

In The
Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Petitioner,

v.

MICHELLE THOMAS, ET AL.,
Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

EDWARD M. BIALACK
Counsel of Record

ERROL I. HORWITZ
Attorney

LAW OFFICES OF
ERROL I. HORWITZ
5550 Topanga Canyon
Boulevard
Suite 200
Woodland Hills, CA 91367
(818) 347-5268

DEBORAH E. ANKER
NANCY KELLY
JOHN WILLSHIRE-CARRERA
Attorneys

HARVARD IMMIGRATION AND
REFUGEE CLINIC AT GREATER
BOSTON LEGAL SERVICES
Women Refugees Project
197 Friend Street
Boston, MA 02114
(617) 603-1808
(617) 371-1222 (fax)

QUESTION PRESENTED

Where the limited issue on appeal was properly raised and exhausted before the Attorney General, and where it subsequently remanded to the Board of Immigration Appeals on multiple dispositive issues of law and fact, did the Court of Appeals err in applying long-standing and consistently reaffirmed agency precedent to the undisputed facts to reach the restricted ruling that the family before it had been targeted on account of their immutable kinship ties?

PARTIES TO THE CASE

The petitioner in this Court is the Attorney General of the United States, Alberto R. Gonzales, who was the respondent in the court of appeals.

The respondents in this Court 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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INTRODUCTION

Petitioner, in a misplaced attack on the Court of Appeals for the Ninth Circuit, not only incorrectly characterizes the breadth and effect of the holding in the instant case, but proposes the revision of long-standing Board of Immigration Appeals precedent conferring protected “particular social group” status on asylum applicants, despite the BIA’s continued adherence to its own precedent. In doing so, petitioner ignores the essential feature of the en banc panel’s ruling: that it has, consistent with *INS v. Ventura*, 537 U.S. 12 (2002), remanded this matter to the BIA for multiple dispositive legal and factual findings on the very issues that animate the policy concerns petitioner touts. Simply put, petitioner is wrong on the facts, wrong on the law, and wrong on the public policy implications.

In its decision, the Court of Appeals has resolved residual intracircuit conflict and has adhered to the rulings of all of the other Courts of Appeals, which, where they had considered the issue, unanimously found that a family may constitute a particular social group for purposes of asylum and withholding of removal under the Immigration and Nationality Act. These circuit court decisions, in turn, have relied on the Board’s decision in *In re Acosta*, 19 I. & N. Dec. 211, 232 (BIA 1985),¹ and similar progeny – a decision the BIA has never departed from, and has consistently re-affirmed. Because the BIA had already definitively found that kinship ties give rise to a particular social group, the Ninth Circuit did not “identify a broad category of aliens that are *now* entitled to seek asylum,” Pet. 12-13 (emphasis added). In fact, the Court did not hold that family, *without more*, may constitute a particular social group. Pet. 15. What the court *did* hold is set forth succinctly in the opinion itself:

¹ Overruled on other grounds, *In re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

We hold that family membership may constitute membership in a ‘particular social group,’ and thus confer refugee status on a family member who has been persecuted or who has a well-founded fear of future persecution on account of that familial relationship. . . . We defer to the BIA’s view of kinship ties as giving rise to social group membership, as expressed in [*Acosta*] and elsewhere; and we join the univocal view of our sister circuits that a family may make up a particular social group.

Pet. App. 2a.

Petitioner’s argument that the en banc decision opened the floodgates “to asylum eligibility based on nothing more than the common criminal harassment of a few members of a family,” Pet. 28 is not credible. In making this argument petitioner repeatedly conflates distinct elements of the asylum inquiry and proceeds as if the Ninth Circuit ordered an asylum grant. In fact, the en banc panel remanded the case to the BIA to determine, inter alia, whether the attacks upon the respondents were embraced with the concept of “persecution,” whether the South African government provided adequate protection from any such harm, whether the Thomases’ fear was well-founded, and “the ultimate issue of whether the Thomases are eligible for asylum in the first instance.” Pet. App. 22a.

The Court of Appeals acted appropriately, without usurping the authority of the Attorney General to decide the Thomases’ asylum claim; resolution of that matter remains with the BIA.

STATEMENT OF THE CASE

1. Petitioner’s characterization of the harm suffered by Michelle Thomas and her family is inaccurate and incomplete, but it is also irrelevant to these proceedings and therefore does not require detailed correction. The Ninth Circuit did not decide whether the Thomases’ mistreatment rose to a level to be embraced within persecution. The Ninth

Circuit remanded this issue – as well as the related issues of whether the government failed to protect the Thomases from harm and whether respondents face a countrywide threat – for the agency to resolve. Also irrelevant is petitioner’s observation that persecution does not include “[r]outine crimes and adversities arising from personal relationships unconnected to a protected ground.”² Besides addressing issues of persecution not decided by the en banc decision, this statement seems to conflate the “persecution” and “on account of” elements of the asylum inquiry. The only factual matters relevant to these proceedings relate to whether the Thomases were targeted for harm because of kinship ties to their racist relative, “Boss Ronnie,” an abusive foreman at Strong Shore Construction Company. The undisputed facts clearly establish that they were.³

2. The Thomases were targeted multiple times under circumstances that made it clear the incidents were connected to their family ties with Boss Ronnie. On one occasion, Michelle Thomas was playing in the front yard with her children when a black man wearing Strong Shore Construction overalls approached her and asked if she knew Boss Ronnie. After Michelle fled inside with her children, the stranger told her he would come back and slit her throat. Pet. App. 4a, 67a. In a subsequent incident,

² Although this sentence can be parsed several different ways, none of them accurately describes law pertaining to the “persecution” element of the asylum inquiry. Petitioner may intend to make the point that no degree of harm can establish asylum eligibility unless it is inflicted on account of a statutory ground.

³ The petitioner’s observation that the immigration judge (IJ) found aspects of Michelle Thomas’s testimony not “totally credible” is irrelevant to these proceedings. Petitioners have previously conceded that Michelle Thomas’s testimony is to be taken as true for purposes of evaluating the Thomases’ asylum claims. Pet. App. 38a. In fact, petitioners specifically argued in their brief before the panel that the immigration judge’s decision was not based on an adverse credibility determination. Brief for Respondent at 26, *Thomas v. Gonzales*, 359 F.3d 1169 (9th Cir. 2004) (No. 02-71656) available at 2002 WL 32297961.

Michelle testified that she was on her way to the store with her young daughter when four black men, one of whom wore Strong Shore overalls, surrounded her and attempted to seize Michelle's daughter from her arms. She fell to the ground struggling to maintain control of her daughter, and the men fled when Michelle's screams alerted a neighbor. Pet. App. 4a; AR 194. Even after respondents installed higher fencing, bars on their windows, acquired a guard dog, and requested additional police protection, the threats and violence continued. Pet. App. 4a.

