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UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

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

RESPONDENT'S BRIEF

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INTRODUCTION

Congress has directed that asylum is available to those who fear persecution "on account of … membership in a particular social group." INA § 101(a)(42)(A). For over thirty years, the Department of Justice, the Department of Homeland Security, and the federal courts have uniformly concluded that particular social groups may be formed on the basis of kinship ties.

On December 3, 2018, Matthew G. Whitaker issued an order directing the Board of Immigration Appeals ("Board") to refer this case to him and directing the parties to submit briefs on the following question: "Whether, and under what circumstances, an alien may establish persecution on account of membership in a 'particular social group' under 8 U.S.C. § 1101(a)(42)(A) based on the alien's membership in a family unit." *Matter of L-E-A-*, 27 I&N Dec. 494 (A.G. 2018) (hereinafter "*L-E-A- II*").

Because an immediate family relationship is a trait upon which all societies draw significant distinctions, and because such relationships are clearly defined and cannot be changed, an immediate family unit is a particular social group. Persecution is on account of one's family membership when an immediate family relationship is at least one central reason for the harm. The Attorney General should reaffirm these principles, vacate the decision of the Board, and remand.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Respondent, [redacted], first came to the United States in 1998. I.J. at 3. In 2009, while [redacted] was still in the United States, La Familia Michoacana, a powerful drug cartel, attempted to extort his father by falsely claiming to have kidnapped [redacted] for ransom. Exh. 3 at 12-a. However, this attempt failed because [redacted] father was able to contact his son and verify that he had not been kidnapped. *Id.* In May 2011, [redacted] returned to Mexico pursuant to a grant of voluntary departure, I.J. at 3, and went to live at his parents' house in Mexico City. Tr. at 25-26. The same day that [redacted] returned, his father warned him that he had received a threat

from two men associated with La Familia Michoacana. Tr. at 27. Specifically, the men threatened to retaliate against [redacted] father for refusing to sell drugs out of his store by targeting his family members. Tr. at 27-28. [redacted] father, a former police officer, believed that his son was especially vulnerable to cartel attacks because he was the only other male in the family. Tr. at 27.

Three days after [redacted] return to Mexico, he went out of the house with his cousin and nephew to run an errand. I.J. at 4. Gunshots rang out, and [redacted] sought cover. *Id.* A black SUV drove by, and the same SUV would be present during subsequent threats and attacks on [redacted]. *Id.* For this reason, [redacted] came to believe that the attempted shooting was carried out by the same men who threatened him and that the shots were directed at him. *Id.*

One week after the shooting, La Familia Michoacana approached [redacted], who demanded that he sell drugs for them out of the store. *Id.* [redacted] refused, and the cartel members threatened him. *Id.*

Then, a week after the cartel members demanded that he sell drugs for them, four masked men in an SUV attempted to kidnap [redacted], but he was able to escape. I.J. at 5. After this attempted kidnapping, [redacted] left Mexico City and fled to the United States. *Id.*

[redacted] was served with a Notice to Appear on August [redacted] 2011, ordering him to appear before an Immigration Judge. Exh. 1. This document omitted the location of the hearing and informed [redacted] that the time and date of the hearing were "to be set." *Id.*

[redacted] timely applied for asylum. I.J. at 2. The Immigration Judge accepted his testimony as credible, I.J. at 8, but denied the application. Among the reasons provided by the Immigration Judge for denying the application for asylum was that the cartel's focus was on the store and not on [redacted] family. I.J. at 9. On that basis, the Immigration Judge held that [redacted] had not been targeted on account of a protected ground. *Id.*

[redacted] timely appealed, and the Board of Immigration Appeals solicited supplemental and amicus briefing relating to the circumstances under which a particular social group based on family satisfies the nexus requirement for asylum. The Board first held that whether a family will serve as the basis for a cognizable particular social group "will depend on the nature and degree of the relationships involved and how those relationships are regarded by the society in question." *Matter of L-E-A-*, 27 I&N Dec. 40, 43 (BIA 2017) (hereinafter "*L-E-A- I*"). Under the facts of this case, and in consideration of the agreement of the parties, the Board had "no difficulty identifying the respondent, a son residing in his father's home, as being a member of the particular social group comprised of his father's immediate family." *Id.* The "key issue," therefore, was whether the harm [redacted] experienced and fears is on account of his membership in that particular social group. *Id.*

Regarding that issue, the Board concluded that the Immigration Judge had not clearly erred when she found that the cartel's motive to sell contraband in the family store was a central reason for its actions against [redacted]. *Id.* at 46-47. While the Board acknowledged that [redacted] father was the initial object of the cartel's attempts at coercion, it also noted the cartel's efforts to coerce [redacted] himself into selling drugs. *Id.* at 46. The Board held that any motive to harm [redacted] because he was a member of his father's family was, at most, incidental. *Id.* Accordingly, the Board dismissed [redacted] appeal from the denial of his application for asylum. *Id.* at 47. The Board determined that further findings of fact were necessary to evaluate [redacted] claim for withholding of removal under the Convention Against Torture. *Id.* The Board further found that remand was appropriate for further evaluation of [redacted] claim for withholding of removal under INA § 241(b)(3) in light of the Ninth Circuit's decision in *Barajas-Romero v. Lynch*, 846

F.3d 351 (9th Cir. 2017). Those remanded proceedings remain pending, but are stayed pursuant to the Acting Attorney General's order. *L-E-A- II*, 27 I&N Dec. at 494.

On November 7, 2018, Attorney General Jefferson B. Sessions resigned at the request of the President. The same day, the President invoked the Federal Vacancies Reform Act, 5 U.S.C. § 3345, to designate Matthew G. Whitaker as Acting Attorney General. Mr. Whitaker was Attorney General Sessions's chief of staff at the Department of Justice, a position that does not require Senate confirmation. On February 14, 2019, William P. Barr was confirmed by the Senate and sworn in as Attorney General.

William P. Barr has a history of demonstrated bias towards immigrants in general and asylum seekers in particular. When he was Attorney General under George H.W. Bush he detained HIV-positive Haitian asylum seekers at Guantanamo Bay. Reflecting on that decision in 2001, Barr stated, "You want 80,000 Haitians to descend on Florida several months before the election? Come on, give me a break. Governor [Lawton] Chiles, the Democratic Governor, is supporting us in this policy? Florida will go ape. Now if you want to give me Fort something-or-other in Arkansas and let me put them there, I'll be glad to put them on American soil." UVA Miller Center, *William P. Barr Oral History, Assistant Attorney General; Deputy Attorney General; Attorney General*, https://millercenter.org/the-presidency/presidential-oral-histories/william-p-barr-oral-history-assistant-attorney-general (Apr. 5, 2001). During that same interview, Barr went on to demonstrate his disdain for the statutorily mandated procedural protections for asylum system, stating, "One of the biggest problems we have with immigration—or had, I think it's still a problem—is the abuse of the asylum laws. People would get on the airplane, they'd come to the United States, and then they'd claim asylum as soon as the airplane touched down. Under our laws, we have this very robust process that they have to go through." *Id.*

Barr recently co-authored an op-ed in which he praised former Attorney General Sessions for "attack[ing] the rampant illegality that riddled our immigration system, breaking the record for prosecution of illegal-entry cases." William Barr et al., *We Are Former Attorneys General. We Salute Jeff Sessions.*, Washington Post, Nov. 7, 2018, https://www.washingtonpost.com/opinions/jeff-sessions-can-look-back-on-a-job-well-done/2018/11/07/527e5830-e2cf-11e8-8f5f-a55347f48762_story.html?utm_term=.a2816cdf88a9.

In Barr's Senate confirmation hearing,[1] in responding to a question by Senator Blumenthal on January 15, 2019, Barr would not admit that there was anything wrong with detaining Haitians in Guantanamo. Instead, he responded, "Well, I think it's always -- given the abuses of the asylum's system right now, I would always prefer to process asylum seekers outside the United States." And in responding to another question about asylum at his confirmation hearing, Mr. Barr responded to a question from Senator Ernst that, "people are abusing the asylum system, coming in, they're being coached what to say." And again, responding to a question by Senator Lee, Barr demonstrated an utter disregard for the critical protections provided by the U.S. asylum system, stating, "And just to allow people to come crashing in, be told that if you say this you'll be treated as an asylum and then you don't have to -- you don't have to appear for your EAE (ph) [EOIR] hearing or whatever, it's just an abuse of the system."

STATEMENT OF THE ISSUES

1. Is an immediate family unit a "particular social group" as that term is used in INA § 101(a)(42)?

[1] An official transcript of the Senate Judiciary Committee's hearing on Attorney General Barr's nomination is not yet available. Video of the hearing is available on the committee's website. Senate Judiciary Committee, *Nomination of the Honorable William Pelham Barr to be Attorney General of the United States*, https://www.judiciary.senate.gov/meetings/nomination-of-the-honorable-william-pelham-barr-to-be-attorney-general-of-the-united-states (Jan. 15, 2019).

2. Under what circumstances has an applicant for asylum established that his fear of persecution is on account of a particular social group consisting of his family?
3. Would any change to the long-standing principle that family units constitute a particular social group be impermissibly retroactive?
4. Does 8 C.F.R. § 1003.1(h)(1)(i) permit the Attorney General to direct the Board to refer a case for review if the Board has already divested itself of jurisdiction by ordering a case remanded?
5. Is this case properly before Attorney General Barr where the case was referred by Acting Attorney General Matthew G. Whitaker, who was not the Attorney General and not properly appointed as Acting Attorney General?
6. Would Attorney General Barr's public statements cause a reasonable person to conclude that his impartiality might reasonably be questioned, requiring recusal?
7. Does jurisdiction vest with the Immigration Court when the Department of Homeland Security files a charging document that does not contain the information required by INA § 239(a)(1)(G)(i) and 8 C.F.R. § 1003.15?

STANDARD OF REVIEW

The Attorney General's review of legal issues is plenary. *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018). However, Attorneys General have not engaged in fact-finding in cases referred under 8 C.F.R. § 1003.1(h). *See id.* at 346 (remanding to the Immigration Judge for further proceedings consistent with the legal principles articulated in the Attorney General's opinion). A persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and is reviewed for clear error. *Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011). However, if an Immigration Judge's findings of fact are incomplete in light of the governing legal standard, remand is necessary. *Matter of S-H-*, 23 I&N Dec. 462, 465 (BIA 2002).

SUMMARY OF THE ARGUMENT

Family units are "particular social group[s]" as that term is used in INA § 101(a)(42). Thirty-four years of precedent, international law sources, and a straightforward application of the three-prong test for determining a valid particular social group all lead to this conclusion.

The Board of Immigration Appeals, in its very first articulation of the core characteristics of a particular social group, stated in *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985), that a particular social group's common characteristic must be fundamental to an individual's identity and proffered "kinship ties" as a quintessential example. For the past 34 years, the Board has continued to treat family ties as a touchstone for the meaning of the phrase "particular social group." Likewise, the federal courts have uniformly concluded that families are particular social groups.

Further, family is specifically mentioned as a particular social group in guidelines promulgated by the United Nations High Commissioner for Refugees (UNHCR). The Attorney General should not upset the United States' longstanding approach to complying with its treaty obligations under the 1967 United Nations Protocol Relating to the Status of Refugees.

Finally, family units possess the three characteristics of a cognizable particular social group: immutability, particularity, and social distinction. Family units are immutable because a person cannot change his or her family ties. Family units are particular because commonly accepted configurations of births and marriages provide a clear benchmark for who is, and is not, included within any particular family. This is particularly true of the parent-child relationship at issue in this case. Finally, family units are a universal and fundamental building block of society, and are thus socially distinct. Accordingly, the Attorney General should reaffirm the longstanding principle of asylum law that family units are particular social groups.

Persecution is on account of one's family unit, and, therefore, is on account of one's membership in a particular social group, when at least one central reason for the harm is the person's

membership in his or her family. When a persecutor purposefully employs a tactic of targeting immediate family members in an effort to coerce or retaliate against a primary target, family membership is among the central reasons for the persecution. In this case, the Board, like the Immigration Judge, failed to give reasoned consideration to potentially dispositive evidence that drug cartels in Mexico had threatened to retaliate against [redacted] father by kidnapping or killing his son, [redacted]. Therefore, the Attorney General should reaffirm the principle that [redacted] immediate family is a particular social group, but he should vacate the Board's order denying asylum and remand to the Immigration Judge for further proceedings.

