

No.

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

MICHELLE THOMAS, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in holding, in the first instance and without prior resolution of the questions by the Attorney General, that members of a family can and do constitute a “particular social group,” within the meaning of the Immigration and Nationality Act’s definition of “refugee,” 8 U.S.C. 1101(a)(42)(A), and that they were harmed “on account of” that status.

PARTIES TO THE PROCEEDINGS

The petitioner in this Court is the Attorney General of the United States, Alberto R. Gonzales. The respondents are Michelle Thomas, David George Thomas, Tyneal Michelle Thomas, and Shaldon Waide Thomas, who were petitioners in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Attorney General Alberto R. Gonzales, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-29a) is reported at 409 F.3d 1177. The prior opinion of a panel of the court of appeals (Pet. App. 30a-50a) is reported at 359 F.3d 1169. The orders of the Board of Immigration Appeals (Pet. App. 51a-58a), and the decision of the immigration judge (Pet. App. 59a-76a), are unreported.

JURISDICTION

The en banc court of appeals entered its judgment on June 3, 2005. On August 25, 2005, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including October 3, 2005. On September 26, 2005, Justice O'Connor further extended the time within which to file a petition for a writ of certiorari to and including October 31, 2005. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced at Pet. App. 77a-91a.

STATEMENT

In this case, the Ninth Circuit, sitting en banc, held that respondents could qualify as "refugees" under the Immigration and Nationality Act (INA or Act), 8 U.S.C. 1101 *et seq.*, based on a finding that they are members of a family that had been the target of criminal activity. The Ninth Circuit reasoned that belonging to a family constitutes "membership in a particular social group," which is one of the grounds for protection under the Act. 8 U.S.C. 1101(a)(42)(A). That issue, and the interpretation of "membership in a particular social group" more generally, are of considerable significance in the administration of the INA. Although the Ninth Circuit acknowledged that the question whether respondents qualified as members of a "particular social group" was never addressed by the immigration judge or the Board of Immigration Appeals in respondents' removal proceedings, the court definitively resolved that issue rather than remanding as required by *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam).

1. a. Congress has charged the Secretary of Homeland Security (Secretary) “with the administration and enforcement of [the Immigration and Nationality] Act and all other laws relating to the immigration and naturalization of aliens.” 8 U.S.C. 1103(a)(1), as amended by the Homeland Security Act of 2002, Pub. L. No. 107-296, § 1102(2)(B), 116 Stat. 2273, and the Homeland Security Act Amendments of 2003, Pub. L. No. 108-7, Div. L, § 105(1), 117 Stat. 531. Congress vested the Secretary with the authority to make asylum determinations for aliens who are not in removal proceedings and to establish procedures for such determinations. Pub. L. No. 107-296, § 451(b)(3), 116 Stat. at 2196 (to be codified at 6 U.S.C. 271(b)(3)); see also 8 C.F.R. 208.2(a), 208.4(b), 208.9(a).

The Attorney General is responsible for conducting proceedings against an alien charged by the Department of Homeland Security with being removable. 8 U.S.C. 1103(a)(1), 1229a(a)(1). Removal hearings are conducted by immigration judges in the Executive Office for Immigration Review within the Department of Justice, and the Board of Immigration Appeals (Board) hears appeals from decisions of the immigration judges. See 8 C.F.R. 1240.1(a)(1), 1240.15. The Attorney General has the authority to review any decision of the Board. 8 C.F.R. 1003.1(h).

Aliens who are in removal proceedings make their asylum applications before immigration judges, rather than the Secretary. See 8 C.F.R. 208.2(b), 208.4(b), 1240.15. The decision whether to grant asylum to an alien in removal proceedings rests with the Attorney General. 8 U.S.C. 1103(g) (Supp. II 2002); 8 U.S.C. 1158(b)(1)(A), 1229a(c)(4), as amended by REAL ID Act of 2005 (REAL ID), Pub. L. No. 109-13, Div. B, § 101(a) and (d), 119 Stat. 302, 304. The INA further provides that an alien who wishes to challenge a final removal order of the Attorney General may do so by

filing a petition for review in the court of appeals for the circuit in which the hearing before the immigration judge was held. See 8 U.S.C. 1252(a)(1). Congress also directed that, in the administration of the Act, the “determination and ruling by the Attorney General with respect to all questions of law shall be controlling.” 8 U.S.C. 1103(a)(1).

b. The INA defines a “refugee” as an alien who is unwilling or unable to return to his or her country of origin “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. 1101(a)(42)(A). If the “Attorney General determines” that an alien is a “refugee,” he may, in his discretion, grant the alien asylum in the United States. 8 U.S.C. 1158(b)(1)(A), as amended by REAL ID § 101(a), 119 Stat. 302. In addition to the discretionary relief of asylum, mandatory withholding of removal is available if “the alien’s life or freedom would be threatened in [the country of removal] because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. 1231(b)(3)(A).

