

CENTER FOR
Gender & Refugee
STUDIES

Brief Filed by CGRS in *G-M-*

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 March 18, 2011 in the matter of *G-M-*. Identifying information has been redacted in accordance with the wishes of the applicant. The brief addresses persecution of an Evangelical family by an El Salvadoran gang based on family membership, religion, and the social group of “Evangelical Christians of King’s Castle Church in El Salvador who preach and proselytize to gang members and youth.”

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No. ██████████

**In the United States Court of Appeals
for the Ninth Circuit**

██████████
██████████
██████████
PETITIONERS

v.

**ERIC H. HOLDER, Jr.,
RESPONDENT**

ON APPEAL FROM THE BOARD OF IMMIGRATION APPEALS

BRIEF OF PETITIONERS

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STATEMENT REGARDING ORAL ARGUMENT

Petitioners (hereinafter, the “[REDACTED] family” or “[REDACTED]”) respectfully submit that oral argument would be helpful to the disposition of this appeal. This case presents important questions concerning the application of the phrases “on account of” and “particular social group,” as they are used in the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (2006).

STATEMENT REGARDING RELATED CASES

The [REDACTED] state that they are unaware of any related cases pending before this Court.

STATEMENT OF DETENTION STATUS

Pursuant to Circuit Rule 28-2.4(b), the [REDACTED] state through undersigned counsel that:

1. They are not currently detained in the custody of the United States Department of Homeland Security.
2. They have not at any time moved the Board of Immigration Appeals (“BIA”) to reopen their case, and they have not applied to the District Director for an adjustment of status.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(B)(ii) (2006) and 8 U.S.C. § 1252(a)(2)(D) (2006). Venue is proper before this Court pursuant to 8 U.S.C. § 1252(b)(2) (2006).

STATEMENT OF THE ISSUES

1. Whether the [REDACTED] well-founded fear of future persecution was “on account of” their religion.

2. Whether the [REDACTED] well-founded fear of future persecution was “on account of” of their membership in a “particular social group” on the ground that:

a. Evangelical Christians of the Castillo del Rey church (a/k/a King’s Castle) in El Salvador who preach and proselytize to gang members and youth constitute a “particular social group,” and the [REDACTED] fear of future persecution was “on account of” their membership in that group;

b. In the alternative, the [REDACTED] as a family constitute a “particular social group,” and the [REDACTED] fear of future persecution was “on account of” their membership in that group.

Pertinent statutory provisions are set forth in an addendum to this Brief.

STATEMENT OF THE CASE

A. Proceedings Below

██████████ and ██████████ ██████████ (ages 55 and 57 respectively) and their three children, ██████████ ██████████ and ██████████ (ages 25, 23, and 21 respectively) are evangelical Christians who fled their home in El Salvador in 2006 after gang members threatened them with death because of the family's public proselytizing. Due to their well-founded fear of returning to El Salvador, the ██████████ family petitioned for asylum on February 20, 2007, within one year of their arrival in the United States.¹ Mrs. ██████████ is the lead applicant, and the remaining family members, other than the eldest son ██████████, are derivatives under 8 U.S.C. § 1158(b)(3) (2006). Because of his age at the time of filing, ██████████ filed a separate application for asylum.

¹ The original application, submitted February 20, 2007, was returned. R85. A subsequent application, submitted March 5, 2007, was also returned. *Id.* The third application, submitted May 14, 2007, just after the one-year bar expired, was accepted. R86. The Immigration Judge held that the one-year requirement was met: "The Court has no issue with regard to the one year bar. It is certainly satisfied that the respondents attempted to file their application within one year of their entry into the United States." *Id.* The Government did not challenge this ruling before the BIA.

Because the applications were filed after May 11, 2005, this case is governed by the REAL ID Act of 2005.² R86. On March 13, 2009, the Immigration Judge (“IJ”) denied the petitions for asylum. The ██████████ timely appealed the IJ’s decision on August 11, 2009. The BIA affirmed and dismissed the ██████████ appeal in a two-page written opinion dated March 24, 2010. The family timely filed a petition for review with this Court on April 23, 2010.

B. Statement of the Facts

We detail the events as described by the ██████████ family in their submissions and testimony during the removal hearing, an account that the IJ found credible, R88, and that the BIA expressly did not dispute, R3.

We also set forth the relevant opinions of the ██████████ country conditions expert, Dr. Harry Vanden. A tenured professor of International Studies at the University of South Florida, Dr. Vanden has studied Central America since the 1960s. R312, R1356. He has written extensively on conditions in El Salvador, including presenting several papers at international conferences and publishing two articles and a book chapter dealing specifically with human rights abuses there. R312, R1357-58. At the time of his

² Pub. L. No. 109-13, div. B, tit. I, § 101(h)(2), 119 Stat. 231, 305.

testimony in 2007, Dr. Vanden resided in Sao Paulo, Brazil on a Fulbright Grant and was working on a bibliography of gangs in Central America, much of which was focused on gangs in El Salvador. R312, R1357. He has been qualified as an expert witness on political and gang related conditions in El Salvador and other countries in Central America numerous times in U.S. courts. R1358.

In preparing his expert report, Dr. Vanden reviewed relevant literature, interviewed each of the [REDACTED] family members, and read the declarations they filed in support of their asylum applications. He also personally visited the [REDACTED] family home and neighborhood in El Salvador. R308, R311, R321. During that visit, he interviewed a number of the [REDACTED] neighbors, a police officer in the community, family friends, and the family's pastors. R311, R318, R322.

1. Background

a. Prior to arriving in the United States, the [REDACTED] family lived in Cristos Redentor, a neighborhood of the capital of El Salvador, San Salvador. R315. In 2000, the father of the family, [REDACTED], joined the Joshua Central Church of the Assembly of God, a conservative evangelical church. R1110 (¶ 7). It was not a mission of the Assembly of God to minister

to young children and ██████████ did not preach or evangelize to others when he belonged to that church. R219-20.

In December 2004, the family learned that ██████████ name had been placed on a gang's "death list." R1054-55 (¶¶ 17-27); R1174 (¶¶ 11-16). ██████████ explained to the Immigration Judge that she was placed on the death list both because she was a Christian and because she had refused a gang member's advances. R380.

b. In May 2005, after evangelical youth missionaries visited ██████████ the family became active members of King's Castle church. R957-973, R1010-24. Including the ██████████, approximately ten families in the community belong to King's Castle. R200-01.

King's Castle is associated with the Assemblies of God Pentecostals and directs its evangelical activities toward youth and families with the goal of "present[ing] the Gospel to every child in El Salvador, and in doing so, touch[ing] parents, grandparents and communities, transforming this nation and its future." R998-1002, R1031, R1033, R1050, R1175 (¶18). The members of King's Castle proselytize by means of "spectacle evangelism," including street performances of music and drama to draw a crowd. R1007. According to the Church: "When our evangelism teams invade the streets, they

are quick to win the attention of people and draw a crowd. Typically equipped with bright costumes and a moving dramatization to a quality song or soundtrack, curious spectators soon become drawn in to our core message of every performance; that ‘Jesus saves and is coming soon.’” R1007. The members also “conduct clowns, parades, puppet shows, illustrated sermons, and human videos,” so as to “utilize every method that is within our reach to preach the gospel.” *Id.* They are committed to “helping people who receive Jesus in our programs to find a healthy home church where they can produce good fruit and continue to mature in Christ.” *Id.*

The [REDACTED] family became local leaders for King’s Castle in their “zone.” R1174 (¶ 17). On Sundays, the family would venture into the community neighborhoods to preach, both in one-on-one and public sessions. R197-200, R391, R410, R424, R1174-75 (¶17). The family’s house became a locus for church activities, including weekly meetings for the young women and fundraising activities to benefit the church. R1174 (¶ 17). The family’s “house was always available for church functions,” *id.*, and [REDACTED] often preached about Jesus to the young people who congregated there, R197.

[REDACTED] was particularly involved in recruiting youth, including gang members, to the church. He preached to them about Jesus and urged

them to give up “vices,” including not abusing drugs and not joining gangs. R197-98. On Wednesdays and Sundays, ██████████ met local children in the parking lot across the family’s house and drove them to church in the back of his pickup truck—a trip of about one hour each way. R197, R420-23, R1174 (¶ 17). ██████████ helped by raising money, through selling items such as tamales, for the church and its activities. R196.