In the alternative, if the Attorney General departs from the Justice Department's longstanding recognition that family units are particular social groups, this interpretation should not be given retroactive effect. If an agency changes its interpretation of the law, the Ninth Circuit employs a five factor balancing test to determine whether that new interpretation may be applied retroactively. *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322, 1333 (9th Cir. 1982). Each of those factors precludes the retroactive application of any new definition that excludes families from the scope of the phrase "particular social group." First, this is not an issue of first impression. Second, disrupting this substantially well-settled area of law weighs against retroactive enforcement. Third, a person in [redacted] position would rely on the Board's continual affirmation of the existing rule. Fourth, deportation is a severe burden. Finally, the government's interest in retroactive enforcement is weak where it has lived with the preexisting rule for several decades.

In addition to answering the questions posed by the referral order in this case, it is also necessary to address several reasons why, ultimately, the referral order should be vacated. First, the Attorney General referral regulations do not permit the referral of a case over which the Board has divested itself of jurisdiction. Second, the referral order is void because the appointment of

Matthew G. Whitaker as Acting Attorney General violated 28 U.S.C. § 508 and ran afoul of the Appointments Clause of the United States Constitution. Since Mr. Whitaker was not a duly appointed Attorney General, or even a lawfully appointed Acting Attorney General, he lacked authority to refer this case to himself. And, finally, even if the referral had been appropriate, the newly appointed Attorney General, William P. Barr, has made public statements demonstrating his bias against asylum seekers which require his recusal from this case.

One final question prevents the Attorney General from acting in this case. The Immigration Court, and, by extension, the Attorney General, never had jurisdiction in this case because the Notice to Appear that purported to initiate these removal proceedings did not comply with INA § 239(a) and 8 C.F.R. § 1003.15. Under the Supreme Court's recent decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), a document that does not include the statutorily enumerated information is not a "notice to appear." Accordingly, jurisdiction never vested with the Immigration Court and the Attorney General is constrained to enter an order terminating removal proceedings for lack of jurisdiction.

ARGUMENT

I. Family units are particular social groups.

The principle that family units[2] are particular social groups is a well-settled point of law. The Board of Immigration Appeals has repeatedly said so for over thirty years. The courts of appeals are unanimous. And, as previously conceded by the Department of Homeland Security in

[2] [redacted] fear of persecution is on account of his membership in his immediate family. The parties agree that the question of whether more extended family relationships can define a particular social group may depend on the society in question. *See* DHS April 21, 2016 Supplemental Brief at 9. Because social group determinations must be made on a "case-by-case basis," *Matter of M-E-V-G-*, 26 I&N Dec. 227, 242 (BIA 2014), and because the complex questions raised by claims involving more extended family relationships are not presented here, the Attorney General should observe the traditional judicial practice of reserving such a question until it is presented in an appropriate case. *Cf. White v. Woodall*, 572 U.S. 415, 432 (2014) ("The Court often identifies

this case, immediate family relationships will define particular social groups in "virtually all societies." DHS April 21, 2016 Supplemental Brief at 7-9. This longstanding rule of law must be reaffirmed.

A. For over thirty years, the Board has affirmed that kinship ties form the basis of particular social groups.

In 1985, the Board in *Matter of Acosta* held that "any characteristic that defines a particular social group must be immutable, meaning it must be a characteristic that the members of the group either cannot change or should not be required to change because it is fundamental to their individual identities …." 19 I&N Dec. 211, 233 (BIA 1985). Since this very first pronouncement on the contours of the phrase "particular social group," "kinship ties" have been cited as a quintessential example. *Id.*

Acosta's reference to kinship ties as an example of a valid particular social group was not an aberration. Virtually every time the Board has clarified the concept of "particular social group," it has held up families as the paradigmatic example. *See Matter of H-*, 21 I&N Dec. 337, 342 (BIA 1996) (*en banc*) (noting that "clan membership … is inextricably linked to family ties"); *Matter of Kasinga*, 21 I&N Dec. 357, 365-66 (BIA 1996) (*en banc*) (citing *Matter of H-* for the proposition that "identifiable shared ties of kinship warrant characterization as a social group"); *Matter of V-T-S-*, 21 I&N Dec. 792, 798 (BIA 1997) (*en banc*) (analogizing the group "Filipino[s] of mixed Filipino-Chinese ancestry" to "kinship ties"); *Matter of C-A-*, 23 I&N Dec. 951, 955 (BIA 2006) (stating that "[s]ocial groups based on … family relationship are generally easily recognizable and

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questions that it is *not* answering in order to clarify the question that it *is* answering.") (emphasis in original); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2782 n.40 (2014) (refusing to opine beyond a statute's application to the factual scenario presented). This brief uses the term "family units" to denote immediate families, *i.e.* a group of people consisting of parents and their children or a married couple.

understood by others to constitute social groups"); *Matter of M-E-V-G-*, 26 I&N Dec. 227, 240 (BIA 2014) (noting that the social group in *H-* was "inextricably linked to family ties"); *Matter of W-G-R-*, 26 I&N Dec. 208, 216 (BIA 2014) (same). Each time that the Board has refined the definition of particular social group over the past 34 years, it has returned to family ties as the touchstone for this protected ground.

B. Courts of appeals are unanimous in holding that family units are particular social groups.

In addition to the Board, the courts of appeals have uniformly approved of the proposition that family units are particular social groups. Several courts of appeals have made this holding in no uncertain terms. The First Circuit says "there can, in fact, be no plainer example of a social group based on common, identifiable characteristics than that of the nuclear family." *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993). The Ninth Circuit, where this case arises, has expressly called family units "prototypical," *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986), and "quintessential," *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015), particular social groups. The Fourth Circuit has agreed that the family provides a prototypical example of a particular social group. *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011). The Sixth, Seventh, and Eighth Circuits have found that families are particular social groups. *See Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009) ("[A] family is a 'particular social group' if it is recognizable as a distinctive subgroup of society."); *Ayele v. Holder*, 564 F.3d 862, 869 (7th Cir. 2009) ("Our circuit recognizes a family as a cognizable social group under the INA."): *Bernal-Rendon v. Gonzales*, 419 F.3d 877, 881 (8th Cir. 2005) ([P]etitioners correctly contend that a nuclear family can constitute a social group …."). The Second Circuit has deferred to the Board's unambiguous holding in *Matter of H-*, 21 I&N Dec. at 342, that a family may constitute a particular social group. *Vumi v. Gonzales*, 502 F.3d 150, 155 (2d Cir. 2007). The remaining circuits have, at a minimum,