For purposes of both forms of protection from removal, “persecution” generally refers to significant mistreatment by the government itself or by groups or individuals that the government is unable or unwilling to control. See *In re Villalta*, 20 I. & N. Dec. 142, 147 (BIA 1990); *In re Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). Routine crimes and adversities arising from personal relationships unconnected to a protected ground are not covered. See *In re Y-G-*, 20 I. & N. Dec. 794, 799-800 (BIA 1994); *In re Pierre*, 15 I. & N. Dec. 461, 463 (BIA 1975); see also *Molina-Morales v. INS*, 237 F.3d 1048, 1052 (9th Cir. 2001).

c. The phrase “particular social group” in the definition of “refugee” and in the provision for withholding of removal is not further defined in the Act. The Attorney General, through the Board, has interpreted “particular social group,” at a general level, to mean

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

Acosta, 19 I. & N. Dec. at 233. The group characteristic, at a minimum, must be one which “the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.” *Ibid.* The Board determined in *Acosta*, however, that the “particular kind of group characteristic” that will constitute a “particular social group” is best determined on a “case-by-case basis.” *Ibid.*

2. Respondents, a wife, husband, and two minor children, are natives and citizens of South Africa who entered the United States as visitors and then applied for asylum. Pet. App. 2a. The lead respondent, Michelle Thomas, explained in her asylum application that the family left South Africa because of the “alarming” crime rate, the “lack of proper education” for the children, and “[p]olitical corruption and the lack of law enforcement [which] has made it unsafe [and] demoralizing.” Certified Admin. Rec. (A.R.) 410; C.A. E.R. 326. On her application for asylum and withholding, Michelle Thomas checked the boxes marked “membership in a particular social group” and “political opinion” as the grounds on which she allegedly was persecuted. Pet. App. 5a; A.R. 411.

Respondents were placed in removal proceedings. In the hearing before an immigration judge in 1999, Michelle Thomas testified that her family “was seeking asylum on the grounds of race because as a White family in South Africa, they are being targeted for persecution by Black South Africans” who “hold a grudge against her and her family, because of the way her allegedly racist father-in-law, known as “Boss Ronnie,” treated his Black workers. Pet. App. 61a-62a; A.R. 162. Boss Ronnie was a foreman at Strongshore construction company from 1986 until his retirement in 1998. Pet. App. 64a-65a, 68a; A.R. 87. Respondents also submitted “voluminous material on the high crime rate of South Africa.” Pet. App. 67a; A.R. 270-271 (listing submissions).

In support of her claim of persecution, Thomas testified that, in early 1996, the family dog was poisoned, their car was vandalized, and human feces were thrown against their house. Pet. App. 62a-63a. Thomas also testified that, seven months later, a black man wearing Strongshore overalls appeared outside the gate to her home, Pet. App. 4a; A.R. 190-191, and “asked me if I knew Boss Ronnie which was David’s father and he said to me he’[d] come back and cut my throat,” Pet. App. 4a. Nothing further happened until March 1997, when “four black men approached [Thomas] and tried to take her daughter from her arms.” *Ibid.* One of the men wore Strongshore overalls. When a neighbor came out in response to Thomas’s screams, the men ran off. *Ibid.*

Two months later, after finding tenants for their home, the respondents left for the United States. Pet. App. 64a; A.R. 170. No further incidents occurred during those intervening two months. Pet. App. 64a-65a. Thomas also testified that, while her brother-in-law had been subjected to a few property crimes and threats, there was no evidence

that he had been targeted for retribution based on his father's activities, nor any evidence of retribution against any other family member. A.R. 199. In fact, the brother-in-law had returned to South Africa by the time of the hearing. Pet. App. 65a. At one point, Thomas specifically agreed with the proposition that the harassment was not "because of [their] race, [their] religion, [their] membership in a social group, [or] a political opinion," but was "because of the racism of" her father-in-law and "the way [he] treated his workers." *Id.* at 8a; A.R. 156, 173.

3. The immigration judge denied asylum and withholding of deportation. Pet. App. 59a-76a. The immigration judge noted that, according to Michelle Thomas's written application, the respondents are seeking asylum "on the grounds of race because as a White family in South Africa, they are being targeted for persecution by Black South Africans," and because "Black workers in South Africa hold a grudge against her and her family." *Id.* at 61a-62a; see *id.* at 68a. The immigration judge concluded, however, that respondents' allegations of persecution amounted to a claim of "personal retaliation of workers who worked for the father-in-law," and that such "[p]ersonal problems," without more, "cannot be the basis of a claim for asylum." *Id.* at 71a. The immigration judge further found that Thomas's testimony was not "totally credible," *id.* at 72a, noting that the father-in-law had worked for the construction company for a decade before the incidents began and that respondents offered "no explanation as to why these attacks against her family suddenly began in 1996," given that Boss Ronnie "was probably as racist in 1986 as he was in 1996." *Id.* at 73a.

In denying relief, the immigration judge concluded that respondents "ha[d] failed to meet [their] burden of proving * * * [they] suffered persecution in South Africa based on

any of the five statutory grounds whether it is race or political opinion.” Pet. App. 73a-74a.

4. Respondents appealed to the Board of Immigration Appeals. In their brief to the Board, respondents asserted a well-founded fear of persecution “on account of race,” A.R. 9, arguing that “the [r]espondents suffered from past persecution on account of their race,” and that they “were targeted for persecution by black South Africans,” *id.* at 12. Respondents elaborated:

South Africa is a country comprised of great wealth and extreme poverty. The wealth is generally in the hands of white South Africans, who since the abolition of apartheid, have been targets of an ever growing criminal class comprised mainly of poor black South Africans. Violent crime is a way of life in South Africa. * * * White South Africans are the targets of choice by criminals because of their perceived wealth.

Id. at 13-14. The brief then framed “[t]he issue [a]s not whether the government is an active participant in the violence against whites, but rather its transparent inability to protect white South Africans from violent crime and lawlessness.” *Id.* at 14.

The Board summarily affirmed the decision of the immigration judge. Pet. App. 51a-58a.

5. A divided panel of the court of appeals granted respondents’ petition for review. Pet. App. 30a-47a. Although respondents’ briefs were “a little vague” and they had submitted documentary evidence concerning race-based crime in South Africa, the panel observed that respondents “do not appear to contend seriously that their race or political opinion was the basis for their persecution.” *Id.* at 40a-41a. Instead, the panel decided that respondents’ “best statutory ground” was based on “mem-

bership in a particular social group, as relatives of Boss Ronnie.” *Id.* at 41a. The panel held that, “[w]here family membership is a sufficiently strong and discernible bond that it becomes the foreseeable basis for personal persecution, the family qualifies as a ‘social group.’” *Id.* at 43a. The panel also determined that respondents “have demonstrated that the alleged persecution suffered was a result of the fact that they are related to Boss Ronnie,” *ibid.*, and that the criminal harassment of the respondents constituted “persecution,” *id.* at 44a-45a.

