being persecuted only because of their group ties, should not qualify for refugee status. Similar examples can easily be created for race, nationality, particular social groups other than families, and political opinion.

Given its wide applicability, the fundamental circuit conflict it creates, the national importance of the law at issue, and the consequences of an improper application of law (here, violent persecution or death), the *Demiraj* rule merits this Court's attention.

The *Demiraj* rule results from the majority's construction of the "on account of" requirement in the INA's definition of refugee. *Demiraj*, 631 F.3d at 198. The starting point in statutory construction is the

actual language in the statute itself. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). When "the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks and citations omitted); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (noting that the "ordinary and obvious meaning of the phrase is not to be lightly discounted" and rejecting a contrary BIA construction). The plain meaning of "on account of" is "because of." *See Oxford Dictionary of English* 11 (2d ed. 2003). In this sense (and to avoid inconsequential but-for causes), threatened persecution is "on account of" family membership if membership in the family group is a meaningful or material cause of the threatened persecution. This construction does not limit the reasons that causally link the threatened persecution to family membership; it simply says that if there is a cognizable "particular social group" and membership in that group is a material cause of the petitioner's threatened persecution, then the petitioner satisfies the definition of a refugee.

*Demiraj* is a significant outlier. *Gebremichael*, *Chen*, *Lin*, *Torres*, and *Crespin-Valladares* all interpreted the "on account of" requirement according to its plain language—namely, whether the petitioner's family membership was a material cause of persecution without further limitation. This approach also is employed in other refugee status cases outside the family persecution area. *See generally* Stephen H. Legomsky & Cristina M. Rodriguez, Immigration and Refugee Law and Policy

985-90 (5th ed. 2009) (discussing "on account of" requirement and adopting equivalent definition).

The "material cause" construction is strongly supported by the enactment of the REAL ID Act in 2005, REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, which added a new sub-provision to 8 U.S.C. § 1158 regarding the burden of proof on the applicant in demonstrating refugee status:

> The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant.

REAL ID Act § 101(a)(3), 119 Stat. at 303 (codified at 8 U.S.C. § 1158(b)(1)(B)(i)) (emphasis added). Importantly, the REAL ID Act did *not* change the definition of "refugee" in Section 1101. Rather, the purpose of the REAL ID Act's amendment was to codify Congress' view of what the "on account of" requirement already meant. *See* H.R. Rep. No. 109-72, at 163 (2005) (Conf. Rep.) (noting that clarification is "in keeping with decisions of reviewing courts" and citing *Ambartsoumian v. Ashcroft*, 388 F.3d 85, 91 (3d Cir. 2004), *Useinovic v. INS*, 313 F.3d 1025, 1033 (7th Cir. 2002), and *Girma v. INS*, 283 F.3d 664, 668 (5th Cir. 2002)).

In addition, a material cause interpretation of the "on account of" requirement, without the limitation imposed by the *Demiraj* majority, is in tune with the INA's legislative history. When amending the INA in 1980, Congress intended "to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees."[7] *Cardoza-Fonseca*, 480 U.S. at 436-37. This Court went on to note that the definition of "refugee" that Congress adopted is "virtually identical" to the one prescribed by Article 1 of the 1951 Convention Relating to the Status of Refugees,[8] which was incorporated by reference in the 1967 Protocol. Article 1 defines a refugee to be one who, "owing to a well-founded fear of being persecuted *for reasons of* race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country." 1951 Convention, art. IA(2) (emphasis added). This history indicates that the INA's "on account of" standard should be synonymous with the 1951 Convention's causal language—"persecuted *for reasons of* . . . ." and should be construed no more narrowly than the plain language indicates. [9]

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[7] Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577.

[8] July 28, 1951, 189 U.N.T.S. 150.

[9] *See* S. REP. NO. 590, 96TH CONG., 2D SESS. 20 (1980) (noting that Refugee Act of 1980 was adopted "with the understanding that [its refugee definition] is based directly upon the language of the [U.N.] Protocol and it is intended that the language be construed consistent with the Protocol").