approvingly recited that portion of *Acosta* that holds up "kinship ties" as an example of a valid basis for social group definition. *Rivera-Barrientos v. Holder*, 666 F. 3d 641, 648 (10th Cir. 2012); *Castillo-Arias v. U.S. Att'y Gen.*, 446 F. 3d 1190, 1193 (11th Cir. 2006); *Ontunez-Tursios v. Ashcroft*, 303 F. 3d 341, 362 (5th Cir. 2002); *Fatin v. INS*, 12 F. 3d 1233, 1239-40 (3d Cir. 1993). The Attorney General should not depart from the settled consensus among the courts of appeals that family is a particular social group.

C. The United Nations High Commissioner for Refugees (UNHCR) Recognizes Family as a Particular Social Group.

United States refugee and asylum law is rooted in international standards and obligations. Under these international obligations, the United States is prohibited from returning a refugee to a country where he or she would be persecuted. United Nations Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 150, 176; *see also* INA § 241(b)(3). As the Supreme Court has recognized, "If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, to which the United States acceded in 1968." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987). Given that the United States asylum system is based on international law, the Ninth Circuit has found the "United Nations definition of what factors are relevant in determining refugee status are particularly significant in analyzing [former INA §§ 243(h) and 208(a)] claims, because Congress specifically passed the Refugee Act of 1980 with the intent of bringing United States statutory provisions concerning refugees into conformity with the provisions of the United Nations Convention Relating to the Status of Refugees." *Damaize-Job v. INS*, 787 F.2d 1332, 1336 n.5 (9th Cir. 1986).

The Attorney General and the Board have also found it instructive to look at international law when interpreting U.S. asylum law. *See Matter of Q-T-M-T-*, 21 I&N Dec. 639, 644 (A.G. 1996) (citing UNHCR Handbook in case analyzing particularly serious crime); *Matter of M-E-V-G-*, 26 I&N Dec. 227, 248 (BIA 2014) (finding UNHCR guidelines to be a "useful interpretative aid," though not binding on the Attorney General, Board, or federal courts); *Matter of Negusie*, 27 I&N Dec. 347, 359 (BIA 2018) (noting consistency in approach with UNHCR guidelines); *Matter of Acosta*, 19 I&N Dec. 211, 221 (BIA 1985) (finding UNHCR guidelines to be a "useful tool to the extent that it provides us with one internationally recognized interpretation of the Protocol").

The UNHCR[3] guidelines define membership in a particular social group as "a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights." UNHCR, *Guidelines On International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, May 7, 2002, ¶ 6, *available at* https://www.unhcr.org/3d58de2da.html. In discussing these two different alternative analyses, the UNHCR guidelines recognize "family" as constituting a particular social group under both approaches. That is, family is both cognizable under an immutability test and under a "perceived group" test. *Id.* at ¶¶ 6-7. A longer document analyzing international particular social group analysis as part of the 50th anniversary of UNHCR

[3] The United Nations High Commissioner for Refugees (UNHCR) is the sole international United Nations agency entrusted by the U.N. General Assembly with the responsibility of ensuring international protection be provided to refugees across the globe and, together with governments, to seek permanent solutions to their problems. Statute of the Office of the UNHCR ¶ 1 U.N. Doc. A/RES/428(V) (Dec. 14, 1950), *available at* http://www.unhcr.org/3b66c39e1.html.

concluded that "family is properly understood as constituting a particular social group for Convention purposes, regardless of the particular context to the claim." Michelle Foster, *UNHCR, Legal and Protection Policy Research Series, The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments Relating to 'Membership of a Particular Social Group,'* Aug. 2012, at 57, *available at* https://www.unhcr.org/protection/globalconsult/4f7d8d189/25-ground-clarity-comparative-study-jurisprudential-developments-relating.html. The United States should continue to comport with international standards and reaffirm that family is a cognizable particular social group.

D. Family units are immutable, particular, and socially distinct.

Even if the issue had not been addressed extensively by the Board and the federal courts, the straightforward application of this agency's precedents leads to the conclusion that family units are particular social groups. Under the three part test adopted by the Board in *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), and recently endorsed by the Attorney General in *Matter of A-B-*, 27 I&N Dec. 316, 319 (A.G. 2018), a particular social group is: "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct in the society in question." *M-E-V-G-*, 26 I&N Dec. at 237; *accord Reyes v. Lynch*, 842 F.3d 1125, 1129 (9th Cir. 2016), *cert. denied sub nom. Reyes v. Sessions*, 138 S. Ct. 736 (2018). In every society in the world,[4] immediate families satisfy these three criteria.

[4] Generally, an adjudicator must assess a proposed particular social group on a case-by-case basis. *See W-G-R-*, 26 I&N Dec. at 214-15; *M-E-V-G-*, 26 I&N Dec. at 242-43, 251; *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014). While it may be technically correct to instruct immigration judges to assess whether family units are cognizable groups in each individual case, it is also appropriate to note that it is difficult to conceive a society in which immediate families are not considered by society to be discrete, socially distinct groups.

1. Family units are immutable.

First, family membership *per se* is an immutable characteristic. *See Acosta*, 19 I&N Dec. at 233 ("The shared characteristic might be an innate one such as … kinship ties …."). It is beyond dispute that family membership "cannot [be] change[d] … [and] is fundamental to [its members] individual identities …." *See W-G-R-*, 26 I&N Dec. at 210 (citing *Acosta*, 19 I&N Dec. at 233).

2. Family units are defined with particularity.

Second, family units have sufficient particularity to qualify as particular social groups. The purpose of the particularity test is to ensure that there is "a clear benchmark for determining who falls within the group." *M-E-V-G-*, 26 I&N Dec. at 239 (quoting *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2007)). A sufficiently particular group is described by terms with "commonly accepted definitions in the society of which the group is a part." *Id.*

In the context of family-based claims, the requisite particularity is provided by well-defined and commonly accepted family relationships. Evidence of births and marriages[5] within a family provide a benchmark that is both clear to judges assessing an applicant's group membership and that is commonly accepted by every society as defining a family unit. Indeed, one's relationship to a child, parent, or spouse is the very benchmark by which a whole host of legal rights and duties flow, from the legal duty to provide for children, to how property is distributed after death.

