No. 10-1545

IN THE

Supreme Court of the United States

RUDINA DEMIRAJ AND REDIOL DEMIRAJ,
Petitioners,

v.

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

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

BRIEF FOR *AMICI CURIAE* HUMAN RIGHTS AND REFUGEE ORGANIZATIONS SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether an asylum applicant who demonstrates persecution in retaliation for the acts of a family member demonstrates persecution "on account of … membership" in the family.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are human rights, refugee, and legal services organizations that advocate for or work with refugees and asylees. *Amici* regularly work with and

[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part and that no person or party, other than *amici* or their counsel, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the parties' written consent, which is on file with the Clerk.

on behalf of foreign nationals whose claims for asylum are based on kinship ties or family membership.

Human Rights Watch is the largest United States-based international human rights organization. It was established in 1978 to investigate and report on violations of fundamental human rights in some 90 countries worldwide. Through its refugee program, Human Rights Watch monitors, investigates, and documents human rights abuses against refugees, asylum seekers, and internally displaced persons, and advocates for the rights and humanitarian needs of all categories of forcibly displaced persons around the world. Human Rights Watch regularly appears before this Court as *amicus curiae*, and this Court has relied upon Human Rights Watch's research in its decisions. *See, e.g.*, *Graham* v. *Florida*, 130 S. Ct. 2011, 2033 (2010).

The Immigrants' Rights Project of Public Counsel provides representation to individuals seeking asylum in the United States, representing clients from all over the world for whom the United States is the last place of refuge and return to their home country may mean torture or death. Founded in 1970, Public Counsel is the largest pro bono public interest law firm in the world. The Immigrants' Rights Project of Public Counsel represents over 100 asylum seekers each year. The Immigrants' Rights Project of Public Counsel regularly appears before this Court as *amicus curiae*. *See, e.g.*, Brief for Organizations Representing Asylum Seekers as *Amici Curiae* in Support of Petitioner, *Carachuri-Rosendo* v. *Holder*, No. 09-60, 2010 WL 565218 (U.S. Feb. 4, 2010).

Immigration Equality is a national organization that works to end discrimination in immigration law against those in the lesbian, gay, bisexual, and trans-

gender community and immigrants who are living with HIV or AIDS. Incorporated in 1994, Immigration Equality helps those affected by discriminatory practices through education, outreach, advocacy, and the maintenance of a nationwide resource network and a heavily-trafficked website. Immigration Equality also runs a pro bono asylum program and provides technical assistance and advice to hundreds of attorneys nationwide on sexual orientation, transgender, and HIV-based asylum matters. Immigration Equality regularly appears in federal courts as *amicus curiae*.

Since 1997, the Women's Refugee Commission (WRC) has advocated for the protection, access to safety, and right to due process of refugee, migrant, and asylum-seeking women, children, and families. WRC advocates before the Departments of Homeland Security, Health and Human Services, Justice, and State and before Congress to promote immigration enforcement policies and procedures that reaffirm family unity, protect children, unburden state social-service organizations, and strengthen society as a whole. WRC's work on asylum includes serving as an expert resource to attorneys and advocates and government actors.

Diocesan Migrant & Refugee Services, Inc. (DMRS) is the only full-service immigration legal aid clinic serving low-income immigrants and refugees residing in the southwestern United States. A ministry of the Catholic Diocese of El Paso, Texas, DMRS began providing legal services in 1987 to Central and South American refugees. Since then, DMRS has expanded its services to provide legal assistance to individuals and families facing removal (formerly deportation) from the United States and individuals seeking to attain citizenship, as well as assistance with the family-based

immigration process, with special focus on the unification and reunification of families and on victims of domestic violence and human trafficking.

Capital Area Immigrants' Rights (CAIR) Coalition is a non-profit legal services organization founded in 1999. CAIR Coalition provides individuals and organizations representing asylum seekers and other immigrants with education and training services, leadership on public policy development, and forums for information sharing. In addition, CAIR Coalition is the only organization with a legal service program dedicated exclusively to working with individuals, including arriving asylum seekers, who are detained by the Department of Homeland Security in Virginia and the Washington metropolitan area.

The Iraqi Refugee Assistance Project (IRAP) was founded in 2008 to assist displaced Iraqi nationals with immigration and refugee matters. Among other things, IRAP represents more than 1,000 Iraqi nationals seeking refuge in the United States. A significant portion of IRAP's clients have faced persecution and have been forced to flee their homes as a direct result of their familial affiliations.

