No. 11-____

In the Supreme Court of the United States

OSCAR ALEXANDER GRANADOS GAITAN,
Petitioner,
v.
ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress enacted the Refugee Act of 1980 to conform United States asylum law to the 1967 United Nations Protocol Relating to the Status of Refugees (Protocol). The Refugee Act is codified as amended as part of the Immigration and Nationality Act (INA). Under the INA, an alien qualifies as a "refugee," and therefore is eligible for asylum, if, *inter alia*, the alien is unwilling or unable to return to his country of origin "because of … a well-founded fear of persecution on account of … membership in a particular social group." 8 U.S.C. § 1101(a)(42)(A).

For more than two decades, in accordance with the U.N. Protocol, the Board of Immigration Appeals recognized as refugees persons who could establish a well-founded fear of persecution on account of their membership in a social group. But in 2008, without explanation and in conflict with its prior definition promulgated under the Protocol, the Board reinterpreted the phrase "particular social group" to require those seeking asylum to prove that their group possesses "social visibility" and "particularity." *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582-83(BIA 2008). Seven circuits now defer to this novel social-visibility requirement; two circuits do not, on the ground that the Board's new interpretation is arbitrary and capricious and "makes no sense." *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (Posner, J.). The question presented is:

Whether the Board's new definition of "particular social group" is arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), or unreasonable under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

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OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 671 F.3d 678 (App. 1a-16a). The opinion respecting the denial of rehearing and rehearing en banc is reported at --- F.3d ---, 2012 WL 2036972 (App. 36a-39a). The opinion of the Board of Immigration Appeals is reproduced at App. 30a-33a.

JURISDICTION

The Eighth Circuit issued its opinion on March 1, 2012. A divided court denied rehearing en banc, and the panel denied rehearing, on June 7, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

8 U.S.C. § 1101(a)(42)(A) is reproduced at App. 40a-41a.

INTRODUCTION

Gaitan fled El Salvador for the United States as a boy, eventually joining his mother and other family members who are legally residing in and around Saint Paul, Minnesota. Gaitan fled his home country to escape the infamous Mara Salvatrucha gang (MS-13), which had actively sought to recruit him and threatened serious harm to him and his family because of his refusal to join their ranks. Gaitan sought asylum based on his well-founded fear of persecution because of his membership in a particular social group—*i.e.*, Salvadorans who have been recruited by, and have refused to join, MS-13 based on their steadfast opposition to the gang.

Though it found Gaitan credible, the BIA denied relief, invoking its recent precedential decisions that

restrict "particular social groups" to those that are "socially visible" and "particularized"—requirements that the Board here determined categorically foreclosed Gaitan's asylum claim. The Eighth Circuit affirmed the Board's decision, holding that it was bound by circuit precedent to defer to BIA's new "social visibility" test for particular social group claims. App. 6a-8a.

The Eighth Circuit's decision deferring to the BIA deepens a widely acknowledged, deep, and entrenched circuit conflict on the validity of the Board's new interpretation of "particular social group." It also is plainly wrong. As the Third and Seventh Circuits have held, the Board's newly added requirements are arbitrary and capricious because the Board has never provided a reasoned explanation for why it adopted this new interpretation of "particular social group" or how its new requirements are plausibly consistent with the statute. Those requirements rest on a misreading of relevant precedent, and—because they are incoherent and internally inconsistent—are unreasonable and fail to give refugees adequate notice of what is required to prove an asylum claim. The questions presented arise with staggering frequency, and this Court's intervention is urgently needed. The petition should be granted.

STATEMENT OF THE CASE

1. a. Congress enacted the Refugee Act of 1980 to "respond to the urgent needs of persons subject to persecution in their homelands." Pub. L. No. 96-212, § 101(a), 94 Stat. 102, 102. The Act was designed to conform United States asylum law to the 1967 United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577

(Protocol), to which the United States is a signatory. *See generally INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987).

The provisions of the Refugee Act are codified as part of the Immigration and Nationality Act (INA). 8 U.S.C. § 1101 *et seq.* As amended, the INA provides that the Attorney General and the Secretary of Homeland Security may, in their discretion, grant asylum to an alien who demonstrates that he or she is a "refugee." 8 U.S.C. § 1158(b)(1)(A). "Refugee" is defined as any person who is unable or unwilling to return to his country of origin "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) (emphasis added).