The record reflects that each time respondents were accosted, the incidents shortly followed a confrontation between Boss Ronnie and his workers. AR 156. As Michelle Thomas testified:

[S]lowly but surely more and more things started happening and it just so happened the more the things were happening the more abusive . . . David's father [Boss Ronnie] was being to his workers and every time an incident happened something happened at his work for us to get targeted.

AR 156-157. The family of Michelle's brother-in-law – Boss Ronnie's son – had also been subjected to threats, vandalism, and break-ins. Pet. App. 4a; AR 33.

3. Although the immigration judge (IJ) accepted Michelle Thomas's testimony that her family was targeted on multiple occasions, Pet. App. 71a, she rejected respondents' arguments that the workers were retaliating against the family due to their kinship ties to Boss Ronnie, apparently because "there is no explanation as to why these attacks against her family suddenly began in 1996." *Id.* The IJ concluded that the harm experienced by respondents was a manifestation of random crime unconnected to any statutory ground. Pet. App. 73a-74a. In their pro se notice of appeal to the BIA, the Thomases reasserted that they had been targeted due to their family relationship to Boss Ronnie, attaching their original declaration as the basis of their appeal. Pet. App. 8a. The

BIA affirmed the IJ's decision without opinion.⁴ Pet. App. 51a-58a.

4. Respondents petitioned for review. A three-judge panel found the Thomases eligible for relief as members of a particular social group. The Ninth Circuit granted rehearing en banc “to reconcile our intracircuit conflict on the question of whether a family may constitute a ‘particular social group’ for the purposes of 8 U.S.C. § 1101(a)(42)(A).” Pet. App. 2a. The en banc court found that the Thomases faced a highly targeted threat, not “random crime,” and that the evidence compelled the conclusion that the attacks against respondents were on account of their membership in the Thomas family. Pet. App. 19a. The Ninth Circuit reached the limited ruling that since family may constitute a particular social group, the Thomases had connected their mistreatment to one of the statutory grounds of persecution. In its ruling, the Court observed that the “BIA has never departed from the principle enunciated in *Acosta*” and its progeny, “for the proposition that shared ties of kinship warrant characterization as a social group,” nor had any of the other circuits that considered the question. Pet. App. 14a. The Ninth Circuit, responding to the petitioner’s view that more than kinship ties was required, observed that “nothing in the statute itself, nor in the BIA’s interpretation of the relevant provisions, [suggests] that membership in a family is insufficient, standing alone, to constitute a particular social group in the context of establishing eligibility for asylum or withholding of removal.” Pet. App. at 20a. The circuit court declined the petitioner’s invitation to contravene long-standing precedent by announcing new conditions on

⁴ The Executive Office of Immigration Review’s regulations allowing such “streamlined” decisions are set forth at 8 C.F.R. § 1003.1(a)(7) (2005). When the Board affirms an IJ’s decision without opinion, the circuit court reviews the immigration judge’s decision as the final agency determination. See, e.g., *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 849 (9th Cir. 2003).

the ability to seek asylum based upon social group membership. Pet. App. 21a.

Citing *Ventura*, the Ninth Circuit then remanded the case for determinations on every other issue. It remains for the Board to decide (1) whether the harm inflicted on the Thomases is encompassed within the term persecution, (2) whether the government of South Africa met its standard of care in protecting the Thomases⁵ (3) whether the respondents face a country-wide threat of persecution and might avoid harm by relocating internally,⁶ (4) whether the Thomases have a well-founded fear of future persecution, and (5) whether the Thomases merit a favorable exercise of discretion, among other issues relating to these inquiries.

5. The petitioners do not contest subject matter jurisdiction, conceding that the particular social group issue was properly raised and exhausted before the agency. Specifically, the petitioners do not dispute the Ninth Circuit's determination that respondents "sufficiently put the Board on notice of the issue to satisfy the exhaustion requirement." Pet. 9-10, n.1. As the Ninth Circuit observed in its en banc opinion, "the purpose of exhaustion 'is to give [the] . . . agency the opportunity to resolve a controversy or correct its own errors before judicial intervention.' . . . For this reason, an asylum petitioner must 'put the BIA on notice' of the issue." Pet. App. 7a-8a.

REASONS FOR DENYING THE PETITION

1. In its apparent effort to advance some new and unspecified quality of deference to decisions of the immigration agencies, the petitioner erroneously and unfairly paints the Ninth Circuit's decision as the work of a rogue

⁵ See, e.g., *In re O-Z- & I-Z-*, 22 I. & N. Dec. 23 (BIA 1998) (addressing failure of state protection within the meaning of persecution).

⁶ See, e.g., *In re Fuentes*, 19 I. & N. Dec. 658 (BIA 1988) (denying asylum where the applicant feared persecution from Salvadoran guerrillas in his hometown).

court, embarked upon usurping asylum decisions entrusted, in the first instance, to the Attorney General. Substituting advocacy for accuracy, the petitioner misstates both the holding of the en banc court and the existing agency precedent pertaining to membership in a particular social group. A correct representation of the Ninth Circuit's holding and the Board's precedent reveals that the Ninth Circuit not only complied with and deferred to applicable Board precedent, but also corrected a line of circuit authority conflicting with the Board's particular social group jurisprudence and brought itself into line with the other circuits. The Ninth Circuit then remanded multiple critical issues to the Board for decision.

a. The en banc court unanimously held that family may constitute a particular social group under long-standing Board precedent. Pet. App. 17a, 22a. A majority of the court, in full compliance with the requirements of *Ventura* as discussed below, went on to apply the Board's existing law to the facts of the case and determined that the Thomases had been targeted on account of their kinship ties, an immutable characteristic that has repeatedly been found to give rise to a particular social group.

As an initial matter, it is crucial to be clear about what the en banc court *did not* hold. The court did not rule that family in all cases constitutes a particular social group. Rather, it made a limited determination based on the facts before it. After laying bare the agency's error – its ruling that the Thomases failed to connect their mistreatment to any statutory ground – the Ninth Circuit cautiously remanded every remaining issue to the Board.

Despite the limited nature of the en banc opinion, petitioner stretches it to fit the label “far-reaching” by importing possible policy concerns relating to issues never decided by the Ninth Circuit. Specifically, petitioner seriously mischaracterizes the Ninth Circuit ruling as reaching out to open wide the asylum floodgates for large numbers of “ordinary crime” victims. As the petitioner's “might potentially qualify” language suggests, Pet. 24, this is so attenuated a conclusion given the scope of the court's

remand order and the remaining eligibility requirements that it approaches rank speculation. It should be noted that the question of coverage of “crime victims” is embraced within the persecution inquiry, an issue the circuit court remanded to the Board.

