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UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

In the matter of:	
[redacted]	File no.: [redacted]
In removal proceedings	

RESPONDENT'S REPLY BRIEF

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INTRODUCTION

It is difficult to imagine a nation in which an immediate family is not a group that fundamentally affects how its members navigate society. The Department of Homeland Security (DHS) urges a rigorous, individualized, case-by-case analysis of whether any family grouping might be a cognizable particular social group. However, simply because a legal rule is rigorous does not mean that there are not obvious applications of the rule. Families are the building block of society; it should surprise no one that the Board of Immigration Appeals (Board) had "no difficulty identifying [redacted], a son residing in his father's home, as being a member of the particular social group comprised of his father's immediate family." *Matter of L-E-A-*, 27 I&N Dec. 40, 43 (BIA 2017). [redacted] membership in his immediate family was among the central reasons that the Familia Michoacana cartel, chose him, and not another person, for persecution. The Attorney General should vacate the Board's decision in part, and remand to the Board for further evaluation of [redacted] asylum claim.

ARGUMENT

I. The Attorney General should not engage in appellate fact finding.

Each of DHS's arguments asks the Attorney General to reach the ultimate issues in this case: whether [redacted] proposed social groups are cognizable, whether he has established that his membership in his immediate family is at least one central reason for his persecution, and whether the government of Mexico is unable or unwilling to protect him. *See* DHS Brief at 37-42. Evaluation of each of these ultimate issues, however, may require further fact finding, and the Attorney General should not engage in that fact finding directly for three reasons.

First, the referral order in this case only invites the parties to submit briefs. *See Matter of L-E-A-*, 27 I&N Dec. 494 (A.G. 2018). The submission of briefs alone is not a mechanism for fact finding. The Attorney General should, therefore, remand this case for further fact finding on any

issue on which the Immigration Judge's findings of fact are incomplete in light of the appropriate legal standard. *Cf. Matter of S-H-*, 23 I&N Dec. 462, 465 (BIA 2002) (holding that remand may be unavoidable where findings of fact are incomplete); *see also Matter of A-B-*, 27 I&N Dec. 316, 343-44, 346 (A.G. 2018) (identifying errors in the Board's factual review and remanding to the Immigration Judge). Second, even if the referral order had not limited the invitation to the parties to the filing of briefs, the Attorney General should respect the statutory role of Immigration Judges regarding the receipt and evaluation of evidence. *See* INA § 240 (providing a comprehensive scheme for receiving and evaluating evidence in removal proceedings). Finally, the regulatory authority under which this proceeding has been referred to the Attorney General states that "[t]he Board shall refer [certain cases] to the Attorney General for *review of its decision* …." 8 C.F.R. § 1003.1(h)(1). Where a higher appellate authority, such as the Supreme Court or, here, the Attorney General, "review[s]" the decision of a lower appellate tribunal, it is bound by the same limitations on fact finding as the immediately subordinate decision maker. *See McAllister v. United States*, 348 U.S. 19, 20 (1954) (holding that the Supreme Court "stand[s] in review in the same position as the Court of Appeals"). Assertions by previous Attorneys General stating that the Attorney General retains full authority to receive additional evidence and make *de novo* factual determinations should, therefore, be overruled. *See Matter of J-F-F-*, 23 I&N Dec. 912, 913 (A.G. 2006); *Matter of A-H-*, 23 I&N Dec. 774, 779 n.4 (A.G. 2005); *Matter of D-J-*, 23 I&N Dec. 572, 575 (A.G. 2003); *Deportation Proceedings of Joseph Patrick Thomas Doherty*, 12 Op. O.L.C. 1, 4 (1988).

II. The Attorney General is bound by the Ninth Circuit's decision in *Rios v. Lynch*.

DHS argues at length that nuclear or immediate family groups are not *per se* sufficiently particular or socially distinct. *See, e.g.*, DHS Brief at 14, 20. As described in Respondent's opening

brief, whatever the society-specific outer bounds of cognizable family-based social groups, the immediate family is at the very core of what the Board and courts have found to meet the requirements of a particular social group. Indeed, DHS's argument fails to acknowledge the Ninth Circuit's holding that even after the Board's refinement of its particular social group jurisprudence in *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), "the family remains the quintessential particular social group." *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015). The Attorney General must follow this binding authority from the court of appeals and similarly find that the family is a qualifying particular social group.[1]

III. Alternatively, DHS is bound by its concession that [redacted] immediate family is a particular social group.

In this case, DHS "stipulate[d] that the immediate family unit of the respondent's father qualifies as a cognizable particular social group." Apr. 21, 2016 DHS Supp. Brief at 20. Now, relying on *dicta* from the Attorney General's decision in *Matter of A-B-*, 27 I&N Dec. 316, 334, 340 (A.G. 2018), DHS reverses course, arguing that the Board "inappropriately relied on the parties' concessions." DHS Brief at 18. This argument must be rejected, and DHS should be held to its stipulation in this case.

[1] The government's reliance on *Gonzales v. Thomas*, 547 U.S. 183 (2006), is misplaced, and *Thomas* does not undermine the conclusion that *Rios* is binding. *Cf.* DHS Brief at 7. In *Thomas*, the Supreme Court held that the Board had "not yet considered whether Boss Ronnie's family presents *the kind* of 'kinship ties' that constitute a 'particular social group.'" *Thomas*, 547 U.S. at 186 (emphasis added). The government mischaracterizes this holding, saying instead that the Supreme Court held that the determination of whether the term particular social group should be construed "to encompass *any sort of family unit*" is left to the Attorney General. DHS Brief at 7 (emphasis added). The question left open by *Thomas* is not *whether* the family is a particular social group, but under what circumstances. Indeed, in *Rios*, the Ninth Circuit expressly relies on its prior holding in *Thomas* to reach the conclusion that the family is the quintessential particular social group. 807 F.3d at 1128.

Matter of A-B- should not be read to mean that the Board should never issue a precedent decision in any case where the government has conceded an issue, as such a rule would be arbitrary and capricious. It is common throughout the American judicial system for parties to stipulate to issues, and it is not error to refer to those stipulations in the course of issuing a precedential decision. *See, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2114 (2018) (relying on the Government's concession that only part of the statute "bears on the meaning of a 'notice to appear'"). Indeed, stipulations are so integral to the proper functioning of the immigration courts that an Immigration Judge may order the parties to submit a pre-hearing statement that includes "[a] statement of facts to which both parties have stipulated, together with a statement that the parties have communicated in good faith to stipulate to the fullest extent possible." 8 C.F.R. § 1003.21(b). Consistent with this longstanding and valuable judicial practice, the Board has stated that "in significant cases where the Service does not oppose a grant of relief, a brief providing the rationale for the Service position should be submitted." *Matter of Villalta*, 20 I&N Dec. 142, 146 (BIA 1990). The ability of DHS to make stipulations in significant cases is especially important because the Secretary of Homeland Security has a shared duty to administer and enforce the immigration laws. *See* 8 U.S.C. § 1103(a)(1). In cases where the considered positions of the parties are in substantial agreement, the Board must retain the authority to "provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations." 8 C.F.R. § 1003.1(d)(1).

Further, the Board's analysis in this case neither "lacked rigor" nor "broke with the Board's own precedents." *A-B-*, 27 I&N Dec. at 333. Rather, the Board's decision looked to its own longstanding recognition of family as a particular social group, as well as that of the courts of

appeals. *L-E-A-*, 27 I&N Dec. at 42. After surveying thirty-two years of case law, the Board announced a limited harmonizing principle that "the inquiry in a claim based on family membership will depend on the nature and degree of the relationships involved and how those relationships are regarded by the society in question." *Id.* at 43. In light of the well-established principle that families may be particular social groups, the facts of this case, and the agreement of the parties, the Board then accepted that [redacted] is a member of the particular social group comprised of his father's immediate family. *Id.*

DHS has not identified any egregious circumstances that would justify departing from its distinct and formal stipulation that [redacted], under the circumstances of this case, is a member of a particular social group comprised of the immediate family unit of his father. *Cf. Matter of Velasquez* 19 I&N Dec. 377, 382 (BIA 1986) ("Absent egregious circumstances, a distinct and formal admission made before, during, or even after a proceeding by an attorney acting in his professional capacity binds his client as a judicial admission."). Accordingly, the Attorney General, in reviewing the Board's decision in this particular case, should hold DHS to its concession regarding the cognizability of the operative particular social group, and, for the reasons described below, vacate the Board's conclusion that [redacted] has not shown that his membership in that group was not one central reason for the harm he suffered.

IV. At a minimum, remand to the Immigration Judge is required to assess whether the immediate family of [redacted] father is a particular social group in Mexico.