As this Court has observed, the definition of "refugee," like the entire 1980 Act, was lifted from the Protocol—which, in turn, incorporated the definition contained in the 1951 United Nations Convention Relating to the Status of Refugees, 19 U.S.T. 6259, 189 U.N.T.S. 150 (Convention). Congress thus adopted a definition of refugee that "is virtually identical to the one prescribed by … the Convention." *Cardoza-Fonseca*, 480 U.S. at 437; *see also, e.g.*, H.R. Rep. No. 96-781, at 19 (1980), *reprinted in* 1980 U.S.C.C.A.N. 160. (explaining that the committee "incorporated the U.N. definition" of refugee).[1]

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[1] The two definitions differ in minor respects not relevant here. *See Velasquez-Otero v. Holder*, No. 11-1321 (pending), Pet. for Cert. at 5-6 & n.1 (*Velasquez-Otero* Pet.) (Apr. 13, 2012) (comparing the two).

From time to time, the United Nations High Commissioner for Refugees (UNHCR) has issued guidelines interpreting the Convention and Protocol. In a memorandum issued by the Office of Legal Counsel within the Department of Justice roughly contemporaneously with the passage of the 1980 Act, then-Assistant Attorney General Theodore Olson explained that Congress is presumed to have been aware of the UNHCR guidelines respecting the proper interpretation of the Protocol. *Status of Persons Who Emigrate for Economic Reasons Under the Refugee Act of 1980*, 5 Op. O.L.C. 264, 266 (1981). It is therefore "appropriate to consider the guidelines … as an aid to the construction of the Act." *Id.*

b. This case involves the fourth category of protection set forth in Section 1101(a)(42)(A), *i.e.*, "membership in a particular social group." In its landmark decision interpreting "particular social group" (PSG), the BIA acknowledged that "Congress intended the definition of a refugee in section 101(a)(42)(A) of the Act to conform to the Protocol." *Matter of Acosta*, 19 I. & N. Dec. 211, 219-20 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). The BIA further reasoned that its interpretation of PSG should be informed by the principle of *ejusdem generis—i.e.*, it should be interpreted in kind with the other four grounds enumerated in the statute: race, religion, nationality, and political opinion. *Id.* at 233. Because "[e]ach of these grounds describes persecution aimed at an immutable characteristic," the BIA defined PSG as a "group of persons all of whom share a common, immutable characteristic." *Id.*

The BIA further explained that the characteristic common to the group may be either "an innate one such

as sex, color, or kinship ties" or a "*shared past experience* such as former military leadership or land ownership." *Id.* (emphasis added). "[W]hatever the common characteristic that defines the group," the BIA explained, "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." *Id.* Applying that test to the facts of *Acosta*, the BIA concluded that taxi drivers who refused to engage in work stoppages did not constitute such a group, because their occupation was not an "immutable" or "fundamental" characteristic that they ought not be required to change. *Id.*

Applying *Acosta* for two decades, the BIA recognized a number of PSG claims, including those of former members of the Salvadorian national police, *Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (BIA 1988); members of the Marehan subclan of the Darood clan in Somalia, *In re H-*, 21 I. & N. Dec. 337, 341 (BIA 1996); unmutilated young women who oppose female genital mutilation on moral grounds, *In re Kasinga*, 21 I. & N. Dec. 357, 358 (BIA 1996); and Cuban homosexuals, *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (BIA 1990). *Acosta* was adopted and applied by the BIA and the courts for twenty years.[2]

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[2] *See, e.g.*, *Alvarez-Flores v. INS*, 909 F.2d 1, 7 (1st Cir. 1990); *Koudriachova v. Gonzales*, 490 F.3d 255, 262 (2d Cir. 2007); *Mwembie v. Gonzales*, 443 F.3d 405, 414-15 (5th Cir. 2006); *Castellano-Chacon v. INS*, 341 F.3d 533, 546 (6th Cir. 2003), *modified in part by Almuhtaseb v. Gonzales*, 453 F.3d 743 (6th Cir. 2006); *Lwin v. Ashcroft*, 144 F.3d 505, 512 (7th Cir. 1998); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008); *Thomas v. Gonzales*, 409 F.3d 1177, 1184 (9th Cir. 2005), *overruled on other grounds by Gonzales v. Thomas*, 547 U.S. 183 (2006); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005); *Castillo-Arias v.*

c. In 2002, UNHCR issued interpretative guidance about the meaning of "particular social group." 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) (*Guidelines*), *available at* http://www.unhcr.org/refworld/docid/3d36f23f4.html.

