No. 11-_____

In The
Supreme Court of the United States

EDWIN JOSÉ VELASQUEZ-OTERO,

Petitioner,

v.

ERIC H. HOLDER, JR., U.S. Attorney General,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

STEPHEN B. KINNAIRD
PAUL HASTINGS LLP
875 15th Street, N.W.
Washington, DC 20005
(202) 551-1842

MIGUEL MENDIZABAL
IMMIGRANTS' RIGHTS CENTER
1468 South Semoran Boulevard
Orlando, FL 32807

STEPHANOS BIBAS
Counsel of Record
JAMES A. FELDMAN
NANCY BREGSTEIN GORDON
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
SUPREME COURT CLINIC
3501 Sansom Street
Philadelphia, PA 19104
(215) 746-2297
sbibas@law.upenn.edu

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Congress enacted the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, to conform United States asylum law to the United Nations Convention and Protocol Relating to the Status of Refugees. For more than twenty years, the Board of Immigration Appeals granted asylum to persons belonging to persecuted social groups in accordance with the U.N. Convention. But in 2008, without explanation and in direct conflict with the definition promulgated under the U.N. Convention, the Board added a new requirement that those seeking asylum based on "membership in a particular social group" prove that their claimed groups are socially visible. Eight circuits defer to this novel social visibility requirement while two do not, on the grounds that the Board's new interpretation is arbitrary and capricious and leads to incongruous if not absurd results.

The question presented is:

Is the Board's unexplained addition of the social visibility requirement for asylum under 8 U.S.C. § 1101(a)(42)(A) arbitrary or capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), or unreasonable under *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984)?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

PETITION FOR A WRIT OF CERTIORARI

Edwin José Velasquez-Otero respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's unpublished opinion (App. 1a-9a), relying on prior published circuit precedent, is available at 2012 WL 281811. The Board of Immigration Appeals' opinion (App. 10a-12a) is unreported, as is the immigration judge's decision (App. 13a-25a).

JURISDICTIONAL STATEMENT

The Eleventh Circuit filed its opinion on February 1, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1101(a)(42)(A) provides, in relevant part:

(42) The term "refugee" means

> (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or

> unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .

STATEMENT OF THE CASE

The Refugee Act of 1980 authorizes asylum for people who cannot return to their home countries because they are persecuted or justifiably fear persecution based on their "membership in a particular social group." 8 U.S.C. § 1101(a)(42)(A). Congress passed the Act to implement a United Nations convention on refugees.

Until 2006, the Board of Immigration Appeals interpreted the quoted phrase to require that members of the persecuted group share characteristics that they "cannot change, or should not be required to change." *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled on irrelevant grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). The U.N. interprets "particular social group" to mean *either* a group whose members share a characteristic (as required by *Acosta*) *or* a group that is perceived as such by society. In 2006, citing the U.N.'s Guidelines, the Board for the first time considered whether a group was socially visible "as a relevant factor" in determining whether it qualified as a

particular social group. *In re C-A-*, 23 I. & N. Dec. 951, 956 (B.I.A. 2006), *aff'd sub nom. Castillo-Arias* v. *U.S. Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006), *cert. denied*, 549 U.S. 1115 977 (2007). Two years later, the Board reinterpreted *C-A-* and other precedent to *require* proof of social visibility. *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582 (B.I.A. 2008).

Petitioner Edwin José Velasquez-Otero entered the United States in 2006, fleeing violent, recurring persecution for refusing to join a Honduran gang. Though the immigration judge found him credible and granted him asylum, the Board vacated that decision, holding that people who resist gang recruitment do not constitute a particular social group. The Eleventh Circuit affirmed, deferring to the Board's requirement that an applicant for asylum prove that his particular social group is socially visible.

The social visibility requirement has split the circuits. Eight circuits defer to the Board while two do not, finding the Board's unexplained addition of the social visibility requirement arbitrary, capricious, and unreasonable. The circuit split is firmly entrenched.

The Board's position is clearly wrong. It has concocted a social visibility requirement that is nowhere stated in the statute and that irrationally deprives many victims of group-based persecution of the Act's protection. There is no basis in the Act for denying eligibility to persons persecuted for belonging to hidden groups, or victims (like petitioner) whom

persecutors target because they are members of a group, regardless of whether the public can see that they are members.

This case presents a clean vehicle for resolving this important, recurring issue. Persecution for refusal to join a gang is a common ground for seeking asylum, and the decision below rested solely on the Board's social visibility requirement. Disparate treatment of asylum-seekers produces inconsistent outcomes across the country and could force refugees to engage in forum-shopping. Only this Court can harmonize the divergent positions and ensure uniform treatment of asylum-seekers nationwide.

A. Statutory Background

1. Asylum Under the Refugee Act of 1980

"[I]t is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands." Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102, 102 (1980) (codified as Congressional Declaration of Policies and Objectives, 8 U.S.C. § 1521) (Refugee Act or the Act). The Act provides the framework for all asylum applications.

The Act was designed to conform U.S. asylum law to the United Nations Convention and Protocol Relating to the Status of Refugees (the Convention), which the United States joined in 1968. *See* Protocol

Relating to the Status of Refugees, Jan. 31, 1967, T.I.A.S. No. 6577, 19 U.S.T. 6223 (entered into force Nov. 1, 1968). Accordingly, the congressional conference committee settled upon a definition of refugee that "incorporated the U.N. definition." S. REP. NO. 96-590, at 19 (1980) (Conf. Rep.). In a 1981 memorandum, Assistant Attorney General Theodore Olson of the Department of Justice's Office of Legal Counsel "assume[d] that Congress was aware" of the guidelines provided by the United Nations High Commissioner for Refugees (UNHCR) and thus "that it is appropriate to consider the guidelines . . . as an aid to the construction of the Act." Status of Persons Who Emigrate for Economic Reasons Under the Refugee Act of 1980, 5 Op. O.L.C. 264 (1981). And, as this Court has observed: "If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance" with the Convention. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987).

To achieve that primary purpose, Congress adopted a definition of refugee that "is virtually identical to the one prescribed by Article 1(2) of the Convention." *Cardoza-Fonseca*, 480 U.S. at 437.[1]

[1] The two definitions differ in narrow respects that are immaterial here. For instance, the definition of refugee adopted by the conference committee "incorporated the U.N. definition" but "specifically excluded from the definition persons who

(Continued on following page)

Indeed, the two definitions list the same conditions for refugee status, albeit in different orders, as shown below (with shared language emphasized and bracketed numbers indicating original order):

U.S. Definition of Refugee (8 U.S.C. § 1101(a)(42)(A))	**Convention Definition of Refugee** (art. 1(2), as adopted by U.S., 19 U.S.T. 6223)
[A]ny person who	*[A]ny person who. . . .*:
[1] *is outside* any *country of* such person's *nationality* . . .	[3] *is outside* the *country of* his *nationality*
[2] and who is unable or unwilling to return to, *and is unable or unwilling to avail himself* or herself *of the protection of*, *that country*	[4] *and is unable or*, owing to such fear, is *unwilling to avail himself of the protection of that country. . . .*
[3] because of persecution or a *well-founded fear of* persecution	[1] owing to *well-founded fear of* being persecuted
[4] on account *of race, religion, nationality, membership* in *a particular social group*, *or political opinion. . . .*	[2] for reasons *of race, religion, nationality, membership* of *a particular social group or political opinion*,

---

themselves have engaged in persecution." Conf. Rep. 19; *see* 8 U.S.C. § 1101(a)(42).

Under the Refugee Act, asylum may be granted to any noncitizen who meets his burden of satisfying each part of the statutory definition of a refugee. 8 U.S.C. § 1158(b)(1)(A); 8 C.F.R. § 1208.13(a) (2012). In making such a showing, "[t]he testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." *Id.*

2. "Membership in a Particular Social Group"

Of the five grounds of persecution that can support an application for refugee status under the Act, the meaning of "membership in a particular social group" is the least obvious. "[P]articular social group" is undefined by federal law. "Congress did not indicate what it understood this ground of persecution to mean. . . ." *Acosta*, 19 I. & N. Dec. at 232.

1. In *Acosta*, the Board of Immigration Appeals (the Board or BIA) first defined membership in a particular social group. The Board declined to grant asylum to Acosta, holding that taxi drivers who refused to engage in work stoppages did not constitute such a group. 19 I. & N. Dec. at 232-34, 237. The Board noted that the particular social group "requirement . . . comes directly from the . . . U.N. Convention" but that its meaning is otherwise unspecified. *Id.* at 232. The Board noted that the other enumerated types of persecution focus on characteristics that either are "beyond the power of an individual to change or [are] so fundamental to

individual identity or conscience that [they] ought not be required to be changed." *Id.* at 233. Applying the *ejusdem generis* canon of construction, the Board held that a particular social group is a group of people who all "share a common, immutable characteristic." *Id.* "The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances might be a shared past experience such as former military leadership or land ownership." *Id.* The characteristic must be one that group members "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Id.*; *see, e.g.*, *In re Kasinga*, 21 I. & N. Dec. 357, 366 (B.I.A. 1996) ("The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it" by submitting to female genital mutilation). That definition remained unchanged for more than twenty years.

2. In 2002, the UNHCR issued "interpretative guidance" explaining the meaning of "particular social group," to instruct signatory nations making "refugee status determinations." UNHCR, *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* 1, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) (the Guidelines). The Guidelines noted that the signatories to the Convention had concurrently developed two contrasting definitions of a particular social group. *Id.* ¶ 5. The first essentially

tracked the Board's definition in *Acosta*, focusing on characteristics that are either "immutable" or "so fundamental to human dignity" that refugees should not be forced to change them. *Id.* ¶ 6. Immutable characteristics include "a past temporary or voluntary status," because one can no longer change what one has already done or been. *Id.* The second definition of a particular social group, the "social perception" approach, considers whether "a group shares a common characteristic" that makes the *group*, as opposed to the *characteristic,* "cognizable . . . or sets [its members] apart from society at large." *Id.* ¶ 7. The Guidelines incorporated both tests, providing that if a group satisfies *either* the *Acosta* definition or the social perception test, it should qualify as a particular social group. *Id.* ¶ 11.