Judge Fernandez dissented. Pet. App. 47a-50a. He noted that “there is little authority for the proposition that a family, as such, is a social group, and the use of that concept here shows just how poor an idea it is.” *Id.* at 47a (footnote omitted). In Judge Fernandez’s view, the panel’s decision “extends general language in our cases almost beyond recognition in order to foster a grant of asylum to people who are in no proper sense true refugees,” and “[i]t makes a mockery of the serious concerns that lie behind the virtually universal desire to protect people who are truly being persecuted in their own countries.” *Id.* at 49a.

6. a. The court of appeals granted rehearing en banc. Pet. App. 2a.¹ In both its petition for rehearing en banc and

¹ At the outset, the en banc court rejected the government’s argument that respondents failed to exhaust the “particular social group” issue. The INA permits judicial review of a final order of removal “only if,” *inter alia*, “the alien has exhausted all administrative remedies available to the alien as of right.” 8 U.S.C. 1252(d)(1). The court concluded that the proceedings before the immigration judge, a declaration attached to respondents’ notice of appeal to the Board, and respondents’ brief to the Board sufficiently put the Board on notice of the issue to satisfy the exhaustion requirement. Pet. App. 7a-10a. The dissenting judges accepted the majority’s conclusion that the issue was

its supplemental brief to the en banc court, the government emphasized that the question whether respondents could qualify as refugees on the basis of “membership in a particular social group”—to wit, their relationship to Boss Ronnie—had not been decided by the immigration judge or the Board. The government accordingly argued to the Ninth Circuit that it was required by *Ventura, supra*, to remand to the Board to decide the “particular social group” question in the first instance. Gov’t En Banc Supp. Br. 5-12; Gov’t Pet. for Reh’g En Banc 13-18.

In its decision, the en banc majority acknowledged that the immigration judge did not decide any claim based on “membership in a particular social group,” Pet. App. 9a-10a, but the court nevertheless did not address the government’s argument that *Ventura* required a remand to the Board on that issue. Instead, the court proceeded directly to the merits of the question whether the Thomas family constituted a “particular social group” under the INA. The court held that a “family may constitute a social group for the purposes of the refugee statutes,” and “overrule[d] all of [its] prior decisions that expressly or implicitly have held that a family may not constitute a particular social group.” *Id.* at 17a-18a. The court then ruled that “the Thomas family constitutes a particular social group * * * because the family demonstrated that the harm they suffered was solely a result of their common and immutable kinship ties with Boss Ronnie.” *Id.* at 18a. The court further held that the record in this case “compels the conclusion that the harm suffered by the [respondents] was not the result of random crime, but was perpetrated on account of their * * * family relationship with Boss Ronnie.” *Id.* at 19a.

“technically exhausted,” even though respondents’ “focus * * * was on race.” *Id.* at 25a-26a. We do not contest the court’s determination on that issue.

The court noted the government’s concern about “confer[ring] refugee status on all victims of vendettas or feuds that have swept in the family of the initial target, and all victims of ‘street wars’ between rival criminal families,” but the court expressed the view that other components of the asylum inquiry, such as the requirement that the persecution be by the government or organizations that the government cannot control, might ultimately provide a basis for denying relief. Pet. App. 20a. After resolving the foregoing issues, the en banc court remanded to the Board the question whether the alleged harassment amounted to “persecution” and any other remaining asylum issues. *Id.* at 22a (citing *Ventura*).

b. Judge Rymer, joined by Judges O’Scannlain, Kleinfeld, and Bea, dissented. Pet. App. 22a-29a. The dissenters would have remanded the question of respondents’ eligibility for asylum as members of a particular social group to the Board “because the issue whether a nuclear family, without more, is a ‘particular social group’ has never been vetted” by the Board, and whether the “Thomas family *is* a ‘particular social group’” also was not considered by the Board, “no doubt because [respondents’] appeal failed to focus on this ground.” *Id.* at 22a-23a. The dissent noted in this regard:

It is not immediately obvious that an ordinary family, albeit a social group, is a *particular* social group akin to a clan or tribe for purposes of § 1101(a)(42)(A). It may be, or it may not be without other indicia of societal recognition. In its considered judgment the BIA may believe that family-*plus* is required for an ordinary family to qualify, or it may not. However, these are matters for the BIA, not for us to sort out in the first instance.

Id. at 28a.

The dissent further noted that the courts “owe deference to the [Board’s] interpretation and application of the immigration laws,” Pet. App. 23a (citing *Ventura*), and accordingly would have confined the court’s role to recognizing that, under extant Board precedent, a family “should not be foreclosed from being a ‘particular social group,’” *ibid.* In the dissent’s view, “to go further, as the majority does by holding that the Thomas family *is* a ‘particular social group,’ transgresses this principle by going further than the [Board] has ever gone,” and “has profound implications” for immigration policy that the court had “no business deciding * * * without the [Board]’s having first addressed it.” *Id.* at 27a, 23a.

REASONS FOR GRANTING THE PETITION

The decision of the en banc Ninth Circuit usurps the Executive Branch’s statutorily assigned role in interpreting and enforcing the immigration laws, and its constitutionally assigned role in making the sensitive domestic and foreign-policy judgments that inhere in identifying which categories of individuals may receive refuge in the United States from persecution in their home land. The court’s decision defies the most basic rules for judicial review of agency action and, in so doing, flatly conflicts with this Court’s decision in *INS v. Ventura*, 537 U.S. 12 (2002) (*per curiam*), which summarily reversed another Ninth Circuit decision that similarly preempted the Board’s consideration of an important question of asylum law. The en banc court of appeals’ decision also conflicts with the rulings of other circuits, which have hewed to this Court’s *Ventura* mandate and have remanded immigration law questions to the Board, rather than independently resolving the issues themselves. The court of appeals’ error is especially egregious because it reached out to identify a broad category of

aliens that are now entitled to seek asylum—a decision that has far-reaching ramifications for immigration policy.

1. a. The decision of the en banc court of appeals cannot be reconciled with this Court’s ruling in *Ventura*, or the fundamental principles of administrative review that *Ventura* reconfirmed. The Immigration and Nationality Act “entrusts the agency to make the basic asylum eligibility decision here in question.” *Ventura*, 537 U.S. at 16. The INA provides that the “Attorney General may grant asylum” to an alien who applies in accordance with “procedures established by the Attorney General” if “the *Attorney General determines* that such alien is a refugee” within the meaning of 8 U.S.C. 1101(a)(42)(A). 8 U.S.C. 1158(b)(1)(A) (emphasis added), as amended by REAL ID § 101(a), 119 Stat. 231, 302-303. Likewise, the withholding provision affords relief only if “the *Attorney General decides*” that the alien’s life or freedom would be threatened on one of the protected grounds listed in 8 U.S.C. 1101(a)(42)(A). 8 U.S.C. 1231(b)(3)(A) (emphasis added). Unless and until the Attorney General actually “determines” or “decides” whether an alien is eligible for relief on a particular ground, there simply is nothing for a court to review on the matter.

Moreover, the Attorney General’s interpretation of the relevant statutory terms is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). The Attorney General’s interpretation of the asylum and withholding provisions in a removal proceeding thus must be respected if it reflects a “permissible construction of the statute.” *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); see 8 U.S.C. 1103(a)(1) (the “determination and ruling by the Attorney General with respect to all questions of law shall be controlling”); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987). A re-

viewing court cannot accord the Attorney General the deference that is required if it does not first permit him to pass on the relevant legal issue.

While a final order of removal issued by the Attorney General or his designate, the Board of Immigration Appeals, 8 C.F.R. 1003.1(d)(1), is subject to judicial review, 8 U.S.C. 1252(a), the statutory scheme and established principles of administrative law sharply limit the judicial role. “[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration.” *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952). Thus, if a legal or factual question has not been addressed by the Board, a court of appeals “is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.” *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). “[T]he proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” *Ibid.* A “judicial judgment cannot be made to do service for an administrative judgment.” *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

In this case, the court of appeals properly recognized (Pet. App. 10a-14a) that the Board *could* decide, consistent with the statutory text and Board precedent, that under some circumstances “kinship ties” may help to identify a “particular social group.” *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987); see *In re H-*, 21 I. & N. Dec. 337, 339-340, 343, 346 (BIA 1996) (subclan defined by kinship ties, “linguistic commonalities,” and political characteristics constitutes a particular social group). But the court also acknowledged that neither the Board nor the immigration judge had analyzed respondents’ claim to

refugee status based on membership in a particular social group. Pet. App. 9a-10a. Indeed, the majority specifically noted that the immigration judge (whose decision the Board summarily affirmed) had failed to appreciate the “legal significance” of respondents’ factual assertions, “did not expressly reference ‘membership in a particular social group,’” and failed to “properly characterize the social group claim, instead describing it as a claim based on racial persecution.” *Id.* at 5a, 9a; see also *id.* at 26a (Rymer, J., dissenting) (“[T]here is no question that it was not ruled upon. Neither the immigration judge nor the [Board] discussed this ground at all. The agency’s focus, like Thomas’s, was on race.”). Once the court of appeals concluded that the respondents had adequately raised “membership in a particular social group” as a ground for relief, the failure by the Board and the immigration judge to address that claim was the only error properly cognizable by the court. After that “error” was “laid bare,” the “function of the reviewing court end[ed],” and it was required to remand the case to the Board to address the respondents’ claim in the first instance. *Idaho Power*, 344 U.S. at 20.

Accordingly, as in *Ventura*, the court of appeals “should have applied the ordinary ‘remand’ rule,” 537 U.S. at 18, and allowed the Board to decide whether a nuclear family, without more, may constitute a particular social group and, if so, whether respondents qualify and whether any harassment they suffered was “on account of” a protected status, 8 U.S.C. 1101(a)(42)(A). Instead, the en banc court proceeded to resolve the threshold legal question definitively, thereby establishing circuit-wide precedent. And the court then concluded that the record compelled a finding that the criminal incidents respondents described were “on account of” their membership in a particular social group, even though neither the immigration judge nor the Board ever

reviewed the record with that claim in mind. The court thereby usurped that aspect of the Attorney General’s role as well, including the Board’s authority to conduct further proceedings and receive further evidence on that issue if it elected to do so. See *Ventura*. 537 U.S. at 18.

The Ninth Circuit’s error here was more significant—and thus even more worthy of this Court’s review—than the Ninth Circuit’s error in *Ventura* itself. This time, the Ninth Circuit ignored *Ventura* and the fundamental principles of agency review that it reiterated *while sitting en banc*, and, in so doing, the court (i) reached out to decide a broad legal question with potentially sweeping ramifications for asylum law, (ii) without any prior resolution of that question by the Board or the Attorney General *in any case*, and in the face of (iii) this Court’s recent summary reversal of the same court for the same error in *Ventura*, (iv) the government’s specific argument for remand under *Ventura*, and (v) a vigorous dissent focused on the court’s failure to adhere to *Ventura*. That en banc disregard for the proper relationship between the courts and the Attorney General under the immigration laws is alone sufficient to warrant review by the Court, especially given the implications of the resulting en banc ruling on the meaning of “membership in a particular social group.”²

b. Moreover, the Ninth Circuit’s failure here to adhere to this Court’s decision in *Ventura*, and the traditional limitations on judicial review that it reiterates, is part of a continuing pattern by that court. In *Baballah v. Ashcroft*, 367

² Rehearing en banc on, *inter alia*, *Ventura* grounds was denied in *Jie Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004), which likewise raised the issue of whether a family could be a particular social group, albeit in the context of a claim of ineffective assistance of counsel. En banc consideration in *Lin* was pending at the same time as the en banc petition in this case.

F.3d 1067 (2004), for example, the Ninth Circuit overturned a finding that past persecution was not established and then, rather than remanding, the court ruled that (i) the record compelled a finding of past persecution, (ii) the resulting presumption of a well-founded fear of future persecution, 8 C.F.R. 208.13(b)(1), had not been rebutted, and (iii) it would be “exceptionally unfair” to remand to permit the government to present evidence of changed country conditions. *Baballah*, 367 F.3d at 1078 & n.11. The court subsequently rejected the government’s petition for rehearing en banc based on *Ventura*, *id.* at 1070, notwithstanding that *Ventura* itself involved the Ninth Circuit’s refusal to remand for a finding concerning changed country conditions and the consideration of additional evidence, see 537 U.S. at 15-16.

Similar failures to adhere to *Ventura* have occurred in many more cases, including the following cases in which the government filed *Ventura*-based petitions for rehearing that were denied: *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004) (rather than remanding, the court of appeals found a well-founded fear of persecution based on a “disfavored group” theory that was not considered by the agency); *Mashiri v. Ashcroft*, 383 F.3d 1112 (9th Cir. 2004) (as amended Nov. 2, 2004) (having overturned a finding of no past persecution, the court of appeals found both past persecution and a well-founded fear of future persecution, rather than remanding for rebuttal analysis; the court of appeals also overturned the finding that internal relocation was feasible based on issues not considered by the Board, rather than remanding); *Faruk v. Ashcroft*, 378 F.3d 940 (9th Cir. 2004) (having found error in the no-past-persecution ruling, the court of appeals found a well-founded fear of future persecution, rather than remanding for rebuttal analysis); *Khup v. Ashcroft*, 376 F.3d 898 (9th Cir. 2004)

(rather than remanding, the court of appeals found past persecution based on an incident and theory of persecution not addressed by the immigration judge). The court has continued this pattern in a number of unpublished decisions in which petitions for rehearing on *Ventura* grounds also were denied.³

That persistent and recurring error by the court of appeals—one that has profound implications for immigration policy and the proper allocation of roles between courts and Executive Branch agencies—has now been made all the more serious and intractable through its commission by the

³ See *Hassan v. Ashcroft*, 94 Fed. Appx. 461 (9th Cir. 2004) (having overturned adverse credibility and resettlement rulings, the court of appeals addressed unresolved asylum eligibility issues, rather than remanding); *Istifan v. Ashcroft*, 84 Fed. Appx. 952 (9th Cir. 2003) (having overturned an adverse credibility finding, the court of appeals addressed unresolved asylum eligibility issues, rather than remanding); *Vasquez-Hoyos v. Ashcroft*, 84 Fed. Appx. 886 (9th Cir. 2003) (where the immigration judge had not made an express adverse credibility finding, the court of appeals decided that the testimony was true and ordered the remand to proceed on that basis); *Singh v. Ashcroft*, 75 Fed. Appx. 643 (9th Cir. 2003) (rather than remand, the court of appeals found asylum eligibility where the immigration judge addressed only the failure to offer corroborating evidence and country conditions); *Abadi v. INS*, 52 Fed. Appx. 997 (9th Cir. 2002) (having found error in an adverse credibility finding, the court of appeals then addressed unresolved asylum eligibility issues, rather than remanding), amended on denial of reh'g, 56 Fed. Appx. 435 (2003); *Gao v. Ashcroft*, 49 Fed. Appx. 180 (9th Cir. 2002) (although the Board had not addressed the causal connection between persecution and a protected category, the court of appeals made the causal connection finding, rather than remanding); *Behnam v. Ashcroft*, 49 Fed. Appx. 684 (9th Cir. 2002) (rather than remand, the court of appeals independently found a well-founded fear of persecution, even though the Board had never addressed that issue or the predicate question of whether the conduct amounted to persecution).

court of appeals sitting en banc. Correction by this Court is necessary.

2. The Ninth Circuit's failure to follow *Ventura* conflicts with the decisions of other courts of appeals, which, as would be expected, have adhered to this Court's direction and respected the longstanding limitations on judicial review of agency action in immigration cases. In *Amanfi v. Ashcroft*, 328 F.3d 719 (2003), for example, the Third Circuit reversed the Board's determination on imputed membership in a particular social group based on controlling Board authority, but then remanded for the Board to determine whether the persecution was "on account of" the alien's membership in a particular social group, reasoning that "[w]e must therefore defer to the [Board]'s expertise in evaluating petitions for asylum and withholding of removal, and remand this case for further consideration of Amanfi's claim." *Id.* at 730 (citing *Ventura*). Likewise, in *Kanchaveli v. Gonzales*, 133 Fed. Appx. 852 (2005) (non-precedential opinion), a panel of the Third Circuit concluded that substantial evidence in the record supported a social group claim based on family status, but rather than decide the question itself, remanded because "there is no discussion of this claim in the IJ's decision." *Id.* at 857 (citing *Ventura*). That is the exact opposite of the Ninth Circuit's decision here, which, having found that the "particular social group" category was triggered, ventured on to hold that respondents fell in that category and that the harassment was "on account of" their membership in that group. Pet. App. 18a.

In *Corado v. Ashcroft*, 384 F.3d 945 (2004), the Eighth Circuit overturned the Board's finding of no past persecution based on legal error, but then remanded for application of the correct legal standard by the Board in the first instance. *Id.* at 948. The Eighth Circuit also left for the

Board to decide the disputed issues of the alien’s credibility and the previously unaddressed issue of whether the alien had a well-founded fear of future persecution. *Ibid.* (citing *Ventura*). See also *Niang v. Gonzales*, 422 F.3d 1187, 1197 (10th Cir. 2005) (“[W]e must be cautious not to assume the role of the BIA. Decisions should be made in the first instance by the BIA. And when it has failed to address a ground raised by an applicant in support of her claim, we should ordinarily not reverse on that ground but should instead remand.”) (citing *Ventura*); *Pergega v. Gonzales*, 417 F.3d 623, 630-631 (6th Cir. 2005) (where the Board denied asylum solely on adverse credibility grounds, the court of appeals remanded under *Ventura* for consideration of other asylum eligibility issues); *Dia v. Ashcroft*, 353 F.3d 228, 260 (3d Cir. 2003) (en banc) (after overturning an adverse credibility finding, the court refused to grant asylum and instead “remand[ed] in order for the agency to further explain or supplement the record”); *El Moraghy v. Ashcroft*, 331 F.3d 195, 204-205 (1st Cir. 2003) (after exposing legal error in a finding of no well-founded fear of persecution, the court remanded for the Board to apply the correct legal standard and to address in the first instance the issues of past persecution and credibility); *id.* at 205 (“If the BIA or the IJ has not ruled on an issue, either explicitly or implicitly, the respondent cannot ask us to uphold a decision on those grounds.”). And in *Chen v. Department of Justice*, No. 03-41100, 2005 WL 2319137 (Sept. 23, 2005), the Second Circuit expressly disagreed with the Ninth Circuit’s refusal to remand after overturning a credibility ruling, finding the Ninth Circuit’s practice to be “in tension

with the Supreme Court's explanation in *Ventura* of the rationale for remanding." *Id.* at *10.⁴

This Court's review is necessary to resolve that conflict in the courts of appeals and to bring uniformity to the lower courts' review of Board decisions. According to statistics compiled by the Department of Justice, in Fiscal Year 2005, 10,373 petitions for review in immigration cases were filed in the federal courts of appeals, with 54% of those filed in the Ninth Circuit. Of those petitions for review, 4460 were in asylum cases, of which 37% were in the Ninth Circuit. In addition, the Department of Homeland Security has advised that 31% of its administrative applications for asylum fall within the jurisdiction of the Ninth Circuit. Stability and consistency in the interpretation and enforcement of the immigration laws is not possible if the primacy of the Executive Branch's interpretive authority is disregarded and the Ninth Circuit is independently formulating new rules and revising extant principles of immigration law in the circuit in which one-third of all asylum cases (and more than half of all removal cases) arise.

3. The issue presented is of pressing importance not only because *Ventura* and the fundamental principles it reaffirmed have been rejected by the Ninth Circuit sitting en banc, but also because of the significant implications for

⁴ See also *Zhang v. Gonzales*, No. 02-4533, 2005 WL 2562630, at *6 (2d Cir. Oct. 13, 2005) (after finding error in immigration judge's finding that governmental extortion was not persecution, court remanded for resolution of other eligibility issues "in the first instance," citing *Ventura*). But see *Zhao v. Gonzales*, 404 F.3d 295, 311 (5th Cir. 2005) (describing *Ventura*'s remand language as "precatory"); *Ghebremedhin v. Ashcroft*, 392 F.3d 241, 243 (7th Cir. 2004) (where the record compelled a finding of future persecution, "we do not agree that *Ventura* stands for the broad proposition that a court of appeals must remand a case for additional investigation or explanation once an error is identified").

immigration law of that court's decision to recognize a potentially very expansive category of aliens who can now qualify for asylum and withholding of removal. See *Ventura*, 537 U.S. at 17 (court should not "independently create[] potentially far-reaching legal precedent about * * * highly complex and sensitive matter[s]" of immigration law).

a. Asylum decisions, like immigration decisions generally, are "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power," and the definition of the national community. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589 (1952). For that reason, "judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" *Aguirre-Aguirre*, 526 U.S. at 425 (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)). "The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions." *Ibid.* Indeed, such matters "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades*, 342 U.S. at 589; see also *Escobar v. Gonzales*, 417 F.3d 363, 368 (3d Cir. 2005) ("[T]he choice of those aliens who shall be permitted to enter or remain in the country is a matter of policy within the special competence of the legislative and executive branches.").

Asylum applications, moreover, play a significant role in the immigration work and workload of the Justice Department and the Department of Homeland Security. In Fiscal Year 2004, the Attorney General adjudicated more than 55,000 claims for asylum from aliens in removal proceedings, and in Fiscal Year 2003, the Secretary of Home-

land Security received 42,000 applications for asylum. See Executive Office for Immigration Review, Dep't of Justice, *Immigration Courts—2004 Asylum Statistics* (Apr. 2005), <<http://www.usdoj.gov/eoir/FY04AsyStats.pdf>>; Office of Immigration Statistics, Dep't of Homeland Security, *2003 Yearbook of Immigration Statistics* 50 (2004). Accordingly, court decisions that independently forge new standards of eligibility for asylum or withholding or that relax existing ones can have a significant impact on immigration policy and the administration of the immigration laws.