UNHCR noted that two distinct approaches had developed among signatory nations. One approach tracked BIA'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, instructing that that if a group satisfies either *Acosta* or the social-perception test, it qualifies as a PSG under the U.N. Protocol and Convention. *Id.* ¶ 11. The *Guidelines* thus explain that "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." *Id.* (emphasis added). The test is disjunctive. If a person seeks refugee

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U.S. Attorney Gen., 446 F.3d 1190, 1196 (11th Cir. 2006), *cert. denied*, 549 U.S. 1115 (2007).

status based on a characteristic that is neither fundamental nor unchangeable, therefore, 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." *Id.* ¶ 13. That, in turn, "depend[s] on the circumstances of the society in which [the group] exist[s]." *Id.* ¶ 7.

d. In 2006, the BIA invoked the *Guidelines* and considered for the first time "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." *In re C-A-*, 23 I. & N. Dec. 951, 956-57 (BIA 2006). But it suggested that the relevant factor was whether members of the group were *personally* identifiable by others. *Id.* (denying asylum to "former government drug informants working against the Cali drug cartel" because they "*intend[] to remain unknown and undiscovered*").

The BIA then fundamentally altered the *Acosta* standard. It elevated "social visibility" to a threshold requirement for establishing a PSG. In so doing, it confused the *Guidelines*' "social perception" approach—which was meant to be an alternative to *Acosta*, not a modification of it—with its new "social visibility" concept. *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582 (BIA 2008) ("[M]embership 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)); *see also Matter of E-A-G-*, 24 I. & N. Dec. 591, 594-95 (BIA 2007) ("Persons who resist joining gangs have not been shown to be part of a socially visible group ...."). The Board added that the proposed group was insufficiently "particular" because it was "potentially large" and members of the group might be targeted

"quite apart from any perception that [they are] members of a class." *S-E-G-*, 24 I. & N. Dec. at 585. The Board stated that its decisions "give greater specificity to the definition of a social group." *Id.* at 582.

The circuits are now deeply and intractably divided over whether they must defer to the BIA's decision to engraft the "social visibility" and "particularity" requirements onto the definition of "particular social group."

2. a. Petitioner Gaitan is a Salvadoran national. His mother fled to the United States when Gaitan was just a young boy, with the hope of making a better life for her family. She obtained Temporary Protected Status under 8 U.S.C. § 1254a and has been a law-abiding resident of Minnesota for almost two decades. Back in El Salvador, Gaitan was raised by an aunt.

El Salvador "is captive to the growing influence and violence of gangs." USAID, Bureau for Latin Am. & Caribbean Affairs, *Central America and Mexico Gang Assessment* 34, 44 (2006), *available at* http://www.uscrirefugees.org/2010Website/5_Resources/5_3_For_Service_Providers/5_3_9_Gangs/USAID.pdf. Perhaps the most notorious of those gangs is Mara Salvatrucha (MS-13), a "sophisticated organization[]" with a "complex, clandestine hierarch[y]." Harvard Law School Human Rights Program, *No Place to Hide: Gang, State, and Clandestine Violence in El Salvador* 28, 25 (2007), *available at* http://www.law.harvard.edu/programs/hrp/documents/FinalElSalvadorReport(3-6-07).pdf. The Salvadoran police has been unable to control the activities of gangs such as MS-13 and, as a result, youths who live in areas dominated by gangs "'simply have no choice'" as to whether to join. *Id.* at 30 (citation omitted); *see id.* at

61-62. It is now widely recognized that gangs such as MS-13 target youths who refuse to join, along with their families, for serious physical abuse and even death. *See id.* at 30; *see also, e.g.*, Julia Preston, *Losing Asylum, Then His Life*, N.Y. Times, June 30, 2010, at A16, *available at* http://www.nytimes.com/2010/06/29/us/29asylum.html?pagewanted=all.

When Gaitan was twelve years old, members of MS-13 began attempting to recruit him. App. 19a. Gaitan testified that MS-13 recruited other young men from his neighborhood to join gangs and explained that he repeatedly refused the gang's attempts to recruit because he was opposed to the gangs. *Id.* His refusal to join led MS-13 members to threaten Gaitan and his family. App. 2a, 19a. Gaitan was afraid that he would be beaten, killed, or that something would happen to his sister, because he had refused to join MS-13. App. 19a. Gaitan resisted MS-13's overtures for approximately three years before finally fleeing to the United States. App. 19a-20a.

After a treacherous journey through Guatemala and Mexico, Gaitan entered the U.S. without inspection in April 2002, eventually making his way to Saint Paul, Minnesota, where his mother and stepfather lawfully reside. He graduated from high school in the U.S. and has no criminal record.

