

No. 10-1545

IN THE
Supreme Court of the United States

RUDINA DEMIRAJ AND REDIOL DEMIRAJ,
Petitioners,

v.

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

**On Petition For A Writ Of Certiorari
To The U.S. Court Of Appeals
For The Fifth Circuit**

**BRIEF FOR FORMER FEDERAL LAW-
ENFORCEMENT OFFICERS AS *AMICI*
CURIAE IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are more than 40 former federal law-enforcement officers, including a former Attorney General and a former Director of the FBI.² They know firsthand that to fight crime effectively, law-enforcement officers must have the cooperation of ordinary civilians. *Amici* also know, however, that deciding to cooperate is not always easy. In particular, in *amici*'s experience, civilians very likely will not cooperate when they fear that doing so would put their families in danger.

In the fight against international organized crime, the Immigration and Nationality Act's ("INA") asylum provision helps calm this fear. "Insiders" with incriminating information on international crime syndicates tend to come from the parts of the world that these organizations regularly terrorize. As a result, if they live in the United States, they may have family living with them that are subject to deportation back to those regions because of their immigration status. The insider's cooperation thus puts these relatives in danger, because it is highly likely that, if they are deported, they will be targeted for retaliation. The INA's asylum provision helps

¹ Each party has consented to the filing of this brief. No party's counsel authored this brief in whole or in part. And no party, party's counsel, or other person other than *amici* and their counsel made a monetary contribution intended to fund this brief's preparation or submission.

² The full list of *amici* appears in the Appendix.

solve this problem by making them eligible to remain in this country and avoid deportation. *See* 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A).

The INA's asylum provision thus makes the insiders more likely to cooperate: It assures them that doing so will not thrust their families into harm's way. *Amici* are concerned, however, that the Fifth Circuit's decision below prevents the INA's asylum provision from serving this critical law-enforcement purpose. Accordingly, they respectfully urge this Court to grant review.

INTRODUCTION

Fighting crime takes a team effort. Law-enforcement officers, like police and prosecutors, play the most visible roles, but ordinary civilians make an invaluable contribution, by serving as witnesses and informants. As Congress put it, “[w]ithout the cooperation of [civilians], the criminal justice system would cease to function.” 18 U.S.C. § 1512, Congressional Findings and Declaration of Purposes. To be sure, civilians do cooperate often. But, there is a powerful force acting in the opposite direction: the fear that doing so would endanger their families.³

³ *See, e.g., Russian Organized Crime in the United States: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs*, 104th Cong. 192 (1996) [hereinafter *Russian Organized Crime*] (statement of Detective Bill Pollard, Organized Crime Intelligence Division, Los Angeles Police Department); *Terrorist Defectors: Are We Ready?: Hearing Before the S. Comm. on Governmental Affairs*, (continued...)

The world's most powerful international criminal organizations—groups, like the Colombian drug cartels and the Russian and Albanian mobs, that terrorize entire regions of the world, often with assistance from corrupt local governments—thrive on this fear. They know that the people who stand to do them the most harm by cooperating are their trusted insiders, many of whom come from those regions and still have family there. See H.R. Rep. No. 101-676, at 4 (1990); *Russian Organized Crime* at 172 (statement of Anonymous Russian Criminal), 179 (statement of Detectives Daniel Mackey and Ralph Cefarello, New York City Police Department). And the insiders know that these criminal organizations enjoy carte blanche in those regions, so cooperating against them would put relatives living there in serious jeopardy of being harmed. *Protection of Foreign Nationals* at 8, 10 (Mermelstein testimony), 26 (testimony of Richard Gregorie, former U.S. Attorney, Southern District of Florida). Insiders also know that cooperating would put

102d Cong. 28 (1992) [hereinafter *Terrorist Defectors*] (statement of Neil J. Gallagher, Chief, Counter-terrorism Section, FBI); *Fed. Witness Security Program and Protection of Foreign Nationals: Hearing Before the Government Information, Justice, and Agriculture Subcomm. of the H. Comm. on Governmental Operations*, 101st Cong. 8 (1990) [hereinafter *Protection of Foreign Nationals*] (testimony of Max Mermelstein, Federally Protected Witness); *International Drug Control: Hearing Before the S. Comm. on the Judiciary*, 101st Cong. 106 (1989) [hereinafter *International Drug Control*] (testimony of Robert W. Merkle, former U.S. Attorney, Middle District of Florida).

relatives living in the United States whose immigration status makes them removable to those regions in just as much danger: Interacting with law enforcement likely would prompt an inquiry into the family's immigration status, and removal would spell certain victimization. As a Colombian drug cartel informant put it, "they . . . kick my relatives out of the country" and back to Colombia, "and instant death awaits." *Id.* at 10 (Mermelstein testimony); see *International Drug Control* at 106 (Merkle testimony).