Amici are concerned that the decision below, if left in place, will result in the improper rejection of meritorious claims for asylum or withholding of removal, contrary to the will of Congress as reflected in the Immigration and Nationality Act. *Amici* urge that this Court grant the petition for certiorari and reverse the judgment of the Fifth Circuit.

SUMMARY OF ARGUMENT

Petitioners presented direct, undisputed evidence of a well-founded fear of persecution "on account of" membership in their family, specifically their close kinship to Edmund Demiraj. Their persecutors went so far as to tell Mr. Demiraj's nieces, whom the persecutors have similarly targeted and who have already received asylum, that they were targeted as "payback to your [U]ncle Edmund," that "their family was going to pay for everything," and that "you're going to pay for your sisters and your uncle." *Demiraj* v. *Holder*, 631 F.3d 194, 202 (5th Cir. 2010) (Dennis, J., dissenting). It is unusual for persecutors to explain so clearly that their victims are being targeted because of their family membership.

Despite these uncontroverted facts, and despite the Fifth Circuit's acknowledgement that a family is a "particular social group" within the meaning of section 101(a)(42)(A) of the Immigration and Nationality Act, the Fifth Circuit rejected Petitioners' asylum claim. The court's conclusion rested on an artificial and unsupported distinction between family-based persecution deriving from anger at an individual family member's actions—which the Fifth Circuit ruled was insufficient—and persecution deriving from a more generalized, deep-seated hatred of the entire family. That distinction, which appears nowhere in the INA, would eliminate asylum protection for numerous worthy applicants seeking protection "on account of" membership in a family. Indeed, the Fifth Circuit's reasoning risks affecting asylum claims based on other protected grounds, as well as claims for withholding of removal. The Court should grant certiorari and reverse the judgment below.

ARGUMENT

I. THE FIFTH CIRCUIT'S NOVEL RULE IS INCORRECT

Membership in a family is a "common, immutable characteristic" that "members of the group … cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of Acosta*, 19 I. & N. Dec. 211, 233-234 (BIA 1985), *overruled on other grounds*, *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). It is accordingly settled that a family is a "particular social group" and that a "well-founded fear of persecution on account of" family membership establishes asylum eligibility. 8 U.S.C. § 1101(a)(42)(A); *see also Gebremichael* v. *INS*, 10 F.3d 28, 36 (1st Cir. 1993) ("There can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family."); *Al-Ghorbani* v. *Holder*, 585 F.3d 980, 995 (6th Cir. 2009); *Bernal-Rendon* v. *Gonzales*, 419 F.3d 877, 881 (8th Cir. 2005); *Lopez-Soto* v. *Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004).

Asylum eligibility turns on whether the applicant has suffered or reasonably fears suffering persecution "on account of" a protected ground, including "membership in a particular social group." 8 U.S.C. § 1101(a)(42)(A). Interpreting the phrase "on account of," this Court has stated that simply showing that persecution is "*because of*" a protected ground is sufficient to satisfy this requirement. *INS* v. *Elias-Zacarias*, 502 U.S. 478, 483 (1992); *see also id.* at 481 n.1; *Parussimova* v. *Mukasey*, 555 F.3d 734, 739 (9th Cir. 2009) ("As the Supreme Court held in *Elias-Zacarias*, the term 'on account of' in § 1101(a)(42)(A) requires an asylum

applicant to prove that she was persecuted '*because of*' a protected ground." (emphasis in original)).

The Fifth Circuit's rule, however, requires an additional inquiry into the *origins* of the persecutor's motives. Where the persecution originates from a desire to retaliate for an individual family member's actions or in order to harm an individual other than the applicant, the Fifth Circuit holds the applicant ineligible for asylum because, in its view, the persecution is not due to "membership in the … family *as such*." *Demiraj*, 631 F.3d at 199; *see also id.* at 200 n.6 ("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*." (emphasis added)). The Fifth Circuit appears to limit asylum for family-based persecution to cases where the persecution manifests a "generalized desire to hurt" the family, *id.*, such as would accompany an attempt to "terminate a line of dynastic succession," *id.* at 199.