Thus, the Guidelines explain, "a particular social group is a group of persons [1] who share a common characteristic other than their risk of being persecuted, or [2] who are perceived as a group by society." Guidelines ¶ 11 (emphasis omitted). "The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights." *Id.* (emphasis omitted). "This definition includes characteristics which are historical and therefore cannot be changed." *Id.* ¶ 12. Members of the group need not know or associate with one another or otherwise be "cohesive." *Id.* ¶ 15. Nor must the persecution come at the hands of state actors; it is enough that state authorities knowingly tolerate the persecution or

refuse or prove unable to protect the refugee effectively. *Id.* ¶ 20.

The Guidelines' test is disjunctive. If someone claims refugee status based on a characteristic that is neither fundamental nor unchangeable, he still may be entitled to asylum if he is a member of a "group [that] is nonetheless perceived as a cognizable group in that society." Guidelines ¶ 13. And the social perception element is case-specific, "depending on the circumstances of the society in which [each group] exist[s]." *Id.* ¶ 7.

3. The Board has cited the UNHCR's Guidelines in revising *Acosta*'s definition of a particular social group. In *C-A-*, in 2006, the Board looked to the Guidelines and considered "as a relevant factor the extent to which members of a society perceive those with the characteristic in question as members of a particular social group." 23 I. & N. Dec. at 956-57.

In 2008, the Board both conflated the UNHCR criterion of perception as a social group with social visibility and turned the latter into a requirement. It did so by reinterpreting its "recent decisions [as] holding that membership in a purported social group *requires* that the group . . . possess a recognized level of social visibility." *S-E-G-*, 24 I. & N. Dec. at 582 (citing *C-A-*, 23 I. & N. Dec. at 951 and *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74 (B.I.A. 2007), *aff'd sub nom. Ucelo-Gomez* v. *Mukasey*, 509 F.3d 70 (2d Cir. 2007) (per curiam)) (emphasis added). Thus, in the span of two years, the Board moved from the

Acosta formulation to requiring refugees to prove that their proposed social groups are socially visible.

B. Facts and Procedural History

1. Petitioner Edwin José Velasquez-Otero was born in Honduras in 1990. App. 2a. When he was nine, his mother and sister left Honduras in search of "a better life" in the United States. App. 19a. Mr. Velasquez-Otero remained in Honduras, living with his aunt and surrogate grandfather until they also left five or six years later, and became a target for recruitment by Honduran gang members. *Id.* Four or five times, gang members demanded that he join, threatening to hurt him and his family if he did not, but he refused every time and never joined a gang. App. 19a-20a. Because of his resistance, gang members assaulted him eight times. App. 19a. Mr. Velasquez-Otero suffered injuries to his face, lost one of his teeth, and once, at age fourteen, was pistol-whipped and beaten so severely that he had to go to the hospital. Administrative Record (AR) 118-19. He explained that he resisted gang members' recruitment efforts because he "did not want to be like them. . . . [and] threaten[ ] other people." AR 115-16; App. 20a. Because he refused to join a gang, he endured repeated threats to his person and his family. App. 21a.

2. To escape those threats and beatings, Mr. Velasquez-Otero entered the United States without inspection on April 2, 2006 and was arrested by a

Border Patrol agent. *See* App. 13a. He was served with a Notice to Appear, which charged that he was removable under INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i). App. 2a. Mr. Velasquez-Otero conceded removability but applied for asylum, withholding of removal, and relief under the Convention Against Torture. *Id.* During this time, Mr. Velasquez-Otero was reunited with his mother, sister, grandfather, and aunt, all of whom are in the United States lawfully. His mother has received temporary protected status; his other three relatives are lawful permanent residents. *See* App. 19a.

3. The immigration judge granted Mr. Velasquez-Otero's application for asylum. App. 25a. The judge found that he was a credible witness and, in particular, that "he has established credibly that there ha[ve] been in fact beatings by members of gangs who wanted to recruit him . . . which he opposed." App. 24a. The judge further found that Mr. Velasquez-Otero credibly fears that if he were to return to Honduras, "reprisals [would be] taken against him" by these same gangs. App. 22a. Relying on his credible testimony, the judge found that he "has established that there is a reasonable possibility that he may suffer other serious harm upon removal to Honduras." App. 23a. Thus, the immigration judge held, Mr. Velasquez-Otero "has met his burden of proof to establish that he could be defined [as] a refugee." *Id.* In granting his asylum application, the judge held that the evidence "establish[ed] that he could be perceived as a member of a particular social

group." App. 24a.[2] The judge did not reach the claims under the Convention Against Torture or for withholding of removal, since those claims would require meeting "a higher burden" than an asylum claim. App. 24a-25a.

4. On review, the Board vacated the immigration judge's grant of asylum on the ground that Mr. Velasquez-Otero was not a member of a particular social group. Despite the immigration judge's factual findings, the Board held that his legal determinations were "contrary to our controlling precedents." App. 12a. (citing *S-E-G-*, 24 I. & N. Dec. at 582 and *Matter of E-A-G-*, 24 I. & N. Dec. 591 (B.I.A. 2008)). Without further discussion, the Board reiterated that people

[2] The immigration judge found it immaterial that Mr. Velasquez-Otero had been arrested four times, since none was for a "felon[y] or particularly serious crime[ ]" and thus none disqualified him for asylum. App. 20a. He was arrested twice for driving without a license and once for petty theft, when a companion shoplifted a bottle of perfume from a department store. *Id.*; AR 116-17. In addition, Mr. Velasquez-Otero was arrested after accompanying a group of classmates who broke into and entered a dwelling. Because he did not take anything from the dwelling, he was sentenced to probation and must make monthly payments. AR 121-23. He did not serve jail time for any of these offenses, and neither the immigration judge nor the government below thought that these offenses disqualified Mr. Velasquez-Otero from asylum. App. 20a ("None of these, however, disqualify him from asylum as they are not felonies or particularly serious crimes."); AR 123 (statement of government attorney Ms. Lang) ("I don't believe it disqualifies him from asylum.").

who resist gang recruitment "are not members of a particular social group for asylum purposes." *Id.*

5. The Eleventh Circuit affirmed, deferring to the Board's interpretation that members of a particular social group must prove that they have "social visibility." App. 6a-7a. In his pro se brief, Mr. Velasquez-Otero maintained that he had been persecuted on account of being a member of the particular social group of youths who had resisted gang recruitment, relying on *Acosta*'s definition of that term. CA11 Pet'r's Br. 15-17. He also argued that the Eleventh Circuit should reject social visibility as a requirement for a particular social group, just as the Seventh Circuit had. *Id.* at 13 n.6, 21 n.10 (citing *Gatimi* v. *Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009), and *Benitez Ramos* v. *Holder*, 589 F.3d 426, 430-31 (7th Cir. 2009)).

Nevertheless, the Eleventh Circuit deferred to the Board's more recent definition, holding that its decision was not arbitrary or capricious. App. 7a. Relying on binding circuit precedent, the Eleventh Circuit squarely held that "[s]ocial groups must have sufficient social visibility to be entitled to protection, and the BIA has declined to recognize social groups similar to the one Velasquez-Otero claimed to be in." App. 6a (citing *Castillo-Arias*, 446 F.3d at 1198; *E-A-G-*, 24 I. & N. Dec. at 591; *S-E-G-*, 24 I. & N. Dec. at 585; and *A-M-E & J-G-U-*, 24 I. & N. Dec. at 74-75). It thus held that persons who have been persecuted for resisting gang recruitment are categorically ineligible for asylum as a matter of law. *Id.*

This petition follows.

REASONS FOR GRANTING THE WRIT

1. The federal circuits are intractably divided on the question presented. Eight circuits defer to the Board's requirement that an applicant for asylum prove that his particular social group is socially visible. By contrast, two circuits have expressly considered and rejected the Board's social visibility requirement as arbitrary, capricious, unexplained, inconsistent, and incongruous; they vacate denials of asylum based on lack of social visibility. Multiple circuits have acknowledged the circuit split and taken sides, and they persist in disagreeing after considering one another's positions.

2. The Board's novel, unexplained social visibility requirement does not merit deference. First, its adoption of the requirement was arbitrary and capricious, as the Board never explained or justified its shift in agency policy. Second, the Board failed to weigh the import of the U.N. Convention, even though one of the main purposes of the Refugee Act was to implement that agreement. In erecting the novel social visibility bar, the Board provided no evidence that it adequately considered the Convention, the Guidelines, or sister signatories' contrary interpretations. Third, the social visibility requirement would produce incongruous if not absurd results by denying protection to applicants who hid from their persecutors or failed to broadcast their group

membership. Invisible groups such as homosexuals and women opposed to genital mutilation, who were protected by earlier Board case law, would now be ineligible for asylum.

3. The question presented is one of recurring national and international importance, affecting applicants for asylum across the country and around the world. This case is an excellent vehicle for considering the question, as Mr. Velasquez-Otero preserved the issue below and the court below rested its holding on this pure question of law. Further review is warranted.

I. THE CIRCUITS ARE SPLIT 8-2 OVER THE BOARD'S ADDITION OF THE SOCIAL VISIBILITY REQUIREMENT FOR ASYLUM CLAIMS

The Board's addition of a social visibility requirement to the definition of a particular social group has split the federal circuits: Eight circuits defer to the Board and require proof of social visibility, two reject the Board's addition of the new requirement, and one has acknowledged but not resolved the issue.[3]

[3] The Fourth Circuit has noted that the Seventh Circuit rejected the social visibility requirement but stated that "the Fourth Circuit has not yet decided whether such requirement comports with the INA." *Zelaya* v. *Holder*, 668 F.3d 159, 165 n.4 (4th Cir. 2012). But the Fourth Circuit had previously rejected a

(Continued on following page)

A. Eight Circuits Defer to the Board's Novel Social Visibility Requirement

The First, Second, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits defer to the Board's social visibility requirement. These eight courts affirm the denial of asylum claims whenever, in the Board's view, a proposed social group lacks social visibility.

The First Circuit has repeatedly deferred to the Board and denied asylum claims because the applicant and his group lacked social visibility. Approving the new requirement, the First Circuit explained that social visibility requires that group "members possess 'characteristics . . . visible and recognizable by others in the [native] country.'" *Scatambuli* v. *Holder*, 558 F.3d 53, 58-59 (1st Cir. 2009) (alterations in original) (rejecting purported group of informants against Brazilian smuggling ring, citing deference under *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984)). Accordingly, the First Circuit affirmed the Board's rejection of a proposed group of people who had resisted gang recruitment because it was not "generally recognized in the community as a cohesive group" and thus not socially visible. *Mendez-Barrera* v. *Holder*, 602 F.3d 21, 26

---

challenge to the Board's definition of a particular social group, citing First and Eleventh Circuit precedents on the majority side of the split and stating: "[W]e defer to [the Board's] reasonable interpretation of that term." *Contreras-Martinez* v. *Holder*, 346 F. App'x 956, 959 (4th Cir. 2009) (unpublished).

(1st Cir. 2010) (citing *Chevron* and *Motor Vehicles Mfrs. Ass'n* v. *State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)); *accord Larios* v. *Holder*, 608 F.3d 105, 109 (1st Cir. 2010) (rejecting similar group).

The Second Circuit has also affirmed using social visibility as a prerequisite for proving a particular social group. That court noted with approval that the Board's "social visibility requirement is consistent with" Second Circuit precedent that members of a particular social group must possess a shared, immutable characteristic "which serves to distinguish them in the eyes of a persecutor – or in the eyes of the outside world in general." *Ucelo-Gomez*, 509 F.3d at 73 (per curiam) (internal quotation marks omitted), *aff'g In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69.[4] The court applied *Chevron* deference. *Id.* at 72. The Second Circuit has likewise affirmed the Board's rejection of a proposed particular social group of people "who resisted gang recruitment in El Salvador . . . because of [the group's] lack of particularity and social visibility." *Fuentes-Hernandez* v. *Holder*, 411 F. App'x 438, 439 (2d Cir. 2011) (unpublished summary order).

The Fifth and Sixth Circuits explicitly apply *Chevron* deference to the Board's social visibility

[4] Although the court approved of what it took to be the Board's requirement of social visibility, its reference to "*In re C-A-*'s social visibility requirement" misinterpreted that case. *C-A-* held only that social visibility was "a relevant factor" in the analysis. 23 I. & N. at 957.

requirement. *Mendoza-Marquez* v. *Holder*, 345 F. App'x 31, 32 (5th Cir. 2009) (unpublished per curiam); *Castro-Paz* v. *Holder*, 375 F. App'x 586, 590 (6th Cir. 2010) (unpublished per curiam). Like the other circuits in the majority, both the Fifth and Sixth Circuits treat social visibility as a prerequisite for establishing a particular social group. *Soriano-Dominguez* v. *Holder*, 354 F. App'x 886, 887 (5th Cir. 2009) (unpublished) (affirming Board's rejection of group of "non-criminal witnesses who have reported crimes" because it "lack[s] the requisite social visibility" and is not "readily identifiable"); *Kante* v. *Holder*, 634 F.3d 321, 327 (6th Cir. 2011) (listing social visibility as a "requirement[ ]" for a particular social group, alongside a "shared 'immutable' or 'fundamental' characteristic"); *Flores* v. *Mukasey*, 297 F. App'x 389, 400 (6th Cir. 2008) (unpublished) (alternative holding that young Salvadorans who refuse to join gangs lack the requisite social visibility).

Similarly, the Eighth Circuit has affirmed the Board's treatment of social visibility as a requirement for establishing a particular social group. It held that people who have suffered violence because they refused to join criminal gangs do not constitute a particular social group because they "'lack[ ] the visibility and particularity required to constitute a social group.'" *Ortiz-Puentes* v. *Holder*, 662 F.3d 481, 483 (8th Cir. 2011) (quoting *Constanza* v. *Holder*, 647 F.3d 749, 753 (8th Cir. 2011) (per curiam) (holding that families and persons who resist gang recruitment lack the requisite social visibility and invoking

agency deference)). Over one judge's strong disagreement, the Eighth Circuit continues to hold that the Board's creation of the social visibility requirement is neither arbitrary nor capricious, based on its binding circuit precedent. *Gaitan* v. *Holder*, 671 F.3d 678, 681 (8th Cir. 2012); *see id.* at 682 (Bye, J., concurring in judgment as bound by circuit precedent but explaining that Board acted arbitrarily and capriciously by failing to explain its adoption of the social visibility requirement).

The Ninth Circuit defers to the Board's social visibility requirement as well. On that basis, it affirmed the Board's rejection of the proposed group of young Honduran men who have resisted gang recruitment. *Ramos-Lopez* v. *Holder*, 563 F.3d 855, 859-61 (9th Cir. 2009). The social visibility requirement, it held, merited *Chevron* deference and was neither arbitrary nor capricious. *Id.*

The Tenth Circuit also applies the social visibility requirement. In *Rivera-Barrientos* v. *Holder*, it held that Salvadoran women who had resisted gang recruitment lacked social visibility and particularity and so did not qualify as a particular social group. 666 F.3d 641, 648, 652-53 (10th Cir. 2012) (deferring to the Board). While that circuit does not interpret social visibility to require a characteristic visible to the naked eye, it does require applicants for asylum to prove "that the applicant's community is capable of identifying an individual as belonging to the group." *Id.* at 651. The Tenth Circuit "therefore join[s] those circuits that have accepted the BIA's social visibility

test in interpreting the statute." *Id.* at 652-53 (citing, as examples, decisions of the First, Second, Eighth, Ninth, and Eleventh Circuits).

Finally, the Eleventh Circuit accords *Chevron* deference to the Board's expansion of *Acosta*'s formulation to require social visibility. *Castillo-Arias*, 446 F.3d at 1196-97. In that circuit, "[a] group may qualify as a particular social group *only if* it has *both* immutability and social visibility." *Portillo* v. *U.S. Att'y Gen.*, 435 F. App'x 844, 847 (11th Cir. 2011) (emphases added). Likewise, in the decision below, the Board rejected Mr. Velasquez-Otero's proposed social group of people who have resisted recruitment by gangs in Honduras. App. 6a. The Eleventh Circuit affirmed the Board's decision that the group of "'persons resistant to gang membership[ ]' lacks the social visibility necessary that would allow others to identify its members as part of such a group." App. 11a (quoting *E-A-G-*, 24 I. & N. Dec. at 594).

B. Two Circuits Refuse to Defer to the Board, Rejecting the Social Visibility Requirement

While the Third and Seventh Circuits acknowledge that a majority of circuits apply the social visibility requirement, they have expressly rejected the Board's recent addition to the definition of a particular social group. In one case, the Board rejected an asylum application by a former member of a violent Kenyan political group because the group of

former members lacked social visibility, but the Seventh Circuit vacated the Board's decision. *Gatimi*, 578 F.3d at 615. In that case, "[t]he government's brief state[d] flatly that secrecy disqualifies a group from being deemed a particular social group." *Id.* at 616. But, writing for the court, Judge Posner explained that a social visibility requirement is illogical, as many victims of persecution look no different from anyone else and strive not to broadcast their membership in the targeted group. *Id.* The Board's interpretation is not only substantively unreasonable, the court explained, but also arbitrary and capricious. *Id.* at 615-16. The Board's rejection of the Kenyan group could not be squared with its recognition of similar groups, such as former employees of the Colombian attorney general. *Id.* As the Seventh Circuit noted, the Board's own precedents are inconsistent, so courts cannot choose to defer to one line of precedent but not the other without "condon[ing] arbitrariness and usurp[ing] the agency's responsibilities." *Id.* at 616. Thus, that circuit refused to defer to the Board's novel social visibility requirement. *Id.* at 615-16.

The Seventh Circuit reaffirmed its position in a case involving a group of former gang members, reversing the Board's rejection of that group. *Benitez Ramos*, 589 F.3d at 429-30, 432. That court held that former gang members were a particular social group because "being a former member of a group is a characteristic impossible to change." *Id.* at 429. Judge Posner's opinion rejected the government's "emphatic" argument "that you can be a member of a

particular social group only if a complete stranger could identify you as a member if he encountered you in the street, because of your appearance, gait, speech pattern, behavior, or other discernible characteristic." *Id.* at 430 (citing but disagreeing with the First Circuit's decision in *Scatambuli* and the Ninth Circuit's decision in *Ramos-Lopez*, both of which supported the government's argument). That holding establishes that the Seventh Circuit would have reversed the Board's vacatur of the immigration judge's decision in this case, instead of affirming the Board's judgment as the Eleventh Circuit did.

Similarly, the Third Circuit has held that the "'social visibility' requirement is inconsistent with past BIA decisions" and therefore "is an unreasonable addition to the requirements" for establishing a particular social group. *Valdiviezo-Galdamez* v. *Holder*, 663 F.3d 582, 604 (3d Cir. 2011). That circuit explained that the Board's precedents had previously recognized several particular social groups that would now necessarily fail the social visibility test, including Cuban homosexuals, former Salvadoran national police officers, and women opposed to female genital mutilation. *Id.*; *see also C-A-*, 23 I. & N. Dec. at 960 (listing these three groups as cognizable social groups). Though the Board may amend its interpretation of the statute, the Third Circuit explained, it must "announce[ ] a principled reason" for changing its previous reading. 663 F.3d at 608. Because the Board had not done so, the Third Circuit followed the Seventh Circuit's decision in *Gatimi*. *Id.* at 604,

606-07. It rejected the adoption of the social visibility requirement as arbitrary, capricious, contrary to the statutory purpose, and unworthy of *Chevron* deference. *Id.* at 603, 608. It thus remanded for the Board to consider whether Honduran youths who have resisted gang recruitment constitute a particular social group under *Acosta*. *Id.* at 608-09, 612. Those facts are materially indistinguishable from this case. *Valdiviezo-Galdamez* is strong evidence that the Third Circuit would have vacated and remanded the Board's rejection of Mr. Velasquez-Otero's asylum application, instead of affirming it as the Eleventh Circuit did.

The Third Circuit recently rejected the social visibility requirement again, refusing to affirm a Board decision that young Salvadoran men who resist gang recruitment do not constitute a particular social group. *Mejia-Fuentes* v. *Att'y Gen.*, No. 08-2783, 2012 WL 593252, at *3 (3d Cir. Feb. 24, 2012) (unpublished). And, in *Garcia* v. *Attorney General*, that circuit held that Guatemalans who testified against a gang constituted a particular social group. 665 F.3d 496, 503-04 (3d Cir. 2011). In that case, Garcia "share[d] a 'common, immutable characteristic' with other civilian witnesses who ha[d] the 'shared past experience' of assisting law enforcement against violent gangs." *Id.* at 504 (quoting *Acosta*, 19 I. & N. Dec. at 233). "It is a characteristic that members cannot change because it is based on past conduct that cannot be undone. To the extent that members of this group can recant their testimony, they 'should

not be required to' do so." *Id.* (quoting the same). Similarly, youths like Mr. Velasquez-Otero who have resisted gang recruitment share that characteristic based on past conduct. They should not be required to nullify their rejection of gang membership by giving in to persecution and joining a gang. Thus, if this case had arisen in the Third Circuit, that court would not have affirmed the Board's reversal of the grant of asylum.

C. The Circuit Split Is Well-Developed and Entrenched

This Court should intervene now, as the issue has had time to percolate and the split has grown entrenched. Eleven circuits have weighed in on the issue and ten have taken sides, either deferring to the social visibility requirement or rejecting it. The issue has arisen in more than a hundred appeals following the Board's July 2008 decision in *S-E-G-*.[5] The courts of appeals have had the opportunity to resolve the split but have declined to do so.

Multiple courts of appeals have acknowledged the split. The Fourth Circuit noted the Seventh Circuit's rejection of the Board's requirement. *Zelaya*, 668 F.3d at 165 n.4. The Tenth Circuit acknowledged but declined to follow the Seventh Circuit's position,

[5] These cases may be found by searching for "particular social group" within the same paragraph as "social visibility" or "socially visible" in Westlaw's CTA database.

instead following the First, Second, Eighth, Ninth, and Eleventh Circuits. *Rivera-Barrientos*, 658 F.3d at 1233-34. In the Eighth Circuit, Judge Bye recognized that "[t]his new approach to defining 'particular social group' split the circuits as to the validity and permissible extent of the BIA's reliance on 'social visibility' and 'particularity.'" *Gaitan*, 671 F.3d at 685 (Bye, J., concurring in the judgment) (advocating the position of the Third and Seventh Circuits as opposed to that of the First, Second, and Ninth Circuits). Likewise, academic commentary has recognized the split. *See* Elyse Wilkinson, Comment, *Examining the Board of Immigration Appeals' Social Visibility Requirement for Victims of Gang Violence Seeking Asylum*, 62 ME. L. REV. 387, 418 (2010).

Furthermore, the minority circuits are firmly entrenched. The Seventh Circuit denied a petition for rehearing en banc in *Gatimi* and later reaffirmed that decision in *Benitez Ramos* and *Sarhan* v. *Holder*, 658 F.3d 649, 654 (7th Cir. 2011). Similarly, the Third Circuit reaffirmed *Valdiviezo-Galdamez* in *Garcia* and again in *Mejia-Fuentes*. If anything, the minority side of the split may grow larger and even more entrenched. The Ninth Circuit, which currently follows the majority rule, is reconsidering its position en banc in *Henriquez-Rivas* v. *Holder*, 449 F. App'x 626 (9th Cir. 2011), *reh'g en banc granted*, 670 F.3d 1033 (9th Cir. 2012).

In the last fiscal year, 95.3% of all immigration cases were filed in immigration courts within circuits

that have taken sides in the split. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2011 STATISTICAL YEAR BOOK B3 tbl. 1 (2012). The circuit split has spread widely and matured, now encompassing the vast majority of asylum proceedings. Only this Court can harmonize these disparate positions and ensure that similarly situated refugees receive equal treatment and review across the country.

II. THE BOARD'S ADDITION OF A SOCIAL VISIBILITY REQUIREMENT TO THE STATUTE DOES NOT MERIT DEFERENCE

For more than twenty years, the Board relied on its 1985 decision in *Acosta*, premising social group determinations on whether group members "share a common, immutable characteristic." 19 I. & N. Dec. at 233. In 2008, without explanation, the Board added an additional hurdle that applicants must clear to gain asylum. According to *S-E-G-*, membership in a particular social group now "*requires* that the group . . . possess a recognized level of social visibility." 24 I. & N. Dec. at 582 (emphasis added). The Board's unexplained imposition of this novel requirement is not only arbitrary and capricious, but produces inconsistent and unreasonable results. It is unworthy of deference.

A. The Board's Unexplained Adoption of Social Visibility as a Requirement Was Arbitrary and Capricious, Necessitating Remand

The Board's creation of a social visibility requirement was arbitrary and capricious, both because it changed course without explanation and because it failed to examine the UNHCR Guidelines to the Convention, on which Congress modeled the governing statutory language. Where an agency's explanation is inadequate, "'"the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."'" *Gonzales* v. *Thomas*, 547 U.S. 183, 186 (2006) (per curiam) (quoting *INS* v. *Orlando Ventura*, 537 U.S. 12, 16 (2002) (per curiam) and citing *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947)).

1. The Board Failed to Explain Why It Changed Its Interpretation to Require Social Visibility

Determining whether an agency acted arbitrarily or capriciously under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), "involves examining the reasons for agency decisions – or, as the case may be, the absence of such reasons." *Judulang* v. *Holder*, 132 S. Ct. 476, 484 (2011). "[A]n agency changing its course must supply a reasoned analysis"; failure to do so may make the change arbitrary and capricious, requiring a remand. *State Farm*, 463 U.S. at 57 (internal quotation marks omitted); *see also Nat'l*

Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). Where the grounds of an agency's decision are not "clearly disclosed and adequately sustained," a court cannot engage in meaningful review and should remand. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94-95 (1943).

Here, the Board failed to explain why it made social visibility a requirement. The Board relied exclusively on *S-E-G-*, which in turn claims support from *C-A-* and *A-M-E- & J-G-U-*. But that support is illusory. In *C-A-*, the Board cited the UNHCR Guidelines' and various circuits' definitions of a particular social group before adopting social visibility as a "relevant factor" while also claiming to "continue to adhere to the [pre-social visibility] *Acosta* formulation." 23 I. & N. Dec. at 955-57. The Board considered the social visibility factor only after finding that the asylum-seekers did not satisfy *Acosta*'s immutable-characteristics test. *Id.* at 956-61. Thus, for the first time, the Board in *C-A-* adopted social visibility as a possible alternative way to prove membership in a particular social group. *C-A-* in no way suggests that social visibility is or should be a *necessary* requirement, as *S-E-G-* later held.

In *A-M-E-*, the Board cited *C-A-* as both "reaffirm[ing] the importance of social visibility as a factor" and "reaffirming the *requirement* that the shared characteristic of the group . . . be recognizable." 24 I. & N. Dec. at 74 (emphasis added). As noted, however, *C-A-* did not reaffirm (or even create) any social visibility *requirement*. But rather than explain

its equivocation, the Board merely cited *C-A-* as support.

Then, in *S-E-G-*, the Board claimed to be "guided by [its] recent decisions holding that membership in a purported social group *requires* that the group . . . possess a recognized level of social visibility." 24 I. & N. Dec. at 582 (emphasis added). The Board cast *C-A-* and *A-M-E-* as "reaffirming" the social visibility "requirement," although neither actually did: *C-A-* treated social visibility as a "relevant factor," 23 I. & N. Dec. at 957, and *A-M-E-* claimed to adopt *C-A-*'s reasoning.[6] The Board also claimed support from the UNHCR Guidelines, which it said "endorse an approach" that treats social visibility as "an important factor." *S-E-G-*, 24 I. & N. Dec. at 586. But that claim is misleading. The importance of social perception under the Guidelines is as an alternative test that broadens rather than narrows the permissible grounds for asylum. Guidelines ¶ 11.

As Judge Posner explained in *Gatimi*, "the Board [has not] attempted, in this or any other case, to

[6] The Board also failed to acknowledge that the Board in *A-M-E-* had been influenced by the view of the Second Circuit, the same circuit in which that dispute arose. *See A-M-E-*, 24 I. & N. Dec. at 71, 74; *see also Gomez* v. *INS*, 947 F.2d 660, 664 (2d Cir. 1991) ("[T]he attributes of a particular social group must be recognizable. . . ."). To the extent that the Board in *A-M-E-* was interpreting the specific law of the Second Circuit, its conclusion sheds no light on the *Board*'s own construction of the Refugee Act. To the extent that the *S-E-G-* Board considered itself bound by its own precedent, it flatly misread *C-A-* and *A-M-E-*.

explain the reasoning behind the criterion of social visibility." 578 F.3d at 615. It cannot circumvent *Chenery*'s clear-explanation requirement by erroneously claiming that it had previously adopted the social visibility requirement, when in fact it had not. Like *S-E-G-*, the Board's one-page opinion in this case simply pointed to its own precedent, adding to the list of cases resting on an unexplained and unacceptable agency rationale. The Board did not try to reconcile the conflict between its rule and the sources it cited or explain how they support the test it adopted. Thus, the Board's decision was arbitrary and capricious.

2. The Board Failed to Weigh the U.N. Convention, a Factor that Congress Intended the Agency to Consider

Arbitrary and capricious review requires evaluating whether the agency's decision "was based on a consideration of the relevant factors." *State Farm*, 463 U.S. at 43 (internal quotation marks omitted). If an agency decision does not reflect consideration of factors Congress made relevant, the reviewing court "must strike down [the] agency action" as arbitrary and capricious. *D&F Afonso Realty Trust* v. *Garvey*, 216 F.3d 1191, 1195 (D.C. Cir. 2000) (reversing FAA decision for failing to consider relevant factors). Congress passed the Act in order to implement the Convention. Yet the Board acted arbitrarily and capriciously by failing to adequately consider or properly interpret the Convention, the Guidelines, and sister signatories' interpretations.

"As this Court has twice recognized, one of Congress' primary purposes in passing the Refugee Act was to implement the principles agreed to in the" Convention. *Negusie* v. *Holder*, 555 U.S. 511, 520 (2009) (internal quotation marks and citations omitted). Congress deliberately incorporated the Convention's definition of a refugee into the Act. While the UNHCR Guidelines do not bind the Board, they deserve respectful consideration in interpreting the Act. *See Cardoza-Fonseca*, 480 U.S. at 438-39 & n.22 (noting that the UNHCR's Handbook "provides significant guidance in construing the Protocol, to which Congress sought to conform" in enacting the Act). On its face, the UNHCR's disjunctive test rejects any social perception requirement as a prerequisite for identifying a particular social group. Guidelines ¶ 11.

Furthermore, "[i]n interpreting any treaty, [t]he opinions of our sister signatories . . . are entitled to considerable weight." *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1993 (2010) (internal quotation marks omitted). Other parties to the Convention either do not include social visibility in their tests for particular social groups or have expressly repudiated it as a requirement. *See, e.g.*, *Applicant S* v. *Minister for Immigration and Multicultural Affairs* (2004) 217 C.L.R. 387, ¶¶ 67-69, 98 (Austl.) (expressly rejecting social visibility as a requirement because it is not imposed by the Convention and would exclude hidden groups such as homosexuals); *see also* T. Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of 'Membership of a Particular Social*

Group,' *in* REFUGEE PROTECTION IN INTERNATIONAL LAW 263, 268-71, 273-75, 280-82 (Erika Feller et al. eds., 2003) (demonstrating that the tests in Canada, the United Kingdom, New Zealand, and France do not require social visibility).

Nevertheless, the Board provided no evidence that it weighed the Convention, the Guidelines, or sister signatories' interpretations in mandating proof of social visibility. *See S-E-G-*, 24 I. & N. Dec. at 586-88. Instead, the Board merely referred to past decisions that had quoted the Guidelines — *C-A-* and *A-M-E-* — without any discussion of how the Guidelines informed the conclusion it drew. *Id.* at 586. Though its passing references to the Guidelines in *S-E-G-* and *A-M-E-* suggest that the Board knew it was required to consider the Convention, it cannot "merely recite" a relevant factor as a substitute for actually considering it. *State Farm*, 463 U.S. at 52. Because the Board's interpretation failed to weigh the significance of a relevant factor that Congress intended the Board to consider, its decision to require social visibility was arbitrary and capricious.

B. The Board's Requirement Is Unreasonable Under *Chevron* Because It Denies Asylum to Refugees Who Hid from Social Visibility to Avoid Persecution

The Board's adoption of the social visibility requirement was not only arbitrary and capricious under *State Farm*, but was also unreasonable under

step two of *Chevron*. The purpose of the Act was to conform U.S. law to the Convention, and its stated policy is to respond to the "urgent needs" of persecution victims around the world. Refugee Act § 101(a). The statute's aim was to greatly *broaden* the availability of asylum. *See* Joni L. Andrioff, Comment, *Proving the Existence of Persecution in Asylum and Withholding Claims*, 62 CHI.-KENT L. REV. 107, 109 n.14 (1986). Yet the Board has, without explanation, applied a gloss to the Act that instead *restricts* the availability of asylum and contravenes explicit congressional policy. That interpretation is unreasonable on its face. It fails closer scrutiny as well, by producing absurd results in the many cases where asylum-seekers hide from persecution.

The Board incorrectly equates social perception that a distinct group exists with social visibility. Persecution can drive its victims underground, necessarily decreasing their social visibility. *See, e.g.*, *Muhur* v. *Ashcroft*, 355 F.3d 958, 961 (7th Cir. 2004) (Posner, J.) (explaining that religious persecution seeks to drive adherents underground). Victims of the harshest persecution, who merit asylum the most, are most likely to hide and perversely are least likely to satisfy the social visibility requirement. As Judge Posner explained in *Gatimi*:

> [The social visibility requirement] makes no sense; nor has the Board attempted, in this or any other case, to explain the reasoning behind the criterion of social visibility. Women who have not yet undergone female

> genital mutilation in tribes that practice it do not look different from anyone else. A homosexual in a homophobic society will pass as heterosexual. If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they will not be "seen" by other people in the society "as a segment of the population."

578 F.3d at 615.

The Third Circuit highlighted the same contradiction: any "attempt[s] to avoid persecution by blending into the society at large . . . would cause [victims] to forfeit eligibility for asylum based on the persecution they would experience if recognized as a member of the particular social group in their society." *Valdiviezo-Galdamez*, 663 F.3d at 607; *see also* Fatma E. Marouf, *The Emerging Importance of "Social Visibility" in Defining a Particular Social Group and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL'Y REV. 47, 79-103 (2008) (noting that requiring social visibility would bar asylum based on sexual orientation, domestic violence, human trafficking, and other gender-related grounds).

Moreover, the social visibility requirement is unreasonable as it bars asylum for refugees who were formerly eligible under *Acosta* because they shared a

past experience as opposed to an overt trait such as skin color. *See, e.g.*, *Kasinga*, 21 I. & N. Dec. at 365-66, 368 (recognizing group and granting asylum to a young Togolese woman who had not undergone female genital mutilation and opposed the practice); *In re Fuentes*, 19 I. & N. Dec. 658, 662 (B.I.A. 1988) (recognizing that former Salvadoran national police officer who faced persecution because of that employment could qualify as a member of a particular social group). The Board's new social visibility requirement would produce the incongruous result of denying asylum to members of such groups.

Additionally, as *Acosta* reasoned, the canon of *ejusdem generis* requires assimilating membership in a particular social group to the other enumerated categories of race, religion, nationality, and political opinion. 19 I. & N. Dec. at 233. While races are sometimes socially visible, religions, nationalities, and political opinions usually are not. Thus, it is unreasonable to graft a social visibility requirement onto the statute.

Finally, requiring social visibility overreads the text of the subsection. The Act requires that refugees be persecuted or fear persecution "*on account of* . . . membership in a particular social group." 8 U.S.C. § 1101(a)(42)(A) (emphasis added). A persecutor must generally be aware that a victim has the characteristic that makes him a member of a group, or the victim must reasonably fear persecution if the characteristic is discovered, in order for his group membership to be *the reason* he is persecuted. Thus, the group is

defined not merely by the fact of persecution, but by the characteristic, experience, or status that its members share. But the Act does not further require that the group have some level of visibility to society at large (an amorphous test), let alone that group members be readily identifiable to the general public, as the government argued in *Gatimi* and *Benitez Ramos*.

Here, Mr. Velasquez-Otero and his peers are not being attacked randomly or because of their personal idiosyncrasies. They are being persecuted because organized gangs perceive the group to which they belong — those who resist gang recruitment — as a threat. The gangs cannot tolerate having potential gang recruits regard gang membership as optional or voluntary because that would destroy their power to conscript future recruits. Instead, they mount a campaign of sustained violence against members of this distinct group both to force its members to withdraw (and join the gang) and to prevent others from joining the group of gang resisters to begin with. The Board's interpretation perversely excludes vast amounts of group-based persecution from its coverage and denies the Act's protection to the very refugees it was meant to protect.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR ADDRESSING AN IMPORTANT, RECURRING ISSUE

The question presented is important and recurring. More than 50,000 refugees apply to immigration

courts or the Department of Homeland Security for asylum each year. *See* OFFICE OF PLANNING, ANALYSIS, & TECHNOLOGY, UNITED STATES DEPARTMENT OF JUSTICE, FY 2011 STATISTICAL YEAR BOOK I1 (2012); DANIEL C. MARTIN, OFFICE OF IMMIGRATION STATISTICS, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, REFUGEES AND ASYLEES: 2010 ANNUAL FLOW REPORT 1 (2011). More than 73,000 refugees were admitted to the United States in 2010 under the same criteria that govern applications for asylum. *See* Martin, *supra*, at 1. Of the possible grounds for asylum, membership in a particular social group is the second most common ground raised by applicants. ANNA MARIE GALLAGHER & SHANE DIZON, IMMIGRATION LAW SERVICE 2D § 10:138 (West 2011).

The persistence of the circuit split leads to arbitrary and inconsistent outcomes across the country, preventing some applicants from receiving asylum solely because they applied in majority-rule circuits. Uniformity is especially important in immigration law because refugees can sometimes choose the jurisdiction in which they seek asylum. *Cf.* Immigration Control and Reform Act of 1986, § 115, 100 Stat. 3384 ("It is the sense of Congress that . . . the immigration laws of the United States should be enforced vigorously and uniformly."). Legitimate refugees may feel compelled to avoid cities like New York, Miami, and Los Angeles, irrespective of family ties, safety, or job opportunities in order to avoid harsher immigration law in those circuits. The result may be forum-shopping.

This case offers an excellent vehicle for resolving the question presented. Its facts, involving a youth who suffered violence for having resisted gang recruitment, is a typical, recurring pattern. Mr. Velasquez-Otero raised the issue below, and the court of appeals based its holding squarely on its resolution of this issue. The Eleventh Circuit deferred to the Board's new reading of the statute. It thus ruled, as a matter of law, that Mr. Velasquez-Otero was ineligible for asylum because his claimed group lacked the social visibility required by the Board. App. 6a-7a.

Finally, the outcome of this case turns on the resolution of the legal question presented. The immigration judge found that Mr. Velasquez-Otero was credible, eligible, and merited asylum. App. 23a-24a. The Board reversed solely on the legal question, reasoning that the immigration judge's ruling was "contrary to [its] controlling precedents" requiring social visibility. App. 12a. Similarly, the Eleventh Circuit's decision rested purely on the legal issue. It expressly found that the Board's decision was not arbitrary or capricious, agreed that "[s]ocial groups must have sufficient social visibility to be entitled to protection," and deferred to the Board's denial of asylum. App. 6a-7a. The dispositive legal issue was pressed and passed upon below and is cleanly presented for this Court's review.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

STEPHEN B. KINNAIRD
PAUL HASTINGS LLP
875 15th Street, N.W.
Washington, DC 20005
(202) 551-1842

MIGUEL MENDIZABAL
IMMIGRANTS' RIGHTS CENTER
1468 South Semoran Boulevard
Orlando, FL 32807

STEPHANOS BIBAS
Counsel of Record
JAMES A. FELDMAN
NANCY BREGSTEIN GORDON
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
SUPREME COURT CLINIC
3501 Sansom Street
Philadelphia, PA 19104
(215) 746-2297
sbibas@law.upenn.edu

Counsel for Petitioner

May 1, 2012

2012 WL 281811 (C.A.11)

United States Court of Appeals,
Eleventh Circuit.

Edwin Jose **VELASQUEZ-OTERO**, Petitioner,

v.

U.S. ATTORNEY GENERAL, Respondent.

No. 11-11565
Non-Argument Calendar.
Feb. 1, 2012.

Petition for Review of a Decision of the Board of Immigration Appeals. Agency No. A099-672-349.

Before EDMONSON, CARNES, and KRAVITCH, Circuit Judges.

PER CURIAM:

Edwin Jose Velasquez-Otero, proceeding *pro se*, seeks review of the Board of Immigration Appeals' final order, which vacated the Immigration Judge's grant of asylum and ordered Velasquez-Otero removed from the United States. He contends the BIA erred when it concluded he was not a member of a particular social group. He also contends the BIA violated his due process rights when it failed to remand his case to the IJ to determine whether he was eligible for withholding of removal or for relief under the United Nations Convention Against Torture (CAT).

I.

Velasquez-Otero was born in Honduras in 1990. In 2006, after refusing to join Honduran gangs following several beatings by gang members, Velasquez-Otero entered the United States without inspection. The Department of Homeland Security filed a Notice to Appear charging Velasquez-Otero with removability under 8 U.S.C. § 1182(a)(6)(A)(i) as an alien present in the United States without being admitted or paroled. Velasquez-Otero admitted the facts in the NTA and conceded removability. He then filed an application for asylum, withholding of removal, and CAT relief.

The government submitted to the IJ a 2006 State Department issue paper indicating that because of limited resources Honduran law enforcement faced a major challenge from gangs but that combating gang activity was a high priority. It noted that gang violence was primarily an urban problem and that although gang recruitment focused on males between 13 and 20 years old, membership was overwhelmingly voluntary. Forced recruitment was rare outside of prison.

Velasquez-Otero argued that the IJ should grant him humanitarian asylum. He testified at his asylum hearing that he is afraid to go back to Honduras because of things he hears on the news. And he argued that his circumstances were extraordinary because if he were sent back there he would be homeless and without family support. The IJ agreed and found that

Velasquez-Otero would be subject to targeting by gang members because he would be homeless and because the clothing and materials he had obtained by [sic] while he was in the United States would lead gang members to mistakenly believe him to be wealthy. The IJ distinguished Velasquez-Otero's case from *Matter of E-A-G-,* 31 I. & N. Dec. 591 (BIA 2008), based on lack of family support, found that he had established refugee status through credible testimony, and granted him asylum. The IJ did not, however, decide whether Velasquez-Otero was eligible for withholding of removal or CAT relief and gave no notice to Velasquez-Otero that he must reassert those claims if the government appealed.

On appeal to the BIA, the government argued that Velasquez-Otero had not established that he was a refugee because he was not a member of a "particular social group" and it asked the BIA to order Velasquez-Otero removed. Velasquez-Otero argued that the IJ's decision to grant asylum was correct because he was a member of a particular social group that shared the common attributes of age, homelessness, and lack of wealth, and that social group was discrete, limited, clearly defined, and socially visible. He requested that the BIA affirm the IJ. Neither Velasquez-Otero nor the government addressed Velasquez-Otero's earlier request for withholding of removal or CAT relief.

The BIA sustained the government's appeal, vacated the IJ's decision, and ordered Velasquez-Otero removed. It concluded that the IJ's decision was

contrary to controlling BIA precedents holding that people a gang attempts to recruit and people perceived as wealthy are not members of a particular social group. It also concluded that Velasquez-Otero's lack of family members remaining in Honduras was irrelevant. The BIA did not address Velasquez-Otero's earlier request for withholding of removal or CAT relief and did not remand the case to the IJ to determine those issues. This petition followed.

II.

Velasquez-Otero contends the BIA erred when it reversed the IJ's decision granting him asylum. Because the BIA did not expressly adopt the IJ's decision, we review only the BIA's decision. *See Ruiz v. Gonzales,* 479 F.3d 762, 765 (11th Cir.2007).

"To the extent that the BIA's decision was based on a legal determination, review is *de novo.*" *Castillo-Arias v. U.S. Att'y Gen.,* 446 F.3d 1190, 1195 (11th Cir.2006). Under *de novo* review, the BIA's interpretation of a statute it administers is entitled to the level of deference articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2278 (1984)." *Castillo-Arias,* 446 F.3d at 1195. Therefore, we defer to the BIA unless its interpretation is arbitrary, capricious, or clearly contrary to law – i.e., unreasonable. *See Castillo-Arias,* 446 F.3d at 1195; *see also Chen v. U.S. Att'y Gen.,* 565 F.3d 805, 809 (11th Cir. 2009). "The degree of deference

given is especially great in the field of immigration." *Chen,* 565 F.3d at 809.

The Attorney General or Secretary of Homeland Security has discretion to grant asylum if the alien meets the definition of "refugee." 8 U.S.C. § 1158(b)(1)(A). A refugee is defined in relevant part as:

> any person who is outside any country of such person's nationality . . . who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42)(A). A petitioner can prove refugee status by showing either "past persecution on account of a statutorily protected ground" or "'a well-founded fear' of future persecution on account of a protected ground." *Rivera v. U.S. Att'y Gen.,* 487 F.3d 815, 820-21 (11th Cir.2007) (citing 8 C.F.R. § 208.13(b)).

Because Congress did not define "particular social group," we defer to the BIA's formulation from *Matter of Acosta*. *Castillo-Arias,* 446 F.3d at 1196; *Matter of Acosta,* 19 I. & N. Dec. 211, 233 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi,* 19 I. & N. Dec. 439 (BIA 1987). Under *Acosta,* a particular social group is made up of those who share

> a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some

> circumstances it might be a shared past experience, such as former military leadership or land ownership. . . . However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

Acosta, 19 I. & N. Dec. at 233.

Velasquez-Otero argues that the BIA should have found that he is a part of particular social group, but he has not shown that he [sic] BIA's decision not to do so is unreasonable. The "particular social group" category is not a catch-all for people who allege persecution but do not fit into other protected groups. *Castillo-Arias,* 446 F.3d at 1198. Social groups must have sufficient social visibility to be entitled to protection, *see id.* at 1198, and the BIA has declined to recognize social groups similar to the one Velasquez-Otero claimed to be in. *See, e.g., Matter of E-A-G-,* 24 I. & N. 591, 591 (rejecting "persons resistant to gang membership" as a "particular social group"); *Matter of S-E-G-,* 24 I. & N. Dec. 579, 585 (BIA 2008) (rejecting "male children who lack stable families and meaningful adult protection, who are from middle and low income classes, who live in the territories controlled by the MS-13 gang, and who refuse recruitment" as a "particular social group"); *In re A-M-E & J-G-U-,* 24 I. & N. Dec. 69, 74-75 (BIA 2007) (rejecting affluent Guatemalans as a "particular social group").

Therefore, the BIA's decision in this case was not arbitrary, capricious, or clearly contrary to law. Accordingly, we defer to the [sic] its conclusion and deny Velasquez-Otero's petition for review of the denial of his asylum claim.

III.

Velasquez-Otero also contends the BIA violated his right to due process when it ordered him removed without remanding his petition to the IJ to determine whether he was eligible for withholding of removal or CAT relief. The government argues that we lack jurisdiction over this claim and, alternatively, that Velasquez-Otero's due process claim fails. We review *de novo* both jurisdictional questions and constitutional claims. *Ali v. U.S. Att'y Gen.,* 443 F.3d 804, 808 (11th Cir. 2006).

We have jurisdiction to review an order of removal only if the alien has first exhausted his administrative remedies. 8 U.S.C. § 1252(d)(1); *Avila v. U.S. Att'y Gen.,* 560 F.3d 1281, 1285. "[T]he exhaustion doctrine exists . . . to avoid premature interference with administrative processes," "to allow the agency to consider the relevant issues," to ensure the agency "has had a full opportunity to consider a petitioner's claims," and to allow the BIA to compile an adequate record for judicial review. *Id.* at 1250.

We have recognized, however, that "some due process claims do not require exhaustion." *Avila,* 560 F.3d at 1285. Other circuits have held that the exhaustion requirement does not apply in circumstances

similar to those in this case. *See James v. Gonzales,* 464 F.3d 505, 512-513 (5th Cir.2006) (holding that the exhaustion requirement does not apply when the government appeals an IJ's decision and the petitioner lacks adequate notice that failure to make claims before the BIA will result in forfeiture); *Noriega-Lopez v. Ashcroft,* 335 F.3d 874, 881 (9th Cir. 2003) (holding that an alien habeas petition did not need to exhaust his claim that the BIA acted *ultra vires* by ordering him removed because, in part, "[t]here was no deliberate bypass of the administrative scheme"). Because Velasquez-Otero did not receive adequate notice that failure to assert his request for withholding of removal or CAT relief to the BIA would result in forfeiture, and the record does not suggest any deliberate bypass of the administrative scheme, we conclude that the government has not established that Velasquez-Otero truly failed to exhaust his due process claim before the BIA. Therefore, we have jurisdiction.

"In order to establish a due process violation, an alien must show that he or she was deprived of liberty without due process of law, and that the asserted error caused him substantial prejudice." *Avila,* 560 F.3d at 1285. "To show substantial prejudice, an alien must demonstrate that, in the absence of the alleged violations, the outcome of the proceeding would have been different." *Lapaix v. U.S. Att'y Gen.,* 605 F.3d 1138, 1143 (11th Cir. 2010). Therefore, Velasquez-Otero must show that if the BIA had remanded his case to the IJ, the IJ would not have ordered him removed.

Velasquez-Otero, however, has failed to make that showing. "To qualify for withholding of removal or CAT relief, an alien must establish standards more stringent than those for asylum eligibility." *Rodriguez Morales v. U.S. Att'y Gen.,* 488 F.3d 884, 891 (11th Cir. 2007) Thus, an alien unable to meet the standard for asylum necessarily fails to meet the standard for withholding of removal. *Id.* Further, "[t]o establish eligibility for CAT relief, an applicant must show that it is more likely than not that he will be tortured by, or with the acquiescence of, government officials if returned to the designated country of removal." *Todorovic v. U.S. Att'y Gen.,* 621 F.3d 1318, 1324 (11th Cir.2010) (citing 8 C.F.R. § 208.16(c)(2)). Velasquez-Otero points to nothing in the record that suggests he will be subjected to torture by government officials or with their acquiescence if he is returned to Honduras.

Velasquez-Otero has therefore failed to show that "in the absence of the alleged violations, the outcome of the proceeding would have been different," which is required to show substantial prejudice, *Lapaix,* 605 F.3d at 1143, and his due process claim fails for that reason.[1]

PETITION DENIED.

---

[1] Velasquez-Otero also suggests in his brief to this Court that he might be entitled to voluntary departure, but he specifically stated at his removal proceeding that he was not asking for voluntary departure as alternative relief.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A099 672 349 – Orlando, FL Date: MAR 11 2011

In re: EDWIN JOSE VELASQUEZ-OTERO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Miguel Mendizabal, Esquire

ON BEHALF OF DHS: Elizabeth G. Lang
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] – Present without being admitted or paroled

APPLICATION: Asylum; withholding of removal; Convention Against Torture

In a decision dated April 27, 2010, the Immigration Judge found the respondent, a native and citizen of Honduras, removable as charged. He granted the respondent's application for asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158 (I.J. at 12-13). The DHS has appealed. We will sustain the appeal.

On appeal, the DHS argues that the Immigration Judge erred in finding that the respondent demonstrated a well-founded fear of future persecution in Honduras on account of his membership in a particular social group. The DHS contends that the respondent failed to establish that he is a member of a particular social group which is cognizable for asylum purposes.

The DHS asserts that this Board has held that youth who have been subjected to gang recruitment efforts and who have rejected or resisted membership do not constitute a particular social group, citing our decision in *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008), in support of its argument. There, we found that in a case involving a Honduran alien, the group, "persons resistant to gang membership," lacks the social visibility necessary that would allow others to identify its members as part of such a group. *Id.* at 594. In a similar case involving young Salvadorans who had been subject to recruitment efforts by criminal gangs, but who refused to join, the Board found that the group fails the "social visibility" test, and does not qualify as a particular social group. *Matter of S-E-G-*, 24 I&N Dec. 579, 588 (BIA 2008). The DHS asserts that the Immigration Judge incorrectly distinguished these cases based on the respondent's lack of family members in Honduras who could support him (I.J. at 11). The DHS also pointed out that in *Matter of E-A-G-*, *supra*, the Board held that gang violence is prevalent in Honduras, but concluded that

this did not establish a well-founded fear of persecution.

We agree with the DHS that the Immigration Judge erred in finding the respondent was a member of a particular social group, and granting him asylum. The Immigration Judge's ruling is contrary to our controlling precedents. *See Matter of S-E-G-*, *supra*, and *Matter of E-A-G-*, *supra*. In those cases, we held that individuals that a gang attempts to recruit, as allegedly occurred in the respondent's case (Tr. at 25), are not members of a particular social group for asylum purposes. *See also Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006). Moreover, insofar as the respondent fears harm because he will be perceived as wealthy upon return from the United States, *see* I.J at 11-12, we note that this too is not a basis for asylum. *See Matter of A-M-E- & J-G-U-*, 24 I&N Dec 69 (BIA 2007). We also agree with the DHS that the respondent's lack of family members remaining in Honduras is irrelevant to whether he belongs to a particular social group.

Accordingly, the following order will be entered.

ORDER: The DHS appeal is sustained, the Immigration Judge's decision is vacated, and the respondent is ordered removed to Honduras.

/s/ [Illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Orlando, Florida

File No.: A 099 672 349		Date: April 27, 2010
In the Matter of EDWIN JOSE VELASQUEZ-OTERO Respondent	)))))	IN REMOVAL PROCEEDINGS

CHARGE: Immigration and Nationality Act Section 212(a)(6)(A)(i) – alien present in the United States without being admitted or paroled.

APPLICATIONS: Asylum; restrictions on removal; withholding under the Torture Convention.

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Miguel Mendizabal, Esquire	Elizabeth Lang Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is today a 20-year-old single male alien native and citizen of Honduras. He entered the United States near Los Indios, Texas, on or about April 2, 2006, without being admitted or paroled after inspection by an Immigration Officer.

This matter came before the Court as a result of the issuance of a Form I-862 (Exhibit 1) served on the respondent in person on April 2, 2006, and in compliance with Section 239(a)(1)(F) of the Act. The NTA states that the respondent is subject to removal as aforementioned.

During Master Calendar proceedings, the respondent, through counsel, conceded that he was subject to removal as charged and asked to be considered for asylum, withholding of removal and Torture Convention relief in an application that he filed in an I-589 (Exhibit 2) in which he claims that he fears being returned to Honduras based on gang persecution and forced recruitment. The Court informed the respondent, through counsel, of the consequences of filing a frivolous application for asylum. The advisals are Exhibit 3 of these proceedings. The Court also invited the respondent to submit evidence to corroborate his claim and he has submitted two notices of filing, Exhibits 4 and 5, which contain the latest *County Reports*, *Human Rights Practices* for Honduras, as well as other country reports and biographical and personal documentation of the respondent. Neither of these have been objected by the Government.

The Government, on its part, has submitted an *Issue Paper* from May 2006. It is really outdated. It discusses, however, youth gang organizations in Honduras. It is a four-year-old document that still, however, is relevant as it discusses the problem that the Honduran citizenship has with the gangs present and how that relates to asylum applicants.

Biometrics have been completed and, therefore, the Court is ready to issue these decisions based on relief requested, asylum pursuant to Section 208 of the INA, withholding of removal pursuant to Section 241(b)(3) of the INA, as well as withholding of removal under the regulations that govern the Torture Convention. Voluntary departure has not been requested and is, therefore, not being considered.

STATUTORY REQUIREMENTS FOR ASYLUM, RESTRICTIONS ON REMOVAL AND WITHHOLDING UNDER THE TORTURE CONVENTION

Pursuant to Section 208(b) of the INA, the Attorney General may grant asylum to an alien if it is determined that the alien is a refugee within the meaning of Section 101(a)(42)(A) of the INA. That Section defines the term refugee to include any person who is outside any country of such person's nationality, but who is unable or unwilling to return to that country because of either past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group or political opinion, whether real or imputed. *See INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

When evaluating an application for asylum, the Court must make a specific finding that the applicant has or has not suffered past persecution based on a statutorily enumerated ground and then apply the

regulatory framework at 8 C.F.R. Section 1208.13(b)(1) (2007).

If the applicant has established past persecution, there is a presumption of a well-founded fear of persecution in the future and the burden shifts to the Department of Homeland Security to prove by a preponderance of the evidence that there are, in fact, changed country conditions or that the applicant could avoid future persecution by relocating and that it would be reasonable to do so under all of the circumstances.

In order to establish a well-founded fear of persecution, the respondent must show (1) that he possess a belief or a characteristic which an identifiable persecutor seeks to overcome in others by means of punishment of some sort; (2) that the persecutor is already aware or could become aware that the alien possess a belief or a characteristic; (3) that the persecutor has the capability of punishing the respondent; and (4) that the persecutor has the inclination to punish the respondent. *Matter of Mogharrabi*, *supra*.; *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985).

The burden of proof is on the applicant to establish that he is a refugee as defined in Section 101(a)(42)(A) of the INA. The burden of proof may be met by evidence which can include only the alien's testimony and it will suffice where the testimony is believable, consistent and sufficiently detailed to provide a plausible and a coherent account of the basis for the alien's fear. Under the REAL ID Act, an

asylum applicant should, however, provide documentary support for material facts which are central to his claim and easily subject to verification. *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1987); *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007).

The respondent's request for asylum in the United States as contained is being viewed as an application for restrictions on removal. Section 241(b)(3) of the INA restricts the removal of an alien to a country where an alien's life or freedom would be threatened also because of race, religion, nationality, membership in a particular social group or political opinion, whether real or imputed. The statutory provision requires that the respondent must demonstrate a clear probability of persecution on account of one of the five grounds enumerated in the Act. *See INS v. Stevic*, *supra*. This clear probability standard requires a showing that it is more likely than not that the respondent would be subject to such persecution. Thus, it is more stringent than that required for asylum. But, although the burden is high, it can also be earned by evidence without corroboration if the respondent's testimony is also credible, consistent and sufficiently detailed.

Finally, under the Regulations that govern the Torture Convention, those are found at 8 C.F.R. Section 1208.16 *et seq*., define torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for one of several purposes. In addition, in order to constitute torture, the act must be directed against the person

in the offender's custody or physical control. Furthermore, the pain or suffering must be inflicted by or at the instigation of or with the consent or acquiescence of either a public official or other person acting in an official capacity. In order to constitute torture, mental pain or suffering must be prolonged. It must be caused by or resulting from intentional or threatened infliction of severe physical pain or suffering, threatened or actual, administration or application of mind altering substances or similar procedures or threatened imminent death.

An applicant for withholding of removal under the Torture Convention bears the burden of proving that it is more likely than not that he, in this case, would be tortured if removed to Honduras. As with asylum and restrictions on removal, this burden can be established by testimony without corroboration if the testimony is credible, consistent and sufficiently detailed.

In assessing whether the applicant has satisfied the burden of proof, the Court must consider all evidence relevant to the possibility of future torture, which includes evidence of past torture inflicted upon the applicant as well as evidence that the applicant could relocate to a part of the country of removal where he is not likely to be tortured. Furthermore, evidence of gross, flagrant or mass violations of human rights within the country of removal are also to be considered and any other relevant information of conditions in the country of removal.

ANALYSIS OF THIS CLAIM AND
CONCLUSIONS OF THE COURT

First evaluating credibility, the Court does not have any credibility issues with the testimony of this young man who is just barely 20 years of age and who entered the United States at the age of 16 looking for his mother. According to the testimony, the facts of this case established that the respondent has now been here for four years, that he lived in a place in Honduras called El Paraiso, Yoro, and that he was there in the eighth grade in school. But, he was living with his aunt and a grandfather figure, as he described the man. He is a boy without a father because his father abandoned them when he was only two years of age and his mother, who had another younger daughter, decided to come to the United States to give them a better life when the respondent was just nine years old. He was then allowed to live with some friends of hers, according to her affidavit which is part of the record, but they could not take care of him and then he was forced to live with his paternal grandfather and his aunt. Those eventually came here to the United States as well and they seem now to be legal in the United States. The respondent's mother does have TPS status accorded to her and which is renewed and the respondent's younger sister apparently is now a lawful permanent resident.

In Honduras, the respondent testified that while he was going to school, he was assaulted eight times by gang members. Four to five times he was asked to join them or they would harm him and his family.

But, he would say that he would not because he did not want to be like them. He was never a member of any gang in Honduras. Never a member of any group. He was never jailed there. He has been arrested here four times, however, two times for driving without a license, once for petty theft and apparently recently for illegally entering a dwelling and he is now serving probation for that crime. None of these, however, disqualify him for asylum as they are not felonies or particularly serious crimes.

The respondent claims that he has absolutely no living relative in Honduras and if he were to go back, he is very much afraid of gang recruitment because he would be despondent. He would be dependent on the government which cannot take care of him. Here, he is now going to school. He is going to Mid-Florida Tech and he is earing [sic] a degree. He is living with his mother. His mother has submitted an affidavit that he has not given her any problem notwithstanding these recent brushes with the law, but he is very repentant of that at this point in time.

He was told by his aunt and grandfather that his house was almost broken into which caused them to move when he was only 14 or 15. He, himself, came to the United States barely when he was a little bit over 16.

He is very afraid of going back and he says he cannot rely on the police in Honduras because the police over there is not the same as it is here. In order

for them to do something for the citizens, it has to be something very serious for them to help.

The Government does not have any credibility issues with the respondent and has only established that it is worried that based on the number of arrests, it fears that his arrests have been escalating to a degree where the Court should not exercise discretion favorably in this case and grant asylum to the respondent.

Respondent, through counsel, however, finds that this case can be distinguished from the Board decisions of *Matters of S-E-G-* and *E-A-G-*, 24 I&N Dec. 579 and 591, respectively, (BIA 2008), which discuss the membership in a particular social group factor of Salvadoran youth in one case and a young Honduran male in another case that are resistant to gang membership as the evidence, at least in *Matter of E-A-G-* particularly, was found to have failed to establish that members of Honduran society or even gang members themselves would perceive those opposed to gang membership as members of a social group. And, so the respondent in that particular case could not establish that he was a member of a particular social group of young persons who are perceived to be affiliated with gangs based on the incorrect perception by others that he is such a gang member. In this case, this young man is saying he did not want to join the gangs and for that reason, he was subject to beatings and to threats including threats to his family.

The *Issue Paper* presented by the Government, which they cite as an example of improving country conditions in Honduras, is from May 2006 and does describe the gang problem in Honduras as a serious and pervasive social, economic challenge to the security, stability and welfare of the country as well as other nations of Central America. "In Honduras, as well as in other countries, the gangs engage not only in petty theft, robbery, and inter-gang rivalries, but also undertaking independently or as foot soldiers and mercenaries for larger organized crime operations of drug trafficking, kidnaping [sic], contract killings, alien smuggling, trafficking in persons, smuggling of contraband goods, rape, torture, assault, and extortion." A number of Honduran asylum applicants, it is recognized, claim regarding violence perpetrated against them by the gang members as well as regarding alleged abusive treatment by Honduran officials of current or former gang members who, because of dress or physical characteristic, purportedly resemble gang members. The adolescence [sic] between the ages of 13 and 20 are the prime targets for gang recruitment.

It is noted that this respondent left Honduras when he was 16 and he is just now barely 20. So, the respondent having refused to join them is afraid not only of reprisals taken against him, but of the pervasive problem that would exist if he goes to a country where he has absolutely no support from anyone of his family and where he has absolutely nowhere to live. He would be despondent. He would be a homeless person and he would not know what to do.

The position paper discusses that as of 2006 most people were usually able to avoid joining a gang and continue their normal activities.

But, in this particular case, this respondent would not go back to normal activities. He would go back to be a homeless person and, therefore, it is presumed or at least believed that there is a chance that the respondent may be abused by gang members because he may be perceived of being returning from the United States with money or resources that he really would not have and there would be pretty much nothing, if anything, that the government of Honduras could do to protect him because there is no one for him to return to.

So, I distinguish this case from *Matter of E-A-G-*, particularly because in *Matter of E-A-G-* there were family members for the Honduran respondent. There were grandparents. There were siblings. There was support from family members there. Here, this respondent would have no one. And, I believe that I can then exercise discretion favorably and grant this case.

Pursuant to Section 1208.13, where the respondent has met his burden of proof to establish that he could be defined a refugee because the testimony of the respondent, which I found credible, could be sufficient to sustain the burden of proof without more corroboration, I would find that the applicant has established that there is a reasonable possibility that he may suffer other serious harm upon removal to Honduras.

Even if there is no severe past persecution, although he has established credibly that there has been in fact beatings by members of gangs who wanted to recruit him for which he opposed and that just for having t-shirts and sneakers, he would be assaulted and robbed of these minimal possessions. If the respondent were to return to Honduras today, he would be taking with him clothing. He would be taking with him what he has obtained in the United States. He would not go back barefoot and he simply would be perceived as coming back from a country where wealth of course is normal and he probably would be targeted by these gang members. I believe that that, in my view, does establish that he could be perceived as a member of a particular social group.

In fact, those who return from the United States and are perceived to be wealthy enough or have resources that would be then the target of these gang members in Honduras for which the government of Honduras quite frankly, and even pursuant to the latest *Country Report*, though efforts have continued to be made, it is described that the gangs continue to inflict serious harm on citizenship and threaten the stability and the security of many of the people in the country.

So, in this matter, I am exercising my discretion favorably and granting the respondent asylum pursuant to his testimony and to the record before us and, again, pursuant to the Regulations without having to go then into whether we can consider him favorably for withholding under the regulations and

the statute, 241(b)(3) of the INA, as that requires a higher burden or Torture Convention relief pursuant to the regulations.

After having considered the totality of the record, the following orders are hereby entered.

ORDERS

IT IS HEREBY ORDERED that the application for asylum is hereby granted.

/s/ [Illegible]
RAFAEL ORTIZ-SEGURA
Immigration Judge