No. _____

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 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Each year, tens of thousands of undocumented immigrants seek protection in the United States from persecution abroad. Many are unfairly targeted in their home country in retaliation for the acts of a relative. Thousands will be tortured or killed for no other reason than their membership in a particular family—they are related by blood or marriage to someone against whom their attackers seek revenge.

The United States protects these foreigners under the Immigration and Nationality Act as long as they can demonstrate that they are "unable or unwilling to return to" their native country because of "a well-founded fear of persecution on account of … membership in a particular social group." 8 U.S.C. § 1101(a)(42)(A). The courts of appeals have uniformly held that membership in a family can qualify as "membership in a particular social group." But the lower courts are divided 4-1 on the following question:

Whether, under the Immigration and Nationality Act, persecution in retaliation for the acts of a family member is persecution "on account of … membership" in a family.

PARTIES TO THE PROCEEDING BELOW

Petitioners are Rudina Demiraj and Rediol Demiraj, petitioners below.

Respondent is United States Attorney General Eric H. Holder, Jr., respondent below.

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OPINIONS BELOW

The opinion of the court of appeals, entered on January 11, 2011, is reported at 631 F.3d 194 (5th Cir. 2011) and reprinted in the Appendix to this Petition ("App.") at 5-24a. The decisions of the Board of Immigration Appeals are unreported, but reprinted at App. 25-26a (Jul. 9, 2009); App. 27-32a (Oct. 14, 2008); and App. 33-35a (Nov. 21, 2006). The decision of the Immigration Judge, dated September 12, 2005, is unpublished, but reprinted at App. 36-48a.

On April 1, 2011 and June 15, 2011, the court of appeals granted Petitioners' motions to stay the court's mandate pending the filing of a petition for writ of *certiorari* before this Court. App. 1-4a.

JURISDICTION

The court of appeals entered its judgment on January 11, 2011. It denied a petition for rehearing *en banc* on March 21, 2011. This Petition is timely filed, and the Court's jurisdiction is invoked under 28 U.S.C. § 1257.

STATUTES INVOLVED

Section 208(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(A), provides as follows:

> The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the

> Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.[1]

Section 101 of the Act, 8 U.S.C. § 1101(a)(42)(A) defines a "refugee" as follows:

> 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 ….

INTRODUCTION

In 2001, an Albanian national named Edmond Demiraj agreed to serve as a prosecutorial witness for the United States Department of Justice. He offered testimony critical to the government's case against an Albanian sex trafficker who subsequently

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[1] At all times relevant to the underlying petition for asylum, the controlling Act referred only to the Attorney General and not "The Secretary of Homeland Security." That text was added in 2005, effective March 1, 2003, REAL ID Act of 2005, Pub. L. No. 109-13, § 101, 119 Stat. 302, 305 (2005), and does not affect the question presented or this Court's review of the opinions below.

fled the United States and returned to Albania. There, he systematically targeted members of the Demiraj family in retaliation for Mr. Demiraj's cooperation with U.S. authorities. Most recently, he kidnapped three of Mr. Demiraj's teenage nieces, trafficked them to Western Europe, and forced them into prostitution as "payback" for their uncle's actions. Each niece miraculously escaped to the United States and successfully applied for asylum under the Immigration and Nationality Act ("INA" or "the Act"). That federal law protects petitioners from persecution "on account of … membership in a particular social group." The courts of appeals have uniformly held that family membership can qualify as "membership in a particular social group."

Petitioners in this case are Mr. Demiraj's wife and son. They also applied for asylum under the same statutory provision that protects Mr. Demiraj's nieces. But the government denied them any protection. Like the nieces, Petitioners undisputedly demonstrated a "well-founded fear" of persecution at the hands of the same murderous trafficker that the U.S. government wants to imprison. Yet the government has ordered Petitioners' immediate removal to Albania, where they will very likely face torture and probably execution.

A divided panel of the Fifth Circuit approved that order, splitting the circuit courts 4-1 on the question presented—whether federal law protects foreign individuals from persecution in retaliation for the actions of a family member. The panel majority concluded that, as a matter of law, the INA protects individuals from persecution on account of member-

ship in a particular social group, but only where the reason for persecution is a petitioner's group membership "*as such*." It interpreted the Act to exclude Petitioners because their persecution would result not from their family *identity*, but from their family *ties* (to Mr. Demiraj). The panel majority found no relevant difference between familial ties and those among non-relatives, like friends or lovers or even neighbors.

Four other circuits disagree. Their unanimous panels have, over the past 20 years, interpreted the Act to protect individuals who fear persecution in retaliation for the acts of a family member—be it an uncle who was a prosecutorial witness (in the Fourth Circuit), a brother who escaped from prison (in the First Circuit), a brother who deserted the army (in the Seventh Circuit), or a mother who failed to pay government fines (in the Ninth Circuit). In each of those cases, the courts recognized that persecution as "payback" for a family member's alleged or perceived transgression would be persecution "on account of" family membership. And in none of those cases did the court modify or augment the plain language of the phrase "membership in a particular social group" to limit its scope. Only the Fifth Circuit adds to that decades-old statutory text a *per se* requirement that does not otherwise appear on its face.

Although the lower court's interpretation of federal law stands alone among the circuits, it nonetheless controls the second highest volume of immigration proceedings by circuit. The consequences for those among the tens of thousands of

asylum-seekers each year are potentially dire—ranging from deportation to execution. The majority decision has obvious implications for family welfare, and women's and children's safety—especially from sex trafficking. It also frustrates effective law enforcement and anti-terrorism efforts. Where, as here, individuals are persecuted because of the assistance a family member has lent to U.S. government authorities, failure to protect those individuals will almost certainly chill future assistance and support from anyone with foreign relatives in harm's way.

It is important for this Court to harmonize the discord among the lower courts and unify the application of federal law to tens of thousands of individuals every year in every state.

STATEMENT OF THE CASE

Petitioners Fear Persecution In Retaliation For Their Family Member's Cooperation With U.S. Prosecutors

Petitioners are Albanian citizens Rudina Demiraj and her teenage son Rediol. App. 6a. In 2001, Mrs. Demiraj's husband, also an Albanian citizen, courageously agreed to put his life and family at risk to assist the U.S. Department of Justice as a material witness. App 7a. The government's target was an Albanian sex trafficker and human smuggler—a "mobster … capable of brutal violence." App. 19a. That man, Asqeri "Bill" Bedini, learned of Mr. Demiraj's cooperation with federal authorities and fled the United States to avoid prosecution. App. 7a. He remains a fugitive hiding in Albania, untouched by corrupt Albanian police. App. 20a, 41a. There, he

has systematically targeted every member of the Demiraj family in retaliation for Mr. Demiraj's cooperation with U.S. officials. App. 20a, 44a; Administrative Record ("A.R.") 631.

Meanwhile, the U.S. government, having no further use for Mr. Demiraj's testimony against Bedini, denied Mr. Demiraj any protection under the INA and deported him. *See* App. 7a. When Mr. Demiraj returned home to Albania, Bedini was waiting for him, having promised to retaliate against Mr. Demiraj for his cooperation with U.S. prosecutors. A.R. 275. Bedini kidnapped Mr. Demiraj and his brother. App. 20a. He beat both men, then drove Mr. Demiraj to "a very dark place," and beat him further, asking him "why [he] wanted to be a witness against him in America." A.R. 267 He then tried to kill Mr. Demiraj by shooting him at close range, wounding him and leaving him for dead. App. 40a. Mr. Demiraj deflected the gunshot into his side and then passed out, bleeding and close to death. *Id.*

A good Samaritan discovered Mr. Demiraj and took him to a hospital. *Id.* After a painful recovery (the bullet had just missed his kidney), Mr. Demiraj again courageously testified against Bedini: He offered a full report to Albanian police, and even identified Bedini's license plate number, App. 41a, and phone number, A.R. 270. In response, Albanian police told Mr. Demiraj that because his "dispute" with Bedini had arisen in the United States, they would not protect him or his family. App. 41a; A.R. 117, 270-71. Within a month, Mr. Demiraj was healthy enough to return to the United States, where an immigration judge ("IJ") granted him refugee status

and withheld his removal from the United States. App. 8a.

Bedini accelerated his campaign of terror against Mr. Demiraj's family, waging a "blood feud" between the Bedinis and the Demirajes. *Id.* Unfortunately common in Albania, these feuds target the male members of an enemy's family in retaliation for some perceived dishonor.[2] Each year, tens of thousands of Albanian men and boys withdraw from public life and live in fear of retaliatory killings. A.R. 366. Mr. Demiraj's father abandoned everything and went into hiding. App. 21a. Mr. Demiraj's brother fled to Greece. *Id.* Mr. Demiraj's oldest son, a petitioner in this case, remains a prime target for execution.

Bedini targeted the female Demirajes as well. He kidnapped two of Mr. Demiraj's young nieces and trafficked them to Italy. App. 8a, 20a, 39a, 41a. There, he beat them, starved them, and forced them into prostitution as "payback" for their uncle's cooperation with United States authorities. App. 20a. He then abducted the girls' younger sister, Mr. Demiraj's third niece, and put her through the same ordeal in Germany. App. 21a. He beat her and told her that her family was "going to pay for everything … you're going to pay for … your uncle." *Id.* All three girls managed to escape to the United States. A.R. 20-37, 456-80. Each girl petitioned for asylum

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[2] *See, e.g.*, Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, Country Report on Human Rights Practices in Albania (Mar. 11, 2008), available at http://www.state.gov-/g/drl/rls/hrrpt2007/100544.htm; Refugee Documentation Centre (Ireland), Blood Feuds in Albania (Jul. 17, 2009), available at http://www.unhcr.org/refworld/pdfid/4a89476b0.pdf.

on the basis of the same allegation underlying Petitioners' own application—a well-founded fear of persecution on account of their family membership. *Id.* They, like Petitioners, testified that Bedini targeted them in retaliation for their uncle's cooperation with the United States. *Id.* But unlike Petitioners, they were granted asylum—two in New York, and one in Houston. *Id.*

There is no dispute that Mrs. Demiraj and her son have reason to share the fears that tormented Mr. Demiraj's nieces and still afflict the rest of his family. App. 6a, 28a. If they return to Albania, they will be persecuted—perhaps Bedini will kidnap them and beat them; perhaps he will traffic Mrs. Demiraj and force her into prostitution; perhaps he will simply execute them both. Regardless of the form his attacks will take, Petitioners live in daily terror of Bedini and the persecution that awaits them in Albania.

For the time being, however, the family (including the Demirajes' second son and two young daughters—all American citizens) reside near Houston, where Mr. Demiraj owns a small painting company and some investment properties. Mrs. Demiraj works as a waitress to help support her family. Their son Rediol is a senior in high school who hopes to go to college.

