

No. 10-71311

In the United States Court of Appeals
for the Ninth Circuit

EMILIA GRANDE MERCADO, PEDRO MERCADO,
ARISTIDES G. MERCADO GRANDE, DANY MERCADO GRANDE,
AND SUSY MERCADO GRANDE,
PETITIONERS
v.
ERIC HOLDER,
RESPONDENT

ON APPEAL FROM THE BOARD OF IMMIGRATION APPEALS

**BRIEF AMICUS CURIAE OF THE UNITED NATIONS HIGH
COMMISSIONER FOR REFUGEES IN SUPPORT OF PETITIONERS**

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AMICUS CURIAE IN SUPPORT OF PETITIONER

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*UNHCR Interpreting Article 1 of the 1951 Convention Relating to the Status
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INTEREST OF AMICUS CURIAE¹

The United Nations High Commissioner for Refugees [“UNHCR”] has a direct interest in this matter as the organization entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees and others of concern, and together with Governments, for seeking permanent solutions for their problems. Statute of the Office of the UNHCR ¶ 1, U.N. Doc. A/RES/428(v) (Dec. 14, 1950). According to its Statute, UNHCR fulfils its mandate by, inter alia, “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.” *Id.* ¶ 8. UNHCR’s supervisory responsibility is also reflected in the Preamble and Article 35 of the *1951 Convention relating to the Status of Refugees*, July 28, 1951, 19 U.S.T. 6259 (hereinafter *1951 Convention*) and Article II of the *1967 Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 606 U.N.T.S. 267 (hereinafter *1967 Protocol*), obligating States to cooperate with UNHCR in the exercise of its mandate and to facilitate its supervisory role.

In 1968, the United States acceded to the *1967 Protocol*, which incorporates by reference all the substantive provisions of the *1951 Convention*. Congress passed the 1980 Refugee Act with the explicit intention to bring the United States

¹ Pursuant to FRAP 29(c)(5), no person or entity other than *amicus curiae* UNHCR authored this brief or provided any funding related to preparing or filing it.

into compliance with its international obligations under the *1951 Convention* and *1967 Protocol*. The courts have an obligation to construe federal statutes in a manner consistent with United States international obligations whenever possible.

The views of UNHCR are informed by 60 years of experience supervising the treaty-based system of refugee protection established by the international community. UNHCR provides international protection and direct assistance to refugees throughout the world and has staff in some 120 countries. It has twice received the Nobel Peace Prize for its work on behalf of refugees. UNHCR's interpretation of the provisions of the *1951 Convention* and its *1967 Protocol* are both authoritative and integral to promoting consistency in the global regime for the protection of refugees.

This case involves the interpretation of the refugee definition in the *1951 Convention* and its *1967 Protocol* as implemented in United States law at 8 U.S.C. § 1101(a)(42). As such, it presents questions involving the essential interests of refugees within the mandate of UNHCR. Moreover, UNHCR anticipates that the decision in this case may influence the manner in which the authorities of other countries apply the refugee definition. The issue presented here, the interpretation and application of establishing a causal link or nexus between the well-founded fear of persecution and one or more of the Convention grounds, is one of national significance. UNHCR submits this brief *amicus curiae* to provide guidance to the

court on the relevant international standards and not to offer an opinion directly on the merits of the claim.

SUMMARY OF ARGUMENT

To qualify as a refugee, it must be established that the well-founded fear of persecution is “for reasons of” race, religion, nationality, membership of a particular social group or political opinion. *1951 Convention* art. 1(A) as amended by *1967 Protocol* art. I ¶¶ (2) and (3); see also, *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ¶ 66, U.N. Doc. HCR/IP/4/Eng/REV.1 (1979, re-edited Jan. 1992) (hereinafter *UNHCR Handbook*), available at <http://www.unhcr.org/refworld/docid/3ae6b3314.html>.²

The refugee definition requires that a Convention ground be a relevant contributing factor but not the sole or dominant cause for the well-founded fear of

² The *UNHCR Handbook* is internationally recognized as an important source of interpretation of international refugee law. The *UNHCR Handbook* was prepared by the UNHCR in 1979 at the request of Member States of the Executive Committee of the High Commissioner’s Programme, including the United States, to provide guidance to governments in applying the terms of the Convention and Protocol. The United States Supreme Court has determined that, although the *UNHCR Handbook* is not legally binding on United States officials, it nevertheless provides “significant guidance” in construing the Protocol and in giving content to the obligations established therein. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987); see also, *Matter of S-P-*, 21 I. & N. Dec. 486, 492 (BIA 1996)(noting that in adjudicating asylum cases the BIA must be mindful of “the fundamental humanitarian concerns of asylum law,” and referencing the *UNHCR Handbook*).

persecution. United States law is consistent with this standard, requiring that a protected ground is “one central reason” for the persecution. 8 U.S.C. § 1158(b)(1)(B)(i).

The analysis of the causal link between the persecution feared and the protected ground should be part of a holistic approach with the focus on the reasons for the applicant’s predicament. “It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition [of a refugee] is met with in this respect.” *UNHCR Handbook* ¶ 67. The applicant himself or herself often may not be aware of the reasons for the persecution. *Id.* ¶ 66. Although U.S. law requires an analysis of the persecutor’s motive, it acknowledges the difficulty of this requirement, and that, in light of this, the adjudicator should consider all available evidence, both direct and circumstantial. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992). United States law also recognizes that there may be multiple reasons for persecution and that these may include Convention and non-Convention reasons.

The causal link may be satisfied where there is a risk of being persecuted at the hands of State or non-State actors for reasons which are related to one of the Convention grounds, or where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason. *UNHCR Guidelines on*

International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees ¶ 23 (May 7, 2002) (hereinafter *Social Group Guidelines*), available at <http://www.unhcr.org/refworld/docid/3d36f23f4.html>.

In situations of widespread violence, nexus should be assessed in the same manner as other claims. Certain individuals may still be targeted because of a Convention ground.

The nexus analysis is a case-by-case determination and must be assessed in light of the object and purpose of the *1951 Convention* and *1967 Protocol*. Deviation from these principles could lead to refugees being erroneously denied international protection and subjected to refoulement, that is return to a country where their “life or freedom would be threatened,” in violation of United States’ obligations under Article 33 (1) of the *1951 Convention*.

In the case before this Court, the Board of Immigration Appeals (*Board*) found that “the respondents, a family of five who are natives and citizens of El Salvador, were threatened and harassed by members of a criminal gang in that country” and held that there was “little evidence connecting the actions of the gangs to the respondents’ evangelical beliefs or their work with the church, other than their work in anti-gang activities.” *Matter of Grande Mercado*, A088-558-110, at 1-2 (BIA Mar. 24, 2010). The Board found that its decision in *Matter of*

S-E-G-, 24 I. & N. Dec. 579 (BIA 2008), “controls the outcome of this case” and thus “the purported social group, consisting of those who have taken direct action to oppose criminal gangs, is not meaningfully distinguishable from the groups that the Board and the United States Court of Appeals for the Ninth Circuit have found to lack the characteristics of a particular social group.” *Id.* The Board recognized that “family” may constitute a particular social group; but held that the applicants in this case were “not targeted on account of their family membership” and that they did not demonstrate that the family had “any recognized level of social visibility.” *Id.* at 2.

In this brief, UNHCR presents its views on establishing a causal link or “nexus” between the well-founded fear of persecution and one or more of the protected grounds contained in the *1951 Convention*. It further examines this causal link in the context of persecution by gang members for reasons of religion and membership of a particular social group, including the requirements for establishing a claim based on social group membership, the grounds which may be most relevant and applicable in the case before this Court.

ARGUMENT

I. THE UNITED STATES IS BOUND BY THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES

Article VI of the United States Constitution states that treaties the United States has acceded to “shall be the supreme law of the land.” As such, the courts are bound by United States treaty obligations and have a responsibility to construe federal statutes in a manner consistent with those international obligations to the fullest extent possible. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”). The United States acceded to the *1967 Protocol*, which in Art. I ¶ 1 incorporates Articles 2 – 34 of the *1951 Convention*, and amends the definition of “refugee” by removing the temporal and geographic limits found in Article 1 of the 1951 Convention. *1967 Protocol* art. I ¶¶ (2) - (3).

The United States Supreme Court has recognized that when Congress enacted the Refugee Act of 1980, it made explicit its intention to “bring United States refugee law into conformance with the 1967 United Nations Protocol

Relating to the Status of Refugees.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (citing H.R. Rep. No. 96-608 at 9 (1979)). “[O]ne of Congress’ primary purposes’ in passing the Refugee Act was to implement the principles agreed to in the 1967 [] Protocol Relating to the Status of Refugees” *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (quoting *Cardoza-Fonseca*, 480 U.S. at 436-37).

The obligations to provide refugee protection and not to return a refugee to any country where she or he would face danger lay at the core of the *1951 Convention* and *1967 Protocol*. In fulfilling these obligations, the United States Congress provided a path for refugees to seek asylum in the U.S., 8 U.S.C. §1101(a)(42) and §1158, and to be protected from return to a place where they would face danger. 8 U.S.C. § 1231(b) (3). The 1980 Refugee Act thus serves to bring the United States into compliance with its international obligations under the *1951 Convention* and *1967 Protocol* and so it must be interpreted and applied in a manner consistent with these instruments.

II. THE NEXUS OR CAUSAL LINK SHOULD BE INTERPRETED CONSISTENT WITH THE 1951 CONVENTION AND 1967 PROTOCOL AND IN LIGHT OF WELL-ESTABLISHED INTERNATIONAL STANDARDS.

To qualify for protection under the *1951 Convention* as supplemented by the *1967 Protocol*, an individual must establish a well-founded fear of persecution “for reasons of” race, religion, nationality, membership of a particular social group, or

political opinion. *1951 Convention* art. I; *1967 Protocol* art. I ¶¶ (2)-(3). It is sufficient that the Convention ground be a relevant factor contributing to the well-founded fear of persecution and is not necessary that it be the sole, or even dominant, cause. UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* ¶ 23 (Apr. 2001) (*Interpreting Article 1*), available at <http://www.unhcr.org/refworld/docid/3b20a3914.html>; see also, e.g., *UNHCR Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* ¶ 29 (Mar. 31, 2010) (hereinafter *Gang Guidance Note*), available at <http://www.unhcr.org/refworld/docid/4bb21fa02.html>; *UNHCR Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* ¶ 20, (May 7, 2002) (hereinafter *Gender Guidelines*), available at <http://www.unhcr.org/refworld/docid/3d36f1c64.html>. In addition, more than one protected ground may apply and these grounds may, and frequently will, overlap. *UNHCR Handbook* ¶¶ 66-67; *Social Group Guidelines* ¶ 4.

Key to an analysis of the existence of a causal link is that it be assessed in the light of the text, context, and object and purpose of the Refugee Convention and Protocol. This assessment is best made as part of a holistic analysis of the refugee definition.

Some States have expounded on the importance of using a holistic approach that looks to the *1951 Convention* to understand the “for reasons of” nexus. For example, the High Court of Australia has ruled that:

The meaning of any statutory notion of causation depends upon the precise context in which the issue is presented. Providing that meaning will usually involve the decision-maker in introducing considerations of policy which cannot be reduced to a strictly logical deduction from words. . . . In the context of the expression ‘for reasons of’ in the Convention, *it is neither practicable nor desirable to attempt to formulate ‘rules’ or ‘principles’ which can be substituted for the Convention language.*

Chen Shi Hai (an infant) by his next friend Chen Ren Bing v. Minister for Immigration and Multicultural Affairs [1998] FCA 622, ¶ 68 (5 June 1998) (emphasis added), available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/1998/622.html?stem=0&synonyms=0&query=title%28friend%20Chen%20Ren%20Bing%20and%20.%20Minister%20for%20Immigration%20%29>. See also, e.g., *The U.K., Islam (A.P.) v. Sec’y of State for the Home Dep’t, Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.)* (Conjoined Appeals) [1999] at 11 (House of Lords), available at http://www.unhcr.org/refworld/country,,GBR_HL,,PAK,,3dec8abe4,0.html; *New Zealand, Refugee Appeal No. 71427/99* (2000) ¶ 115 (“We do not in this decision have to decide what, in the refugee law context, is the appropriate causation test, an issue also left open by Lord Steyn in *Shah* In that case [Lords Hoffman and

Hope] rejected as an oversimplification the proposition that the requirement of causation could be satisfied by applying the ‘but for’ test.”) (citation omitted), *available at* <http://www.refugee.org.nz/Casesearch/Fulltext/71427-99.htm>.

In other jurisdictions, such as the United States, the causal link is viewed as a more discrete analytical inquiry. However, even when the “for reasons of” element must be separately established, the existence of a nexus to a protected ground must be assessed in light of the other elements of the definition and, as stated above, be assessed in the light of both the letter and the spirit of the *1951 Convention* and *1967 Protocol*. Such an approach would keep foremost in view the humanitarian and protection-oriented goals and purposes of international refugee protection.

The United States and other States have likewise embraced the view that a protected ground need not be the sole or dominant reason for the persecution. 8 U.S.C.S. § 1158(b)(1)(B)(i). This Court has fully addressed this approach, ruling:

The [2005 amendment to 8 U.S.C.S. § 1158(b)(1)(B)(i)], requires that a protected ground represent one central reason for an asylum applicant's persecution. . . . [This text] leads to two initial conclusions. First, an asylum applicant need not prove that a protected ground was the *only* central reason for the persecution she suffered. The Real ID Act requires that a protected ground serve as "one central reason" for the persecution, naturally suggesting that a persecutory act may have multiple causes. Second, an applicant need not prove that a protected ground was the most important reason why the persecution occurred. The Real ID Act states that a

protected ground must constitute "at least one" of the central reasons for persecutory conduct; it does not require that such reason account for 51 percent of the persecutors' motivation. ... [As such] an applicant must prove that such ground was *a* cause of the persecutors' acts.

Parussimova v. Mukasey, 555 F.3d 734, 740-41 (9th Cir. 2009) (emphasis added).

See also, *Sec'y of State for the Home Dep't (Respondent) v. K (FC) (Appellant)* [2006] 1 A.C. 12 and *Fornah (Appellant) v. Sec'y of State for the Home Dep't (Respondent)*, (2006) 2006 UKHL 46 ¶ 17 (U.K.) (ruling that the ground on which a "claimant relies need not be the only or even the primary reason for the apprehended persecution. It is enough that [it] is an effective reason.").

Where the risk of persecution derives from a non-State actor, the causal link may be satisfied "(1) where there is a risk of persecution at the hands of a non-State actor for reasons which are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related; or (2) where the risk of persecution at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason." *Social Group Guidelines* ¶ 23; *Gender Guidelines* ¶ 21; *Gang Guidance Note* ¶ 29.

A. Establishing the Causal Link including the Motive of the Persecutor.

The analysis of the causal link between the persecution feared and the protected ground should be part of a holistic approach with the focus on the

reasons for the applicant's predicament. *See, e.g., UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, ¶ 28 (Nov. 21, 2008) available at, <http://www.unhcr.org/refworld/docid/48abd5660.html>.

Whether there is intent to persecute is irrelevant if the effect of the measures taken amounts to persecution for the individual concerned and there is a link to a Convention ground; thus, it is not necessary to establish the motive of the persecutor.

This causal link will be revealed by either direct or circumstantial evidence of the reasons that led to the infliction, threat or fear of harm, or of the State's inability or unwillingness to provide protection in the face of a fear or infliction of harm at the hands of a non-State actor. The applicant may not be aware of the reasons for the persecution or absence of protection, thus it is for the examiner to ascertain the reason or reasons for the persecution feared or the lack of State protection and to decide whether, in light of the underlying facts of a particular claim, the refugee definition is met. *UNHCR Handbook* ¶ 66 -67.

In analyzing the causal link under United States law, the motive of the persecutor is considered an important factor. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992). The United States Supreme Court also recognized, however, that it will often be difficult to establish such motive, ruling further that direct proof of the persecutor's motive is not required and circumstantial evidence will suffice.

Id. In applying the Supreme Court ruling, this Court has explicitly recognized that “because it is difficult to conclusively prove motive, [an applicant] need only provide *some* evidence of motive, direct or circumstantial, and demonstrate the connection between the [persecutor's] actions and [the protected ground].” *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1073 (9th Cir. 2004) (quoting *Baballah v. Ashcroft*, 367 F.3d 1067, 1077 (9th Cir. May 6, 2004)). This Court has further ruled that “[i]t is important to emphasize that persecutors are hardly ‘likely to submit declarations explaining exactly what motivated them to act,’ and we do not believe the Real ID Act demands such an unequivocal showing.” *Parussimova v. Mukasey*, 555 F.3d 734, 742 (9th Cir. 2009) (quoting *Gafoor v. INS*, 231 F.3d 645, 654 (9th Cir. 2000)).

B. Persecutors May Engage in Persecution for Convention and Non-Convention Reasons

As stated above, there may often be more than one reason for persecution. Consistent with the views of UNHCR, United States law has long recognized that a persecutor may have more than one motive for persecution. *See, e.g., Matter of S-P-*, 21 I. & N. Dec. at 490. Following the 2005 amendments to asylum law requiring that a protected ground be at least “one central reason” for the persecution, the Board of Immigration Appeals affirmed this principle ruling that “[h]aving considered the conference report and the language of the REAL ID Act,

our standard in mixed motive cases has not been radically altered by the [2005] amendments.” *Matter of J-B-N- & S-M-*, 24 I. & N. Dec. 208, 214 (2007).

Non-state actors in particular may target individuals for both Convention and non-Convention reasons. *See, e.g., UNHCR Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked* ¶¶ 31, 32 (Apr. 7, 2006) available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=443679fa4&page=search>. In the context of gang-related violence, the fact that a gang may be motivated to harm an individual for reasons related to advancing its criminal goals does not preclude the possibility that an individual has been targeted based on a protected ground. *Gang Guidance Note* ¶¶ 10-11. It is reasonable to conclude, for example, that a gang may view encouraging community members to follow God and not join gangs as both a threat to their control over the community and as anti-gang activity. In this context, an assessment of the motive for the harm must take into account the gang’s motive to persecute the individual for his or her actual or perceived anti-gang religious belief or position. Moreover, when a gang’s efforts to eliminate such perceived threat or “competitor” also result in the cessation of that individual’s religious activity, it would be difficult to conclude that the gang

did not act at least in part on account of the religious activity of the group, in addition to any other non-Convention related reasons for such harm.

C. Persecutors Engaged in Widespread Violence May Simultaneously Target Individuals For Reasons Of a Convention Ground.

In situations of widespread violence, the “for reasons of” nexus assessment should be conducted in the same manner as it is in other claims, and no additional requirements should be applied. *Interpreting Convention Article 1* ¶ 20.

In the context of gang-related violence, there may well be cases in which an applicant is able to establish that he or she has been specifically targeted for persecution on account of a protected ground, even though gangs are also often engaged in violence that affects large segments of a society. *Gang Guidance Note* ¶ 10-11. Some victims of gang violence, such as workers in non-governmental organizations, human rights activists, lawyers, and participants in community and religious groups who oppose gangs, are distinguishable from the general population. Such individuals may be specifically targeted for persecution because of a protected characteristic, or they may be more vulnerable than the general population because of such a characteristic and thus more likely to be harmed. *Id.* ¶ 12, 41. Vulnerability itself may be used as circumstantial evidence of a causal link between the harm and a protected ground.

III. A CAUSAL LINK BETWEEN PERSECUTION BY MEMBERS OF VIOLENT GANGS AND ONE OR MORE CONVENTION GROUNDS MAY BE ESTABLISHED

As discussed above, the Convention protection grounds are not mutually exclusive; often overlap; and more than one may apply in any given case. In UNHCR's view, when a powerful criminal gang uses violence and threats against members of an Evangelical church group who, as a core value of their religious mission, advocate for youth to avoid joining such gangs, both the religion ground and membership of a particular social group ground may apply.

A. Persecution Based On Religion.

The right to freedom of religion includes the freedom to manifest one's religion or beliefs, either individually or in community with others, in public or private, in worship, observance, practice and teaching. *Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees* ¶ 11 (Apr. 28, 2004) (hereinafter *Guidelines on Religion*), available at <http://www.unhcr.org/refworld/docid/4090f9794.html>. See also, e.g., *Universal Declaration of Human Rights*, art. 18, G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N.Doc. A/810 (1948) (hereinafter *UDHR*) and *International Covenant on Civil and Political Rights*, art. 18(1), Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (hereinafter *ICCPR*). Furthermore, “[b]earing witness in words and

deeds is often bound up with the existence of religious convictions.” *Guidelines on Religion* ¶ 13.

In assessing a religious-based protection claim, the inquiry should explore:

the individual profile and personal experiences of the claimant, his or her religious belief, identity and/or way of life, how important this is for the claimant, what effect the restrictions have on the individual, the nature of his or her role and activities within the religion, whether these activities have been or could be brought to the attention of the persecutor and whether they could result in treatment rising to the level of persecution.

Id. ¶ 14.

An individual’s religion may include the belief that gang life-style and gang violence contradict the word of God and, as a core activity, preaching against youth involvement in gangs. This is particularly so in a society such as El Salvador where gang violence is pervasive and gangs wield power or control over communities. An individual who encourages community members to reject gangs, eschew violence, and join a church, could be perceived by gangs as a threat to their power and influence. Such activity would also likely be viewed as a sign of disrespect and as taking an anti-gang position. Gangs may direct harm against individuals who have resisted gang activity, oppose, or are perceived to oppose, their practices and conduct. *Gang Guidance Note* ¶ 12.

Persecution of individuals engaged in religious activity that a gang has identified as opposing it or its practices may be considered to have been on account

of the individual's religious beliefs. *Id.* ¶ 48. Gangs generally view any position that may call their power or activities into question as an anti-gang stance that calls for a violent response, whether or not actual opposition is voiced. *Id.* ¶ 51.

Specifically, such gangs:

tend to share a common mentality which defines the way in which they perceive and respond to events. Central to this mentality is the notion of respect and responses to perceived acts of disrespect. Because respect and reputation play such an important role in gang culture, members and entire gangs go to great lengths to establish and defend both. Refusals to succumb to a gang's demands and/or any actions that challenge or thwart the gang are perceived as acts of disrespect, and thus often trigger a violent and/or punitive response.

Id. ¶ 6. At least one U.S. court has ruled on this issue consistent with the interpretation quoted above.

The Seventh Circuit Court of Appeals recently found that persecution by the FARC in Colombia of a woman who refused to give in to their demands led to the inference that she was targeted “to overcome the anti-FARC political opinion they attributed to her.” *Martinez-Buendia v. Holder*, 616 F.3d 711, 717 (7th Cir. 2010). “If political opposition is the reason an individual refuses to cooperate with a guerrilla group, and that individual is persecuted for his refusal to cooperate, logic dictates that the persecution is on account of the individual's political opinion.” *Id.* at 718. This reasoning leads to the similar conclusion that if an individual refuses to comply with

threats and violence due to *religious* beliefs opposing the conduct and lifestyle of violent gangs “and that individual is persecuted for his refusal to cooperate, *logic dictates that the persecution is on account of the individual's*” *religious beliefs. Id.* (emphasis added). As this Court has ruled, “persecution may be found by cumulative, specific instances of violence and harassment toward an individual and her family members not only by the government, but also by a group the government [is unwilling or unable] to control.” *Krotova v. Gonzales*, 416 F.3d 1080, 1086 (9th Cir. 2005) (quoting *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998)).

Once an individual has been targeted for retaliation, the gravity of the threat does not diminish over time. *Gang Guidance Note* ¶ 6. Persistent opposition to gang activity may deepen the gang’s sense of the need to retaliate against such individual and thus may heighten the risk and the degree of harm to such individual by the gang members. Continuing to evangelize in a community with the goal of drawing youth away from gangs and directing them to join a church and follow the word of God despite repeated threats and harassment by gang members would thus only enhance the likelihood that the gang sought to overcome the individual’s religious beliefs. The Seventh Circuit Court of Appeals has also made this observation, finding that the asylum applicant’s “persistent refusal to politically align with the FARC despite the increasingly violent nature of the

persecution would have only strengthened the FARC's belief that she was a political opponent.” *Martinez-Buendia*, 616 F.3d at 717. In addition, threats and attacks that contribute to or effectively lead to the cessation of religious activity may, in themselves, constitute persecution on account of religion.

B. Persecution Based On Membership of a Particular Social Group.

The *Social Group Guidelines* present the two alternative approaches to the particular social group definition: “protected characteristics” and “social perception.” Where the protected characteristics approach is satisfied, the social perception approach need not, and ought not, be considered. The protected characteristics test “examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it.” *Social Group Guidelines* ¶ 6. The seminal Board decision on this issue upholds this approach as the standard for assessing a claim based on social group membership. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), *overruled in part on other ground by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). This Court has affirmed the *Acosta* test, holding that a “‘particular social group’ is one united by . . . an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.” *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000).

In assessing membership of a particular social group in a case such as the one now before the Court, the “protected characteristics” approach is applicable. Under this analysis, members of an Evangelical church-based group who, as a fundamental component of their religious beliefs, advocate against gang violence and involvement in gang activity and encourage community members to join the church instead, are united by characteristics—their religious beliefs and practices—that are fundamental to their identity.

Recently, the Board of Immigration Appeals has taken the view that “social visibility” is a requirement to establish the existence or membership of a particular social group. In developing this view, the Board has cited the *Social Group Guidelines* as supportive authority, characterizing them as “endors[ing] an approach in which an important factor is whether the members of the group are ‘perceived as a group by society.’” *Matter of S-E-G-*, 24 I. & N. Dec. at 586 (quoting *Matter of C-A-*, 23 I. & N. Dec. 951, 956 (BIA 2006), *aff’d*, *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190 (11th Cir. 2006), *cert. denied sub nom.*, *Castillo-Arias v. Gonzales*, 127 S. Ct. 977 (2007)). This characterization is inaccurate.

The *Social Group Guidelines* present the “social perception” approach as an *alternative* to be assessed only if it has first been determined that the social group members do not possess a protected characteristic. If the protected characteristic

approach is satisfied, no further analysis is necessary or appropriate. *Social Group Guidelines* ¶ 13.

