

No. 02-71656

**IN THE UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT**

**MICHELLE THOMAS (A75-597-033)
DAVID GEORGE THOMAS (A75-597-034)
TYNEAL MICHELLE THOMAS (A75-597-035)
SHALDON WAIDE THOMAS (A75-596-036)
Petitioners,**

v.

**JOHN ASHCROFT, Attorney General
Respondent.**

**IN SUPPORT OF PETITION FOR REVIEW OF AN ORDER
OF THE BOARD OF IMMIGRATION APPEALS**

**AMICUS CURIAE BRIEF
ON REHEARING *EN BANC***

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	1
INTRODUCTION	3
STATEMENT OF INTEREST OF THE AMICUS CURIAE.....	6
ARGUMENT	7
1. Gender Persecution and Family Group Membership	7
2. Family as a Particular Social Group: Consistency In Board Decision-making .	10
CONCLUSION	13
STATEMENT OF COMPLIANCE WITH NINTH CIRCUIT LOCAL RULE 32	15

Table of Authorities

Cases:

<i>In Re Acosta</i> 19 I. & N. Dec. 211, 232 (BIA 1985) overruled in part by <i>In Re Mogharrabi</i> , 19 I. & N. Dec. 439, 1987 WL 108943 (BIA 1987)	10, 12
<i>Agbuya v. INS</i> , 241 F.3d 1224, 1228 (9th Cir.2001)	4
<i>Amanfi v. Ashcroft</i> , 328 F.3d 719, 729 (3rd Cir. 2003)	13
<i>Chang v. INS</i> , 119 F.3d 1055, 1065 (3rd Cir.1997)	5
<i>Chen v. Ashcroft</i> , 289 F.3d 1113, 1116 (9th Cir. 2002) vacated by <i>Chen v. Ashcroft</i> , 314 F.3d 995 (9th Cir. 2002) (per board grant of asylum)	4, 5, 11
<i>Davila-Bardales v. INS</i> , 27 F.3d 1, 4, 5(1st Cir. 1994)	14
<i>Estrada-Posadas v. INS</i> , 924 F.2d 916 , 919 (9 th Cir 1991)	11
<i>Fatin v. INS</i> , 12 F.3d 1233, 1239- 40 (3rd Cir. 1993)	11
<i>Gebremichael v. INS</i> , 10 F.3d 28, 36 (1st Cir.1993)	11
<i>Girma v. INS</i> , 283 F.3d 664, 667-68 (5th Cir.2002)	5
<i>In Re H-</i> , 21 I&N Dec. 337, 342 (BIA 1996) Interim Dec. 3276, at 10 (BIA 1996)	10
<i>Henry v. INS</i> , 74 F.3d 1, 7 (1st Cir. 1996)	14
<i>Hernandez-Montiel v. INS</i> , 225 F.3d 1084, 1093 (9th Cir. 2000)	12
<i>Iliev v. INS</i> , 127 F.3d 638, 642 & n. 4 (7th Cir.1997)	11
<i>In Re Mogharrabi</i> , 19 I. & N. Dec. 439, 1987 WL 108943 (BIA 1987)	11
<i>Lopez-Soto v. Ashcroft</i> , 383 F.3d 228, 235 (4th Cir. 2004)	4, 5, 11
<i>Lukwago v. Ashcroft</i> , 329 F.3d 157, 170 (3rd Cir.2003)	4

<i>Osorio v. INS</i> , 18 F.3d 1017, 1028 (2nd Cir.1994)	5
<i>Rodriguez-Roman v. INS</i> , 98 F.3d 416, 427 (9th Cir. 1996)	13
<i>In Re S-P-21</i> I&N Dec. 486, 495 (BIA 1996)	4
<i>Salameda v. INS</i> , 70 F.3d 447, 452 (7th Cir. 1995)	13
<i>Singh v. Ilchert</i> , 63 F.3d 1501, 1509 (9th Cir.1995)	4
<i>In Re Sukhrajkaur Harbhajan Heer</i> (27 Immig. Rptr. B1-112 APR 1 2003)	5, 9

Secondary Authority:

Deborah E. Anker, <i>Law of Asylum in the United States</i> , 386 (1999)	10, 12
<i>Department of Justice’s Fact Sheet on the Board at</i> http://www.usdoj.gov/eoir/fs/biabios.htm	13
<i>Guidelines on International Protection No. 1</i> , United Nations High Commissioner on Refugees, HCR/GIP/02/01, 7 May 2002	7
<i>In re Rodi Alvarado-Pena</i> , Department of Homeland Security’s Position on Respondent’s Eligibility for Relief (2003) available at http://www.gbls.org/immigration/dhs_brief_ra.pdf	12

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The attached motion and this brief of amicus curiae, Women Refugeess Project, Harvard Immigration and Refugee Clinic, are submitted in support of the Petitioners (Michelle, David, Tyneal and Shaldon Thomas) and in connection with this Court's rehearing en banc of the panel's decision in *Thomas v. Ashcroft*, 359 F.3d 1169 (9th Cir 2004). Amicus curiae maintain that the decision of the Board of Immigration Appeals, denying the Thomases asylum protection under U.S. law,

should be overturned. Petitioners amply satisfy the criteria for “refugee” status pursuant to 8 U.S.C. § 1101(a)(42(A) and thus are eligible for asylum.

In this rehearing en banc, the Court has directed the parties to address two specific issues:

1. May a family constitute a “particular social group” within the meaning of 8 U.S.C. § 1101(a)(42(A)?

2. If a family can be a particular social group, were the Petitioners for asylum in this case persecuted on account of their membership in their family?

Due to limitations of time and the scope of this amicus briefing, we will primarily address the first question posed by this Court: whether a family constitutes a “particular social group.” Amicus, with limited exception,¹ adopt the position of

¹ Petitioners argue they suffered and will face persecution solely on account of their membership in the Thomas family. We agree with this position, but wish to emphasize that to establish a “nexus,” the applicant need not prove that the protected ground is the exclusive reason that she faces persecution. The Board, this circuit and other courts have long recognized that there may be mixed motivations for persecution. *In re S-P-*, 21 I&N Dec. 486, 495 (BIA 1996); *Chen v. Ashcroft* 289 F.3d 1113, 1116 (9th Cir. 2002), *vacated on other grounds by Chen v. Ashcroft*, 314 F.3d 995 (9th Cir. 2002) (“It is not necessary that persecution be solely on account of one of the forbidden grounds for an asylum applicant to secure asylum. It is enough that a principal reason for the persecution be on account of a statutory ground”); *Lopez-Soto v. INS* 383 F.3d 228, 236 (4th Cir. 2004) (“[T]o qualify for asylum, the persecution feared falls within the statute so long as the illicit motive was *a* cause – not necessarily the *sole* cause – of the persecution.”); *Agbuya v. INS*, 241 F.3d 1224, 1228 (9th Cir.2001); *Borja v. INS*, 175 F.3d 732, 735 (9th Cir.1999) (en banc) (holding that proof of persecution “solely” on account of protected status is not required); *Singh v. Ilchert*, 63 F.3d 1501, 1509 (9th Cir.1995); *Lukwago v. Ashcroft*, 329 F.3d 157, 170 (3d Cir.2003) (“A persecutor may have multiple

Petitioners as to the second question, agreeing that Petitioners have established that the persecution they fear is on account of the particular social group constituted by their family.

motivations for his or her conduct, but the persecutor must be motivated, at least in part, by one of the enumerated grounds”) (citing *Chang v. INS*, 119 F.3d 1055, 1065 (3d Cir.1997)); *Osorio v. INS*, 18 F.3d 1017, 1028 (2d Cir.1994) (holding that "persecution on account of" does not mean "persecution *solely* on account of"); *see also Girma v. INS*, 283 F.3d 664, 667-68 (5th Cir.2002) (per curiam) (adopting the "mixed motive" analysis of the nexus requirement, following the reasoning in *Borja* and *Osorio*).

