No. 05-552

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

MICHELLE THOMAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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In this case, the en banc Ninth Circuit, over the strongly worded dissent of four judges (Pet. App. 22a-29a), has cemented as circuit precedent a clear disregard for this Court's command in *INS* v. *Ventura*, 537 U.S. 12 (2002). In so doing, that court has adopted potentially far-reaching legal precedent governing aliens' eligibility for asylum as members of a "particular social group," 8 U.S.C. 1101(a)(42)(A), without any prior consideration of the question by the agency that Congress has expressly charged with interpreting and administering the immigration law.

That disregard for *Ventura* is part of a widespread pattern of such decisions by the Ninth Circuit. See Pet. 16-19. Indeed, the Ninth Circuit recently denied rehearing en banc in another case in which a panel announced yet another novel rule of asylum law—that an alien may obtain asylum based on harms suffered by her child—even though the Board of Immigration Appeals (Board) and immigration judge had not addressed that question. *Tchoukhrova* v. *Gonzales*, 430 F.3d 1222 (9th Cir. 2005). As the seven

judges dissenting from the denial of rehearing en banc explained:

> In *INS* v. *Ventura*, * * * the Supreme Court told us in no uncertain terms that the agency charged with administering the statute gets first crack at ruling on its construction. It has taken us less than three years to work our way around this rule.

Id. at 1223 (Kozinski, J., dissenting, joined by O'Scannlain, Tallman, Rawlinson, Bybee, Callahan, and Bea, JJ.).

Unable to defend that circumvention of Supreme Court precedent and usurpation of Executive Branch authority, respondents devote most of their brief in opposition to denying that the court of appeals ignored *Ventura*. That argument fails, as a straightforward reading of the *majority* opinion below (not to mention the dissent) reveals. Neither the Board nor the immigration judge in this case addressed whether respondents were persecuted on account of their membership in a "particular social group" consisting only of their immediate family. Indeed, one scours Board precedent in vain for *any* prior holding that select members of a nuclear family or, more precisely, victims of ordinary street crime united by their relation to a purportedly crime-inspiring in-law, constitute a "particular social group" under the immigration law. *Ventura* demands that such a significant expansion of asylum eligibility be considered by the expert agency in the first instance.

Given the importance of *Ventura* principles to the proper and efficient functioning of the immigration system, the sheer volume of immigration cases that arise within the Ninth Circuit, that court's en banc refusal to correct its own law, and the conflict between the decisions of other courts of appeals that have respected

Ventura and the Ninth Circuit's pattern of ignoring its command, this Court's intervention is necessary.

1. This Court's holding in *INS* v. *Ventura*, *supra*, was direct and straightforward: Congress has charged the Attorney General, not the courts, with interpreting and applying the immigration law in removal proceedings and "mak[ing] the basic asylum eligibility decision" in the first instance. 537 U.S. at 16. Accordingly, when a court of appeals identifies legal error by the agency, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation," rather than to decide the issue *de novo* "and to reach its own conclusions based on such an inquiry." *Ibid.* (quoting *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985)). For a court of appeals to go further and "independently create[] potentially far-reaching legal precedent" would "seriously disregard[] the agency's legally mandated role." *Id.* at 17.

a. Respondents argue repeatedly (*e.g.*, Br. in Opp. 7, 10-13, 15, 17, 19-22) that the court of appeals did not violate *Ventura* because it simply reversed "on an issue the agency decided in the first instance" (*id.* at 19) and that was "definitively decided by" the immigration judge (*id.* at 22). A plain reading of the decision below proves otherwise. Indeed, even the en banc majority candidly acknowledged that the immigration judge did not even "reference 'membership in a particular social group,'" Pet. App. 5a, and "did not properly characterize the social group claim, instead describing it as a claim based on racial persecution," *id* at 9a. Of course, in summarily affirming the immigration judge's decision, the Board did not address that question either. See *id.* at 51a-58a.