This is where the INA's asylum provision comes in. It makes a foreign national living in the United States eligible to avoid deportation and remain in this country if she demonstrates a "well-founded fear of persecution on account of . . . membership in a particular social group" should she be deported to her country of origin. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A). And as a practical matter, only in the "exceedingly rare" case will someone who is asylum-eligible not actually be granted asylum. *Zuh v. Mukasey*, 547 F.3d 504, 507 (4th Cir. 2008); Philip G. Schrag et al., *Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum*, 52 Wm. & Mary L. Rev. 651, 655 n.5 (2010). Thus, by cooperating with law enforcement, an insider enables his family members to obtain asylum here, because if deported they almost certainly will face retribution on account of their membership in his family.

Accordingly, when Edmond Demiraj agreed to cooperate against Albanian mobster Bill Bedini, he had every reason to believe that the INA's asylum provision would protect his wife and son by making

them eligible to remain in the United States and avoid deportation to Albania. Albania has a “blood feud” culture: If one person “wrongs” another, the “wronged” person is honor-bound to retaliate against the family of the “wrongdoer.” *See* Pet. App. 8a. By cooperating against such a powerful and influential Albanian, Mr. Demiraj would be considered the “wrongdoer.” Thus, if returned there, Mr. Demiraj’s wife and son doubtless would face Bedini’s wrath. *Id.* at 13a-14a. Indeed, once Mr. Demiraj began to cooperate, Bedini made this reality crystal clear: He sold Mr. Demiraj’s nieces into prostitution, pistol-whipped his brother, and even kidnapped, beat, and shot Mr. Demiraj when he returned to Albania. *Id.* at 7a-8a, 40a-41a. There is no doubt that if they are deported back to Albania, Mr. Demiraj’s wife and son will be next. *Id.* at 13a-14a.

Nevertheless, a divided panel of the Fifth Circuit held that Mr. Demiraj’s wife and son are not asylum-eligible. In the majority’s view, the Albanian mob will not terrorize them because of their status as members of Mr. Demiraj’s family. Rather, the mob will be motivated to exact payback “because they are people who are important to Mr. Demiraj.” *Id.* at 14a. According to the majority below, the INA’s asylum provision does not afford protection from retaliation for a family member’s actions. It simply protects individuals against persecution on account of family membership “as such,” for example, when “a persecutor [seeks] to terminate a line of dynastic succession.” *Id.* at 13a-14a.

Dissenting from the ruling below, Judge Dennis rejected the majority’s interpretation of the INA’s asylum provision. He recognized that it protects

individuals against persecution having “some nexus” with family membership, and that retribution for Mr. Demiraj’s cooperation “clearly” meets this requirement. *Id.* at 19a. After all, Mr. Demiraj’s wife and son are important to him—and therefore are certain targets—because they are his family. *See id.* at 21a.

This Court should grant the petition for a writ of certiorari for at least three reasons. *First*, the Fifth Circuit’s ruling discourages cooperation by insiders with the most valuable incriminating information in the fight against international organized crime. Specifically, it renders the INA’s asylum provision unavailable to ensure that their removable family members living in the United States can remain in the United States and avoid deportation in the event the insiders cooperate.

Second, by making insiders less likely to cooperate with law enforcement, the majority’s decision frustrates congressional intent. Specifically, it undermines Congress’s goal of ensuring that insiders do cooperate. That goal is reflected by the comprehensive statutory scheme—including, *inter alia*, other provisions of the INA—that protects cooperators’ families from retaliation, and the majority below provided no support for its decision to interpret the INA’s asylum provision inconsistently with that scheme.

Third, without the correct application of the INA’s asylum provision, the comprehensive statutory scheme would fail. The majority dismissed the INA’s asylum provision as irrelevant to the insider-cooperation calculus. To the contrary, it is indispensable.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Makes Insiders Who Are Crucial To The Fight Against International Organized Crime Less Likely To Cooperate With Law Enforcement.

Protecting the country from the world's most powerful international criminal organizations requires insider cooperation. These groups plan their crimes secretly. Without insiders' help, law-enforcement officers cannot intercept them at the preparation stage. They execute their crimes skillfully. Without insiders' help, law-enforcement officers cannot catch them in the act. And they evade capture consistently. Without insiders' help, law-enforcement officers cannot apprehend them so that they will be made accountable for their actions. *See Protection of Foreign Nationals* at 40 (statement of Gerald Shur, Senior Associate Director, Office of Enforcement Operations, Criminal Division, Department of Justice). To neutralize these dangerous groups, law-enforcement officers need cooperation from people who know how they operate, what they are planning on doing, and how they are planning on doing it. *See id.*; U.S. Dep't of Justice, *Overview of the Law Enforcement Strategy to Combat International Organized Crime* 1, 10, 15 (2008).