We agree with Petitioners there is more than ample evidence in the record that Petitioners' persecution is on account of their family membership. Indeed, there is virtually no evidence of other motivation. *Cf* *Chen v. Ashcroft*, *supra* at 1116 (finding that feared persecution was on account of family membership even where other motives, repayment of debt and prosecution under Chinese law, were present); *In re Sukhrajkaur Harbhajan Heer* (Los Angeles, Cal., BIA Apr 1, 2003, A75 734 367) (27 Immig. Rptr. B1-112 APR 1 2003) *available at* <http://web.lexis.com/xchange/practiceareas/immigration/default.asp> in BIA & AAU Non-Precedent Decisions (finding that feared persecution was on account of family membership even though government agents also motivated by revenge for mistaken belief that husband was a member of militant group). In some cases based on particular social group/family membership, courts have found the "on account of" evidence too attenuated. *See Lopez-Soto v. Ashcroft*, 383 F.3d 228 *supra* at 238 where the court held that it was not "compelled" to overrule the Immigration Judge's and Board's finding of no connection between the threats the Petitioner received from the "Mara 18" gang in Guatemala and his family membership (largely, the killing of his brother by the same gang, many years earlier); that he was threatened with recruitment simply because he was a young male living in the particular area where the gang was recruiting). The Thomases case is distinguishable, since the connection between the violence against Michelle Thomas and her father-in-law's actions and beliefs is hardly attenuated; indeed, the record is virtually uncontroverted that the actions against Ms. Thomas were because of her relationship with her father-in-law.

Statement of Interest of the Amicus Curiae

The Women Refugees Project of the Harvard Law School Immigration and Refugee Clinic has worked with hundreds of women from around the world since its founding in 1992. It combines representation of individual women asylum applicants with the development of theories, policy and national advocacy. The Project participated in developing the *Considerations for Asylum Officers Adjudicating the Asylum Claims of Women* issued by the Immigration and Naturalization Service (INS) in May 1995, and has been engaged by the Justice Department in the training of immigration judges, asylum officers and supervisors on issues related to women's asylum claims. In addition the Project provides advice, support, and supplemental services to advocates around the United States representing women seeking asylum.

The Project has an interest in the proper application and development of the law in this area, so that claims by women for asylum protection receive fair and proper consideration under existing standards of law. The Project has submitted amicus curiae briefs in several asylum and immigration-related cases in the past including such major cases involving gender persecution as *Fatin v. INS*, 12 F.3d 1233, 1240 (3rd Cir.1993) and *In re R-A-*, Int. Dec. 3403 (BIA 1999), *vacated* (A.G. 2001), now pending before Attorney General.

ARGUMENT

1. Gender Persecution and Family Group Membership

Amicus present this brief based on its long-standing interest in U.S. asylum law, and in particular in the protection and fair treatment of women in applications for asylum and related protections. Family-based persecution is particularly relevant to women. Especially for women, the family is “a focus of fundamental affiliational concerns and common interests” *Sanchez-Trujillo v. INS*, 801 F. 2d 1571, 1576 (9th Cir. 1986). Women are often persecuted because of family association or affiliations.

In many cases of women applying for asylum protection, family membership is the reason for the feared persecution. *See* Heaven Crawley, *Refugees and Gender: Law and Process* 86 (noting that many women asylum seekers are persecuted or face future persecution due to the status, activities or view of family members, including spouses, parents, siblings; decision makers have often failed to recognize the significance of family relationships in shaping women’s experience of persecution); United Nations High Commissioner for Refugees, *Guidelines on International Protection No. 1*, HCR/GIP/02/01, 7 May 2002 (noting important role of family membership in claims of Women Refugees to protection, and that such claims for protection may be based on particular social group/family membership)

Gender is implicated in asylum cases, not only when the persecution is on account of gender per se, but also where the type of harm inflicted by a persecutor (or feared) is “gendered” in that it targets a female applicant's vulnerability as a woman or as a mother. Women are especially vulnerable to such “gendered” violence when they are alone (that is, without male protection), and when they are mothers (because of their consequent role as protectors and caretakers, and because of a mother’s special relationship – and attachment – to her children).

The instant case illustrates the particularly gendered way in which women face persecution, especially as a result of their family membership. Petitioner Michelle Thomas suffered many instances of threats and persecution, including a kind of persecution, that is gendered – violence that she was vulnerable to because she is a woman and a mother. Thus she testified as to one major incident of persecution in which she was alone at her house on her veranda, with her children playing in the yard. In front of her children, a black man from her father-in-law’s company threatened to cut her throat. (AR 159). In another instance, Michelle Thomas was again alone with her daughter Tyneal, going to a store when she was viciously attacked, as a woman and as a mother – her young daughter almost snatched from her arms.

