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Gender & Refugee
STUDIES

Amicus Brief Filed by CGRS in *S-L-*

Overview of the Attached Brief

The attached amicus brief was filed by the Center for Gender & Refugee Studies (CGRS or Center) to the United States Court of Appeals for the Ninth Circuit on November 17, 2008 in the matter of *S-L-*. Identifying information has been redacted in accordance with the wishes of the applicant. The brief addresses gang violence in El Salvador as a basis for asylum. It argues that asylum eligibility is a case by case determination and that a court must analyze the record before it, rather than rely on the record in a different case to assess asylum eligibility.

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Case File No. [redacted]

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[redacted],

Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition for Review of a Decision of The Board of Immigration Appeals

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BRIEF FOR *AMICUS CURIAE,* THE CENTER FOR GENDER AND REFUGEE STUDIES, IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING AND REHEARING *EN BANC*

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I. Introduction

In *Santos-Lemus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008) a panel of this Court substituted its rationale for that of the Board of Immigration Appeals (BIA) and upheld an administrative decision which is inconsistent with this Circuit's jurisprudence on the definition of "political opinion," "social group membership" and the burden of proof required to establish a well-founded fear. The Court should rehear this case and properly articulate the definitions and standards relevant to these statutory terms.

II. Interest of *Amicus Curiae*

Amicus Center for Gender & Refugee Studies (CGRS), at the University of California, Hastings College of the Law, has a direct and serious interest in the development of refugee law consistent with international norms. *Amicus* has filed briefs regarding the interpretation of domestic asylum law in the Second, Fourth, Fifth, Sixth, Eighth and Ninth Circuits of Appeal. The questions under consideration in this appeal regarding proper interpretation of "political opinion" and "membership in a particular social group," as well as the interpretation of well-founded fear where a single family member survives unharmed in the home country, implicate issues of great consequence to the matters central to *amicus'* core interest and expertise. *Amicus* offers this brief under FRAP 29, Circuit Rule 29-2.

III. Summary of Argument

Mr. [redacted] petitioned for asylum and related forms of relief on the basis of his political opinion in opposition to gangs, and his membership in two social groups – "young men in El Salvador who resist the violence and intimidation of gang rule," and "family."

In denying, the BIA issued a *per se* rule that anti-gang opinion is not political opinion; that – as a matter of law – the proposed social group of young men who resist gangs is not socially visible; and that the Petitioner had failed to establish a well-founded fear on the basis of family group membership because his mother remained unharmed in El Salvador.

The panel upheld the BIA's decision, and violated well-established principles of review by improperly substituting its reasoning for that of the BIA on two of the three theories. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). The BIA had rejected the political opinion and gang-based social group theories as a matter of law, but the panel analyzed – and upheld – the denial on these theories as issues of fact. Furthermore, the panel's ruling that the Petitioner could not establish a well-founded fear on the basis of family social group membership contradicts Ninth Circuit jurisprudence, and that of other circuits.

IV. Argument

a. The Ninth Circuit panel committed legal error in denying Mr. [redacted]'s petition on the basis of political opinion because it substituted its own reasoning to uphold the BIA's decision.

A reviewing court must judge the propriety of the agency's action based solely on the grounds invoked by the agency itself. "If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

The Petitioner argued that gang members persecuted him because of his political opinion. A.R. 24-25. The BIA denied on the purely legal ground that anti-gang beliefs do not constitute a political opinion, stating that "there is no controlling precedent which establishes that opposition to gangs is a political opinion." A.R. 3. The BIA did not analyze Mr. [redacted]'s reasons for opposing the gangs to determine whether his opinion could be considered "political" within the meaning of the refugee definition. Instead, the BIA attempted to support its rejection of gang resistance as political opinion by invoking the fear of floodgates, stating that "if such opinion were a protected

ground, then every citizen in a country with substantial gang or criminal violence would be potentially eligible for asylum."[1] A.R. 3.

The panel affirmed the BIA's decision, but it did not do so by upholding the Board's *per se* ruling that anti-gang beliefs can never be political. Instead it ruled that Mr. [redacted] had not provided evidence "that his opposition to the gang's criminal activity was based on political opinion" or "that he was politically or ideologically opposed to the ideals espoused by the Mara or to gangs in general[.]" *Santos-Lemus*, 542 F.3d at 747.