3. Family units are socially distinct.

Finally, family units are universally recognized as socially distinct. The Board has held that to be socially distinct, a proposed group must be "set apart within society in some significant way." *M-E-V-G-*, 26 I&N Dec. at 244. The Board also explained that "members of a particular

[5] Whether domestic or family relationships beyond a unit comprised of parents and their children would be recognized as a family in a particular society is not presented by this case. *See* note 2, *supra*.

social group will generally understand their own affiliation with the group[ ]," as will other members of society. *Id.* at 238.

A common-sense understanding of a family unit satisfies this test. Both members within and without a particular family are clearly able to recognize one another's affiliation with the group. *See Matter of C-A-*, 23 I&N Dec. 951, 959 (BIA 2006) (stating that "[s]ocial groups based on … family relationship are generally easily recognizable and understood by others to constitute social groups"). The family unit has long been recognized as a universal and fundamental building block upon which society rests. *See Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) ("[T]he traditional relation of the family … [is] a relation as old and as fundamental as our entire civilization."); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) ("Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together."); *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."); *DeBurgh v. DeBurgh*, 250 P.2d 598, 601 (Cal. 1952) ("The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people."); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, Art. 16(3), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."). In short, immediate

families are the most basic and pervasive social grouping in any society; they must necessarily, therefore, satisfy the social distinction criterion for a cognizable social group.

For the foregoing reasons, the Attorney General should hold that that the immediate family of Respondent's father, [redacted], consisting of his wife and children (including Respondent), is a cognizable particular social group.

II. Persecution is on account of a protected ground when kinship ties are at least one central reason for the harm.

The Acting Attorney General's order in this case also directs the parties to address the circumstances under which an asylum applicant can establish eligibility for asylum based on his membership in a family unit. *L-E-A- II*, 27 I&N Dec. 494. The answer to this question is provided by the statute. Because immediate families will generally constitute particular social groups, an applicant for asylum establishes his eligibility for relief when he produces evidence from which it is reasonable to believe that his familial association "was or will be at least one central reason for persecuting the applicant." INA § 208(b)(1)(B)(i); *see also Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 211 (BIA 2007) ("[W]e have stated that an applicant must produce evidence, either direct or circumstantial, from which it is reasonable to believe that the harm was or would be motivated in part by an actual or imputed protected ground.") (citing *Matter of S-P-*, 21 I&N Dec. 486, 494 (BIA 1996)). In the Ninth Circuit, where this case arises, a reason is central if "that motive, standing alone, would have led the persecutor to harm the applicant." *Parussimova v. Mukasey,* 555 F.3d 734, 741 (9th Cir. 2009). "[P]ersecution may be caused by more than one central reason, and an asylum applicant need not prove which reason was dominant." *Id.*

In the context of claims based on family as a particular social group, the case law of the First and Fourth Circuits is instructive. In *Gebremichael v. INS*, the First Circuit found that it was

compelled to conclude[6] that the persecution of an Ethiopian asylum seeker was on account of his relationship to his brother. 10 F.3d 28, 36 (1st Cir. 1993). The asylum applicant in *Gebremichael* was eligible for asylum because "the Ethiopian security forces applied to [him] the 'time-honored theory of *cherchez la famille* ('look for the family'),' the terrorization of one family member to extract information about the location of another family member or to force the missing family member to come forward." *Id.* In other words, if persecutors have a primary victim, and, in order to force that victim's hand, the persecutors target one or more of the primary victim's family members, then at least one central reason for the *family members*' persecution is that they share a family unit with the primary victim.

The Fourth Circuit has also addressed the circumstances under which a person qualifies for asylum on account of his or her membership in a family unit. In a series of four recent published opinions, the Fourth Circuit made clear that asylum is available to those who have a well-founded fear of persecution on account of a family member's conflict with a criminal organization that the applicant's government was unable or unwilling to control. *See Cordova v. Holder*, 759 F.3d 332, 339 (4th Cir. 2014) (holding that persecution was on account of family membership where the applicant was targeted because his uncle and cousin belonged to a rival gang); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949-50 (4th Cir. 2015) (holding that a mother was eligible for asylum based on family ties because she interfered with her son's recruitment by a gang); *Cruz v. Sessions*,

[6] *Gebremichael* was decided before the enactment of the REAL ID Act. The *Gebremichael* court's observations regarding causation remain persuasive for two reasons. First, as stated by both the Board and the First Circuit, the REAL ID Act "did not 'radically alter'" the standard for demonstrating nexus to a protected ground. *Singh v. Mukasey*, 543 F.3d 1, 5 (1st Cir. 2008) (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)). Second, the *Gebremichael* court ultimately concluded that "the link between family membership and persecution is *manifest*," 10 F.3d at 36 (emphasis added). It is therefore clear that the First Circuit would reach the same conclusion applying the REAL ID Act's "one central reason" standard.

853 F.3d 122, 129 (4th Cir. 2017) (holding that persecution of the wife of the bodyguard of a drug trafficker was on account of her membership in the bodyguard's nuclear family); *Zavaleta-Policiano v. Sessions*, 873 F.3d 241 (4th Cir. 2017) (holding that an applicant who was targeted because her father failed to comply with extortion demands was persecuted on account of her membership in her family).

