No. 2010-530

IN THE

Supreme Court of the United States

January Term, 2012

ANITA KURZBAN,

Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourteenth Circuit

BRIEF FOR RESPONDENT

Team R3

Counsel for Respondent

QUESTIONS PRESENTED

I. Whether a state conviction for possession of an unspecific amount of marijuana constitutes an "aggravated felony" under federal immigration law causing petitioner to be ineligible for asylum.

II. Whether under the Immigration and Nationality Act, persecution in retaliation for the acts of a family member is persecution "on account of . . . membership" in a family for withholding of removal purposes.

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TO THE HONORABLE UNITED STATES SUPREME COURT:

Respondent, the Attorney General of the United States, respectfully submits this brief in support of its request that this Court uphold the decision of the Court of Appeals for the Fourteenth Circuit.

JURISDICTIONAL STATEMENT

A statement of jurisdiction has been omitted in accordance with the rules of the U.C. Davis School of Law Asylum and Refugee National Moot Court Competition.

STATEMENT OF THE CASE

I. Statement of Facts

Petitioner, Anita Kurzban, was born in the country of Purifica. (R. 5.) Petitioner's father, John Kurzban, worked as a reporter at a local television news station in Atos, Purifica. (R. 5.) Her father was intent on making a documentary about the mob in the city of Atos. (R. 5.) The people of Atos were aware of the mob's presence, but few knew exactly what it did or who controlled it. (R. 5.) Petitioner's father learned of information about the mob and its alleged leader, Caro Tortolucci. (R. 5.) Mr. Tortolucci is a wealthy businessman in Atos who had made his fortune in the sex and drug trafficking industry. (R. 5.)

Mr. Tortolucci learned that Petitioner's father was going to reveal his identity as the leader of the mob on national television. (R. 5.) He threatened to kill Petitioner's father if he went forward with his documentary project. (R. 5.) Petitioner's father lived in fear for his safety, and knew that these threats were solely a response to his decision to make and air the film. (R. 5.) He disregarded these warnings and decided to air the documentary entitled "The Mob of Atos and Its Leader" in April 2004 on national television. (R. 5.) After the documentary aired Petitioner's father received threatening messages. One day he was pulled out of his vehicle by two men, beaten and his car set on fire. (R. 5.) Upon leaving, the two men told him, "This is what happens when you don't keep your mouth shut." (R. 5.) Petitioner's father decided not to turn to the police for remedy or justice, convinced by town gossip that the mob was controlled by the police. (R. 5.)

In May 2004, Petitioner and her father left the rest of their family behind to look after their home in Atos, and entered the United States without inspection. Petitioner and her fathered settled in Crawford, Fraternia. (R. 5.) On June 6, 2004, Petitioner's father decided to return to Purifica after he received word that Mr. Tortolucci's men set his house in Purifica on fire. (R. 5 - 6.) Petitioner stayed behind in the United States where she lived with her boyfriend, a well-known gang member. (R. 6.)

Back in Purifica, Petitioner's father was kidnapped and shot because of his documentary depicting Mr. Tortolucci as the leader of the Atos mob, but survived the attack. (R. 6.) Petitioner's father reported the incident to the police, but they stated that they would not investigate the matter. (R. 6.) In further retaliation for the personal actions of Petitioner's father, Petitioner's brother and cousin were kidnapped and beaten by Mr. Tortolucci with a message from the mob leader, "This is what you get for having a father like yours." (R. 6.) Petitioner's family remained in Purifica, but decided to relocate to avoid further threats. (R. 6.) Although Petitioner had some fear of having to return to Purifica, she was unable to abide by the laws of the United States and avoid a serious conviction in order to afford the privilege of being granted asylum. (R. 6.)

On August 5, 2004, Petitioner was arrested after a search warrant of the home she shared with her boyfriend revealed marijuana in the basement. (R. 6.) Petitioner was charged with a violation of Fraternia Penal Code Section 1173(a) and pled no contest to attempted possession of an unspecified amount of marijuana with intent to deliver. (R. 6 - 7.) Two months later, Crawford Police stopped Petitioner and her boyfriend based on her boyfriend's well-known status as a gang member and suspicion that they were both involved in gang-related activities. (R. 7.) The Crawford Police contacted Department of Homeland Security/Immigration and

Customs Enforcement ("DHS/ICE") agents because Petitioner was not a United States citizen and she had a prior criminal conviction. (R. 7.) Petitioner was charged with being removable pursuant to INA § 212(a)(6)(A)(i), for having entered without inspection, being present without admission, and for committing an "aggravated felony" under INA § 237(a)(2)(A)(iii). (R. 7.)

Subsequently, Petitioner filed for asylum and withholding of removal. As a defense for her removal, Petitioner argues her state conviction was not an "aggravated felony" and that she has a well-founded fear of persecution if she were to return to Purifica, where all of her family resides. (R. 8.)

II. Procedural History

Petitioner initiated an asylum application following her arrests for attempted possession of an unspecified amount of marijuana with intent to deliver and for suspicion of gang-related activity. (R. 7 - 8.) Petitioner represented herself in front of the Immigration Judge who sustained both charges of removability and denied her application for asylum. (R. 8.) The Immigration Judge found that even if she were eligible for withholding of removal, she had not shown that her fear of persecution was on "account of" her membership in her family. (R. 8.) Petitioner appealed the denial of her asylum and withholding of removal applications to the Board of Immigration Appeals ("BIA") which affirmed the decision of the Immigration Judge. (R. 8.) On appeal, Petitioner argues that her state drug conviction is not an "aggravated felony," and that her asylum application and withholding of removal applications are erroneously denied. (R. 8.)

SUMMARY OF THE ARGUMENT

Petitioner, a native and citizen of Purifica, petitions for review of a final decision by the BIA denying her applications for withholding of removal and asylum. The BIA determined that

she was ineligible for these forms of relief because her state drug conviction was an "aggravated felony" and because she could not prove that she would be persecuted in Purifica on account of her membership in a particular social group.

Petitioner abandoned the privilege to seek a new life in the United States when she was convicted of a particularly serious crime, possession with intent to distribute marijuana. Under the "categorical approach" outlined in *Taylor v. United States,* 495 U.S. 575 (1990), only the fact of conviction and the statutory definition of the prior offense are relevant not the defendant's actual criminal conduct. Thus, a state-law conviction is categorically an "aggravated felony" if the conviction is punishable as a felony under federal law. Petitioner pled guilty to attempted possession with intent to deliver marijuana, in violation of Fraternia Code Section 1173(a). The elements of that offense are an attempt to possess with intent to deliver less than five kilograms of the drugs. Similarly, the Controlled Substance Act ("CSA") prohibits a person from "possess[ing] with intent…to distribute…a controlled substance." 21 U.S.C. § 841(a)(1).

Although there is nothing in the record that discloses the amount of marijuana in Petitioner's case, the attempt to possess with the intent to deliver any amount of marijuana less than fifty kilograms is punishable by up to five years in prison under federal law. Any crime for which the maximum term of imprisonment is great than one year is considered a federal felony. Thus, the elements of Petitioner's state offense correspond to the elements of the federal felony offense of attempting to possess with intent to deliver marijuana outlined in 21 U.S.C. § 841(a)(1) making her conviction an "aggravated felony."

Assuming arguendo convictions under Fraternia's Penal Code § 1173(a) are overly broad to include misdemeanor conduct, Petitioner's specific conduct nonetheless renders her conviction an "aggravated felony." Various Federal circuits have held that when a state statute

includes some non-felonious conduct, a conviction under the statute can still qualify as an "aggravated felony." Petitioner's conviction was for possession with intent to deliver marijuana. Her crime constitutes a federal felony for drug trafficking, which qualifies as an "aggravated felony" under the Immigration and Nationality Act ("INA").

The amount of marijuana in Petitioner's possession or whether she was distributing for money is irrelevant. State law and drug convictions for possession with intent to distribute marijuana in immigration cases should carry the presumption of a federal felony. This presumption assures consistency between federal criminal and immigration law and protects citizens and immigrants. Furthermore, Petitioner cannot establish that she is eligible for the misdemeanor exception in 21 U.S.C § 841 because she lacks evidence to prove she was only distributing small amounts of marijuana.

Petitioner argues that she would be persecuted in Purifica "on account of" her membership in a particular social group, the Kurzban family. A person who would be subject to persecution in her home country on account of race, religion, nationality, membership in a particular social group, or political opinion may be entitled to withholding of removal. Her request for withholding of removal, however, lacks the requisite nexus between her fear of persecution and her membership in the Kurzban family. For social groups based on membership in a family, the persecution must result from the persecutor's desire to overcome a part of the family's identity. Petitioner cannot overcome the burden of proving that Mr. Tortolucci was motivated by a desire to punish or to overcome the family relationship to Petitioner's father.

Further, the context surrounding persecution is significant in determining whether a persecutor is motivated by a desire to harm based on social group membership. In some cases, personal motives cannot be unraveled from motives based on family membership. Mr.

