

No. 10-1545

IN THE
Supreme Court of the United States

RUDINA DEMIRAJ; 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 OF *AMICI CURIAE*
SUPPORTING PETITIONERS**

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BRIEF OF *AMICI CURIAE*

ASISTA Immigration Assistance Project, Coalition to Abolish Slavery & Trafficking, Equality Now, End Child Prostitution and Trafficking (ECPAT-USA), Humanity United, and the National Underground Railroad Freedom Center (collectively “*amici*”) respectfully submit this brief, pursuant to Supreme Court Rule 37.2(a), as *amici curiae* in support of petitioner seeking a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.¹

INTEREST OF *AMICI CURIAE*

The issue presented in this petition significantly affects *amici’s* interests and those of their members. *Amici* are a group of like-minded human rights organizations acting together in this matter to accomplish the common goals of combating human trafficking and slavery and aiding trafficking victims. The core missions of *amici* include promoting international human rights, ending human trafficking, empowering women, supporting immigrant crime-victims, and protecting families. *Amici* thus have a substantial interest in the legal standards governing immigrant families victimized by human traffickers. *Amici* seek to ensure that those legal standards adequately protect families, further the fight against

¹ Pursuant to Rule 37.2(a), *amici curiae* state that petitioner and respondent have both granted consent to file this brief. Letters from the parties consenting to the filing of this brief are on file with the Court. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief.

human trafficking, and are consistent with sound public policy. Because of their extensive experience in assisting human-trafficking victims and combating human trafficking in the United States and around the world, *amici* are uniquely positioned to inform the Court regarding this case's consequences on international human trafficking.

The question presented by this case is whether, under the Immigration and Nationality Act (INA), persecution by human traffickers in retaliation for a family member's cooperation with U.S. prosecutors is persecution "on account of" membership in a family. If so, the INA entitles the persecuted individuals to asylum protection in the United States. This issue strikes at the heart of *amici's* efforts to promote human rights and combat human trafficking. A vital tool to promote those human rights and protect families from persecution at the hands of international trafficking criminal enterprises is U.S. immigration law. Yet under an incorrect interpretation of the INA this tool will be compromised. Human-trafficking prosecutions will be undermined if key government witnesses fail to testify because they fear for their families' safety—safety that is properly ensured by immigration law. *Amici* thus have a vital interest in the issue presented in this case, and their views can assist the Court in deciding whether certiorari should be granted.

SUMMARY OF THE ARGUMENT

The Fifth Circuit below improperly narrowed an asylum provision under the INA. That provision enables a person persecuted abroad "on account of" membership in the particular social group of the family to seek asylum in the United States. The Fifth Circuit incorrectly held that persecution by human

traffickers in retaliation for a family member's cooperation with U.S. prosecutors does not qualify as persecution "on account of . . . membership in a family." If not reversed, this rule will prevent families who are victimized by criminal human-trafficking organizations from gaining asylum in the United States. The rule will also obstruct human-trafficking prosecutions because key witnesses will fear for their families' safety. And the rule will embolden human-trafficking criminals who routinely target families.

Human trafficking is an abhorrent, transnational crime that encompasses sexual slavery and forced labor. Sex trafficking in particular is a human rights travesty in which organized criminals subject women and children to forced prostitution under deplorable conditions. Trafficking in persons is very lucrative, and organized trafficking groups are intent on maintaining their valuable enterprise while avoiding detection. Traffickers routinely use threats to harm or kill the family members of victims as a way to perpetuate control over them. Knowing that witness testimony is crucial to successful prosecutions, traffickers similarly threaten and target the families of those who are in a position to assist prosecutors.

In response to the human-trafficking threat, Congress amended the INA by enacting the Trafficking Victims Protection Act (TVPA) of 2000. The TVPA establishes a national policy to prosecute human traffickers and protect trafficking victims through immigration law, which also traditionally has been used to protect families. Congress expanded the eligibility and scope of protections for family members of cooperating witness victims through subsequent reauthorizations, most recently in 2008. Yet by narrowing the asylum provision's function in circumstances involving human trafficking, the Fifth

Circuit's decision frustrates Congress's efforts to combat human trafficking and protect victimized families. It effectively prevents the INA's asylum provisions from incorporating the TVPA's policy of fighting human trafficking.