The government became aware of Gaitan because his mother affirmatively applied for asylum with U.S. Citizenship & Immigration Services (USCIS) and included him as a derivative child in her application. USCIS referred the mother's application to the immigration court sitting in Bloomington, Minnesota, and on August 10, 2007, the United States Department of Homeland Security (DHS) simultaneously initiated removal proceedings against Gaitan.

b. Gaitan conceded that he was removable but, as relevant here, timely sought asylum based on a well-founded fear of persecution on account of his steadfast refusal to join MS-13. To support his claim, Gaitan testified about his terrifying experience with MS-13 in El Salvador, their efforts to recruit him, and his persistent refusal to join. He submitted corroborating evidence of the gang epidemic in El Salvador, including evidence of the gangs' history of deadly retaliation against those who have refused to join their ranks. After a hearing, an immigration judge orally denied Gaitan's application, holding that the BIA's recent decisions in *S-E-G-* and *E-A-G-* foreclosed Gaitan's claim. App. 25a-28a.[3]

The BIA dismissed Gaitan's appeal on the ground that "gang recruitment activities do not, in general, constitute a proper basis for asylum," because individuals who have refused to join a gang cannot meet the "social visibility" or "particularity" requirements established by *S-E-G-* and *E-A-G-*. App. 31a.

The Eighth Circuit denied Gaitan's petition for review. The court of appeals concluded that it was constrained to uphold the BIA's "social visibility and particularity" requirements, based on recent Circuit precedent applying *S-E-G-*. *See* App. 6a-7a. The court of appeals agreed with BIA's categorical determination that Gaitan's articulated social group was "not sufficiently narrowed to cover a discrete class of

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[3] The IJ also stated that Gaitan's testimony was not "sufficiently detailed" to warrant a positive credibility finding, App. 22a-24a, but that statement was explicitly rejected by the BIA. App. 31a.

persons who would be perceived as a group by the rest of society." App. 7a-8a.

Judge Bye "reluctantly" concurred in the judgment, though he was "convinced" that the BIA "act[ed] arbitrarily and capriciously in adding the requirements of 'social visibility' and 'particularity' to its definition of 'particular social group.'" App 8a. While he was "bound by circuit precedent" to concur in the result reached by the majority, *id.*, Judge Bye expressed his "disagreement with our circuit's as-a-matter-of-course adoption of 'social visibility' and 'particularity' as requirements for establishing 'membership in a particular social group.'" He explained that the BIA had "grafted the requirements of 'social visibility' and 'particularity' to petitioners' social groups claims" without "offer[ing] any explanation [for] the addition of these new requirements—which are very clearly inconsistent with the BIA's prior decisions …." App. 8a-9a.

Acknowledging that the BIA's new approach had "split the circuits as to the validity and permissible extent of the BIA's reliance on 'social visibility' and 'particularity,'" App. 14a, Judge Bye agreed with the Third and Seventh Circuits—which have held the BIA's new test for PSG arbitrary and capricious—because the new requirements "are in direct conflict with the definition of 'particular social group' announced in *Acosta*." App. 15a. While the BIA is free to reexamine and alter its definition of "particular social group" within the bounds of the INA, Judge Bye explained, the Board's unexplained departure from established precedent was "'a reason for holding [the departure] to be an arbitrary and capricious change from agency practice[.]'" App. 16a (quoting *Nat'l*

Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (alteration in original)).

Gaitan timely filed a petition for panel rehearing and rehearing en banc. The panel denied rehearing and the court of appeals denied rehearing en banc over the dissenting votes of three judges. App. 36a-39a. Judge Colloton concurred in the denial of rehearing en banc, noting that "a conflict in the circuits regarding the validity of *Matter of S-E-G-* will exist no matter how this court decides the question." *Id.*

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's decision upholding the BIA's new interpretation of "particular social group" deepens a well-developed and entrenched (7-2) circuit conflict. The Eighth Circuit has joined the First, Second, Sixth, Ninth, Tenth, and Eleventh Circuits in deferring to the Board's new "social visibility" test. The Third and the Seventh Circuits have held that test arbitrary and capricious. Nearly every circuit that entertains petitions for review of final BIA decisions has weighed in, and there is nothing to suggest that the conflict will resolve itself. Several circuits have acknowledged the conflict and yet have denied rehearing en banc. *See, e.g.*, App. 38a (opinion of Colloton, J.); *Rivera-Barrientos v. Holder*, 658 F.3d 1222, 1233-34 (10th Cir. 2011), *amended and reh'g denied*, 666 F.3d 641 (10th Cir. 2012). This Court's intervention is needed.

The PSG requirements articulated in *S-E-G-* are not entitled to deference for at least four reasons. First, the BIA departed from decades of settled law under Acosta without adequate acknowledgement of or explanation for the change. