

No. 13-70470

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSÉ FUENTES-COLOCHO,
Petitioner,

v.

UNITED STATES ATTORNEY GENERAL,
Respondent.

FROM THE BOARD OF IMMIGRATION APPEALS
FILE No. A094-803-651

BRIEF OF *AMICI CURIAE* HARVARD
IMMIGRATION AND REFUGEE CLINICAL
PROGRAM AND OTHER IMMIGRATION RIGHTS
ADVOCATES IN SUPPORT OF PETITIONER

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**BRIEF OF *AMICI CURIAE* HARVARD
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PROGRAM AND OTHER IMMIGRATION RIGHTS ADVOCATES IN
SUPPORT OF PETITIONER**

STATEMENT OF *AMICI CURIAE*¹

1. *Lead amicus* the Harvard Immigration and Refugee Clinical Program (the Clinic) at Harvard Law School has worked with hundreds of immigrants and refugees since its founding in 1984. It combines representation of individual applicants for asylum and related relief with the development of theories and policy relating to asylum law. The U.S. Department of Justice has engaged the Clinic in the training of immigration judges, asylum officers, and supervisors on a variety of issues related to asylum law. In addition, the Clinic provides advice, support, and supplemental services to immigration advocates throughout the United States.

¹ Pursuant to F.R.A.P. 29(c)(5), *amici* represent that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than *amici* or counsel contributed money intended to fund the preparation and submission of this brief.

The Clinic has filed briefs as *amicus curiae* in many cases before the U.S. Supreme Court, the federal Courts of Appeals, the Board of Immigration Appeals (BIA), and various international tribunals.

The Clinic has an interest in the proper application and development of U.S. asylum law to ensure that the claims of individuals seeking asylum and related relief receive fair and proper consideration under standards consistent with U.S. laws and treaties. *Amicus* regards the issues in this case as especially important. It is concerned that the protective function of the U.S. asylum statute and its international treaty obligations will be undermined by an erroneous interpretation of 8 U.S.C. § 1101(a)(42)(A), which requires an asylum applicant to show that the persecution she has suffered or reasonably fears she will suffer is “on account of” one or more protected grounds, including political opinion; and 8 U.S.C. § 1158(b)(1)(B)(i), which requires an applicant to show that a protected ground is “at least one central reason” she was persecuted or fears persecution.

2. *Amicus* The Advocates for Human Rights is a non-profit organization dedicated to the promotion and protection of internationally recognized human rights. Founded in 1983, The

Advocates for Human Rights today engages more than 800 active volunteers annually to document human rights abuses, advocate on behalf of individual victims, educate on human rights issues, and provide training and technical assistance to address and prevent human rights violations. The Advocates for Human Rights provides pro bono legal assistance to indigent asylum seekers in the Upper Midwest. The Advocates for Human Rights has a strong interest in seeing that the United States construes legal protections for refugees in a way that is consistent with international human rights standards and that does not leave deserving victims of persecution outside its reach.

3. *Amicus* Immigrant Law Center of Minnesota (ILCM) is a Minnesota based non-profit organization that engages in advocacy, direct services, education, outreach, and impact litigation to protect the civil and human rights of noncitizens. ILCM represents asylees and refugees throughout Minnesota in removal proceedings before immigration courts, the BIA, and in the federal courts. ILCM represented the asylum applicants involved in the BIA's landmark gang-asylum precedent *Matter of S-E-G*, 24 I. & N. Dec. 579 (BIA 2008). ILCM has a strong interest in the fair and correct interpretation

of the U.S. asylum statutes and regulations, including those provisions affecting youth fleeing gang violence.

4. *Amicus* Lawyers' Committee for Civil Rights of the San Francisco Bay Area (LCCR) is a civil rights and legal services organization that protects and promotes the rights of communities of color, low-income individuals, immigrants, and refugees. LCCR's nationally recognized pro bono Asylum Program was founded in 1983 and has since assisted thousands of individuals fleeing persecution. As many who seek the Asylum Program's legal services have suffered grave harm committed by gangs on account of protected grounds such as political opinion and membership in a particular social group, LCCR has a strong interest in the proper resolution of the questions before the Court in this case.

5. *Amicus* the Center for Gender & Refugee Studies (CGRS), at the University of California, Hastings College of the Law, has played a central role in the development of refugee law and policy consistent with international norms through its scholarship, expert consultations, and litigation. The questions under consideration in this appeal, regarding the proper interpretation of the "political opinion" ground for

asylum and “nexus,” implicate issues of great consequence to matters central to amicus’ core interest and expertise. CGRS has published articles on the topics of refugee claims based on political opinion and on resistance to organized gangs. CGRS has also provided expert consultation to attorneys in at least 400 cases where the applicant feared persecution by organized gangs if returned to the country of origin, more than 200 of which involved applicants from El Salvador. CGRS has presented argument, both as amicus and as counsel of record, regarding the interpretation of domestic asylum law in this court and nearly every other federal Court of Appeals.

The following immigration rights scholars sign on in their individual capacities:

Deborah Anker, Clinical Professor of Law and Director, Harvard Immigration and Refugee Clinical Program, Harvard Law School;

Nancy Kelly and John Willshire, Clinical Instructors and Co-Managers of the Harvard Immigration and Refugee Clinic at Greater Boston Legal Services;

Palmer Lawrence, Research Fellow, Harvard Immigration and Refugee Clinical Program;

Benjamin Casper, Visiting Associate Clinical Professor University of Minnesota Law School, Center for New Americans Federal Immigration Litigation Clinic;

Linus Chan, Staff Attorney, DePaul Asylum and Immigration Law Clinic;

Mark R. von Sternberg, Senior Attorney, Catholic Charities Community Services and Adjunct Professor of Law at Pace University School of Law, Saint John's University School of Law, and New York Law School;

Virgil Wiebe, Director of Clinical Legal Education, Professor of Law, University of St. Thomas School of Law.

STATEMENT OF THE CASE

The Clinic adopts the statement of facts and procedural history set forth in Petitioner's Opening Brief on Appeal.

INTRODUCTION

Petitioner José Fuentes Colucho (José) seeks refuge from El Salvador, where he was repeatedly and violently persecuted by Mara Salvatrucha (MS-13), one of the two largest "maras," or gangs, operating there. As the country conditions information in the Certified Administrative Record (CAR) show and as we explain below, groups like

MS-13 have evolved from street gangs into organized insurgent groups that threaten the political stability of their home nations. The Immigration Judge (IJ) found José entirely credible but rejected his application because it decided he had not shown that he was persecuted on account of his membership in a social group or his political opinion.²

We address José’s claim that he was persecuted on account of his political opinion. The IJ rejected this claim, stating that (1) José could not “explain” how his membership in the Lomas de Santiago Soccer Association (the LSA) was political, and (2) that he did not show that his membership in the LSA was the reason he was persecuted.³

To the contrary, José presented abundant and compelling evidence that, from the age of twelve, he held a leadership position in the LSA, an organization widely known for its opposition to gangs generally and to MS-13 in particular, he wore a uniform and armband identifying himself as the LSA captain, he was recognized by MS-13 members as

² The BIA adopted and affirmed the IJ’s opinion pursuant to *Matter of Burbano*, 20 I. & N. Dec. 872 (BIA 1994), so this Court reviews the IJ’s decision directly as if it were the BIA’s. *E.g.*, *Rendon v. Holder*, 603 F.3d 1104, 1109 (9th Cir. 2009).

³ While we focus on political opinion, we agree with Petitioner’s arguments that he is also entitled to relief based on his membership in a social group.

the LSA captain even when he was not in uniform, he spoke out against publicly MS-13 and encouraged others to resist its recruitment efforts, that MS-13 members heard him making these statements, he was beaten up regularly after games that MS-13 members attended, he was beaten unconscious on at least two occasions, he was threatened at gunpoint and forced to watch MS-13 members rape his female friends, and he was singled out for extra abuse because of his leadership position in the LSA. What more did José – who was persecuted between the ages of twelve and sixteen and still a minor when he applied for refugee status in the U.S. – need to show?

A teenager coming from a country torn apart by insurgent groups like MS-13 and suffering (as José undisputedly did) from post-traumatic stress disorder as a result of persecution cannot be expected to deliver a sophisticated lecture explaining why the LSA – and his own activities opposing MS-13 – were political. Nor was José required to provide direct evidence that his LSA membership and activities were at least a central reason for his persecution by MS-13. José's own credible testimony, the corroborating statement of a teammate who witnessed his persecution, and the objective evidence supplied by the country

reports in the record are more than enough to pass muster under the asylum laws and court precedent.

Apparently, José's application was tainted by the fact that he was persecuted by MS-13, a predicament by many youths in Central America. But José's case should be addressed on its own unique facts, and his application treated like one from any other country where individuals are persecuted for holding political opinions that threaten ruling powers, legitimate or not.

ARGUMENT

JOSÉ IS ENTITLED TO ASYLUM ON ACCOUNT OF HIS POLITICAL OPINION

A. MS-13 Is A Political Entity

As the country conditions information in the record demonstrates, MS-13 is far more than a street gang; it effectively operates as an alternative or surrogate government in El Salvador. MS-13 rules entire municipalities in El Salvador using violence and extortion. (CAR 527, 556-57, 691, 702-03, 1002-03.); J. Sullivan, "*Maras Morphing: Revisiting Third Generation Gangs*," *Global Crime*, Aug.-Nov. 2006, pp. 494-95. It "exercises its own justice, demanding certain behavior from ... citizens, and sanctioning those who do not obey." (CAR 691.)

Like a government, MS-13 collects “taxes” by extorting payments from bus drivers, cab drivers, and local business owners, among others.

(CAR 527, 556-57, 609-610, 691, 725, 765-67, 1002.) Those who oppose MS-13 are targeted for violent retribution. (CAR 604-07.)

In 2010, for example, after bus drivers banded together to resist paying “taxes” to MS-13, the gang attacked two crowded buses in the capital, San Salvador, spraying one bus with automatic weapons power and setting another on fire with the passengers inside. D. Farah, *Central American Gangs: Changing Nature and New Partners*, 66 J. Int’l Aff. 53, 60 (Fall/Winter 2012).

Legal scholars and military experts report that large and powerful gangs like MS-13 and its rival, Calle 18, have evolved into what are called “third generation” gangs. While such groups originated as street gangs, they developed into drug cartels and are now insurgents that threaten legitimate state authorities. In other words, these gangs are no longer just a local crime problem; they are also a serious national and international political problem.

As Professor Jillian Blake explains, powerful gangs in Central America, including El Salvador, “have de facto control over a significant

amount of territory and directly influence state and government officials, competing with them for control of the state.” J. Blake, *Gang and Cartel Violence: A Reason to Grant Political Asylum from Mexico and Central America*, 38 Yale J. Int’l Law 31, 37 (2012) (footnote citation omitted). To carry out their political ends, MS-13 leaders have consolidated their power at the national level, while subgroups of the gang, called “clickas,” closely coordinate their activities at the local level. Sullivan, *supra*, at 493; A. Grayner, *Escaping Forced Gang Recruitment: Establishing Eligibility for Asylum After Matter of S-E-G*, 63 Hastings L. J. 1417, 1422-23 (June 2012). The results of this coordination are dire for those who oppose MS-13: “The increasingly sophisticated nature of gang networks renders it nearly impossible for a target of gang violence to escape within the country or region.” *Id.* at 1423.

The sheer size of the maras alone makes them a formidable threat. A Salvadoran police study estimates that MS-13 has 27,500 members in El Salvador alone. Farah, *supra*, at 58. By comparison, the Salvadoran guerrilla group Farabundo Marti National Liberation Front (FMLN) had no more than 9,000 to 12,000 members at its peak, yet was

strong enough to negotiate an end to civil war without surrendering.

Id. at 59.

The armed strength of groups like MS-13 and Calle 18 often outstrips the forces available to the government. J. Blake, *supra*, at 34 (“[e]ven the lower estimate indicates that there are more gang members than military personnel in the region [Central America]. Even under the most conservative estimates of the U.S. Southern Command, gang members outnumber military personnel in Central America, including El Salvador. *Id.* In some areas, a mara’s control is so complete that police must obtain permission from the mara leaders to enter the territory. Grayner, *supra*, at 1425.

The El Salvadoran government itself treats MS-13 like a political faction. In 2012, for example, the government brokered a truce between El Salvador’s two main maras, MS-13 and Calle 18. Farah, *supra*, at 54. Observers report that leaders of different political parties have been known to negotiate with mara leaders, offering support for favorable laws in exchange for votes in gang-controlled territories. *Id.* at 63.

American national security experts also conclude that groups like MS-13 pose a grave threat to political stability. Max Manwaring of the U.S. Army War College's Strategic Studies Institute states that:

Insurgents and third generation gangs are engaged in a highly complex political act – political war ... [R]ather than directly competing with a nation-state, sophisticated and internationalized street gangs and their ... allies can use a mix of complicity, indifference, corruption, and violent intimidation to coopt and seize control of a state or a portion of a nation-state.

M. Manwaring, *Street Gangs: The New Urban Insurgency*, Strategic Studies Institute (Mar. 2005).⁴ Security experts Steven Boraz and Thomas Bruneau agree that such groups “present a serious threat to the democracies, economies, and security of Latin America. They overwhelm the governments, the police, and the legal systems with their sheer audacity, violence, and numbers.” S. Boraz and T. Bruneau, *Are the Maras Overwhelming Governments in Central America?*, *Military Review*, Nov.-Dec. 2006, at 38.⁵ And intelligence expert John Sullivan reports that gangs in El Salvador “challenge the legitimacy of the state,” “act as surrogate government[s],” “dominate the informal economic sector,” “infiltrate police and non-governmental

⁴ <http://www.strategicstudiesinstitute.army.mil/pdf/files/pub597.pdf>.

⁵ <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA483853>.

organizations,” and “effectively rule at least fifteen ... municipalities.”

J. Sullivan, *Maras Morphing: Revisiting Third Generation Gangs*, *Global Crime*, Aug.-Nov. 2006, at 494-95.

Not surprisingly, MS-13’s power is greatest in towns lacking security and social services, like José’s hometown of Santiago de Lomas (Lomas). (CAR 691, 165-66, 226, 391 para. 5.) The nearest police station is forty-five minutes away. Villagers believe there is little reason to travel there because the police are complicit with MS-13 and will not help persons who complain about the group. (CAR 165-66, 226, 391 para. 5, 252-53, 781.)

The widespread belief that the police are ineffectual, and often complicit with MS-13, is well-grounded in fact. (CAR 564, 590-91, 592, 595, 701, 710.) The police routinely fail to investigate and prosecute crimes involving MS-13 members. (CAR 564, 588-96, 691.) Indeed, it is well-established that MS-13 is able to access weapons, dominate territory, and conduct illegal activities because of corruption within El Salvador. (CAR 691.)

B. José Demonstrated that His Opposition to MS-13 Constitutes a Political Opinion

The decision in this case reflects the unfortunate tendency of immigration officials to reflexively reject the asylum applications of boys and young men fleeing persecution by groups like MS-13. The facts of this case, however, require a fresh look. If José were not from El Salvador, his story would likely be recognized for what it is – the compelling story of a young person who not only resisted MS-13’s recruitment efforts, but who took and maintained a courageous stance by opposing MS-13, by publicly declaring his opposition to MS-13, and by encouraging others to resist MS-13. He took this stance before he was eleven years old, and maintained it for five years in the face of near-constant abuse, leaving the country only after he was twice beaten unconscious, threatened at gunpoint, and forced to watch MS-13 members rape his friends.

José credibly testified that at the age of six, he joined the LSA, a group well-known in his community, including the government of his community, for its opposition to MS-13. Far from being just a soccer league, the LSA had a mission, namely, to channel boys and young men away from gang life by providing them with moral, academic, and

political guidance as well as athletic opportunities. (CAR 72-73.) José came to embrace that mission. He adhered to its strict code of conduct, including refraining from drinking, smoking, using drugs, stealing, and associating with MS-13. (*Id.*) When he turned eleven, he was recognized as a leader and made team captain. (CAR 73.) He prominently displayed his leadership role by wearing an armband on his uniform reading “captain.” (*Id.*)

As team captain, José frequently spoke at team meetings to discourage his teammates from joining MS-13. (CAR 73.) José also urged his classmates at school to oppose MS-13. (*Id.*) Members of MS-13 were well aware of José’s opinions and active efforts to keep youth out of gangs. (*Id.*) José reasonably believed that he was singled out for greater abuse because of his leadership role in the LSA. (*Id.*) His understanding was corroborated by the sworn statement of a teammate who witnessed his persecution. (CAR 75.)

The IJ nevertheless rejected the notion that José had a political opinion because he could not “explain” to the IJ’s satisfaction how his opposition to MS-13 was political. The IJ in this case took what Justice Sotomayor, in her role as Second Circuit Judge, called “an impoverished

view of what political opinions are,” which is especially inappropriate “in a country where democratic rights have only a tenuous hold.” *Zhang v. Gonzales*, 426 F.3d 540, 546 (2nd Cir. 2005) (Sotomayor, J.) (citation and quotations omitted).

The United Nations High Commissioner for Refugees (UNHCR) has likewise counseled that the definition of “political opinion” should “reflect the reality of the specific geographical, historical, political, legal, judicial, and socio-cultural context of the country of origin.” UNHCR Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, para. 46 (2010). It is well-established that “political opinion encompasses more than electoral politics or formal political ideology or action.” *Ahmed v. Keisler*, 504 F.3d 1183, 1192 (9th Cir. 2007). In the asylum context, membership in an organization that has a political purpose or outlook may demonstrate political opinion even if the organization is not a political party. *See, e.g., Mendoza-Perez v. INS*, 902 F.2d 760, 762 (9th Cir. 1990) (involvement with Salvadoran land reform organization); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374 (9th Cir. 1985) (involvement with anti-government group in El Salvador); D. Anker, *LAW OF ASYLUM IN THE UNITED STATES* (2013) 339-345 (“the

political opinion ground does not require the applicant's adherence to a formal political ideology or the platform of an official political party. Refugee protection is not the exclusive domain of the elite.”) (footnote citations omitted); *see also id.* at 339-68 (discussing other forms of political opinion recognized by the courts, including membership in labor organizations and opposition to family planning laws).