The Fifth Circuit's approach is flawed for three reasons. *First*, the court incorrectly grafted an added element of malicious intent onto the requirements for asylum. The requirement that an asylum applicant establish that her persecution is motivated by a generalized, deep-seated hatred of her family, rather than by a desire to punish or harm another member of that family, finds no support in the INA, and is contrary to prior decisions from the BIA and other courts of appeals. *See, e.g.*, *Matter of Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996) (holding that "'punitive' or 'malignant' intent is not required for harm to constitute persecution"); *Tchoukhrova* v. *Gonzales*, 404 F.3d 1181, 1194 (9th Cir. 2005) (noting that "lack of malicious intent on the part of the persecutor is irrelevant" for purposes of determining whether persecution occurred), *vacated*

and remanded in light of Gonzales v. *Thomas*, 547 U.S. 183 (2006).[2]

Second, the Fifth Circuit's holding effectively swallows the rule that family membership is a protected social group, because victims of persecution on account of family membership are regularly—and perhaps invariably—targeted because of the actions of another member of their family. "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), and persecution connected to family membership is frequently traceable to dissatisfaction with a particular family member's past conduct. *See, e.g.*, *Crespin-Valladares* v. *Holder*, 632 F.3d 117, 121, 125-127 (4th Cir. 2011) ("[G]ang members often intimidate their enemies by attacking those enemies' families."); *Torres* v. *Mukasey*, 551 F.3d 616, 630 (7th Cir. 2008) (finding that applicant was eligible for asylum because he was targeted "to pay for [his] brothers' [desertion] because [he] was the last one that remained"); *Vumi* v. *Gonzales*, 502 F.3d 150, 154 (2d Cir. 2007) (finding that membership in the family of a suspect in an assassination plot could qualify as a protected social group); *Bernal-Rendon*, 419 F.3d at 879 (family targeted by guerillas because of sister's government employment was eligible for asylum); *Lopez-Soto*, 383

[2] To be sure, as this Court held in *Elias-Zacarias*, the INA "makes [the persecutor's] motive critical." 502 U.S. at 483. This much is clear from the statute's requirement that persecution be "on account of" a protected ground. But here, the record is clear that Petitioners reasonably fear persecution due to their familial relationship to Mr. Demiraj. The Fifth Circuit's error was in requiring Petitioners to demonstrate *why* their persecutors possessed that persecutory motive.

F.3d at 236 (noting that a gang "will target a family member of an individual who they have already killed for refusing to join the gang ... [to avoid] that person [] seek[ing] revenge on [the gang] by joining a rival gang"); *Chen* v. *Ashcroft*, 289 F.3d 1113, 1116 (9th Cir. 2002) (child punished for crime of mother was eligible for asylum).

Persecutors may also target family members in order to elicit information about their relatives or to force their relatives out of hiding. *See, e.g.*, *Gebremichael*, 10 F.3d at 36 ("[T]he Ethiopian security forces 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. As a result ... no reasonable factfinder could fail to find that petitioner was singled out for mistreatment because of his relationship with his brother.").

The Fifth Circuit's rule would also eliminate asylum protection in situations where the government seeks to persecute a political opponent's family to discourage or punish the political opponent. While such cases occasionally turn on the imputation of political opinion to the family members, that theory does not always apply, because "[o]ft times persecutors target children of political dissidents not because they have imputed the parents' political opinion to the children, but as a means of harassing, intimidating, and influencing the behavior of the parent." *Mema* v. *Gonzales*, 474 F.3d 412, 417 (7th Cir. 2007); *see also id.* ("If [applicant] was or will be persecuted because of his relationship to [his father], either because the Socialists imputed [his father's] political opinions to [applicant], or as a means of punishing or influencing [his father], [applicant] is

entitled to asylum."); *BinRashed* v. *Gonzales*, 502 F.3d 666, 672-673 (7th Cir. 2007) (noting that applicant might be persecuted on account of membership in his father's family, due to his father's political views); *Djouma* v. *Gonzales*, 429 F.3d 685, 688 (7th Cir. 2005) ("[T]he term 'membership in a particular social group' would cover this case regardless of [applicant's] political activities or opinions if Chad had decided, as a method of collective punishment of its political enemies, to persecute the members of their families.").

Third, the Fifth Circuit's rule effectively holds that nobody is persecuted "on account of" family membership unless *all* the family's members are subject to persecution. *See Demiraj*, 631 F.3d at 199 ("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."). At the very least, the Fifth Circuit suggests a rule that would require the applicant to establish that some threshold minimum number of family members have been persecuted. *Amici* are unaware of any other Circuit that has required applicants seeking asylum due to family-based persecution to prove that other members of their family face persecution for the same reason. That additional requirement would disqualify numerous otherwise-worthy applicants simply because persecutors have chosen to target, for instance, the members of Mr. Demiraj's family who are closest to him or most accessible to the persecutors.