[I] had Tyneal in my arms and the next thing I knew that four Black men had approached me and were trying to take Tyneal out of my arms. . . . There they walked up to me, they surrounded me and the next thing I knew is that they were trying to get Tyneal out of my arms. I held her tight and fell to the

ground with her and the next thing I know is that my neighbor had come out of the house because he had heard me screaming and shouting and they ran off. . . .[T]he only thing I recognized was that Strong Shore overall again.” (AR 194).

After this incident, Mrs. Thomas felt she had to leave South Africa, out of fear, among other harms, that the men would return and “take one of my children.” (AR 196).

As Petitioners note in their supplemental brief, the Board – along with every circuit that has addressed the question – has consistently reaffirmed its long-standing doctrine that family constitutes, indeed is the quintessential example of, “particular social group.” The Board has specifically granted asylum based on family membership to a woman applicant who suffered gender-based persecution, as a result of her family membership. In *In Re Sukhrajkaur Harbhajan Heer* (Los Angeles, Cal., BIA Apr 1, 2003, A75 734 367) (27 Immig. Rptr. B1-112 APR 1 2003)², the Board found the woman applicant, who had been subjected to sexual and other violence because of her father’s suspected affiliation with militant groups, suffered persecution on account of her membership in a particular social group, i.e. her family. In that case, Sikh militants had abducted the applicant’s father, but the police believed he had voluntarily joined the Sikhs and was training militants. Slip

² available at:

<http://web.lexis.com/xchange/practiceareas/immigration/default.asp>
(in BIA & AAU Non-Precedent Decisions)

Op. at 2. The applicant testified that she was arrested twice, during which time police attempted to force her to tell them her father's whereabouts. While detained, she was beaten, sexually groped, and had her feet frozen on ice. The BIA found that respondent was persecuted – suffered gender-based violence – on account of a protected ground, specifically her membership in a particular social group, that being her family. *Id.*, Slip Op. at 2.

2. Family as a Particular Social Group: Consistency In Board Decision-making

“Under U.S. case law, one widely accepted type of particular social group is the family . . . “ Deborah E. Anker, Law of Asylum in the United States 386 (3d ed. 1999). This doctrine has been repeatedly affirmed by the Board, which first established the principle in *Matter of Acosta*, 19 I. & N. Dec. 211, 232, (BIA 1985), *overruled on other grounds by In Re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).³ The Board has specifically granted asylum based on the applicant's membership in the particular social group of her family. *See In re Sukhrajkaur Harbhajan Heer, supra*; *see also Chen v. Ashcroft*, 289 F.3d 1113, 1116 (9th Cir. 2002) *vacated on*

³ *See also* Anker, *supra* 387 (“clan . . . is a characteristic also generally based on kinship that, similarly, cannot be changed and can provide the basis for particular social group membership; citing *In re H-*, 21 I&N Dec. 337, 342 (BIA 1996) Interim Dec. 3276, at 10 (BIA 1996) (noting that clan membership is a “highly recognizable, immutable characteristic...acquired at birth and...inextricably linked to family ties.”)

other grounds by Chen v. Ashcroft, 314 F.3d 995 (9th Cir. 2002) (citing Board decision in which it specifically overruled the Immigration Judge and quoting Board’s clear position that, “[t]he family has been recognized as a social group, such that persecution on account of family membership can serve as a basis for asylum”).

This circuit has similar, long-standing doctrine. In its seminal 1986 *Sanchez-Trujillo* decision, the court emphatically noted that family membership is the prototype of a “particular social group.” *Sanchez-Trujillo, supra* at 1576. *See also Pedro-Mateo v. INS*, 224 F.3d 1147, 1151 (9th Cir. 2000) (noting 9th Circuit “rule” that family qualifies as a particular social group).⁴ Every other circuit that has subsequently addressed the issue has affirmed the principle that family constitutes a particular social group, including most recently the Court of Appeals for the Fourth Circuit. *See Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004) (“We join our sister circuits in holding that ‘family’ constitutes a “particular social group” and noting that every circuit court that has addressed the issue, has found that family constitutes a particular social group (citing *Iliev v. INS*, 127 F.3d 638, 642 & n. 4 (7th Cir.1997)); *Fatin v. INS*, 12 F.3d 1233, 1239- 40 (3d Cir. 1993) (accepting BIA

⁴ The only possible contrary decision is *Estrada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir 1991) (denying asylum based on family membership where the applicant’s testimony was less than credible, where the applicant failed to establish a well-founded fear of persecution, and where the applicant presented little evidence that she was associated or identified with her family).

ruling in *Acosta, supra*, that “kinship ties” qualify as a particular social group); *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”).