According to the U.S. Citizen and Immigration Services Guidelines for Children's Asylum Claims (2009) (the 2009 USCIS Guidelines), a child's age and maturity should also be taken into account, because “the ability to form a political opinion for which one may be persecuted may be more difficult for a young child to establish. Because the level of children's political activity varies widely among countries, however, asylum officers should not assume that age alone prevents a child from holding political opinions for which he or she may be persecuted.” *Id.* at 24 (citing *Civil v. INS*, 140 F.3d 52, 56 (1st Cir. 1998) (criticizing IJ's refusal to “believe that the Ton Ton Macoutes could be fearful of the conversations of 15-year-old children,” and noting that the evidence submitted by petitioner cast serious doubts on “the

contention that ‘15-year-old children’ are unlikely targets of political violence in Haiti.”)).⁶

Political authorities in El Salvador recognize that clubs like the LSA are not just soccer leagues – they serve a *political* function because they check the growth of groups like MS-13, and pose an active threat to MS-13. The El Salvadoran National Council for Public Security administers grants to communities to build soccer fields and encourage the formation of groups like the LSA. (CAR 931.) The mayor of Loma has provided the LSA with funds for this reason. (CAR 73.)

Public opposition to an organization that uses violence to accomplish its goals – like MS-13 – is also widely recognized as evidence that someone holds a political opinion. As this Court stated in a case involving opposition to the violent tactics of the FLMN in El Salvador, “opposition to the strategy of using violence can constitute a political opinion that is a protected ground for asylum purposes.” *Regalado-Escobar v. Holder*, 717 F.3d 724, 729 (9th Cir. 2013); *Canales-Vargas v. Gonzales*, 441 F.3d 739, 744-45 (9th Cir. 2006) (applicant who made

⁶ http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson29_Guide_Children%27s_Asylum_Claims.pdf.

speeches criticizing the Shining Path had a well-founded fear of future persecution on account of her political opinion); *Sherpa v. Holder*, 2013 WL 4310944 at *3 (9th Cir. Aug. 16, 2013) (applicant who “discouraged the villagers from joining the Maoists” showed that he had a political opinion).⁷

The decisions cited by the IJ in José’s case themselves indicate that joining an organization that oppose groups like MS-13 and speaking out in public against such groups, both of which José undisputedly did, may establish a political opinion for asylum purposes. For example, in *Matter of S-E-G*, the BIA rejected applicants’ asylum claims because the applicants failed to show that they “were politically active or *made any anti-gang political statements.*” 24 I.&N. Dec. 579, 589 (BIA 2008) (emphasis added).

⁷ Indeed, “an asylum petitioner may hold a political opinion within the meaning of the INA even if the petitioner did not participate in organized political activities.” *Meza-Manay v. INS*, 139 F.3d 759, 763-64 (9th Cir. 1998) (applicant who testified credibly that she opposed the Shining Path because of its “communist principles” and the violence and death that they inflicted on innocent people demonstrated that she had a political opinion); *see also Martinez-Buendia v. Holder*, 616 F.3d 711, 716-17 (7th Cir. 2010) (holding that refusal to cooperate with the insurgent Fuerzas Armadas Revolucionarias de Colombia (FARC) constituted a political opinion for asylum purposes).

In short, José’s youth, his years of participation and leadership in the LSA, and his public statements opposing MS-13 compel the conclusion that he has a political opinion in the sense contemplated by U.S. and international refugee laws and guidelines.

C. The Record Compels the Conclusion that José’s Political Opinion Was “At Least One Central Reason” He Was Persecuted by MS-13

To establish a nexus between his political opinion and his persecution by MS-13, José was required to show that his political opinion was “at least one central reason” for MS-13’s repeated and vicious attacks on him. 8 U.S.C. § 1158(b)(1)(B)(i).

An applicant may establish nexus through direct or circumstantial evidence. *E.g.*, *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992). Such evidence includes, *inter alia*, the persecutor’s “conduct or statements,” *Navas v. INS*, 217 F.3d 646, 659 (9th Cir. 2000), “the timing and substance of the persecution,” *Singh v. Gonzales*, 439 F.3d 1100, 1111 (9th Cir. 2006), the location of the persecution, *Donchev v. Mukasey*, 553 F.3d 1206, 1222 (9th Cir. 2009), or other “obvious signs connecting persecutory acts to the alleged persecutors and suggesting the alleged persecutors’ motives,” *Karouni v. Gonzales*, 399 F.3d 1163, 1174 (9th

Cir. 2005); *In re S-P*, 21 I. & N. Dec. 486, 495-96 1996 WL 422990 (BIA 1996) (“Taking into account the context of the Sri Lankan conflict, the information in the State Department Country Reports, and the circumstances, duration and extent of the abuse inflicted, we find that the applicant has produced evidence from which it is reasonable to believe that those who harmed him were in part motivated by an assumption that his political views were antithetical to those of [his persecutors].”).