Procedural Background

In 2005, Mrs. Demiraj appeared before an IJ in Texas to petition for asylum, naming her minor son as a derivative beneficiary. App. 36a. She told the

IJ her family's tragic story: Bedini had tried to assassinate her husband, A.R. 93-94; the government granted Mr. Demiraj withholding of removal, App. 8a; Bedini's "family have vowed to murder Edmond Demiraj *and all known family members,*" A.R. 631; Bedini kidnapped, trafficked, and tortured her nieces as "payback" for their uncle's betrayal, *id.* at 96-97; and Bedini would "try to murder me because I am married to Edmond Demiraj," *id.* at 630.

The government did not dispute Petitioners' credibility, and the IJ credited all relevant testimony. App. 8a, 44a. He found that there were no factual questions at issue: "The evidence is clear that … the attempted acts of violence against the respondent's husband and other family members are in retaliation for Mr. Demiraj['s] serv[ice] as a witness against Be[d]ini, and a criminal investigation in the United States relating to alien smuggling." App. 44a. "[B]ut for Mr. Demiraj's service as a witness," the IJ concluded, "the Demirajes would not be at risk from Be[d]ini and his associates in Albania." App. 45a. The IJ further found that the petition before him involved a "*narrow issue of law*," *id.* (emphasis added), namely, whether the INA protects individuals against persecution in retaliation for a family member's service to the United States government.

But the IJ then concluded that Mrs. Demiraj's fear of "retribution over personal matters" did not qualify her for asylum under the law. App. 45a (citing *Matter of Mogharrabi*, 19 I&N Dec. 439, 447 (BIA 1987)). He therefore denied her petition.

Mrs. Demiraj appealed unsuccessfully to the Board of Immigration Appeals ("BIA"). App. 8a. She then appealed to the Fifth Circuit, which granted the Attorney General's motion to remand in light of this Court's intervening decision in *Gonzales v. Thomas*, 547 U.S. 183 (2006). *Id.*

On remand, the BIA again dismissed the appeal and a motion to reconsider, concluding that persecution in retaliation for a family member's actions is not persecution on account of family membership. App. 28a. The Board accepted that Mrs. Demiraj and her son had reason to fear the persecution she described, *id.*, that they were part of a social group by virtue of their membership in the Demiraj family, App. 29a, and that the torture they might suffer would be in retaliation for Mr. Demiraj's service to the United States, App. 31a. The BIA also accepted that the persecution of Demiraj family members was "on account of revenge the assailants are attempting to extract against [Mr. Demiraj]," *id.* But it then affirmed its previous conclusion that persecution on account of family membership does not qualify a party for asylum unless the persecution is motivated by "a desire to overcome the family relationship." App. 31a.

On appeal, the Fifth Circuit agreed with the IJ that "[t]he only dispute between the parties is

whether the facts as found by the IJ constitute, *as a matter of law*, proof of persecution 'on account of' Mrs. Demiraj's membership in the Demiraj family or not." App. 12a (emphasis added). It, too, recognized that Mrs. Demiraj and her son clearly demonstrated a well-founded fear of persecution and that the Demiraj Family could constitute a "particular social group." App. 11a, 14a. But the court nonetheless upheld the BIA's denial of asylum on the ground that the Demirajes failed to demonstrate that their persecution would be on account of their family membership. *Id.* According to the court, "Mrs. Demiraj, her son, and Mr. Demiraj's nieces were targeted because they are people who are important to Mr. Demiraj—that is, because hurting them would hurt Mr. Demiraj." App. 14a. The court continued, "[n]o one suggests that distant members of the Demiraj family have been systematically targeted as would be the case if, for example, a persecutor sought to terminate a line of dynastic succession." *Id.*

Judge Dennis dissented. He concluded that Mrs. Demiraj had plainly demonstrated "a nexus between the persecution she fears and the protected ground of membership in a social group, *i.e.*, her membership in the family of Mr. Demiraj." App. 20a. "[T]here is no evidence," Judge Dennis noted, "that Bedini has any grudge against Mrs. Demiraj, her son, or any other Demiraj family members as individuals—rather, his only interest in them is because of their membership in the family of Mr. Demiraj." App. 21a. The dissent further observed that the Fifth Circuit "majority has created a circuit split" with the opinion of a sister circuit in *Torres v. Mukasey,* 551 F.3d 616

(7th Cir. 2008), which Judge Dennis described as "indistinguishable from the current case," App. 24a.

The court denied Petitioners' motion for rehearing *en banc*, App. 49-50a, but granted their motions to stay the court's mandate pending petition for writ of *certiorari*. App. 1-4a.

REASONS FOR GRANTING THE PETITION

This Court should grant *certiorari* for three reasons: (I) there is a clear split among the courts of appeals on the question presented; (II) the answer to that question is a matter of profound national importance affecting thousands of asylum-seekers (many of whom—like Petitioners here—face the probability of execution if they do not qualify for relief); and (III) the Fifth Circuit's interpretation is wrong.

I. THE COURTS OF APPEALS ARE SPLIT ON THE QUESTION PRESENTED

There is stark disagreement among the federal circuit courts on whether the INA protects individuals against persecution in retaliation for a family member's actions. A divided panel of the Fifth Circuit concluded that it does not. Four other circuits—the First, Fourth, Seventh, and Ninth—hold the opposite view. In each of those circuits, a petitioner need only demonstrate that her persecution was on account of retaliation for the acts of a family member—and not the family membership "as such."

The Fourth Circuit embraced this view in a recent case appealing the government's denial of asy-

lum for a family member of a government witness. *See Crespin-Valladares v. Holder,* 632 F.3d 117, 126 (4th Cir. 2011). In that case, based on nearly identical relevant facts and decided one month after this case, a Salvadoran national sought asylum from persecution arising out of his uncle's role as a prosecutorial witness. *Id.* at 120-21. He argued that the persecution he feared was on account of his membership in a particular social group "consisting of family members of those who actively oppose [criminal gangs in El Salvador] by agreeing to be prosecutorial witnesses." *Id.* (internal quotation marks omitted).

The BIA rejected the petition because he had alleged membership in no "particular social group," and in any event his membership in the putative social group did not motivate his asserted persecution. *Id.* at 124. The Fourth Circuit disagreed. It first observed that the petitioner there had clearly demonstrated his membership in a particular social group as a family member of a prosecutorial witness. *Id.* at 127 ("[E]very circuit to have considered the question has held that family ties can provide a basis for asylum.") (citing *Al-Ghorbani v. Holder,* 585 F.3d 980, 995 (6th Cir. 2009); *Ayele v. Holder,* 564 F.3d 862, 869 (7th Cir. 2009); *Jie Lin v. Ashcroft,* 377 F.3d 1014, 1028 (9th Cir. 2004); *Gebremichael v. INS,* 10 F.3d 28, 36 (1st Cir. 1993)). It then concluded that the petitioner need only demonstrate that his persecution was on account of his "family ties." *Id.* at 127. The court remanded the case for the BIA to review the IJ's finding that "[a]t least one central reason why the gang members targeted [him] was because of his uncle's cooperation with the Salvadoran government." *Id.* at 127-28.

The Seventh Circuit adopted a similar position in another case born of "markedly similar" facts and involving "essentially the same situation" as the Demirajes' petition. App. 21a, 23a. In *Torres v. Mukasey,* 551 F.3d 616 (7th Cir. 2008), the petitioner alleged persecution as "punishment for his brothers' actions." *Id.* at 621. Those brothers escaped military conscription in Honduras, leaving Mr. Torres to answer for their actions. His persecutors, like Bedini, revealed without hesitation that "You are going to pay for your brothers' desertion. You are going to pay for [their] escape because you are the last one that … we have …. [Y]ou have to pay for what your brothers did for their escape because they … defy the army." *Id.* at 630.

As in this case, the immigration judge concluded that the petitioner had failed to demonstrate a nexus between his alleged persecution and his membership in a particular social group. *Id.* at 624. The Seventh Circuit disagreed and held that the petitioner's descriptions of persecution in retaliation against a family member "clearly … establish" a "family's history as the nexus for his mistreatment." *Id.* at 630. It vacated the BIA's order for voluntary departure and remanded the case in accordance with its clarification.

The First Circuit adopted the same approach in a case involving an Ethiopian alien who sought asylum from "the detention and torture visited upon him as a means of persecuting *his brother*." *Gebremichael v. INS,* 10 F.3d 28, 30 (1st Cir. 1993) (emphasis added). The petitioner's brother was imprisoned for his participation in a Seventh Day

Adventist Service, but then escaped. The government imprisoned the petitioner in retaliation for his brother's escape. He, too, escaped and, fearing persecution if removed to Ethiopia, applied for asylum on a variety of theories. The "strongest" of those theories was that "he is a refugee because he was mistreated *on account of his relationship to his brother*." *Id.* at 35 (emphasis added). The BIA denied his application for the same reasons it denied Mrs. Demiraj's application: It held that the petitioner was "merely a vehicle for the persecution of his brother" and therefore not entitled to relief under the INA. *Id.*

The First Circuit rejected that position. The court first observed (as other circuits have) that "a prototypical example of a 'particular social group' would consist of the immediate members of a certain family, the family being a focus of fundamental affiliational concerns and common interests for most people." *Id.* at 36 (quoting *Ravindran v. INS*, 976 F.2d 754, 761 n.5 (1st Cir. 1991) (quoting *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986))). Those "affiliational concerns" were sufficient in the First Circuit's view to establish the required nexus between the persecution the petitioner feared and the protected "social group" category: "*[T]he link between family membership and persecution is manifest*" where, for instance, persecutors "applied to petitioner the 'time-honored theory of *cherchez la famille* ('look for the family'),' the terrorization of one family member to extract information about the location of another family member or to force the missing family member to come forward." *Id.* (emphasis added). The court was "compelled to

conclude that no reasonable factfinder could fail to find that petitioner was singled out for mistreatment because of his relationship to his brother. Thus, this is a clear case of … 'persecution on account of … membership in a particular social group.'" *Id.*

Finally, the Ninth Circuit has observed that retaliation for the acts of a family member is persecution "on account of … membership in a particular social group." In *Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004), a 14-year-old Chinese boy claimed that he "was persecuted in China as a result of his parents' resistance to the mandatory limits on procreation." *Id.* at 1028. Lin's mother had given birth to a second child and the government fined her 50,000 renminbi as punishment. Because she could not pay, the entire family was forced into hiding. In its discussion of family membership as a basis for protected "social group" refugee status, the Ninth Circuit observed that Lin was "in personal danger of further punishment 'on account of" his family status if he returned to China … [e]ven though such punishment … would not derive from Lin's own activities, *but from those of his parents.*" *Id.* at 1029 & n.9 (emphasis added).

The Fifth Circuit's interpretation of Section 101 of the INA falls entirely outside the consensus summarized above. As a result, it conditions the fate of a petitioner fleeing persecution on a game of geographic roulette—the alien victim fortunate enough to escape to Los Angeles, Chicago, Baltimore, or Boston qualifies for asylum. Escape to Houston, Baton Rouge, or Biloxi means deportation. For those who, like Petitioners, have fled countries or cultures where retaliatory violence knows no bounds, the ac-

tual consequence is torture, forced prostitution, or death. This Court should resolve the split and settle the meaning of federal law applied by more than 230 immigration judges in more than 55 administrative courts nationwide.[3]

II. THE QUESTION PRESENTED IS RECURRING, ITS RESOLUTION IS OF PROFOUND NATIONAL IMPORTANCE, AND THIS CASE PRESENTS A PERFECT VEHICLE FOR REVIEW.