The material cause construction also finds support from courts outside of the United States interpreting legislation based upon the 1951 Convention and recognizing that retaliation against an applicant for the acts of a family member is persecution that qualifies the applicant for refugee status. *See, e.g.*, *Sec'y of State for the Home Dep't v. K*, [2006] 1 A.C. 412 (H.L.)(appeal from Eng.); *Gomez de Leon v. Minister of Citizenship & Immigration*, [2007] F.C. 127 (Can.); *Refugee Appeal Nos. 76485, 76486 & 76487*, New Zealand: Refugee Status Appeals Authority, June 17, 2010, *available at* http://www.unhcr.org/refworld/ docid/4c3ad9582.html; Verwaltungsgerichtshof [VwGH] [Administrative Court] December 16, 2010, Docket No. 2007/20/1490 (Austria). The European Union also has recognized that persecution in retaliation for the acts of a family member can be a basis for refugee status. *See Council Directive 2004/83*, ¶ 27, 2004 O.J. (L 304) 13 (EC) ("Family members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status.").

In interpreting the "on account of" requirement to exclude refugee eligibility based on ties within the family group, as opposed to some other shared characteristic among family members, the *Demiraj* majority engaged in no analysis of the relevant INA provisions, the INA's legislative history, the conflicting cases in the other circuits (with one exception in response to the dissent), the public policy underlying our asylum laws, or the international

treaties to which the United States is a signatory and our asylum laws were designed to implement.[10]

Rather, the majority's only authority was the BIA decision that was the subject of the appeal. *See Demiraj*, 631 F.3d at 198-99 (discussing only the test applied in *In re Demiraj*, Nos. A095 218 801 & 802, slip op. at 2-3 (BIA Oct. 14, 2008)). Although courts give substantial deference to an agency's construction of a statute that it administers, *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984), that deference does not extend to cases where the agency has engaged in an impermissible or unreasonable construction of the statute. *Id.* at 843; *see Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710 (2009) (rejecting agency interpretation as reaching beyond the "outer limits" of permissible construction). Here, the *Demiraj* majority adopted a construction of a statutory requirement to limit the definition of refugee in a way that conflicts with the statute's plain meaning, the statute's legislative history, interpretations by multiple courts of appeal in other circuits, and the public policy manifest in the asylum

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[10] The one case the majority did address was *Torres v. Mukasey*, 551 F.3d 616 (7th Cir. 2008). As discussed above, *supra* p. 12, the Seventh Circuit in that case characterized the persecution of the petitioners as retribution "for the perceived offenses of his four brothers." *Id.* at 623. Surprisingly, and unpersuasively, the *Demiraj* majority explicitly rejected the Seventh Circuit's characterization and provided its own—that petitioner's persecutors in the Honduran military "had generalized their resentment of the brothers for desertion into a vengeful hatred of an entire family as a group of deserters"—in order to make the *Torres* result consistent with the majority's new rule. *See Demiraj*, 631 F.3d at 199 n.6.

laws. *Chevron* deference is unwarranted and cannot support the *Demiraj* majority's result.[11]

## III. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE CIRCUIT SPLIT

This case is an excellent vehicle for resolving the circuit split over the standard for refugee status based on family persecution. It is a final decision on the merits by the Fifth Circuit Court of Appeals and presents a single clear issue of law.

There is no dispute that in this case four of the five elements for discretionary asylum are present: Petitioners are (1) outside their country of nationality, (2) unwilling or unable to return to that country, (3) unwilling or unable to avail themselves of the protection of that country because of persecution or a well-founded fear of persecution, and (4) members of a particular social group, namely the Demiraj family.