An applicant need not show that political opinion is the *only* reason he was attacked, or even the *most significant* reason; rather, “an applicant must prove that such a ground was a cause of the persecutors’ act.” *Parussimova*, 555 F.3d 734 (9th Cir. 2009) 740-41; *see also Ali v. Ashcroft*, 394 F.3d 780, 785 (9th Cir. 2005). In a very recent opinion, the First Circuit confirmed the widely accepted principle that an applicant need not “show that an impermissible motivation was the sole motivation for his persecution [because] [applicants] seldom know the exact motivation[s] of their persecutors and, of course, persecutors may often have more than one motivation.” *Ivanov v. Holder*, --F.3d--, 2013 WL 6037164, at *7 (1st Cir. Nov. 15, 2013) (quoting *In re S-P*, 21

I. & N. at 490, and citing, *inter alia*, *Borja v. INS*, 175 F.3d 732, 735–36 (9th Cir. 1999) (en banc)); *see id.* at *7-8 (holding that applicant satisfied the requirements for asylum by presenting evidence that he was persecuted on account of his religious belief, even though the skinheads who persecuted him were likely also motivated by their economic interest in closing his church’s drug rehabilitation program).

The facts of this case illustrate the need for these principles. Because the IJ failed to consider José’s evidence in the context of the political conditions discussed above, it failed to comprehend the political nature of MS-13 and the political nature of José’s membership in the LSA. The IJ compounded its error by failing to consider the record as a whole, as it was required to do, in reviewing José’s claim that he was persecuted, at least in part, on account of his political opinion. *See Ivanov*, 2013 WL 6037164, at *8 (“viewing the record in its entirety, including the evidence the IJ ignored or misconstrued, and relying on the IJ’s own finding that [the applicant’s] testimony was generally credible, we cannot conscientiously find the IJ’s determination that [the applicant] did not establish the requisite nexus ... is supported by substantial evidence. While we are mindful of the deferential nature of

our standard of review, we are also cognizant of our obligation to reject the IJ’s findings if, as here, a ‘reasonable adjudicator would be compelled to conclude to the contrary.’”) (citations omitted).

1. MS-13 persecuted José in response to his outspoken opposition to the group’s violent conduct

Federal courts have recognized that persons who are known and active members of a group that opposes a ruling faction – whether it is a governmental entity or a guerilla organization that threatens the government – may rely on this evidence to show that they were persecuted on account of their political opinion, because a person who “mount[s] a challenge to the legitimacy and authority of the ruling regime itself” poses a political threat. *Zhang*, 426 F.3d at 546 (Sotomayor, J.).⁸

⁸ It is undisputed that José was politically opposed to gangs and expressed that opinion publicly. Even if he had not, the BIA and the courts recognize that an applicant may establish nexus based on imputed political opinion. “[W]hether the political opinion is actually held or implied makes little difference when the [applicant’s] life is at risk.” *Desir v. Ilchert*, 840 F.2d 723, 728 (9th Cir. 1988); *see also In re S-P-*, 1996 WL 422990 (“Persecution for ‘imputed’ grounds (*e.g.*, where one is erroneously thought to hold particular political opinions or mistakenly believed to be a member of a religious sect) can satisfy the ‘refugee’ definition.”)).

Recent cases support this conclusion. In *Sharma v. Holder*, 729 F.3d 407 (5th Cir. 2013), for example, the Fifth Circuit determined that a Nepalese student whose volleyball team was abducted and tortured by Maoists demonstrated the required nexus by testifying that he told his captors he was a member of a student group opposed to Maoism. *Id.* at 410-13. The Court rejected the BIA’s conclusion that he failed to show nexus because there was no evidence that the Maoists cited his political views as a reason for holding or torturing him, observing that the applicant was not required to make this showing. *Id.* at 412. His testimony that the Maoists escalated and prolonged their abuse when he told them he belonged to the student group constituted circumstantial evidence that his politics were at least one central reason for his persecution. *Id.* at 412-13.

The Tenth Circuit likewise granted the petition of a Nepalese applicant who testified he was an elected official in a political party known for its anti-Maoist position, that he discouraged fellow villagers from joining the Maoists, and that he promoted villagers’ educational development, which Maoists oppose. *Sherpa*, 2013 WL 4310944, at *3. “[U]nlike in *Elias-Zacarias*, there is evidence here of more than

[petitioner's] refusal to accede to forcible recruitment efforts.” *Id.* at *3 (citing *INS v. Elias-Zacarias* 502 U.S. 478, 482 (1992)). Petitioner’s testimony regarding his party membership, his espousal of ideas contrary to Maoist principles, and his efforts to convince others not to join the Maoists “*did* show a political motive.” *Id.* (emphasis added). Because “the record as a whole [did] not support the IJ’s conclusion that the Maoists were *only* motivated by their desire to extort or recruit” the petitioner, the Court reversed and remanded for further proceedings. *Id.* at *3-4 (emphasis added).

And in *Singh v. Holder*, 523 Fed. Appx. 495 (9th Cir. 2013), this Court decided that an Indian applicant who suffered beatings by the police after “canvassing for a political party and returning from a political party meeting” had demonstrated the required nexus between persecution and political opinion. *Id.* at 498 (reversing negative credibility determination and remanding to the BIA for further proceedings).