Moreover, the court of appeals' enterprising foray into an issue never addressed by the agency was the

focal point of the dissent, which stressed that "the issue whether a nuclear family, without more, is a 'particular social group' has never been vetted by the Board," Pet. App. 22a, and that the Board "has never considered whether a family such as the Thomas family *is* a 'particular social group,'" *id.* at 23a. Citing *Ventura*—which the en banc majority notably failed to cite until a number of pages *after* it had independently decided that the Thomas family is a "particular social group" (compare *id.* at 18a, with *id.* at 22a)—the four dissenting judges pointedly asserted that "[w]e have no business deciding [the particular social group] question without the BIA's having first addressed it because we owe deference to the BIA's interpretation and application of the immigration laws." *Id.* at 23a.

Respondents suggest (Br. in Opp. 7, 22) that the agency's resolution of the "particular social group" question was embodied in the immigration judge's general holding that respondents had failed to establish eligibility for asylum "on any of the five statutory grounds" (Pet. App. 73a-74a). That argument ignores the rest of the immigration judge's sentence, which states in full that respondents failed to demonstrate persecution "on any of the five statutory grounds *whether it is race or political opinion.*" *Ibid.* (emphasis added). Those are the only two grounds that the immigration judge understood to be before her, *id.* at 61a, 67a-72a, as the court of appeals itself acknowledged, *id.* at 5a, 9a & n.2.

b. Respondents next attempt to paint the court of appeals' decision as a "limited" and "cautious[]" (Br. in Opp. 7) holding only that "family membership may constitute membership in a 'particular social group'" (*id.* at 2 (quoting Pet. App. 2a)). But that argument simply ignores the succeeding twenty pages of the opinion, in which the en banc

majority went on to "hold"—without any citation to Board precedent, because there is none—"that the Thomas family constitutes a particular social group within the meaning of 8 U.S.C. § 1101(a)(42)(A)." Pet. App. 18a. In fact, it was that further doctrinal step—holding that a sub-familial unit of "persons related to Boss Ronnie" (but not including Boss Ronnie) *is* a "particular social group"—from which the dissent parted company. *Id.* at 22a-23a. And the court did not stop there. The majority went on to hold that the harm the respondents suffered was "specifically on account of the family relationship with Boss Ronnie." *Id.* at 19a.[1]

c. Respondents argue thirdly (Br. in Opp. 15) that *Ventura* was not violated because "specific and pre-existing agency pronouncements" dictated the conclusion that "persons related to Boss Ronnie" (Pet. App. 21a) constitute a "particular social group." Even if true, that assertion would not excuse the court's failure to remand to the Board to consider the application of its past law to this case. But it is not true. Notably absent from respondents' argument is any citation to such "specific and pre-existing agency pronouncements." All that respondents offer is the Board's decision in *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). That case, however, involved *taxi drivers*, not select family members, claiming to be a particular social group.

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[1] Respondents correctly note (Br. in Opp. 7, 21-22) that the court of appeals remanded remaining questions to the Board. But respondents make no effort to defend as a matter of law or logic the Ninth Circuit's selective adherence to *Ventura*, in this case or elsewhere. *Ventura*'s principles of agency deference are not optional, and they apply to all matters that "statutes place primarily in agency hands," 537 U.S. at 16, not just those that the Ninth Circuit chooses to leave for agency resolution in a particular case.

Furthermore, all that the Board said in *Acosta* was that the phrase "particular social group" implies "a group of persons all of whom share a common, immutable characteristic" and that shared characteristic "*might* be an innate one such as sex, color, or kinship ties." 19 I. & N. Dec. at 233 (emphasis added). The Board stressed that, given the potential breadth of the term, the "particular kind of group characteristic" that will constitute a "particular social group" is best determined on a "case-by-case basis." *Ibid.* Beyond that, the Board has only once actually relied upon kinship linkage in identifying a "particular social group," and then it was for a *clan* that enjoyed distinct social status and political recognition and the members of which shared uniquely identifying linguistic characteristics. See *In re H-*, 21 I. & N. Dec. 337, 340, 346 (BIA 1996).[2]

Nothing in that very limited precedent compelled the court of appeals' conclusion, nor would it have foreclosed the Board from holding that a sub-familial unit or some other subset of relatives, without more, is not a particular social group within the meaning of the immigration law.

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[2] Respondents only other citation (Br. in Opp. 13) is to *In re Heer*, No. A75 734 367 (BIA Apr. 1, 2003), which is an unpublished, non-precedential decision by a single Board member that simply followed an earlier Ninth Circuit decision, apparently unaware that the decision had been vacated. See *id.* at 2 (applying *Chen* v. *Ashcroft*, 289 F.3d 1113, vacated, 314 F.3d 995 (9th Cir. 2002)); see also *In re Amado & Monteiro*, 13 I. & N. Dec. 179, 181 (BIA 1969) (Board considers itself bound to apply the case law of the circuit in which a case is adjudicated); see generally *Chan* v. *Reno*, 113 F.3d 1068, 1073 (9th Cir. 1997) ("[B]y the INS's own regulations, 'unpublished decisions carry no precedential weight. Moreover, 'unpublished precedent is a dubious basis for demonstrating the type of inconsistency which would warrant rejection of deference.'") (citation omitted). Moreover, in the *Heer* case, the familial relationship overlapped with political persecution. Slip op. 2 ("[T]he police targeted the respondent in order to gain information about her father and possibly to punish her because of her father's political activities.").

For that reason, the court's observation (Pet. App. 20a) —echoed by respondents (Br. in Opp. 5)—that nothing in the Board's precedent "suggest[s] that membership in a family is insufficient, standing alone, to constitute a particular social group" misses the point. Nothing in Board precedent holds that family membership alone is *sufficient* either, and there is no principle of administrative law that assumes that an agency adopts, in advance, all possible applications of a statutory term that its precedents have not expressly foreclosed. Rather, under *Ventura* and the traditional principles of judicial review of agency action that it reaffirms, such silence on questions the Board "has not yet considered" must be left for that agency to decide "in light of its own expertise." 537 U.S. at 17.

d. Respondents argue that, even if the Board did not address the particular social group question, the conclusion that some set of persons related to Boss Ronnie is a particular social group (Pet. App. 21a) "flows directly" from prior Board cases "pointing to the conclusion"—in respondents' characterization—that family "as a general matter constitute[s] a particular social group" (Br. in Opp. 10, 21). Whether select nuclear family members united solely by an imputed criminal grudge stand on the same footing, for purposes of identifying a particular social group, as a socially, politically, and linguistically distinct clan is a profoundly debatable proposition. See Pet. 25-29. It is also beside the point. What novel interpretations of "particular social group" flow from or are pointed to in Board precedent are for the Board to decide in the first instance. Congress has "entrusted" the Attorney General "to make th[at] basic asylum eligibility decision," and the Ninth Circuit's "judicial judgment cannot be made to do service for [that]

administrative judgment." *Ventura*, 537 U.S. at 16 (quoting *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943)).[3]

e. Lastly, respondents contend (Br. in Opp. 20) that *Ventura* does not apply because the particular social group question was technically exhausted before the agency (albeit by the most skeletal of presentations, see Pet. 9 n.1). That is wrong. Indeed, the question of "changed country conditions" that provided the basis for remand in *Ventura* also had been presented to the agency. 537 U.S. at 15. But that was not enough. *Ventura* required remand to permit the Board actually to *decide* that question in the first instance and to receive additional evidence if it chose to do so. *Id.* at 16-18. Thus, contrary to respondents' arguments and the court of appeals' approach in this case, agency records are not *Anders* briefs[4]—courts may not seize upon issues that "merely lurk in the record,"[5] and then "independently create[] potentially far-reaching legal precedent" about "highly complex and sensitive" asylum-eligibility matters without permitting the agency to address the issue in the first instance, *Ventura*, 537 U.S. at 17.

2. Respondents' brief confirms the inter-circuit conflict created by the Ninth Circuit's decision. See Br. in Opp. 14 n.19, 23 n.27. Indeed, in *Konan* v. *Attorney General*, No.