b. Recognizing the potential breadth of the phrase “membership in a particular social group,” the Board of Immigration Appeals has been deliberately cautious and circumspect in identifying what groups qualify for protection, and has emphasized that the identification of protected groups should be made on a “case-by-case basis.” *Acosta*, 19 I. & N. Dec. at 233. In the decades since Congress enacted that definition of “refugee,” the Board’s precedent has recognized only five “particular social groups.” See *In re V-T-S-*, 21 I. & N. Dec. 792 (BIA 1997) (Filipinos of Chinese ancestry); *In re Fauziya Kasinga*, 21 I. & N. Dec. 357 (BIA 1996) (young women of the Tchamba-Kunsuntu Tribe of northern Togo who do not undergo female genital mutilation and who oppose the practice); *In re H-*, *supra* (members of the Marehan subclan of Somalia); *In re Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990) (gay men and lesbians in Cuba); and *In re Fuentes*, 19 I. & N. Dec. 658 (BIA 1988) (former members of the national police of El Salvador). While the Board identified “kinship ties” as a potentially relevant consideration in *Acosta*, 19 I. & N. Dec. at 233, only once has the Board actually relied upon familial linkage in identifying a qualifying “particular social group,” and then it was when other factors, such as accent

and common political characteristics, also served to identify a subclan. *In re H-*, 21 I. & N. Dec. at 339-340, 346.

The Board has never held that relations within a nuclear or immediate family alone are sufficient to define a protected social group. By going “further than the [Board] has ever gone,” Pet. App. at 26a (Rymer, J., dissenting), the en banc Ninth Circuit “usurped an administrative function.” *Idaho Power*, 344 U.S. at 20. Because of the near universality of familial status, the Ninth Circuit’s holding substantially expands the number of aliens who might potentially qualify for asylum and withholding and thus “has profound implications” for immigration and foreign policy. Pet. App. 23a (Rymer, J., dissenting); see *Aguirre-Aguirre*, 526 U.S. at 425. And because of the regrettable pervasiveness of criminal activity, the Ninth Circuit’s holding will, at a minimum, invite many new asylum claims by aliens who may have been the victims of ordinary crime, but who allege that the crime was committed on account of the family to which they belong. Indeed, since the en banc decision in the case at hand, the Ninth Circuit has overturned numerous Board decisions on the basis of a potential claim for relief resting on familial status, sometimes requiring nothing more than an allegation that another family member was harmed or persecuted.⁵

⁵ See *Soto-Morales v. Gonzales*, No. 04-75044, 2005 WL 2662639, at *1 (Oct. 19, 2005) (mem.) (remand under *Thomas* where alien testified that her husband was murdered and she was threatened not to talk); *Rodas v. Gonzales*, No. 02-73083 (Oct. 11, 2005) (unpub. order) (remanding for Board to consider claim in light of “harm to her husband and nephew”); *Chhuon v. Gonzales*, No. 04-15843, 2005 WL 2464205, at *1 (Oct. 6, 2005) (unpub. mem) (holding that alien suffered past persecution based on his family’s forcible placement in a Khmer Rouge camp, even though the alien “was an infant at the time, was not harmed, and does not have any recollection of the events”); *Morales v. Gonzales*, No. 02-73937, 2005 WL 2250712, at *1 (Sept. 15, 2005) (unpub. mem.)

The potentially far-reaching implications of the en banc court's decision do not stop there. The immigration law also *prohibits* the Attorney General from granting asylum or withholding of removal to any person who has “assisted, or otherwise participated in the persecution of any person” on account of, *inter alia*, that person’s “membership in a particular social group.” 8 U.S.C. 1158(b)(2)(A)(i), 1231(b)(3)(B)(i). The court of appeals’ decision thus threatens to expand the statutory bar on asylum for otherwise deserving refugees.

c. Certainly nothing in the text of the Immigration and Nationality Act compels the conclusion that an immediate family constitutes a “particular social group.” One relevant meaning of the word “social” could be “of or relating to human society.” *Webster’s Third New Int’l Dictionary* 2161 (2002). Under that definition, the phrase “social group” could reasonably be interpreted to suggest a division or class of society at large, identified as such by society, and one that is typically larger than a nuclear family and that shares and exhibits distinctive characteristics beyond immediate familial relations alone. That or other limiting constructions also could reasonably be supported, under the doctrine of *ejusdem generis*, by reference to the

(finding past persecution based on family as a social group where, when the alien was a child, three members of his family were killed by guerrillas); *Torres-Ariza v. Gonzales*, No. 02-73535, 2005 WL 2250716, at *1 (Sept. 15, 2005) (unpub. mem.) (remanding for consideration of persecution claim based on family membership); *Bhasin v. Gonzales*, 423 F.3d 977, 984-985 (2005) (ordering Board to reopen case based on alleged evidence of persecution linked to family status); *Hovhannisyan v. Gonzales*, 140 Fed. Appx. 732, 733 (2005) (unpub. mem.) (remanding for consideration of claim based on family membership); *Zolotukhin v. Gonzales*, 417 F.3d 1073, 1076 (2005) (remanding for consideration of Russian family’s claim to be a particular social group).

other statutorily protected grounds (*i.e.*, race, religion, nationality, and political opinion).