Tortolucci, however, was motivated solely by revenge to harm Mr. Kurzban, and any problems that Petitioner may face in Purifica are on account of revenge for her father's documentary, and not on account of her membership in a particular social group as required by statute. The United States does not protect against personal vendettas, and so Petitioner's request must fail.

For these reasons, Respondent respectfully requests this Court affirm the decision of the Court of Appeals for the Fourteenth Circuit.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY HELD THAT PETITIONER'S CONVICTION FOR POSSESSION WITH INTENT TO DELIVER MARIJUANA WAS AN "AGGRAVATED FELONY" THUS MAKING PETITIONER INELIGIBLE FOR ASYLUM.

Although Petitioner was entitled to seek a new life in the United States, that privilege was abused, thus asylum should be denied. Only three months after entry into the United States, Petitioner was convicted of a particularly serious crime, possession with intent to distribute marijuana, a Schedule I narcotic. Since the conviction of particularly serious crimes, specifically labeled "aggravated felonies," renders aliens deportable, Petitioner is ineligible for asylum. 8 U.S.C. § 1227(a)(2)(A)(iii) (2006). Thus, the Court of Appeal's decision should be affirmed.

A. Petitioner became ineligible for asylum after her conviction under Fraternia Penal Code Section 1173(a) for possession with intent to deliver marijuana, an "aggravated felony."

When an alien is convicted of an "aggravated felony" anytime after admission to the United States, she will become deportable. *Id.* "Aggravated felonies" as defined by United States Code include "illicit trafficking in a controlled substance…(including a drug trafficking crime as defined in section 924(c) of Title 18, United States Code). 8 U.S.C. § 1101(a)(43)(B) (2006). Section 924(c) of Title 18 of the United States Code defines the term "drug trafficking

crime" as, "any felony punishable under the Controlled Substance Act (21 U.S.C. 801, et. seq.). 18 U.S.C. § 924(c) (2006). Finally, section 841 of Title 21 in the United States Code provides "it shall be unlawful for any person knowingly, or intentionally…to manufacture, distribute, or dispose, a controlled substance." 21 U.S.C. § 841(a)(1) (2006).

A state offense that is considered a drug trafficking crime is an "aggravated felony." *Garcia v. Holde*r, 638 F.3d 511, 515 (6th Cir. 2011). Drug-trafficking crimes occur when the state offense "proscribes conduct punishable as a felony" under the CSA. *Id.* (quoting *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006)). Although mere possession is not a felony under the CSA, possessing more than what one person needs for herself will support a conviction for possession with intent to distribute, a federal felony. *Id.* at 53. The CSA also defines a felony as "a crime for which the 'maximum term of imprisonment authorized' is 'more than one year.'" *Carachuri-Rosendo v. Holder,* 130 S.Ct. 2577, 2589 (2010), (citing 18 U.S.C. § 3559(a) (2011)). Further, BIA precedent provides that state convictions for possession of an indeterminate amount of marijuana with the intent to distribute are considered "aggravated felonies" under the CSA. *Matter of Aruna,* 24 I. & N. Dec. 452 (BIA 2008).

i. Convictions for possession with intent to distribute under Fraternia Penal Code section 1173(a) constitute "aggravated felonies" because the elements are analogous to its federal counter-part under the Controlled Substance Act.

In determining whether a particular crime qualifies as an "aggravated felony" under federal immigration law, courts generally first use the "categorical approach." *U.S. v. Crawford,* 520 F.3d 1072, 1078 (9th Cir. 2008). This approach looks to the statutory definition of the crime at issue in order to determine whether it substantially corresponds to the federal statute. *Taylor v. United States,* 495 U.S. 575, 602 (1990). It is recognized that the INA's "aggravated felony" definition "contains language referring to generic crimes." *Nijhawan v. Holder,* 129 S.Ct. 2294,

2301 (2009). Thus the categorical approach applies to determine whether a state offense is equivalent to a federal crime. *Id.* The INA placed "drug trafficking" offenses in that category. *Id.* at 2300. Thus, for a state conviction to qualify as an "aggravated felony," the underlying conduct of the state conviction must be punishable as a federal felony. *Lopez,* 549 U.S. at 60.

