

No. 11-1321

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IN THE  
**Supreme Court of the United States**

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EDWIN JOSÉ VELASQUEZ-OTERO,

*Petitioner,*

—v.—

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

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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**BRIEF OF *AMICUS CURIAE* KIDS IN NEED OF  
DEFENSE IN SUPPORT OF PETITIONER**

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## STATEMENT OF INTEREST<sup>1</sup>

*Amicus curiae* Kids in Need of Defense (“KIND”)<sup>2</sup> is a non-profit organization founded in 2008 to assist youths who come to the United States without a parent or guardian and are placed into immigration custody. KIND’s mission is to find high-quality and compassionate pro bono legal counsel for these unaccompanied youths. Every year, more than 8,000 unaccompanied youths come to the United States, often to escape abuse or persecution in their home countries. KIND works to find and train pro bono attorneys to represent these youths, striving to ensure that no youth appears in immigration court without representation. In carrying out its mission, KIND has assisted unaccompanied youths who have fled to the United States from Central America to escape persecution by violent gangs. KIND’s experience enables it to provide a valuable perspective on the problem of gang recruitment faced by Central American youths, particularly in Honduras, El Salvador, and Guatemala. Since its establishment, KIND has also advocated for changes in US law to protect the rights of unaccompanied youths.

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<sup>1</sup> In accordance with Supreme Court rules, counsel of record for both parties received timely notice of KIND’s intention to file this brief, and both parties consented to the filing of this brief.

<sup>2</sup> Counsel for KIND authored this brief in its entirety. No person or entity other than KIND, its staff, or its counsel made a monetary contribution to the preparation or submission of this brief.



In his petition for certiorari, Edwin Velasquez-Otero explains that the adoption of a “social visibility” requirement by the Board of Immigration Appeals (“BIA”) in evaluating claims by individuals seeking asylum based on membership in a particular social group is arbitrary and capricious, is not entitled to *Chevron* deference, and has caused a split among the circuits in evaluating such claims for asylum. KIND agrees, and the primary purpose of this amicus brief is to underscore that Central American youths who have resisted gang recruitment are a particular social group for whom asylum should be available. KIND urges this Court to reject the new social visibility requirement so as to properly align the interpretation and application of the asylum statute with the policies that motivated Congress to enact the statute, thereby affording protection to the groups the statute was designed to protect.

### SUMMARY OF ARGUMENT

Congress passed the Refugee Act of 1980 (“Refugee Act”) to bring US asylum law into conformance with the United Nations Convention and Protocol Relating to the Status of Refugees (“Convention”).<sup>3</sup> Closely tracking the Convention definition, the Refugee Act makes asylum relief available to people who are subjected to persecution in their home countries on account of their membership in various protected classes, including their membership in a “particular social group.” The phrase “particular social group” was purposefully general in consideration of the evolving nature of social

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<sup>3</sup> *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987).



interaction and the possibility of newly persecuted groups that do not fit neatly into the other enumerated classes in the Refugee Act.

With this understanding, the BIA for years interpreted the phrase “particular social group” to refer to a group that shared a characteristic that members either could not change or should not be required to change because it is fundamental to their individual identity or conscience.<sup>4</sup> In 2008, however, the BIA moved away from its well-established precedent by creating an additional requirement that asylum-seekers must meet: “social visibility” of their group. As the petition for certiorari discusses in detail, the BIA adopted this new requirement without comment or explanation. And as the petition further highlights, the conflict between the BIA’s past precedent and this new requirement has led to a widely acknowledged split among the courts of appeals, with eight circuits deferring to the BIA’s new social visibility requirement and two rejecting it.

The social visibility requirement finds no support in the Refugee Act and undermines Congress’s intent in passing the Act. The requirement conflicts with the UN interpretation of “particular social group” as laid out in guidelines issued in 2002 (“Guidelines”) by the United Nations High Commissioner on Refugees (“UNHCR”) and a recent guidance note by the UNHCR on the particular question of asylum claims made by victims of organized gangs (“Guidance Note”). The UN interpretation is

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<sup>4</sup> *Matter of Acosta*, 19 I. & N. Dec. 211, 233–34 (BIA 1985), overruled on other grounds by *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).



persuasive in light of the history of the Refugee Act and supports finding that Central American youths who have resisted gang recruitment are members of a particular social group eligible for asylum.

The prevalence of violence committed by gangs in Central America against the youths who refuse their recruitment efforts is such that the issue before this Court is important and recurring. Gangs have a substantial presence in several Central American countries, and vulnerable youths are their primary targets. Youths resisting gang demands in those countries are met with violence, threats, and other forms of persecution on account of their resistance. And the governments in such countries are either unwilling or unable to provide protection.

Gang recruitment is a discrete but significant problem. KIND knows of too many members of this particular social group who have been subjected to traumatic experiences that affect their lives forever, and in the worst cases, end their lives altogether. It is therefore not surprising that youths who resist gang recruitment and are persecuted on that basis seek the safety of our shores. Refusing asylum to deserving refugees based on an unmet social visibility requirement is a perverse result that cannot be squared with congressional intent. Moreover, any concern that eliminating the social visibility requirement would “open the floodgates” to undeserving asylum claimants is unfounded, as Congress has included safeguards in US asylum law to protect against such a possibility.

This Court should grant Velasquez-Otero’s petition for certiorari to provide much-needed clarity and



consistency to the phrase “particular social group,” upon which such vulnerable youths rely.

## ARGUMENT

### I. THE SOCIAL VISIBILITY REQUIREMENT UNJUSTLY PENALIZES PARTICULAR SOCIAL GROUPS SUCH AS YOUTHS RESISTING GANG RECRUITMENT IN CENTRAL AMERICA.

#### A. The BIA’s Unexplained Adoption of the Social Visibility Requirement Does Not Warrant Deference.

The phrase “particular social group” was first used in US asylum law when Congress enacted the Refugee Act of 1980.<sup>5</sup> Congress passed the Refugee Act to “bring United States refugee law into conformance” with the Convention.<sup>6</sup> Accordingly, as this Court has recognized, and as discussed in greater detail in the petition for certiorari,<sup>7</sup> the UN interpretation of the Convention definition “provides significant guidance in construing the Protocol, to which Congress sought to conform” US asylum law.<sup>8</sup>

Starting with *Matter of Acosta*, the BIA interpreted the phrase “particular social group” consistently with the Convention to refer to a group whose members share a characteristic that they

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<sup>5</sup> See Pub. L. No. 96-212, 94 Stat. 102.

<sup>6</sup> *Cardoza-Fonseca*, 480 U.S. at 436.

<sup>7</sup> Pet. App. 4–10, 15, 31–34.

<sup>8</sup> *Cardoza-Fonseca*, 480 U.S. at 439 n.22.



either cannot change or should not be required to change because it is fundamental to their individual identities or consciences.<sup>9</sup> The BIA subsequently began considering other factors such as whether a group is recognized by its home society as an identifiable segment of the population. The BIA was careful to note, however, that such additional factors “are *not* prerequisites,” but are “additional considerations that *may* properly bear on whether a social group should be recognized in an individual case.”<sup>10</sup> In July 2008, however, the BIA’s *willingness* to consider whether a particular group is recognized as such by society solidified into a *requirement* above and beyond the *Acosta* “immutability” test.<sup>11</sup>

The BIA offered no explanation for suddenly making “social visibility” a requirement, failed to acknowledge that this new requirement stood in conflict with its own precedent based on *Acosta*,<sup>12</sup>

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<sup>9</sup> See 19 I. & N. Dec. at 233–34.

<sup>10</sup> See, e.g., *In re R-A-*, 22 I. & N. Dec. 906, 919 (BIA 1999) (emphasis added).

<sup>11</sup> See *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582 (BIA 2008) (“In deciding this question, we are guided by our recent decisions holding that membership in a purported social group *requires* that the group have particular and well-defined boundaries, and that it possess a recognized level of social visibility.”) (emphasis added); *Matter of E-A-G-*, 24 I. & N. Dec. 591, 593–95 (BIA 2008) (adopting and applying the social visibility requirement set forth in the companion case of *S-E-G-*, decided on the same day).

<sup>12</sup> Under the test set forth in *Acosta*, groups of people who would not meet the new social visibility requirement were deemed to be particular social groups that qualified for asylum protection. See, e.g., *In re Kasinga*, 21 I. & N. Dec. 357, 365–66 (BIA 1996) (holding that “young women of the



and even failed to provide a single, governing definition of “social visibility.” Indeed, the BIA has employed differing definitions of that phrase in different cases, and even within a single case.<sup>13</sup>

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Tchamba-Kunsuntu Tribe who have not had [female genital mutilation] . . . and who oppose the practice” are members of a particular social group); *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822–23 (BIA 1990) (holding that persons identified as homosexuals are members of a particular social group); *Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (BIA 1988) (holding that former members of the El Salvador national police are members of a particular social group); *accord Valdiviezo-Galdamez v. Holder*, 663 F.3d 582, 603–04 (3d Cir. 2011) (noting that groups whose members have been granted asylum in the past have characteristics that are “completely internal to the individual and cannot be observed or known by other members of the society in question (or even other members of the group) unless and until the individual member chooses to make that characteristic known,” thereby illuminating the conflict between the BIA’s social visibility requirement and the BIA’s own precedent); *Gatimi v. Holder*, 578 F.3d 611, 615–16 (7th Cir. 2009) (noting that the BIA has been inconsistent in its application of social visibility and that the requirement is at odds with the BIA’s own precedent).

<sup>13</sup> See, e.g., *Matter of S-E-G-*, 24 I. & N. Dec. at 586–87 (referring to social visibility as “the requirement that the shared characteristic of the group should *generally be recognizable by others* in the community”) (emphasis added); *Matter of E-A-G-*, 24 I. & N. Dec. at 594–95 (variously defining social visibility as “the extent to which members of a society perceive those with the characteristic in question as members of a social group;” whether members “have the *kind of social visibility* that would make them *readily identifiable to those who would be inclined to persecute them*;” whether claimant “possesses any *characteristics that would cause others in . . . society to recognize*” claimant as a member of that social group; whether “*membership* [in the alleged group] . . . is of concern to anyone in [the home society];” or whether “individuals who



Thus, as the BIA's own decisions and inability to consistently define the requirement show, its adoption of a social visibility requirement is arbitrary and capricious and not entitled to *Chevron* deference.<sup>14</sup>

**B. Central American Youths Who Resist Gang Recruitment Share Immutable Characteristics That Join Them Together As Members of a Particular Social Group.**

The BIA's addition of a social visibility requirement also conflicts with the UN approach to asylum, a result that is contrary to congressional intent.<sup>15</sup> The UNHCR Guidelines and Guidance Note do not set forth a social visibility requirement. Rather, according to the Guidelines and Guidance Note, a social group may be defined by a shared characteristic that is often "innate" or

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are part of that body of persons are *seen as a segment of the population in any meaningful respect . . .*") (emphases added); *see also Valdiviezo-Galdamez*, 663 F.3d at 606–07 (noting the BIA's apparent failure to understand the difference between "on-sight visibility" and "social visibility"); *Gatimi*, 578 F.3d at 616 (noting the absurdity of the requirement that claimants can only qualify as members of a particular social group if they make themselves physically visible and identifiable to their persecutors); *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009) (rejecting the BIA's requirement of literal "visibility" as a misunderstanding of the use of "external" criteria to identify a particular social group).

<sup>14</sup> *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

<sup>15</sup> *See Cardoza-Fonseca*, 480 U.S. at 436–39 & n.22.



“unchangeable” (tracking the BIA’s definition in *Acosta*) or by a society’s perception of a distinct group.<sup>16</sup> The test is disjunctive, and, according to the UNHCR, the group “only needs to be identifiable through one of the approaches, not both.”<sup>17</sup>

It is telling that, in the wake of the BIA’s 2008 decisions creating the social visibility requirement in *S-E-G-* and *E-A-G-*, the UNHCR issued direct guidance on the question of whether victims—and specifically youths—who are targeted by gangs constitute a particular social group for purposes of asylum relief. This group shares age and the past experience of having resisted gang recruitment, characteristics that are both expressly highlighted in the Guidance Note. With respect to age, the Guidance Note acknowledges that the “immutable character of ‘age’ or ‘youth’ is, in effect, unchangeable at any given point in time.”<sup>18</sup> With respect to a shared past experience, the Guidance Note points out the BIA’s own acknowledgement that “youth who

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<sup>16</sup> U.N. High Comm’r for Refugees, *Guidelines on International Protection No. 2: “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*, HCR/GIP/02/02 ¶¶ 11–13 (May 7, 2002), available at <http://www.unhcr.org/refworld/docid/3d36f23f4.html>.

<sup>17</sup> U.N. High Comm’r for Refugees, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* ¶ 34 & n.51 (Mar. 31, 2010), available at <http://www.unhcr.org/refworld/docid/4bb21fa02.html> (citing the Guidelines and distinguishing the Guidelines’ definition from the introduction of additional requirements of “social visibility” and “particularity” in US jurisprudence).

<sup>18</sup> *Id.* ¶ 36.



have been targeted for recruitment by, and resisted, criminal gangs may have a shared past experience, which, by definition, cannot be changed”<sup>19</sup> and is thus “immutable.”<sup>20</sup> Consistent with the UNHCR’s conclusion, youths who have resisted gang persecution because of these shared characteristics should be eligible as a “particular social group” under the Refugee Act.<sup>21</sup>

**C. The Social Visibility Requirement  
Conflicts with the Purpose of the  
Refugee Act by Denying Asylum Relief  
to These Persecuted Youths.**

Congress intended the Refugee Act to provide relief to those escaping persecution in their home countries, and the social visibility requirement undermines this congressional intent. The requirement has the effect of blocking asylum for individuals who have resisted gang recruitment and, as a result, hurts youths in particular because they are especially vulnerable to gang recruitment. Many youths in Central America grow up poor and without stable families. Coupled with the general impressionability of youths, these factors embolden Central American gangs in their recruitment efforts. The UNHCR has observed—and KIND has also witnessed in numerous cases—that Central American gangs

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<sup>19</sup> *Matter of S-E-G-*, 24 I. & N. Dec. at 584.

<sup>20</sup> Guidance Note, *supra*, ¶ 37.

<sup>21</sup> *See id.* ¶ 65.



“frequently target young people.”<sup>22</sup> And youths who resist gang membership are often the subject of increased violence, as gangs retaliate against them on account of their defiance.<sup>23</sup> The UNHCR has also found that gangs target individuals who refuse to comply with gang demands, making youths who are recruited but refuse to join gangs especially at risk.<sup>24</sup>

The context of gang recruitment is particularly relevant to the asylum analysis because the phrase “particular social group” is open-ended. Referring to young people who are persecuted for resisting gangs, the UNHCR remarked in the recent Guidance Note that the “interpretation of the 1951 Convention grounds needs to be inclusive and flexible enough to encompass emerging groups and respond to new risks of persecution.”<sup>25</sup> As discussed in more detail in Section II below, gang recruitment of young people in Central America—and the subsequent persecution of youths who refuse gang membership—is a serious, recurring problem, particularly in Honduras, El Salvador, and Guatemala. It is exactly the kind of persecution for which Congress intended the Refugee Act to provide relief beyond the other specifically enumerated grounds.

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<sup>22</sup> *Id.* ¶ 36; *see also id.* ¶ 63 (“Many asylum claims originate from marginalized youth who have been caught up in the violence.”).

<sup>23</sup> *See, e.g.,* Int’l Human Rights Clinic, Harvard Law School, *No Place to Hide: Gang, State, and Clandestine Violence in El Salvador* 76 (2007).

<sup>24</sup> *See* Guidance Note, *supra*, ¶ 63.

<sup>25</sup> *Id.* ¶ 65.



In addition, the social visibility requirement makes no sense in the context of groups whose members seek to avoid persecution in their home countries precisely by avoiding group visibility. As noted by Judge Posner, members who are targeted for persecution naturally “will take pains to avoid being socially visible.”<sup>26</sup> But under the social visibility requirement, the very efforts members make to avoid persecution in their home countries can become the basis for denying asylum. Judge Posner’s observation highlights that refusing asylum to groups that do not meet the social visibility requirement leaves gang resisters with several poor options. On the one hand, they might make themselves visible by adopting a physical indication of their resistance, which would lead to violent confrontations with well-connected gangs, increasing the violence and potential reprisals by gang members against families and communities of such resisters. Alternatively, resisters with no hope for asylum might succumb to gang recruitment against their will, thus increasing the number and influence of gang members. Or, resisters may decide to live imprisoned by their fear.

**II. PERSECUTION SUFFERED BY THIS DISCRETE SOCIAL GROUP IS A SERIOUS, RECURRING ISSUE DESERVING THIS COURT’S REVIEW.**

Gang recruitment and gang reprisals are a pervasive problem in Central American countries, particularly in Honduras, El Salvador, and

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<sup>26</sup> *Gatimi*, 578 F.3d at 615.



Guatemala. As discussed in Section I.C, the problem is especially acute for youths, who are more susceptible to recruitment. As KIND observes on a regular basis, children in Central America are frequent targets for gang recruitment, and their resistance leads to physical violence and threats of violence. For example, KIND has worked with hundreds of youths who were persecuted by gangs in their home countries, primarily in El Salvador. Since the beginning of 2012 alone, KIND has identified over 60 such cases. And of course, while KIND's experience provides a valuable perspective on the problem, it is a mere sampling of the depth of the problem. The BIA's social visibility requirement prevents this discrete group of youths from obtaining asylum protection from persecution.<sup>27</sup>

**A. The Threat of Gang Violence Is Prevalent in Central America, and It Poses Significant Challenges to Youths Persecuted for Resisting Gang Membership.**

The pervasiveness of gang violence in Central America demonstrates the salience of the issue presented by the petition for certiorari. Central American gangs are cancers on their communities, often associated with extreme violence, narcotics, and increased homicide rates.<sup>28</sup> Gangs in Central

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<sup>27</sup> KIND also works with other groups of youths whose protection is threatened by the social visibility requirement, including homosexuals and females subject to, or threatened with, genital mutilation.

<sup>28</sup> See Guidance Note, *supra*, ¶ 8 (noting that “a key function of gangs is criminal activity,” including “[e]xtortion, robbery, murder, prostitution, kidnapping, smuggling and



America also have aggressive recruitment methods. In general, the gangs focus on vulnerable youths and often require abhorrent initiation rituals, such as physical and sexual violence or the commission of serious crimes.<sup>29</sup> Resistance to such violent recruitment methods leads equally to violent reprisals.

At the same time, the problem of Central American gang violence, while significant, is discrete. Most of the problems associated with gangs in Central America originate in three countries—Honduras, El Salvador, and Guatemala—where the number of youth gang members is 36,000, 10,500, and 14,000, respectively.<sup>30</sup> Indeed, the majority of gang-related matters KIND has before it, and *all* of KIND’s 2012 gang-related matters, involve youths from Honduras, El Salvador, and Guatemala.

Revealing examples of the significance of the problem can be found in journalistic accounts as well as the individual cases in which KIND has been involved. For example, the Washington Post reported about Belazario Rivera, a resister of gang

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trafficking in people, drugs and arms”). Indeed, “[y]outh gangs in Central America are extremely violent and contribute to high homicide rates.” United States Senate Caucus on International Narcotics Control, *Responding to Violence in Central America* 23–24 (2011), available at <http://www.grassley.senate.gov/judiciary/upload/Drug-Caucus-09-22-11-Responding-to-Violence-in-Central-America-2011.pdf>.

<sup>29</sup> See Guidance Note, *supra*, ¶ 7.

<sup>30</sup> United Nations Office on Drugs and Crime, *Crime and Development in Central America: Caught in the Crossfire* 60 (2007), available at [http://www.unodc.org/pdf/research/central\\_america\\_study.pdf](http://www.unodc.org/pdf/research/central_america_study.pdf).



membership who was the victim of physical violence. According to the Post:

**Belazario Rivera.** The threats, thefts and beatings started for Belazario Rivera in high school. The feared 18th Street Gang ruled one side of the central Honduran town where he lived with his ailing grandmother, while the equally vicious Mara Salvatrucha patrolled the other. Sporting new shoes or a new jacket, Rivera was an easy target. He refused to join the gangs, so they took whatever he had. Fears escalated when a gang member showed his grandmother a gun and told her, ‘This is the gun I’m going to use to kill your grandson.’ Rivera soon went to live with his mother in Miami, joining a steady stream of young people from Central America who apply for asylum in the United States to escape street gangs. . . . Rivera, like most other illegal immigrants in his situation, lost his case and is set for deportation.<sup>31</sup>

A story of a child whom KIND assisted in obtaining counsel further demonstrates the gravity of threats and violence gangs inflict upon youths who resist gang membership. Cesar<sup>32</sup> was a resident of El Salvador who was first asked to join the MS-13 gang in 2006. His refusal led to violence and the threat of more severe persecution. Cesar thought he

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<sup>31</sup> Jennifer Kay, *Central Americans Seek Refuge from Gangs*, Wash. Post, May 24, 2006.

<sup>32</sup> The names used in cases involving KIND have been changed to preserve anonymity.



could protect himself by spending most of his time at home or at the computer lab, where an access card was required to gain entry. At the computer lab, Cesar made a friend, Ricardo. Ricardo also refused to join a gang. Cesar's own words describe his and Ricardo's experiences:

**Cesar.** "Like me, Ricardo had been approached by MS-13 to join it. He did not attend the same school that I did, but he and I would walk to and from the computer lab together and people knew we were friends. Sometimes MS-13 would approach me to join when I was with Ricardo and other times they would approach me alone. Their approach was getting more forceful and threatening to me in early 2009. They were getting more threatening to Ricardo at the same time. Ricardo refused to join MS-13 before he was murdered in or around June 2009. He was murdered during the day when he was walking home from school. I learned from the people who were outside and witnessed Ricardo's murder that multiple known members of MS-13 shot Ricardo in the chest as he approached his home. They said that the murderers had MS-13 tattoos. I was afraid of suffering the same fate of Ricardo, and so I fled El Salvador within two months of his murder. . . . I have learned that since I fled El Salvador that MS-13 members have started asking my mom where I am. I have



learned that MS-13 told her they are waiting for me to come back.”<sup>33</sup>

Youths resisting gang membership also have well-founded fears that they will be persecuted if they return to their home countries. As the UNHCR explains, “once an individual or family has been targeted for retaliation, the gravity of the threat does not diminish over time.”<sup>34</sup> The tragic account of asylum-seeker Edgar Chocoy illustrates this point.

**Edgar Chocoy.** Abandoned by his parents, [Chocoy] grew up in a rough part of Guatemala City and at age 12 was recruited into a gang called Mara Salvatrucha, according to Chocoy’s lawyer and court documents. Gang members beat him, robbed him, and threatened to kill him and the relatives he lived with, court records show. In 2001, after Chocoy entered the United States, he lived for some months with his mother. But then Los Angeles police arrested him at a drug crime scene. He served time in juvenile facilities for truancy and possession of a gun. He was transferred last year to a lockdown youth facility in Alamosa where he studied math and began a program to have his gang tattoos removed, according to progress

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<sup>33</sup> Supplemental Aff. in Supp. of Mem. for Asylum App., U.S. DOJ Exec. Office for Immigr. Rev. (Arlington, Va. Nov. 28, 2011) (Schmidt, J.), on file with KIND, 1300 L Street, NW, Suite 1000, Washington, DC 20005, (202) 824-8685 (redactions in original).

<sup>34</sup> Guidance Note, *supra*, ¶ 6.



reports. In his case for asylum, Chocoy filed an affidavit saying that he'd be killed if he were sent home. An expert on Central American gangs—Bruce Harris of the charity organization Covenant House—submitted an affidavit supporting Chocoy's claim. [An immigration court judge] denied Chocoy's request on Jan. 5. Chocoy was deported on March 10. He was shot to death March 27 in Guatemala City—apparently by members of the gang he tried to escape . . . .<sup>35</sup>

Edgar's death explains the well-founded fear of persecution of many Central American youths who have resisted gang membership. Imposing a social visibility requirement on such youths exposes those who are denied asylum or withholding of removal to the possibility of a similar fate.

**B. Some Central American Governments Are Unable or Unwilling to Control Youth Gang Violence in Their Countries, and Youths Seeking Asylum Justifiably Fear Returning to Their Home Countries.**

The inability or unwillingness of some Central American governments to contain or control gang violence further reinforces the gravity of this problem. Countries such as Guatemala, Honduras, and El Salvador have failed to ensure public safety,

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<sup>35</sup> Bruce Finley, *Deportee's Slaying Spurs Reform Push Advocates Say Teen's Fear of Gangs Unheeded*, Denv. Post, Apr. 8, 2004, at A-01.



and they provide ineffective protection for victims of gang violence. Such lack of protection is attributable to insufficient infrastructure and institutional failures of the courts and police departments.<sup>36</sup> According to the Harvard Human Rights Group, the Salvadoran state frequently fails to investigate and prosecute violence in which the victim is a member of a marginalized or powerless social group.<sup>37</sup> One study even suggests that the influence of Central American gangs causes collusion with police officers, bureaucrats, prosecutors, and judges.<sup>38</sup> And even though some of these countries have attempted to curtail the violence, most notably through “*mano dura*” policies, the techniques have mostly been repressive and the strategies have generally been counterproductive.<sup>39</sup>

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<sup>36</sup> See generally Int’l Human Rights Clinic, *supra*; see also Hal Brands, Strategic Studies Institute, *Crime, Violence and the Crisis in Guatemala: A Case Study in the Erosion of the State*, at v (2010), available at <http://www.strategicstudiesinstitute.army.mil/profiles/PUB986.pdf> (“Guatemala’s weak institutions have been unable to contain this violence, leading to growing civil disillusion and causing marked erosion in the authority and legitimacy of the state.”).

<sup>37</sup> See Int’l Human Rights Clinic, *supra*, at 65 (“[I]t is clear . . . that the vast majority of homicides do not result in convictions.”).

<sup>38</sup> See Jeffrey D. Corsetti, Note, *Marked for Death: The Maras of Central America and Those Who Flee Their Wrath*, 20 Geo. Immigr. L.J. 407, 409 (2006).

<sup>39</sup> See Ctr. for Inter-Am. Studies & Programs at the Instituto Tecnológico Autónomo de México, the Ford Found. & the Kellogg Found., *Executive Summary of Youth Gangs in Central America, Mexico and the United States 2* (explaining that “[t]he evidence shows that gangs have become more organized and less visible in response to



In denying Edgar Chocoy's asylum claim, the immigration judge "felt that Edgar, a child of fifteen, could hide from the gang somewhere in a country of 13 million people."<sup>40</sup> That rationale proved fatally misguided. Youths targeted by gangs often face a real and substantial threat of violence if they return home. Until the governments of Central American countries are willing and able to curtail gang violence and protect these vulnerable youths who resist gang membership, the United States should make asylum available to such youths.

**C. Velasquez-Otero's Experience in This Case Exemplifies the Extent of the Problem and Offers This Court an Opportunity to Assess the Merits of the New Social Visibility Requirement.**

This case provides this Court with a perfect opportunity to address this pressing issue. Like the youths described above, Edwin was a victim of gang violence in his home country. He was assaulted by gang members eight times on his way to school, and was asked several times to join the gang. If Edwin did not join, the gang threatened to harm him and his family. He resisted. Seeking protection from persecution, Edwin came to the United States. Although the immigration judge found Edwin's testimony credible and granted him asylum, the BIA

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*'mano dura'* policies, and public security has not improved").

<sup>40</sup> Letter from American Immigration Lawyers Ass'n to Tom Ridge, Sec. U.S. Dep't of Homeland Sec. et al., AILA InfoNet Doc. 04070265 (posted July 2, 2004), *available at* <http://www.aila.org/content/default.aspx?docid=10988>.



reversed the finding because of the lack of social visibility in his claimed social group.