The petitioner’s policy argument depends on the mistaken assumption that the only legal and factual issue standing between an applicant and asylum status is a particular social group determination. As this case well illustrates, nothing could be farther from the truth. The determinations remanded to the Board in the instant case included multiple dispositive issues, each of which must be resolved in the Thomases’ favor in order for them to receive a grant of asylum or withholding. The petitioner inaccurately claims that the en banc decision has “far-reaching ramifications” because it “reached out to identify a broad category of aliens that are now entitled to seek asylum.” Pet. 12-13. Congress has specifically provided that broad categories of individuals – including those with a political opinion, a nationality, anyone adhering to a religion, and all members of a race – are “entitled to seek asylum” as the petitioner puts it. However, it is not enough for applicants merely to prove a statutory ground on account of which they may have been persecuted. They must also establish that they (1) have been, or face a well-founded fear of being, (2) persecuted, (3) “on account of” the asserted statutory ground. These additional requirements (which encompass numerous subsidiary issues) serve to restrict asylum eligibility to a narrow subset of all individuals who can claim they are described by a statutory ground. In this sense, family membership “without more” could never establish asylum eligibility.⁷

⁷ The immigration agencies have in the past, and in the specific context of a particular social group defined by kinship ties, addressed the concern that social groups would encompass numerically large categories of individuals. A December 9, 1993, legal opinion of the Office of the INS General Counsel provides that:

(Continued on following page)

In addition to meeting the eligibility requirements, applicants must clear numerous bars to asylum and withholding relief as well as certain grounds of inadmissibility/removability. *See* 8 U.S.C. § 1158(b)(2)(A) (Pet. App. 81a-82a); 8 U.S.C. § 1231(b)(3) (*Id.* at 90a-91a). The practical effect of these grounds and bars seriously undermines the petitioner’s suggestion that as a result of the court’s ruling, more applications will fail under the “persecution of others” bar. If such a thing can even be conceived of under the law, it would be a rare case indeed in which an adjudicator finds that an alien has inflicted or incited the infliction of persecutory harm on another because of their family membership, but that these acts of persecution (1) do not constitute the commission of a “serious nonpolitical crime” (8 U.S.C. § 1158(b)(2)(A)(iii)), (2) do not give rise to “reasonable grounds for regarding the alien as a danger to the security of the United States” (8 U.S.C. § 1158(b)(2)(A)(iv)), and (3) do not implicate the broad terrorism-related bars referenced by 8 U.S.C. § 1158(b)(2)(A)(v). To be granted asylum, such an alien would also require a favorable exercise of discretion by the Attorney General, which a history of persecuting others (even on account of an unprotected ground) would weigh strongly against.

The fact that clans may be large, that almost all members of Somali society can claim some clan membership, and that inter-clan conflict is prevalent in Somalia, should not create undue concern that virtually all Somalis would qualify for refugee status. Any applicant for refugee status claiming membership in a particular social group must establish he or she has been persecuted, or may be persecuted, on account of that membership. Thus, while a Somali clan appears to meet the definitional criteria for a particular social group, this is merely the beginning of the inquiry into whether an individual applicant can establish refugee status.

United States Department of Justice, Immigration and Naturalization Service, Office of the General Counsel, Op. No. 93-91 (Dec. 9, 1993), available at 1993 WL 1504038.

b. The BIA has spoken early and often to define the phrase “particular social group” for purposes of asylum eligibility under 8 U.S.C. § 1101(a)(42)(A). The Ninth Circuit’s ruling flows directly from this existing agency precedent and did not address a novel issue of law undecided by the agency. Rather, the Ninth Circuit merely upheld the existing agency interpretation of “particular social group,” which included none of the constraints the petitioner attempted to impose on it in the course of appellate arguments.

The Board of Immigration Appeals has consistently reaffirmed its longstanding doctrine that kinship ties constitute, and indeed are the quintessential example of, the sort of immutable characteristic that gives rise to a particular social group. The Board first set forward kinship ties as the archetype of immutable characteristics in its seminal case interpreting “particular social group,” *In re Acosta*, 19 I. & N. Dec. 211, 233-234 (BIA 1985), overruled on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (1987)⁸:

[W]e interpret the phrase “persecution on account of membership in a particular social group” to mean persecution that is directed toward an individual who is a member of 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*,⁹ or in some circumstances it might be a shared past

⁸ Neither Congress, the BIA itself, nor any other court, has ever overruled the BIA’s holding in *Acosta* interpreting “particular social group.”

⁹ “Kinship” has been variously defined as “[c]onnection by blood, marriage, or adoption; family relationship”; “the quality or state of being kin,” Webster’s Ninth New Collegiate Dictionary (1991); “the state of being related by common ancestry,” American Heritage Dictionary, Second College Edition (1985). “Kin” is defined as “[o]ness relatives; family; kinfolk,” American Heritage Dictionary, Fourth Edition (2000). The term “kinship ties” is not reasonably susceptible to an interpretation that includes familial relationships among members of a clan but excludes relationships among family members.

experience such as former military leadership or land ownership. . . . [W]hatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities.

Id. at 233 (emphasis and footnote added). Explaining its holding further, the Board went on to state that “[b]y construing ‘persecution on account of membership in a particular social group’ in this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.”¹⁰ *Id.* *Acosta’s* thoroughly reasoned interpretation of the particular social group ground has been praised as both principled and restrained in view of competing conceptions¹¹ of the particular social group ground of persecution.¹² *Acosta’s* reasoning has been widely acclaimed and adopted in the United States, shaping the fabric of asylum law and guiding adjudicators in both the courts and the

¹⁰ The petitioner finds it “perverse” that in some cases individuals who are “unable by their own actions . . . to avoid persecution” receive refuge although the principal target of a persecutor’s ire may be ineligible for relief. *Acosta*, 19 I. & N. Dec. at 233. But there is nothing perverse, for example, about extending protection to the innocent daughter of a vicious former dictator, himself ineligible for asylum, when that relative is targeted for persecution by the new regime because of her family relation. Boss Ronnie’s eligibility or ineligibility for asylum does not bear on the fact that the Thomases were targeted on account of their kinship ties, an immutable characteristic clearly identified in *Acosta* and its progeny as defining a particular social group.

¹¹ These alternate conceptions disregarded the text and structure of the asylum statute by either extending protection to all conceivable victims of persecutory conduct, or failing to recognize membership in a particular social group as an independent ground by introducing additional requirements derived from the other grounds. Applying the doctrine of *eiusdem generis*, the Board deliberately took a middle position supported by the text and structure of the statute.