Federal felonies under the United States Code include crimes by "any person knowingly or intentionally…to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1) (2006). Marijuana is considered a controlled substance under federal law. 21 U.S.C. § 802(6); 21 U.S.C. § 812 Schedule I(c)(10) (2006). Further, "distribute" is defined as "to deliver," and "deliver," as "the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship." 21 U.S.C. § 802(8) (2006). Finally, when possession is of less than fifty kilograms of marijuana, the CSA authorizes up to five years imprisonment for a violation. 21 U.S.C. § 841(b)(1)(D) (Supp. II, Vol. 2 2009). A federal offense carrying this potential punishment qualifies as a federal felony. 18 U.S.C. § 3559(a) (2006).

Much like its federal counter-part, Fraternia's Penal Code provides, in part, that "a person shall not…deliver, or possess with intent to…deliver a controlled substance…" Fraternia Penal Code § 1173(a) (2011). The statute further provides "a person who violates this Section as to marijuana…is guilty of a felony punishable if the amount is less than five kilograms…" *Id.* Similarly, § 841 of Title 21 of the United States Code provides for felony punishment of possession with intent to distribute any amount of marijuana. 21 U.S.C. § 841 (2006). Since the *underlying conduct* of the state conviction determines whether the conviction is punishable as a federal felony, any argument by Petitioner that Fraternia's Penal Code also includes acts that would not be considered a federal felony fails. *See Lopez,* 549 U.S. at 60. Thus, the

aforementioned specific elements of Petitioner's conviction under Fraternia's Penal Code substantially correspond to the federal felony statute, constituting an "aggravated felony." *See Taylor,* 495 U.S. at 602.

ii. Even assuming convictions under Fraternia's Penal Code § 1173(a) are overly broad to include misdemeanor conduct, Petitioner's specific conduct nonetheless renders her conviction an "aggravated felony."

If a particular state offense "correlates with a federal crime that the INA treats as an aggravated felony, but the state statute…cover[s]…some non-felonious conduct, the government can show that a conviction under the state statute nonetheless qualifies as an aggravated felony." *Julce v. Mukasey,* 530 F.3d. 30, 34 (1st Cir. 2008) (quoting *Conteh v. Gonzales,* 461 F.3d 45, 55-56 (1st Cir. 2006)). This occurs when the record of conviction provides "clear and convincing evidence that the….offense 'constitutes a crime designated as an aggravated felony in the INA.'" *Julce,* 530 F.3d. at 34 (quoting *Conteh,* 461 F.3d at 55-56). Other Federal circuits similarly provide, when a state statute includes conduct that could be punished as a felony or misdemeanor under the CSA, then some evidence can be considered when determining whether the conduct constitutes an "aggravated felony." *Omari v. Gonzales,* 419 F.3d 303, 308 (5th Cir. 2005). This approach looks to the specific conduct for which the defendant was convicted. *Pelayo-Garcia v. Holder,* 589 F.3d 1010, 1014 (9th Cir. 2009). Admissible evidence includes the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard v. U.S.,* 544 U.S. 13, 16 (2005).

Regardless of Fraternia's specific statute, Petitioner's conviction constitutes an "aggravated felony." Various Federal circuits have held that when a state statute includes some non-felonious conduct, a conviction under the statute can still qualify as an "aggravated felony." *Julce,* 530 F.3d. at 34; *See also Conteh,* 461 F.3d at 55-56.

Specifically, Petitioner's conduct for conviction was possession with intent to deliver marijuana. Under federal law, such a conviction constitutes a federal felony for "drug trafficking," making it an "aggravated felony" under the INA. *See* 21 U.S.C. § 841 (b)(1)(D) (Supp. II, Vol. 2 2009); 18 U.S.C. § 3559(a) (2006). Facts such as the amount of marijuana in Petitioner's possession or whether she was distributing it for money are not required elements under the federal felony statute. *See* 21 U.S.C. § 841 (b)(1)(D) (Supp. II, Vol. 2 2009).

Federal convictions for possession of less than fifty kilograms of marijuana with intent to distribute are subject to up to five years imprisonment. *Id*. Since punishment of a crime where the "maximum term of imprisonment authorized" is over one year constitutes a federal felony, the amount of marijuana in possession is not a required element. 18 U.S.C. § 3559(a) (2006). Thus, Petitioner's crime, regardless of the amount of marijuana in her possession or whether she was selling for money constitutes a federal felony. As such, Petitioner's conviction for possession with intent to distribute marijuana is an "aggravated felony."

B. State law drug convictions for possession with intent to distribute marijuana in immigration cases should carry the presumption of a federal felony, assuring consistency between federal criminal and immigration law and protecting citizens and immigrants of the United States.

