FILE NO. [redacted]

UNITED STATES COURT OF APPEALS
FOR
THE NINTH CIRCUIT

[redacted] **et. al.,**

Petitioners – Appellants

- v. -

ALBERTO R. GONZALES, Attorney General of the United States,

Respondent - Appellee

ON APPEAL FROM THE BOARD OF IMMIGRATION APPEALS

PETITIONERS' – APPELLANTS' OPENING BRIEF FOR *EN BANC* REHEARING

Karen Musalo, CSB No. 106882
Stephen Knight, CSB No. 189546
Center for Gender and Refugee Studies
U.C. Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102
(415) 565-4720
Of Counsel

Tala Hartsough, CSB No. 230204
Center for Gender and Refugee Studies
On Brief

Philip Hornik, OSB No. 78049
Attorney at Law
520 SW Sixth Avenue, Suite 1010
Portland, OR 97204-1595
(503) 243-2733
Attorney for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

Petitioners [redacted] and [redacted], husband and wife, and citizens of Ethiopia, seek asylum under 8 U.S.C. § 1158, INA § 208, and challenge an Immigration Court's denial of asylum and withholding of deportation, issued under 8 U.S.C. § 1229(a)(1), INA § 240(a)(1). Prior to April 1, 1997, such proceedings were known as deportation proceedings, and were authorized by former 8 U.S.C. § 1252(b), INA § 242(b). The Board of Immigration Appeals (BIA) has the authority to review decisions of Immigration Judges (IJs) in deportation cases pursuant to 8 C.F.R. § 1003.1(b)(2). Jurisdiction to review final orders of deportation is conferred on this Court by former 8 U.S.C. § 1105(a), INA § 106.[1] The order subject to this appeal is a final order of removal because the BIA issued a *per curiam* decision that adopted and affirmed the opinion of the IJ. *See Nuru v. Gonzales*, 404 F.3d 1207, 1215 (9th Cir. 2005) ("To the extent that the BIA simply affirms the immigration judge, we review the decision of that judge as if it were the

---

[1] Section 306(a)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996), repealed 8 U.S.C. § 1105(a), INA § 106. Under IIRAIRA section 309, most of its provisions took effect on April 1, 1997. However, under IIRAIRA section 309(c)(1)(B), cases such as the Petitioners', that were commenced prior to April 1, 1997, and in which a final order of deportation was issued on or after October 30, 1996, "shall continue to be conducted without regard to" the amendments of IIRAIRA section 309.

final agency action.").

STATEMENT OF ISSUES

The issues presented for review are as follows:

1. Whether, in light of the well-documented repression of political opponents by the Ethiopian government, the record compels the conclusion that Mr. [redacted] fear of persecution on account of his political opinion is well-founded, given the fact that he has been a vocal opponent of the government; and was an active member of the Medhin, a political organization that has been banned in Ethiopia.

2. Whether, given the Ethiopian government's concerted campaign of oppression against anyone associated with the Derg, Ethiopia's former reviled regime, the record compels the conclusion that Mr. [redacted] has a well-founded fear of persecution on account of his imputed political opinion of support for the Derg. Whether the IJ erred in failing to find that such an opinion would be imputed to Mr. [redacted] in light of the fact that Mr. Mengistu believes in a multi-ethnic democracy in Ethiopia, a viewpoint associated with former Derg supporters; he is a Christian Amhara, an ethnic group which dominated the Derg; he is the son of active members of the Derg's political party who were repressed as a result of their association with

the Derg; and he was given a Derg-sponsored scholarship to study in the United States.

3. Whether the record compels the conclusion that Mr. [redacted] and Ms. [redacted] have a well-founded fear that their daughter, [redacted], who is currently nine years old and was born in the United States, will be subjected to genital cutting. Whether the IJ erred in failing to find that their fear is well-founded, given the high prevalence of genital cutting in Ethiopia; the fact that both Mr. [redacted] and Ms. [redacted] belong to ethnic groups that adhere to this practice; and that Ms. [redacted] own parents subjected her to it.

4. Whether, given the harsh consequences of being uncut in Ethiopian society, Mr. [redacted] and Ms. [redacted] have established a well-founded fear of persecution on the basis of the social and familial ostracism that [redacted] would suffer, were they to succeed in preventing her from being cut.

5. Whether Mr. [redacted] and Ms. [redacted] have established that their fear of persecution based on the infliction of genital cutting on their daughter, or alternatively, her ostracism for resisting that ritual, is on account of their membership in a particular social group of parents of Ethiopian females of ethnic groups which practice genital cutting, or parents of Ethiopian females.

6. Whether Mr. [redacted] and Ms. [redacted] have a well-founded fear of

persecution based on the social and familial ostracism they would suffer for their resistance to [redacted] genital cutting, and whether the feared harm is on account of their membership in a particular social group of parents of Ethiopian parents who oppose the genital cutting of their daughter.

7. Whether Mr. [redacted] and Ms. [redacted] have a well-founded fear of persecution on account of their political opinion of resistance to genital cutting.

STATEMENT OF THE CASE

Petitioner [redacted] is a native and citizen of Ethiopia and belongs to the Amhara ethnic group. He entered the United States on January 1, 1990, as a J-1 exchange student. His wife, Ms. [redacted] joined him on February 22, 1993. On July 13, 1993, they applied affirmatively for asylum at the San Francisco Asylum Office, and were referred to the Immigration Court on January 22, 1996.

In an order dated November 17, 1997, the IJ denied the petitioners asylum and withholding of deportation, holding that Mr. [redacted] did not have a well-founded fear of persecution as a result of (1) his opposition to the Ethiopian government or his family's ties to the former government, or (2) the potential infliction of female genital cutting upon his minor daughter, [redacted]

In a *per curiam* decision, the BIA adopted and affirmed the IJ's decision. A

panel of the Ninth Circuit upheld the BIA decision, with Judge Ferguson dissenting. On March 3, 2005, this Court granted a petition for rehearing *en banc*, vacating the panel decision.

STATEMENT OF FACTS

Political Background

From 1974 to 1991, Ethiopia was ruled by the Derg, a "brutal and dictatorial Marxist regime," headed by President Mengistu Haile Mariam.[2] AR 270, 421, 467. During the Mengistu era, political control remained in the hands of a Mengistu-established political party known as the Worker's Party of Ethiopia (WPE), which was dominated by members of the Amhara ethnic group. AR 335, 455. The Derg was overthrown in 1991 by the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), a coalition of political parties united by their ideological affinity and their opposition to President Mengistu. AR 270, 333.

The EPRDF was, and continues to be, largely controlled by the Tigrean People's Liberation Front (TPLF) – comprised mainly of members of the Tigrean ethnic group. AR 234, 253, 291. After the Derg was overthrown, a transitional government – the Transitional Government of Ethiopia (TGE) – was formed to rule

---

[2] There is no family relationship between the applicant and former President Mengistu.

the country. AR 389. The TGE was dominated by the EPRDF and TPLF, and headed by President Meles Zenawi, the leader of the EPRDF and TPLF. AR 234, 330.

The TGE expressed its commitment to establishing a multi-party democracy and protecting the human rights of all nationalities and ethnic groups within Ethiopia. However, the reality remained starkly different. AR 193, 470. The TGE adopted a policy of fomenting ethnic conflict and responding to political opponents with violence, harassment, arbitrary arrests, detention, and torture. Amharas were particularly targeted, because they had dominated the Derg and were considered to be close supporters of the former despised government. AR 235.

In 1995, federal elections were held in Ethiopia. Most opposition groups boycotted the elections, claiming that the TGE prevented them from participating effectively in the political process. AR 262. As a result, the EPRDF won the majority of the regional as well as national seats, and Mr. Zenawi became the prime minister of Ethiopia. AR 253. The EPRDF continued the TGE's policy of fostering ethnic conflict and showing intolerance for political opponents. AR 183, 193-96. It also split Ethiopia geographically along ethnic lines, granting local regional authorities considerable fiscal and political autonomy. AR 253.

Background and Ethnicity of Mr. [redacted] and Ms [redacted]

Ms. [redacted] is a member of the Christian Amhara ethnic group, and Mr. [redacted] identifies with both the Amhara and Oromo ethnic groups because his biological mother is an Amhara and his father and stepmother are Oromos. AR 88, 92, 158. He is considered to be an Amhara because he is an Orthodox Christian whose primary language is Amharic, and because of his "centrist" views (advocating a multi-ethnic government in Ethiopia, and opposing the government's decision to split Ethiopia along ethnic lines).[3] AR 55, 88, 416-17. Mr. [redacted] biological parents are divorced and both have remarried. He has one brother and three sisters, and four half-brothers and three half-sisters. AR 132. All of them live in or around Addis Ababa (the capital of Ethiopia). AR 294.

Mr. [redacted] graduated with a degree in electrical engineering from Addis Ababa University. AR 89. From 1986 to 1989, he taught Electrical Technology at Teacher's College in Addis Ababa. AR 106. He and Ms. [redacted] married in 1988. AR 107. In early 1990, while the Derg was still in power, he came to the United States on a J-1 exchange visitor visa, having received a government-sponsored

[3] Some experts use the term "Amhara" to describe not only members of a particular ethnicity and religion, but also those who are "urbanized" and "who speak Amharic and identify with the concept of a unified, centralized Ethiopian state." AR 455.

scholarship to study at Oregon State University. AR 105-06, 289. Ms. [redacted] joined him in February 1993. AR 107.