¹² See, e.g., DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 376-98 (3rd ed. 1999 & Supp. 2002); JAMES C. HATHAWAY, *LAW OF REFUGEE STATUS* 160 (1991) (praising the Board’s restrained approach).

agencies.¹³ The former Immigration and Naturalization Service (INS) adopted *Acosta*,¹⁴ as has the Department of Homeland Security in a lengthy exposition, less than one year ago.¹⁵ *Acosta* has also formed the basis of foreign jurisprudence interpreting membership in a particular social group.¹⁶

Since *Acosta*, in both precedent and nonprecedent decisions, the Board has never departed from the reasoning of that decision and has continually held that kinship ties are the sort of immutable characteristic that gives rise to a particular social group. In *In re H-*, 21 I. & N. Dec. 337 (BIA 1996), the Board held that a member of the Marehan subclan in Somalia had been targeted on account of “membership in this familial group.” Relying on *Acosta*, the Board noted that clan membership is a “highly recognizable, immutable characteristic . . . acquired at birth and . . . inextricably linked to family ties.” *Id.* at 342. The petitioner seeks to distinguish *In re H-* on the grounds that the Board has relied on family ties to identify a particular social group only “when other factors, such as accent and common political characteristics” were also present. Pet. 23-24. This is flatly wrong; the Board made

¹³ See, e.g., PHYLLIS COVEN, U.S. Dep’t Of Justice, CONSIDERATIONS FOR ASYLUM OFFICERS ADJUDICATING ASYLUM CLAIMS FROM WOMEN 12 (May 26, 1995), reprinted in IRS Publishes Gender Persecution Guidelines, 72 Interpreter Releases 771 app. (June 5, 1995) (“[t]he *Acosta*-based line of reasoning is sound and well-supported”); UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE (OFFICE OF THE GENERAL COUNSEL), BASIC LAW MANUAL, U.S. Law and INS Refugee Asylum Adjudications 48 (1995) (Basic Law Manual).

¹⁴ See IMMIGRATION AND NATURALIZATION SERVICE, ASYLUM OFFICER BASIC TRAINING 18 (2001).

¹⁵ See Department of Homeland Security’s Position on Respondents Eligibility for Relief at 19-25, *In re R-A-*, 22 I. & N. Dec. 906 (BIA 1999; AG 2001), available at http://www.gbls.org/immigration/dhs_brief_ra.pdf.

¹⁶ See, e.g., *Islam (A.P.) v. Sec. of State for the Home Dep’t*, 2 App. Cas. 629 (H.L. 1999) (United Kingdom); *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 733.

no such qualification in its opinions. Rather than constituting specific, immutable characteristics that were a necessary component of the social group, these ancillary commonalities only served to establish that the subclan was identifiable to those who would target it for harm. The Board confirmed this when on two separate occasions in published opinions it characterized *In re H-* as finding “that identifiable shared ties of kinship warrant characterization as a social group.”¹⁷ It is noteworthy that the Board did not say that shared ties of kinship *plus* a certain accent *plus* historical commonalities warrant characterization as a social group; the latter two criteria went to identifiability by would-be persecutors. It is also instructive that the Board in *In re H-* cites with approval a 1993 opinion of the INS Office of General Counsel upholding family ties as giving rise to a particular social group. The same opinion is cited in the INS Basic Law Manual, which states that “[u]ntil other guidance is issued, INS asylum and refugee adjudicators may recognize a family as constituting a particular social group.” Basic Law Manual at 48.¹⁸

Other Board decisions also specifically hold that kinship ties are an immutable characteristic that gives rise to a particular social group, and verify that family is recognized by the Board as a particular social group. In *In re Sukhrajkaur Harbhajan Heer*, No. A75 734 367, 27 Immig. Rptr. B1-112 (BIA Apr. 1, 2003), the Board of Immigration Appeals stated that “[t]he family is recognized as a particular social group.” *Id.* It went on to rule that the respondent “was targeted because of membership in her family” and specifically that “she was targeted because of her relationship with her father.” The circuit court in *Jian Chen v. Ashcroft*, 289 F.3d 1113 (9th Cir. 2002), quoted the

¹⁷ *In re Kasinga*, 21 I. & N. Dec. 357 (BIA 1996); *In re V-T-S-*, 21 I. & N. Dec. 792, 798 (BIA 1997).

¹⁸ No intervening guidance has been issued instructing asylum and refugee adjudicators that family does not constitute a particular social group.

Board's opinion below which stated 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." *Id.* at 1115.

c. The decision of the Ninth Circuit was also in accord with the ruling of every other circuit that considered the same issues. Circuit courts have repeatedly ruled that kinship ties give rise to a particular social group, or in the course of applying *Acosta's* immutability framework have echoed the Board's use of kinship ties as a prototypical immutable characteristic giving rise to a particular social group. See, e.g., *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) (holding "[t]here can, in fact, be no plainer example of a social group based upon common, identifiable and immutable characteristics than that of the nuclear family" and finding that the petitioner was targeted on account of membership in this group); *Ravindran v. INS*, 976 F.2d 754, 761, n. 5 (1st Cir. 1992) (quoting with approval the Ninth Circuit's allusion to family as a prototypical social group); *Aguilar-Solis v. INS*, 168 F.3d 565, 571 (1st Cir. 1999) (holding that as a matter of law, the IJ could have found that Aguilar-Solis was targeted on account of membership in the particular social group of his family, but finding that the evidence of targeting did not compel such a result in this case); *Fatin v. INS*, 12 F.3d 1233, 1240 (3rd Cir. 1993) (approving of and adopting the *Acosta* immutability framework and quoting *Acosta's* language pointing to kinship ties as an exemplary immutable characteristic)¹⁹; *Lopez-Soto v. Ashcroft*, 383 F.3d 228,

¹⁹ Since the en banc decision in the instant case was issued, a panel of Third Circuit judges commented in a footnote that "whether persecution on account of family ties constitutes persecution on account of membership in a particular social group" is a novel legal question, where (unlike the instant case) persecution on account of family membership had not been raised by *any* of the IJ's discussion of the facts, and where the applicant himself requested remand on that issue. *Konan v. AG of the United States*, No. 04-3467, 2005 WL 3556909, *8 (3rd Cir. Dec. 30, 2005). As a general view, this position is difficult to sustain in light of the overwhelming precedent discussed above. It