Currently, the Federal circuits are split on whether convictions under state drug law for possession with intent to distribute marijuana are presumptively "aggravated felonies" or misdemeanors under 21 U.S.C. § 841(b)(4). [1] To ensure consistency in federal criminal and immigration law, this Court should hold that state law drug convictions for possession with intent

[1] *Matter of Aruna,* 244 I. & N. Dec. 452 (BIA 2008); *Garcia v. Holder,* 638 F.3d 511, 516 (6th Cir. 2011); *U.S. v. Hamlin,* 319 F.3d 666, 670-671 (4th Cir. 2003); *Julce v. Mukasey,* 530 F.3d 30, 35 (1st Cir. 2008); *U.S. v. Eddy,* 523 F.3d 1268, 1271 (10th Cir. 2008); *Wilson v. Ashcroft,* 530 F.3d 377, 381 (3d Cir. 2003); *Martinez v. Mukasey,* 551 F.3d 113, 119 (2d Cir. 2008).

to distribute marijuana are presumptively "aggravated felonies" under immigration law. Further, such a holding will prove beneficial for both citizens and immigrants of the United States.

Various federal circuits have held the amount of marijuana involved does not need to be proven in order to convict and punish under section 21 U.S.C. § 841(b)(1)(D), the federal felony statute. *Garcia,* 638 F.3d at 516. The Board of Immigration Appeals agrees. *Matter of Aruna,* 21 I. & N. Dec. 452 (BIA 2008) (holding that since the presence of remuneration and more than a small amount of marijuana are merely a mitigation exception, not statutory elements provided in 21 U.S.C. § 841(b)(4), every state offense for possession with intent to distribute marijuana qualifies as an "aggravated felony"). As such, the amount of marijuana, so long as it is less than fifty kilograms, is not a required element of the federal felony offense. *Garcia,* 638 F.3d. at 516.

Rather, when the amount of marijuana is undetermined, the default provision for punishing possession of marijuana with intent to distribute is under 841(b)(1)(D), *not* 841(b)(4). *Id.; see also U.S. v. Hamlin,* 319 F.3d 666, 670-671 (4th Cir. 2003) (holding that a federal felony under 841(b)(1)(D) is the default provision for convictions of possession with intent to sell marijuana). Similarly, other circuits have reasoned that the nature of 21 U.S.C. § 841(b)(4) is not a stand-alone misdemeanor offense; rather, it is better viewed as a mitigating sentencing provision. *Julce,* 530 F.3d at 35; *see also U.S. v. Eddy,* 523 F.3d 1268, 1271 (10th Cir. 2008). As such, "in the absence of defendant meeting his burden to show his conduct fits within section 841(b)(4), possession of any amount of marijuana up to fifty kilograms with intent to distribute…is punishable as a felony under the CSA." *Julce,* 530 F.3d at 35.

To the contrary, other circuits have held that "distribution of an undefined 'small amount' of marijuana 'without remuneration is not inherently a felony under federal law.'" *Wilson v. Ashcroft,* 530 F.3d 377, 381 (3rd Cir. 2003) (quoting *Steele v. Blackmun,* 236 F.3d 130, 137 (3d

Cir. 2001)). The Third Circuit has gone so far as to hold that a state law drug conviction involving no proof of either remuneration or a specified amount of marijuana is a misdemeanor for removal purposes, unless the record of conviction establishes otherwise. *Jeune v. Attorney General,* 476 F.3d 199, 200 (3d Cir. 2007) (holding that a state conviction containing no information as to the amount of marijuana possessed or indication that the marijuana was being distributed for money did not constitute an "aggravated felony").

Furthermore, the Second Circuit has held that, "841(b)(4) is not just a stand alone subsection but is also referenced directly in 841(b)(1)(D)," thus it "is not merely 'one of lesser degree than those covered by (b)(1)(D), but more akin to simple possession than to provisions intended to cover traffickers.'" *Martinez v. Mukasey,* 551 F.3d 113, 119 (2d Cir. 2008) (quoting *U.S. v. Outen,* 286 F.3d 622, 637 (2d Cir. 2002)). These circuits "rely only on 'what the convicting court must necessarily have found to support the conviction.'" *Jeune,* 476 F.3d at 205 (quoting Steele, 236 F.3d at 135).