Mr. [redacted] Political Activities

Mr. [redacted] has always been engaged in, and concerned with, Ethiopia's political situation. When he was in high school and college, he was a member of the Youth League of the Ethiopian People's Revolutionary Front (EPRF), a group opposed to the Derg regime. AR 89. In 1981, as a result of his involvement with the Youth League, Mr. [redacted] was imprisoned by the government for nearly five days. AR 90. He was released after he signed an affidavit agreeing to stop associating with the EPRF. AR 91.

Mr. [redacted] remained active in matters concerning Ethiopian politics even after moving to the United States. He has been openly critical of the Ethiopian government because the EPRDF's ethnocentric policies and suppression of political opposition are completely contrary to his vision of a multi-party and multi-ethnic democracy in Ethiopia. AR 111-12. He joined a number of organizations in the Portland community, including the Yehadar Afkarian Mahbir, which held many meetings addressed by prominent opposition leaders, and the Ethiopian Cultural Organization, which was both "cultural and political," and opposed the EPRDF. AR

120, 285.

In 1993, he became a member of the Medhin, a political organization that supports the creation of a multi-ethnic democracy and opposes the Ethiopian regime. AR 115-17. Many of its members had ties with the former Mengistu government. AR 241. The Medhin (which means "salvation" in Amharic) does not accept the Ethiopian government as legitimate, and some of its members have not ruled out the use of violence to overthrow it. AR 115, 211, 262. As a result, the Medhin has been banned from operating in Ethiopia. AR 262. Mr. [redacted] however, made it clear that he does not "believe in violence" but rather, supports the "democratic process" and working through "peaceful means." AR 116-17.[4]

As a Medhin member, Mr. [redacted] attended meetings, helped recruit members, and discussed Medhin materials and policies with other members. AR 117-18, 248. In August 1996, he participated in a Medhin conference in Washington, D.C., that was attended by over 100 people, including participants from Canada and Europe. AR 118, 128. Mr. [redacted] believes that the Ethiopian Embassy was aware of the conference and learned the identities of the attendees,

---

[4] A 1994 Profile by the Resource Information Center of the former Immigration and Naturalization Service (INS) notes that some asylum applicants have made a distinction between the exiled component of Medhin, which is non-violent, and the armed or military wing of Medhin. AR 238 n.39.

because this was a major conference convened by a banned political group whose members are subjected to strict surveillance. AR 118, 128, 249.

Other of Mr. [redacted] actions have also likely made his critical views known to the Ethiopian government. While he was studying at Oregon State University, Mr. [redacted] frequently expressed his criticism of the government to his roommate, Mr. [redacted] who is a Tigrean. Mr. [redacted] actively supports the EPRDF, and, after returning to Ethiopia, became the dean of a college in Nazeth, a city 90 kilometers away from Addis Ababa.[5] AR 121-22.

Mr. [redacted] had similar discussions with Mr. [redacted] friend, who is also a Tigrean. This friend publishes a pro-EPRDF magazine, and has met with Prime Minister Zenawi and other high-level Ethiopian officials. AR 128. Further, Mr. [redacted] has been a vocal critic of the EPRDF within the Ethiopian community in Portland, where he resides, and where there are many EPRDF supporters. AR 119-20.

In addition to the acts that have already marked him as a dissident in the eyes of the Ethiopian government, Mr. [redacted] has made it clear that he does "not

---

[5] The record establishes that the Ethiopian government has exerted its influence over the universities, dismissing faculty members who do not agree with its policies. AR 194, 427. Given this demonstrated degree of government intervention in the running of the country's universities, one can infer from Mr. Terefe's appointment as dean that he is on positive terms with the government.

accept the way the EPRDF conducts business" and would continue to "vehemently oppose" the government. AR 117. The stated policy of the EPRDF is that it will recognize and cooperate with political opponents, including members of Medhin, as long as they renounce violence. AR 191, 276. In practice, however, as the documentary and testimonial evidence discussed below demonstrates, the government has been oppressing all political opponents, whether or not they renounce violence.

Risk of Being Considered to be a Derg Supporter

Beyond the actions that mark Mr. [redacted] as a political opponent in the eyes of the government, Mr. [redacted] also faces a high risk of being considered a Derg supporter. Mr. [redacted] own parents were members of the WPE, the political party in power during the Derg regime, and themselves experienced repression as a consequence. AR 96-101. His father worked for the Ethiopian Air Force, and later, the Ministry of Defense. AR 92-94. Both his father and stepmother were actively involved in their local neighborhood associations, known as "kebeles," that were created during the Derg regime. AR 91, 95.

The WPE was disbanded when the EPRDF came into power, and his parents were imprisoned for two weeks without being charged, and were stripped of their

civil rights, including their right to vote. They were harassed by officials and supporters of the EPRDF, could not purchase goods they would have otherwise been entitled to purchase with their ration cards, and Mr. [redacted] father was denied permission to start a small shop. AR 96-101. They were also kept under strict surveillance, required to report regularly to their local neighborhood association, and had to obtain special travel permits in order to leave their local village. AR 96-100, 286-88. As Mr. [redacted] father described in a letter to his son, "[o]ur house is searched constantly, they summon us to their office and put us in jail in [sic] this and that pretext." AR 401. Mr. [redacted] brother-in-law was transferred to another region and then fired "for no apparent reason." His cousins were "pistol whipped" by EPRDF soldiers and thrown into jail and had to drop out of school. AR 250.

Mr. [redacted] sister has been "blacklisted by the government" because in 1991, as a student at an engineering school in Addis Ababa, she had participated in a military training to defend against the EPRDF takeover. AR 287. As a result, she was kept under surveillance and was unable to obtain a job. AR 287-88.

Moreover, as noted above, Amharas are assumed to be Derg supporters because they dominated the Derg and because many Amharas are opposed to the government's "system of ethnic representation." AR 234, 458. In the wake of the

overthrow of the Derg government, ethnic Amharas were the victims of concerted ethnic cleansing that the government was unable or unwilling to control. AR 429, 452. In 1992, Ms. [redacted] own parents and siblings, who are Christian Amharas, were driven out of their home in the eastern part of Ethiopia, and her cousin, who was found in the family home, was killed. AR 131, 159, 161.

Finally, in addition to the suspicion arising from his and his wife's ethnicity and family background, Mr. [redacted] will be suspected of being a Derg supporter because the basis of his travel to the United States in 1990 was the award of a highly competitive scholarship sponsored by the Derg government. AR 105-06, 289-90.

Evidence that the EPRDF is Suspicious of Mr. [redacted] Background

Mr. [redacted] and his family have already experienced the repercussions of their family background and his political activities. When Ms. [redacted] applied for an exit visa and passport in order to join Mr. [redacted] government officials said they wanted to "investigate" his background. AR 156, 290. They also wanted to know "how he got the scholarship," and "what he is doing here [in the United States]." *Id.* Even after she provided them with the requested information, they repeatedly denied her the necessary documents. Initially they said they had not finished their

investigation, but later began imposing additional requirements, such as a stamp from the Ethiopian Embassy in Washington, D.C., which Mr. [redacted] learned was not a requirement. Finally, the immigration officials claimed to have lost her file and informed her that she would need to start the application process all over again. AR 108-9, 291.

Ms. [redacted] was eventually able to obtain an exit visa in February 1993, nearly a year after she had first applied for it, by bribing a low ranking immigration clerk with 700 birr (the equivalent of $125). AR 110, 156-57, 291. The clerk was able to bypass the official channels and provide Ms. [redacted] with the requisite documents. AR 110. Mr. [redacted] testified that these problems occurred because "they suspect [sic] that because I was able to gain a scholarship to . . . the West at that time, I must have . . . a serious tie with the old government." AR 110.

Supporting Evidence Regarding Mr. [redacted] Political Persecution Claim

Mr. [redacted] submitted considerable evidence in support of his claim. Testimony was given by [redacted], a friend and co-member of Medhin. The record includes documentary evidence on country conditions, a statement from Ejigou Demissie, the chairperson of Medhin, a letter from Reverend Matthew Tate, the rector of the Eastern Orthodox Church of the Annunciation to which the

petitioners belong, and letters from both Mr. [redacted] and Ms. [redacted] parents.

The testimonial and documentary evidence establishes that the government has no tolerance for political opposition, has fostered ethnic conflict, and has particularly targeted political groups, such as the Medhin, that favor a multi-ethnic rule in Ethiopia. The evidence also demonstrates that Amharas are particularly singled out for persecution.[6]

Mr. [redacted] who has himself been granted asylum in the United States,[7] is an active Medhin member, and remains engaged in the political developments in Ethiopia. He testified that based on his knowledge of the conditions in Ethiopia, the government is aware of Mr. [redacted] political opinions and Medhin membership, and that the petitioner would be imprisoned and his life would be in danger if he were sent back to Ethiopia. AR 147, 49.