The elder children, ██████████, were also heavily involved in church activities, including in the “spectacle evangelicalism.” ██████████ participated in singing and theater displays of stories from the Old and New Testaments to teach children about God; ██████████ would sometimes dress up as a clown to draw the children’s attention and cheer them up. R199-200, R414, R477-78. When preaching in the neighborhood, ██████████ regularly wore T-shirts emblazoned with the King’s Castle name, a slogan reading “Kids Belong to God,” and a biblical quote. R391, R479. ██████████ was also involved in the Compassion ministry of King’s Castle, which helped low-income orphaned children obtain medical attention, food, and clothing. R198, R390.

c. King’s Castle church members actively proselytize the word of Jesus to children and, in so doing, counsel against drug abuse and gang life. This proselytizing is a core of the group’s, and the ██████████ religious belief

system. ██████████ proselytized to gang members “[b]ecause myself as a Christian evangelical, I know that God called me to do that.” R425. ██████████ explained that the church sought to “reach every single kid and young man in El Salvador,” because “on top of obeying the commandment that Jesus Christ left for us, we know that the only way that we have to reach them is to avoid them getting into drugs, and gangs as they are.” R477; *see also* R1097 (¶ 7), R1175 (¶ 18). ██████████ explained further, “[w]e are trying to save the youth by converting them and directing them into positive activities, while the gangs try to keep them poor, unhealthy, addicted to drugs and living a life of sin and crime.” R1175 (¶ 18); *see also* R195.

d. Mara Salvatrucha 13 (“MS-13”) is a notoriously violent gang active throughout Central America. R530-748. MS-13 operates largely with impunity in El Salvador. The government has been unsuccessful at curbing the gang’s expanding power, which has “widespread, national visibility” in El Salvador and is primarily responsible for the country’s high rate of violent crime. R628 (USAID Gang Assessment, 2006); *see also* R512 (2008 U.S. State Department Human Rights Report) (“protection of human rights was undermined by widespread violent crime, including gang-related violence”), R530, R691, R714, R743, R1364. Dr. Vanden confirmed that neither the po-

lice nor the judicial authorities can control the increase in gang activity or the growing violence it generates. R1364; *see also* R333-35.

e. As a result of the King's Castle church's public focus on dissuading individuals from becoming gang members and recruiting them to the church, *see supra* pp. 6-9, MS-13 perceives that church, and other evangelical groups, to be a direct challenge to its authority. R201, R333, R1372. ██████████ testified that the gangs did not like "King's Castle's ideology [because] they were trying to prevent the children from getting trapped in [] vices." R201. The gangs did not want the children to become involved in the church because "they wanted the children to get involved in their [gang] activity so that their gang would become bigger." R201-02. ██████████ explained further that gangs saw evangelicals as their "enemies" because "they want the kids and the youth to be with them, and we want those persons to come to the feet of Jesus." R393.

Dr. Vanden testified that gangs do not necessarily oppose all churches, but do oppose evangelicals, whom they regard as a specific threat to their power. R332-33. This is so because evangelicals "actively tr[y] to get members of a community who . . . the gang members think they need to recruit for their gang." R333. "[I]f any particular evangelical group, church, tried to

evangelize gang members, that's particular[ly] offensive to them because then you're trying to take people away from them." *Id.* "So evangelicals are suspect." R333; *see also* R335, R1372.

Dr. Vanden testified that individuals who evangelize to gang members are therefore at a greater risk of being targeted by the gang than the general population. R319, R1368-69. The gangs have "certainly targeted individuals from [King's Castle] [] who endeavored to evangelize them; that is to say who endeavored to recruit them for that church." R319.

f. MS-13 knows the ██████████ are evangelicals. R321. As part of his evangelizing, ██████████ preached to gang members and invited them to church. R424-25, 430, R1112 (¶ 21). Gang members watched as ██████████ loaded youth into his truck twice weekly to take them to church. R423. They often joined the crowds watching ██████████ perform with other church members and taunted him while he was proselytizing. R414, R478. Dr. Vanden spoke in person with the ██████████ pastor in El Salvador and confirmed that the gang had targeted the ██████████ and that MS-13 was aware "that the family, the father, in particular [] were engaged in evangelical activities in this particular neighborhood, and were trying to get [] the young people to get on this bus and go to the . . . church." R336.

After the family joined King's Castle in 2005, the gang's harassment and threats intensified. ██████████ testified:

[B]efore we became part of King's Castle, everything was different. // [They harassed], but not to the point of thinking about killing. Before that, you know, they took the tires away from our car, things like that, but they didn't mess up with our lives, but once we became members things changed.

R482. ██████████ corroborated this account, noting that after the family joined King's Castle, she felt "more harassed" by the gang. R279. As did ██████████, who testified that she was "more scared" after the family joined the church, "Because by now they would see me as a person, a rival person to them. // Because we tell the kids and the youth to get closer to Jesus because He's going to change their lives." R394. MS-13 members would say derogatory remarks to ██████████ when he performed in public. R478.

The gang's targeting of the family reached a crisis point in 2006. In January of that year, an MS-13 gang member named Pusungo, accompanied by several other gang members, entered the family's yard brandishing a machete. R430. ██████████ had previously invited Pusungo to church and preached to him the word of God. *Id.* As ██████████ watched from the

second story of the family's house, Pusungo cut down the family's mango tree. R430-31. When ██████████ went into the yard to question Pusungo, Pusungo told her he was doing it to provoke "the old Evangelical man." R432-33, R255-57, R1124 (¶ 20). ██████████ testified that, on the advice of his family, he did not go outside for fear that "[Pusungo] could kill me." R431.

Sometime that year, a gang member named "Skinny," who was in jail, sent word back to the family that he planned to kill ██████████ upon his release. R266-67. ██████████ testified that she understood the motive for the death threat to be that ██████████ preached the word of God and that he would take recruits away from the gangs and direct them to join the church instead. *Id.*

On March 1, 2006, the family received a series of six or more threatening phone calls from MS-13 members. R234-35. Gang members "the Angel" and "Cipher" told ██████████ they were being paid \$10,000 to violently harm her family, and that unless she gave them \$5,000 within 48 hours, they would kill her children. R236-37. The gang members threatened ██████████ ██████████ by reciting intimate details of the family's life: the names of ██████████ and ██████████, where they worked and went to school; what time ██████████ returned

home from work; where the family lived and what their house looked like; and the facts that they ran a store, owned a pickup truck, and had relatives in the United States. R235-46, R1125. During one of the calls, [REDACTED] tried to preach to the callers about Jesus, but the gang members responded that "they already knew where they were headed." R241.

Afraid that the gang members would carry out their threats, and worried that cooperating with the police would place the family into even greater danger, [REDACTED] made the decision to flee San Salvador with [REDACTED] and [REDACTED] early the next morning. R245-50. [REDACTED] followed them to Acajutla. R246-47. From there the family traveled to Mexicali and then to the United States, where [REDACTED] brother and sister live. R243-44, R247. In so doing, they left behind their house, jobs, school, family business and pick-up truck. R193, R459.

Gang members continued to make threats against the family even after they left El Salvador. In one instance, gang members surrounded the family's pick-up truck,³ hugged and kissed it, and made signs of the cross. R261.

³ The truck was being driven by someone hired by [REDACTED] mother. R261.

Dr. Vanden explained that hugging and kissing an item is a death threat from the gang, as is making a sign of the cross. R348.

g. MS-13 gang members have also targeted other individuals who belong to King's Castle. In one incident, they "beat up" the pastor from the neighboring King's Castle church. R479. In another incident, when the ██████████ pastor was preaching across from the family's home, a gang member snatched the megaphone from the pastor's hand and threw it to the ground while yelling profanities. R438-39. Dr. Vanden testified that the gang members "have been known to go into churches and kill gang members who were trying to get away, or trying to be saved by the different evangelicals." R333.

h. The ██████████ have remained active in the Church since arriving in the United States. They are currently members of the Macedonia Assembly of God church, an evangelical church related to King's Castle. R1056 (¶ 37); 1099 (¶ 19); 1105 (¶ 12); 1114 (¶ 39). ██████████ and ██████████ each testified that if they were forced to return to El Salvador, they would continue to attend church and evangelize despite the threat to their lives. ██████████ explained, "Q: "If you had to return to El Salvador, would you continue to participate in King's Castle?" ██████████ "Yes . . . Because I missed that, be-

cause it's there, and I want to be with God, and I want the children to get closer to God, not get lost. It's sad to see these young kids already in the gang." R395; *see also* R448, 480.

i. During their hearing before the Immigration Judge, the family members testified that they fear persecution from MS-13 should they be forced to return to El Salvador. ██████████ explained that if he returned to El Salvador, he would still attend church and evangelize, but that he would "have fear of dying." R448. ██████████ highlighted that the family was, "singled out to death by [the gang]." R396. ██████████ testified that he believed his family would be killed by the gangs if they returned to El Salvador, "That's what they do all the time. You see that on the news, they kill the families." R485.

Dr. Vanden corroborated this assessment, opining that the ██████████ family was at an increased risk of retaliation and persecution because of their evangelical beliefs and proselytizing on behalf of King's Castle. Based on his expertise and personal investigation, he reported that there is well in excess of a "10% probability" that the ██████████ family would be attacked by gangs if they were forced to return to El Salvador, and that they "have good reason to fear severe bodily harm, torture, or murder if they returned." R1369-71; *see also* R320-21.