Even if the Attorney General accepts DHS's suggestion that the family is not universally a particular social group, remand is required to conduct the case-by-case analysis that DHS proposes. Before the Board, DHS itself took the position that the "immediate family unit of the respondent's father qualifies as a particular social group." DHS Brief at 38 n.14. The Board relied on that concession. *See Matter of L-E-A-*, 27 I&N Dec. 40, 42 (BIA 2017). Even now, after changing its

position dramatically, DHS concedes that "the record was not developed before the immigration judge, as factfinder, on this basis, and the Board performed only cursory analysis in light of the parties' 'concessions.'" DHS Brief at 38 n.14.

In DHS's view, the Attorney General should respond to this lack of case-by-case analysis by simply refusing to consider whether the immediate family unit of [redacted] father is a particular social group. *See id*. This is incorrect for several reasons. First, as described above, the current state of the law in the Ninth Circuit is that "the family" is a particular social group. *See Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015). If the Attorney General opts to announce a different standard than the Ninth Circuit, [redacted] should be given the chance to meet his burden of proof under the amended standard. Further, where a party in removal proceedings has formally conceded an issue, that party should not be permitted, at a later stage in the case, to argue that its opponent has waived it. Finally, "if an applicant is not clear as to the exact delineation[2] of the proposed social group, the Immigration Judge should seek clarification." *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018). The Immigration Judge understandably did not seek clarification because she expressly accepted [redacted] initial position, stating during closing arguments that "family is certainly a particular social group." Tr. at 63. [redacted] should not be required to have anticipated that the law as the Immigration Judge understood it would later be called into question.

For these reasons, if the Attorney General concludes that a social group consisting of "family" is insufficient, but that another family-unit-based social group, including one consisting of

[2] [redacted] further objects to the substance of the "exact delineation" requirement contained in *W-Y-C-*, as it is too stringent a standard for appellate waiver. However, in light of the current state of the law in the Ninth Circuit, DHS's prior concession, and the Immigration Judge's failure to develop the record on this issue, the Attorney General does not need to address the precise scope of doctrines of appellate waiver in this case.

"the immediate family of the respondent's father," *could* be sufficient, the proper course is to remand to the Immigration Judge for further fact finding.

V. The Attorney General should decline the government's invitation to consider hypothetical scenarios not presented by this case.

Despite DHS's apparent concern that no social group, no matter how universally present it is across societies, be analyzed at a high level of generality, *see, e.g.*, DHS Brief at 14, 20, it proceeds to argue that there are several "common scenario[s]" that warrant a finding that protection claims based on membership in a family unit will "ordinarily" fail to satisfy the nexus requirement for asylum. *See* DHS Brief at 27-32. However, in any given case, "[t]he motivation of the persecutors involves questions of fact," *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007), and it is impossible to generalize from the record in this case how the "one central reason" test should be applied to a variety of hypothetical examples. *See Grace v. Whitaker*, 344 F.Supp.3d 96, 126 (D.D.C. 2018) (holding that "an effective categorical ban on domestic violence and gang-related claims" was arbitrary and capricious because such a general rule was without a "legal basis" and "runs contrary to the individualized analysis required by the INA"). The Attorney General should reject an approach that requires the analysis of several alternative hypothetical scenarios. Instead, he should answer the question presented by this case: Did the Board of Immigration Appeals adequately consider whether [redacted] membership in his immediate family was at least one central reason for why he, and not some other person, was chosen for persecution by the cartel.

VI. Persecution does not need to be directed at an entire protected class in order to be at least one central reason for an individual applicant's feared harm.

In order to obtain asylum on the basis of membership in a particular social group, the applicant must show that it is reasonable to believe that his or her group membership is or was "at least one central reason" for the persecution. INA § 208(b)(1)(B)(i). A reason is central if it "was a cause of the persecutor's acts." *Parussimova v. Mukasey*, 555 F.3d 734, 741 (9th Cir. 2009); *see*

also Hernandez-Avalos v. Lynch, 784 F.3d 944, 950 (4th Cir. 2015) (holding that an asylum application should be granted where a protected ground is "why [the applicant], and not another person," was or will be chosen for harm). Congress specifically framed the inquiry as *one* central reason, "naturally suggesting that a persecutory act may have multiple causes." *Parussimova*, 555 F.3d at 740; *see also Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 213 (BIA 2007) ("That language thus confirms that aliens whose persecutors were motivated by more than one central reason continue to be protected under section 208 of the Act if they can show a nexus to a protected ground.").