The record here is even more compelling. José demonstrated the requisite nexus to his political opinion not just by showing that he belonged to and was publicly identified with the LSA, an organization

known for its opposition to MS-13. He also supported his claim that he was persecuted on account of his political opinion by credibly testifying that:

- he displayed his membership in the LSA by wearing his LSA uniform and – from the age of eleven – an armband identifying him as the LSA captain;
- MS-13 members knew who he was because they regularly watched him practice and participate in LSA games;
- MS-13 members overheard him speaking out against the group to his teammates after games;
- he made his views publicly known by speaking out against MS-13 at school to youths who were not his teammates;
- he was wearing his LSA uniform during two especially violent attacks; and
- he was identified by his attackers as the LSA captain during another attack even though he was not wearing his LSA uniform and armband.

(CAR 72-73.) Furthermore, the teammate who was with José during two of the most violent attacks corroborated in his sworn statement

that MS-13 persecuted José “more than anyone,” and stated that the MS-13 members who threatened José in his hometown also threatened him in other towns and said they could “recognize his face anywhere.” (CAR 75.)⁹

The IJ and BIA nevertheless decided that José was a victim of mere “random acts of violence” based on the IJ’s determination that José’s testimony about the majority of the attacks – which occurred almost every week – was not “specific” enough and that his testimony about four specific (and especially violent) episodes, taken one by one, did not prove that he was attacked on account of his political opinion. During two of the attacks, the IJ observed, José was not wearing his soccer uniform. (CAR 84-85.) The IJ rejected out of hand the fact that José was positively identified during one of these attacks as captain of the soccer team, stating that this did not prove the reason for the attack. (CAR 85.)

Although the IJ recognized that José was in uniform during two subsequent violent attacks, he observed that these occurred outside his

⁹ IJ inexplicably characterized the teammate’s statements as “contrary” to José’s, apparently because José said he didn’t recognize the MS-13 members who attacked him outside of Lomas. (CAR 75.)

hometown so the MS-13 members who attacked him might not have recognized him; thus, “there is no reason to believe that these assaults ... were motivated in any way by the respondent’s soccer team membership.” *Id.* The IJ did not mention José’s teammate’s statement that the MS would have known José anywhere.

Like the immigration officers whose decisions were rejected by the appellate courts in the above-cited cases, the IJ and BIA here strained to find reasons that nexus was not proven in each instance of violence against José, instead of viewing the record as a whole and recognizing that political opinion was *at least one central reason* that MS-13 persecuted José.

2. The IJ should have considered José’s age and experience in evaluating the nexus between his persecution by the MS and his political opinion.

José was seventeen when he applied for asylum and nineteen when he testified about the attacks he experienced from the time he was a small boy until he was sixteen. (CAR 72-75.)¹⁰

¹⁰ The 2009 USCIS Guidelines advise asylum officers to “bear in mind that an applicant whose claim is based on experiences that occurred under the age of eighteen may exhibit a minor’s recollection of the past experiences and events.” *Id.* at 15.

Courts have recognized that a child’s testimony should be treated differently than an adult’s. In *Mejilla-Romero v. Holder*, 614 F.3d 572 (1st Cir. 2010), for example, a panel of the First Circuit vacated its earlier opinion denying review of a teenaged boy’s application for asylum and remanded to the BIA for reconsideration in light of the Department of Homeland Security’s *Guidelines for Children’s Asylum Claims* (1998) and the *Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children* (2004), both of which, the panel noted, were informed by the UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Minors Seeking Asylum (1997) (the UNHCR Guidelines). The panel’s decision to vacate and remand reflects the concerns expressed by Judge Stahl, the dissenter in the original opinion, who urged that asylum cases involving children must be “approach[ed] ... with particular care[.]” *Mejilla-Romero v. Holder*, 600 F.3d (1st Cir. 2010) 63, 83-84 (Stahl, J., dissenting).

As Judge Stahl observed, “a child experiences traumatic events in ways that are different from an adult, and a child is less likely to understand and to be able to explain the reasons that violence has been inflicted upon him.” *Mejilla-Romero*, 600 F.3d at 83, 84 (Stahl, J.,

dissenting) (citing *inter alia Kahssai v. INS*, 16 F.3d 323, 329 (9th Cir. 1994) (granting petition of a young girl who was not herself attacked, but traumatized by seeing her family killed); “Guidelines for Children’s Asylum Claims,” U.S. Department of Justice, INS Policy and Procedure Memorandum, December 10, 1998, 1998 WL 34032561).¹¹

Because of the difficulty a child is likely to have in explaining what happened to him and why, “[t]he [UNHCR] Guidelines highlight ... the need for adjudicators to give greater weight to objective factors when testimony appears incomplete and to afford children a liberal benefit of the doubt.” D. Anker, N. Kelly, J. Wilshire Carrera and S. Ardalan, *Mejilla-Romero: A New Era for Child Asylum*, 12-09 Immig. Briefings 1, 3 (2012) (citing UNHCR Guidelines at 19, 26; *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004)) (quotations omitted). The USCIS Guidelines likewise provide that, a “child may be unable to