Like others before him, Edwin legitimately fears for his safety. He is a victim of past persecution on the basis of his membership in the particular group of youths who have refused gang recruitment and has good reason to fear future persecution. His home country does not provide sufficient protection. Indeed, the immigration judge stated that “gangs continue to inflict serious harm on citizenship and threaten the stability of many of the people in the country.”<sup>41</sup> Yet the BIA and Eleventh Circuit rejected Edwin’s petition based on an arbitrary requirement that is inconsistent with the BIA’s own precedent under *Acosta*. This Court should take this case to establish uniformity among the circuits and give Edwin and others like him necessary clarity regarding the deserving nature of their asylum claims.

### **III. REJECTING THE SOCIAL VISIBILITY REQUIREMENT WILL NOT OPEN THE FLOODGATES TO UNDESERVING ASYLUM CLAIMS.**

Any concern that eliminating the social visibility requirement would “open the floodgates” to undeserving asylum claimants is unfounded because there are statutory safeguards in place to screen out meritless claims.

First, Congress did not limit asylum protection based on the size of the group whose members seek

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<sup>41</sup> Pet. App. 24a.



protection. The mere fact that a particular social group may be large does not preclude its recognition for asylum purposes. Indeed, as the Guidelines make clear, the “size of the purported social group is not a relevant criterion in determining whether a particular social group exists . . . .”<sup>42</sup> The size of the other protected classes enumerated in the Refugee Act reinforces this point. Groups persecuted on account of “race, religion, or nationality” are likely far larger than Petitioner’s claimed group, which, as discussed in Section II.A above, is a sizable but discrete group.<sup>43</sup> The Refugee Act contains no limitation on the size of a group with respect to these other enumerated classes, and neither should asylum protection be blocked for a particular social group with a large membership.

In addition, a claimant who belongs to a particular social group must show “persecution or a well founded fear of persecution,” and such persecution must be “on account of” his membership in a particular social group.<sup>44</sup> These statutory requirements are separate and in addition to the requirement that a claimant establish membership in a particular social group.

The Refugee Act also allows the immigration court judge to conduct a determination of whether an individual seeking asylum is credible.<sup>45</sup> In *Cardoza-Fonseca*, this Court recognized that “Congress has

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<sup>42</sup> Guidelines, *supra*, ¶ 18.

<sup>43</sup> 8 U.S.C. § 1101(a)(42).

<sup>44</sup> *Id.*

<sup>45</sup> 8 U.S.C. § 1158(b)(1)(B)(iii).



assigned to the Attorney General and his delegates the task of making these hard individualized decisions; although Congress could have crafted a narrower definition, it chose to authorize the Attorney General to determine which, if any, eligible refugees should be denied asylum.”<sup>46</sup> In practice, immigration court judges abide by Congress’s directive. A random sample of 150 cases revealed that in 56 decisions, the immigration court judge’s adverse finding with respect to credibility was explicitly mentioned as a factor in the decision to deny asylum relief.<sup>47</sup> Thus, this statutory safeguard is doing its job, and any concern about undeserving refugees obtaining asylum relief in the absence of a social visibility requirement is unwarranted.

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<sup>46</sup> 480 U.S. at 444–45.

<sup>47</sup> See, e.g., *Amegbedji v. Holder*, No. 11-2126, 2012 WL 1522512, at \*1 (4th Cir. May 2, 2012); *Barre v. Holder*, No. 10-2785-ag., 2012 WL 1292905, at \*1–2 (2d Cir. Apr. 17, 2012); *Akhmedov v. U.S. Att’y Gen.*, No. 11-13020, 2012 WL 933249, at \*1 (8th Cir. Mar. 20, 2012). This finding was based on a random, targeted search of immigration court cases as well as appeals from decisions in the immigration court to the BIA and courts of appeals in which the BIA or court of appeals opinions describe the proceedings in the immigration court.



## CONCLUSION

For the foregoing reasons, KIND respectfully requests that this Court grant the petition for certiorari.

Respectfully submitted,

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