While the Fifth Circuit suggested that its rule would permit asylum for dynasties targeted for eradication, *Demiraj*, 631 F.3d at 199, even that much is not clear. Hatred of a dynastic line often stems from the actions taken by individual members while in power. At oral argument below, it was suggested that Nicholas

II of Russia would be an example of a person persecuted due to general hatred of his family.[3] But Russian antipathy towards the Romanovs originated not from irrational, generalized hatred, but from the perception that individual members of the Romanov family had misruled Russia. *See* Steinberg & Khrustalëv, *The Fall of the Romanovs* 40-41, 282-283 (1995); Lincoln, *The Romanovs* 633, 647, 650, 739, 748 (1981).

Similarly, even "generalized ... vengeful" hatred of entire families frequently originates from retaliation for an individual's actions. For example, the legendary Hatfield-McCoy feud had its roots in the alleged murder of a McCoy by a Hatfield. *See Hatfield* v. *Kentucky*, 12 S.W. 309, 309-310 (Ky. Ct. App. 1889). Under the Fifth Circuit's rule, the subsequent individual attacks on family members were not "on account of" family membership because the feud began as a personal vendetta.

If the Fifth Circuit's rule is allowed to stand, the INA's protection of persons seeking protection from persecution based on family membership will be virtually eliminated. To suggest that the United States offers asylum from persecution on account of family membership but to subject it to the Fifth Circuit's severe nonstatutory limitation would be to "sound the word of promise to the ear but break it to the hope."

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[3] Oral Argument at 5:01, *Demiraj* v. *Holder*, No. 08-60991 (5th Cir. Dec. 6, 2010), *available at* http://www.ca5.uscourts.gov/OralAgumentRecordings.aspx?prid=236266.

Ananeh-Firempong v. *INS*, 766 F.2d 621, 628 (1st Cir. 1985) (Breyer, J.).[4]

II. THE FIFTH CIRCUIT'S RULE RISKS IMPROPERLY CURTAILING PROTECTION FROM PERSECUTION IN NUMEROUS MERITORIOUS CASES

Although the Fifth Circuit's opinion dealt specifically with persecution "on account of" family membership, it did not suggest that its reasoning would not be equally applicable in cases based on other grounds. Indeed, the court's interpretation could well apply to asylum applications claiming persecution on account of race, religion, nationality, political opinion, or membership in any other "particular social group." *See* 8 U.S.C. § 1101(a)(42).

The Fifth Circuit's reasoning suggests that targeting people due to membership in a protected group is insufficient to show persecution "on account of" such membership where the persecution originally derives from a desire to deter or harm other people in the protected group. For example, the Fifth Circuit's decision would appear to foreclose asylum on the basis of race if

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[4] In *Ananeh-Firempong*, then-Judge Breyer noted that the United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) (the "*Handbook*") was a "useful tool" for interpreting the phrase "social group" in the INA. 766 F.2d at 626. It bears mention, then, that the Fifth Circuit's rule is also inconsistent with the Handbook. The Handbook notes that persecution may be on account of group membership when the persecutor has "no confidence in the group's loyalty" or when "the political outlook, antecedents or economic activity of its members … is held to be an obstacle to the Government's policies." *Handbook* ¶¶ 77-78. Neither of these cases would fall within Fifth Circuit's rule, as they do not involve a desire to eliminate an entire group "as such."

persecutors target a certain racial group in retaliation for actions that others of that race took while in power—such persecution would be in revenge for past actions of others, not due to a generalized hatred of the group "as such." *Cf.*, *e.g.*, *Matter of H-*, 21 I. & N. Dec. 337, 345-346 (BIA 1996) (noting that clans in power sought to persecute members of the formerly ruling clan and that applicant had shown he was persecuted "because he was identified with the former ruling faction by being a member of the Marehan clan"); *Ananeh-Firempong*, 766 F.2d at 626 (government persecution of those associated with former government, including particular tribe, together with persecution of applicant's family, established eligibility for asylum); *Chen*, 289 F.3d at 1116 ("If a member of a particular ethnic group assassinated a member of the ruling party in a dictatorship, the rulers might punish the entire ethnic group, imputing to them vicarious responsibility for their fellow ethnic's crime; such a procedure would be punishing the group both on account of the crime and on account of membership in the group. It would be ethnic persecution."). The Fifth Circuit's rule would deny asylum whenever a government sought to punish an entire ethnic group for the acts of one or more identified members.