In Dr. Vanden's opinion, "if [the family members] were to practice their faith or engage in evangelization, they would clearly and quickly draw attention from the gang." R324. He further testified that the police would not be able to protect the ██████████, both because of a lack of resources and lack of willingness to take on MS-13, R322-23, and that relocation elsewhere in El Salvador to avoid the gang would be difficult because of the small size of the country, the networks that the gang maintains, and its persistence (*i.e.*, "they just don't let go"). R324, R1372.

2. *Procedural History*

a. At the removal hearing, the ██████████ conceded their removability but applied for asylum. In particular, the ██████████ claimed that they harbored a well-founded fear of persecution because of their religion and membership in particular social groups. The ██████████ testified to the facts outlined above. They also provided the written and oral testimony of Dr. Vanden as outlined above. The ██████████ submitted evidence corroborating their active membership in King's Castle church; written declarations from relatives and neighbors detailing the family's problems in El Salvador with MS-13; various news articles and governmental reports analyzing the King's Castle church and the Salvadoran gang violence; and other information cor-

roborating the threats they received, including a police report filed by [REDACTED] [REDACTED] and the transcript of a voicemail message she left a relative in the United States contemporaneously detailing the threatening phone calls she received in March 2006.

b. After hearing the evidence the IJ made several findings:

(i) The IJ found the [REDACTED] family members credible: “the Court is completely satisfied with the credibility of every one of the applicants. . . . The Court is satisfied that everything that they stated that happened to them in El Salvador actually did happen.” R88.

(ii) The IJ also held that the [REDACTED] had demonstrated both a subjective and objectively reasonable fear of future persecution. R104-06. “The Court has no doubt that the subjective component is satisfied by each of the individuals who have presented credible testimony that they genuinely fear persecution . . . and based upon the testimony of the expert witness, there probably is an objective basis for a fear of future persecution.” *Id.*

(iii) However, the IJ denied the asylum applications because she determined that the [REDACTED] had not demonstrated that their fear of persecution was “on account of” their religion, political opinion, or membership in a particular social group. “But for satisfaction of the nexus require-

ment, the respondent would be found to be eligible for asylum [on a claim of a well-founded fear of future persecution].” R106; R100 (“the main problem with the case is the nexus”).

The IJ found that the family joined King’s Castle church in 2005 and that the church “was famous for trying to attract young people to the right way of life rather than following the gangs.” R99. “The idea was that it would give young people good morals, provide gathering, and raise money so they would have something to do positively rather than be influenced to join the gangs.” She found that “[t]his was well known in the community.” *Id.* Nonetheless, the IJ held that the evidence did not establish any nexus between the family’s fear of persecution and their religion because the family faced some harassment prior to joining the church and the only express reference to religion made during the threats was when a gang member cut down the family’s mango tree to provoke the “old Evangelical man.” R102-04.

(iv) The IJ also rejected the claim of persecution on account of a particular social group. In so doing, the IJ relied on *In re S-E-G-*, 24 I. & N. Dec. 579 (BIA 2008), and *Santos-Lemus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008). R100. “What all these cases so far address is that persons simi-

larly situated like these respondents, that is the parents, who do not want their two sons and daughter to have anything to do with the gangs . . . do not fall into any one of the five protected grounds.” *Id.* She explained further, “[y]oung persons perceived to avoid gang membership have no different social visibility than any other individuals unless they are wearing gang clothing.” R101.

c. The [REDACTED] timely appealed to the BIA, which held that the “facts of [the] case are not in dispute.” R3. In a summary opinion, the BIA affirmed. R3-4. It identified four reasons for doing so.

(i) The BIA held “most of the problems [the [REDACTED] family] faced with the gang were due to their refusals to be associated with them and the gang members’ attempts to extort money from the family, as they were perceived to be wealthy.” R3. It agreed with the IJ that *S-E-G-* controlled the outcome of the case, and that “the respondents have failed to show that the gang members who threatened them were motivated by any of the grounds protected under the Act.” R4.

(ii) With respect to the [REDACTED] religion-based claim, the BIA held, “[t]here is . . . 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.” *Id.* The BIA concluded that “many of the problems they had occurred before they joined the church and only passing reference was made to their religion at one point during a single encounter with gang members.” *Id.*

(iii) With respect to the [REDACTED] claim based on their membership in a particular social group, the BIA analyzed the proposed group as consisting of those “who have taken direct action against the gangs” and then held that such a group is not different from those groups the Board and this Court have already found do not constitute a particular social group. R4.

(iv) Finally, with respect to the claim that they were persecuted on account of their membership in the [REDACTED] family, the BIA acknowledged that a family may constitute a particular social group, but found that there was no nexus and that, in any event, the [REDACTED] failed to show their family had any level of recognized social visibility. R4.

d. In holding that the [REDACTED] did not fear persecution “on account of” their religion, neither the Immigration Judge nor the BIA addressed substantial evidence in the record. They did not discuss, *inter alia*, the following: (1) the [REDACTED] did not begin proselytizing until after they joined the King’s Castle church; (2) the [REDACTED] anti-gang evangelism was

an integral aspect of their work to spread the word of Jesus and recruit members to King's Castle church; (3) MS-13 targets evangelicals because gang members consider them to be competition to their own recruitment efforts; (4) the threat from MS-13 and the [REDACTED] fear of harm increased exponentially after the family joined King's Castle and began proselytizing; (5) that if returned to El Salvador the family would continue publicly proselytizing; and (6) that continued proselytizing would both bring them again to the attention of MS-13 and very likely result in physical violence toward, if not outright murder of, the family.

e. In holding that the [REDACTED] did not belong to a particular social group, both the Immigration Judge and the BIA concluded that the family members were "similarly situated" to other families in El Salvador that oppose their children joining gangs. Neither addressed the evidence that the members of King's Castle church who publicly proselytize, including the [REDACTED] are in fact differently situated from others who oppose gangs because they: (1) have formed a voluntary association (based on fundamental beliefs) that poses a known and direct threat to MS-13's recruitment efforts because of their work recruiting young people to the church; (2) are highly visible to MS-13 because of their "spectacle evangelism" and direct competi-

tion with them for recruits; and (3) constitute a particular group because they can be described in a manner sufficiently distinct that the group is recognized in El Salvador.

f. The IJ and the BIA also denied withholding of removal and relief under the Convention Against Torture.

3. *Standard of Review*

a. This Court reviews findings of fact for substantial evidence. *See Zhao v. Mukasey*, 540 F.3d 1027, 1029 (9th Cir. 2008). Questions of law and the application of law to fact are reviewed under the considerably less deferential *de novo* standard. *See Hoque v. Ashcroft*, 367 F.3d 1190, 1195 (9th Cir. 2004).

b. When the Immigration Judge finds an asylum applicant credible, this Court “h[as] considered nexus issues to be questions of law entitled to *de novo* review.” *Baghdasaryan v. Holder*, 592 F.3d 1010, 1022 n.4 (9th Cir. 2010) (citing case law).

c. Whether a group constitutes a particular social group under the Immigration and Nationality Act is reviewed *de novo*. *See Perdomo v. Holder*, 611 F.3d 662, 665 (9th Cir. 2010).

SUMMARY OF ARGUMENT

This Court should find the ██████████ eligible for asylum because they have a well-founded fear of future persecution on account of a ground protected under the Immigration and Nationality Act.

A. In holding there was no nexus between the ██████████ fear of persecution and their religion, the BIA principally erred by secularizing the ██████████ anti-gang activities, setting those aside, and only then conducting the nexus analysis of the religion-based claims. *See pp. 33-34, infra.* But the evidence is conclusive that the family's anti-gang message was not secular. The family's proselytizing to the young mandated that it also advocate against joining gangs, *viz.* leading the young to Jesus necessarily meant leading them away from MS-13. The BIA further erred in ignoring substantial evidence in the record that MS-13 specifically targeted the ██████████ because they are evangelicals and actively proselytized in their neighborhood. *See pp. 34-37, infra.*

B. The BIA independently erred in holding that evangelical Christians of King's Castle in El Salvador who preach and proselytize to gang members and youth are "similarly situated" to all other persons in El Salvador who oppose gangs and thus, under *In re S-E-G-*, do not constitute a par-

ticular social group. That holding was incorrect. *See* pp. 44-50, *infra*. The vast majority of individuals opposed to MS-13 do not hold religious beliefs compelling them to proselytize, wear King's Castle T-shirts with biblical slogans, publicly preach to youth, sing and dance in the public square to proselytize, or dress up in public as clowns to attract children as members. Such actions inescapably make the King's Castle members visible in El Salvador. As Dr. Vanden found, *see* pp. 10-11, *supra*, these actions draw the gang's ire and retaliation, as it competes with the King's Castle church members for the same recruits. And, unlike a group defined as the public at large, King's Castle members in the [REDACTED] community are a discrete, particularized group.