Moreover, the Fifth Circuit's decision is unjustified by the INA's text and conflicts with the sound interpretation applied in four other circuits. This Court should resolve the conflict in favor of the majority view, which adheres to the statute and advances the important national policy of prosecuting the perpetrators and protecting the victims of human trafficking.

For these reasons, *amici* respectfully request that this Court grant the petition for certiorari.

ARGUMENT

I. THE ISSUE RAISED BY THE PETITION IS EXCEEDINGLY IMPORTANT TO ANTI-HUMAN TRAFFICKING GROUPS AND MILLIONS OF HUMAN-TRAFFICKING VICTIMS AND THEIR FAMILIES.

A. Human Trafficking Is A Horrific, Transnational Crime.

Human trafficking is a form of modern-day slavery.² "Human trafficking" or "trafficking in persons" refers to activities that "involve[] the use of force, fraud, or coercion to exploit a person for profit,"

² See U.S. Dep't of Justice, *Attorney General's Annual Report to Congress on U.S. Government Activities to Combat Trafficking in Persons: Fiscal Year 2006*, at 1 (2007), available at http://www.justice.gov/archive/ag/annualreports/tr2006/agreport_humanttrafficking2006; Stephanie Richard, *State Legislation and Human Trafficking: Helpful or Harmful?*, 38 U. Mich. J.L. Reform 447, 447 (2005).

including forced labor, forced child labor, bonded labor, and sexual servitude. Heather J. Clawson et al., ICF Int'l, *Prosecuting Human Trafficking Cases: Lessons Learned and Promising Practices* 1 (2008). Women and children are the primary targets of sex trafficking; men are more often subjected to forced labor. See Jill Laurie Goodman, *What We Know About Human Trafficking: Research and Resources, in Lawyer's Manual on Human Trafficking: Pursuing Justice for Victims* 4 (Jill Laurie Goodman & Dorchen L. Leidholt eds., 2011). Trafficking markets are not confined to poor or undeveloped countries. Indeed, the deprivation of basic human dignities is ubiquitous. Trafficking victims can be found in “virtually every inhabited corner of the globe.” *Id.* at 1. It can take place within the borders of a single country, but more frequently involves transportation and exploitation across borders. *Id.*

The International Labour Organization—the United Nations’ agency responsible for tracking the incidence of human trafficking—estimates that 12.3 million people are held as forced laborers or sex servants across the globe at any given time. Patrick Belser et al., Int’l Labour Org., *ILO Minimum Estimate of Forced Labour in the World* 1 (2005) (hereinafter “ILO Estimate”). Human trafficking also claims 700,000 *new* victims each year. See Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101(b)(1) (2006) (hereinafter “TVPA”).

According to a 2009 United Nations Office of Drugs and Crimes (UNODC) report, 79 percent of trafficking victims are forced into commercial sex and 18 percent into forced labor. U.N. Office on Drugs & Crime, *Global Report on Trafficking in Persons* 6 (Feb. 2009) (hereinafter “UNODC Report 2009”). Although the use of children in the commercial sex

trade is prohibited by the Palermo Protocol and legislation in countries around the world, UNICEF estimates that two million children are currently exploited as sex slaves. U.S. Dep't of State, *Trafficking in Persons Report 9* (2011) (hereinafter "2011 TIP Report").³ And these numbers likely represent only the small fraction of trafficking victims that have been identified by law enforcement.⁴ Many victims remain unidentified, others remain silent, and still others are not counted because of the ILO's narrow definition of "forced labor."⁵

Once captured, trafficking victims suffer horrific existences. Most women and children forced into prostitution are raped, gang-raped, and beaten by their captors so that the traffickers can establish dominance.⁶ One woman recalls that she was forced to clean the toilets with her tongue, explaining "I think they did it because I was the newest girl." Preston Mendenhall, *Infiltrating Europe's Shameful*

³ Report available online at <http://www.state.gov/g/tip/rls/tiprpt/2011/>.

⁴ See UNODC Report 2009 at 12, available at http://www.unodc.org/documents/Global_Report_on_TIP.pdf; see also U.S. Gov't Accountability Office, GAO 06-825, *Human Trafficking: Better Data, Strategy, and Reporting Needed to Enhance U.S. Antitrafficking Efforts Abroad* 10-17 (2006); Goodman, *supra*, at 3.