The question presented by the Fifth Circuit's opinion further warrants this Court's attention for several reasons.

First, the statute at issue affects tens of thousands of individuals every year. Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2010 Statistical Yearbook I1 (Jan. 2011) ("DOJ 2010 Yearbook"), available at http://www.justice.gov/eoir/-statspub/fy10syb.pdf. The United States receives the highest volume of asylum petitions worldwide. U.N. High Commissioner for Refugees (UNHCR), Asylum Levels and Trends in Industrialized Countries 2010, 7 (Mar. 28, 2011), available at http://www.unhcr.org/4d8c5b109.html. That volume is growing; last year, the U.S. received 15% more pe-

[3] *See* Office of the Chief Administrative Judge, U.S. Dep't of Justice, http://www.justice.gov/eoir/ocijinfo.htm (last visited June 19, 2011); *see also* Deborah Anker, Law of Asylum in the United States 3 (2011) ("[Asylum] law has evolved in a patchy and *ad hoc* manner, in part as a result of … hesitancy of the federal judiciary in embracing its responsibility to review decisions of administrative bodies for clear errors of law ….").

titions than it received in 2009. *Id.*

Although the Fifth Circuit's interpretation is unique among the appellate courts' opinions, it affects a disproportionate number of individuals: The Fifth Circuit has jurisdiction over the second highest volume both of refugee arrivals and immigration proceedings among the circuit courts of appeals. Office of Refugee Resettlement, U.S. Dep't of Health and Human Services, Fiscal Year 2009 Refugee Arrivals, available at http://www.acf.hhs.gov/programs/orr/data/fy2009RA.htm; U. N. High Commissioner for Refugees (UNHCR), Asylum Levels and Trends in Industrialized Countries 2010, 7 (Mar. 28, 2011), available at http://www.unhcr.org/-4d8c5b109.html. DOJ 2010 Yearbook N2. Only the Ninth Circuit (which interprets the Act to *protect* petitioners from the kind of persecution threatened here, *see supra* at 16) has jurisdiction over more proceedings. DOJ 2010 Yearbook N2. The Fifth Circuit also has jurisdiction over the greatest number of immigration proceedings involving aliens detained by the government. *Id.* at O3.

That large volume of immigration proceedings is not likely to decrease. Nor is the subset of refugees at issue here—*i.e.*, those who fear retaliatory attacks against family members. *See e.g.*, *Crespin-Valladares*, 632 F.3d at 121 (gang members in El Salvador "often intimidate their enemies by attacking those enemies' families"); *Gebremichael*, 10 F.3d at 36 (noting the "'time-honored theory of *cherchez la famille* ('look for the family'),' the terrorization of one family member to extract information about the location of another family member or to force the miss-

ing family member to come forward"); *Voci v. Gonzales*, 409 F.3d 607, 614 (3rd Cir. 2005) (Albanian police intimidate family members of a political dissident); *Neli v. Ashcroft*, 85 Fed. App'x 433, 434 (6th Cir. 2003) (reviewing persecution in retaliation for grandfather's status as a U.S. citizen); *Matter of Izatula*, 20 I&N Dec. 149, 153 (BIA 1990) ("[T]hreats of abuse against family members" are "typical" forms of punishment for political opponents in Afghanistan.) (citation omitted). "To retaliate against a man by hurting a member of his family is an ancient method of revenge." *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088 (7th Cir. 1987). Sex traffickers, in particular, often threaten women with retaliation against their victims' family members.[4]

Second, the question presented is of profound national importance. Deportation is always a "harsh" and "drastic measure … at times the equivalent of banishment," *INS v. Cardoza-Fonseca,* 480 U.S. 421, 449 (1987); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10

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[4] *See, e.g.*, Joyce Koo Dalrymple, Book Note, Human Trafficking: Protecting Human Rights in the Trafficking Victims Protection Act, 25 B.C. Third World L.J. 451, 466 (2005) ("U.S. law enforcement typically lacks the power to prevent traffickers from retaliating against family members in other countries, especially when police in those countries are unresponsive, underfunded, or corrupt.") (reviewing Craig McGill, Human Traffic: Sex, Slaves and Immigration (2003)); Free the Slaves & Human Rights Ctr., Univ. of California, Berkeley, Hidden Slaves: Forced Labor in the United States 31-32 (2004), available at http://www.freetheslaves.net//Document.Doc?id=17; Leslye E. Orloff & Janice V. Kaguyutan, Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses, 10 Am. U. J. Gender Soc. Pol'y & L. 95, 104 (2001).

(1948). In the best of circumstances, it merely disrupts work, life, and family. *See, e.g.*, *Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 479 (1963) (deportation "can destroy lives and disrupt families"). As the Demirajes' own circumstances illustrate, petitioners for asylum are often rooted in this country with jobs, families, and ties to their communities—all of which are unfairly impacted by unwarranted deportation. This Court has frequently granted *certiorari* to resolve conflicts among the circuits involving questions arising out of the INA for that very reason. *See, e.g.*, *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2584 (2010); *Cardoza-Fonseca*, 480 U.S. at 426; *INS v. Errico*, 385 U.S. 214, 214-15 (1966).

But deportation becomes a matter of *profound* importance when, as here, an asylum seeker has demonstrated a well-founded fear of persecution for which the consequences are abduction, torture, forced prostitution, and execution. *See Cardoza-Fonseca,* 480 U.S. at 449 ("Deportation … is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country."). If deported, Mrs. Demiraj and her son face the risk of torture and death. They, and others like them, wait every day in fear. Claims based on family membership are particularly important to vulnerable individuals like Petitioners because persecutors often "target family members when they cannot or dare not target their intended victim." Deborah Anker, Membership in a Particular Social Group: Developments in U.S. Law, PLI Corporate Law and Practice Course Handbook Series, PLI Order No. 8729, p. 206 (Oct. 2006).

If, indeed, federal law does not protect Petitioners, their story is tragic. But if the law does protect them—as it does in at least four federal circuits—then their wrongful deportation becomes something far worse.

Third, the issue in this case carries great significance for the continued viability of critical and ongoing law enforcement and national security efforts, both of which depend heavily on the assistance of government cooperators.[5] Indeed in this case, the

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[5] *See, e.g.*, Mary E. Kramer, Immigration Consequences of Criminal Activity 401 (Richard J. Link ed., 3d ed. 2008); Hearing on Law Enforcement Treaties Before the S. Comm. on Foreign Relations, 108th Cong. 18 (2004) (statement of Bruce Swartz, Deputy Assistant Att'y Gen. of the United States) (noting importance of cooperating witnesses in penetrating "secretive organized crime groups"); Vincent Cannistraro, Former Chief of Operations & Analysis, Central Intelligence Agency Counterterrorism Ctr., and Former Special Assistant for Intelligence, Office of the Sec'y of Def., Remarks at the 26th National Legal Conference on Immigration and Refugee Policy (Apr. 3, 2003) ("[W]hen we alienate communities, particularly immigrant communities, we undermine the very basis of our intelligence collection abilities because we need to have the trust and cooperation of people in those communities."). H.R. Rep. No. 111-166, at 173 (2009) (noting the "great risk" to families of Iraqi citizens who assisted coalition forces); H.R. Rep. No. 106-487(I), at 21 (1999) (noting sex traffickers' threats "to kill [women's] families if [they] refused to dance nude in a nightclub"); H.R. Rep. No. 105-258, at 2 (1997) ("Police and prosecutors report an increased incidence of threats of physical violence against victims, witnesses, and their families."); H.R. Rep. No. 90-658, at 4 (1967), *reprinted in* 1967 U.S.C.C.A.N. 1760, 1764 ("Experience has evidenced that potential witnesses or their families are often intimidated, threatened, or even gravely injured during the investigative preliminaries to a criminal prosecution").

law Mr. Demiraj agreed to help enforce was immigration law, itself—Bedini is wanted for human smuggling. But many types of transnational organized crime affect virtually every country in the world. Criminal networks continue to diversify their trafficking in drugs, human beings, and stolen property, as well as thriving operations in money laundering, counterfeiting, fraud, and political corruption.[6] Non-citizen families of federal witnesses are especially easy targets.[7] Retaliation against family members by human traffickers is common.[8]

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[6] *See, e.g.*, Bureau for Int'l Narcotics and Law Enforcement Affairs, U.S. Dep't of State, International Narcotics Control Strategy Report 15-16 (Mar. 2008), available at www.state.gov/documents/organization/102583.pdf (listing major drug-transit and money-laundering countries throughout world); Ryszard Piotrowicz, European Initiatives in the Protection of Victims of Trafficking Who Give Evidence Against Their Traffickers, 14 Int'l. J. Refugee L. 263, 263 (2002) (identifying human trafficking as one of "greatest threats to human rights" in post-communist Europe); U.N. Office on Drugs and Crime, Organized Crime Assessments, http://www.unodc.org/unodc/-en/organized-crime/assessments.html (last visited June 19, 2011) (describing phenomenon of organized criminal activity throughout West Africa and Central Asia).

[7] *See, e.g.*, *Builes v. Nye*, 239 F. Supp. 2d 518, 526 (M.D. Pa. 2003) (immigrant informant's brother and sister were executed in Colombia in retaliation for his cooperation with U.S. law enforcement); *Guerra v. Gonzales*, 138 F. App'x 697, 698 (5th Cir. 2005) (noting allegations that drug traffickers threatened informant's family members).

[8] *See, e.g.*, U.S. Dep't of State, Trafficking in Persons Report 39 (June 2009), available at http://www.state.gov/-

The lack of independent asylum protection for family members of cooperating witnesses and informants dramatically raises the stakes of an alien's decision to assist U.S. authorities. Even U.S. citizens with noncitizen family members abroad should be concerned about assisting the government if doing so will put relatives at risk. Government intelligence efforts depend on information and assistance from foreign nationals—or from those with foreign family members—in countries like Afghanistan, Pakistan, Iraq, and Yemen, where retaliation against family members is common.[9] *See, e.g.*, *Oryakhil v. Mukasey,* 528 F.3d 993, 996 (7th Cir. 2008) (alien's cooperation with U.S. and allied military forces against the Taliban put his family in jeopardy). But potential prosecutorial witnesses and informants will no doubt think twice about assisting government authorities if they know that our laws do not protect their families from persecution in retaliation for that

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documents/organization/123357.pdf (rescued human trafficking victims fear attacks against family members).