Although the panel's discussion of Mr. [redacted]'s individualized facts does constitute the type of analysis required in determining whether a belief is political, it cannot substitute for the BIA's reasoning. The BIA's rationale

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[1] The BIA's invocation of floodgates improperly shifted the focus away from an individualized analysis of Mr. [redacted]'s beliefs, which is required in refugee status determinations. *See Singh v. INS*, 94 F.3d 1353, 1359 (9th Cir. 1996); *see also Osorio v.* INS, 18 F.3d 1017 (2d Cir. 1994). Furthermore, it relies upon an erroneous premise; namely that a finding of political opinion in Mr. [redacted]'s case would require a similar finding in every case involving aversion or opposition to gangs. This is clearly incorrect.

In *INS v. Elias-Zacarias*, the U.S. Supreme Court ruled that an individual's refusal to join a guerrilla group could be motivated by "a variety of reasons - fear of combat, a desire to remain with one's family and friends, a desire to earn a better living in civilian life, to mention only a few." *INS v. Elias-Zacarias,* 502 U.S. 478, 482 (U.S. 1992). The Court ruled that since Zacarias had not shown that a political motive underlay his resistance to the guerrillas, he did not qualify for relief. It is no less true that resistance to gangs can arise from a multitude of motivations, and a finding that a petitioner's motivation is political in one case does not translate into a finding that it is political in all cases.

constituted a legal finding, divorced from the particular facts of Mr. [redacted]'s case, while the panel's ruling was based on an analysis of the facts.

b. The BIA's creation of a *per se* rule conflicts with established jurisprudence of this and other circuits requiring that determinations of eligibility for asylum involve a context-specific, fact-based analysis.

The panel could not have upheld the BIA's decision had it not substituted a fact-based analysis for the Board's *per se* legal rationale that anti-gang opinion is not political opinion. The creation of a *per se* rule conflicts with well-established precedent that the determination of what constitutes political opinion must be made on a case by case basis. *See Caceres-Cuadras v. U.S. I.N.S.*, No. 89-70000, 1990 WL 124010 (9th Cir. Aug. 23, 1990) (unpublished) ("courts have given shape to the meaning of 'persecution for political opinion' through the regular process of case by case adjudication.")

Countless Ninth Circuit decisions analyze the circumstances of the particular asylum seeker's actions and opinions to determine whether they are political. *See, e.g.*, *Fedunyak v. Gonzales*, 477 F.3d 1126, 1129 (9th Cir. 2007) (in Ukraine, opposition to government corruption and extortion was political opinion); *Sagaydak v. Gonzales*, 405 F.3d 1035, 1043 (9th Cir. 2005) (petitioner's actions were "undeniably a political statement in the context of the country's evolving politics"); *Grava v. INS*, 205 F.3d 1177, 1181 (9th Cir. 2000) (contextual analysis to determine whether opposition to corruption constitutes political opinion).

This has been no less the case when the political opinion consists of opposition to a criminal or guerrilla group, such as in Mr. [redacted]'s case. *See, e.g., Del Carmen Molina v. INS*, 170 F.3d 1247, 1249-50 (9th Cir. 1999)(considering family involvement with military and petitioner's disagreement with the guerrillas).

Other circuits follow this same approach, avoiding any *per se* rule, and analyzing the opinion and activities in context. *See, e.g., Zhang v. Gonzales*, 426 F.3d 540, 547 (2d Cir. 2005) ("categorical rule that opposition to government extortion cannot serve as the basis for a claim based on 'political opinion'" fails to undertake the required analysis); *Marku v. Ashcroft*, 380 F.3d 982 (6th Cir. 2004) (although opposition to government corruption can constitute political opinion, it did not on the facts of this case); *Osorio v. INS*, 18 F.3d 1017 (2d Cir. 1994) (within the repressive context of Guatemala, trade union activities constitute an expression of political opinion); *Perkovic v. INS*, 33 F.3d 615, 622 (6th Cir. 1994) (analysis of country conditions and the criminalization of peaceful dissent to find that the "crimes" committed were an expression of political opinion)

c. The panel improperly substituted its own legal and factual reasoning to uphold the BIA's decision denying relief on the basis of membership in the particular group of "young men in El Salvador who resist the violence and intimidation of gang rule"