Most recently, under facts that bear a striking resemblance to [redacted] case, the Fourth Circuit again held that persecution was on account of family membership where gang members targeted a family-operated business for extortion. In *Salgado-Sosa v. Session*s, the asylum applicant and his extended family operated a small convenience store and automobile repair shop. 882 F.3d 451, 454 (4th Cir. 2018). Armed members of the MS-13 gang threatened and harassed the family for an extortionate "war tax" in exchange for protection. *Id.* The applicant's stepfather refused to pay the gang, and the gang broke into the family home and attacked the family. *Id.* The gang attacked the applicant two more times, and continued to search for him even after he moved. *Id.* The Immigration Judge denied asylum, holding that the applicant was not persecuted on account of his family, but rather because his stepfather refused to pay extortion and because the family fought back against the gang when attacked. *Id.* at 455. The Board affirmed on substantially the same grounds. *Id.* at 456. The Fourth Circuit granted the petition for review, holding that the record "manifestly establishes that MS-13 threatened Salgado-Sosa 'on account of' his connection to his stepfather and to his family." *Id.* at 457. The stepfather's refusal to give MS-13 the war tax, and MS-13's reprisals, established the centrality of the family-based motivation. *Id.* at 457-58. The Fourth Circuit held that "[t]here is no meaningful distinction between whether Salgado-Sosa was threatened because of his connection to his stepfather, and whether Salgado-Sosa was threatened

because MS-13 sought revenge on him for an act committed by his stepfather. However characterized, Salgado-Sosa's relationship to his stepfather (and to his family) is indisputably why he, and not another person, was threatened by MS-13." *Id.* at 458. Finally, the court rejected the notion that because the motive for the attacks on the *family* was financial gain or personal vendettas, that the applicant himself could not have been targeted based on his ties to his family. *Id.* at 458-459.

Of course, the centrality of membership in a family unit to a persecutor's motive will depend on the facts of each individual case. Some common themes may nevertheless be discerned. At a minimum, where a persecutor purposefully employs a tactic of targeting immediate family members in an effort to coerce or retaliate against a primary target, persecution is on account of the particular social group of the family unit. Likewise, a person is eligible for asylum under any factual scenario in which membership in a family unit is a reason why the applicant, and not another person, is targeted. This includes retribution for an action taken or withheld by a family member.

In this case, the Immigration Judge's and the Board's reasoning fails to account for the genesis of [redacted] ordeal. Before [redacted] even returned to Mexico, La Familia Michoacana tried to leverage the family relationship between [redacted] and his father to engage in extortion. Exh. 3 at 12-a. Indeed, just before [redacted] returned to Mexico, two cartel members specifically told [redacted] father that they would retaliate against his family for not complying with their demands. Tr. at 27-28. The threats, shooting, and attempted kidnapping against [redacted] cannot be divorced from this context — the cartel moved against [redacted] in the aftermath of specifically threatening to *harm his father's family*. This evidence of the cartel's motivation is "potentially dispositive," and the Immigration Judge was required to give it "reasoned consideration." *Cole v.*

Holder, 659 F.3d 762, 772 (9th Cir. 2011). The cartel's explicit threats to harm [redacted] on account of his relationship to his father did not feature in the Immigration Judge's analysis.[7] Therefore, remand to the Immigration Judge is required for complete findings of fact relating to the issue of nexus. *See Matter of S-H-*, 23 I&N Dec. 462, 465 (BIA 2002) (holding that remand may be unavoidable where findings of fact are incomplete).

III. Any change to the agency's longstanding recognition of family units as particular social groups cannot be retroactively applied to [redacted].

The Attorney General should reaffirm the settled principle that families are particular social groups. However, to the extent that the Attorney General announces an interpretation of asylum law at odds with the well-established principles articulated above, that new interpretation should not apply retroactively to [redacted] case because it was not in place at the time [redacted] initially applied for asylum.

Assuming that the Attorney General overrules *L-E-A- I*, the agency does not have carte blanche to apply any such new interpretation retroactively. The Ninth Circuit places a substantive limitation on an agency's power to apply a changed interpretation to an action by a regulated party that occurred prior to the announcement of the changed position. *See Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322, 1333 (9th Cir. 1982). As stated in a recent opinion, analysis of a claim of impermissible retroactivity proceeds in two steps. First, there must be a "change in law." *Olivas-Motta v. Whitaker*, 910 F.3d 1271, 1276 (9th Cir. 2018). If the law has changed, then each of the factors articulated in *Montgomery Ward* must be assessed. *Id.* Those factors include: (1) whether the particular case is one of first impression; (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law; (3)

[7] The Board recognized the importance of complete findings of fact regarding motive, *L-E-A- I*, 27 I&N Dec. at 46 n.5, but, like the Immigration Judge, failed to account for testimony that cartel members had expressly threatened to retaliate against [redacted] father by targeting his family.

the extent to which the party against whom the new rule is applied relied on the former rule; (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard. *Montgomery Ward*, 691 F.2d at 1333 (quoting *Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972).

The Board has repeatedly announced that family ties may permissibly form the basis of a particular social group. *See Acosta*, 19 I&N Dec. at 233; *H-*, 21 I&N Dec. at 342; *Kasinga*, 21 I&N Dec. at 365-66; *V-T-S-*, 21 I&N Dec. at 798; *C-A-*, 23 I&N Dec. at 955; *M-E-V-G-*, 26 I&N Dec. at 240; *W-G-R-*, 26 I&N Dec. at 216. If the Attorney General's decision departs from these precedents, this change of law would trigger a *Montgomery Ward* assessment.

Each *Montgomery Ward* factor weighs against retroactively applying any rule narrowing the circumstances under which family qualifies as a particular social group. First, this issue is hardly one of first impression. The "kinship ties" rule from *Acosta* has been applied for nearly 35 years. For much the same reason, the second factor also weighs against retroactive application of any new rule — the law in this area is substantially well-settled, and disrupting this state of the law weighs against retroactive enforcement. Third, "an alien in [redacted] position would rely on the BIA's continual affirmation of the rule" that persecution on account of one's family qualifies a person for asylum. *Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1295 (9th Cir. 2018). Because of this focus on reliance interests, the Attorney General should announce that any changes in law that make asylum more difficult to obtain only apply to persons who enter the United States after the announcement of the new rule. This is because a person persecuted on account of a family relationship relies on the current rule when he or she makes the decision to flee *to the United States*. Fourth, deportation is a severe burden weighing against retroactive application. *Id.* Finally,

while the government has an interest in treating all asylum seekers uniformly, this interest does not have a great deal of weight where the Department of Justice lived with the preexisting rule for several decades. *Id.* at 1295-96. Accordingly, even if the Attorney General narrows the circumstances under which family units serve as qualifying particular social groups for the purposes of asylum (which he should not), then such a narrowing interpretation should not apply to any person who entered the United States before it was announced, including [redacted].