⁵ ILO Convention No. 29, adopted in 1930, defines "forced labour" as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." See ILO Estimate at 7.

⁶ Cathy Zimmerman et al., London Sch. of Hygiene & Tropical Med., *The Health Risks and Consequences of Trafficking in Women and Adolescents: Findings from a European Study* 4 (2003).

Trade in Human Beings, MSNBC, Apr. 26, 2011.⁷ As a result of repeated rape and prostitution, sex trafficking victims frequently suffer from sexually transmitted diseases, including HIV and AIDS, customer-perpetrated violence, and complications surrounding unplanned pregnancies, including unsafe abortions. See Goodman, *supra*, at 12.

Forced labor victims are deprived of basic necessities like food, sleep, and shelter. See Sarah Stephen-Smith & Sarah Edwards, *Routes In, Routes Out: Quantifying the Gendered Experience of Trafficking to the UK* 23 (2008); Zimmerman, *supra*, at 39-40. They are kept hungry and tired, living in dirty and overcrowded conditions. See Zimmerman, *supra*, at 39-40; Goodman, *supra*, at 11. CNN recently featured the plight of child laborers in India. Siddharth Kara, one of the foremost experts on human trafficking, reported that boys as young as six years old are kept in bondage to make carpets. Siddharth Kara, *India's Carpet Industry Plagued by Child Labor*, CNNWorld, Aug. 16, 2010.⁸ They are force-fed stimulants so they can work 16-18 hour days and, as a result of the working conditions, often have deformed spines and respiratory illness. *Id.* In addition to deprivation, exhausting working conditions, and isolation, traffickers frequently threaten to harm, kidnap, or kill family members of victims to maintain control over them. See ACLU, Women's Rights Project, *Human Trafficking: Modern*

⁷ Article available online at http://www.msnbc.msn.com/id/3071965/ns/us_news-only_on_msnbc_com/t/infiltrating-europes-shameful-trade-human-beings/#.

⁸ Article available online at http://articles.cnn.com/2010-08-16/world/kara.human.traffic.india_1_carpet-belt-carpet-industry-child-labor?_s=PM:WORLD.

Enslavement of Immigrant Women in the United States 2 (2005).⁹

Regrettably, the United States is not immune from this international scourge. The State Department categorizes the United States as a “source, transit, and destination country” for men, women, and children subjected to forced labor, debt bondage, and forced prostitution. 2011 TIP Report at 372. Trafficking in the United States occurs for commercial sexual exploitation in street prostitution, massage parlors, and brothels, and for labor in domestic servitude, agriculture, manufacturing, janitorial services, hotel services, hospitality industries, construction, health and elder care, and strip club dancing. *Id.*

B. Trafficking Organizations Are Often Transnational, Sophisticated Criminal Enterprises That Brutally Target Vulnerable Populations And Their Families.

Trafficking organizations are complex syndicates that employ large numbers of individuals throughout different countries, often as part of a larger criminal network. See Louise Shelley, *Trafficking in Women: The Business Model Approach*, 10 *Brown J. World Affairs* 119, 119-21 (2003). Louise Shelley, a prominent human-trafficking researcher, explains, “[t]he high profits, low risk of detection, and minor penalties involved have made the human trade attractive to crime groups that previously trafficked in other commodities and to new groups which have developed recently.” *Id.* at 121. Traditional organized crime syndicates possess well-established hierarchi-

⁹ Article available online at [http://www.aclu.org/pdfs/womens rights/200705humantraffickingfs.pdf](http://www.aclu.org/pdfs/womens%20rights/200705humantraffickingfs.pdf).

cal structures and relationships with corrupt public officials, which facilitate the transportation of large numbers of individuals. *See* Goodman, *supra*, at 6. The Balkans, which includes Albania, along with China, are common home bases for these types of trafficking groups, but even domestic trafficking within the United States is linked to organized crime. *See* Shelley, *supra*, at 123-27; *see also* Jeremy M. Wilson & Erin Dalton, *Human Trafficking in Ohio: Markets, Responses, and Considerations* 24-26 (2007).