[9] *See*, *e.g.*, Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, 2010 Human Rights Report: Afghanistan 10-11 (April 8, 2011), available at http://www.state.gov/-documents/organization/160445.pdf; Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, 2008 Human Rights Report: Pakistan (Feb. 25, 2009), http://www.state.gov/-g/drl/rls/hrrpt/2008/sca/119139.htm; Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, 2010 Human Rights Report: Iraq 4, 16, 29 (April 8, 2011), available at http://www.state.gov/documents/organzation/160462.pdf; Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, 2009 Human Rights Report: Yemen (March 11, 2010), http://www.state.gov/g/drl/rls/hrrpt/2009/nea/136083.htm.

assistance.[10]

Finally, this case also provides an excellent vehicle for review. It is a direct appeal from a final judgment of a federal court of appeals, it involves no procedural defaults to obstruct the issue, and it squarely presents the legal issue on undisputed facts. The decision below rested expressly on the lower court's interpretation of the relevant federal statutory language—language that has been interpreted by four other circuit courts. The only question before the lower court was the question of law presented here.[11] The majority panel had the oppor-

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[10] *See e.g.*, Jaya Ramji-Nogales, A Global Approach to Secret Evidence: How Human Rights Law Can Reform Our Immigration System, 39 Colum. Hum. Rts. L. Rev. 287, 322 (2008) (discussing risk that informants will not provide information valuable to national security interests unless the informant feels confident that their family will be protected from acts of retaliation).

[11] In 2005, Congress amended the INA with passage of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005). The REAL ID Act provides that "[t]o establish that the applicant is a refugee within the meaning of [Section 101(a)(42)(A)], 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." 8 U.S.C. § 1158(b)(1)(B)(i). That amendment is not relevant to the question presented here. Congress intended the REAL ID Act to clarify the standard of review where a persecutor has *multiple* and *mixed* motives for his violence. *See Matter of C-T-L-*, 25 I&N Dec. 341, 345 (BIA 2010) (citing H.R. Rep. No. 709-72, at 163 (2005), *reprinted in* 2005 U.S.C.C.A.N. 240, 288). This is not a "mixed motive" case: It is undisputed that Bedini's sole (and therefore "central") reason for persecuting members of Mr. Demiraj's family was retaliation for Mr. Demiraj's cooperation with U.S. authorities. The issue is whether

tunity to review the four opinions in four different circuits cited here, *see supra* 12-16, before it denied Petitioners' motion for reconsideration. The split it has created is therefore not likely to resolve absent this Court's intervention.

III. THE LOWER COURT'S DECISION IS WRONG.

The INA protects individuals who fear persecution "on account of … membership in a particular social group." 8 U.S.C. § 1101(a)(42)(A). There is no dispute that Petitioners fear persecution on account of membership in a particular social group. And yet the Fifth Circuit has denied them any relief. According to the panel majority, petitioners for federal protection from persecution must demonstrate that the harm they fear is not merely on account of membership in a particular social group, but on account of membership in a particular social group "*as such*." App. 14-15a (emphasis in original). The lower court requires petitioners to demonstrate that their persecution is motivated by animus towards their family *per se*, or out of a desire to exterminate the family line. Absent that showing, the lower court views Petitioners as no different from other individuals who might fear persecution on account of their *non*-familial relationship with Mr. Demiraj, such as an ex-wife or a girlfriend, *see id.*, a "next-door neighbor [or] school teacher" whom Mr. Demiraj "has feelings

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that reason—central or not—can qualify a petitioner for protection under the INA.

for."[12] That labored construction of the statute obscures the INA's plain language, ignores this Court's guidance, frustrates congressional intent and statutory purpose, and unnecessarily complicates the application of federal immigration law.

First, the Fifth Circuit's interpretation grafts an additional requirement onto the INA that appears nowhere in the plain text of the statute. That plain language conveys refugee status upon any person who fears persecution "on account of … membership in a particular social group." 8 U.S.C. § 1101(a)(42)(A). Certainly, petitioners seeking asylum under this provision must demonstrate a nexus between the persecution they fear and their "membership" in a "social group." To establish persecution on account of family membership, for instance, one cannot merely show that multiple members of a single family had negative experiences. Those experiences would, at the very least, have to be causally linked to family membership. But that is all the plain text of the statute requires. It does not support—much less *require*—the exclusion of victims who fear persecution on account of the ties inherent in family membership but not on account of family identity *per se*.

Second, the Fifth Circuit's construction of the statute ignores this Court's decades-old principle that, in light of the damage they can cause, "[d]eportation statutes … should be *strictly* construed" in favor of

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[12] Oral Argument, *Demiraj v. Holder*, 631 F.3d 194 (5th Cir. 2011) (No. 08-60991), available at http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx?prid=236266.

the alien. *Barber v. Gonzales*, 347 U.S. 637, 642 (1954) (emphasis added) (citing *Delgadillo v. Carmichael,* 332 U.S. 388, 391 (1947)). The panel majority did the opposite: Abandoning restraint, it substituted its own *unfavorable* reading of the statute for the more permissive language that appears in the statute enacted. Even if that language were ambiguous (it is not), this Court has long construed ambiguities in favor of the alien. *See, e.g.*, *Fong Haw Tan*, 333 U.S. at 10 (even where applying a deportation statute "less generously to [an] alien might find support in logic," courts should decline to interpret the statute beyond what "is *required*" by the most lenient of "several possible meanings of the words used").

Third, the purpose and legislative history of the INA further highlight the lower court's legal error. This Court has noted Congress's clear preference that immigration law be used in appropriate cases "to unite families and preserve *family ties*." *Errico*, 385 U.S. at 220 (emphasis added). Indeed, "[t]he fundamental purpose of [the Act] was to unite families," *id.* at 224; *see also Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) ("The Immigration and Nationality Act ... was intended to keep families together. It should be construed in favor of family units ...."). This Court has clarified that "[t]he legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a *liberal* treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united." *Errico*, 385 U.S. at 220 n.9 (emphasis added) (quoting H.R. Rep. No. 85-1199/S. Rep. No. 85-1057,

at 7 (1957), *reprinted in* 1957 U.S.C.C.A.N. 2016, 2020) (discussing the "underlying intentions of our immigration laws regarding the preservation of the family unit" and observing that "it has been the policy of Congress to approve legislation designed to facilitate the reunification of families")). In 1965, the Act was amended to replace nationality and ethnic considerations with a system that privileged reunification of families. *See* Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965); *see also* Act of Nov. 29, 1990, Pub. L. No. 101-649, §§ 111-24, 104 Stat. 4986-97 (1990) (reaffirming U.S. commitment to family reunification).[13]

The panel majority has gone to the other extreme. Its interpretation would grant asylum from persecution on account of family membership on the narrowest terms possible—protecting only the wealthy and elite members of family dynasties persecuted for their lineage alone (be they Romanoffs or Qadhafis).[14] Given the limited prevalence of dynas-

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[13] Congress has resisted narrower definitions of asylum, even though doing so has expanded refugee eligibility. *Cardoza-Fonseca*, 480 U.S. at 444 (it is "anomalous" for the Government to ask the Court to "restrict its discretion to a narrow class of alien. Congress has assigned to the Attorney General … the task of making hard individualized decisions; although Congress could have crafted a narrower definition," it chose not to).

[14] At oral argument, Judge Haynes illustrated her view of the case by explaining that, "When Nicholas II was thrown out of Russia…they killed his whole family because they didn't want to leave any lineage in case a royal family…might come back into power. So that would be an 'on account of' membership in that family." Oral Argument, *Demiraj v. Holder*, 631 F.3d 194 (5th Cir. 2011) (No. 08-60991), available at

ties targeted by persecutors, the lower court's interpretation all but eliminates protection for membership in a family—no protection would extend to the Chinese woman persecuted on account of her husband's political dissidence; or the Iraqi man persecuted on account of his cousin's work as an interpreter for the United States military; or the Syrian child persecuted on account of her parents' conversion to Christianity.

Even those petitioners who do fit within the Fifth Circuit's too narrowly conscribed group of eligible applicants face an impermissibly high evidentiary burden. They must demonstrate not only their well-founded fear of persecution, their membership in a particular social group, and the nexus between the two, but they must show that their persecutor has in mind their family identity and not simply their family ties. That requirement limits the flexibility Congress sought to provide the United States in reviewing asylum petitions. *See Cardoza-Fonseca*, 480 U.S. at 449-50 (citing H.R. Rep. No. 96-608, at 9 (1979)). It also ignores the government's own determination that "[a]n applicant does not bear the unreasonable burden of establishing the exact motivation of a 'persecutor' where different reasons for actions are possible." *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988).

Finally, the Fifth Circuit's rule unnecessarily complicates the application of immigration law. It

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http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx?prid=236266.

requires judges to determine and distinguish between and among subtle and nuanced differences in persecutory motivation. The lower court's opinion forces immigration judges to ask, "Is the persecution retaliation against a family member, or a family, itself? And if so, is it persecution against the family *as such*? And if so, to what extent?" The court would presumably have IJs apply a similar multistep analysis to petitions grounded in the other federally protected categories. Under its rule, courts must now determine whether petitioners have demonstrated a well-founded fear on account of race, religion, nationality, or political opinion *as such*.

The difficulty these questions present is compounded where, as here, subcategories overlap. Bedini has targeted every member of the Demiraj family in retaliation for Mr. Demiraj's betrayal. If he succeeds, he will have terminated the family line. And yet the Fifth Circuit, having accepted Petitioners' testimony, denied asylum even on these facts, blurring already-cloudy distinctions and complicating the administration and review of federal law at all levels.

CONCLUSION

This petition presents an ideal vehicle to resolve a narrow but important question of law that affects the lives of thousands of individuals across the country. For the reasons given above, this Court should grant *certiorari* to resolve the conflict over federal immigration law that has arisen among the circuit courts.

Respectfully submitted,

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June 20, 2011

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-60991

RUDINA DEMIRAJ; REDIOL DEMIRAJ,

Petitioners

v.

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

Respondent

Petition for Review of an Order of the Board of Immigration Appeals

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O R D E R:

( ) The Petitioners' motion for ( ) stay ( ) recall and stay of the mandate pending petition for writ of certiorari is DENIED.

( ) The Petitioners' motion for (X) stay ( ) recall and stay of the mandate pending petition for writ of certiorari is GRANTED through June 13, 2011.

4-1-2011

/s/
CATHARINA HAYNES
UNITED STATES CIRCUIT JUDGE

MDT4

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-60991

RUDINA DEMIRAJ; REDIOL DEMIRAJ,

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v.

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

Respondent

Petition for Review of an Order of the Board of Immigration Appeals

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O R D E R :

IT IS ORDERED that petitioners' unopposed motion to extend the stay of mandate pending filing of a petition for writ of certiorari is Granted.

6-15-2011

/s/

CATHARINA HAYNES
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States
Court of Appeals
Fifth Circuit

F I L E D
January 11, 2011
Lyle W. Cayce

Nos. 08-60991

RUDINA DEMIRAJ; REDIOL DEMIRAJ,

Petitioners

v.

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

Respondent

Petitions for Review of Orders of the Board of Immigration Appeals

Before BARKSDALE, DENNIS, and HAYNES, Circuit Judges.