IV. The order referring this case for review should be vacated.

If the merits of the questions posed in Mr. Whitaker's referral order are addressed, they should be resolved in [redacted] favor as described above. However, the merits of those questions should not be addressed in this case, and, instead, the order referring this case for review should be vacated as improvidently granted. First, this case was not before the Board at the time Mr. Whitaker referred it to himself, and the referral was therefore not permitted under 8 CFR § § 1003.1(h). Second, the referral order is void because Matthew G. Whitaker had no authority to certify this case to himself when his installation as Acting Attorney General violated 28 U.S.C. § 508 and the Appointments Clause of the United States Constitution. Finally, even if the procedural irregularities in initial referral do not require rescission of the referral, the newly appointed Attorney General, William P. Barr, has made public statements about the asylum system that require his recusal.

A. The Attorney General may not order referral of a case after the Board divests itself of jurisdiction by issuing a remand order.

The Acting Attorney General had no authority to certify this case to himself because the case was not pending before the Board. Following its issuance of a precedential decision, the Board remanded [redacted] case to the immigration judge for further fact finding with regard to his claims for withholding of removal and protection under the Convention against Torture. *L-E-A- I*,

27 I&N Dec. at 47. This case was pending before the Immigration Judge, not the Board, at the time the Acting Attorney General referred the case to himself.

While the Attorney General has broad discretion in reviewing cases, he cannot act beyond the scope of the authority given to him by the regulations. The regulations state, "The Board shall refer to the Attorney General for review of its decision all cases that (i) The Attorney General directs the Board to refer to him." 8 C.F.R. § 1003.1(h). Yet this case was not before the Board. When the Board "remands a case to an immigration judge for further proceedings, it divests itself of jurisdiction of that case unless jurisdiction is expressly retained." *Matter of Patel*, 16 I&N Dec. 600 (BIA 1978).

If the Attorney General wishes to review the Board's decision, he should wait until such time as the case may again be before the Board. In this case, the Board did not have jurisdiction because [redacted] case had been remanded to the Immigration Judge and any decision rendered pursuant to the current referral order would constitute agency action "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Accordingly, the Attorney General should withdraw from that portion of *Matter of A-B-*, 27 I&N Dec. 316, 323-24 (A.G. 2018), that holds to the contrary and vacate the order referring this matter to himself.

B. Matthew G. Whitaker was not authorized to refer this case to himself.

Mr. Whitaker was not properly appointed as Acting Attorney General, and, therefore, his invocation of the powers of the Office of the Attorney General was void. Under the Department of Justice's organic statute, 28 U.S.C. § 508, the Deputy Attorney General should have become Acting Attorney General when Attorney General Sessions was forced to resign. Instead, President Trump improperly invoked the more general Federal Vacancies Reform Act, 5 U.S.C. § 3345(a)(3), and installed Matthew G. Whitaker as Acting Attorney General. This improper maneuver further violated the Appointments Clause of the Constitution. That clause states that the

President "shall nominate, and by and with the Advice and Consent of the Senate, …Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl 2. The President unlawfully bypassed the Appointments Clause when he appointed Mr. Whitaker who had never been through a Senate confirmation hearing. It was improper for Mr. Whitaker to exercise the powers of a principal officer of the United States without the advice and consent of the Senate. Accordingly, the referral order in this case should be vacated.

C. Attorney General William P. Barr's public statements require recusal.

On February 14, 2019, William P. Barr was sworn in as Attorney General. However, Barr has demonstrated through his public statements that he cannot be an unbiased adjudicator in this case. He has publicly attacked the asylum protections in Immigration and Nationality Act for the past three decades. As Attorney General under George H.W. Bush, Barr detained HIV-positive Haitian asylum seekers at Guantanamo Bay. He later defended that decision, stating, "You want 80,000 Haitians to descend on Florida several months before the election? Come on, give me a break." UVA Miller Center, *William P. Barr Oral History, Assistant Attorney General; Deputy Attorney General; Attorney General*, https://millercenter.org/the-presidency/presidential-oral-histories/william-p-barr-oral-history-assistant-attorney-general (Apr. 5, 2001). And he further identified the "robust" asylum protections under the INA as a problem, stating, "One of the biggest problems we have with immigration—or had, I think it's still a problem—is the abuse of the asylum laws. People would get on the airplane, they'd come to the United States, and then they'd claim asylum as soon as the airplane touched down. Under our laws, we have this very robust process that they have to go through." *Id.*

More recently, at his Senate confirmation hearing on January 15, 2019, Attorney General Barr made his views on the asylum system very clear—he testified that "given the abuses of the asylum's system right now, I would always prefer to process asylum seekers outside the United States." He furthermore indicated disdain for the role that attorneys play in explaining the complex asylum system to traumatized asylum seekers, stating, "people are abusing the asylum system, coming in, they're being coached what to say." And again, responding to a question by Senator Lee, Barr painted a picture of asylum seekers as lawless gate "crashers" rather than individuals who have a right under U.S. and international law to seek protection from persecution. Barr testified, "And just to allow people to come crashing in, be told that if you say this you'll be treated as an asylum and then you don't have to -- you don't have to appear for your EAE (ph) [EOIR] hearing or whatever, it's just an abuse of the system." In a time when the administration has used immigration as a political wedge issue, it is more important than ever that the head of the immigration adjudication system be unbiased and demonstrate an ability to fairly apply the asylum laws enacted by Congress. William P. Barr's public statements show a clear bias against the procedures that have been enacted to protect asylum seekers.

As former United States Citizenship and Immigration Services Chief Counsel Stephen Legomsky explains, "When the decision being reviewed was rendered by a multi-member panel, agency head review entails the substitution of one person's judgment for the collective judgment of several adjudicators. And the probability that a strong ideological bias will influence the result is greater when one person is deciding than when the decision is rendered by a randomly selected multi-member panel." Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 Stan. L. Rev. 413, 461 (2007). Given the greater susceptibility to bias in the Attorney General review process, it is especially important that an individual who

wields the extraordinary power of appellate review of Board decisions do so impartially and without demonstrable bias.