---

[6] The documentary evidence in this case spans a period of five years, from 1992 to 1997, during which time there were changes in the Ethiopian government. The evidence establishes that the period directly following the EPRDF takeover was marked by a high level of violence, political intolerance and ethnic fighting. The more recent documentary evidence indicates that while conditions had improved somewhat, "serious problems remain[ed]," including extrajudicial, summary or arbitrary executions, beating and mistreatment of detainees, prolonged pretrial detention, arbitrary arrests and denial of constitutional rights. AR 189, 253-54.

[7] Mr. [redacted] applied for asylum in November 1994. He sought asylum because he is an Amhara, who are "really hated" by the government, and because of his and his family's ties to the Derg regime. AR 150.

Mr. Demissie, the chairperson of Medhin, who has personally known Mr. [redacted] for several years, noted Mr. Mengistu's deep commitment to "social justice and national unity," as well as his patriotism towards Ethiopia. AR 248. He corroborated the depth of Mr. [redacted] involvement in the Medhin, noting that he "has been active in the party meetings, in recruiting members for [the] Medhin party [and] other efforts to expose the EPRDF regime's criminal activities to the civilized world." AR 248.

In his role with the Medhin, Mr. Demissie keeps himself apprised of the reports of human rights organizations. AR 249. On this basis, he expressed an informed opinion about the suppression of political dissent by the government and the treatment meted out to political opponents, including Medhin members. He stated that the Ethiopian Embassy in Washington vigilantly tracks the activities of opposition groups and reports them to the Ethiopian government. AR 249. He concluded that Mr. [redacted] activities with the Medhin were "well known" to the government and, therefore, like other Medhin members, he too would be "arrested, imprisoned, and possibly put to death by the EPRDF." AR 249.

Finally, Reverend Tate, the rector of the Eastern Orthodox Church to which the petitioners belong, vouched for Mr. [redacted] and Ms. [redacted] high moral and ethical character. Reverend Tate stated that they are "two of the most gentle, kind

and honest people I have ever known. I admire them greatly." AR 416. He also corroborated that Mr. [redacted] has been an outspoken critic of the EPRDF in his community. AR 417.

In addition to the testimony and statements of individuals, the petitioners also submitted country conditions evidence which clearly documents the use of arrests, detention, disappearance, torture and other forms of violence by the TGE and EPRDF/TPLF in order to suppress opposition:

1. The May 1997 edition of Ethiopian Review, an independent bi-monthly magazine published in the United States, reports that "there has been a new surge in the crackdown on suspected opponents of the TPLF regime. . . . Some of these victims have disappeared without trace." AR 183. Another edition notes that "[v]iolence, . . . harassment and detention of opposition leaders and candidates is a common practice under the [TPLF] . . . regime," AR 448, and that political persecution is worse in the rural areas outside of Addis Ababa, where opposition parties have unanimously reported that their members have been arrested, detained and killed by agents of the Ethiopian regime. *Id.*
2. The 1996 Ethiopia Country Report issued by the State Department (1996 Country Report) notes that the "federal Government [sic] can not yet protect constitutional rights at the regional level." AR 253.
3. A 1996 report by the United Nations Commission on Human Rights cites allegations of extrajudicial, summary or arbitrary executions by the Ethiopian government. AR 188-90.
4. According to reports issued in 1995 by Amnesty International, "[h]undreds of opposition party members were detained on account of their peaceful political activities." AR 464. "Dozens of government opponents have 'disappeared.' People have been held in secret detention centers, and torture has been inflicted on suspected members of opposition groups." AR 467.

The evidence also shows that groups advocating a centrist or multi-ethnic rule

are particularly targeted:

1. The 1994 Profile by the Resource Information Center of the former Immigration and Naturalization Service[8] (1994 INS Profile) states that the "Transitional Government is relatively inflexible in its relations with groups which advocate the 'centrist' position, *even if they do not, to outside observers, appear to pose a military or political threat to the government.*" AR 240 (emphasis added).
2. The December 1994 Ethiopian Review reports that "[p]olitical groups like the . . . Medhin . . . have been hindered by the regime from participating freely and safely in any political activity within the country." AR 448. An August 1993 edition notes that forty faculty members of the Addis Ababa University were fired by the TGE because they "constituted a conspicuous source of support for the unity of Ethiopia as a multiethnic society. President Meles and his colleagues have been keenly aware that some of these faculty members opposed what they consider his ethnically divisive initiatives." AR 436.

Further, the evidence shows that Amharas, and those perceived to be WPE members, and therefore supporters of the Derg regime, have been singled out for persecution:

1. The 1994 INS Profile notes that the TGE has disenfranchised, restricted and indefinitely detained members of the WPE, the majority of whom are Amharas, even though most of them have not been charged with any crime. AR 235.
2. The March 1993 Ethiopian Review states that since the EPRDF takeover in 1991, "thousands of Amharic speaking Christians have been killed or mutilated." AR 452. The February 1993 edition reports that "Amaras [sic] continue to live under physical and psychological attacks by TPLF/EPRDF. For the last 20 months the TPLF/EPRDF-led government in Ethiopia exposed defenseless Amaras [sic] to untold atrocities after confiscating their weapons." AR 429.

---

[8] On March 1, 2003, the functions of the INS were transferred to the Department of Homeland Security.

Mr. [redacted] and Ms. [redacted] Fear of Female Genital Cutting Being Imposed on Their Daughter, or, in the Alternative, Being Ostracized for Their Resistance

Mr. [redacted] and Ms. [redacted] strongly oppose the practice of female genital cutting, which is a common cultural and societal requirement in Ethiopia. Mr. [redacted] stated that he would try to prevent his daughter [redacted] a United States citizen who is now nine years old, from being subjected to the ritual, but was unsure if he would be successful in doing so because of the intense social and familial pressure on girls to undergo cutting. AR 136-37. Both families belong to ethnic groups (Amhara and Oromo) that practice cutting, and Ms. [redacted] own parents subjected her to it. AR 163, 201.

Mr. [redacted] explained that even if he were to be successful in protecting his daughter, she would be "ostracized and . . . ridiculed." AR 137. Mr. [redacted] also stated that if "for some reason," such as being incarcerated, he was not able to be with his family, his wife alone would be unable to prevent the family or society from inflicting genital cutting on their daughter. AR 138. Ms. [redacted] testified that she would be rejected by her family, her husband's family, and the society if she was unwilling to allow her daughter to undergo the ritual practice. AR 164.

Supporting Evidence Regarding Petitioners' Genital Cutting Claim

The country conditions documentation regarding genital cutting clearly establishes that it is widely practiced in Ethiopia and is a broadly-accepted social norm:

1. According to the 1996 Country Report, "[s]ocietal discrimination and violence against women and abuse of children remain problems; FGM [female genital mutilation] is nearly universal." AR 254. "[T]he most extreme and dangerous form of FGM, can occur any time between the age of 8 and the onset of puberty." AR 264.
2. According to the 1993 Ethiopia Country Report issued by the State Department, "the percentage of Ethiopian women who have undergone genital mutilation may be as high as 90 percent." AR 336.
3. The Female Genital Cutting Education and Networking Project reports that a "girl who is not circumcised is considered 'unclean' by local villagers and therefore unmarriageable. A girl who does not have her clitoris removed is considered a great danger and ultimately fatal to a man if her clitoris touches his penis." AR 198.
4. A report entitled *Female Genital Mutilation Around the World* documents that genital cutting is practiced by thirteen ethnic groups in Ethiopia, including the Amhara and Oromo. AR 201.

SUMMARY OF ARGUMENT

First, the IJ erroneously held that Mr. [redacted] did not have a well-founded fear of persecution based on his vocal criticism of the government and his active involvement in the Medhin. As discussed in section 1(a), this finding is based on factual errors and speculation, and a proper application of the facts to the law compels the conclusion that Mr. [redacted] has a well-founded fear on these bases.

Further, the IJ erred in finding that Mr. [redacted] did not have a well-founded fear of being persecuted on account of his political opinion of support for the former Derg regime. As discussed in section 1(b), this finding is also against the weight of the evidence and must be reversed.

And, as discussed in section 1(c), Mr. [redacted] has also established that his fear of persecution exists countrywide.

Second, the IJ erroneously ruled that Mr. [redacted] and Ms. [redacted] did not have a well-founded fear on the basis that their daughter, [redacted] would be subjected to genital cutting. As discussed in section 2(a), this holding is based on legal and factual errors and must be reversed.

In addition, the IJ completely overlooked the petitioners' alternative claim that even if they were able to prevent their daughter from being genitally cut, she would be ostracized by their extended families and the rest of society. As discussed in section 2(b), social ostracism for not undergoing genital cutting rises to the level of persecution, and this fear is well-founded. Moreover, as detailed in section 2(c), the persecution of female genital cutting or ostracism to the petitioners' daughter would also constitute persecution as to them.

Further, because the IJ concluded that there was no well-founded fear arising out of the female genital cutting claim, he did not rule on the issue of nexus. As

discussed in section 2(c), Mr. [redacted] and Ms. [redacted] have a well-founded fear of persecution on account of their membership in either of two alternative social groups: parents of Ethiopian females of ethnic groups which practice genital cutting, or parents of Ethiopian females.