Organized trafficking groups target vulnerable and uneducated populations. Many victims are tricked into servitude by promises of a better life and job opportunities that will allow them to send money to their families back home. *See* Dan Bilefsky, *On Speedboats, Legal Again, Albania's Illicit Sex Trade Flares*, N.Y. Times, Jul. 17, 2009, at A6. Other victims are abducted from their homes and schools. *See* Goodman, *supra*, at 8. Women and children are especially susceptible to trafficking because they are routinely denied access to education and employment while subjected to gender- and age-based discrimination as well as domestic violence. U.N. Office on Drugs & Crime, *Human Trafficking: An Overview* 18 (2008).

Threats against victims' families is a key aspect of human trafficking. Traffickers routinely threaten families in order to deter victims from attempting to escape or seeking help. Victims "may be threatened to keep them from revealing any indicators of trafficking such as involuntary confinement, debt bondage, or threats of violence against them and their families." U.S. Dep't of State, *Trafficking in*

Persons Report 40 (2010).¹⁰ Labor and brothel managers threaten to harm both victims and their families if they contact authorities. *Id.* This practice spans the globe. In Chicago, traffickers confiscated the passports of Russian and Latvian women, beat them, and “threatened to kill their families if the women refused to dance nude in a nightclub.” H.R. Rep. No. 106-487, pt. 1, at 15 (1999). A Central American trafficking ring warned women in California that “they or their families—including children—would be beaten or killed” if they sought help.¹¹

Traffickers also threaten, kill, and forcibly traffic the family members of trafficking survivors and *witnesses* who cooperate with law enforcement. See Human Rts. Ctr., *Safety After Slavery, Protecting Victims of Human Trafficking: Final Conference Report and Policy Recommendations* 2 (Apr. 22-24, 2004).¹² “Family members are particularly at risk

¹⁰ Report available online at <http://www.state.gov/g/tip/rls/tiprpt/2010/index.htm>.

¹¹ See Raja Abdulrahim, *Prison for 5 in Sex Trafficking Ring*, L.A. Times, Aug. 19, 2009, at A8 (“The defendants forced at least 10 girls and women into prostitution with beatings, *threats* of rape and *threats that their families* in Guatemala would be killed if they tried to escape.”); see also Teresa Watanabe, *Home of the Freed; Former Thai Slave Laborers, Liberated From an El Monte Sweatshop in 1995, Become U.S. Citizens*, L.A. Times, Aug. 14, 2008, at A1 (“Chuai Ngan, 47, who came to the U.S. in 1993, said she also was intimidated with threats that her family would be harmed and their home in Thailand burned down if she attempted to leave.”).

¹² Report available online at <http://www.law.berkeley.edu/HRCweb/pdfs/protectingvictims.pdf>. See also U.N. Office on Drugs & Crime, *Anti-human Trafficking Manual for Criminal Justice Practitioners*, Module 5, 4-5 (2009) (listing witnesses and victims fully cooperating with law enforcement, along with their

during ‘critical periods’ of reprisal,” including around the time of arrest, trial, and sentencing of suspected traffickers. *Id.* Committing violence against family members sends a message to potential witnesses that the traffickers will not tolerate cooperation.

The Petitioners in this case seek refuge from persecution in Albania, which is a haven for some of the most dangerous and determined human-trafficking groups. *See* Mendenhall, *supra*. Instability and civil conflict in Albania and other Balkan states have led to a large, vulnerable population, making the region especially susceptible to human trafficking. *See* Shelley, *supra*, at 126. Albanian women and children are primarily forced into prostitution; Albanian men are trafficked into forced labor in the agricultural sector of Greece and neighboring countries.¹³

Trafficking in the Balkans commonly follows what is known as the “Violent Entrepreneur Model.” *Id.* This model is associated with extreme violence and human rights violations. *See id.* Ethnic Albanian rebels in Serbia, Kosovo, and Macedonia—long recognized for their presence in the drug trade—are major players in the trafficking business, using the proceeds from trafficking to fund their separatist movements. *See* Mendenhall, *supra*. Routine violence against the trafficking victims is combined with threats to family members back home. *See* Shelley, *supra*, at 126.

families and friends, among those at risk during a human trafficking prosecution).

¹³ U.S. Dep’t of State, *Trafficking in Persons Report* 60 (2009), available at <http://www.state.gov/g/tip/rls/tiprpt/2009/>. Albanian victims are trafficked primarily to Greece, Italy, the U.K., and other Western European countries, which are major importers of sex and labor servants. *Id.*

While Petitioners in this case have the misfortune of being targeted by traffickers from a part of the world notorious for brutality and ruthlessness, organized criminal groups worldwide employ similar tactics, including physical violence and systematic human rights violations, to maintain control over their share in the highly lucrative trade in persons. *See id.* at 123-27.