HAYNES, Circuit Judge:

Rudina Demiraj and her son, Rediol Demiraj, petition for review of the decision of the Board of Immigration Appeals ("BIA") denying their applications for asylum, withholding of removal, and protection under the Convention Against Torture. The

petitioners, who are Albanian nationals, are the wife and son of Edmond Demiraj, a material witness in the United States' prosecution of Bill Bedini. While conceding removability, the petitioners contend that they reasonably fear reprisal from Bedini and his associates if they are returned to Albania.

While the petitioners have assembled competent record evidence of the risks they may face upon returning to Albania, we, like the Immigration Judge ("IJ") and the BIA, nevertheless conclude that those concerns do not entitle them to the relief they seek under the Immigration and Nationality Act. We therefore DENY the petition for review.

I. Facts & Procedural History

Rudina Demiraj and her minor son, Rediol, entered the United States without inspection in October 2000. Mrs. Demiraj timely filed an application for asylum, withholding of removal, and protection under article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture"), Dec. 10, 1984, S. TREATY DOC. No. 100-20, 1465 U.N.T.S. 85, 113. Mrs. Demiraj named Rediol as a derivative beneficiary of her application. In her application, filed on September 28, 2001, and refiled as corrected on November 19, 2001, Mrs. Demiraj asserted that she was entitled to the relief requested because of her and her family's political involvement in opposing Albania's former communist regime and current socialist party and conse-

quent fear of reprisal and torture in Albania.[1] On December 27, 2001, the Immigration and Naturalization Service issued Mrs. Demiraj and her son a notice to appear, charging her with removability; after a hearing before an IJ in 2002, Mrs. Demiraj and her son were denied all relief and ordered removed. Mrs. Demiraj appealed to the BIA, claiming that the court's interpreter was ineffective; the BIA dismissed the appeal in October 2003.

In February 2004, the BIA allowed Mrs. Demiraj to reopen her case based on changed circumstances. After the IJ's initial disposition of Mrs. Demiraj's case, Mr. Demiraj was shot in Albania by Bill Bedini, an Albanian wanted in the United States for human smuggling.[2] Mr. Demiraj had been identified by the United States as a material witness against Bedini, but Mr. Demiraj never actually testified against Bedini because Bedini fled to Albania. After Mr. Demiraj was deported to Albania, Bedini kidnaped, beat, and shot Mr. Demiraj because of his cooperation with the United States' efforts to prosecute Bedini. After Mr. Demiraj recovered from the shooting, local police in Albania took his statement but intimated that they would not investigate the crime. Bedini threatened Mr. Demiraj again, and he

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[1] Mrs. Demiraj and her son originally were named in Mr. Demiraj's application for the same relief, but she elected to separate her and her son's applications and to refile them separately.

[2] The IJ ultimately accepted all of Mr. and Mrs. Demiraj's testimony with respect to the Bedini incidents as factually credible, and the BIA accepted that determination; we therefore recite it here as fact.

fled to the United States. Mr. Demiraj was granted withholding of removal in a separate proceeding.[3] During the same time period, two of Mr. Demiraj's nieces were also kidnaped by Bedini and his associates and trafficked to Italy. After escaping, the nieces fled to the United States and were granted asylum.

These new facts, along with evidence of the interfamilial "blood feud" culture in Albania, were presented to the IJ following the BIA's order to reopen Mrs. Demiraj's proceedings. The IJ credited all of the testimony presented by Mrs. Demiraj but found nevertheless that she was not entitled to any of the relief she sought. The IJ therefore ordered Mrs. Demiraj and her son deported to Albania. The BIA dismissed the appeal in November 2006, adopting and affirming the decision of the IJ. Mrs. Demiraj petitioned this court for review, but before we issued a decision, the Attorney General moved for voluntary remand to the BIA for reconsideration in light of the Supreme Court's intervening decision in *Gonzales v. Thomas*, 547 U.S. 183 (2006). We granted that motion and remanded. *Demiraj v. Gonzales*, No. 06-61125, slip op. at 1 (5th Cir. June 18, 2007).

On remand, the BIA applied *Thomas* but again dismissed the appeal in October 2008. Mrs. Demiraj filed a second petition for review with this court and moved to reconsider before the BIA, offer-

[3] We note that withholding of removal, unlike asylum, does not confer any derivative benefits or protections on the alien's family. *Arif v. Mukasey*, 509 F.3d 677, 682 (5th Cir. 2007) (per curiam).

ing additional evidence that another of Mr. Demiraj's nieces had been granted asylum in the United States after Bedini kidnaped her and told her she would "pay" for the actions of her "sisters and her uncle." We stayed proceedings until the BIA denied the motion to reconsider in July 2009; Mrs. Demiraj also filed a third petition for review of the order denying reconsideration.

Mrs. Demiraj's petitions for review of the BIA's October 2008 decision on remand and of its July 2009 denial of reconsideration were timely filed. We have jurisdiction under 8 U.S.C. § 1252(b) and (d).

II. Standard of Review

The BIA's interpretation of statutory and regulatory provisions that determine whether a petitioner is statutorily eligible for relief from removal is an issue of law that we review de novo. *See Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 348 (5th Cir. 2002) (reviewing statutory eligibility for asylum); *Shaikh v. Holder*, 588 F.3d 861, 863–64 (5th Cir. 2009) (reviewing statutory eligibility for withholding of removal); *Efe v. Ashcroft*, 293 F.3d 899, 906–07 (5th Cir. 2002) (reviewing eligibility for protection under the Convention Against Torture). In that de novo review, we "afford considerable 'deference to the BIA's interpretation of immigration statutes unless the record reveals compelling evidence that the BIA's interpretation is incorrect.'" *Shaikh*, 588 F.3d at 863 (quoting *Mikhael v. INS*, 115 F.3d 299, 302 (5th Cir. 1997)).

We review the BIA's underlying findings of fact "for substantial evidence, which 'requires only that the BIA's decisions be supported by record evidence and be substantially reasonable.'" *Shaikh*, 588 F.3d at 863 (citing *Mikhael*, 115 F.3d at 302, and quoting *Omagah v. Ashcroft*, 288 F.3d 254, 258 (5th Cir. 2002)); *see also* 8 U.S.C. § 1252(b)(4)(B). Where, as here, the BIA's decision depended in large part on the factual findings of the IJ, we review the IJ's findings under this same standard to the extent that they influenced or were relied upon by the BIA. *See Chun v. INS*, 40 F.3d 76, 78 (5th Cir. 1994).

III. Discussion

Mrs. Demiraj and her son asserted three grounds for relief from removal before the IJ and the BIA: (1) asylum, (2) withholding of removal based on a probability of persecution, and (3) protection under the Convention Against Torture. The IJ and the BIA ruled that the petitioners were ineligible for any of the three forms of relief. Asylum and withholding of removal based on a probability of persecution are closely related, and the BIA found the petitioners statutorily ineligible for relief under both for the same reason; we therefore address those claims together.[4]

A. Asylum & Withholding of Removal

[4] The standards for relief are structured such that an applicant who cannot meet the persecution standard for asylum necessarily cannot meet the persecution standard for withholding of removal. *See, e.g.*, *Efe*, 293 F.3d at 906.

The BIA found the petitioners ineligible for asylum or withholding of removal because, even crediting all of the petitioners' evidence, Mrs. Demiraj and her son could not demonstrate that any persecution they might suffer in Albania was "on account of" their membership in the Demiraj family within the meaning of the statute and regulation. An alien who is otherwise subject to removal is eligible for discretionary asylum if the alien demonstrates that she is a "refugee" as defined under the Immigration and Nationality Act ("INA"). 8 U.S.C. § 1158(b)(1)(A); *see also* 8 C.F.R. § 1208.13(b). The statute in turn defines "refugee" in relevant part as a person who is unable or unwilling to return to her home county "because of persecution or a well-founded fear of persecution on account of . . . membership in a particular social group . . . ." 8 U.S.C. § 1101(a)(42)(A). Similarly, an alien may obtain withholding of removal if she proves that her "life or freedom would be threatened in th[e] country [to which removal is ordered] because of the alien's . . . membership in a particular social group . . . ." 8 U.S.C. § 1231(b)(3)(A). The petitioners argue that they would be persecuted in Albania by Bedini "on account of" their membership in a particular social group, namely, the Demiraj family. The BIA, in its order after voluntary remand, agreed with the petitioners that the "Demiraj family" could constitute a "particular social group" within the meaning of the asylum and withholding of removal statutes, and the Government does not dispute that conclusion.

The core of this case instead is the question of whether Mrs. Demiraj's evidence showed that she reasonably feared persecution or likely would be per-

secuted "on account of" her family membership.[5] *See Thuri v. Ashcroft*, 380 F.3d 788, 792 (5th Cir. 2004). The IJ and the BIA concluded that the evidence did not establish this requisite connection between her family membership and the identified persecution by Bedini and his associates. The only dispute between the parties is whether the facts as found by the IJ constitute, as a matter of law, proof of persecution "on account of" Mrs. Demiraj's membership in the Demiraj family or not.

After considering the record and the case law, the BIA explained its conclusion thus:

> Nexus may be shown . . . where there is a desire [by the alleged or feared persecutor] to punish membership in the particular social group, [and] also where there is a desire [by the persecutor] to overcome what is deemed to be an offensive characteristic identifying the particular social group. The respondents here [viz., Mrs. Demiraj and her son]

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[5] Because Mrs. Demiraj's application for asylum was submitted before the effective date of the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 302, she "had only to demonstrate that 'one of the persecutor's motives [fell] within a statutorily protected ground.'" *Shaikh*, 588 F.3d at 864 (alteration in original) (quoting *Girma v. INS*, 283 F.3d 664, 667 (5th Cir. 2002)). By contrast, in cases decided "under the REAL ID Act, an alien 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.'" *Shaikh*, 588 F.3d at 864 (quoting 8 U.S.C. § 1158(b)(1)(A)); *see also* REAL ID Act § 101(a)(3), 119 Stat. at 303.

> must identify some evidence, direct or circumstantial, that the assailants are motivated, at least in part, by a desire to punish or to overcome the family relationship to [Mrs. Demiraj]'s husband.
>
> Here, the individuals involved were seeking revenge against [Mr. Demiraj] for his testimony, and seek to harm [him] by attacking the respondents. We do not ordinarily find that acts motivated solely by criminal intent, personal vendettas, or personal desires for revenge establish the required nexus. . . . On this record, although the respondents are members of a particular social group, we do not find they fear persecution on account of this membership. Rather, the problems they may face are on account of revenge the assailants are attempting to extract against [Mr. Demiraj].

In re Demiraj, Nos. A095 218 801 & 802, slip op. at 2–3 (B.I.A. Oct. 14, 2008) (internal citations omitted).