This Court should follow the approach of the First, Fourth, Sixth, and Tenth Circuits, disregarding the approach taken by the Second and Third Circuits. The reasoning of the Second and Third Circuits does not appropriately account for the role of 21 U.S.C. § 841(b)(4), which is an *exception* to the sentencing scheme under 21 U.S.C. §841(b)(1)(D). *See Julce,* 530 F.3d at 36 fn. 6. Even when relying on the minimum conduct necessary to support a conviction, "a state offense whose elements include the elements of a felony punishable under the CSA is an aggravated felony." *See Lopez,* 549 U.S. at 57. Since the amount of marijuana is not an element necessary to prove a federal felony for possession with intent to distribute marijuana, possession of any amount, even the minimum, with intent to distribute sustains a felony conviction. *Garcia,* 638 F.3d at 517.

Policy considerations further dictate that this Court should follow the First, Fourth, Sixth, and Tenth Circuits. To ensure consistency with federal criminal law, immigration cases should not require the government to bear the burden of proving section 841(b)(4), which does not apply to requisite state drug convictions. Such a requirement would create a disparity in the law's use of the analogy to federal criminal statutes. *Julce,* 530 F.3d at 36.

More importantly, if this Court were to adopt the lenient approach of the Second and Third Circuits, it would be to the detriment of this country as a whole and those who choose to immigrate here. Becoming a citizen of the United States is a privilege that should not be abused. Allowing those who commit serious crimes in this country to remain here sets an example, not only to fellow immigrants, but also to the citizens of the United States. If this Court were to hold that a conviction for selling illegal drugs, when the amount in possession is not determined, is presumptively a misdemeanor, it sets an example for the country as a whole that selling drugs, as long as it is in small or indeterminate amounts, is not a serious crime. Being that illicit drug sales are already a problem in the United States, a holding to this effect will only fuel the fire. For the foregoing reasons, this Court should find the default punishment for possession of marijuana with intent to distribute under section 841(b)(1)(D), *not* 841(b)(4) of Title 21 of the United States Code, thus making the crime a presumptive federal felony.

C. Petitioner cannot establish that she is eligible for the misdemeanor exception in 21 U.S.C. § 841 because she lacks evidence to prove she was only distributing small amounts of marijuana.

As provided above, the exception in 21 U.S.C. § 841(b)(4) provides that anyone in violation of the section by distributing small amounts of marijuana will be charged with a misdemeanor punishable by no more than one year in prison. *Garcia,* 638 F.3d at 516. This provision is better viewed as a mitigating sentencing provision. *Julce,* 530 F.3d at 35; *see also*

U.S. v. Eddy, 523 F.3d 1268, 1271 (10th Cir. 2008). Thus, the party convicted of the crime bears the burden of proving that her conduct fits within section 841(b)(4). *Julce,* 530 F.3d at 35. In the absence of the party meeting the necessary burden, a conviction for possession of any amount of marijuana less than fifty kilograms is punishable as a felony under the CSA, thus is an "aggravated felony" for immigration purposes. *Id.*

Petitioner might argue that the record does not state whether she was distributing for money, or specify the amount of marijuana in her possession and therefore her circumstances should be mitigated under 21 U.S.C. § 841(b)(4). This argument fails, however, because the record does not contain evidence for her to meet the burden of showing her conduct fits within section 841(b)(4). *See id.* Thus, since the default provision for punishing possession of marijuana with intent to distribute is under 841(b)(1)(D), *not* 841(b)(4), Petitioner's conviction constitutes an "aggravated felony*"*. *See Garcia,* 638 F.3d at 516; *see also U.S. v. Hamlin,* 319 F.3d 666, 670-671 (4th Cir. 2003).

II. THE COURT OF APPEALS PROPERLY HELD THAT PERSECUTION IN RETALIATION FOR THE ACTS OF HER FATHER DID NOT ENTITLE PETITONER TO WITHHOLDING OF REMOVAL, AS HER FEAR OF PERSECUTION WAS NOT "ON ACCOUNT OF" HER MEMBERSHIP IN THE FAMILY.

Petitioner, though entitled to seek a new life in the United States, must do so through established procedures and according to the established requirements of the United Nations and United States. An organized crime outfit's targeting of her father due to his wholly individual viewpoints is insufficient to qualify Petitioner for withholding of removal. The persecution she faced was not a result of familial membership. The Court of Appeal's decision should be affirmed.

This Court holds that demonstration of a clear probability of persecution will qualify a party for withholding of removal. *INS v. Stevic*, 467 U.S. 407, 429 (1984); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). The principle of "non-refoulement" underlying the Court's decision in *Stevic* prohibits removal of a person who would be subject to persecution in her home country on account of race, religion, nationality, membership in a particular social group, or political opinion. *See* INA § 241(b)(3)(B). Further, Congress has stressed the need for procedural uniformity in refugee matters by revising the INA. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980). Accordingly, without a showing that the persecution is "for reasons of" one of the five protected grounds, even the clearest probability of persecution will be insufficient for withholding. United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, para. 51 (Geneva 1992).