The panel improperly substituted its own reasoning to uphold the BIA's denial on the basis of membership in the particular social group of "young men in El Salvador who resist the violence and intimidation of gang rule." A.R. 3.,

Chenery, 332 U.S. at 196. The BIA's discussion consists of three sentences which focus exclusively on the legal requirement of "social visibility" established in *In re C-A-*, 23 I. & N. Dec. 951 (BIA 2006). First, the BIA notes that *In re C-A-*, established that the "social visibility of the members of a claimed social group is an important consideration in identifying the existence of a particular social group." A.R. 3. Then, without any discussion or record analysis, and citing *In re C-A-* a second time,[2] the BIA states that "[y]oung men in El Salvador who oppose gang violence have no 'social visibility' as a group" and that therefore it would "decline" to find the Petitioner a member of a particular social group. A.R. 3.

It is well-established that the determination of whether a social group is socially visible must be based on the facts and context of a particular country. "Whether a proposed group has a shared characteristic with the requisite 'social visibility' must be considered in the context of the country of concern and the persecution feared." *In re A-M-E- and J-G-U-*, 24 I. & N. Dec. 69, 74 (BIA 2007). *Accord*, *Arteaga v. Mukasey*, 511 F.3d 940, 945 (9th Cir. 2007) ("In assessing visibility, we must consider the persecution feared in the context of the country concerned.")

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[2] *In re C-A-* addressed the social visibility of the social group of former noncriminal drug informants working against the Cali drug cartel in Colombia; because the proposed social groups and countries in *C-A-*, and in the instant case are different, the BIA's reference to *In re C-A-* cannot be read as an attempt to resolve the question whether individuals who oppose gangs in El Salvador have social visibility.

Numerous circuit court decisions have applied this principle, as is evident in their discussion of country conditions when evaluating the existence of a social group. *See, e.g., Malonga v. Mukasey*, No. 07-3443 (8th Cir. Nov. 3, 2008) (Lari ethnic group of Kongo tribe in Congo); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008) (defining visibility as "the extent to which members of the applicant's society perceive those with the characteristics as members of a social group") (citing *Koudriachova v. Gonzales*, 490 F.3d 255, 261 (2d Cir. 2007)). The total absence of any reference to the record demonstrates the failure of the BIA to engage in the required fact-based analysis.

The panel attempts to cure this deficiency by ruling that the BIA's decision in *Matter of S-E-G-* is dispositive on the *factual* issue of whether "young men in El Salvador who oppose gang violence" have social visibility. The panel's approach evokes an analysis found impermissible in the oft-cited Ninth Circuit decision of *Kovac v. INS,* 407 F.2d 102, 107 (9th Cir. 1969). The petitioner in *Kovac* was a Yugoslavian seaman who deserted ship to seek asylum in the U.S., and argued that his politically motivated defection would result in persecution, including the denial of all employment. The Board denied his claim, finding that if he were returned, he would not be denied employment, but would simply "be assigned to ships not destined" for the U.S. The Ninth Circuit rejected this finding, noting that the Board had based its decision on another case involving a Yugoslavian seaman, and

that Kovac "was entitled to a determination" based upon the facts of his case, "not of others." *Id.* at 105. Likewise, the Petitioner is entitled to a determination as to whether his proposed group is socially visible on the basis of his record, and not on the basis of the record in *Matter of S-E-G-*.

The panel's reliance upon *Matter of S-E-G-* is problematic for another reason; namely, the BIA's decision in that case is inconsistent with established precedent in the Ninth Circuit. In *S-E-G-*, the BIA denied asylum to a young man who argued that he belonged to the particular social group of "Salvadoran youth...who have rejected or resisted membership in the gang based on their own *personal, moral and religious opposition* to the gang's values and activities[.]" *Matter of S-E-G-*, 24 I.&N. Dec. 579, 581 (BIA 2008) (emphasis added). The Ninth Circuit has long held that a social group may be defined by characteristics that are "so fundamental to the identities or consciences of its members that members either cannot or should not be required to change [them]." *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000). There can be no doubt that moral and religious beliefs are exactly the type of fundamental characteristics that an individual should not be required to change in order to avoid persecution.