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235 (4th Cir. 2004) (stating that “[w]e join our sister circuits in holding that ‘family’ constitutes a ‘particular social group’” and noting that every circuit court that had addressed the issue found that family constitutes a particular social group (citations omitted)); *Iliev v. INS*, 127 F.3d 638, 642, n.4 (7th Cir. 1997) (noting that its case law “has suggested, with some certainty, that a family constitutes a cognizable ‘particular social group’ within the meaning of the law”); *Lwin v. INS*, 144 F.3d 505, 511-12 (7th Cir. 1997) (adopting *Acosta*’s immutability framework and noting kinship ties as an example of an immutable characteristic cognizable under *Acosta*).²⁰

d. As Board and circuit precedent establish, the en banc opinion did not cover new legal ground. It simply applied specific and pre-existing agency pronouncements concerning kinship ties. The petitioner strains to cobble together various dicta and incidental facts to suggest that more than kinship ties – identified and targeted as the basis for

should be noted, however, that the analysis applied by the Third Circuit in *Konan* is in accord with that applied by the Ninth Circuit in the instant case. Where the IJ had considered the basic factual underpinnings of *Konan*’s argument that he had been persecuted on account of his imputed political opinion (although, as in *Thomas*, the IJ did not discuss the legal claim per se), the court ruled that the IJ’s finding that *Konan* was only the victim of general unrest, was not supported by substantial evidence. As in the instant case, the court vacated the Board’s decision and remanded for a determination of asylum eligibility with that ruling as a starting point. (It should be further noted, that although the court did not rule on the family membership question, it issued a virtual “directed finding” on this question). In any event, *Konan* does not reveal a conflict between the Third and Ninth Circuits over the interpretation of *Ventura* and its underlying principles, since prior decisions of the Ninth Circuit indicate it would remand an immigration law issue it understands as novel to the Board. See, e.g., *Abebe v. Gonzales*, No. 02-72390, 2005 U.S. App. LEXIS 29009, *16-*17 (9th Cir. Dec. 30, 2005) (remanding the issue of whether petitioners could qualify for asylum based on the persecution their U.S. citizen child could face in their parents’ home country).

²⁰ The numerous Ninth Circuit decisions adhering to *Acosta*, and recognizing that family membership can constitute a particular social group, are set forth in the en banc opinion at Pet. App. 16a-17a.

mistreatment – might be required. First, the petitioner suggests that precedent requires particular social groups to be identified strictly on a case-by-case basis. Pet. 23. This argument misrepresents the Board’s clear language in *Acosta*, which states that the “particular kind of group characteristic” that gives rise to a particular social group, *not the formulation of the social group itself*, should be determined on a “case-by-case basis.” *Acosta*, 19 I. & N. Dec. at 233. This is widely understood and uncontested. In nearly every circuit court case applying *Acosta*’s immutability framework, the BIA had not “pre-approved” the social group formulation found by the circuit court in the manner suggested by petitioner. Instead, courts have recognized particular social groups according to the immutable characteristics the Board has previously identified.²¹

The petitioner also suggests that in particular social group cases involving families, additional requirements such as an “exceptional linkage between political persecution of other family members” might apply. Pet. 28. The petitioner’s suggestions are rooted in convenient factual circumstances rather than principled application of precedent. Nothing in the particular social group doctrine suggests a “double-nexus” requirement (e.g., targeting on account of relationship to a family member, who in turn is targeted on account of another statutory ground). Membership in a particular social group is a distinct, independent statutory basis for an asylum claim that need not be propped up by another ground. Thus, the Board in *In re H-* recognized the Marehan subclan as a particular social group even though no other ground of persecution applied:

²¹ See, e.g., *Lukwago v. INS*, 329 F.3d 157, 179 (3rd Cir. 2003) (finding that “former child soldiers who have escaped LRA captivity fits precisely within the BIA’s own recognition that a shared past experience may be enough to link members of a ‘particular social group’”). Like countless other social group determinations made by adjudicators, “former child soldiers who have escaped LRA captivity” does not appear on the petitioner’s list of particular social groups explicitly recognized by the Board.

“victims were reportedly singled out for no reason other than their clan affiliation.” 21 I. & N. Dec. at 345 (quotations and citations omitted). Circuit courts have also recognized that such extraneous conditions as those offered by the petitioner are inconsistent with *Acosta*. In *Niang v. Gonzales*, 422 F.3d 1187 (10th Cir. 2005), the court found that in light of *Acosta*, language in Board decisions describing the social group in terms suggestive of other statutory criteria was descriptive of, rather than instrumental to, the social group. The court stated that “we are not persuaded that the BIA, contrary to the language of *Acosta*, requires more than gender plus tribal membership to identify a social group.” *Id.* at 1200.

The additional requirements the petitioner strains to append to the immutability framework, if posited, would effectively rewrite *Acosta*. Nowhere in *Acosta* did it state that the Board, having identified a specific immutable characteristic that gives rise to a particular social group, would impose additional requirements in future cases involving that immutable characteristic. Any such revision of *Acosta* would call a great number of circuit court and agency decisions into question. If the Board intended any such modification, it would be necessary for it to clearly state its departure from the *Acosta* immutability analysis and explain the new standard. In the absence of any such guidance, the long-standing and consistently applied position of the Board of Immigration Appeals and Department of Justice is the law of the land. Circuit courts have emphasized this fundamental rule-of-law principle, insisting that Board rulings be consistent.²² It is also a settled

²² See, e.g., *Henry v. INS*, 74 F.3d 1, 6 (1st Cir. 1996) (finding Board must consistently apply the same basic rules to all similarly situated applicants; BIA cannot “flit like a bee” from decision to decision); *Rodriguez-Roman v. INS*, 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
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principle of administrative law that an agency cannot depart from standards announced in prior adjudications without explanation. See, e.g., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971) (“an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed”). Furthermore, the Ninth Circuit was under no obligation to narrow existing standards by giving voice to the various post-hoc doctrinal embellishments appellate counsel sought to hang on *Acosta’s* clear framework. This Court has “declined to give deference to an agency counsel’s interpretation of a statute” where that interpretation is not rooted in the agency’s prior pronouncements on the subject, on the grounds that “Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216 (1988). In this case as in *Bowen*, “[d]eference to what appears to be nothing more than an agency’s convenient

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. INS*, 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 determining 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).

The DOJ itself has also underscored the importance of consistency in Board 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.” U.S. Department of Justice, Executive Office for Immigration Review, Fact Sheet: Board of Immigration Appeals, available at <http://www.usdoj.gov/eoir/fs/biabios.htm>.

litigating position^[23] would be entirely inappropriate.” *Id.* at 217.