As an empirical matter, the people these organizations trust with this information tend to come from the parts of the world that the organizations call home. The Colombian drug cartels recruit people with connections to Colombia. *See*

Protection of Foreign Nationals at 9-10 (Mermelstein testimony). The Russian mob recruits people with connections to Russia. *See Russian Organized Crime* at 172 (statement of Anonymous Russian Criminal). And the Albanian mob, even when selecting house painters like Mr. Demiraj, recruits people with connections to Albania. *See Admin. Rec. 272*. Should these insiders have any relatives living in the United States, it is likely that some of them will be subject to removal to the criminal organizations' home bases. Unless the Government can protect these relatives, the insiders will not cooperate.

Consider Max Mermelstein. Mermelstein was a mechanical engineer who married a Colombian woman and, soon after, in the late 1970s and early 1980s, began smuggling drugs for that country's Medellin cartel. He worked tirelessly to improve the cartel's productivity and expand its business, and as a result was rapidly promoted, eventually becoming a confidant to Medellin leaders including Pablo Escobar. Mermelstein established himself as Escobar's go-to operative and began coordinating the cartel's shipments worldwide. If the cartel was moving drugs, Mermelstein knew from where, to where, how much, and when. *See generally Protection of Foreign Nationals* at 7-20 (Mermelstein testimony).

The U.S. Government had been pursuing Escobar and the cartel for some time for federal drug and money-laundering crimes, but never had been able to obtain a significant indictment. Then, agents arrested Mermelstein. They soon discovered that if they could tap Mermelstein's impressive reservoir of

insider information, they could prosecute Escobar. *See generally id.*

They offered Mermelstein a place in the federal Witness Security Program, a new identity, and round-the-clock security. But Mermelstein agreed to cooperate only after he was promised that his Colombian family members who were not lawfully present in the United States would not be deported back to Colombia, where the cartel would be lying in wait. *Id.* at 10 (Mermelstein testimony). Mermelstein went on to provide testimony that allowed the Government to prosecute not only Escobar, but many other Medellin leaders as well. *See generally id.* at 7-20 (Mermelstein testimony). “Justice Department officials said [Mermelstein] has provided narcotics investigators with some of the best intelligence data on the [Medellin] cartel and its methods.” Selwyn Raab, *Expert Witness Details Secrets of a Drug Cartel*, N.Y. Times, Nov. 6, 1988.

Mermelstein said that “if the cartel still had me on the payroll, I could tell them how to go in and wipe out one quarter of the U.S. witnesses.” *Protection of Foreign Nationals* at 22 (Gregorie testimony) (internal quotation marks omitted). By rendering the INA’s asylum provision unavailable to protect insiders’ families, the decision below makes future Max Mermelsteins more likely to stay “on the payroll” of—rather than cooperate against—the criminal syndicates they stand to help law enforcement bring to justice.

II. Ensuring That International Criminal Enterprise Insiders Cooperate With Law Enforcement Is A Clear Congressional Goal.

Congress is aware that insiders like Max Mermelstein are invaluable to the fight against international organized crime. *Cf.* 18 U.S.C. § 1512, Congressional Findings and Declaration of Purposes. Indeed, full and frank insider cooperation has been a paramount criminal-justice objective dating back to 1850s' English common law. *See Briscoe v. LaHue*, 460 U.S. 325, 332-34 (1982) (citing, *inter alia*, *Henderson v. Broomhead*, 4 H. & N. 569, 578-79, 157 Eng. Rep. 964, 968 (Ex. 1859)). Congress also knows that insiders will not provide this cooperation unless they are assured that their families will be kept safe. Accordingly, Congress has created a comprehensive scheme to ensure that insiders' families are protected from harm. For example,

- The Freedom of Information Act may not be used to obtain police records concerning an individual's cooperation with law enforcement if disclosure would reveal his identity or otherwise "could reasonably be expected to endanger the life or physical safety of" his family. 5 U.S.C. § 552(b)(7)(C)-(D), (F).
- Retaliating against a cooperator by causing or attempting to cause his family serious physical harm or injury to tangible property is a federal offense. 18 U.S.C. § 1513(a)-(b); *see* S. Rep. No. 97-532, at 20 (1982) (urging enactment of § 1513 because, *inter alia*, then-

current law “d[id] not clearly proscribe retaliation against [a cooperator’s] relatives”).

- The Government may seek a civil protective order to stop someone who has engaged in a pattern of retaliatory harassment against a cooperator’s family. *Id.* § 1514(a).
- The Attorney General may enroll certain cooperators and their families facing imminent danger in the federal Witness Security Program so that they may be re-located and given new identities. *Id.* § 3521.