The BIA, in *Matter of S-E-G-*, entirely ignored any discussion of the moral and religious beliefs that were the underpinnings for the asylum seeker's resistance to gang membership. Its discussion was limited to the social visibility and

particularity of such a group. The BIA never addressed whether the application of these criteria – visibility and particularity – should be tempered in light of the fundamental characteristics – *moral and religious opposition* – which were central to the social group definition. The application of social visibility and particularity to deny protection to an individual motivated by conscience is inconsistent with Ninth Circuit precedent.[3] *See Ahmed v. Keisler*, 504 F.3d 1183, 1199 (9th Cir. 2007) (finding a social group of dissident Biharis in Bangladesh, where the petitioner was not required to "abandon [his] beliefs simply to avoid persecution.") *See also Yadegar-Sargis v. INS*, 297 F.3d 596, 603 (7th Cir. 2002) (Christian women in Iran who do not wish to adhere to the Islamic female dress code); *Fatin v. INS*, 12 F. 3d 1233, 1241 (3d Cir. 1993) (Iranian women who refuse to conform to the government's gender-specific laws and norms).

It is also inconsistent with the BIA's landmark analysis in *Matter of Acosta* – which ruled that the principle of *ejusdem generis* should govern the interpretation

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[3] This application of the "social visibility" requirement to deny the cognizability of social groups defined by immutable or fundamental characteristics is also contrary to UNHCR's guidelines. UNHCR, *Guidelines on International Protection: "Membership in a Particular Social Group" Within the Context of Article 1(A)(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/02 (2002). UNHCR's position is that particular social groups can be defined by immutable or fundamental characteristics, UNHCR Guidelines, ¶6; *or in the alternative*, by what it refers to as the "social perception" approach; namely whether the group shares a characteristic that sets members apart in society. Lack of social visibility does not defeat the cognizability of groups defined by immutable or fundamental traits.

of "particular social group." *Matter of Acosta*, 19 I.&N. Dec. 211 (BIA 1985). As the BIA held in *Matter of Acosta*, "the other four grounds of persecution enumerated in the Act" provide a frame by which "social group" may be construed. *Id.* at 232. It runs absolutely counter to this principle that a group defined by reference to religious and moral beliefs would fail to be cognizable, where religion itself is one of the protected statutory grounds.

The panel also cited to *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1572, 1577 (9th Cir. 1986) (rejecting social group of young working class men of military age) and *Ochoa v. Gonzales*, 406 F.3d 1166, 1170 (9th Cir. 2005) (rejecting social group of business owners who refuse to take part in illegal activity) to buttress the legitimacy of *Matter of S-E-G-* within this Circuit's jurisprudence. *Santos-Lemus*, 542 F.3d at 742. "This analysis [*in Matter of S-E-G-*] is consistent with our case law on similar issues." *Santos-Lemus,* 542 F.3d at 745. However, neither *Sanchez-Trujillo* nor *Ochoa* involved groups – such as that in *Matter of S-E-G-* – which were defined by moral or religious beliefs. Neither the young men in *Sanchez-Trujillo* nor the business owner in *Ochoa* had asserted that their actions or affiliations were motivated by conscience.

The panel also cites to its recent decision, *Arteaga v. Mukasey*, to rule that *Matter of S-E-G-*, and therefore its analysis in Mr. [redacted]'s case, is consistent with Ninth Circuit jurisprudence. *Santos-Lemus*, 542 F.3d at 745 (citing

Arteaga v. Mukasey, 511 F.3d 940, 944-45 (9th Cir. 2007)). In *Arteaga*, the Ninth Circuit rejected a social group defined by past gang membership. The petitioner in *Arteaga* argued that his gang membership was socially visible due to the tattoos he bore which were characteristic of gang membership. *Arteaga*, 511 F.3d 940. The Ninth Circuit in *Arteaga* rejected the proposed social group, ruling that the requirement of social visibility could not have been "intended to include members or former members of violent street gangs under the definition of 'particular social group" and that Congress could not have intended that social group be defined in a manner which offered protection to "violent street gangs who assault people and who traffic in drugs and commit theft." *Arteaga*, 511 F.3d at 945.