DHS argues that "the persecutor's motive must be directed against the whole family unit, and not to a relationship to a specific person in that family unit …." DHS Brief at 25.[3] However, this analysis conflicts with the mixed-motive analysis required by Congress. *See Salgado-Sosa v. Sessions*, 882 F.3d 451, 458 (4th Cir. 2018) (holding that it is improper to focus on "whether [an applicant's] *family* was persecuted on account of a protected ground, rather than whether [*the applicant*] was persecuted because of a protected ground — here, his relationship to his family.") (emphasis in original). A reason for a person's actions may still be central — that is, it may still be a cause — even if the actor does not direct the same action at all members of the same class. An example given by the Seventh Circuit is illustrative:

> Suppose, for example, that Muslims in a particular country are wildly disfavored and frequently persecuted by the government. Wealthy Muslims, however, are tolerated because of their vast contribution to the poor country's business, tax base and overall wealth. The government, on the other hand, routinely beats, jails and strips of rights poor Muslims. Although the United States does not grant asylum based on poverty, the fact that the persecuted group shares this common characteristic does not disqualify the group from seeking asylum

[3] DHS abruptly reverses course just three pages later, stating that where an asylum applicant alleges that he or she will be persecuted on account of a familial tie with a specific person, the "applicant must demonstrate that he or she was targeted because of that familial tie." DHS Brief at 28.

> based on religious persecution. We cannot tease out one component of a group's characteristics to defeat the definition of social group.

Cece v. Holder, 733 F.3d 662, 673 (7th Cir. 2013) (*en banc*). Likewise, in *Matter of S-A-* 22 I&N Dec. 1328 (BIA 2000), the applicant's father was the persecutor, and he only targeted the applicant and no one else. That the applicant's father targeted only one person did not change the fact that he targeted her because of her liberal religious beliefs. There is no basis to apply a different nexus analysis here.

VII. Persecution on account of an asylum applicant's relationship to a particular family member may still be persecution on account of a qualifying particular social group comprised of an immediate family.

The parties agree that the assessment of whether a particular social group is cognizable under the statute is separate from the assessment of whether persecution is on account of that particular social group. *See* DHS Brief at 26; *accord Matter of W-G-R-*, 26 I&N Dec. 208, 218 (BIA 2014). An Immigration Judge must first determine whether a family unit is a particular social group. In this case, binding Ninth Circuit decisions answer that question in the affirmative. Even if the decisional law was less clear, a case-by-case assessment of [redacted] immediate family, assessed within the context of Mexican society, will almost certainly pass muster on remand as a particular social group. Only after correctly identifying the operative particular social group[4] can an Immigration Judge or the Board proceed to evaluate whether membership in that group was or will be at least one central reason for the persecution.

DHS offers several arguments for denying asylum claims "where an applicant is harmed or threatened to be harmed because of his or her familial relationship with another person targeted by the persecutor," DHS Brief at 28. Each of these arguments should be rejected.

[4] An Immigration Judge or the Board may, of course, perform the nexus analysis assuming that the proposed particular social group is cognizable.

[redacted]

First, DHS attempts an analogy to *Matter of S-E-G-*, 24 I&N Dec. 579, 585 (BIA 2008). As is relevant here, *S-E-G-* held that "Salvadoran youth who have been subjected to recruitment efforts by MS-13 and 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" was "amorphous." *Id.* at 581, 585. Because the second respondent in that case defined her social group as "family members of *such* Salvadoran youth," *id.* at 581 (emphasis added), and because that formulation could include an unspecified number of family relationships,[5] the Board found that the particular social group, as articulated, was "*also* too amorphous." *Id.* at 585 (emphasis added). However, the Board was careful to reserve for another case the question of "whether 'family' alone is a social group …." *Id.* at 585 n.2.[6] Unlike *S-E-G-*, [redacted] delineation of his particular social group does not rely on an amorphous extrinsic characteristic for its validity, and, therefore, presents the question that the Board reserved in *S-E-G-*. Whether analyzed under Ninth Circuit precedent or on a case-by-case basis, [redacted] immediate family has particularized boundaries.