Moreover, the IJ also failed to consider two additional bases for Mr. [redacted] and Ms. [redacted] well-founded fear – their membership in a social group of Ethiopian parents who oppose the genital cutting of their daughter, discussed in section 3, and their political opinion, discussed in section 4.

ARGUMENT

Standard of Review

This Court reviews findings of fact under the substantial evidence standard. Factual findings must be overturned if they are not "supported by reasonable, substantial, and probative evidence in the record." *See Melkonian v. Ashcroft*, 320 F.3d 1061, 1065 (9th Cir. 2003); *see also Ghebllawi v. INS*, 28 F.3d 83, 85 (9th Cir. 1994). Questions of law, however, are reviewed *de novo*. *Melkonian*, 320 F.3d at 1065.

Petitioners' Credibility

Since neither the IJ nor the BIA questioned Mr. [redacted] and Ms. [redacted] credibility, this Court must accept their testimony as being true.[9] *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004) ("Testimony must be accepted as true in the absence of an explicit adverse credibility finding.").

1. **Any Reasonable Fact-Finder Would be Compelled to Find that Mr. [redacted] Has a Well Founded Fear of Persecution on Account of His Actual and Imputed Political Opinion**

   a. Mr. [redacted] Has a Well-Founded Fear of Persecution for His Vocal Opposition to the Government and for His Membership in the Medhin

      i. *The IJ Erred in Relying Selectively on State Department Reports and Ignoring All Other Evidence*

In finding that Mr. [redacted] did not have a well-founded fear of being persecuted for his vocal opposition to the government, and his membership in the Medhin, the IJ selectively relied on State Department reports to erroneously conclude that the EPRDF limits its targeting to those people "who are actively opposed to the present government and who will not renounce violence." AR 63-65.

---

[9] The substantive asylum law amendments regarding nexus and credibility issues made by the REAL ID Act of 2005 do not apply to this case, but only to "applications for asylum, withholding, or other relief from removal made on or after" the bill's enactment. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, div. B (REAL ID Act of 2005), sec. 101(h)(2), 119 Stat. 231, 305 (amending § 208(b)(1) of the Immigration and Nationality Act (8 U.S.C. 1158(b)(1)).

He concluded that since Mr. [redacted] was willing to renounce violence, he was unlikely to be persecuted. *Id.* These findings are not supported by the record, and must be overturned. *Gafoor v. INS*, 231 F.3d 645, 650 (9th Cir. 2000).

First, the IJ's findings are directly contradicted by the State Department, which has documented the repression of individuals or groups not accused of refusing to renounce violence. As noted in the 1994 State Department Profile of Asylum Claims and Country Conditions (1994 State Department Profile), "[i]n the face of opposition, [the TGE] showed at times increasing intolerance of political dissent," targeting opposition parties, the independent press, and the members of the Ethiopian Human Rights Council. AR 271. The 1996 Country Report observed that although conditions had improved somewhat, "serious [human rights] problems remain[ed]." AR 253. The report also noted allegations by opposition groups and the Ethiopian Human Rights Council that many detainees were held for "political reasons[,]" and many of those detained by the government were beaten or mistreated. AR 258, 253.

Further, in relying solely on State Department reports, the IJ, in violation of the agency's own regulations, overlooked other contradictory evidence from well-known and credible sources in the record. *See* 8 C.F.R. § 1208.12 (a). As noted in the 1994 INS Profile:

> The Transitional Government has arrested some [opposition groups], ignored others, held some until the renounce violence, and *continued to hold some despite their renouncing violence*. The . . . very unpredictablity is part of the policy . . . and keeps political opponents off balance and reduces their ability to operate.

AR 210 (emphasis added). The Profile further stated that the "Transitional Government is relatively inflexible in its relations with groups which advocate the 'centrist' position, *even if they do not, to outside observers, appear to pose a military or political threat to the government.*" AR 240 (emphasis added).

Moreover, two different 1995 reports by Amnesty International documented the detention, disappearance and torture of numerous suspected political opponents and opposition party members for their peaceful political activities. AR 464, 467-68. Also, a 1996 report by the U.N. Commission on Human Rights cited Ethiopia for extrajudicial, summary or arbitrary executions. AR 189.

This Court and others have observed that State Department reports do not always convey a complete picture of country conditions. *Shah v. INS*, 220 F.3d 1062, 1069 (9th Cir. 2000) ("the [State] Department soft-pedals human rights violations by countries that the United States wants to have good relations with") (citation omitted) (alteration in original); *Chand v. INS*, 222 F.3d 1066, 1077 (9th Cir. 2000); *Tian-Yong Chen v. INS*, 359 F.3d 121, 130 (2d Cir. 2004); *Galina v. INS*, 213 F.3d 955, 959 (7th Cir. 2000) (State Department reports should be treated

with "healthy skepticism.").

Record evidence shows that the State Department reports may indeed have been soft-pedaling the human rights situation in Ethiopia. As one journalist noted, "[i]n spite of an obviously worsening human rights record, the Meles government continues to receive considerable support from Washington." AR 443; *see also* AR 449 (criticizing the State Department for its "business as usual attitude" towards the Ethiopian government).

This evidence establishes that persons like Mr. [redacted] who are strong and vocal proponents of a multi-ethnic democracy in Ethiopia, are at high risk of being persecuted, even if they do not advocate violence. While Mr. [redacted] believes in achieving reform through peaceful democratic means, he testified that he would continue to "vehemently oppose" the government and would be outspoken about his views. AR 117. As the evidence demonstrates, this opposition alone puts him at a high risk of being persecuted. *See Matter of Mogharrabi*, 19 I. & N. Dec. 439, 447-49 (BIA 1987).

ii. *The IJ Erred in Finding that Mr. Mengistu Had Not Been Involved in Activities that Would be Viewed as Harmful by the Present Government*

The IJ made a factual error in finding that Mr. [redacted] "membership in the Medhin party . . . consisted of attending one conference in Washington, D.C." and that he had not been "involved in any activities which would be viewed as harmful to the present government of Ethiopia." AR 65-66. To the contrary, as discussed above, Mr. Mengistu has consistently been an outspoken critic of the government. Since 1993, he has been an active member of the Medhin, and has been involved in recruiting Medhin members as well as other efforts to "expose the EPRDF regime's criminal activities to the civilized world." AR 248. Given that the government views all political opposition with suspicion and hostility, and that the Medhin is a banned organization, all of these activities would be viewed as harmful by the present government, and place Mr. Mengistu at risk for harm.

iii. *The IJ Erred by Finding that the Delay Experienced by Ms. [redacted] in Obtaining Travel Documents From the Government Was Due to Corruption and Not to Suspicion About Mr. [redacted]*

Contrary to the evidence, the IJ engaged in speculation when he concluded that the delay in Ms. [redacted] receipt of travel documents was "probably a simple case of corrupt officials desiring a bribe." The judge's conclusion was pure

conjecture and has no support in the record. AR 66. *See Chouchkov v. INS*, 220 F.3d 1077, 1083 (9th Cir. 2000) (overruling BIA decision where it was premised on personal conjecture about expected efficiency and competence of government officials).

When Ms. [redacted] approached immigration officials for the requisite documents, they expressly informed her that they wanted to "investigate" Mr. [redacted] background. AR 109. Specifically, they wanted to know "how he got the scholarship," and "what he is doing here [in the United States]." AR 156. These are not the innocuous comments of an official attempting to elicit a bribe. Rather, these are comments – the use of the word "investigate," the interest in Mr. [redacted] ability to obtain a scholarship from the ousted former regime, as well the interest in his activities in the United States – indicating their suspicions of Mr. [redacted] Given the political context in which this exchange took place, it strains credulity to conclude that the government officials were simply attempting to elicit a bribe.

The IJ rejected this interpretation of the events, speculating without support in the record that if Mr. [redacted] was really considered to be a security threat, the immigration official would not have accepted a "mere $125 bribe." AR 66. First, of all, the record makes clear that 700 birr (approximately $125), is roughly equivalent

to one month's salary for a college graduate, and is not, as the IJ suggested, a paltry sum of money. AR 291. But more importantly, as Mr. [redacted] explained, the payment of the bribe to a low-ranking official allowed Ms. [redacted] to bypass higher officials – those very officials who had the interest in, and suspicion of, Mr. [redacted] AR 110.

iv. *The Record Compels the Conclusion that Mr. [redacted] Fear of Persecution is Well-Founded*

In order to establish that a fear of persecution is well-founded, an applicant needs to show that persecution is a "reasonable possibility." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (quoting *INS v. Stevic*, 467 U.S. 407, 425 (1984)). As the Supreme Court explained in *Cardoza-Fonseca*, a 10% chance of persecution may be sufficient to establish a well-founded fear. *Id.*

A well-founded fear must be subjectively genuine and objectively reasonable. *Montecino v. INS*, 915 F.2d 518, 520–21 (9th Cir. 1990). The subjective prong of the well-founded fear test is satisfied by an applicant's credible testimony that he or she genuinely fears harm. *See Singh v. INS*, 134 F.3d 962, 966 (9th Cir. 1998). Since neither the IJ nor the BIA questioned Mr. [redacted] credibility, his testimony must be accepted as true; therefore the subjective prong is met. *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004). Additionally, through objective

evidence regarding country conditions and the targeting of political opponents, he has established more than a reasonable possibility that he will be persecuted because of his actions against the Ethiopian government.