Moreover, Congress has used the INA to provide protection for the families of precisely the type of insiders who can contribute most to the fight against international organized crime. For example, as part of the Violent Crime Control and Law Enforcement Act of 1994, Congress amended the INA to permit the Attorney General to grant “S visas” each year to up to 250 foreign nationals who possess “critical reliable information concerning a criminal organization” or “terrorist organization.” 8 U.S.C. §§ 1101(a)(15)(S)(i)-(ii), 1184(k)(1). The Attorney General may also grant S visas to the insider’s immediate family. *Id.* The S visa allows the insider and his immediate family to remain in the country for three years if the insider cooperates. *Id.* § 1184(k)(2). If his information “substantially contribute[s] to the success of an authorized criminal investigation or the prosecution of an individual” or to “the prevention or frustration of an act of terrorism,” the Attorney General may upgrade him

and his immediate family to permanent-resident status. *Id.* § 1255(j).

This statutory scheme clearly reflects Congress's overarching intent to assure insiders that cooperating with law enforcement will not put their families in danger. Accordingly, every other court of appeals to consider the issue has interpreted the INA's asylum provision to further this legislative goal. Pet. 12-17 (discussing cases). The majority below, however, improperly declined to read the INA's asylum provision with this mission in mind. *See United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

III. If The INA's Asylum Provision Is Unavailable To Serve Its Law-Enforcement Function, Congress's Goal Of Ensuring Insider Cooperation Cannot Be Achieved.

The INA's asylum provision is indispensable to the statutory scheme that encourages international organized crime insiders to cooperate with law enforcement. All the other federal statutes designed to encourage cooperation by protecting family members, such as those discussed in Part II above, cannot fully accomplish Congress's goal unless the INA's asylum provision serves its law-enforcement function.

The INA's asylum provision strikes the ideal balance between reactive measures, such as the obstruction-of-justice laws, and proactive measures, such as enrollment in the Witness Security Program. Obstruction statutes, such as 18 U.S.C. § 1513,

which criminalizes retaliating against a cooperator's family, certainly provide insiders' families with a measure of safety. But these statutes, like all criminal statutes, are largely reactive. They punish an offender after he has already engaged in criminal conduct.

The Witness Security Program, on the other hand, may sometimes be too proactive. Families who have built their lives in a particular part of the United States are forced to abandon their homes and the lives they have built. The program gives them new identities and re-locates them far away from the friendships and community bonds they worked so hard to create. As *amici* know from experience, and as other former law-enforcement officers have stated under oath, “[t]he biggest problem is that [the program] is not a social service agency They will keep you alive,” but they will not go out of their way to do much else. *Protection of Foreign Nationals* at 21 (Gregorie statement). In some instances, this problem may be insurmountable. *See id.* at 10 (Mermelstein testimony) (“[Mermelstein’s brother-in-law] was so depressed with the program that he committed suicide”); *see also* H.R. Rep. No. 101-676, at 7-8; *Oversight of the Department of Justice Witness Security Program: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 24-25 (1996) (testimony of anonymous Witness Security Program participant).

The INA’s asylum provision strikes a careful balance. It allows the insider’s family to remain in the United States and avoid returning to their home country, where they are likely to face retaliation. At

the same time, it does not require the family members to turn their lives upside down, as they would be forced to do under the Witness Security Program. Instead, it lets the removable family members stay where they are.

Even the INA's S visa provision, which offers an insider's family similar protection, is no substitute for the asylum provision:

- The number of insiders who can receive S visas (and who therefore can apply for derivative privileges for their families) is congressionally capped at 250 per year. 8 U.S.C. § 1184(k)(1). By contrast, Congress has put no cap on the number of yearly grants of asylum.
- Only immediate family members can qualify for derivative S visa status. *Id.* § 1101(a)(15)(S). The INA's asylum provision, however, makes persecution of any relative a ground for asylum eligibility.
- An S visa holder cannot remain in the United States permanently unless his cooperation actually results in a "success[ful]" investigation or prosecution or in "the prevention or frustration" of an act of terrorism. *Id.* § 1255(j). By contrast, the INA's asylum provision recognizes that a cooperator's family may still face retaliation in their home country even if the cooperation did not lead to a conviction or to the prevention of a terrorist attack. Therefore, the INA's

asylum provision does not tie how long the cooperator's family can remain in the United States to whether law enforcement successfully brought the target of the cooperation to justice or thwarted the target's terrorist aims (either of which may depend upon a variety of factors other than the quality of the insider's cooperation). *See id.* § 1158(c)(2).

CONCLUSION

The petition for a writ of certiorari should be granted.

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