The parties disagree about the meaning of "on account of." We need not resolve that dispute here because, even assuming that the petitioners' definition—"because of"—is the correct one, they cannot prevail. The crucial finding here is that the record discloses no evidence that Mrs. Demiraj would be targeted for her membership in the Demiraj family

as such. Rather, the evidence strongly suggests that Mrs. Demiraj, her son, and Mr. Demiraj's nieces were targeted because they are people who are important to Mr. Demiraj—that is, because hurting them would hurt Mr. Demiraj. No one suggests that distant members of the Demiraj family have been systematically targeted as would be the case if, for example, a persecutor sought to terminate a line of dynastic succession. Nor does the record suggest that the fact of Mr. and Mrs. Demiraj's marriage and formal inclusion in the Demiraj family matters to Bedini; that is, Mrs. Demiraj would not be any safer in Albania if she divorced Mr. Demiraj and renounced membership in the family, nor would she be any safer if she were Mr. Demiraj's girlfriend of many years rather than his wife. The record here discloses a quintessentially personal motivation, not one based on a prohibited reason under the INA.[6]

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[6] For this reason, our decision does not conflict with the Seventh Circuit's decision in *Torres v. Mukasey*, 551 F.3d 616 (7th Cir. 2008). *Torres* held that a petitioner had successfully demonstrated persecution on account of membership in his family where he had been singled out for extreme mistreatment while enlisted in the Honduran army simply because, "within Honduran military circles[,] the Flores Torres clan is known as a family of deserters." *Id.* at 622. The Seventh Circuit characterized the persecution of the petitioners in that proceeding as retribution "for the perceived offenses of his four brothers," *id.* at 623, but the facts of that case make quite clear that the 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. *See id.* at 623–24. Here, by contrast, the IJ and BIA determined that Bedini was motivated by personal revenge; that is, that Mrs. Demiraj is at risk because Bedini seeks to hurt Mr. Demiraj by hurting her—not because he has a generalized desire to hurt the Demiraj family as such. That finding has support in the record, and we

Thus, the record in this case does not compel us to reject the BIA's determination here. Mrs. Demiraj and her son are not entitled to asylum or withholding of removal.

B. Convention Against Torture

The United States' implementation of the article 3 "non-refoulement" provision of the Convention Against Torture entitles an alien to withholding of removal if she can "establish that it is more likely than not that . . . she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 1208.16(c)(2); *see also Tamara-Gomez v. Gonzales*, 447 F.3d 343, 350 (5th Cir. 2006) ("To obtain relief under the Convention Against Torture, the alien need not demonstrate all of the elements of a persecution claim; instead he must show a likelihood of torture upon return to his homeland."). The regulation defines "torture" as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when

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are therefore obliged to defer to it. *See, e.g., Shaikh*, 588 F.3d at 863.

> such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 C.F.R. § 1208.18(a)(1).

In this case, the IJ found Mrs. Demiraj's proof of "consent or acquiescence [by] a public official" lacking. A state actor only "acquiesces" in torture if "the public official, prior to the activity constituting torture, ha[s] awareness of such activity and thereafter breach[es] his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 1208.18(a)(7); *see also Hakim v. Holder*, — F.3d —, No. 09-60549, 2010 WL 5064379, at *4–6 (5th Cir. Dec. 13, 2010) (holding that "'acquiescence' is satisfied by a government's willful blindness of torturous activity"). We have thus held that "relief under the Convention Against Torture requires a two part analysis—first, is it more likely than not that the alien will be tortured upon return to his homeland; and second, is there sufficient state action involved in that torture." *Tamara-Gomez*, 447 F.3d at 350–51 (footnote omitted).

The BIA adopted the IJ's opinion with respect to the Convention Against Torture and provided no independent analysis of that issue. The IJ concluded that Mrs. Demiraj had not demonstrated that she would more likely than not be tortured with the consent or acquiescence of the Albanian government. The IJ found that:

> [a]lthough the police in Albania apparently, assuming that [Mrs. Demiraj]'s information is correct, are reluctant to get involved with [her] problems with Be[d]ini and his associates, there is no evidence that the government of Albania has a policy of ignoring torture if they are specifically aware of [its] occurrence at the time it is occurring and also there is no evidence that [Mrs. Demiraj and her son] would be detained on behalf of the government and subjected to torture with the government's acquiescence.

We decline to disturb this finding. We may only reject the finding of fact that Mrs. Demiraj was not likely to be tortured "if the evidence presented by [the petitioner] was such that a reasonable factfinder would have to conclude that" the finding was incorrect. *See INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992); *see also Chen v. Gonzales*, 470 F.3d 1131, 1134 (5th Cir. 2006) (holding that the standard of review under § 1252(b)(4)(B) "essentially codifies the substantial evidence test established by the Supreme Court in . . . *Elias-Zacarias*"). Mrs. Demiraj only presented evidence that her husband had difficulty convincing the local police to investigate his shooting after the fact. The standard for acquiescence, as the IJ's finding emphasizes, requires an official to be aware of ongoing torture and likely to refuse to act to

intervene and prevent the torture as it is occurring.[7] No such evidence was presented here.

The 2003 State Department Country Report on Albania, which was in evidence before the IJ, estimated that "60 to 65 percent" of what it termed "blood feud" homicides "were brought to court and nearly all of them ended up at the appellate level." The portion of that report that expressly assesses the country's record on torture noted occasional incidents of torture committed by public officials and described most as having been investigated and prosecuted. The IJ therefore had sufficient record evidence to conclude that the state was not "more likely than not" to acquiesce in torture and therefore also to deny relief under that treaty.

IV. Conclusion

We find no error in the BIA's conclusion that the petitioners are not entitled to asylum, withholding of removal under the INA, or protection under the Convention Against Torture. We therefore must DENY the petitions.

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[7] Our recent decision in *Hakim* clarifying the definition of "willful blindness" similarly continues to require at least "awareness" on the part of the government. 2010 WL 5064379, at *5–6 (citing and quoting *Zheng v. Ashcroft*, 332 F.3d 1186, 1194–96 (9th Cir. 2003) (rejecting BIA's former standard for acquiescence because "the BIA's interpretation . . . impermissibly requires *more than awareness*" (emphasis added))).

DENNIS, Circuit Judge, dissenting.

I respectfully dissent. To show persecution "on account of" a protected ground, 8 U.S.C. § 1101(a)(42)(A) "only 'requires the alien to prove *some* nexus between the persecution and [one of] the five protected grounds.'" *Thuri v. Ashcroft*, 380 F.3d 788, 792 (5th Cir. 2004) (quoting *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 349 (5th Cir. 2002)).[1] The evidence presented by Mrs. Demiraj in this case clearly demonstrates a nexus between the persecution she fears and the protected ground of membership in a social group, i.e., her membership in the family of Mr. Demiraj.

Bedini, an Albanian mobster, has shown himself to be a powerful person capable of brutal violence. Bedini previously threatened Mr. Demiraj for agreeing to aid the United States government in its

[1] The REAL ID Act of 2005 changed the "on account of" language to the following: "To establish that the applicant is a refugee . . . 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." 8 U.S.C. § 1158(b)(1)(B)(ii) (emphasis added). The BIA has held that this new standard applies not only to applications for asylum, but also to applications for withholding of removal. *In re C-T-L-*, 25 I. & N. Dec. 341, 344-48 (B.I.A. 2010). However, the REAL ID Act applies "only prospectively to applications for asylum or withholding of removal made on or after the effective date of the Act, May 11, 2005." *Aligwekwe v. Holder*, 345 F. App'x 915, 920 n.4 (5th Cir. 2009) (unpublished) (citing REAL ID Act of 2005, Pub. L. No. 109-13, § 101(h), 119 Stat. 302, 305). Mrs. Demiraj's application for asylum or withholding of removal was filed before 2005. Therefore, as the majority states, the REAL ID Act does not apply in this case.

investigation of his involvement in human smuggling, and, in March 2003, abducted Mr. Demiraj and his brother. Bedini and the other captors beat both men, and Bedini then shot Mr. Demiraj at close range. Although Mr. Demiraj survived, his physician later told him that he was "lucky the bullet did not go through [his] kidney." Although Mr. Demiraj requested help from the police, they refused to take any action against Bedini. Mr. Demiraj then escaped to the United States in April 2003, and was granted withholding of removal.

Besides this attack, Bedini has targeted other Demiraj family members because they are members of Mr. Demiraj's family. In April 2003, several men, one of whom appears to have been Bedini, kidnapped two of the Demirajs' nieces in Albania and took them to Italy, where the captors attempted to force the nieces — ages 19 and 21 — into prostitution. Upon being given clothes to wear for standing on the street, the girls began to cry and protest that they were not prostitutes. One captor, who may have been Bedini, became angry and beat the girls, saying that "this was payback to your [U]ncle Edmund [Mr. Demiraj] for when I was in the United States." The captors then tied the nieces up for days with no food, water, or access to a toilet. Eventually, the nieces, who "both had pain all over, felt sick and nauseated," and had urinated on themselves, consented to work as prostitutes. They were told to clean themselves up and to put on makeup. They were taken outside to the streets, where "[t]he same man . . . who shot [their] Uncle Edmund" gave them "some condoms and told [the nieces] how to use them for sex." Not long afterwards, the nieces, through sheer luck and a

kind taxi driver, managed to escape from their captors and contact their family. Their family worried that if the nieces returned to Albania, Bedini would attack them again, and that the local police would refuse to intervene, as they had done after Mr. Demiraj was shot. The nieces then fled to the United States and were granted asylum.

Three years later, in 2006, Bedini and his associates abducted at gunpoint the nieces' younger sister, who was 19 years old at the time, and took her to Germany. Bedini beat her, saying that he had "warned [her] sisters not to escape from us because their [the Demiraj] family was going to pay for everything," and that "[n]ow you're going to pay for your sisters and your uncle. You better don't do the same as your sisters." Like her sisters, this niece was taken to the streets for prostitution, but managed to escape, and fled to the United States, where she was granted asylum. In addition, the brother who was abducted with Mr. Demiraj has now fled to Greece, and Mr. Demiraj's parents, who have been threatened by Bedini, have gone into hiding.

The majority characterizes all of this as involving merely personal revenge, but there is no evidence that Bedini has any grudge against Mrs. Demiraj, her son, or any other Demiraj family members as individuals — rather, his only interest in them is because of their membership in the family of Mr. Demiraj.

In *Torres v. Mukasey*, 551 F.3d 616 (7th Cir. 2008), whose facts are markedly similar to those of the instant case, the Seventh Circuit explained that

"[a] successful asylee must show that he was persecuted because of his . . . membership in a particular social group," and concluded that "the record shows that [the petitioner] clearly did establish . . . a nexus" between his mistreatment and his family membership, where the petitioner presented evidence that he had been mistreated by the Honduran military because of his relationship to his brothers, who were considered military deserters. *Id.* at 629-30. The Seventh Circuit explained:

> [The petitioner's] testimony is rife with examples that provide his family's history as the nexus for his mistreatment. Throughout the hearing, [the petitioner] noted the numerous occasions on which . . . his primary persecutor[] referenced [the petitioner's] family while inflicting harm on [the petitioner]. In at least one instance when [the persecutor] placed an unloaded pistol to [the petitioner's] head and pulled the trigger, [the petitioner] testified that [the persecutor] 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 . . . we . . . have." According to [the petitioner's] testimony, [the persecutor] told [the petitioner] that he placed [the petitioner] in the water barrel because "I had to pay for the escape of my brothers." [The petitioner] testified that when [the persecutor] forced [the petitioner] to run nude in front of

> his unit, [the persecutor] ordered, "Put this man to run until he falls dead. . . . Because you have to pay for what your brothers did for their escape because they violated. They defy the army." [The petitioner] also stated, "I was so afraid that I was going to stay in [the army] and I was afraid to die in there. Because . . . [the persecutor] told me that I was never going to leave that place. . . . Because I was going to pay for my brothers' escape because I was the last one that remained."