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[3] See, *e.g.*, *De Leon De Leon* v. *Gonzales*, No. 04-73458, 2005 WL 3416200, at *1 (9th Cir. Dec. 13, 2005) (where alien met and married his wife *after* coming to the United States, court reverses Board decision and remands for Board to address whether harm to the alien's father-in-law in Guatemala "establish[es] a well-founded fear of persecution based on a protected ground" under *Thomas*); *Rodas* v. *Gonzales*, No. 02-73083 (9th Cir. Oct. 11, 2005) (withdrawing prior panel decision upholding Board decision, see 103 Fed. Appx. 145 (9th Cir. 2004), and reversing and remanding for Board to consider, under *Thomas*, whether harm to husband and nephew provides a ground for relief).

[4] *Anders* v. *California*, 386 U.S. 738 (1967).

[5] *Webster* v. *Fall*, 266 U.S. 507, 511 (1925).

04-3467, 2005 WL 3556909 (Dec. 30, 2005), the Third Circuit recently took the opposite tack from the Ninth Circuit here and remanded to the Board the question of whether "immediate family member[s] of a gendarme" constitute a particular social group because "the IJ did not discuss [that] separate claim." *Id.* at *4. In so holding, that court, citing *Ventura*, acknowledged what the en banc court here ignored: the "bedrock principle of administrative law that judicial review of an agency's decision is limited to the rationale that the agency provides." *Ibid.* Thus, had respondents' case arisen in the Third Circuit, the Executive Branch's interpretive authority under the immigration law would have been preserved rather than ignored.

The Second Circuit likewise has expressly disagreed with the Ninth Circuit's refusal to hew to *Ventura*, finding that court's practice "to be in tension with the Supreme Court's explanation in *Ventura* of the rationale for remanding." *Chen* v. *Department of Justice*, 426 F.3d 104, 117 (2005).[6]

Respondents, for their part, assert (Br. 24 n.27) that two other circuits have taken a somewhat more restrictive view of *Ventura*'s operation. See *Zhao* v. *Gonzales*, 404 F.3d 295, 311 (5th Cir. 2005) (describing *Ventura*'s remand language as "precatory," rather than "categorical"); *Ghebremedhin* v. *Ashcroft*, 392 F.3d 241, 243 (7th Cir. 2004)

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[6] See *Butt* v. *Gonzales*, 429 F.3d 430, 437 (3d Cir. 2005) (citing *Ventura* and remanding to "give the IJ an opportunity to revisit the credibility issue on remand"); *Gao* v. *Gonzales*, 424 F.3d 122, 130 (2d Cir. 2005) ("The failure of the IJ to analyze the issue of imputed political opinion requires us to remand the case to the BIA for that purpose."); compare *Vorobets* v. *Gonzales*, No. 04-75780, 2005 WL 3361266, at *1 (9th Cir. Dec. 12, 2005) (reversing Board decision that the alien did not suffer past persecution, and then holding, in the first instance, that a well-founded fear of future persecution exists and that the alien is eligible for asylum).

(where the record compelled a finding of future persecution, "we do not agree that *Ventura* stands for the broad proposition that a court of appeals must remand a case for additional investigation or explanation once an error is identified"). But that further disunity underscores, rather than diminishes, the need for this Court's review.[7]

Accordingly, this Court should grant review to clarify *Ventura*'s application and to prevent the continued "end-run around *Ventura*," *Tchoukhrova*, 430 F.3d at 1227, that the Ninth Circuit's en banc decision here ensconces in circuit law, that ten Ninth Circuit judges have decried, *ibid.*; Pet. App. 22a-29a, 47a-50a, and that the Second and Third Circuits have rejected.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JANUARY 2006

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[7] Respondents' argument (Br. in Opp. 23) that the Court should deny review until the Board makes a "final determination" on respondents' asylum claims is without merit. This Court granted review and summarily reversed in *Ventura* before any such final determination. See *Ventura* v. *INS*, 264 F.3d 1150, 1158 (9th Cir. 2001), rev'd, 537 U.S. 12 (2002). Furthermore, if the Board, constrained by circuit precedent, grants asylum, there will be no further opportunity for judicial review. That is particularly problematic when, as here, the denial of proper agency deference is embodied in en banc circuit precedent. Nothing the Attorney General does on remand could diminish or repair the harm flowing from that usurpation of Executive Branch authority and disregard of Congress's statutory charge that the Attorney General interpret and apply immigration law in the first instance in removal proceedings. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); 8 U.S.C. 1103(a)(1).