“Certainly one’s family membership is an affiliation that ordinarily cannot be changed; it also is a protected characteristic that a person should not be required to change.” Anker, *supra* at 386. This “immutable characteristic” formulation for analyzing the particular social group category also is grounded in firm Board precedent and increasingly has been accepted by many circuits, deferring as they should to a reasonable interpretation of the law by the relevant administrative agency. *See, e.g., Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (a particular social group includes a group united either by a voluntary association, or “by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or would not be required to change it”). The Department of Homeland Security has specifically endorsed the immutable characteristic formulation for analyzing the “particular social group” ground. *See In Re Rodi Alvarado-Pena*, Department of Homeland Security’s Position on Respondent’s Eligibility for Relief (2003) available at http://www.gbls.org/immigration/dhs_brief_ra.pdf.

CONCLUSION

This long-standing and consistently stated position of the Board of Immigration Appeals (“Board” or “BIA”) and the Department of Justice (DOJ) should be the law of the land. The DOJ has underscored the importance of the Board’s internally consistent decision making, for the proper management and fair administration of justice. “The Board’s principal mission is to ensure that the immigration laws receive fair and uniform application.” *See* The DOJ Fact Sheet on the Board *available at* <http://www.usdoj.gov/eoir/fs/biabios.htm>.

Circuit courts also have emphasized the fundamental rule-of-law principle, that Board rulings must be internally consistent. *Rodriguez-Roman v. I.N.S.*, 98 F.3d 416, 427 (9th Cir. 1996) (finding that the BIA erred in determining that punishment for illegal departure could not constitute persecution, when previous court and BIA decisions held that punishment for the crime of illegal departure could constitute persecution); *Amanfi v. Ashcroft*, 328 F.3d 719, 729 (3d Cir. 2003) (finding that BIA erred in ruling that imputed membership in a particular social group could not support a grant of asylum relief, when at least two previous BIA decisions had held that persecution for imputed grounds could satisfy the definition of “refugee”); *Salameda v. I.N.S.*, 70 F.3d 447, 452 (7th Cir. 1995) (holding that the

BIA erred in deeming community service irrelevant in deciding whether non-citizen had shown extreme hardship, when court and BIA precedent clearly established that the BIA must consider community service in considering whether extreme hardship had been shown); *Davila-Bardales*, 27 F.3d 1, 4, 5((1st Cir. 1994) (finding that the BIA erred in relying exclusively on the admissions of an unrepresented respondent under the age of 16 who was not accompanied by a guardian, relative, or friend, when previous cases indicated that admissions allegedly made by such a minor would be treated as inherently suspect); *Henry v. INS*, 74 F.3d 1, 6 (1st Cir. 1996) (finding Board must consistently apply same basic rules to all similarly situated applicants; BIA cannot “flit like a bee” from decision to decision).

This case, which raises issues of particular concern to Women Refugees, must follow the long-established doctrine of the Board and this circuit, recognizing family as a particular social group. For these reasons, we respectfully request this Court to reverse the Board decision below, and grant the Thomases’ appeal.

Dated: November 24, 2004

Respectfully submitted,

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STATEMENT OF COMPLIANCE WITH NINTH CIRCUIT

LOCAL RULES 32 AND 40-1

Pursuant to Local Rules 32 of the Rules of this Court, I certify that the Amicus Curiae Brief on Rehearing *En Banc* has been formatted in monospaced Times New Roman 14 point type, the text is double-spaced and consists of 15 pages, and according to the word count feature on the word processor by which this Brief has been prepared, consists of 3600 words. The footnotes are in Times New Roman 14 point type, and are single spaced.

Dated: November 24, 2004

Deborah Anker
Women Refugees Project