2. The Ninth Circuit reversed the agency on an issue the agency decided in the first instance and remanded the case for determinations of all remaining issues, precisely in accordance with *Ventura*.

a. In *INS v. Ventura*, this Court held that the Ninth Circuit erred when it decided, without the Board having addressed the issue, that evidence of country conditions in Guatemala compelled the conclusion that the INS could not rebut Ventura’s well-founded fear of persecution. After discussing principles of administrative law and deference to agency decision-making, this Court found three essential reasons why remand to the Board was required. First, the Ninth Circuit reached out to decide a factual issue never addressed by the agency. Although the Board had explicitly stated in its opinion that it did not decide the question of changed country conditions, the Ninth Circuit failed to remand the issue upon reaching it. 537 U.S. at 15. Second, the country condition evidence was, “at most, ambiguous about” whether the applicant would face a continued well-founded fear of persecution. Had the BIA found changed circumstances rebutting a fear of persecution, its judgment would have stood under the deferential “reasonable factfinder” standard of review. 537 U.S. at 17. Significantly, remand could have led to the presentation of additional evidence of current conditions in the country, which the Court found would be enlightening since the evidence on record was five years old. *Id.* at 18. Third, the

²³ There are indications that the petitioner’s *Ventura*-based arguments are just such a matter of convenience. In petitioner’s brief before the three-judge panel, petitioner argued that the Thomases’ particular social group claim was governed by standing precedent. Brief for Respondent at 23, *Thomas v. Gonzales*, 359 F.3d 1169 (9th Cir. 2004) (No. 02-71656) available at 2002 WL 32297961. Yet after the panel found the weight of precedent ran against government counsel’s position, that counsel argued before the en banc court that the case involved a novel issue that should be remanded to the Board for reconsideration.

Ninth Circuit “independently created potentially far-reaching legal precedent about the significance of political change in Guatemala, a highly complex and sensitive matter, . . . without the BIA having had the opportunity to pass on the matter in the first instance.” 537 U.S. at 17.

In *INS v. Chen*, 537 U.S. 1016 (2002), this Court remanded a decision of the Ninth Circuit in which the circuit panel, after reversing the Board’s credibility finding in an asylum case, went on to decide issues upon which the Board had never ruled. On reconsideration after reversal by this Court, the Ninth Circuit remanded these issues to the Board to decide in the first instance. *Chen v. INS*, 326 F.3d 1316, 1317 (9th Cir. 2003). In both *Ventura* and *Chen*, the Ninth Circuit’s holding on issues previously decided by the Board was preserved on remand. It was only those issues that the circuit court reached out to decide, ahead of the Board, that were remanded back to the agency. There was no suggestion that the reviewing court merely “lay bare an error of law” and then remand for further consideration rather than reversing the agency.

None of the bases of the Court’s rulings in *Ventura* or *Chen* is present in the instant case. The Ninth Circuit neither reached an issue undecided by the agency, nor erroneously determined that the facts compelled the conclusion at which it arrived, nor independently created far-reaching legal precedent without the BIA having had the opportunity to pass on the matter in the first instance.²⁴

First, in the instant case, the petitioner has conceded that the issues reached by the Ninth Circuit were properly raised and exhausted before the agency. Pet. 9-10. Second, petitioner does not seriously contend that the undisputed evidence fails to conclusively establish that the Thomases

²⁴ The third basis of the *Ventura* ruling is not present in this case whether it is construed as encompassing two independent requirements or only one: the en banc decision neither created far-reaching precedent, nor decided an issue without the Board having previously had the opportunity to pass on it.

were targeted due to their family ties to Boss Ronnie. The Ninth Circuit correctly found that the evidence compelled this conclusion. Therefore, *Ventura's* fundamental admonition against making factual determinations not yet reached by the agency is inapplicable. Finally, the Ninth Circuit did not independently create “potentially far reaching precedent,” as discussed in the preceding section. Rather, it based its limited decision on the undisputed facts, coupled with the application of well-established, widely-acknowledged Board precedent concerning kinship ties that was also the understanding of every other circuit that had considered the issue. In doing so, the Ninth Circuit established its deference to *Acosta's* immutability framework, overruled circuit precedent that potentially conflicted with agency guidance, and brought itself into line with the other circuits.

The Ninth Circuit *did not*, as petitioner inaccurately suggests, resolve the issue of asylum eligibility itself. Rather, the Ninth Circuit remanded to the Board for key additional findings and legal determinations. It cannot be emphasized enough that remand in the instant case was specifically for the purposes of further decision-making by the Board, a key detail that petitioner seems to ignore. It also bears repeating that the Ninth Circuit has not usurped the province of the Attorney General in reaching conclusions based on the undisputed facts and pre-existing law before it. Despite agency and circuit court precedent pointing to the conclusion that family not only could, but did as a general matter constitute a particular social group, the Ninth Circuit cautiously avoided any such categorical finding. Instead, it reached a decision based on the particular facts before it, undisputed facts that compelled the conclusion that the Thomases had been identified and targeted on the basis of their family ties. It then remanded on every other issue, including whether the threats and attacks directed at the Thomases were serious enough to be embraced within “persecution”, whether the government could or should be expected to protect the Thomases in this situation, whether the threat to the Thomases was countrywide, and whether the Thomases in

particular face a risk that rises to the level of a well-founded fear.²⁵

In remanding for the Board to make these asylum-related determinations, the Ninth Circuit proceeded in accordance with *Ventura*'s directive that the BIA make the asylum determination "in the first instance." Unlike the posture in *Ventura*, where the circuit court decided issues not yet reached by the agency, the Thomases' social group claim – properly raised and exhausted, as the petitioner concedes – was definitively decided by the IJ, who found that their mistreatment was unconnected to any statutory ground. Thus, the particular social group issue had been decided by the agency and was properly reached by the Ninth Circuit.

The issue was also exhausted before the Board, which chose to affirm the IJ's decision without opinion. By regulatory design, the Board's one-sentence affirmance in this case reveals nothing about what issues it considered or ultimately decided to be dispositive:

An order affirming without opinion, issued under authority of this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board's conclusion that any errors in the decision of the Immigration Judge or the Service were harmless or nonmaterial.

8 C.F.R. § 1003.1(a)(7)(iii) (2005). As such, the petitioner's remark that the Board never "reviewed the record with [the particular social group] claim in mind" is erroneous, pure speculation. If the Board felt the case involved a

²⁵ It is primarily these issues concerning under what circumstances crime can constitute persecution that forms the basis of the petitioner's objections. The fact that petitioner's concerns rest so heavily on these unresolved issues suggests that certiorari should not be granted until they are decided.

novel legal issue it wanted to resolve in the first instance, it had the opportunity to do so.