In a case with comparable facts, the BIA held that the applicant's fear of persecution was well-founded. *See Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). *Mogharrabi* involved an Iranian applicant who had expressed his derogatory views of the Iranian regime to officials working in the Iranian Interests Section at the Algerian embassy in the United States. *Id.* at 447-49. The BIA found that there was a reasonable possibility that the applicant's views had become known to those "in a position, and who have the inclination to punish him for it." *Id.*

Mr. [redacted] actions create more than a reasonable possibility that the Ethiopian government is aware of his political views. He has been a long-standing and active member of the Medhin, which is closely monitored by Ethiopian officials in the United States, and he signed his name to a registration list at the organization's 1996 conference in Washington, D.C. AR 146.

Also, Mr. [redacted] has vocally expressed his opposition views to two individuals who are closely linked with the EPRDF government; his former roommate at Oregon State University, who is the dean of a college in Addis Ababa, and his roommate's friend, who publishes a pro-EPRDF magazine. AR 122, 128.

In addition, Mr. [redacted] has been an out-spoken critic of the EPRDF in the Portland community, where there are many EPRDF supporters. He has also participated in organizations such as the Yehadar Afkarian Mahbir and the Ethiopian Cultural Organization, which are opposed to the EPRDF. AR 120, 285. These actions provide an additional basis for his fear that his views are known to the government.

Given the openness of Mr. [redacted] opposition to the government, and its intolerance of dissent, any of the acts described above creates more than a reasonable possibility that Mr. [redacted] will be persecuted on account of his political opinion. Taken together, however, they compel that conclusion.

b. Mr. [redacted] Has a Well-Founded Fear of Persecution on Account of His Imputed Political Opinion of Support for the Derg Regime

i. *The IJ's Finding that Mr. [redacted] Fear of Persecution on Account of His Imputed Political Opinion is Not Well-Founded is Based on Factual Errors and is Against the Weight of the Evidence*

In finding that Mr. [redacted] did not have a well-founded fear of being persecuted as a result of his imputed political opinion of being a Derg supporter, the IJ ruled that the government is tolerant, and is not targeting "any and all people who had connections with the former Mengistu government." AR 63. Instead, "violations" are occurring only against those organizations that "are actively

opposed to the present government and who will not renounce violence." *Id.*

The IJ also held that Mr. [redacted] would not be suspected of being a member of the Worker's Party of Ethiopia (WPE) because his only connection to the WPE was through his parents, having never joined it himself. AR 64. He further held that Mr. Mengistu's parents "were only detained for two weeks of reeducation," which does not amount to persecution. AR 64. These findings are factually erroneous and must be overturned. *Melkonian v. Ashcroft*, 320 F.3d 1061, 1065 (9th Cir. 2003).

First, as discussed in section 1(a)(I), *supra*, the IJ's finding that the government only targeted those organizations that advocate violence is against the overwhelming weight of the evidence. The record establishes that the EPRDF targeted thousands of people connected with the former government, whether or not they advocated violence. AR 235, 331.

Members of the WPE have been disenfranchised, and many of them have been detained without charge, and without an opportunity to challenge their detention. AR 235. As Mr. [redacted] explained, supporters of the Derg – a much-hated regime that the EPRDF fought long and hard to topple – are targeted, not because they are viewed as a threat, but because the government wants to get "back at them for what they did before," and "make life as difficult as possible" in order to

make "an example of them." AR 101. As a result, anyone linked with the former regime is automatically a "sworn enemy." AR 104.

Second, the IJ's finding that Mr. [redacted] parents were merely "detained for two weeks of education," is factually erroneous. As Mr. [redacted] testified, his parents were also stripped of their civil rights, including their right to vote. AR 96. They were kept under strict surveillance, required to report regularly to their local neighborhood association, and had to obtain special travel permits in order to leave their local village. AR 99, 286-87. In a letter to Mr. [redacted] his father wrote that "[o]ur house is searched constantly, they summon us to their office and put us in jail in [sic] this and that pretext." AR 401.

Finally, the IJ completely ignored the harms experienced by other members of Mr. [redacted] family. As his father recounted, Mr. [redacted] brother-in-law was transferred to another region and then fired "for no apparent reason," and his cousins were "pistol whipped" by EPRDF soldiers and thrown into jail, and had to drop out of school. AR 250.

ii. *The Record Compels the Conclusion that Mr. [redacted] has a Well-Founded Fear of Being Persecuted on Account of His Imputed Political Opinion*

Contrary to the IJ's findings, the record in this case compels the conclusion that as an ethnic Christian Amhara who is a vocal proponent of a multi-ethnic Ethiopian state, the son of former WPE members, and as someone who came to the United States on a Derg-funded scholarship, Mr. [redacted] has a well-founded fear of being persecuted for his imputed political opinion of support for the former Derg regime. An imputed political opinion arises when "[a] persecutor falsely attributes an opinion to the victim, and then persecutes the victim because of that mistaken belief about the victim's views." *Cañas-Segovia v. INS*, 970 F.2d 599, 602 (9th Cir. 1992).

Since the Derg regime was dominated by ethnic Amharas, they have been the primary targets for assault by the government. AR 429, 452. Moreover, the persecution of suspected Derg supporters is not limited to ethnic Amharas; persons who are "urbanized," or those who oppose the "EPRDF's system of ethnic representation," are also identified as Amharas and therefore considered to be former members or supporters of the Derg regime. AR 458. Mr. [redacted] is certainly "urbanized," having studied and lived in Addis Ababa prior to leaving Ethiopia; and he has also been a vocal opponent of the EPRDF's ethnocentric

policies.

Being the son of former WPE members provides an additional basis for Mr. [redacted] fear that he will be associated with the former government. As discussed in the preceding section, Mr. [redacted] family members have directly suffered as a result of the government's vindictive policies towards Derg supporters.

Finally, in addition to the suspicion arising from his religion, ethnicity and political views, Mr. [redacted] will be suspected of being a Derg supporter because he was awarded a highly competitive scholarship sponsored by the Derg government to study in the United States. AR 105-06, 289-90. Therefore, Mr. [redacted] has a well-founded fear of persecution on account of his imputed political opinion.

c. The Risk of Persecution Is Countrywide

Where the source of persecution is the government, a rebuttable presumption arises that the threat exists nationwide, and the government has the burden of establishing by a preponderance of the evidence that internal relocation would be reasonable. *See Melkonian*, 320 F.3d 1061, 1069 (9th Cir. 2003); *see also* 8 C.F.R. § 1208.13(b)(3)(ii). In this case the government presented no evidence to rebut this presumption.

To the contrary, the record is replete with evidence that the EPRDF's

intolerance of political opposition extends throughout the country, and that the persecution of political opponents is worse in the rural areas outside of Addis Ababa, where opposition parties have reported that their members have been arrested, detained and killed by agents of the regime. AR 448.

Furthermore, the government has been unable or unwilling to control the violence against Christian Amharas, which is the consequence of the ethnic fighting that has been unleashed. Since the EPRDF takeover in 1991, "thousands of Amharic speaking Christians have been killed or mutilated." AR 452. The 1996 Country Report states that "religious tensions between Christians and Muslims," continue to persist, noting that these tensions have led to violence, intimidation and harassment. AR 265. Additionally, "sentiment against settlers from other areas of Ethiopia (mostly Amharas . . .) remains prevalent throughout Ethiopia," AR 273, and since Amharas remain widely scattered, they have no viable region where they could safely relocate. AR 240.

Ms. [redacted] own family members, who are Christian Amharas, were the direct victims of this ethnic violence. Ms. [redacted] father was imprisoned on several occasions, and her cousin was killed. AR 158-61. Her parents were stripped of their property and then driven out of their home in the eastern region of Harer, which was ruled by Islamic fundamentalists. AR 131, 411. Despite numerous appeals, the

government refused to respond, or to extend any protection. AR 131. In a letter, Ms. [redacted] father described how he is forced to live as a "refugee" in his own country, and that life has "turned into an earthly hell" for many people in Ethiopia. AR 411.

Under these circumstances it is clear that the threat of persecution is countrywide.