Id. at 630 (internal citations omitted). In this case, we have essentially the same situation: Mrs. Demiraj faces a grave risk of attack from Bedini if she returns to Albania because of her membership in the family of Mr. Demiraj. She married Mr. Demiraj in 1992 and, several years later, he agreed to aid the United States government in a criminal prosecution against Bedini, thereby exposing his family to the depredations of Bedini. Mrs. Demiraj's family membership puts her at risk of attacks similar to what other family members have already experienced.

Accordingly, Mrs. Demiraj is entitled to protection under 8 U.S.C. § 1101(a)(42)(A), which grants asylum to persons who have a well-founded fear of persecution because of their membership in a particular social group:

> To establish that he is a member of a "particular social group," [the petition-

> er] must show that he was a member of a group of persons that share a common characteristic that they either cannot change or should not be required to change because it is fundamental to their individual identities or consciences.

Ontunez-Tursios, 404 F.3d at 352. The majority and the BIA do not dispute that membership in a family meets these criteria. Family membership is a characteristic that a person either cannot change (if he or she is related by blood) or should not be required to change (if he or she is related by marriage). The purpose of asylum law is to honor a moral obligation to protect people who are threatened with persecution because of characteristics like these. The Seventh Circuit applied the law correctly in *Torres*, a case that I find indistinguishable from the current case. The majority has created a circuit split and put our court on the wrong side of it. I therefore dissent.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Files: A095 218 801 – Houston, TX
A095 218 802

Date: JUL - 9 2009

In re: RUDINA DEMIRAJ
REDIOL DEMIRAJ

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS: Yvette M Mastin, Esquire

APPLICATION: Reconsideration

The respondents have filed a motion requesting that we reconsider our decision of October 14, 2008. The motion will be denied.

In our previous decision we found the respondents had failed to demonstrate a nexus between a ground protected under the Immigration and Nationality Act, and the problems they fear in Albania.

The lead respondent's husband was called to testify in a criminal case against another Albanian. Although in our previous decision we stated the husband had testified, he apparently was only called as a witness, but the defendant fled to Albania before the trial. This error had no bearing on the reasoning or outcome of our decision. In their motion, the respondents point to further problems their family has faced in Albania and the fact that other relatives have been granted asylum. The husband was granted withholding of removal. Despite the respondents' arguments in the motion, we properly addressed these issues, including the application of our holding in *Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988), previously. As we noted, the feared attacks in this case are motivated by revenge or retribution rather than a desire to overcome the family membership. Accordingly, the following order will entered.

ORDER: The motion is denied.

/s/
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Files: A095 218 801 – Houston, TX
A095 218 802

Date: OCT 14 2008

In re: RUDINA DEMIRAJ
REDIOL DEMIRAJ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:
Yvette M. Mastin, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

Based on a motion filed by the respondents, the United States Court of Appeals for the Fifth Circuit has remanded the record for us to reconsider our decision dated November 21, 2006, dismissing the appeal from an Immigration Judge decision. The court ordered that, in light of recent case law, we reconsider our previous agreement with the Immigration Judge that the respondents failed to demonstrate their eligibility for asylum, withholding of removal or protection under the Convention

Against Torture. See *Gonzales v. Thomas*, 547 U.S. 183 (2006). Upon reconsideration, we continue to agree with the Immigration Judge that the respondents have failed to show their problems in Albania were on account of a ground protected under the Immigration and Nationality Act. The appeal will again be dismissed.

The respondents are the wife and child of an individual who testified against an Albanian in a criminal case in the United States. The respondents fear reprisals from associates of this individual and argue this fear of persecution is on account of their family membership, which should be considered a particular social group. The respondents have the burden of demonstrating both that they are members of a particular social group and that the past or feared persecution satisfies the "on account of" requirement for asylum. *See* 8 C.F.R. § 1208.13(b). We recently affirmed our conclusions articulated previously in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), overruled in part on other grounds, *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987) that "persecution on account of membership in a particular social group" refers to:

> persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.

Matter of C-A-, 23 I&N Dec. 951, 955 (BIA 2006) (citing *Matter of Acosta*, *supra*, at 233-34).

In *Matter of C-A-*, *supra*, we observed that our decisions involving social groups have considered the recognizability, i.e., the social visibility, of the group in question, and we concluded that groups based upon innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups. See *Matter of C-A-*, *supra*, at 959. Thus, we have affirmed that a family relationship or kinship ties can form the basis of a particular social group claim. This, however, does not end our inquiry.

If we accept that the respondents have established membership in a particular social group, we must proceed with a determination as to whether they met their burden of establishing that the harm and threats of harm they fear are on account of their membership in that group. See *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (addressing requirement that asylum applicant produce some evidence of motive); *Borja v. INS*, 175 F.3d 732, 736 (9th Cir. 1999) (an applicant must produce some evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or implied protected ground); *see generally Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997) (asylum applicants may not establish persecution on account of a protected ground by inference, unless the inference is one that is clearly to be drawn from the facts).

On the record before us, we find that the respondents have not met the burden of establishing the required nexus. As we observed in *Matter of Kasinga*, 21 I&N Dec. 357, 367 (BIA 1996), establishing the required nexus to a particular social group does not necessarily mean establishing that the actors carrying out the harm were motivated by a desire to punish. Nexus may be shown, not only where there is a desire to punish membership in the particular social group, but also where there is a desire to overcome what is deemed to be an offensive characteristic identifying the particular social group. *See Matter of Kasinga*, *supra*, at 367 (addressing situation in which female genital mutilation could be done with subjectively benign intent but was done in significant part to overcome the sexual characteristics of young women of the tribe who had not been subjected to such mutilation); *see also Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997) (addressing mistreatment of homosexuals to "cure" them and rejecting concept that intent to punish was an element of persecution). The respondents here must identify some evidence, direct or circumstantial, that the assailants are motivated, at least in part, by a desire to punish or to overcome the family relationship to the lead respondent's husband. *Compare Matter of J-B-N & S-M-*, 24 I&N Dec. 208 (BIA 2007) (holding that in cases governed by section 101(a)(3) of the REAL ID Act, the applicant alleging mixed motives must produce direct or circumstantial evidence that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for the claimed persecution).

Here, the individuals involved were seeking revenge against the lead respondent's husband for his testimony, and seek to harm this individual by attacking the respondents. We do not ordinarily find that acts motivated solely by criminal intent, personal vendettas, or personal desires for revenge establish the required nexus. *See Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996). We do acknowledge the fact that persecutors may have different motives for engaging in acts of persecution and proving the actual, exact reason for persecution or feared persecution may be impossible in many cases. *Matter of S-P*, *supra*. "An applicant does not bear the burden of showing the exact motivation of a 'persecutor' where different reasons for actions are possible." *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988). The "standard for review is whether the applicant has produced evidence from which it is reasonable to believe that the harm was motivated by a protected ground." *Matter of S-P-*, *supra*. On this record, although the respondents are members of a particular social group, we do not find they fear persecution on account of this membership. Rather, the problems they may face are on account of revenge the assailants are attempting to extract against the lead respondent's husband. Although there has been more recent case law, of which we have the benefit in considering the respondents' application, we note that the Immigration Judge reached a similar conclusion in his decision of September 12, 2005 (I.J. at 8). The motives presented, revenge or retribution, are not the same as a desire to punish or to overcome the family relationship. We find that the respondents

did not establish the required nexus. Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

/s/
FOR THE BOARD

U.S. Department of Justice

Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Files: A95 218 801 – Houston, TX
A95 218 802

Date: NOV 21 2006

In re: RUDINA DEMIRAJ
REDIOL DEMIRAJ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:
Yvette M. Mastin, Esquire

ON BEHALF OF DHS: Michael R. Leppala
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)A)(i)] - Present without being admitted or paroled (both respondents)

APPLICATION: Asylum; withholding of removal; relief under the Convention Against Torture

The respondents, mother and son, natives and citizens of Albania, have timely filed an appeal from an Immigration Judge's decision dated September 12, 2005, denying their application for asylum and withholding of removal under sections 208(a) and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1231(b)(3), respectively, as well as their application for relief under the Convention Against Torture (CAT). *See* 8 C.F.R. §§ 1208.13, 1208.16-18. The respondents' appeal will be dismissed.

We adopt and affirm the September 12, 2005, decision of the Immigration Judge denying the respondents' application for asylum, withholding of removal, and relief under the CAT. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"). The respondents have not demonstrated that they have suffered any harm rising to the level of persecution on account of a protected ground in their native Albania. The respondents fear harm at the hands of the lead respondent's spouse's enemy because the spouse testified against that person in a criminal case in the United States. However, for the reasons discussed by the Immigration Judge and assuming the respondents' credibility, we agree that the respondents have failed to demonstrate that the lead

respondent's spouse's enemy seeks to harm them on account of political opinion, imputed political opinion, membership in a particular social group, or any other protected ground (I.J. at 8-10). As such, the respondents have not demonstrated a well-founded fear of persecution based on a protected ground under the Act were they to return to Albania. Likewise, the respondents have not established that it is more likely than not that they would be persecuted or tortured upon return to Albania. As the record fully supports the result of the Immigration Judge's decision, we affirm the conclusion that the respondents failed to demonstrate eligibility for asylum, withholding of removal, or protection under the CAT. In view of the foregoing, the following order shall be entered.

ORDER: The respondents' appeal is dismissed.

/s/
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Houston, Texas

File Nos.: A 95 218 801
A 95 218 802

September 12, 2005

In the Matters of	)	
	)	
DEMIRAJ, RUDINA	)	IN REMOVAL
DEMIRAJ, REDIOL	)	PROCEEDINGS
	)	
Respondents	)	

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended [present without admission or parole].

APPLICATIONS: Asylum; withholding of removal under Sections 208, 241(b)(3) of the Immigration and Nationality Act, as amended; and also withholding of removal under Article 3 of the Convention against Torture.

ON BEHALF OF RESPONDENTS:	ON BEHALF OF DHS
Yvette Mastin, Esquire 2323 South Moss Street Suite No. 420 Houston, TX 77057	Michael R. Leppala, Assistant Chief Counsel Houston, Texas

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondents are natives and citizens of Albania. The lead respondent and mother of the co-respondent was born May 28, 1976. The co-respondent was born June 15, 1993.