Under the “social perception” analysis, the focus is on whether the members share a common attribute that is understood to exist in the society or that in some way sets them apart or distinguishes them from the society at large. “Social perception” neither requires that the common attribute be literally visible to the naked eye nor that the attribute be easily identified by the general public, yet both misunderstandings have been relied upon by the Board. Nor does “social perception” mean to suggest a sense of community or group identification as might exist for members of an organization or association; members of a social group may not be recognizable even to each other. In applying the “social perception” approach, the determination rests on whether a group is “cognizable” or “set apart from society” in some way. *Id.* ¶ 7.

The *Social Group Guidelines* do address “visibility,” stating that: “[P]ersecutory action toward a group may be a relevant factor in determining the visibility of a group in a particular society” and that “the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society.” *Id.* ¶ 14 (quoting McHugh, J., *Applicant A v. Minister for Immigration and Ethnic Affairs*, (1997) 190 CLR 225, 264, 142 ALR 331); *see also* *Gang Guidance Note* ¶ 35 (“the fact that members of a group have been or are being

persecuted may serve to illustrate the potential relationship between persecution and a particular social group”). This language relates to the role of persecution in defining a particular social group and is meant to illustrate how being targeted can, under some circumstances, lead to the identification or even the creation of a social group in that its members have been set apart in a way that renders them subject to persecution. It is not intended to be considered a defining or necessary factor in determining the existence of a particular social group. Moreover, although it is by no means necessary that all members of a group be targeted to establish a claim, *Social Group Guidelines* ¶ 17, the fact that other members of a group have been targeted may be evidence that the persecution was on account of the particular social group. *Id.* ¶ 14; *Gang Guidance Note* ¶ 35.

United States law also recognizes, albeit in the context of a different aspect of the refugee definition, that a “pattern or practice . . . of persecution [] of persons similarly situated to the applicant” is a relevant factor in establishing asylum eligibility. 8 C.F.R. §208.13 (b)(2)(C)(iii)(A) & (B). Under this provision, such a showing will satisfy the burden of showing that the fear is well-founded. *Id.*

Evidence that the persecutor opposes core characteristics of social group members that are expressed or shared through group activities and so seeks to end these activities would be highly probative of the awareness or “visibility” of the group in the society as well as of the motive of the persecutor. In situations where

the social group does engage in meetings or other activities, if the persecution occurs in close time or proximity to such activities this may also be probative that the harm is related to the group membership.

In the instant case, there are at least two potential social groups that may serve as the basis for persecution: membership in an Evangelical Church that actively seeks to stop others from participating in gangs and gang violence and instead find God with them; and membership in a family.

1. Persecution Based on Membership in an Evangelical Church that Actively Seeks to Stop Others from Participating in Gangs and Gang Violence and Instead Join the Church.

The right to freedom of religion and manifestations thereof by a religious group may be relevant for establishing a nexus between persecution and membership of a particular social group. “Religious belief, identity, or way of life can be seen as so fundamental to human identity that one should not be compelled to hide, change or renounce this in order to avoid persecution.” *Guidelines on Religion* ¶ 13. As such, a religious-based social group would most appropriately be assessed under the “protected characteristics” approach. This appreciation of the fundamentality of religion to one’s identity is upheld in principles of international human rights law that recognize the right to freedom of religion, which includes freedom to manifest that religion or belief in worship; observance; practice; or teaching, as a fundamental human right. *ICCPR* art. 14. The

willingness of group members to put themselves at significant risk by speaking out publicly against gangs and actively discouraging involvement in them can be viewed as strong evidence of the depth and fundamentality of their convictions and their sense of moral obligation to preach their views.

Under the protected characteristics approach to social group analysis, members of an Evangelical church group who, as a fundamental component of their religious beliefs, actively preach against involvement in gang violence and seek to bring youth and other community members into their church are united by characteristics that are fundamental to their identity. These commonly held characteristics are the religious tenets they uphold and their religious-based conviction to express these views freely in their community. Where such church members have been targeted because of these fundamental protected characteristics, no further inquiry as to the existence of a social group is appropriate. Nevertheless, the “social perception” approach may also be satisfied by such a group, for example, because of their activities.

If these church members have engaged in activities such as regularly speaking out in the community against gangs and gang violence; frequently engaging in public performances that preach the gospel; and transporting children away from gang activity and taking them to church activities, these are clear indications that demonstrate both the fundamentality of their religious beliefs and that the church

members are a cognizable group in the society. Where it is demonstrated that gang members view such Evangelicals as enemies, have specifically targeted members of the church for physical assaults and death threats, and have used personal details of members of the church in direct death threats against them, a clear indication that these church members have been targeted because of their religion has been established.