2. **Mr. [redacted] and Ms. [redacted] Have a Well-Founded Fear of Persecution on Account of Their Membership in a Social Group of Parents of Ethiopian Females of Ethnic Groups Which Practice Genital Cutting, or Parents of Ethiopian Females**

a. The IJ Erred in Holding that Mr. [redacted] and Ms. [redacted] Do Not Have a Well-Founded Fear that Their Daughter Will be Subjected to Genital Cutting

In finding that Mr. [redacted] and Ms. [redacted] fear that their daughter [redacted] would be subjected to genital cutting in Ethiopia was not well-founded, the IJ committed legal errors and made factual findings that are not supported by the record. The application of the proper legal standard to the facts compels the opposite conclusion.

i. *The IJ Made a Legal Error in Applying an Improper Standard to Determine that the Fear of Persecution Was Not Well-Founded*

The IJ made a legal error in ruling that Mr. [redacted] and Ms. [redacted] do not have a well-founded of persecution because the genital cutting of their daughter [redacted] is "not likely to be a threat." AR 66. It is a long-established legal principal that a well-founded fear does not require that a harm be "likely," but that it be a "reasonable possibility." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) ("so long as an objective situation is established by the evidence, it need not be shown that the situation will *probably* result in persecution, but it is enough that persecution is a reasonable possibility") (emphasis added).

ii. *The Record Compels the Conclusion that Mr. [redacted] and Ms. [redacted] Have a Well-Founded Fear that Their Daughter Will be Subjected to Female Genital Cutting*

Applying the proper legal standard, the record clearly establishes that the petitioners' fear of the genital cutting of their daughter is well-founded. *Melkonian v. Ashcroft*, 320 F.3d 1061, 1065 (9th Cir. 2003) (*de novo* review of questions of law). As Mr. [redacted] testified, "female circumcision is . . . a very serious issue and almost practically all females have to undergo [it]." AR 136. He stated that he would try to protect his daughter, but feared that he would not be successful in doing so. He explained that if he were jailed, or otherwise unable to be with his

family, his wife alone would be unable to prevent the family or society from imposing it on their daughter. AR 138.

The reasonableness of Mr. [redacted] fear is corroborated by documentary evidence highlighting the prevalence of genital cutting in Ethiopia. Ninety percent of girls in Ethiopia undergo genital cutting. AR 203. A 1996 Country report notes that genital cutting remains "nearly universal," along with societal discrimination, violence against women and child abuse. AR 254. It is also notable that Ms. [redacted] was herself subjected to cutting, and both petitioners belong to ethnic groups (Amhara and Oromo) that adhere to the practice. AR 201.

Indeed, in *Abay v. Ashcroft*, a case with nearly identical facts, the court referred to Ethiopia as a "lion's den of female genital mutilation." 368 F.3d 634, 642 (6th Cir. 2004). The court in *Abay* relied upon evidence similar to that presented in the instant case, including a showing that genital cutting is "nearly universal" in Ethiopia, that the government of Ethiopia is unable to curb this practice, and that Ms. Abay herself was subjected to it. *Id.*

iii. *The IJ Made a Series of Errors in Finding that Genital Cutting Would Not be Imposed on Their Daughter*

In finding that genital cutting would not be imposed on [redacted], the IJ made a series of errors that must be reversed. After correctly noting that cutting is enforced

by families and not the state *per se*, he erroneously, and without evidentiary support, concluded that neither of the families would enforce it, and that Mr. [redacted] and Ms. [redacted] would be able to protect [redacted] from the practice. AR 66.

(1) The IJ Erred in Ruling that Petitioners' Fear of Genital Cutting is Not Well-Founded Because Their Families Would Not Attempt to Enforce it

The IJ held that because genital cutting is "enforced by families, not by the state," Mr. [redacted] and Ms. [redacted] did not have a well-founded fear that their daughter would be subjected to the practice. AR 66. The IJ reached that conclusion by denying that there was any risk from Mr. [redacted] family, and by totally failing to mention Ms. [redacted] family. *Id.*

The IJ referred to Mr. [redacted] family as if it were limited in number, and by definition, would be passive and disinclined to attempt to impose female genital cutting ("respondent has testified that he has no family *other than his elderly parents and his siblings* . . . .") (emphasis added). AR 66. In the first place, the IJ's finding that Mr. [redacted] has no family other than elderly parents and siblings (five brothers and six sisters) is erroneous. AR 66. As Mr. [redacted] testified, his biological parents are divorced and both of them have remarried; therefore he has both parents and step-parents. In addition, Mr. [redacted] has an extended family that

includes his step-mother's brothers and sisters.[10] AR 132-33.

Moreover, the IJ's finding that Mr. [redacted] parents and siblings would be disinterested in the family's compliance with the social norm of genital cutting simply has no support in the record. On the contrary, his biological father and stepmother are Oromo, and his biological mother is Amhara, ethnic groups which practice genital cutting. AR 88, 92, 201. On these facts, there is no reason to believe that they do not support the tradition. Finally, the IJ inexplicably failed to mention Ms. [redacted] family altogether – they are also Amhara, and the fact that Ms. [redacted] was subjected to female genital cutting indicates their adherence to the practice. AR 163, 201.

The likelihood that family members will try to enforce genital cutting on [redacted] is further strengthened by the intense societal pressure in Ethiopia for girls to be cut. As Mr. [redacted] credibly testified, the pressure comes not only from the family, but also from society. AR 137. The documentary evidence affirms that genital cutting is a societal prerequisite: "[a] girl who is not circumcised is considered 'unclean' by local villagers and therefore unmarriageable. A girl who

---

[10] Although part of Mr. [redacted] testimony is not discernible, it is clear that his extended family includes more than the brothers and sisters of his step-mother: "[the relatives] are brothers and sisters of my step-mother and also I have some (indiscernible) and also . . . it's like . . . an extended family." AR 132-33.

does not have her clitoris removed is considered a great danger and ultimately fatal to a man if her clitoris touches his penis." AR 198. The 1996 Country Report notes that "[a]lmost all girls undergo some form of [genital cutting]." AR 264. *See also Abay v. Ashcroft*, 368 F.3d 634, 639-40 (6th Cir. 2004) (recognizing the intense societal pressure on girls to undergo cutting in Ethiopia).

It is also clear that the Ethiopian government is unable or unwilling to curtail this practice. As noted in the 1996 Country Report, although genital cutting is "officially discouraged" by the government, there are no legal prohibitions against it. AR 264. Governmental discouragement appears to have been largely ineffective in protecting young women and girls from this practice - as noted above, the 1996 Country Report states that genital cutting is "nearly universal." *Id. See Siong v. INS*, 376 F.3d 1030, 1039 (9th Cir. 2004); *Matter of Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996).

Contrary to the IJ's speculative findings, therefore, the circumstances establish a high likelihood that both families will try to enforce genital cutting on Amen.

(2) The IJ Made Factual Errors in Finding that the Petitioners Could Protect their Daughter from Genital Cutting

The IJ ruled that Ms. [redacted] had "testified that she would be able to prevent"

the cutting of her daughter, and that Mr. [redacted] testimony that his wife might not be able to protect their daughter was contradictory. AR 66. These factual findings are not supported by the record and must be overturned. *See Gafoor v. Ashcroft*, 231 F.3d 645, 650 (9th Cir. 2000).

Ms. [redacted] never testified that she could protect her daughter from cutting, but simply that if she were "not willing" to let this happen, she would be repudiated not only by her and her husband's family, but also by the larger society. AR 164. The relevant portion of her testimony is as follows:

> Mr. Phil Hornik to Ms. [redacted] Do you believe in the practice of female circumcision?
> A: No, I don't.
> Q. [H]as this been done to your daughter?
> A. No.
> Q. If you were to go back to Ethiopia, . . . is this something that you want to have happen to your daughter?
> A. No.
> Q. [W]hat do you think is going to happen to you if you go back and you were not willing to let this happen to your daughter?
> A. I think I . . . will be rejected by my family, my husband's family and my society too.

Id.

In a society where female genital cutting is "nearly universal," and where women suffer "societal discrimination ... [and] violence," Ms. [redacted] "unwillingness" to acquiesce to genital cutting cannot be transformed into her ability

to prevent it from happening.[11] AR 254. Further, given the prevalence of genital cutting within her and her husband's ethnic groups, and the intense familial and societal pressure she will face to have her daughter undergo the ritual, it is not reasonable to conclude that she will be successful in protecting her daughter from being cut.

In addition to misconstruing Ms [redacted] testimony, the IJ's conclusion that genital cutting would not take place without the mother's consent appears to rely upon a single sentence in the 1994 State Department Profile, which states that "[r]eportedly, women are able to prevent their daughters from being subjected to circumcision by relatives." AR 273. The qualifier "reportedly" indicates that this statement is based on second-hand and/or anecdotal accounts, rather than on its researchers' direct knowledge. There is no other evidence in the record which supports this assertion. To the contrary, evidence regarding the prevalence of genital cutting and the low status held by women in Ethiopian society undercut the conclusion that women could wield the power to say no to a "nearly universal" cultural practice. AR 254.

---

[11] Indeed, by its very definition, the term "unwilling" means to be "reluctant" or to offer opposition. *Webster's Third New International Dictionary of the English Language* 2515 (1993). This simply does not connote an ability to *prevent* something from happening.

b. The IJ Erred in Overlooking Mr. [redacted] and Ms. [redacted] Well-Founded Fear of the Ostracism of Their Daughter for not Undergoing Genital Cutting

Mr. [redacted] and Ms. [redacted] claim regarding the feared genital cutting of their daughter presents two alternative forms of persecution – the cutting itself, and the ostracism which could result from a refusal to comply with the societal ritual. Although the IJ addressed the fear of genital cutting, he overlooked the alternative harm of being ostracized for not undergoing genital cutting.