Further, the Fifth Circuit's inquiry into the origin of the persecutor's animus cannot be reconciled with the settled law that subjective motivations behind persecution are irrelevant to asylum determinations. For example, if a government forcibly institutionalizes people out of misguided but purportedly altruistic motivations, the victims are eligible for asylum notwithstanding the foreign government's subjective intent. *See*, *e.g.*, *Pitcherskaia* v. *INS*, 118 F.3d 641, 648 (9th Cir. 1997) ("The fact that a persecutor believes the harm he

is inflicting is 'good for' his victim does not make it any less painful to the victim, or, indeed, remove the conduct from the statutory definition of persecution.... Human rights law cannot be sidestepped by simply couching actions that torture mentally or physically in benevolent terms such as 'curing' or 'treating' the victims.").

The Fifth Circuit's rule would have particularly harsh consequences for women, who often seek protection from gender-based persecution under the "particular social group" prong of the INA. Women belonging to tribes that practice female genital mutilation ("FGM") frequently seek asylum based on persecution on account of their membership in the particular social group of women of their tribe. *See, e.g.*, *Niang* v. *Gonzales*, 422 F.3d 1187, 1201 (10th Cir. 2005) ("[T]he shared characteristic that motivates the persecution is not opposition [to FGM], but the fact that the victims are female in a culture that mutilates the genitalia of its females."); *id.* at 1197-1198 ("Although many cases construing persecution involve persecutors who had the subjective intent to punish their victims, 'this subjective punitive or malignant intent is not required for harm to constitute persecution.'"); *Kasinga*, 21 I. & N. Dec. at 366-367; *Mohammed* v. *Gonzales*, 400 F.3d 785, 797 n.16 (9th Cir. 2005) ("The persecution at issue in these cases-the forcible, painful cutting of a female's body parts-is not a result of a woman's opposition to the practice but rather a result of her sex and her clan membership and/or nationality. That is, the shared characteristic that motivates the persecution is not opposition, but the fact that the victims are female in a culture that mutilates the genitalia of its females."). Under the Fifth Circuit's reasoning, however, such women would potentially be foreclosed from asylum,

because their persecution is not due to their tribe's generalized hatred of women "as such." *Demiraj*, 631 F.3d at 199.

Similarly, women persecuted on account of their unwillingness to take part in a forced marriage would not be eligible if their persecutor's allegiance to forced marriage was not derivative of a generalized hatred towards women, but rather faithfulness to traditional mores. *See, e.g.*, *Gao* v. *Gonzales*, 440 F.3d 62, 70 (2d Cir. 2006) (applicant "establishe[d] that she might well be persecuted in China—in the form of lifelong, involuntary marriage—'on account of' her membership" in the social group of women sold into marriage in a part of China that recognizes such marriages), *vacated in light of Gonzales* v. *Thomas*, 547 U.S. 183 (2006).

Persecution of families and other particular social groups may begin with antipathy towards one member of the group for personal, non-group-related reasons, or it may spring from a deep-seated hatred untethered to any individual group member's actions or beliefs. It will often be impossible to tell which of these motivations, if any, drives persecutors to do the evil things they do. Yet divining the origins of a persecutor's wickedness is precisely what the Fifth Circuit's rule requires. That inquiry is not only totally impractical, but is completely absent from, and contrary to, the INA. An asylum applicant should not be in the position of having to prove that her persecutor is driven by a hatred of her class that the court thinks is sufficiently deeply rooted. The fact that she is being persecuted due to her membership in a protected class is enough under the INA, and requiring her to prove more would sharply and irrationally limit, if not vitiate, the INA's effectiveness in protecting people fleeing persecution.

III. THE FIFTH CIRCUIT'S RULE ALSO ENDANGERS APPLICANTS FOR WITHHOLDING OF REMOVAL

The Fifth Circuit also applied its erroneous interpretation of the INA to Petitioners' claim for withholding of removal. *See Demiraj*, 631 F.3d at 199-200. The consequences of applying the court's novel rule to withholding of removal claims are even more dire.

The INA provides two forms of relief for foreign nationals seeking protection from persecution: asylum and withholding of removal. *See, e.g.*, *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 423 (1987). Section 241(b)(3) of the INA requires that the Attorney General withhold removal "if [he] decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3). Applicants seeking withholding of removal must satisfy a higher burden of proof than is required for asylum: Instead of having to establish a "well-founded" fear of persecution in their native country, applicants must establish a "clear probability of persecution," meaning that "it is more likely than not that [the applicant] would be subject to persecution." *INS* v. *Stevic*, 467 U.S. 407, 413, 424 (1984). If an applicant cannot demonstrate eligibility for asylum, she necessarily cannot meet the higher burden of demonstrating eligibility for withholding of removal.