2. Persecution Based on Family Membership

A social group based on family membership would be recognized under either or both the “protected characteristics” and “social perception” analyses. Members of a family, whether through blood ties or marriage, and the attendant kinship ties, share a common protected characteristic that is innate and unchangeable as well as fundamental to their identity. The fundamentality of family is recognized under principles of international law, for example, Article 23 (1) of the *ICCPR*, which provides that the family is the “natural and fundamental group unit of society” and is “entitled to protection by society and the State.” *See also UDHR* art. 16 (c) (3) (same).

The Board first established that family constitutes a particular social group in its landmark decision *Matter of Acosta*, ruling that “[t]he shared characteristic might be an innate one such as sex, color, or kinship ties . . .” *Acosta*, 19 I. & N. Dec. at 233. In its decision below, the Board affirms that “a family may constitute

a particular social group.” *Matter of Grande Mercado*, A088-558-110, at 2 (BIA Mar. 24, 2010).

As discussed above, although it is by no means necessary that all members of a group be targeted to establish a claim, *Social Group Guidelines* ¶ 17, the fact that other members of a group have been targeted may be evidence that the persecution was on account of the particular social group. *Id.* ¶ 14; *Gang Guidance Note* ¶ 35. United States law also recognizes, albeit in the context of a different aspect of the refugee definition, that a “pattern or practice . . . of persecution [] of persons similarly situated to the applicant” is a relevant factor in establishing asylum eligibility. 8 C.F.R. §208.13 (b)(2)(C)(iii)(A) & (B). Under this provision, such a showing will satisfy the burden of showing that the fear is well-founded. *Id.* The *Gang Guidance Note* provides, at ¶ 20, that “[h]arm inflicted on other individuals in similar situations, *particularly other family members*, may support the well-foundedness of the fear of the applicant.” (emphasis added).

A family member of an individual who opposes gangs could “be persecuted for reasons of his/her family membership, for example, where the family has a known record of being opposed to a gang. In such cases, the applicant’s ‘family’ may be regarded as a relevant particular social group.” *Id.* ¶ 40. “Gang-related asylum claims frequently reveal that one or more members of the same family have

been threatened, harmed, killed or forced to relocate.” *Id.* ¶ 20. Moreover, gangs may also routinely target family members of participants in church-based groups who oppose gangs. *Id.* ¶ 12, 17.

Statements made by a persecutor before, during, or after the harm is committed are instructive as is evidence that a family member was targeted for reasons distinct from any general acts of violence a persecutor may have also committed. The continuation of threats against family members even after the family has fled the country is also significant.

Evidence that may be probative of a nexus between the persecution feared and family membership could include gang members: placing a family member on a death list for refusing to be a “girl friend” of another gang member; making death threats to other family members and demonstrating that they knew where and when the family members worked and attended school, the location of their home and type of vehicle they own; placing a “bounty” for the killing of family members; and attacking the family vehicle after the family had fled the country and only stopping when they realized the family members were not in the car.

CONCLUSION

For all the foregoing reasons, UNHCR respectfully urges this Court to grant the Petition for Review, remand this case, and instruct the Board to consider the relevant international standards and the views of UNHCR when determining

whether the nexus requirement is satisfied in order to ensure that the United States fulfills its obligations under the 1951 Convention and its 1967 Protocol to protect refugees.

RESPECTFULLY SUBMITTED,

s/pamela goldberg

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Dated: March 25, 2011

CERTIFICATE OF COMPLIANCE WITH FORMAT

I, pamela goldberg, certify that, pursuant to Fed. R. App. P. 32(a) and Ninth Circuit Rule 32-1, this brief is double spaced, using a proportional typeface of 14-point font of Times New Roman and contains 7,000 words, not including the table of contents, table of authorities, certificate of service, and corporate disclosure statement.

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CORPORATE DISCLOSURE STATEMENT

I, pamela goldberg, certify that, pursuant to Fed. R. App. P. 26.1, the Office of the United Nations High Commissioner for Refugees issues no shares or stock within the meaning of Rule 26.1.

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CERTIFICATE OF SERVICE

I, pamela goldberg, certify that on March 25, 2011, I electronically filed the Brief Amicus Curiae of the Office of the United Nations High Commissioner for Refugees with the Clerk of Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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