C. Effective Prosecution Is Critical To Curtailing Human Trafficking Worldwide.

Robust and effective prosecution is key in the fight against human trafficking. Indeed, the legislative history of the TVPA demonstrates that Congress recognized the necessity of criminal prosecutions. *See* H.R. Rep. No. 106-487, pt. 2, at 16 (2000); 146 Cong. Rec. S2617-01, S2630-32 (daily ed. Apr. 12, 2000) (statement of Sen. Wellstone). Prosecution and subsequent imprisonment neutralizes current traffickers, deters future trafficking, and undermines the financial incentives to traffic by imposing asset forfeiture and mandatory restitution. *See* Eileen Overbaugh, *Human Trafficking: The Need for Federal Prosecution of Accused Traffickers*, 39 Seton Hall L. Rev. 635, 642 (2009). Prosecution also protects trafficking victims by separating them from their captors and the immediate dangers of trafficking. *Id.*

1. Witnesses are the most important factor in successful human-trafficking prosecutions.

Information provided by witnesses, including trafficking victims, is essential to successfully prosecuting human-trafficking syndicates. UNODC reports that “[t]he role of witnesses and the evidence they provide in criminal proceedings is often *crucial*

in securing the conviction of offenders, especially in respect of organized crime such as human trafficking.” U.N. Office on Drugs & Crime, *Toolkit to Combat Trafficking in Persons* 91 (2006) (emphasis added).

In a study of 238 TVPA prosecutions, prosecutors cited victim testimony, more than any other factor, as essential to securing a conviction. See Clawson, *supra*, at 17-20. Fifty percent of prosecutors stated that without victim testimony, TVPA cases are “rarely” successful and forty percent stated that they are “never” successful. *Id.* at 20. As one prosecutor noted, “[t]he victim is the case and you need to have that testimony to succeed . . .” *Id.* (emphasis omitted).

Unfortunately, victim testimony is often difficult to obtain. The underground nature of trafficking means victims are often hidden from public view. See *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) (arguing that witnesses are important to identifying “secretive” organized crime organizations.). Victims seldom escape and when they do, many are afraid to testify for fear of retribution against themselves and/or their families.¹⁴ Consequently, the number of trafficking

¹⁴ See Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. Rev. 157, 181 (2007) (“Some victims may decide not to participate in law enforcement investigations for fear that the trafficker’s network will retaliate against family members in their home countries.”).

prosecutions is “woefully low.” Goodman, *supra*, at 5.¹⁵

As a result of the difficulty in obtaining victim testimony, cooperating witnesses become especially critical to effectively prosecuting human-trafficking cases.

2. Protecting cooperating witnesses and their family members is critical to the successful prosecution of human trafficking.

Failing to protect witnesses’ families has a chilling effect on prosecutions.¹⁶ Trafficking victims or other witnesses involved in the investigation or prosecution of human traffickers become targets of these crime groups. See Shelley, *supra*, at 126. Cooperating witnesses and their families experience increased threats once a witness has agreed to testify. See Elaine Pearson, Anti-Slavery Int’l, *The Need for Effective Witness Protection in the Prosecution of Traffickers: A Human Rights Framework for Witness Protection, Address at the First Pan-African Regional Conference on Trafficking in Persons* 4 (Feb. 19-23, 2001) (noting that if a victim does “assist police in identifying the trafficker and agrees to testify, she and her family may experience more threats or reprisals”).

¹⁵ In 2010, the U.S. State Department reported only 6,017 prosecutions and 3,619 convictions worldwide. 2011 TIP Report at 38.

¹⁶ *Trafficking of Women and Children in the International Sex Trade: Hearing Before the Subcomm. on Int’l Operations and Human Rights of the H. Comm. on Int’l Relations*, 106th Cong. 10 (1999) (statement of Harold Hongju Koh, Assistant Sec’y of State, Bureau of Democracy, Human Rights and Labor, U.S. Dep’t of State).