A. Entitlement to withholding of removal requires a nexus between a well-founded fear of persecution and membership in a social group.

The record establishes in sufficient detail the threats and violence facing Mr. Kurzban and other members of his family. Yet, even assuming arguendo, as the Court of Appeals did, that the family qualifies as a particular social group, Petitioner's request for withholding of removal lacks the requisite nexus between her fear of persecution and her membership in the Kurzban family. *See Crespin-Valladares v. Holder*, 632 F.3d 117, 127 (2011) (holding that family ties must be more than an "incidental, tangential, superficial, or subordinate" reason for persecution); *Cardoza-Fonseca*, 480 U.S. at 421.

i. Acts of revenge directed at an individual are insufficient to establish the requisite nexus between fear of persecution and social group membership.

Nexus may be shown where there is a desire by the alleged persecutor to punish membership in the particular social group, and also where there is a desire by the alleged

persecutor to overcome what is deemed to be an offensive characteristic identifying the particular social group. *Demiraj v. Holder*, 631 F.3d 194 (2011). In *Demiraj*, the Fifth Circuit examined a mother and son's fear of reprisal for the testimony of the father, Mr. Demiraj. *Id*. Ultimately, the court concluded: "The evidence strongly suggests that Mrs. Demiraj, her son, and Mr. Demiraj's nieces were targeted because they are people who are important to Mr. Demiraj—that is, because hurting them would hurt Mr. Demiraj." *Id*. at 199.

Similarly, the Seventh Circuit upholds the requirement that a petitioner "articulate a nexus between his fear of return and a protected ground." *See Wilson v. Mukasey*, 275 F.App'x. 555, 558 (7th Cir. 2008); *see also Torres v. Mukasey,* 551 F.3d 616 (7th Cir. 2008). The court in *Wilson* rejected the petitioner's claimed fear that members of a tribe cheated by his father might take revenge against the petitioner if he returned to his home country. *Id*. at 557. Much like the Fifth Circuit in *Demiraj*, the Seventh Circuit in *Wilson* reasoned that the petitioner's "fears of persecution arise from a personal matter, rather than his status as a member of a social group." *Id*. at 559. *See also*, *Matter of Pierre*, 15 I. & N. Dec. 461 (1975) (holding that the motivation behind a persecutor's alleged actions cannot be strictly personal).

The same Seventh Circuit found proof of a nexus between persecution and family membership in *Torres*, where the petitioner belonged to a family of known military deserters. 551 F.3d at 631. In *Torres*, the family possessed the requisite group-identifying characteristic that the persecutor sought to overcome. *Id*. That is, multiple brothers in the Flores-Torres family fled the Honduran military, creating a family identity rooted in desertion. *Id*. at 630. This identity—as opposed to the acts of an individual cited in *Demiraj* and *Wilson*—became the basis for the family's persecution. *Id*. The court in *Torres* overturned the BIA's decision only after determining that it was not supported by "reasonable, substantial, and probative evidence on the

record considered as a whole." *Id*. at 624 (citing *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992)).

ii. Petitioner's fear of persecution resulted from retaliatory measures for the individual action of her father, not from membership in the Kurzban family.

Here, the record considered as a whole reveals a situation that is compellingly similar to the scenarios in *Demiraj* and *Wilson*, and strikingly distinct from the situation in *Torres*. The record indicates that Mr. Tortolucci was motivated by a desire for personal revenge for the acts committed by Petitioner's father, and not by a generalized desire to hurt the family as displayed in *Torres*. From the outset of the violence, the intent behind Mr. Tortolucci's actions is evident, as he warns Mr. Kurzban: "This is what happens when you don't keep your mouth shut." The persecution began as revenge against the father and never transitioned to a more general animus toward the family. This failure to transition reflects a personal matter rejected by both the Fifth and Seventh Circuits as a basis for withholding of removal. *See Demiraj*, 631 F.3d at 199; *Wilson*, 275 F.App'x. at 559.

Furthermore, even when Mr. Tortolucci threatened, "The Kurzban family is going to pay for everything," he immediately followed with, "This is what you get for having a father like yours." As in *Demiraj*, the alleged persecution against various family members results because of their close relationship to the father, and not because of any characteristic, uniform action or belief of the family itself. *Compare Torres*, 551 F.3d at 630. The situation here is strikingly similar to the one in *Wilson*, in that Petitioner's fear results from her belief that Mr. Tortolucci will take revenge for the acts of her father. In both cases, this fear falls short. The BIA's decision, in accord with the standard of deference laid out in *Torres*, should be upheld.