C. The BIA correctly acknowledged that a family can constitute a particular social group. R4. But it erred in holding that the [REDACTED] family does not constitute one. It erred first in holding that there was no nexus between the [REDACTED]'s fear of persecution and their familial association. *See* pp. 50-52, *infra*. To the contrary, the evidence establishes that, if returned to El Salvador, the family as a whole would be targeted. It erred again in concluding that the family is not "socially visible." That unsupported conclusion simply cannot be reconciled with the overwhelming evidence that MS-13 was

(and remains) acutely aware of who they are given the family's "spectacle evangelicalism;" could identify the family's house, store and pickup truck; knew details of each individual's identity and whereabouts; and recently attacked the family pickup truck, believing that the family had returned because it was being driven in town.

D. This Court should defer to the IJ's determination that the [REDACTED] [REDACTED] have a well-founded fear of persecution if returned to El Salvador.

ARGUMENT

The INA permits the Secretary of Homeland Security or the Attorney General to grant asylum to any refugee who meets the refugee definition. *See* 8 U.S.C. § 1158(b)(1)(A) (2006). To qualify, a refugee must demonstrate that she is "unable or unwilling to return to . . . [her] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."

8 U.S.C. § 1101(a)(42)(A). If the Court finds a well-founded fear of persecution on account of religion, it need not reach the issue of whether the [REDACTED] [REDACTED] belong to a particular social group.

With respect to the [REDACTED] religion-based claim, the only issue on appeal is nexus, *i.e.*, the "on account of" requirement, as the IJ found that the

family met all of the other elements to obtain asylum and the BIA did not contest that conclusion. *See* pp. 18, 20, *supra*; R105, R3-4. If this Court holds that the ████████ fear of persecution is on account of their religion, it can grant the petitions and remand to the BIA with an instruction to grant asylum. *See Nieto-Obando v. Holder*, 332 F. App'x 383, 385 (9th Cir. 2009).⁴

In sum, as discussed herein, the ████████ fear persecution both on account of their religion and, independently, on account of their membership in particular social groups. Again, if the Court so determines, it should remand with an instruction to grant asylum. *See id.*

A. Petitioners Fear Persecution on Account of Their Religion.

a. The INA requires those seeking asylum to demonstrate a “nexus” between their fear of persecution and “one or more of the grounds enumerated” in the statute—*i.e.*, race, religion, nationality, membership in a particular social group, or political opinion. *Baghdasaryan*, 592 F.3d at 1023.

⁴ In *Nieto*, 332 F. App'x at 385, this Court held, “Although we would ordinarily remand for the agency to determine whether to exercise its discretion to grant asylum, there is no need to do so here as the IJ already concluded that he would exercise his discretion favorably if Nieto-Obando were eligible for asylum.” *Id.* Here, the IJ did not expressly state that she would exercise her discretion favorably, but repeatedly stated that the only issue in the case was nexus. R100, R105. This indicates that she intended to exercise her discretion favorably, otherwise, nexus would not have been the only issue presented.

Under the INA as amended by the REAL ID Act of 2005, applicants for asylum bear the burden of showing that a protected ground was or “will be at least one central reason” for the persecution they fear. 8 U.S.C. § 1158(b)(1)(B)(i). Asylum applicants need not show that a protected ground is the only reason for their fear of future persecution, however. So long as the protected ground is not “incidental, tangential, superficial, or subordinate to another reason for harm,” “persecution may be caused by more than one central reason, and an asylum applicant need not prove which reason was dominant.” *Parussimova v. Mukasey*, 555 F.3d 734, 741 (9th Cir. 2009);⁵ *In re J-B-N- & S-M-*, 24 I. & N. Dec. 208, 214 (BIA 2007). “[T]o demonstrate that a protected ground was ‘at least one central reason’ for persecution, an applicant must prove that such ground was a cause of the persecutors’ acts.” *Parussimova*, 555 F.3d at 740, 741. Nexus can be established through direct or circumstantial evidence. *See Ramirez-Rivas v. INS*, 899 F.2d 864, 869

⁵ For the purposes of potential subsequent *en banc* review, *see* Fed. R. App. P. 35(b)(1)(B), and Supreme Court review, we respectfully submit that *Parussimova v. Mukasey*, 555 F.3d 734, 741 (9th Cir. 2009) was incorrectly decided. For present purposes, however, the record establishes that, under the interpretation set forth in *Parussimova*, the ██████████ religion was “one central reason” for their persecution.

(9th Cir. 1990)⁶ (“Circumstantial evidence is, of course, evidence.”); *Sangha v. INS*, 103 F.3d 1482, 1486–87 (9th Cir. 1997) (same).

b. The following undisputed facts compel the conclusion that the ██████████ have a well-founded fear of persecution “on account of” their religion. The ██████████ are evangelical Christians who, as an exercise of their religious beliefs, publicly proselytize to youths, including gang members, to join the church. *See* pp. 6-9, 11, *supra*. MS-13 targets evangelicals in particular, and at a greater rate than others in El Salvadoran society, because evangelicals’ efforts to lead young people to Jesus necessarily leads them away from gangs and therefore present a distinct threat to the gang’s own recruitment efforts and power. *See* pp. 10-12, *supra*. MS-13 targeted the ██████████ after the family began proselytizing on behalf of King’s Castle church. If forced to return to El Salvador, the ██████████ will continue to attend church and exercise their religious beliefs by worshipping in public and proselytizing to the youth. This will again bring them to the attention of MS-13 members, who are very likely to physically harm, if not outright kill, them. *See* pp. 15-16, *supra*.

⁶ *Ramirez-Rivas* was subsequently vacated in part on other grounds, 502 U.S. 1025 (1992).

c. In denying the petitions, the BIA held that *S-E-G-* “controls the outcome in this case.” R4. It does not. *S-E-G-* involved the definition of “particular social group” and whether respondents had established that they held an anti-gang political opinion. *See S-E-G-*, 24 I. & N. Dec. at 588-89. The opinion does not address persecution on account of religion.⁷ *S-E-G-* therefore does not inform, much less “control,” the question of whether there is a nexus between the [REDACTED] fear of persecution and their religion.

To the extent that the BIA relied upon *S-E-G-* for the proposition that criminal gang activities affect the population as a whole, that point is inapposite. The [REDACTED] do not complain of a fear of the general “criminal activities” of MS-13, but of a series of targeted and persistent threats directed at them because of their religious activities. *See pp. 11-14, supra.* The fact that gangs may have multiple motives to attack various members of society has no bearing on whether one central reason for targeting the [REDACTED] in particular involved their religious beliefs and practices. *See Ahmed v. Keisler*, 504 F.3d 1183, 1194 n.9 (9th Cir. 2007) (“[E]ven though generalized violence as a result of civil strife does not necessarily qualify as persecution, neither

⁷ *Ramos-Lopez v. Holder*, 563 F.3d 855 (9th Cir. 2009), and *Santos-Lemus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008), affirmed the BIA’s holdings in *S-E-G-*. Neither of those cases addressed religion either.

does civil strife eliminate the possibility of persecution. The relevant analysis is still whether the persecutor was motivated by one of five statutory grounds.”); *see also Crespin-Valladares v. Holder*, _ F.3d _, No. 09-1423, 2011 WL 546531, at 8 & n.6 (4th Cir. Feb. 16, 2011) (fact that criminal gang activities can affect the population as a whole is irrelevant to the question of whether particular family was targeted by gang).

d. Religious-based nexus claims are not analyzed under *S-E-G-*, but instead under the BIA’s precedent addressing the circumstances in which persecution is on account of religion.⁸ *In re S-A-* is an illustrative example. There, the Board held that a woman with liberal Muslim beliefs who was physically assaulted for wearing a short skirt and talking to men, and prohibited from receiving an education, was persecuted on account of her “religious beliefs, as they differed from those of her father concerning the proper role of women in Moroccan society.” *In re S-A-*, 22 I. & N. Dec. 1328,

⁸ Claims of religious persecution should be read in light of the International Religious Freedom Act of 1998 (“IRFA”), in which Congress sought to redress the perceived failure of the administrative system to offer adequate protections to refugees seeking asylum from religious persecution. 22 U.S.C. § 6401(a)(1) (2006). In particular, IRFA recognized that interference with the practice of religion is a serious threat to freedom and “[r]eligious believers and communities suffer both government-sponsored and government-tolerated violations of their rights to religious freedom.” *Id.* at § 6401(a)(4).

1336 (BIA 2000). Similarly, this Court has held that an Armenian Christian man who was detained and beaten because he was dating a Muslim woman was persecuted on account of religion. *See Bandari v. INS*, 227 F.3d 1160, 1169 (9th Cir. 2000); *see also Maini v. INS*, 212 F.3d 1167, 1174–76 (9th Cir. 2000) (finding petitioners targeted because of their interfaith marriage and practices suffered past persecution on account of religion).

The BIA recently affirmed *In re S-A-* in a case governed by the REAL ID Act. Appendix C, *In re S-F-*, June 23, 2009 (three member panel, unpublished). There, citing to *In re S-A-*, it held that a female respondent who opposed forced marriage due to Islamic beliefs regarding gender that were more liberal than her father’s feared persecution on account of her religion. *See id.*

Other decisions of the BIA and this Circuit are in accord that interference with the ability to practice one’s religion can rise to the level of persecution warranting asylum. *See In re L-K*, 23 I. & N. Dec. 677, 683 (BIA 2004) (finding that petitioner who held prayer meetings at home established persecution on account of her religion as a result of violent home invasions); *Krotova v. Gonzales*, 416 F.3d 1080, 1086-87 (9th Cir. 2005) (interference by “skinheads” with petitioner’s ability to practice her religion, along with eco-

conomic disadvantage and physical violence and threats, amounted to past persecution on account of religion); *Popova v. INS*, 273 F.3d 1251, 1258 (9th Cir. 2001) (petitioner who suffered harassment and was fired from her work when she refused to change her religious last name or to prepare atheistic materials had suffered past persecution on account of religion).

e. In an apparent effort to make this case fall within *S-E-G-*, the BIA incorrectly recast the family's evangelizing as secular "anti-gang" activities. R4; see pp. 20-21, *supra*. But the ██████████ anti-gang activities were not secular and could not be ignored when analyzing whether a nexus to religion existed. The ██████████ did not preach—*Do not join gangs*—end stop. They preached—*Come join the Church, follow Jesus*. Sometimes they added—*Gang life is incompatible with being a Christian*. See, e.g., R394, R1175 (¶ 18). The anti-gang sentiment was caused by, and was inextricable from, the family's preaching the word of God. As ██████████ explained when asked why he would evangelize to hostile gang members: "[b]ecause myself as a Christian Evangelical, I know that God called me to do that." R425. ██████████ expressed the same belief: "as Christians we have a mission to preach the gospel to whoever [sic] person there is." R480.

Even if the ██████████ anti-gang message could somehow be extricated from their religious preaching, S-A- and its progeny make plain that persecutors who target aspects of victims' religious beliefs that are objectively secular can be said to persecute on account of religion. Since the victims engage in the activity (*e.g.*, wearing short skirts) because they are expressing a religious viewpoint (*e.g.*, the role of women under liberal Islam), harming them because of that activity has been held to be persecution "on account of" religion where the persecutor is aware that the activity arises from religious beliefs. *See pp. 31-33, supra.*

In short, the fact that in leading young people to Christ, the ██████████ were simultaneously leading them away from gang life, does not make irrelevant to the nexus analysis the primary motivation for their work—serving God as evangelical Christians. The ██████████ religious beliefs are inextricable from the anti-gang message. And, moreover there is ample evidence in the record that MS-13 is fully aware that the family's so-called "anti-gang activities" are religiously motivated, that MS-13 considers evangelicals an anathema, and that MS-13 targeted (and will target) the ██████████ as a result of their religion. *See p. 11, supra.*

f. The BIA has acknowledged that “[p]roving the actual, exact reason for persecution or feared persecution may be impossible in many cases.” *In re S-P-*, 21 I. & N. Dec. 486, 489 (BIA 1996). Thus, circumstantial evidence, as well as direct evidence, may form the basis for proving the motives of persecutors. *See pp. 28-29, supra*. Yet, along with inappropriately setting aside the ██████████ anti-gang activities in conducting its analysis, the BIA also ignored the considerable, persuasive circumstantial evidence in the record that MS-13 is in fact expressly motivated by a disdain for the ██████████ ██████████ religious beliefs and teachings (*e.g.*, that leading a life devoted to God is preferable to leading a life in the gang).

The BIA ignored that MS-13 has targeted other members of King’s Castle church, including two pastors. *See p. 15, supra*. It also ignored each family member’s credible testimony that MS-13 is in competition with their church and considers the family members to be enemies because they recruit the same individuals targeted by the gangs. *See pp. 10-11, supra*. It made no reference, for example, to ██████████ testimony and declaration that the family was “trying to save the youth by converting them and directing them into positive activities, while the gangs try to keep them poor, unhealthy, addicted to drugs and living a life of sin and crime.” R1175 (¶ 18), R195. And it

ignored [REDACTED] testimony that gangs saw evangelicals as their “enemies” because “they want the kids and the youth to be with them, and we want those persons to come to the feet of Jesus.” R394, R201-02.

Most troubling, the BIA did not address Dr. Vanden’s expert report or testimony at all. It inexplicably ignored his testimony, which fully corroborated the family’s account, that MS-13 views evangelical Christians as enemies and therefore singles them out for persecution.⁹ *See* pp. 10-11, *supra*.

⁹ The Immigration Judge credited Dr. Vanden, noting that, “he certainly has an impressive background in his field.” R99. The IJ, however, then devoted almost no time to his opinion and testimony, and appears to have ignored Dr. Vanden’s uncontested opinion that the [REDACTED] were threatened in the past and, if returned to El Salvador, “have good reason to fear severe bodily harm, torture, or murder” by MS-13 because of their religion. R1369-71; *see also* R99, R105-06, R320-21. The BIA ignored it altogether.

This was erroneous. Where a witness—especially an expert witness—is deemed credible, the IJ and BIA must consider his or her testimony in analyzing the elements of an asylum applicant’s claims. *See Ramirez-Rivas v. INS*, 899 F.2d 864, 869 (9th Cir. 1990) (holding that BIA should have considered expert evidence and highlighting that BIA did not explain why it ignored it); *see also Banks v. Gonzales*, 453 F.3d 449, 453 (7th Cir. 2006) (granting petition for review where the IJ formed an opinion regarding the asylum applicant’s claim without relying on evidence and ignored expert testimony that Charles Taylor persecuted members of the applicant’s ethnic group) (“An IJ is not an expert on conditions in any given country, and *a priori* views about how authoritarian regimes conduct themselves are no substitute for evidence . . .”); *Zheng v. Gonzales*, 415 F.3d 955, 960 (8th Cir. 2005) (finding that the IJ erred in failing to consider the testimony of the petitioner’s sister where she was found credible).

According to his expert opinion, individuals who evangelize to gang members are at a greater risk than the general population of being targeted by MS-13. R1363-64, R1369. Dr. Vanden also reported that “gang members perceive evangelization on their turf (neighborhood) as a challenge to their authority and control and [] direct action must be taken to confront it and reassert their authority and control.” R1363-64.

Dr. Vanden’s testimony was also very specific to the ██████████ family. Dr. Vanden traveled to the ██████████ neighborhood in El Salvador, interviewed a number of persons there, *see p. 5, supra*, and concluded that MS-13 is in “clear competition with [Petitioners’] church,” R1372; *see also* R1363-64. He found that each ██████████ family member is “a known member of the Evangelical church, and has been identified by MS-13 as a person who is willing to stand up against them.” R1369. He testified that the ██████████ would be targeted because of their religion. R1363-64. Dr. Vanden’s testimony was thorough, persuasive and unrebutted by the Government. It provides uncontroverted circumstantial evidence that past threats against the family and the family’s well-founded fear of persecution are on account of religion.

g. The BIA also erred when it contended that “many of the problems the ██████████ had occurred before they joined the church.” R4. On

this point, the BIA simply got the record evidence wrong. Although the [REDACTED] [REDACTED] had interactions with gangs prior to 2005, each family member testified that MS-13's targeting of them, and their own fear for their safety, seriously escalated after they became members of King's Castle. Death threats to Mr. [REDACTED], the harassment of [REDACTED] while he was performing in public, the hacking down of the tree, the derogatory remark regarding evangelism, and the final six threatening phone calls all occurred within a year of the family joining King's Castle church. *See pp. 12-14, supra.* The BIA ignored or dismissed the cumulative effect of this evidence.

The BIA also dismissed the one incident it conceded was religion-based by stating "only passing reference was made to [the family's] religion at one point during a single encounter with gang members." R4. This referred to the fact that a gang member, whom Mr. [REDACTED] had previously attempted to convert, R431, accompanied by other gang members, took a machete to the family's mango tree (which it had planted to make a profit from selling the fruit) and hacked it down, while stating that he wanted to get the "old Evangelical man." R432-33, R255-57, R1124 (¶ 20). The brandishing of a lethal weapon on one's property to hack down a tree while hurling a religious insult hardly amounts to a "passing reference" or warrants the dismissive at-

titude expressed by the BIA. Indeed, Mr. ██████████ testified both that Pusungos attacked “because” he was an evangelical and that he did not confront Pusungos because he feared for his life. R430-31. Plainly, the gangs were aware of the family’s religious beliefs and sought to “provoke” Mr. ██████████ because of his religious activities. R255-56.¹⁰ Less than two months later, the family received the series of death threats that forced them to leave El Salvador.

Regardless, the BIA’s analysis of what events occurred in the past is not alone evidence of whether the ██████████ have a well-founded fear of *future* persecution on account of their religion. On this score, the evidence was equally unequivocal, unrebutted and again ignored by the BIA, MS-13 does not want the family to practice its evangelical religion or to proselytize. Yet, the family would indisputably continue to practice its religion and proselytize if returned to El Salvador. R395, R448, R480; *see* p. 15, *supra*. Dr. Vanden

¹⁰ In its opposition brief to the BIA, the Government argued that the gang members cut down the tree because they wanted to eat the mangos. R11. Even putting aside the illogic of inferring that one would machete down a tree in order to pick a fruit, the Government’s speculation is flatly contradicted by the record. Initially misunderstanding their intent, Mr. ██████████ testified that when the gang members first began to “hit” the tree, he shouted to them that the mangos were not yet ripe. R453-454. It quickly became clear, however, that their intent was not to eat mangos, but to threaten Mr. ██████████ R255-256.

opined that this worship and proselytizing would almost certainly result in persecution, a position buttressed by the uncontested fact that the gang recently surrounded the family's pick-up truck and made death signs, believing the family had returned.¹¹ R261, R348.

h. Finally, the BIA erred in finding that "extortion, alone, was the motivating factor for the most severe problem ." R4. This conclusion ignored Dr. Vanden's testimony that, while money may be a factor in MS-13's persecution of individuals, more frequently it is the gang's other contacts with those individuals that spark the harassment. R339-41. It also ignored well-settled precedent that persecutors can have multiple motives and the [REDACTED] are not required to establish which one is dominant. *See Parussimova*, 555 F.3d at 741 (analyzing REAL ID Act case), *supra* p. 28.

The threat of extortion should be evaluated in light of the ample evidence suggesting that MS-13 knew the identities of the family members be-

¹¹ In *Canas-Segovia v. INS*, this Court held that a neutral law of general applicability, *e.g.*, a law of forced conscription, was not alone sufficient evidence of nexus when applied to persons who objected to the law due to their religious beliefs. 970 F.2d 599, 601 (9th Cir. 1992) (citing *INS v. Elias-Zacarias*, 502 U.S. 478 (1992)). In contrast here, as in *In re S-A and Bandari*, the [REDACTED] were not victims of a neutral law of general applicability and there is evidence (indeed, overwhelming evidence) that they were specifically targeted because of their religious practices.

cause their evangelism was publicly visible, and targeted them for that reason. “Careful attention to the particular circumstances surrounding the alleged persecution remains necessary even if the persecution is generally categorized as extortion or recruitment.” *De Brenner v. Ashcroft*, 388 F.3d 629, 638 n.2 (8th Cir. 2004).

i. At least “one central reason” that caused MS-13 to target the ██████████ was their religion. MS-13 targeted the ██████████ for persecution in El Salvador because the family recruited young people to the church and therefore necessarily away from the gangs. If returned to El Salvador, they will continue to practice their religion through public proselytizing. If they proselytize in public, they will be identified, targeted and persecuted by MS-13.

B. Petitioners Are Members of a Particular Social Group.

The BIA also erred in its application of *S-E-G-* to the ██████████ claim that they fear future persecution on account of their membership in the particular social group of evangelical Christians of King’s Castle church in El Salvador who preach and proselytize to gang members and youth.

a. The INA does not expressly define the term “particular social group.” In this Court, the determination of whether a group constitutes a

“particular social group” is as a threshold matter determined by a two-pronged test: “a ‘particular social group’ is one united by a voluntary association, including a former association, *or* 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.” *Perdomo*, 611 F.3d at 665-66 (citation omitted).

In addition to requiring voluntary association or an innate characteristic, the Ninth Circuit has held in light of recent Board decisions that certain factors should be examined in determining whether a particular social group exists, including: 1) whether the group has a requisite level of “social visibility;” and 2) whether the group can be defined with “sufficient particularity to delimit its membership.” *Arteaga v. Mukasey*, 511 F.3d 940, 944-45, 949 (9th Cir. 2007) (citing *In re A-M-E- & J-G-U*, 24 I. & N. Dec. 69, 74-76 (BIA 2007) (holding that “wealthy Guatemalans” do not qualify as a particular social group)).¹²

Applying these precedents, this Circuit has held that persons who share nothing more than a resistance to gang membership do not constitute a

¹² As we detail below, pp. 51-56, *infra*, we respectfully submit that *A-M-E-* and *S-E-G-*, and its progeny in the Ninth Circuit, were wrongly decided and preserve that issue for possible *en banc* and Supreme Court review.

particular social group. *See Ramos-Lopez v. Holder*, 563 F.3d 855 (9th Cir. 2009) (Honduran men who resisted gang recruitment are not a particular social group); *Santos-Lemus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008) (young men in El Salvador resisting gang violence do not constitute a particular social group).

b. Neither the BIA's nor this Court's precedents, however, support the proposition that there can exist no particular social group that is composed of individuals who oppose membership in gangs. To the contrary, the question remains whether a proposed group meets the applicable test. By necessity, social visibility and particularity determinations are made based on the evidence in the particular case and the society in question, *viz.*, on a case-by-case basis. *See In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985)¹³ (particular social group determinations must be made on a case-by-case basis).

Thus, this Court has recently remanded to the BIA to consider the issue of nexus to family membership where the BIA had ignored the familial aspect of a proposed group and erroneously analyzed the group as only those "persons who resist gangs." *Martinez-Seren v. Holder*, 394 F. App'x 404, 405

¹³ *Acosta* was subsequently modified on other grounds in *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

(9th Cir. 2010) (unpublished). Similarly, the Fourth Circuit has also recently held that a social group consisting of the “family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses” constituted a particular social group under *S-E-G-*. See *Crespin-Valladares v. Holder*, _ F.3d _, No. 09-1423, 2011 WL 546531, at 2, 5-7 (4th Cir. Feb. 16, 2011).

As evidenced by *Martinez-Seren* and *Crespin-Valladares*, and contrary to the BIA’s holding here, not all persons, or groups, that oppose gangs are “similarly situated.” And *S-E-G-* is not a rubber stamp that permits the BIA to reject all claims for asylum arising from those who happen to oppose gangs. We respectfully submit that an individualized analysis here compels the finding that the ██████████ belong to a particular social group consisting of Evangelical Christians of King’s Castle church in El Salvador who preach and proselytize to gang members and youth. Alternatively, they belong to the particular social group consisting of the ██████████ family.

1. *Petitioners Have a Well-Founded Fear of Persecution On Account of Their Membership in a Group of Evangelical Christians of King's Castle Church in El Salvador Who Preach and Proselytize to Gang Members and Youth.*

a. Even if this Court were to determine that the ██████████ do not fear persecution because of their religion *per se*, they unequivocally fear persecution based on their work against gangs which arises from their voluntary association with other evangelical Christians of King's Castle church in El Salvador who preach and proselytize to gang members and youth, a group that is driven by fundamental beliefs, is socially visible and clearly defined.

b. The BIA summarily rejected the ██████████ articulation of their particular social group in favor of one that lent itself to dismissal under *S-E-G-*:

Although the respondents claim they were targeted due to their work with their church in opposition to the gangs, 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.

R4.

That analysis is misguided. First, the purported group is not simply “those who have taken direct action to oppose criminal gangs.” R4. The proposed group consists specifically of individuals who publicly proselytize on behalf of the King’s Castle church, preach the word of Christ, and have as their mission to save the youth. *See* Respondent’s Opening Brief at 10 n.2, *In re Grande Mercado* (Aug. 11, 2009). It is reversible error to ignore a group presented by petitioners. *See Crespin-Valladares*, 2011 WL 546531, at 6-7 (reversing, and criticizing the BIA for analyzing a group more favorable to dismissal under *S-E-G-*).

Second, and perhaps more egregiously, the BIA simply ignored all the record evidence in this case in concluding that the [REDACTED] are similarly situated to others who have taken action against gangs. This error is significant in light of the BIA’s own characterization of social visibility and particularity as determinations to be made on a case by case basis. *See In re S-E-G-*, 24 I. & N. Dec. 579, 584-87 (BIA 2008). No reasonable person could review this record and conclude that the [REDACTED] were bound together with the other families in the King’s Castle church simply by their opposition to gang membership. To the contrary, they were bound together most closely,

not by their opposition to gangs, but by their belief in Christ and their mission to save the youth and shepherd them to the Church. *See* pp. 6-11, 33-34, *supra*.

c. Unlike social groups found to be inchoate by the BIA and Ninth Circuit, *see* pp. 42-43, *supra*, members of the King's Castle church in El Salvador who proselytize and recruit youth, including gang members, to the church are: (i) united both by voluntary association and a fundamental characteristic; (ii) socially visible, and (iii) particular.

(i) The ██████████ membership in the group of members of the King's Castle church in El Salvador who proselytize and recruit youth, including gang members, to the church is both a voluntary association and a characteristic they should not be required to change—the family chose to become members (and members associate with one another), and their membership is fundamental to their identities and consciences. Indeed, their membership is so fundamental to their identities that Mr. ██████████, ██████████ and ██████████ testified that they would continue to proselytize on behalf of the Church if returned to El Salvador, even though they know that places them at a material risk of being persecuted by MS-13. R395, R396, R448, 480; *see* pp. 15-16, *supra*.

(ii) Within the context of their country and community, King's Castle evangelicals like the [REDACTED] are socially visible because they are perceived as a group. See *In re S-E-G-*, 24 I. & N. Dec. at 587 (question is whether members are "perceived as a group" by society). For example, one scholarly article in the record, *Religious and Social Participation in War-Torn Areas of El Salvador*, recognizes King's Castle and its parent group Assemblies of God as one of four religious groups working to repair civil society: "The [Castillo del Rey and Exploradores del Rey] groups become training grounds for budding pastors and missionaries, an alternative education for rural young people."¹⁴ R1033-34. "The only program that has seemed to have any effect on the youth of the country has been a Pentecostal group associated with Assemblies of God, named Castillo del Rey [King's Castle]." R1044. This demonstrates that King's Castle is sufficiently high-profile to be recognized by observers of Salvadoran society.

More to the point, King's Castle is visible because its members, including the [REDACTED], engage in public, "spectacle evangelism," which is intended to draw a crowd. R1007; see pp. 6-8, *supra*. For example, members

¹⁴ Ileana Gomez, *Religious and Social Participation in War-Torn Areas of El Salvador*, 41 *Journal of Interamerican Studies and World Affairs* (Winter 1999). R1030-41.

conduct clowns, parades, puppet shows, illustrated sermons, and human videos.” R1007. Among their other public religious acts, ██████████ and ██████████ wore King’s Castle T-shirts when they preached in the neighborhood and sang and danced biblical stories in public. R391, R479. Mr. ██████████ preached to those who congregated outside his house, invited gang members to church, and publicly drove children to church twice a week in his recognizable pickup truck. R197, R420-23, R1174 (¶ 17). The family home was a known locus of religious activity in the neighborhood. *See, e.g.*, R1174 (¶ 17).

It is, frankly, difficult to conceive what would meet the BIA’s so-called “social visibility” test if the ██████████ proposed group—whose members wear clothing identifying themselves as belonging to King’s Castle, literally sing and dance in the public square to draw attention to themselves, and are identified by name in the relevant country conditions literature—do not.

(iii) In *S-E-G-*, the BIA held that the “essence of the ‘particularity’ requirement is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.” 24 I. & N. at 579, 584. The “key question [in determining particularity] is whether the proposed description is sufficiently ‘particular,’ or is ‘too amorphous . . . to create

a benchmark for determining group membership.” *Id.* Members of the King’s Castle church in El Salvador who proselytize and recruit youth, including gang members, to the church easily possess the requisite particularity to qualify as a particular social group. In contrast to social groups that have not met the particularity requirement—*e.g.*, wealthy Guatemalans, young men who resist gang membership, *see pp.* 43-43, *supra*—the Mercados’ group is neither demographically sweeping nor amorphous. King’s Castle evangelicals in El Salvador are a discrete and fairly insular group, with clear benchmarks for determining its membership. And it is well recognized in El Salvador. The IJ found that King’s Castle was “famous” in El Salvador for trying to attract young people to the church and away from the gangs and that “[t]his was well known in the community.” R99.

2. MS-13 Members Recognize and Have Targeted the ██████████ Family as a Particular Social Group.

a. In the alternative to the ██████████ membership in a particular social group composed of King’s Castle evangelicals, the ██████████ family is itself a particular social group. The BIA and this Court have recognized that family membership may constitute a “particular social group.” R4; *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986); *see also Colobong v. Holder*, 386 F. App’x 648, 651 (9th Cir. 2010). R4. Although attenuated fa-

miliial links do not *per se* confer membership in a particular social group, *Lin v. Ashcroft*, 377 F.3d 1014, 1028 (9th Cir. 2004), this Court has recognized that “[p]erhaps a prototypical example of a ‘particular social group’ would consist of the immediate members of a certain family, the family being a focus of fundamental affiliational concerns and common interests for most people.” *Sanchez-Trujillo*, 801 F.2d at 1576.

Other circuits are in accord. See *Crespin-Valladares*, 2011 WL 546531 at 6-7 (recognizing family members of individuals who opposed gangs by testifying for prosecution as a particular social group); *Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009) (holding that family shared common, immutable characteristics of kinship); *Toma v. Gonzales*, 179 F. App’x. 320, 324-25 (6th Cir. 2006) (recognizing those who possessed “immutable kinship ties to family members who were politically active in the Iraqi resistance” as a social group); *Ayele v. Holder*, 564 F.3d 862, 869-70 (7th Cir. 2009) (“Our circuit recognizes a family as a cognizable social group under the INA, as do our sister circuits.” (citations omitted)); *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) (“There can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family.”).

b. Here, the BIA erred in rejecting the [REDACTED] contention that they had a well-founded fear of persecution on account of family membership. R4. The BIA ignored the [REDACTED] testimony and ample record evidence that they were targeted by MS-13. *See* pp. 11-12, 37, 38, *supra*. The BIA also ignored that, if returned to El Salvador, each [REDACTED] would very likely be subjected to severe physical harm or killed outright. R1369-70. As [REDACTED] testified, “You see that on the news, they kill the families.” R484. Citing *S-E-G-*, the BIA concluded that the [REDACTED] lacked the requisite level of visibility. But not only is a family unit inherently visible in society (as the Fourth Circuit has recognized, *Crespin-Valladares*, 2011 WL 546531 at 6), but the evidence is unequivocal that the [REDACTED] family is particularly visible within their community. *See* pp. 47-48, *supra*. And, of course, the nuclear family is both a clearly defined group and a discrete one that meets the particularity requirement. *See id.*

3. *In re S-E-G- Was Wrongly Decided.*

To the extent that this Court determines that *S-E-G-* controls the outcome of this case and that, notwithstanding the above argument, pp. 44-51, the [REDACTED] do not satisfy the requirements of that decision, we respectfully submit that that decision is not entitled to deference.

To be sure, this Court has previously held that *S-E-G-* is entitled to deference. See *Santos-Lemus v. Mukasey*, 542 F.3d 738, 745 (9th Cir. 2008); *Ramos-Lopez v. Holder*, 563 F.3d 855, 856 (9th Cir. 2009). We address the issue here, however, both in the event that the Court wishes to consider the issue *en banc*, see Fed. R. App. P. 35(b)(1)(B), and in order to preserve the issue for subsequent Supreme Court review. And we would respectfully submit that the holding in *S-E-G-*, and this Court's deference to that decision, was erroneous. Should an *en banc* panel or the Supreme Court agree that the social-visibility and particularity requirements are improper, the [REDACTED] would be entitled to a remand to the BIA, because the BIA did not cite any other considerations in upholding the Immigration Judge's denial of asylum.

In *Santos*, this Circuit joined with seven other circuits in adopting the BIA's social-visibility and particularity requirements. That decision conflicts with two decisions of the Seventh Circuit, both written by Judge Posner, rejecting those requirements. In *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009), the Seventh Circuit first refused to defer to the BIA's newly minted requirements. *Gatimi* involved an application for asylum by a defector from a Kenyan group that was "much given to violence." *Id.* at 613. After the de-

factor was attacked for leaving the group, he fled to the United States, along with his relatives (who joined him in applying for asylum). *Id.* at 614.

The Seventh Circuit vacated the BIA's decision to uphold the applicants' removal and remanded for further proceedings. *Id.* at 618. As is relevant here, the court rejected the BIA's consideration of social visibility as "a criterion for determining [membership in a] 'particular social group.'" *Id.* at 615. The court acknowledged that "the [BIA's] definition of 'particular social group' is entitled to deference," *id.*, and that "our sister circuits have generally approved 'social visibility' as a criterion" in the "particular social group" inquiry, *id.* at 616. But the court noted that "the [BIA] has been inconsistent rather than silent" in its consideration of social visibility, finding some groups to qualify without reference to that factor. *Id.* at 615-16. The court reasoned that the social-visibility requirement "makes no sense," because the BIA had not "attempted, in this or any other case, to explain the reasoning behind th[at] criterion." *Id.* at 615. And the court explained that the requirement would lead to perverse results because, "[i]f you are a member of a group that has been targeted for . . . persecution, you will take pains to avoid being socially visible." *Id.*

The Seventh Circuit has recently made clear that it rejects not only the social-visibility requirement, but also the accompanying particularity requirement. In *Benitez-Ramos v. Holder*, 589 F.3d 426, 428 (7th Cir. 2009), the Seventh Circuit considered a request for relief by a Salvadoran national who had renounced his membership in MS-13. The court once again vacated the BIA's decision to uphold the applicant's removal and remanded for further proceedings. *Id.* at 431-32. The court then proceeded to reject the particularity requirement, under which a proposed group could be "too unspecific and amorphous" to qualify as a "particular social group." *Id.* at 431. The court reasoned that, while "[t]here may be categories so ill-defined that they cannot be regarded as groups," such categories could be recognized as groups as long as they were openly targeted for persecution. *Id.* For example, the court explained, the "middle class" would not ordinarily qualify as a "particular social group," but, "if a Stalin or a Pol Pot decide[d] to exterminate" its members, the Russian or Cambodian middle class would. *Id.*

The Seventh Circuit was correct in refusing to defer to the BIA in *S-E-G-*. There is no basis in the text of § 1101(a)(42)(A) for either the social visibility or particularity requirements. That provision defines a "refugee" to include an individual who is unwilling or unable to return to his country of ori-

gin “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42)(A). For purposes of interpreting the phrase “membership in a particular social group,” the social-visibility and particularity requirements, unlike the immutability requirement established in prior BIA opinions, cannot be justified by resort to the interpretive canon of *ejusdem generis*, because neither social visibility nor particularity is a shared feature of the other bases for persecution identified in § 1101(a)(42)(A)—many of which involve characteristics that can be either invisible (*e.g.*, religion) or shared by large and amorphous groups (*e.g.*, political opinion). *Cf. Acosta*, 19 I. & N. Dec. at 233 (relying on the canon of *ejusdem generis* as the basis for the immutability requirement).

Moreover, when the BIA first adopted the social visibility requirement, it did so by erroneously stating that the UNHCR Social Group Guidelines supports such a requirement. *See In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74 (BIA 2007) (citing *In re C-A-*, 23 I. & N. Dec. 951, 956 (BIA 2006)). UNHCR has repeatedly communicated to the BIA that it erred and that its guidelines do not contain any such the requirement. *See* Brief of the United National High Commissioner for Refugees as Amicus Curiae in Support of

Petitioner, *Valdiviezo-Galdamez v. Holder*, No. 08-4564 (A07-447-286) (3d Cir. Apr. 14, 2009); Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner, *Granados-Gaitan v. Holder*, No. 10-1724 (8th Cir. July 17, 2010).

C. Petitioners Have a Well-Founded Fear of Future Persecution.

a. In order to establish a well-founded fear of future persecution, asylum applicants need to show both 1) a “subjectively genuine fear”; and 2) an “objectively reasonable” fear. *Zhao v. Mukasey*, 540 F.3d 1027, 1029 (9th Cir. 2008). “The subjective component is satisfied by credible testimony The objective prong is satisfied either by a rebuttable presumption arising from a showing of past persecution, or by a showing of a good reason to fear future persecution based on credible, direct, and specific evidence in the record of facts that would support a reasonable fear of persecution.” *Id.* (quotations omitted). In this jurisdiction, asylum applicants need not demonstrate that it is more likely than not that they will be persecuted in order to establish a well-founded fear; rather “[e]ven a ten percent chance of [future] persecution may establish a well-founded fear.” *Id.* at 1029-30; *see also Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001).

b. But for the nexus requirement, the Immigration Judge would have granted asylum. R106; *see pp. 18-19, supra*. In light of the BIA's error with regard to nexus, *see pp. 27-51, supra*, and the Immigration Judge's undisputed finding of subjective and objective fear of future persecution, R104-06, this Court should rule as a matter of law that petitioners qualify for refugee status due to a well-founded fear of future persecution.

c. The BIA held that because the nexus requirement was not met, the ██████████ had "failed to satisfy the burden of proof required for asylum," and therefore rejected their claims in their entirety. R4. In its opinion, the BIA did not specifically articulate its reasons for denying ██████████ claim of well-founded fear of *future* persecution. *See* R3-4. Instead its analysis concerned primarily whether the ██████████ could support a claim of past persecution. With respect to future persecution, the BIA appears to have relied entirely on the IJ. *See* R4.

d. Where the BIA does not articulate the reasons for its holding and appears to rely heavily on the Immigration Judge's opinion, the Court should look to the Immigration Judge's opinion for insight as to the BIA's reasoning: "the lack of analysis that the BIA opinion devoted to the issue at hand—its simple statement of a conclusion—also suggests that the BIA gave

significant weight to the IJ's findings. In light of that ambiguity, we will also look to the IJ's oral decision as a guide to what lay behind the BIA's conclusion." *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1197 (9th Cir. 2000); *see also Zhao*, 540 F.3d at 1029 (because, *inter alia*, the BIA "did not express any disagreement with it, we review the IJ's decision as if it were that of the Board") This Court should therefore review the Immigration Judge's opinion regarding fear of future persecution.

e. The Immigration Judge found that both the subjective and objective components of well-founded fear of persecution were met. R105-06. The Immigration Judge cited Dr. Vanden's testimony that "there is every reason to believe that [the [REDACTED] family] would continue to be targeted if they return to El Salvador because that is the method of the gangs. [The expert] said that they could be found wherever they move, and since the family has maintained that they would continue to evangelize, then they would be of interest to these gangs." R99.

f. The BIA did not contest the Immigration Judge's finding of subjective and objectively reasonable fear of future persecution. As a result, if this Court finds that the [REDACTED] fear persecution on account of religion or

particular social group, *see* pp. 27-51, *supra*, it should find that the [REDACTED] are eligible for asylum.¹⁵

D. In the Alternative, [REDACTED] and [REDACTED] Are Entitled to Withholding of Removal and Protection Under the Convention Against Torture.¹⁶

a. The grant of withholding of removal is mandatory where an applicant demonstrates a “clear probability” that his “life or freedom would be threatened” on account of a protected ground if returned to his country of origin. 8 U.S.C. § 1231(b)(3)(A).¹⁷ As discussed above, there is a “clear probability” that Mrs. [REDACTED] and [REDACTED] will be in danger if they are forced to return to El Salvador based on a protected ground. Thus, they are in the alternative entitled to withholding of removal.

¹⁵ In the event that the Government contends, and this Court ultimately concludes, that the BIA did not adequately address whether the [REDACTED] have a well-founded fear of future persecution, the [REDACTED] would be entitled to a remand to the BIA. *See Benjamin v. Holder*, 579 F.3d 970 (9th Cir. 2009) (holding that the BIA erred in failing to consider the petitioner’s claim of well-founded fear of future persecution, and remanding the case for the BIA to decide that issue in the first instance).

¹⁶ Derivatives are not permitted to remain in the country for primary applicants awarded withholding of removal or relief under CAT.

¹⁷ In the Ninth Circuit, “clear probability” under the statute means “more likely than not.” *Wakkary v. Holder*, 558 F.3d 1049, 1060 (9th Cir. 2009). The likelihood of torture need not be tied to a protected ground as with the other forms of relief described above. *Id.*

b. To qualify for protection under the CAT, an applicant must show “that it is more likely than not that he . . . would be tortured if removed to the proposed country of removal.” 8 C.F.R. § 208.16(c)(2) (2011). Torture includes “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him . . . information or a confession, punishing him . . . or intimidating or coercing him.” 8 C.F.R. § 208.18(a)(1) (2011). The torture must be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” *Id.* Here, it is more likely than not—if not absolutely certain—that Mrs. ██████████ and ██████████ will be tortured if returned to El Salvador.

The BIA denied the ██████████ eligibility under CAT on the grounds that they had not shown that the government of El Salvador acquiesces to the torture. However, the BIA did not consider evidence of country conditions in El Salvador. A CAT applicant may satisfy his burden with evidence of country conditions alone. *See Aguilar-Ramos v. Holder*, 594 F.3d 701, 706 (9th Cir. 2010) (holding that the failure of the BIA to consider evidence of country conditions in El Salvador constitutes reversible error and that evidence suggested that “gangs and death squads operate in El Salvador, and

that its government is aware of and willfully blind to their existence”). The record in this case contains country condition evidence that the El Salvadoran government has acquiesced to the gangs’ frequent acts of torture. *See, e.g.,* R. 512 (2008 Human Rights Report) (“[P]rotection of human rights was undermined by widespread violent crime, including gang-related violence, high levels of impunity of prosecution, and judicial corruption.”).

CONCLUSION

This Court should grant the Mercado family's petitions for review and remand to the BIA with an instruction to grant asylum.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD COUNT LIMITATIONS**

I, Ana C. Reyes, counsel for appellants and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, that the attached Brief of Appellants is proportionately spaced, has a typeface of 14 point or more, and contains 13,371 words.

ANA C. REYES