Furthermore, the Ninth Circuit’s holding adopts a particularly anomalous conception of family as a “particular social group,” because the protected family would not include the main target of the criminal harassment. Courts have long held that crimes and personal retaliation against an individual, such as the father-in-law here, do not constitute persecution on a protected ground. See, *e.g.*, *Sanchez v. U.S. Attorney Gen.*, 392 F.3d 434, 438 (11th Cir. 2004) (personal retribution is not persecution); *Abdille v. Ashcroft*, 242 F.3d 477, 494-495 (3d Cir. 2001) (acts of private violence or evidence of mere criminal activity not persecution); *Molina-Morales v. INS*, 237 F.3d 1048, 1052 (9th Cir. 2001) (“[p]urely personal retaliation is, of course, not persecution on account of political opinion”); *Huaman-Cornelio v. BIA*, 979 F.2d 995, 1000 (4th Cir. 1992) (fist-fights based on personal animosity not persecution); *In re Pierre*, 15 I. & N. Dec. 461, 463 (BIA 1975); cf. *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (no persecution where alien “was afraid that the government would retaliate against him and his family” if he joined guerrilla movement).

If the acts of criminal retribution against Boss Ronnie would not sustain an asylum claim by him, then the Board could reasonably conclude that the entirely derivative claim of his family members should fare no better. But the en banc court of appeals’ decision, rejects that conclusion and embraces an anomaly:

If a disgruntled employee slugs his boss for cheating him out of his wages, that is decidedly not persecution. But, if the employee takes a cowardly swipe at his

boss's daughter-in-law, that, according to the majority, is persecution.

Pet. App. 47a (Fernandez, J., dissenting).⁶

d. Other courts of appeals have discussed whether a family is or can be a particular social group, but the impact of those cases has thus far been limited. In *Iliev v. INS*, 127 F.3d 638 (1997), the Seventh Circuit observed that its decisions “suggested, with some certainty,” that a family could constitute a particular social group, but that court has not so held, and the court denied relief in *Iliev* because of the alien’s “failure to raise this argument in the administrative proceedings” and to demonstrate that “his family was a particular target for persecution by Bulgarian authorities.” *Id.* at 642 & n.4.

In *Gebremichael v. INS*, 10 F.3d 28 (1993), the First Circuit overturned the Board’s decision and found an alien eligible for asylum based on his “relationship to his brother.” *Id.* at 35. But, in that case, the alien’s family

⁶ In addition, the Ninth Circuit in *Jie Lin, supra*, acknowledged that its conception of family as a particular social group in that case left little room for the separate “on account of” inquiry. “In practice,” the court explained, “where family membership is proposed as the ‘particular social group’ status supporting a claim of refugee status, this prong of the test melds with the ‘on account of’ prong.” *Lin*, 377 F.3d at 1029. Yet the Board was not given the opportunity in *Lin* or this case to address the question of whether “particular social group” should be construed so as to deprive other statutory provisions of independent effect. Other courts of appeals have refused to render the “on account of” requirement nugatory. “[T]he persecution cannot be what defines the contours of the group.” *Escobar v. Gonzales*, 417 F.3d 363, 367 (3d Cir. 2005) (upholding Board decision that Honduran street children are not a particular social group); *Gebremichael v. INS*, 10 F.3d 28, 35 (1st Cir. 1993) (where family as a social group is claimed, “membership itself” must “generate[] a specific threat to the [applicant]”) (internal quotation marks omitted).

members had been persecuted on political grounds, *id.* at 31 & n.4, and the alien himself had been detained for months and repeatedly tortured by Ethiopian security forces and threatened with execution, *id.* at 31-32, under “the ‘time-honored theory of *cherchez la famille* (‘look for the family’),’ the terrorization of one family member to extract information about the location of another family member or to force the missing family member to come forward,” *id.* at 36. The unique circumstances of that case—the exceptional linkage between political persecution of the other family members, the other family members’ apparent eligibility for refugee status, and the extreme forms of persecution of the alien—have thus far cabined the impact of that court’s ruling, which might be viewed as consistent with the Board’s own precedent. See *In re H-*, *supra* (recognizing a particular social group when clan ties overlapped with a common political heritage and characteristics).⁷

The en banc Ninth Circuit’s decision here, by contrast, has the potential to open the door broadly to asylum eligibility based on nothing more than the common criminal harassment of a few members of a family. The court left little basis for distinguishing respondents’ situation from those of countless others who, due to gang warfare, crime-family syndicates, ordinary inter-family rivalries, or similarly based allegations of motive for street crime, now can be expected to claim refugee status on the same terms as

⁷ See also *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004) (“join[ing] our sister circuits in holding that ‘family’ constitutes a ‘particular social group,’ but then deferring to the Board’s determination that the alien was not eligible for asylum), vacated for reh’g en banc, No. 03-1331 (Jan. 3, 2005), dismissed (July 26, 2005); see also 4th Cir. R. 35(c).

persons tortured and imprisoned for their race, religion, or politics.

e. It may be within the Attorney General's interpretive discretion under *Chevron* and *Aguirre-Aguirre* to adopt a capacious conception of "particular social group" that would allow an alien to qualify for refugee status on the basis of his membership in an identified, immediate familial relationship in certain circumstances, without the showing of other distinguishing features that the dissenting judges in the court of appeals thought the Board might permissibly require. Pet. App. 28a (suggesting that "family-*plus*" might be required). Perhaps the Attorney General could even adopt a conception of "particular social group" that would include nothing more than a combination of transferred personal hostility or an imputed grudge and "common and immutable kinship ties with Boss Ronnie," *id.* at 18a. But the court of appeals lacked the authority to impose that definition on the Executive Branch, without allowing the Board to consider the issue first, in light of the issue's profound implications for immigration policy and "especially sensitive political functions that implicate questions of foreign relations," *Aguirre-Aguirre*, 526 U.S. at 425. The court's role in immigration cases is one "of review, not of first view," *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2120 n.7 (2005), and the en banc Ninth Circuit's decision so far departs from this Court's precedent, the decisions of other courts of appeals, and established principles of administrative law and deference on matters of immigration policy as to warrant this Court's review and correction. Indeed, the Ninth Circuit's error is so obvious in light of *Ventura* that summary reversal would be appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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