B. Entitlement to withholding of removal requires that the members of a particular social group share the traits upon which persecution is based.

The Board of Immigration Appeals has defined a "particular social group" as a group of persons all of whom share a common, immutable characteristic. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (1985). The definition of the class must describe a group that is distinguishable in society such that the shared characteristic of the group reflects the reason for the persecution. United Nations High Commissioner for Refugees, Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, para. 4.1 (Jan. 1, 2003). Further, the harm or suffering has to be inflicted upon the individual in order to punish her for possessing a belief or characteristic the persecutor sought to overcome. *See Lukwago v. Ashcroft*, 329 F.3d 157, 170 (3d Cir. 2003); *Faye v. Holder*, 580 F.3d 37 (1st Cir. 2009). It is well established that asylum and the withholding of removal are not available to an alien who fears retribution solely over personal matters. *See Zoarab v. Mukasey*, 524 F.3d 777, 781 (6th Cir. 2008).

i. A personal dispute that provokes persecution cannot be imputed to other members of a particular social group solely by virtue of their membership in the group.

When reviewing administrative findings of fact, courts consistently utilize the substantial-evidence standard. *Ben Hamida v. Gonzales*, 478 F.3d 734, 736 (6th Cir. 2007). Under this standard, a court must affirm the decision of the BIA if the findings are supported by "reasonable, substantial, and probative evidence on the record considered as a whole." *Elias-Zacarias*, 502 U.S. at 481.

Courts must look to the persecutor's motives in determining whether an applicant has suffered persecution on account of protected grounds. *Al-Ghorbani v. Holder*, 585 F.3d 980, 994 (6th Cir. 2009); *see also Crespin-Valladares*, 632 F.3d at 127. Thus, in *Al-Ghorbani*, the Sixth Circuit examined the overall context of the petitioners' situation before concluding that the

persecutor's personal motives could not be unraveled from his social group-based motives. *Id*. at 997-98. There, a Yemeni general held a personal grudge against the petitioners for defying his wishes regarding the arranged marriage of his daughter. *Id*. at 998. Persecution based on his resulting anger, by itself, would not entitle the petitioners to withholding of removal. *Id*. at 997 (citing *Zoarab,* 524 F.3d at 781). The personal vendetta, however, overlapped with the petitioners' membership in a social group composed of "persons opposing Yemen's traditional, paternalistic, Islamic marriage traditions." *Id*. at 996. Thus Petitioner's persecution was "on account of" group membership.

ii. Petitioner did not play a role in the making of her father's documentary, and thus does not possess the characteristics at the root of her family's persecution.

Examining the entire circumstances, as the Sixth Circuit did in *Al-Ghorbani*, family membership provides the only trait shared by Petitioner and her father. That is to say, unlike in *Al-Ghorbani*, the personal motives underlying Mr. Tortolucci's violence towards Mr. Kurzban and certain members of his family do not overlap with motives based on familial membership. Without evidence that the family shared beliefs or committed acts similar to those of Mr. Kurzban, a claim for entitlement to withholding must fail. *See Elias-Zacarias*, 502 U.S. at 481.

In support of this interpretation, the record indicates that the threats began only after Mr. Tortolucci learned of Mr. Kurzban's plan to reveal him as the leader of the mob on national television. Without the documentary, the Kurzban family, and Petitioner in particular, would not have been subject to persecution at the hands of Mr. Tortolucci. The situation here is distinguishable from the circumstances in *Al-Ghorbani*. Whereas there, the Yemeni general sought to overcome the petitioners' opposition to paternalistic marriage rules, which would coincide with group membership, here Mr. Tortolucci sought to punish Mr. Kurzban for his

documentary. Further, he did not seek to overcome petitioners' membership in the Kurzban family, and for that reason, petitioner's claim must fail.

CONCLUSION

The Board of Immigration Appeals has reasonably interpreted the Immigration and Nationality Act in setting forth asylum and withholding criteria and is due deference. Petitioner failed to show that her state conviction was not an "aggravated felony" and that her fear of persecution was on "account of" her membership in her family. For these reasons, Respondent respectfully prays that this Court affirm the decision of the Fourteenth Circuit.

CERTIFICATION

All team members understand the Rules of the Competition and have adhered to all rules in the writing of this brief. We have no received any assistance in writing this brief.

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