Rather than supporting *Matter of S-E-G-*, the Court's analysis in *Arteaga* undermines it by taking into consideration the underlying policy objectives in defining a social group. The Ninth Circuit in *Arteaga* does not apply the criteria of social visibility as a straitjacket, which prevents it from applying the law in a manner consistent with its understanding of congressional intent.

In the same way that Congress did not intend for members of violent street gangs to be recognized as social groups, it also could not have intended to preclude young men of conscience, who, motivated by their moral and religious beliefs, reject gang membership. *S-E-G-* was wrongly decided, and it would not be sustainable in the Ninth Circuit.

The BIA rejected Petitioner's social group without the required analysis of the proposed group within the context of the country at issue. The panel upheld the BIA's decision on a different rationale – that the BIA's ruling in *S-E-G-* justified the rejection of Mr. [redacted]'s proposed social group. However, *S-E-G-* conflicts with established Ninth Circuit jurisprudence because it denies social groups based on the fundamental characteristics of religion and moral beliefs.

d. The panel's finding that the Petitioner did not establish a well-founded fear of persecution based on his membership in the particular social group of his family because his mother has thus far remained unharmed misapprehends and contravenes established precedent.

The panel affirmed the BIA's legal rationale that the Petitioner could not establish a well-founded fear based on the social group of his family because his mother remained unharmed in El Salvador. *Santos-Lemus*, 542 F.3d at 743. The panel relied upon cases which are distinguishable from the instant case, and contravened Ninth Circuit jurisprudence which does not require that every member of a social group be harmed in order to find a well-founded fear in the case of a specific petitioner.

The panel first cited to *Hakeem v. INS*, 273 F.3d 812 (9th Cir. 2001) for the principle that the continuing safety of family members is an "important factor" in determining a well-founded fear. *Santos-Lemus*, 542 F.3d at 743. However, *Hakeem* is entirely distinguishable from the Petitioner's case, because neither

Hakeem nor his family had been persecuted in the home country. *Hakeem*, 273 F.3d at 814. In the instant case, the Petitioner's eldest brother was killed, and he and two of his other brothers were threatened and beaten. *Santos-Lemus*, 542 F.3d at 740-41.

Aruta v. INS, 80 F.3d 1389 (9th Cir. 1996), relied upon by the panel, is also distinguishable. *Santos-Lemus*, 542 F.3d at 743. In *Aruta*, the petitioner never faced personal harm or threat, and failed to prove that the harm to her family members was due to their membership in the social group of family. *Aruta*, 80 F.3d at 1392-93. Mr. [redacted] has faced physical harm, intimidation, and a death threat at the hands of the Mara, and credibly testified that he and his brothers' persecution at the hands of the Mara was due to their familial relationship. A.R. 141-42. *Santos-Lemus*, 542 F.3d at 740

The panel also cites to *Mendez-Efrain v. INS*, 813 F.2d 279, 282-83 (9th Cir. 1987). *Santos-Lemus*, 542 F.3d at 743 (citing *Mendez-Efrain v. INS*, 813 F.2d 279, 282-83 (9th Cir. 1987)). However, that petitioner did not face harm or persecution himself. *Mendez-Efrain*, 813 F.2d at 282.

Ninth Circuit precedent has never required that every member of a particular social group remaining in the country of origin have experienced harm in order to find a well-founded fear for the case of a specific petitioner. *See, e.g. Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005) (finding a well-founded fear where most,

but not all, Somali girls faced female genital cutting); *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005) (finding that "'all alien homosexuals are members of a 'particular social group'"). The panel's ruling contravenes established Ninth Circuit precedent.

V. Conclusion

For the foregoing reasons, *Amicus* respectfully requests that the panel decision be vacated, and that this Court grant rehearing or rehearing *en banc*.

Respectfully Submitted,

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