[5] *S-E-G-* should not be read as categorically requiring the denial of all cases where the particular social group includes "fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins, and others[.]" 24 I&N Dec. at 585. An applicant for asylum must still be allowed to show that extended family relationships are within the "commonly accepted definition" of a family unit on a case-by-case basis. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 239 (BIA 2014); *see also Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014) (reversing because "the BIA did not perform the required evidence-based inquiry as to whether the relevant society recognizes Pirir-Boc's proposed social group); *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) ("The family unit—centered here around the relationship between *an uncle and his nephew*—possesses boundaries that are at least as 'particular and well-defined' as other groups whose members have qualified for asylum.") (citations omitted) (emphasis added).

[6] In *S-E-G-*, the Board stated that it need not address this question because the respondents did not claim that "the MS-13 targeted *only* their family." 24 I&N Dec. at 585 n.2 (emphasis in original). However, the Board has since substantially withdrawn from that statement, emphasizing that its holding in *Matter of S-E-G-* "should not be read as a blanket rejection of all factual scenarios involving gangs," and that "it is clear that persecution may occur during periods of civil strife if the victim is targeted on account of a protected ground." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 251 (BIA 2014).

DHS also cites *S-E-G-* for the proposition that the Board "suggested a problem of nexus," stating that the motivations of gang members could be "quite apart" from family-based persecution. DHS Brief at 28 (citing *S-E-G-*, 24 I&N Dec. at 585). But that fundamentally factual observation cannot carry over into the nexus analysis in this case, where cartel members expressly threatened to retaliate against [redacted] father's family. Tr. at 27-28.

DHS appears to recognize that there are not problems with particularity or nexus "where the purported social group is narrowed to a familial tie with a specific person[,]" so long as the applicant "demonstrate[s] that he or she will be targeted because of that familial tie." DHS Brief at 28. However, DHS argues that "[s]uch a narrowed group, consisting of a relationship to a specific person, will typically not be distinguished by the applicant's society in question, simply because the two-person group or single relationship is too small to comprise a 'group.'" *Id.* This argument conflates the social distinction and nexus inquiries. The relevant group does not consist of a "relationship to a specific person," but, rather, it consists of the immediate family unit, which is socially distinct. Where persecutors target one member of the immediate family unit, here, the son, because of his relationship to another member of that family unit, here, the father, then, membership in the immediate family unit is among the central reasons for the persecution because membership in that group is a "cause" of the persecutor's acts. *Parussimova v. Mukasey*, 555 F.3d 734, 741 (9th Cir. 2009).

VIII. DHS's arguments regarding nexus suffer from the same deficiencies as the decisions of the Immigration Judge and the Board of Immigration Appeals.

As explained in [redacted] opening brief, the Board's error in this case was that it failed to give reasoned consideration to the potentially dispositive fact that members of the Familia Michoacana cartel specifically told [redacted] father that they would retaliate against the father's *family* if he, the father, did not comply with their demands. Respondent's Brief at 20-21; Tr. at 27-

28. DHS's brief similarly fails to grapple with this important fact. *See* DHS Brief at 4-5, 40-41. However, DHS does concede that "[d]irect proof of motivation may consist of evidence concerning statements made by the persecutor to the victim, or by the victim to the persecutor." DHS Brief at 23-24 (citing *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004). Because [redacted] provided direct evidence from which it is reasonable to believe that at least one central reason for the Familia Michoacana cartel's selection of him for persecution was his membership in his father's immediate family, he qualifies for asylum. Because the Board failed to give reasoned consideration to this potentially dispositive fact, remand is required.

The mere fact that the cartel was *also* motivated by financial gain does not change the result. Indeed, DHS concedes that "[a]lthough one reason the respondent was targeted may have been due to his familial relationship to his father, the central reason for the alleged harm was motivated by financial reasons." DHS Brief at 40-41. This argument suffers from two critical errors. First, by asserting that "*the* central reason" for [redacted] harm was financial gain, DHS articulates a nexus test that has been rejected by both the Board and the courts. *Compare id.* at 40-41 (emphasis added) *with Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 212 (BIA 2007) ("Congress purposely did not require that the protected ground be *the* central reason for the actions of the persecutors.") (emphasis in original); *Acharya v. Holder*, 761 F.3d 289, 299 (2d Cir. 2014) (reversing where the Immigration Judge required that a protected ground be "the central reason" for the persecution); *and Quinteros-Mendoza v. Holder*, 556 F.3d 159, 165 (4th Cir. 2009) (emphasizing that the Board does not require a protected ground the be "*the* central reason") (emphasis in original). Second, DHS's position fails to offer any rationale for why the statement of [redacted] persecutors that they would retaliate against his father's family is not direct evidence from which

it is reasonable to believe that his family membership was among the central reasons why he was, in fact, targeted upon his return to Mexico.