Mr. [redacted] explained that their daughter would be "ostracized and . . . ridiculed if she doesn't do that." AR 137. The documentary evidence establishes that genital cutting is a time-honored ritual that is justified as protecting "family honor, cleanliness, protection against spells, insurance of virginity and faithfulness to the husband." AR 198. An uncut woman is considered "unclean," "unmarriageable" and even dangerous for a man. AR 198. Additionally, being unable to marry in a society where tradition and cultural factors give greater rights and resources to men, and keep women dependent on their husbands, establishes that resistance to genital cutting would have severe economic consequences for any woman who refuses to undergo the ritual. AR 263-64.

On very similar facts, the Sixth Circuit has determined that either genital cutting or the ostracism suffered for not undergoing it rises to the level of

persecution. *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004). In that case, Burhan Amare, an Ethiopian citizen, who, like [redacted] was nine-years-old, sought asylum based on her fear that she would have to undergo genital cutting if she and her mother were sent back to Ethiopia, or would be ostracized for her resistance.

The Sixth Circuit found that Burhan had a well-founded fear of persecution, noting that either the infliction of genital cutting or the resulting social ostracism for refusing it constituted persecution. As the court stated, "[s]hould she be forced to choose between marriage and likely mutilation on the one hand, and social ostracism on the other, . . . any young girl faced with such a choice would have a legitimate fear of persecution . . . ." *Id.*; *see also Matter of Kasinga*, 21 I. & N. Dec. 357, 361 (BIA 1996) ("[African] women have little legal recourse and may face . . . social ostracization for refusing to undergo this . . . practice . . . .") (quoting an alert on female genital cutting issued by the INS Resource Information Center).

When viewed in the context of the status of women in Ethiopian society, and the cultural, religious and social importance attached to genital cutting, the petitioners' testimony compels the conclusion that the ostracism that their daughter faces if they are able to prevent her genital cutting constitutes persecution, and that their fear is well-founded.

c. Mr. [redacted] and Ms. [redacted] Have a Well-Founded Fear of Persecution on Account of Their Membership in a Particular Social Group of Parents of Ethiopian Females of Ethnic Groups Which Practice Genital Cutting, or Parents of Ethiopian Females

Since the IJ found that Mr. [redacted] and Ms. [redacted] did not have a well-founded fear of persecution, he did not consider the issue of whether the feared harm was on account of an enumerated ground. As detailed below, Mr. [redacted] and Ms. [redacted] have a well-founded fear of persecution on account of their membership in a particular social group of parents of Ethiopian females of ethnic groups which practice genital cutting, or parents of Ethiopian females.

i. *Mr. [redacted] and Ms. [redacted] Can Establish Their Eligibility for Asylum on the Basis of the Harms Faced by Their Daughter*

[redacted] is nine years old, and even though, as a United States citizen, she has the legal right to remain here, the deportation of her parents will effectively result in her return to Ethiopia. Devoted parents cannot be expected to abandon their nine-year-old child. In Ethiopia, [redacted] faces the prospect of being subjected to genital cutting or being ostracized, ridiculed and found unmarriageable for not undergoing the ritual, either of which constitutes persecution. Although she would be the direct victim of those harms, they would affect the family as a unit and are therefore directly relevant to Mr. [redacted] and Ms. [redacted] asylum claim. *See Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1190 (9th Cir. 2005); *Abay v. Ashcroft*,

368 F.3d 634, 642 (6th Cir. 2004).

In *Tchoukhrova*, this Court considered the question of whether Victoria and Dmitri Tchoukhrova, the parents of Evgueni, a disabled child, could have an asylum claim on the basis of the harms suffered by their child, and concluded that viewing the family "as a whole" was a logical application of the law. It noted:

> When confronting cases involving persecution of multiple family members, we have not formalistically divided the claims between "principal" and "derivative" applicants but instead, without discussion, have simply viewed the family as a whole. . . . Following that practice here, we hold that a parent of a disabled child may file as a principal applicant in order to prevent the child's forced return to the family's home country and may establish her asylum claim on the basis of the persecution inflicted on or feared by the child.

404 F.3d at 1192.

The reasoning put forth in *Tchoukhrova* applies directly to the instant case, even though [redacted] in contrast to Evgueni, is a citizen and has the legal right to remain in the United States. The reason that this distinction does not mandate a different outcome is because the underlying rationale in both cases is that parents should not be forced to make a "devastating" choice between leaving their child behind or taking the child to a country where she would face persecution. *Id.* at 1191.

In *Tchoukhrova*, Evgueni could clearly have qualified for asylum himself, and

secured the right to remain in the United States – just as [redacted] as a citizen has the right to remain here. However, as this Court held, the family should not be forced to abandon their child in order to protect him or her from persecution.[12] The court's approach in *Tchoukhrova*, which recognizes that the persecution of an applicant's family members can constitute persecution as to the applicant herself, is entirely consistent with well-established asylum jurisprudence.[13]

---

[12] The Court reasoned that immigration law "has always had a purpose of protecting families and, where possible, keeping them united." *Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1190 (9th Cir. 2005). The Court also noted that within American law, the family is treated as a "unique and important social unit entitled to legal protection." *Id.* at 1191. Additionally, it found that taking care of the family "is consistent with our international obligations," citing as an example, the International Covenant on Civil and Political Rights. *Id.* It concluded, therefore, that cases where the child is the only "direct victim" should, like cases involving persecution of multiple family members, be considered by viewing the family as a single unit, in order to prevent the "devastating" effect of forcing parents "to make a choice between abandoning their child in the United States or taking him to a country where it is likely that he will be persecuted." *Id.*

[13] The INS directly addressed this issue in a 1997 Memorandum to asylum officers, explaining that "[a]n individual may suffer harm from the knowledge that another individual is harmed, particularly if that other individual is a family member. The harm may manifest itself as emotional pain from knowing that a loved-one has been harmed. The harm may be intensified if . . . the applicant witnessed the harm to the family member." Memorandum from Joseph Langlois, Office of International Affairs, Asylum Division, Immigration and Naturalization Service, *Persecution of Family Members* 1 (June 30, 1997).

The BIA has recognized this principal in the context of coercive population control cases. *See Matter of C-Y-Z-*, 21 I. & N. Dec. 915, 917-18 (BIA 1997) (in a claim based on the statutorily protected infliction of coercive population, "the husband of a sterilized wife can essentially stand in her shoes and make a bona fide

The principle that persecution inflicted upon an applicant's loved one can be tantamount to persecution as to the applicant herself is all the more true where the applicant fully comprehends the nature and dimension of the harm. Ms. [redacted] herself underwent female genital cutting as a child. The experience was searing, and continues to cause her emotional and physical distress: when questioned on the issue during the hearing, she became visibly upset and her testimony was very tentative and often indiscernible, revealing her acute embarrassment in talking about it. AR 164-65. She ultimately was able to respond to a question regarding the problems that she has experienced as a result of cutting – testifying that the genital cutting had adversely affected her ability to have sexual pleasure within her marriage. AR 165-68.

---

and non-frivolous application for asylum based on problems impacting more intimately on her than on him") (quoting INS brief). Later, in *Abay v. Ashcroft*, the Sixth Circuit explicitly held that a mother who feared that her daughter would be subjected to genital cutting was a refugee because her fear of experiencing the cutting of her daughter's genitalia amounted to a well-founded fear of persecution as to her. 368 F.3d 634, 642 (6th Cir. 2004).

Finally, the UNHCR has also stated that "a woman can be considered a refugee if she or her daughter/daughters fear being compelled to undergo genital cutting against their will; or, she fears persecution for refusing to undergo or allow her daughters to undergo the practice." Heaven Crawley, *Women as Asylum Seekers - A Legal Handbook* 71 (Immigration Law Practitioners' Association and Refugee Action 1997). For a thorough and comprehensive analysis of these issues, *see* Marcelle Rice, *Protecting Parents; Why Mothers and Fathers Who Oppose Female Genital Cutting Qualify for Asylum*, 04-11 Immigration Briefings 1 (2004).

It is clear that [redacted] faces the prospect of being subjected to genital cutting[14] or being rejected by her society, including being potentially unable to marry in Ethiopia, either of which constitute persecution. Under *Tchoukhrova*, those harms can form the basis for Mr. [redacted] and Ms. [redacted] asylum claim.

ii. *Mr. [redacted] and Ms. [redacted] Are Members of a Cognizable Social Group*

In *Tchoukhrova v. Gonzales*, this Court first asked whether the direct victim of the harm was a member of a cognizable social group, and then considered whether the parents of such children could also be recognized as members of a particular social group. After ruling that the direct victim was a member of a social group of "[d]isabled children in Russia," this Court held that the parents of such children belonged to a second group that included their child, and defined it as "Russian disabled children and their parents who help care for them." 404 F.3d 1181, 1189-90 (9th Cir. 2005).

---

[14] It should also be noted that Congress has criminalized the performance of female genital cutting on girls under the age of eighteen. 18 U.S.C. § 116 (2004). In *Tchoukhrova v. Gonzales*, this Court held that recognizing persons with disabilities as a social group was consistent with the Americans with Disabilities Act and its underlying policy of protecting this vulnerable and "powerless[]" group. 404 F.3d 1181, 1189 (9th Cir. 2005). A failure to apply the principal recognized in *Tchoukhrova* to cases involving genital cutting would be inconsistent with the underlying public policy of our genital cutting statute, which is to protect young girls from that harmful and permanently scarring practice.