Informants and potential witnesses have good cause to fear for their families' safety. First, witnesses may have seen traffickers beat or rape victims in the past, so they recognize traffickers' capacity for violence. See Katrina Lynne Baker, Note, *Don't Forget the Family: A Proposal for Expanding Immediate Protection to Families of Human Trafficking Survivors*, 30 Fordham Int'l L.J. 836, 841 (2006). Second, traffickers are often from victims' or witnesses' home country and know where their families live—including their children, who are often left behind in the care of relatives, especially when victims or witnesses believed they were leaving for job opportunities that would enable them to send money home. See *id.* at 841-42.

The risk of retaliation associated with transnational organized crime is especially high. See Shelley, *supra*, at 129. Because traffickers usually operate as part of an organized group, imprisoning one trafficker does not ensure the safety of a witness' or victim's family. When trafficking groups are transnational, they can "threaten victims' families [in their home countries], *increasing* the degree and number of potential victims." *Id.*; see also Pearson, *supra*, at 4 (noting that "imprisonment of traffickers in the destination country does not mean the victim or her family are safe, as other members of the syndicate are still free"). Families, too, recognize the danger in which they live. See Baker, *supra*, at 842 ("Families are frequently aware of the danger they are in and these threats are terrifying because traffickers know where the women live."). As long as other members of the syndicate remain free, neither the cooperators nor their families are safe in their home countries. See Pearson, *supra*, at 4. Given trafficking organizations' track record and propensity

for violence, targeted family members “have no reason to doubt that the traffickers will execute these threats.” Baker, *supra*, at 841.

If witnesses are not confident that their families will be protected, they will be less likely to cooperate with prosecutors. See 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) (noting that “an individual may not provide valuable information unless she feels confident that she and her family will be protected from any acts of retaliation” when organized crime or terrorist groups are involved). Indeed, refraining from filing an official complaint is the “most rational choice” where protections against retribution by human traffickers are “nonexistent, inadequate, or insufficient in protecting the victims’ families.” See 2011 TIP Report at 38.

In Albania, there are heightened concerns about protecting witnesses. See *id.* at 64. The U.S. State Department identified witness protection as a weakness of Albania’s anti-trafficking efforts. See *id.* at 64-65. In some cases, Albanian “police offered no protections to trafficking victims when testifying against their traffickers, forcing victims to rely exclusively on NGOs for protection.” *Id.* at 65.

These facts make it all the more important for the United States to protect the persecuted and at-risk family members of witnesses who agree to testify in U.S. trafficking prosecutions.

II. THE FIFTH CIRCUIT'S NARROW INTERPRETATION IS DETRIMENTAL TO THE EFFORT TO PROSECUTE PERPETRATORS OF AND PROTECT THOSE HARMED BY HUMAN TRAFFICKING.

In narrowing the immigration relief available to family members targeted for persecution by human-trafficking and other criminal organizations, the Fifth Circuit created a rule that undermines the important national interest in combating human trafficking.

As discussed in greater detail in the Demirajes' brief in support of their petition for certiorari and the briefs of other *amici*, the circuit courts have split on the question of what type of conduct qualifies for asylum purposes as persecution "on account of" membership in the particular social group of the family. The Fifth Circuit adopted a unique, narrow interpretation, requiring applicants to establish that they would suffer persecution based upon their family membership "as such," meaning the persecutor must be motivated by a "desire to punish" membership in the family or "to overcome what is deemed to be an offensive characteristic identifying" the family. *Demiraj v. Holder*, 631 F.3d 194, 199 (5th Cir.) (quoting *In re Demiraj*, Nos. A095 218 801 & 802, slip op. at 2-3 (B.I.A. Oct. 14, 2008)), *petition for cert. filed*, 80 U.S.L.W. 3004 (June 20, 2011) (No. 10-1545). This interpretation is at odds with the view adopted in four other Circuits. This fact alone counsels in favor of granting certiorari to resolve the conflict.

In addition, the Fifth Circuit's interpretation would have a detrimental effect on the important national interest in combating human trafficking and protecting those harmed by this odious practice. Congress has expressed the importance of combating

human trafficking by enacting the TVPA and has demonstrated its intent to use immigration law and policy to facilitate that effort. This intersection of human trafficking, human rights, and immigration law generates at least three important policy reasons for reversing the decision below. The Fifth Circuit's rule: (1) frustrates Congress's intent to protect families through immigration law, (2) creates an unnecessary conflict between the INA, which grants asylum to victims of persecution, and the TVPA, which establishes a national policy of combating human trafficking while protecting victims and witnesses, and (3) undermines human-trafficking prosecutions.