As discussed above, the regulations authorize an Attorney General to create binding legal precedent through individual case adjudication. The regulation authorizing Attorney General review of Board decisions is included in the section of the regulations which lays out the structure and function of the Board. In describing the functions of Board members, the regulations specify, "The Board shall resolve the questions before it in a manner that is timely, *impartial*, and consistent with the Act and regulations." 8 C.F.R. § 1003.1 (emphasis added). And, indeed, the legal standard for recusal only requires an *appearance* of bias or partiality. *See Matter of Y-S-L-C-*, 26 I&N Dec. 688, 690-91 (BIA 2015). Likewise, under 28 U.S.C. § 455(a), "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." By issuing an appellate decision in an individual's case, the Attorney General's role is analogous to that of an appellate judge. Mr. Barr has already opined that asylum is "one of the biggest problems in the system," that asylum seekers are "coached," and that they are "abusing the system." He has also admitted to taking electoral considerations into account when taking official action on issues of immigration policy. Having articulated these biases, he cannot adjudicate [redacted] asylum case without the appearance that he has prejudged it as "meritless." Recusal is required.

V. Jurisdiction did not vest with the Immigration Court because the charging document did not contain the information required by INA § 239(a)(1)(G)(i) and 8 C.F.R. § 1003.15.

Finally, the Attorney General does not have jurisdiction to render a decision in this case because the Immigration Court never properly acquired jurisdiction. The Immigration Court lacked jurisdiction because the notice to appear failed to include the time and place of the first hearing as required by INA § 239(a)(1)(G)(i) and 8 C.F.R. § 1003.15. *See* Exh. 1.

Proceedings before an Immigration Judge commence and jurisdiction is vested in the immigration court when a valid charging document is filed by DHS with the immigration court. 8 C.F.R. § 1003.14(a). "Charging documents" include: (i) a "Notice to Appear" (NTA), (ii) a "Notice of Referral to Immigration Judge," or (iii) a "Notice of Intention to Rescind and Request for Hearing." 8 C.F.R. § 1003.13. Thus, for jurisdiction to vest in an immigration court, a "Notice to Appear" or other specifically enumerated category of charging document must be filed with the Immigration Court. *See* 8 C.F.R. §§ 1003.13, 1003.14.

The Immigration and Nationality Act requires that a notice to appear specify "[t]he time and place at which the proceedings will be held." INA § 239(a)(1)(G)(i). The Supreme Court recently held that "a putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a 'notice to appear under § [239(a)].'" *Pereira v. Sessions*, 138 S. Ct. 2105, 2108 (2018). In short, a document that fails to specify the time and place at which the proceedings will be held is not a notice to appear, and only a notice to appear is a "charging document" that vests jurisdiction with an immigration court.

The Board reached a contrary conclusion in *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018). In *Bermudez-Cota*, the Board held that 8 C.F.R. § 1003.14(a) "does not specify what information must be contained in a 'charging document' at the time it is filed with an Immigration Court, nor does it mandate that the document specify the time and date of the initial hearing before jurisdiction will vest." *Id.* at 445. However, *Bermudez-Cota* was wrongly decided. As discussed above, 8 C.F.R. § 1003.13 does define the term "charging document" and that definition includes the Notice to Appear but does not include an immigration-court-issued notice of hearing. Moreover, while the Board is correct that the regulations do not require the NTA to include the time and date of the hearing, they do require the NTA to include "the address of the Immigration Court

where the Service will file the … Notice to Appear." 8 C.F.R. § 1003.15. The NTA [redacted] received did not include the date, time, or **place** of the hearing. Therefore the NTA is defective under both the regulations and the INA.

The Ninth Circuit, in which this case arises, has deferred to *Bermudez-Cota* as a permissible interpretation of *the regulations*. *See Karingithi v. Whitaker*, 913 F.3d 1158, 1161 (9th Cir. 2019). However, a judicial disposition expressing deference to an agency does not prevent the agency from later changing its position. *See National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982 (2005). For the reasons stated above, the Attorney General should hold that in order to qualify as a "charging document" capable of vesting jurisdiction with an immigration court under 8 C.F.R. § 1003.14, a notice to appear must comply with INA § 239(a).

Further, [redacted] disagrees with *Karingithi*'s conclusion that immigration court jurisdiction flows only from the regulations and not from the Immigration and Nationality Act. *See Karangithi*, 913 F.3d at 1160 ("The regulatory definition, not the one set forth in § [239], governs the Immigration Court's jurisdiction."). The only manner of commencing removal proceedings contemplated by the Act is serving a notice to appear described in INA § 239. To the extent that the regulations only require the notice to appear to contain the time, place and date of the initial removal hearing "where practicable," *see* 8 C.F.R. § 1003.18(b), the regulations run afoul of the statute, and the statute must control. *See, e.g., Schneider v. Chertoff*, 450 F.3d 944, 956 (9th Cir. 2006).

Finally, the facts in [redacted] case are distinguishable from those in *Karingithi.* In *Karingithi*, the "notice to appear specified the location of the removal hearing" but did not specify its time and date. 913 F.3d at 1159. By way of contrast, the purported Notice to Appear served upon [redacted] did not specify the location of the immigration court. It therefore did not contain the

information required by 8 C.F.R. § 1003.15(b) and the immigration court did not acquire jurisdiction. The Ninth Circuit did not address the issue of an NTA that does not include the immigration court address as required by both the statute and the regulations; *Karingithi* is not controlling in this case.

Accordingly, the Attorney General must enter an order terminating removal proceedings against [redacted] without prejudice.

CONCLUSION

For the foregoing reasons, the Attorney General should vacate the order that the Acting Attorney General issued referring the case for review. Alternatively, the Attorney General should terminate these removal proceedings without prejudice in compliance with the Supreme Court's decision in *Pereira*. Should the Attorney General reach the merits of the questions posed by the referral order, he should reaffirm that immediate family units qualify as particular social groups and that the statutory one central reason test applies to such claims. Applying those principles to this case, the Attorney General should find that the Immigration Judge's analysis failed to address the cartel's explicit threat to retaliate against [redacted] father by targeting his family, and he should remand this matter to the Board for further proceedings consistent with that finding. Alternatively, to the extent that the Attorney General narrows the circumstances under which a person qualifies for asylum based on family ties, that new construction should not apply to [redacted], and remand remains necessary.

Respectfully submitted,

Date: February 19, 2019

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PROOF OF SERVICE

On February 19, 2019, I, Bradley Jenkins, mailed a copy of this brief and any attached pages to the Department of Homeland Security at the following address:

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