The Government issued a Notice to Appear dated December 27, 2001. The respondents appeared in court represented by counsel on January 17, 2002, admitted the allegations on the Notice to Appear and conceded the exclusion charges. The exclusion charges are not in controversy.

The sole issue before this Court and the respondent's applications are relief from removal.

On April 15, 2002 the Immigration Court issued an oral decision denying relief under Sections 208 and 241(b)(3) of the Immigration and Nationality Act as amended (the "Act"). And, Article 3 of the United Nations Convention against Torture and other forms of cruel, inhumane, or degrading treatment or punishment (Convention against Torture), and ordered the respondents removed to Albania.

The respondents timely filed an appeal. The Board of Immigration Appeals dismissed the appeal on October 27, 2003. However, on February 27, 2004, the Board of Immigration Appeals granted the respondents' unopposed motion to reopen. As a result the Board of Immigration Appeals remanded this case to the Immigration Court to consider new evidence relating to the respondents' applications for relief.

The lead respondent testified in support of her applications and she confirmed that she last arrived in the United States on October 15, 2000, and she has not departed from the United States since that time. Since her younger son, the co-respondent is in her custody and based on the prior record he also has remained in the United States since his arrival.

The respondent testified that her husband was wounded by a person she identified as Bill Bebini.

According to the respondent, her husband returned to Albania where he was shot with a firearm by Bill Bebini.

According to the respondent Bill Bebini informed her husband that if he testified against him her husband would have problems.

According to the respondent another family is involved in this retaliation. She identified the family of Sotir Shole.

According to respondent Shole has the same motive to retaliate against her family for her husband's service as a witness.

The respondent also testified that two of her nieces were kidnaped and taken to Italy for prostitution.

According to the respondent her husband's parents and a brother are at risk as well.

The respondent described a scenario involving another family whose daughter was kidnaped and taken to England and also the father of the family was stabbed and according to the respondent the government did nothing.

Specifically, the respondent testified that her husband was shot in March 7, 2003, and her nieces were kidnaped in April of 2003.

During cross-examination the respondent stated that her parents and two nieces remained in Albania and they received telephone calls around the time that her husband was shot. She also described in general terms an attempt to kidnap the older niece.

According to the respondent the Bebini family consist of less than 10 people in Albania.

The respondent presented her husband as a witness. He identified himself as Edmond Demiraj. The witness stated that he is the respondent's spouse and he confirmed that they have two child-

ren. The oldest is 12 years of age and is the co-respondent.

According to this witness the Bebini family and the Shole family might kill the respondents if they return to Albania.

The respondent described the incident in which he was shot. He stated that the Bebini's along with two others approached the witness and his brother outside their home at about 8 p.m. on March 7, 2003. According to the witness Bebini and one other man forced the respondent into a car at gun-point and the respondent's brother was struck in the back of the head with the butt of a pistol by a third man.

The witness stated that he was taken to a dark place and Bebini opened the door and struck the witness and specifically asked him why he had served as a witness against Bebini in the United States. After this, according to the witness, Bebini pointed a gun at the witnesses' abdomen and when the witness tried to deflect the gun Bebini pulled the trigger and the bullet passed through the witnesses' side and then he became unconscious.

According to this witness he awakened in a hospital where he was questioned by a police officer. The witness stated that a resident living nearby had heard the shot and had taken the witness to the hospital.

According to the witness, he was told by physicians that he was lucky the bullet did not enter into his kidney and he was treated with antibiotics.

According to the witness, he informed the police about who shot him and even provided a license plate for Bebini's car. Ultimately, according to the witness, the police let him know that this was a problem between him and Bebini which had arisen in the United States and the police would not provide protection.

According to the witness, Bebini called him after he was released from the hospital telling him that he would come for the witness again in the future when Shole returns from the United States.

This witness stated that Bebini is retaliating against him for services as a witness regarding a case in which an investigation of Bebini had taken place relating to the smuggling of aliens into the United States through Mexico.

The witness stated that he had worked for Bebini for four years before this incident. This witness stated that while he was in detention in Houston and taken to a room to visit with his attorney Bebini was present. He stated that if the witness testified against Bebini he would be in danger.

The witness stated that his nieces were kidnaped and taken to Italy for prostitution supporting his wife's testimony.

Based on the evidence in this record and affidavits the motives for kidnaping the nieces are the same as the motives for the shooting the respondent's husband.

This witness believes that the respondents could not live in any part of Albania because Bebini has much power due to money. During cross-examination the witness confirmed that his parents had been contacted looking for the witness and they had ultimately moved in with an uncle.

The oral decision of the Immigration Judge issued on April 15, 2002 is incorporated in its entirety in this decision with the following amendment to clarify the burden of proof with regards to asylum and withholding of removal which underlies the decision in this case.

The clarification is as follows: an applicant for asylum in the United States must qualify as a refugee within the meaning of Section 101(a)(42)(A) of the Act. INS v. Stevic, 467 U.S. 407 (1984). This means that the applicant is unwilling to return to and is unable to obtain the protection of the country of his or her nationality or the last country where the applicant had eventually resided because of persecution or a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion.

An applicant can establish persecution by a showing that he or she has been punished or harmed for one or more of the five statutory grounds. Matter

of S-P-, 21 I&N Decision 486 (BIA 1996). See 8 C.F.R. 1208.13(b)(1).

An applicant can establish a well-founded fear of persecution by a showing that a reasonable person would fear future persecution upon return to his or her native country or country of residence. Matter of Mogharrabi, 19 I&N Dec. 439 at 445 (BIA 1987).

A reasonable fear of persecution is not only a subjective fear. In addition, an applicant must establish that: (1) the applicant possesses a belief or characteristic connected to one of the five statutory grounds for asylum. (2) the applicant has been targeted for punishment or harm based on that belief or characteristic or falls within a group subjected to a pattern or practice of punishment or harm based on that belief or characteristic; (3) the persecutor is aware or could become aware that the applicant possesses that belief or characteristic or is a member of a group defined by that belief or characteristic; (4) the persecutor has the capability of punishing or harming the applicant; (5) the persecutor has the inclination to punish or harm the applicant; and (6) internal relocation to avoid the risk of relocation is not reasonable. Matter of Acosta, 19 I&N Decision 211 (BIA 1985) as modified by Matter of Mogharrabi supra. See 8 C.F.R. 1208.13(b)(2).

Withholding of removal under Section 241(b)(3) of the Act is mandatory rather than discretionary. To qualify for withholding of removal an applicant must establish a clear probability of persecution which means that persecution is "more

likely than not." INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); See 8 C.F.R. 1208.16.

In this case the respondents have supplemented their asylum applications with information about the acts of violence committed by a man by the name of Bebini and another man by the name of Shole since the last asylum hearing.

With regard to the testimony of the witnesses that were presented I believe that the witnesses are credible with regard to the descriptions of the incidents in Albania relating to the respondent's husband and father, and the lead respondent's nieces.

The evidence is clear that the motive for the attempted acts of violence and threats of violence against the respondent's husband and other family members are in retaliation for Mr. Demiraj serves as a witness against Bebini, and a criminal investigation in the United States relating to alien smuggling.

The respondent has argued that although this is the ultimate motive the mere fact that the respondent's family is at risk of harm is enough to qualify for asylum as a member of a particular social group which would be the Demiraj family.

Although Bebini and perhaps another person have apparently targeted members of the respondent's family for punishment the ultimate motive for this is in retaliation for service as a witness. In this regard, it is clear that Bebini and his associates are attempting to protect their criminal enterprises

and punish anyone who interferes or provides information that would threaten their criminal activity.

Based on this record it seems clear that but for Mr. Demiraj's service as a witness, the respondents would not be at risk from Bebini and his associates in Albania.

The narrow issue of law is whether the respondent has established a nexus between the motive of the persecutor and one of the five recognized grounds for asylum.

It is well so that people who are fleeing general conditions of violence or who fear retribution over personal matters do not qualify for asylum in the United States. See Matter of Mogharrabi at 447.

Although Bebini and his associates have targeted members of the respondent's family in Albania they are not being targeted because they are members of the family they are being targeted in retaliation to protect a criminal enterprise and, therefore, they are not being persecuted because they are members of a particular social group. Based on this assessment the facts in this case even though there might be a real threat of harm in Albania for the respondents they fail to establish a nexus between any of the five recognized grounds for asylum and the motive of the alleged persecutors.

None of the respondents have established any past persecution in Albania, the new evidence is simply evidence of future risk of harm.

With regard to the respondent's claim for withholding of removal under Section 241(b)(3) of the Act, since they have failed to carry their burden connected with asylum and failed to carry the heavier burden connected with withholding of removal which would be to establish that persecution would be more likely than not that they return to Albania.

With regard to withholding of removal under the Convention against Torture there is no new evidence which would indicate that the government of Albania has any interest in torturing the respondent. The respondent did not provide evidence to establish that the respondents would be subjected to the intentional infliction of severe mental or physical pain or suffering for an illicit purpose at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity while the targeted person is in the custody of physical control of the perpetrator. Acquiescence of a public official requires awareness of torture activity and a breach of a legal responsibility to intervene. See 8 C.F.R. 208.18(a)(7); In re J-E-, 23 I&N Decision 291 (BIA 2002).

Although the police in Albania apparently, assuming that the respondent's information is correct, are reluctant to get involved with the respondent's problems with Bebini and his associates, there is no evidence that the government of Albania has a policy of ignoring torture if they are specifically aware of occurrence at the time it is occurring and also there is no evidence that the respondents would be detained on behalf of the government and subjected to torture ~~if~~ with the government's acquiescence.

Based on this assessment, the facts in this case and the application of law the respondents have failed to establish eligibility for asylum under Section 208 of the Act and have also failed to establish eligibility for withholding of removal under Section 241(b)(3) of the Act. In addition they have failed to establish eligibility for withholding of removal under the Convention against Torture based on the new evidence submitted at this hearing.

The respondents made no other applications for relief. They have not applied for voluntary departure. Based on this record there is no alternative except to issue an order of removal to respondents' native country of Albania.

ORDER

IT IS HEREBY ORDERED that the respondents' applications for asylum under Section 208 of the Immigration and Nationality Act as amended are denied.

IT IS FURTHER ORDERED that the respondents' applications for withholding of removal under Section 241(b)(3) of the Immigration and Nationality Act as amended are denied.

IT IS FURTHER ORDERED that the respondents' applications for withholding of removal under the Convention against Torture are denied.

IT IS FURTHER ORDERED that the respondents be removed to Albania under Sec-

tion 212(a)(6)(A)(i) of the Immigration and Nationality Act as amended.

/s/
WILLIAM K. ZIMMER
Immigration Judge

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-60991

RUDINA DEMIRAJ; REDIOL DEMIRAJ,

Petitioners

v.

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

Respondent

ON PETITION FOR REHEARING EN BANC

(Opinion 1/11/2011, 5 Cir., ____, ____, F.3d _____)

Before BARKSDALE, DENNIS, and HAYNES, Circuit Judges,

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. AND 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. AND 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

3-21-2011

/s/
United States Circuit Judge

REHG6A