The only element in dispute is whether Petitioners' fear of persecution is "on account of" membership in the family group. On vivid, undisputed facts, the Court of Appeals found that Petitioners' fear of persecution was not "on account of" membership in the family group as a matter of law. The Court of Appeals held that because the threat of persecution

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[11] *Chevron* deference is unwarranted in any event, since the BIA appeal below was heard by a single judge (and not a panel) and the decision was unpublished and not precedential. *See, e.g.*, *Duarte-Ceri v. Holder*, 630 F.3d 83, 88 n.2 (2d Cir. 2010); *Quinchia v. Att'y Gen.*, 552 F.3d 1255, 1258 (11th Cir. 2008).

against the family resulted from a scheme of retaliation against a family member due to family ties and not against the "family as such," Petitioners' fear of persecution cannot satisfy the statutory requirement that the persecution be "on account of" membership in the family group.

This holding creates a split in the circuits and squarely presents the question in this case.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Wayne D. Collins
*Counsel of Record*
Matthew Jennejohn
Paige Berges
Alexis Berkowitz
Sheila Jain
Paul Johnson
Geoffrey L. Rawle
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, NY 10022
(212) 848-4000
*Attorneys for Amici Curiae*

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# Appendix

## List of *Amici Curiae*[1]

**Muneer Ahmad**
Clinical Professor of Law
Yale Law School

**Raquel Aldana**
Professor of Law
University of the Pacific, McGeorge School of Law

**Bridgette Carr**
Clinical Assistant Professor and Director
Human Trafficking Clinic
University of Michigan Law School

**Jennifer M. Chacon**
Professor of Law
University of California, Irvine, School of Law

**Gabriel J. Chin**
Professor of Law
University of California, Davis, School of Law

**Erin Corcoran**
Professor of Law and Director of the Social Justice Institute
The University of New Hampshire School of Law

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[1] Institutional affiliations are listed for identification purposes only.

**Niels W. Frenzen**
Clinical Professor of Law
University of Southern California, Gould School of Law

**Denise Gilman**
Clinical Professor of Law and Co-Director
Immigration Clinic
University of Texas School of Law

**Suzanne Goldberg**
Herbert and Doris Wechsler Clinical Professor of Law
Columbia University School of Law

**James C. Hathaway**
James E. and Sarah A. Degan Professor of Law and Director, Program in Refugee and Asylum Law
University of Michigan Law School

**Bill Ong Hing**
Professor of Law
University of San Francisco School of Law

**Kevin Johnson**
Dean and Mabie-Apallas Professor of Public Interest Law and Chicana/o Studies
University of California, Davis, School of Law

**Michael Kagan**
Associate Professor
University of Nevada Las Vegas, Boyd School of Law

**Stephen Legomsky**
John S. Lehmann University Professor
Washington University in St. Louis School of Law

**Judy London**
Adjunct Professor of Law
UCLA School of Law

**Carroll L. Lucht**
Clinical Professor Emeritus of Law
Yale Law School

**Karla McKanders**
Associate Professor of Law
The University of Tennessee College of Law

**M. Isabel Medina**
Ferris Family Distinguished Professor of Law
Loyola University New Orleans, College of Law

**Hiroshi Motomura**
Susan Westerberg Prager Professor of Law
UCLA School of Law

**Lori A. Nessel**
Professor of Law and Director, Center for Social Justice
Seton Hall University School of Law

**Sarah Paoletti**
Practice Associate Professor
Director, Transnational Legal Clinic
University of Pennsylvania School of Law

**Theodore Ruthizer**
Lecturer-in-Law
Columbia University School of Law

**Peter Schuck**
Simeon E. Baldwin Professor Emeritus of Law
Yale Law School

**Anna Williams Shavers**
Cline Williams Professor of Citizenship Law
University of Nebraska College of Law

**David B. Thronson**
Professor of Law
Michigan State University College of Law

**Michael Wishnie**
Clinical Professor of Law and Director, Jerome N. Frank Legal Services Organization
Yale Law School

**Stephen Wizner**
William O. Douglas Clinical Professor Emeritus & Professorial Lecturer
Yale Law School

**Stephen Yale-Loehr**
Adjunct Professor of Immigration and Asylum Law
Cornell University Law School