IX. DHS's arguments relating to the government protection analysis are outside the scope of the Acting Attorney General's referral order.

The referral order in this case solicited briefs on the issue of whether, and under what circumstances an individual may establish persecution on account of membership in a particular social group based on the applicant's membership in a family unit. *Matter of L-E-A-*, 27 I&N Dec. 494 (A.G. 2018). In its brief, DHS claims, "protection claims based on a family unit or familial relationship will ordinarily fail on the requirements of nexus and state protection." DHS Brief at 3. Thus, paradoxically, at the same time DHS reiterates the longstanding principle that asylum claims require case-by-case analysis, *see* DHS brief at 11, 19, it argues the opposite, that such claims "will ordinarily fail." The Attorney General should not reach the issue of state protection as it was not part of the issue raised for briefing,[7] but if he does, as discussed below, [redacted] has demonstrated that it is reasonable to believe that the Mexican authorities were unable or unwilling to protect him.

X. [redacted] cannot rely on the Mexican authorities to protect him from persecution.

[redacted] fled Mexico fearing for his life after being shot at and threatened with kidnapping by the Familia Michoacana cartel. Tr. at 30-33, 36. DHS incorrectly claims that "the respondent failed to show any direct or circumstantial evidence that reporting the harm he suffered would be futile or potentially dangerous." DHS brief at 41. The Ninth Circuit recently addressed the issue of private actor harm and how to analyze cases where the asylum seeker has not reported such

[7] [redacted] acknowledges that his opening brief raises several issues that are also outside the scope of the question raised by the referral order. However, each of those issues relates to the Attorney General's power to decide the question presented in the referral order. By contrast, DHS attempts to inject an additional merits issue into the case that was not addressed by the Board or referenced in the referral order.

harm to the police. In *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017) (*en banc*), the court of appeals explicitly overruled *Castro-Martinez v. Holder*, which had held that without a report to police, there was a gap in proof about how the government would have responded had the asylum applicant reported his persecution, 674 F.3d 1073, 1081 (9th Cir. 2011). Instead, in *Bringas-Rodriguez*, the Ninth Circuit recognized that whether "a victim has reported or attempted to report violence or abuse to the authorities is a factor that may be considered, as is credible testimony or documentary evidence explaining why a victim did not report." 850 F.3d at 1069; *see also Afriyie v. Holder*, 613 F.3d 924, 931 (9th Cir. 2010) ("[R]eporting persecution to government authorities is not essential to demonstrating that the government is unable or unwilling to protect him from private actors.")

The Board has likewise not required police reporting for an applicant to prove that the government would be unwilling or unable to protect the applicant. In *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000), the Board found that the applicant, a women from Morocco with liberal religious beliefs, had suffered persecution at the hands of her father. The Board found that although the respondent "did not request protection from the government, the evidence convinces us that even if the respondent had turned to the government for help, Moroccan authorities would have been unable or unwilling to control her father's conduct." *Id.* at 1335. And the Board has found a lack of government protection even when the government has made some efforts to address the persecutory conduct. *See Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 27 (BIA 1998) (finding that although the State Department report showed that the national government had spoken out against anti-Semitism, local authorities had not taken action against those who perpetrated anti-Semitic violence, and the applicant therefore did not receive government protection.)

DHS argues against a standard of "perfect protection" by the home country's government. DHS Brief at 41. This argument implies that since no government (not even the United States) can provide "perfect protection," essentially whatever protection is provided must suffice. This is not the law. It is axiomatic that if there is a one in ten chance that the asylum seeker will face persecution, he has met the legal standard for well-founded fear. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). Thus, a government could provide protection nine times out of ten, and the applicant might still be able to establish his well-founded fear of return.[8] Moreover, the legal standard for government protection from persecution is disjunctive — unwilling *or* unable — to protect. Thus, even if the Mexican government had made some efforts to provide protection, the adjudicator must determine whether the government is both willing and able to provide such protection. *See Tapia-Madrigal v. Holder*, 716 F.3d 499 (9th Cir. 2013) (remanding the case of a Mexican asylum seeker where the Board had only considered the Mexican government's willingness to protect the applicant from a violent gang and not its ability to do so.)