Because the matter will be remanded to the Board for a determination of key factual and legal issues, the Court should refrain from reviewing this case until those issues are resolved. Unless and until the BIA has made its “final” determination, this case is an especially poor vehicle for review by this Court.

b. Petitioner asserts that the en banc court’s decision is part of a broader pattern of conduct by the Ninth Circuit that is in conflict with the approaches of other circuits. Yet the bulk of the cases cited by petitioner reveal no more than the sort of variations that naturally arise from the application of law to the facts and circumstances of individual cases. Where the Board’s or an IJ’s reasoning is not completely clear on an issue, circuit courts have decided based on the particulars of the case whether review consistent with the principles of administrative law is possible without further explanation or reconsideration. The Ninth Circuit, like other circuits, has decided in some cases that further explanation or reconsideration in light of the correct legal standard is necessary,²⁶ and in other cases that deciding an issue does not usurp the authority of the Attorney General. Petitioner creates the appearance of conflict by citing Ninth Circuit cases from one end of this spectrum and out-of-circuit cases from the other.²⁷

²⁶ See, e.g., *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1078 (9th Cir. 2004) (remanding for consideration of an issue raised before the agency but not addressed, as well as for a determination of country conditions); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1071 (9th Cir. 2003) (remanding alien’s asylum application where the BIA failed to analyze reasonableness of relocation); *Zheng v. Ashcroft*, 332 F.3d 1186, 1197 (9th Cir. 2003) (remanding alien’s Convention Against Torture claim where the BIA had applied an incorrect legal standard); *Murillo-Salmeron v. INS*, 327 F.3d 898, 902 (9th Cir. 2003) (remanding alien’s application for adjustment of status where the BIA applied an incorrect legal standard).

²⁷ Out-of-circuit cases with express discussion of approaches similar to those of Ninth Circuit cases criticized by petitioner include
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The Ninth Circuit cases cited by petitioner do not establish a pattern of disregard for the principles reconfirmed in *Ventura*.²⁸ The Ninth Circuit has not only heeded

Ghebremedhin v. Ashcroft, 392 F.3d 241, 243 (7th Cir. 2004) (“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”); *Zhao v. Gonzales*, 404 F.3d 295, 311 (5th Cir. 2005) (finding persecution without remand for determination of changed conditions did not usurp Board’s authority because it had ruled on the conditions issue); *Singh v. Gonzales*, 406 F.3d 191 (3rd Cir. 2005) (remand for rebuttal of persecution finding unnecessary where the record was “completely devoid of evidence rebutting” the finding of persecution).

²⁸ In at least two of the cases cited by petitioner, the IJ made explicit rulings that in light of the circuit court’s ruling would have rendered remand a mere formality. *Abadi v. INS*, 52 Fed. Appx. 997 (9th Cir. 2002) (“[t]he IJ stated that were it not for credibility analysis he would have ruled in favor of Abadi”); *Gao v. Ashcroft*, 49 Fed. Appx. 180 (9th Cir. 2002) (IJ erroneously found that although Gao was targeted due to perceived involvement with Falun Gong, Gao’s lack of actual involvement meant targeting was not connected to a statutory ground; in light of the correct legal standard, IJ’s findings clearly indicated nexus). In several cases, the “theories” not considered by the agency involved settled law that the IJ or Board failed to correctly apply although raised by the petitioners in the cases. See *Khup v. Ashcroft*, 376 F.3d 898 (9th Cir. 2004) (“incident theory of persecution” was long-standing precedent the IJ failed to apply establishing that not just physical harm, but also severe psychological and emotional suffering may constitute sufficient harm to support a finding of persecution); *Mashiri v. Ashcroft*, 383 F.3d 1112 (9th Cir. 2004) (as amended Nov. 2, 2004); *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004). In other cases, the court found that the government had made no argument and/or submitted no evidence at any stage of the case that could support an alternate result, rendering remand a mere formality. See, e.g. *Faruk v. Ashcroft*, 378 F.3d 940 (9th Cir. 2004). In at least two cases it was unclear what “unresolved issues” the petitioner felt the circuit court had decided ahead of the agency, though there are indications that there may have been disagreement over whether the agency had decided certain issues in the alternative. *Istifan v. Ashcroft*, 84 Fed. Appx. 952 (9th Cir. 2003); *Hassan v. Ashcroft*, 94 Fed. Appx. 461 (9th Cir. 2004). In nearly all cases, it was impossible to fully evaluate petitioner’s claims without reference to the administrative record. In particular, see *Behnam v. Ashcroft*, 49 Fed. Appx. 684 (9th Cir. 2002); *Singh v. Ashcroft*, 75 Fed. Appx. 643 (9th Cir. 2003). But see *Tchoukhrova v.*

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Ventura, it has adapted it to new circumstances and contexts. See, e.g., *Haoud v. Ashcroft*, 350 F.3d 201 (9th Cir. 2003) (in one of the early BIA “affirmance without opinion cases” to come before the Ninth Circuit, the court determined that remand for explanation was required where the summary decision may have rested on grounds not reviewable by the circuit court); *Zara v. Ashcroft*, 383 F.3d 927 (9th Cir. 2004) (holding that although the court reviews the IJ’s order in summarily affirmed cases, petitioners still must put the Board on notice of issues to be argued before the circuit by raising them in their notice of appeal); *Moisa v. Barnhart*, 367 F.3d 882 (9th Cir. 2004) (discussing and applying *Ventura* to a Social Security Administration case).

Two out-of-circuit cases discussed by petitioner as illustrating conflict actually establish the opposite proposition. In *Amanfi v. Ashcroft*, 328 F.3d 719 (3d Cir. 2003), the court reversed the Board on an issue controlled by existing precedent despite government counsel’s arguments that the matter was “without legal precedent.”²⁹ *Id.* at 721. In *Niang v. Gonzales*, the court adopted and applied *Acosta*’s immutability framework to find the petitioner had established membership in a particular social group. Like the Ninth Circuit en banc panel, the *Niang* court resolved the particular social group issue despite the government’s objections that gender and tribal membership, without more, had not previously been held to constitute a particular social group. It went on to make findings that, unless disregarded on remand, effectively required the Board to

Gonzales, 404 F.3d 1181 (9th Cir. 2005) (holding that harm to child supported finding mother had been persecuted). Note that the Ninth Circuit sitting en banc has since remanded a case to the Board involving similar legal issues. See *Abebe v. Gonzales*, No. 02-72390, 2005 U.S. App. LEXIS 29009 (9th Cir. Dec. 30, 2005).

²⁹ Petitioner noted that the *Amanfi* court remanded the nexus issue to the Board. Unlike in *Thomas*, *Amanfi*’s IJ has not made sufficient findings to determine whether the evidence compelled the conclusion that *Amanfi* had been targeted on account of a statutory ground. See *Amanfi*, 328 F.3d at 730.

find that Niang had been targeted on account of her membership in a particular social group.

c. Rather than a correction under existing standards, the petitioner appears to seek a novel, far-reaching form of agency deference that goes well beyond *Ventura*, or indeed any rational framework of judicial review. The petitioners would have *Ventura* stand for the proposition that the agency – having already had an opportunity to pass on the contested issues, but its counsel now unhappy with the court’s ruling – is entitled to repeated opportunities to find other grounds on which an applicant’s case may be denied, thereby avoiding any substantive review of issues that might be decided against the agency. *Ventura* simply does not support this scheme. Any such standard would be fundamentally unfair, as the Ninth Circuit has observed: “the INS, having lost this appeal, should not have repeated opportunities to show that [the applicant] is not credible any more than [the applicant], had he lost, should have an opportunity for remand and further proceedings to establish his credibility.” *He v. Ashcroft*, 328 F.3d 593, 604 (9th Cir. 2003). As this Court has observed, respect for agency decision-making “does not require that we convert judicial review of agency action into a ping-pong game.” *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). The additional delays arising from petitioner’s logic would also impose special hardships on applicants for protection, who must bear the expense, the uncertainty, the legal disabilities, and in some cases the ongoing deprivation of liberty during the pendency of their case – this despite the fact that they often face some of the greatest financial, cultural, and psychological challenges of any class of individuals in the legal system.