In concluding that parents who care for their disabled children "are properly included in the particular social group" of their child, *Tchoukhrova* reasoned that parents act out of "love and devotion for their children," and that such nurturing is fundamental to their identities such that they "should not be required to change." *Id.* at 1189.

Moreover, a parent's relationship with a disabled child is "immutable," making it "appropriate to combine family members into a single social group." *Id.* at 1190. Finally, as a result of the "family interest in preserving the rights and protecting the welfare of a disabled child," parents and their disabled child also constitute a "collection of people closely affiliated with each other, who are actuated by some common impulse or interest." *Id.* (quoting *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986)).

Under *Tchoukhrova*, therefore, parents of a child who faces persecution on account of their membership in a particular social group can be included in a group defined as parents of the members of a social group to which the child belongs. The application of this Court's analysis in *Tchoukhrova* to the instant case leads to the conclusion that Mr. Mengistu and Ms. Abebe are members of a cognizable social group.

[redacted] the direct victim of the harm, belongs to a particular social group of

Ethiopian females of ethnic groups which practice genital cutting, or, alternatively, Ethiopian females. This is a group that is clearly cognizable under asylum jurisprudence.[15] And Mr. [redacted] and Ms. [redacted] are members of the particular social group defined as parents of Ethiopian females of ethnic groups which practice genital cutting or, alternatively, as parents of Ethiopian females. AR 254.

Their resistance to genital cutting arises from their love and devotion to their daughter and their desire to protect her from the devastating effects of genital cutting, and this parental bond is "fundamental" to their identities.[16] *Tchoukhrova*, 404 F.3d at 1189. Their relationship with their daughter is also "immutable," such

---

[15] In its seminal decision in *Matter of Acosta*, the BIA ruled that a social group should be defined by a "common, immutable characteristic" that the members "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." 19 I. & N. Dec. 211, 233 (BIA 1985). Pursuant to *Acosta*, women who face genital cutting have been recognized as members of a particular social group defined by gender alone, or gender in combination with other characteristics. *See Matter of Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996) ("young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice").

In *Mohammed v. Gonzales*, this Court reaffirmed that analysis, defining the social group as "young girls in the Benadiri clan." 400 F.3d 785, 797 (9th Cir. 2005). Alternatively, it held, the social group could also be defined as "Somalian females," because nearly all women in Somalia are subjected to it and the practice is "deeply imbedded in the culture throughout the nation." *Id.*

[16] As discussed in section 4, *infra*, Mr. [redacted] and Ms. [redacted] resistance to genital cutting is also based on their own personal belief that a woman should not be forced to undergo it, which forms the basis of their political opinion.

that any harm faced by their daughter necessarily affects them. *Id.* at 1190. Finally, the family interest in protecting [redacted] rights and welfare "qualifies all of them as members of a social group." *Id.*

iii. *Mr. [redacted] and Ms. [redacted] Will be Targeted on Account of Their Membership in a Particular Social Group of Parents of Ethiopian Females of Ethnic Groups Which Practice Genital Cutting, or Parents of Ethiopian Females*

After establishing membership in a particular social group, an individual seeking asylum must show a causal relationship or "nexus" between the persecution and one of the five enumerated grounds. A showing of nexus requires evidence that the persecutor is motivated at least in part by one of the statutory grounds in inflicting the harm, or that the harm is directed at the applicant because of her protected characteristics. *See INS v. Elias-Zacarias*, 502 U.S. 478, 482-83 (1992); *Gafoor v. INS*, 231 F.3d 645, 650–51 (9th Cir. 2000); *Sangha v. INS*, 103 F.3d 1482, 1486-87 (9th Cir. 1997).

In *Mohammed v. Gonzales*, this Court found that a Somalian female was targeted for genital cutting because of her "sex and her clan membership and/or nationality." 400 F.3d 785, 797 n.16 (9th Cir. 2005). The Court held that where "the immutable trait of being female is a motivating factor – if not a but-for cause – of the persecution," the nexus requirement is met. *Id.* at 798; *Matter of Kasinga*, 21 I.

& N. Dec. 357, 366-67 (BIA 1996).

The country conditions evidence on Ethiopia leads inexorably to the conclusion that [redacted] will be subjected to genital cutting or both she and her parents will be ostracized for their resistance simply because she is a female in a culture where the practice of genital cutting is deeply embedded and societally mandated. Since [redacted] has established a direct link between the harms she faces and her social group membership, under *Tchoukhrova*, the nexus requirement for her parents is also met. *Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1190 (9th Cir. 2005).

3. **Mr. [redacted] and Ms. [redacted] Have a Well-Founded Fear of Persecution on Account of Their Membership in a Particular Social Group of Ethiopian Parents Who Oppose the Genital Cutting of Their Daughter**

In addition to basing their claim on the harms faced by [redacted], Mr. [redacted] and Ms. [redacted] are eligible for asylum on the basis of the severe social and familial ostracism that they themselves face for their resistance to genital cutting. As Ms. [redacted] testified: "I will be rejected by my family, my husband's family and my society too." AR 164. Mr. [redacted] testified that if he and his wife and children were forced to return to Ethiopia, they would try to live close to their families in or near Addis Ababa. AR 294. One can easily imagine the harsh isolation they would suffer should their families and the larger community repudiate them.

Mr. [redacted] also expressed his deep commitment to his children, and a

desire to do what is best for them, and it would be particularly difficult for him to take his daughter to a country where she would be rejected by their family and society. AR 141; *see also* AR 416 (letter from Reverend Tate, describing Mr. [redacted] as a "devoted father and husband").

Given the cultural and societal importance attached to cutting in Ethiopia's traditional society, people who oppose or resist it are likely to be completely shunned, and this ostracism constitutes persecution. *See INS v. Stevic,* 467 U.S. 407, 428 n.22 (1984) (persecution is a broader concept than "threats to 'life or freedom'") (citation omitted); *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004) (social ostracism for resistance to genital cutting constitutes persecution).

Further, Mr. [redacted] and Ms. [redacted] particular social group of Ethiopian parents who oppose the cutting of their daughter is cognizable. Their nationality and status as parents is immutable, and their opposition to genital cutting is so fundamental to their identities that they should not be required to change it. *Acosta,* 19 I. & N. Dec. 211, 233 (BIA 1985); *Matter of Kasinga*, 21 I. & N. Dec. 357, 366 (BIA 1996). Because they would suffer ostracism as a result of their membership in this social group, the nexus requirement has been met. *Mohammed*, 400 F.3d 785, 798 (9th Cir. 2005).

4. Mr. [redacted] and Ms. [redacted] Have a Well-Founded Fear of Persecution on Account of Their Political Opinion of Opposition to Genital Cutting

A political opinion encompasses more than electoral politics or formal political ideology or action. *See Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1189 (9th Cir. 2005) ("Parents who resist the harms inflicted by the Russian government upon their children often express a political opinion . . . ."); *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987) (Salvadoran woman's resistance to rape and beating constituted assertion of a political opinion opposing forced sexual subjugation), *overruled in part on judicial notice grounds by*, *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (*en banc*).

Mr. [redacted] and Ms. [redacted] are strongly opposed to genital cutting; their abhorrence of genital cutting and their resistance to subjecting their daughter to it constitutes a political opinion. Because they will be rejected by their families and societies on account of their resistance to female genital cutting, they have established persecution on account of their political opinion.

CONCLUSION

For the foregoing reasons, Mr. [redacted] and Ms. [redacted] respectfully request that this Court reverse the decisions below denying them asylum, and rule that they have a well-founded fear of persecution on account of their political opinion and

membership in a particular social group, and remand their case for the exercise of discretion.[17]

Dated: May 26, 2005
San Francisco, California

Respectfully Submitted,

Karen Musalo, CSB No. 106882
Stephen Knight, CSB No. 189546
Center for Gender and Refugee Studies
U.C. Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102
(415) 565-4720
Of Counsel

Tala Hartsough
Center for Gender and Refugee Studies
On Brief

Philip Hornik, OSB No. 78049
Attorney at Law
520 SW Sixth Ave., Suite 1010
Portland, OR 97204-1595
(503) 243-2733
Attorney for Petitioners

[17] A remand on issues pertaining to the petitioners' statutory eligibility for the requested relief is not necessary because they were raised before the IJ and the BIA. *See Khup v. Ashcroft*, 376 F.3d 898, 904 (9th Cir. 2004) (when the entire claim was before the IJ, who denied asylum on the basis that the fear of persecution was not well-founded and did not rule on the other elements of the refugee definition, this Court held that a remand on those issues was not necessary, and remanded to the BIA for the exercise of discretion only).

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32-1

I certify that the attached petition contains less than 14,000 words. The petition has been prepared in proportionately spaced typeface using WordPerfect 10.0; Times New Roman 14-point font.

Philip Hornik
Attorney at Law
520 SW Sixth Avenue, Suite 1010
Portland, OR 97204-1595
(503) 243-2733

Dated: May 26, 2005