In this case, [redacted] provided ample evidence as to why the government would not protect him from the Familia Michoacana cartel. As the Immigration Judge stated in her decision, "Respondent explained that the cartels run everything and that he and his father did not report these incidents to the police because his father, the former policeman, told him that the police force were

[8] Courts typically state that the applicant's burden is to show that "the persecution was committed by the government, or by forces that the government was unable or unwilling to control." *Bringas-Rodriguez*, 850 F.3d at 1062 (quoting *Baghdasaryan v. Holder*, 592 F.3d 1018, 1023 (9th Cir. 2010)). In light of DHS's arguments, a significant gloss is necessary. The *substance* of what an applicant must prove to qualify for asylum on the basis of private-actor persecution is that the government was or is unwilling or unable to control his persecutors. But the *standard of proof* in asylum cases remains conditioned by the well-founded fear test. Indeed, the INA focuses on the *applicant's* willingness to seek state protection, defining a "refugee" as "any person … who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of [his or her country of nationality]." INA § 101(a)(42)(A).

involved with these drug cartels, and that respondent is afraid that in any case, it would result in additional retaliatory acts against him and his family." I.J. at 4-5. While DHS claims that [redacted] "only mentioned during testimony" that the police would not protect him based solely on what his father told him, "without providing any additional evidence," DHS brief at 41, DHS ignores [redacted] testimony that he himself also attended the police academy. Tr. at 24. In fact, [redacted] dropped out of the police academy before completing his training because he did not agree with the instructions he had been given "to only deal with minor crimes." Tr. at 24. One of the types of cases they were specifically instructed not to act upon involved "people transporting drugs or people dealing with drugs." Tr. at 25. The criminal enterprise that was threatening [redacted], the Familia Michoacana cartel, was engaged in precisely the type of activity — drug trafficking, Tr. at 27 — that [redacted] had learned himself at the police academy the police had been instructed not to act on. Additionally, [redacted] father was formerly a police officer and his father also confirmed that the police would not help in this type of case. Tr. at 43 ("[M]y father indicated to me that all those officers are working for the cartel. They're part of the cartel."). And, finally, the Department of State country conditions report confirms that the Mexican judiciary suffered widespread corruption, Mexico 2012 Human Rights Report at 14, and that there were credible reports of police involvement in kidnappings for ransom, primarily at the state and local level. *Id.* at 4. The first page of the report summarizes, that "[s]ignificant human rights-related problems included police and military involvement in serious abuses, including unlawful killings, physical abuse, torture, and disappearances." *Id.* at 1.

In short, [redacted] personal knowledge of police orders not to investigate drug-related crimes, coupled with his father's admonition not to go to the police, and supported by the U.S. State Department's objective reporting of widespread police corruption, give ample reason for [redacted]

[redacted] to determine that the police would not protect him. This "credible testimony" and "documentary evidence" are sufficient under *Bringas-Rodriguez* to explain why [redacted] did not report the crimes and why, even if he had, the Mexican police would have been unable or unwilling to protect him.

In the alternative, this case should be remanded to the Immigration Judge for further fact finding in light of *Bringas-Rodriguez*. At the time the Immigration Judge rendered the decision in this case, she was bound by the stricter reporting standard in *Castro-Martinez*, which the Ninth Circuit rejected in *Bringas-Rodriguez.* As discussed above, under *Bringas-Rodriguez*, it is sufficient for the respondent to provide "credible written and oral testimony that reporting was futile and potentially dangerous." 850 F.3d at 1056. If the Attorney General finds there is not sufficient evidence in the record to grant [redacted] asylum, he should remand for further fact finding in light of this change in controlling law.

CONCLUSION

The Attorney General should vacate the order referring this case. In the alternative, the Attorney General should vacate that portion of the Board's opinion concluding that [redacted] membership in a particular social group was not one central reason for the harm he suffered and remand to the Board for further proceedings.

Respectfully submitted,

Date: March 13, 2019

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PROOF OF SERVICE

On March 13, 2019, I, Bradley Jenkins, mailed a copy of this brief and any attached pages to the Department of Homeland Security at the following address:

Cathy Ng
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by FedEx Standard Overnight.

Date: March 13, 2019

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Bradley Jenkins

[redacted]