¹¹ This guidance is not “unique to the immigration context. It has numerous correlates in other areas of juvenile justice.” *Mejilla-Romero*, 600 F.3d at 84 (citing Kristine K. Nogosek, *It Takes a World to Raise a Child: A Legal and Public Policy Analysis of American Asylum Legal Standards and Their Impact on Unaccompanied Minor Asylees*, 24 Hamline L. Rev. 1, 13–17 (2000) (outlining protections and assistance afforded to children in other areas of law, including contract, tort, and criminal law)).

identify all relevant motives, but a nexus can still be found if the objective circumstances [*i.e.*, country condition information] support the child's claim that the persecutor targeted the child based on one of the protected grounds." 2009 USCIS Guidelines at 43. Indeed, the 2009 USCIS Guidelines provide that "the adjudicator should also supplement the record as necessary to ensure a full analysis of the claim" in cases involving minors. *Id.* at 35 (citing *Matter of S-M-J*, Int. Dec. 3303 ("The more background information the Service has about the applicant's country, the more thorough and intelligent the examination will be.")).

The traumatized teenager in *Mejilla-Romero* was unable to explain that the violence he experienced was related to his family's political opposition to the group that attacked him. 600 F.3d at 86 (Stahl, J., dissenting). As Judge Stahl recognized, it was hardly surprising that a child in his position would have difficulty recounting his experiences in the first place, let alone expressing what he suffered in political terms. *Id.* The immigration officers and the panel majority should have taken these factors into account in assessing the evidence linking his persecution to political opinion. *Id.* In the end, the entire

panel decided to remand the case on these grounds. *Mejilla-Romero*, 614 F.3d 572.

Like Mejilla-Romero, José was traumatized by violence at a very young age. He testified to years of regular beatings from the time he was twelve, to two incidents where he was beaten unconscious, and to another incident in which he was held at gunpoint while he watched gang members rape two of his female friends. A psychological exam showed – not surprisingly – that José suffered from post-traumatic stress disorder and deep depression as a result of persecution. (CAR 73.)

The IJ recognized that José’s age and emotional state were relevant to the application filing deadline, but did not take these factors into account or review José’s testimony in an age-appropriate manner when it came to evaluating nexus. Although José testified that the LSA is political and that “[t]o stand as a member of [the LSA] is to publicly renounce” MS-13, the IJ decided that José did not “explain[]” why his anti-gang philosophy was political in nature or to show that the “gang members who abused [him] had any particular political aspirations or attributed to him any particular political ideology.” (CAR 81-82.) The

IJ could not imagine opposition to MS-13 being “political” unless the “applicant’s opposition took on a political dimension, by, for example seeking to expose systemic corruption by public officials who accept bribes by gangs.” (*Id.*) Accordingly, the IJ concluded, José failed to demonstrate “anything more than a moral aversion to gang life.” (*Id.* at 82.)

In reaching this decision, the IJ gave no consideration to the fact that José was still a minor when he applied for asylum and that he was persecuted between the ages of 12 and 16. It is hard (if not impossible) to imagine a child acting as a whistleblower against government corruption. Indeed, it is hard to imagine a child directly confronting MS-13 – as the IJ implied he should (CAR 73) – and living to tell the tale. An applicant for asylum, let alone a child applicant, is not required to pick a fight with his persecutors to prove nexus. Finally, the line between “moral” and “political” is a fine one; a minor should not be rejected for asylum merely because he cannot explain why his views are “political” or because his political acts were not as politically sophisticated as those of an adult.

If José's application were considered in light of his age and emotional state, as the USCIS and the UNHCR prescribe, his testimony concerning his leadership role in an anti-gang organization, his outspoken opposition to MS-13, and his teammate's statement corroborating his testimony that he was singled out for abuse would have to be seen as compelling evidence that the boy held a political opinion, acted on it, and was persecuted as a result.

CONCLUSION

For the foregoing reasons and the reasons stated in the Petitioner's Brief, this Court should reverse the BIA's decision and remand for consideration of José's argument that he was persecuted on account of his political opinion.

Respectfully submitted,

Dated: November 19, 2013

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the volume limitation of Ninth Circuit Rule 29-2(c)(3) because it does not exceed 7,000 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word version 2007 in a 14-point Century Schoolbook font.

Dated: November 19, 2013

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I hereby certify that on November 19, 2013, I electronically filed the foregoing **BRIEF OF *AMICI CURIAE* HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM AND OTHER IMMIGRATION RIGHTS ADVOCATES IN SUPPORT OF PETITIONER** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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