A. By Imposing Unwarranted Hurdles For Family Members Seeking Protection From Traffickers, The Fifth Circuit's Rule Frustrates Congress's Intent To Protect Families Through Immigration Law.

Congress has established an overarching policy of protecting families through immigration law. Only five years after the INA's 1952 enactment, Congress amended the statute for the purpose of "keeping family units together." *INS v. Errico*, 385 U.S. 214, 220 (1966). "Congress felt that . . . it was more important to unite families and preserve family ties than it was to enforce strictly the quota limitations or even the many restrictive sections that are designed to keep undesirable or harmful aliens out of the country." *Id.* The asylum provisions at issue in this case are an extension of that policy; they allow persecuted families to gain asylum as refugees and remain living together in the United States. *See* 8 U.S.C. §§ 1158(b)(1)(A), 1101(a)(42)(A) (2006). They also keep families together by automatically granting

asylees' spouses and children the same refugee status as the asylees even if the spouses and children would not otherwise qualify for asylum. *Id.* § 1158(b)(3)(A) (2006).

The Fifth Circuit's rule undermines this congressional policy of protecting families. The rule prevents families from gaining asylum when the family group is persecuted in retaliation for the acts of another family member, even in a country whose government is unable or unwilling to address the problem. As a result, family members will be left without refuge and will remain subjected to destructive persecution.

This is particularly troublesome in the context of human trafficking because the human-trafficking industry strikes at the heart of family cohesiveness. Traffickers may target a specific family because of the ease or likelihood of acquiring valuable human property, for failure to comply with the demands of organized crime groups, out of retribution for a family member serving as a prosecution witness, or as a warning to others that testifying against traffickers will result in harm to family members. The narrow rule articulated by the Fifth Circuit fails to cover any of these situations because only its two "prohibited reasons"—i.e. the "desire to punish membership" in a family or the desire to overcome "an offensive characteristic" of a family—qualify as persecution "on account of" family membership for asylum purposes.

B. The Fifth Circuit's Rule Creates An Unnecessary Conflict Between The Immigration And Nationality Act And The Trafficking Victims Protection Act.

Not only does the decision below frustrate Congress's general policy in favor of protecting family

unity in immigration law, it creates tension within different provisions of the INA.¹⁷ Ordinarily, courts interpreting statutes favor internal consistency. As interpreted by the majority of Circuit Courts, the INA asylum provisions naturally coordinate with the TVPA to protect families targeted for persecution by human traffickers because a family member cooperates with U.S. prosecutors. Yet under the Fifth Circuit's view, the INA asylum provisions would deny protection to families persecuted by human traffickers based upon retribution for witness testimony. This conflicts with the TVPA's policy of facilitating prosecutions of human traffickers and protecting families victimized by human trafficking. The INA asylum provisions should instead be read to harmonize with the TVPA's policy aims.

Congress's enactment of the TVPA in 2000 established a strong national policy of protecting human-trafficking victims and prosecuting their traffickers. Referencing the Declaration of Independence, Congress stated that "[c]urrent practices of sexual slavery and trafficking of women and children are . . . abhorrent to the principles upon which the United States was founded." 22 U.S.C. § 7101(b)(22) (2006).

With that in mind, the statute established a system for combating human trafficking in general, and sex trafficking in particular, including an interagency

¹⁷ The TVPA amended the INA, adding provisions that directly address human trafficking. Pub L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended at 22 U.S.C. § 7101 *et seq.*). As a result, the INA contains both general asylum provisions, including the statute at issue in this case, and provisions targeted at protecting human-trafficking victims and combating human trafficking. *E.g.* 8 U.S.C. § 1101(a)(15)(T) (2006) (authorizing "T-visa" for human trafficking victims).

task force to monitor and combat human trafficking, new human-trafficking crimes with strong penalties, and “T” visas for foreign victims of human trafficking. *Id.* §§ 7101-7110. In granting T-visas to trafficking victims, Congress understood the serious retribution problem faced by those who would cooperate with U.S. prosecutors. Victims had testified before Congress that they were “afraid of returning to their home countries—fearing retribution from their traffickers for having gone to United States law enforcement authorities.” H.R. Rep. No. 106-487, pt. 2, at 18. In sharp contrast with the Fifth Circuit’s reasoning below, the legislative history suggests that Congress considered retribution as a valid basis for extending immigration law benefits to protect victims of human traffickers.