Withholding of removal reflects the United States' mandatory "*nonrefoulement*" obligations under the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224 (1968) (the "Protocol"), under which the United States accepted the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of

Refugees, July 28, 1951, 189 U.N.T.S. 150 (the "Convention"). *Stevic*, 467 U.S. at 416. Article 33.1 of the Convention provides that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." In the Refugee Act of 1980, Congress amended section 241(b)(3) of the INA to implement the United States' obligations under Article 33.1. 8 U.S.C. § 1231(b)(3); *Stevic*, 467 U.S. at 421; *see also Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 179-180 (1993) (discussing *nonrefoulement*). There is "abundant evidence" that one of Congress's primary purposes in passing the Refugee Act "was to bring United States refugee law into conformance with the [Protocol]." *Cardoza-Fonseca*, 480 U.S. at 432, 436-437; *see also INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 427 (1999).

Section 241(b)(3) reflects Congress's express directive that foreign nationals whose lives are threatened on account of their family membership cannot be driven back to a country where they would be persecuted. These foreign nationals regularly include those who suffer severe persecution motivated by a desire to punish or otherwise harm another member of their families. *See, e.g.*, *Al-Ghorbani* v. *Holder*, 585 F.3d 980, 999 (6th Cir. 2009) (granting withholding of removal to applicant who was detained and tortured because of his brother's disapproved marriage to daughter of a prominent Yemeni family); *Torres*, 551 F.3d at 616 (applicant was eligible for withholding of removal based on family membership because he was physically and mentally abused in the Honduran army in retaliation for his brothers' desertion of the military); *Vumi*, 502 F.3d at

159 (applicant who was detained, beaten, and starved because a relative was suspected of an assassination plot was entitled to withholding of removal based on family membership); *Chen*, 289 F.3d at 1113 (applicant qualified for withholding of removal where, if returned, he would be arrested and tortured by Chinese gangs due to a debt his mother owed).

The Fifth Circuit's rule, as applied to Petitioners, is contrary to Congress's clear intent to comply with the United States' obligations under the Protocol, in that it denies withholding of removal based on the happenstance of the subjective origins of their persecutor's motivations. The consequences of denying withholding of removal are, by definition, very serious and often life-threatening.

The Fifth Circuit's interpretation of "on account of" is particularly problematic because it departs from interpretations of the Protocol by other Parties. *See Air France* v. *Saks*, 470 U.S. 392, 404 (1985) (finding the "opinions of our sister signatories to be entitled to considerable weight" (internal quotation marks omitted)); *Olympic Airways* v. *Husain*, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting) ("We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties."). Courts of other signatory countries have interpreted the Convention's phrase "on account of … membership of a particular social group" to include family membership, regardless of whether the persecution stems from a deep-seated hatred of the family or an attempt to retaliate for the individual actions of another family member. *See, e.g.*, *Secretary of State for the Home Department* v. *K*, [2006] UKHL 46, [2007] 1 A.C. 412, 434-435 (appeal taken from Eng. & Wales) ("if

[family members] are persecuted because of their connection with [another member of the family], it is a matter of ordinary language and logic, *for reasons of* their membership of a family—the group—that they are persecuted." (internal quotation marks omitted)); *id.* ("[The persecutor's motive] may be to terrorise the person against who[m] the persecutor entertains ill will … by getting at his family[.]" (internal quotation marks omitted)); Refugee Appeal Nos. 76485, 76486 & 76487, New Zealand: Refugee Status Appeals Authority, June 17, 2010 (applying *K* to find that husband and child targeted on account of wife/mother's failure to cooperate with a political paramilitary group could claim family membership persecution); Verwaltungsgerichtshof [VwGH] [Administrative Court], Dec. 16, 2010, docket No. 2007/20/1490 (Austria) (finding that applicant who was persecuted because of her husband's involvement in human smuggling could be eligible for protection from *refoulement* based on family membership).

The Fifth Circuit's rule imposes novel and artificial distinctions based on the perceived origins of persecutors' subjective motives, eliminates protection for foreign nationals who have shown that they have a well-founded fear of persecution or that they, in fact, will be persecuted, and seriously restricts withholding of removal in contravention of Congress's manifest intent to comply with the United States' obligations under the Protocol. At the very least, the Fifth Circuit's decision creates a serious division in the courts of appeals regarding eligibility for asylum and withholding of removal—a division this Court should grant certiorari to resolve.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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