The apparent remand principle urged by government counsel would have a particularly perverse result. When the Board or an IJ writes a considered, well-reasoned decision addressing the arguments made by the respondent on their merits, a reviewing court may find that the correct legal standard compelled a different outcome than that reached by the agency. But when the Board or an IJ decides a respondent’s properly raised claim with brief or

conclusory remarks, a reviewing court can only send the agency decision back with instructions to try again. As the Ninth Circuit has noted, given the high volume of cases the agency must adjudicate “it is difficult for IJs to explain their often complicated decisions adequately.” *Recinos de Leon v. Gonzales*, 400 F.3d 1185, 1193 (9th Cir. 2005). Thus, the effect of the government’s apparent proposal could well be to require remand on virtually every issue, factual or legal, irrespective of the Board’s own legal standards, or error. Such a result burdens an already overloaded adjudications system that is increasingly coming under criticism, even by circuit courts. *See, e.g., Pasha v. Gonzales*, No. 04-4166, 2005 U.S. App. LEXIS 28899, *1 (7th Cir. Dec. 29, 2005) (“[a]t the risk of sounding like a broken record, we reiterate our oft-expressed concern with the adjudication of asylum claims by the Immigration Court and the Board of Immigration Appeals and with the defense of the BIA’s asylum decisions in this court by the Justice Department’s Office of Immigration Litigation. . . .The performance of these federal agencies is too often inadequate.”)³⁰ Indeed, the Attorney General

³⁰ See also *Benslimane v. Gonzales*, 430 F.3d 828, 828-9 (7th Cir. 2005):

Our criticisms of the Board and of the immigration judges have frequently been severe. . . . This tension between judicial and administrative adjudicators is not due to judicial hostility to the nation’s immigration policies or to a misconception of the proper standard of judicial review of administrative decisions. It is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice. Whether this is due to resource constraints or to other circumstances beyond the Board’s and the Immigration Court’s control, we do not know, though we note that the problem is not of recent origin. All that is clear is that it cannot be in the interest of the immigration authorities, the taxpayer, the federal judiciary, or citizens concerned with the effective enforcement of the nation’s immigration laws for removal orders to be routinely nullified by the courts, and that the power of correction lies in the Department of Homeland Security, which prosecutes removal cases, and the Department of Justice, which adjudicates

(Continued on following page)

himself has recognized the problem.³¹ In light of these concerns, petitioner's apparent suggestion to restrict the

them in its Immigration Court and Board of Immigration Appeals.

(citations omitted); *Niam v. Ashcroft*, 354 F.3d 652, 652 (7th Cir. 2004):

We have consolidated for decision two petitions to review decisions by the Board of Immigration Appeals denying asylum. The petitions raise different issues, but are related in suggesting, together with other recent cases in this and other circuits, a pattern of serious misapplications by the board and the immigration judges of elementary principles of adjudication. In *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000), we stated forthrightly: 'the Board's analysis was woefully inadequate, indicating that it has not taken to heart previous judicial criticisms of its performance in asylum cases [citing cases]. The elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this as in other cases.'

(citations omitted); *Li Wu Lin v. INS*, 238 F.3d 239, 249 (3rd Cir. 2001) ("[t]he Board's performance in this case was less than it should have been, a problem that, as Judge Posner has remarked, appears to occur too often."); *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000):

The Board's analysis was woefully inadequate, indicating that it has not taken to heart previous judicial criticism of its performance in asylum cases. See, e.g., *Chitay-Pirir v. INS*, 169 F.3d 1079, 1081 (7th Cir. 1999); *Stankovic v. INS*, 94 F.3d 1117, 1120 (7th Cir. 1996); *Hengan v. INS*, 79 F.3d 60, 63-64 (7th Cir. 1996); *Salameda v. INS*, 70 F.3d 447, 449, 451 (7th Cir. 1995); *Bastanipour v. INS*, 980 F.2d 1129, 1133 (7th Cir. 1992); *Colmenar v. INS*, 210 F.3d 967 (9th Cir. 2000); *de la Llana-Castellon v. INS*, 16 F.3d 1093, 1097-98 (10th Cir. 1994). The elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this as in other cases. We are being blunt, but Holmes once remarked the paradox that it often takes a blunt instrument to penetrate a thick hide.

See also Adam Liptak, *Courts Criticize Immigration Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005 at A1.

³¹ See Memorandum from Attorney General to Immigration Judges (Jan. 9, 2005) available at <http://lawprofessors.typepad.com/immigration/files/AGMemorandumtoImmigrationJudges.pdf>.

circuit courts' ability to provide meaningful review is especially inappropriate.

Contrary to the petitioner's view, respect for the primary jurisdiction of administrative agencies does not relieve courts of their responsibility to review and reverse final agency determinations of issues the agency decided in the first instance. It is pointless and inefficient for a court to remand an issue where there is no acceptable ground on which the agency's decision could rest. Deciding an issue under such circumstances does not require a court to guess at the particular reasoning underlying the agency's decision, since no reasoning could sustain the result reached. *Ventura* does not stand for the broad proposition that a court of appeals, upon identifying a legal issue or error of any kind, must refrain from applying the law to an issue that the agency had already decided and instead remand the issue.

4. In the final analysis, petitioner puts before this Court (1) a case that presents no direct or apparent conflict with its decisions, (2) policy considerations with little practical significance in view of the statutory mechanism as a whole, (3) scant evidence of significant conflicts among circuits over remand standards, and (4) an inappropriate application of *Ventura*, suggesting ping pong remands on decided issues. Especially given the limited and cautious nature of the Circuit Court's decision, this case does not provide an appropriate vehicle for the Court to consider for review.

CONCLUSION

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

Respectfully submitted,

EDWARD M. BIALACK

Counsel of Record

ERROL I. HORWITZ

Attorney

DEBORAH E. ANKER

NANCY KELLY

JOHN WILLSHIRE-CARRERA

Attorneys

On Brief

MATTHEW D. MULLER

Harvard Law School J.D. Candidate

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