The TVPA does not limit its protections to direct human-trafficking victims. Instead, the TVPA also aims to protect family members impacted by human trafficking. Section 107(c)(3) instructs federal law enforcement officials to “protect the safety of trafficking victims, including taking measures to protect trafficked persons and their family members from intimidation, threats of reprisals, and reprisals from traffickers and their associates.” Furthermore, the TVPA enables a victim’s spouse, children, and parents to apply for immigration relief in the form of T-visas. Pub. L. No. 106-386, § 107(e)(1), 114 Stat. 1464, 1477-78 (2000).

Since the TVPA was passed in 2000, Congress has repeatedly expanded this protection for the families of those who cooperate with trafficking prosecutions. Under the original TVPA, specified family members of victims could qualify for T-visas if necessary to avoid “extreme hardship.” In 2006, Congress eliminated the extreme-hardship requirement, making

familial status alone sufficient for T-visa protection. Pub. L. No. 109-162, § 801(a)(2), 119 Stat. 2960, 3053-54 (2006). In 2008, Congress again broadened this provision, allowing additional victims' family members to qualify for T-visas, so long as a parent or sibling faces a "present danger of retaliation as a result of the alien's . . . cooperation with law enforcement." Pub. L. No. 110-457, § 201(a)(2)(C), 122 Stat. 5044, 5053 (2008) (codified as amended at 8 U.S.C. § 1101(a)(15)(T)(ii)(III)).

While the TVPA does not specifically address families targeted by human traffickers after a non-victim family member agrees to testify for U.S. prosecutors, the INA asylum provisions coordinate with the TVPA to provide this necessary protection to witnesses. Interpreted correctly, the asylum provisions in § 1158(b)(1)(A) and § 1102(a)(42)(A) protect families that are targeted by traffickers because these families are persecuted "on account of membership" in their family. The Fifth Circuit's rule would prevent the asylum provisions from applying in these human-trafficking cases (except in the highly unlikely event the applicant could demonstrate the traffickers sought to eradicate his or her dynastic bloodline). This prevents the INA asylum provisions from embracing the TVPA's policy of combating human trafficking and protecting those targeted by organized trafficking criminals. Rather than fairly allowing the INA asylum provisions to further our national policy against human trafficking, the Fifth Circuit has created an impediment to the vigorous prosecution of traffickers envisioned in the TVPA and should be reversed.

C. The Fifth Circuit’s Rule Negatively Impacts The Substantial Government Interest In Prosecuting Human Traffickers.

The Fifth Circuit’s rule also hinders U.S. human-trafficking prosecutions. The United States has a significant interest in prosecuting human traffickers. The TVPA’s sponsor explained, “[O]ur bill would provide for life imprisonment, which makes it very clear that we are serious. Put these people away, lock them up and throw the key away, seems to me the only way to deal with the question of those who commit these heinous crimes.” *Trafficking of Women and Children in the International Sex Trade: Hearing Before the Subcomm. on Int’l Operations and Human Rights of the H. Comm. on Int’l Relations*, 106th Cong. 3-4 (1999) (statement of Rep. Christopher H. Smith, Subcomm. Chairman).

Along with this interest in prosecuting human traffickers comes a need for prosecution witnesses. The TVPA was designed to aid in these prosecutions by encouraging victims to come forward and provide valuable testimony. Yet the Fifth Circuit’s rule will have the opposite effect: it will chill witness testimony. Witnesses like Mr. Demiraj will think twice before coming forward to testify if immigration law does not protect their family members from persecution by the sophisticated, transnational criminal groups that often engage in human trafficking. And for those witnesses who do come forward, the United States has an inherent ethical duty to protect prosecution witnesses and their families. *See Baker, supra*, at 852 (“Prosecutors have a duty . . . to victims and witnesses—and in trafficking cases, this duty extends to the families of victims and witnesses.”). Reversing the Fifth Circuit

will honor that duty by correctly allowing immigration law to protect these witnesses' family members targeted for persecution in their home countries.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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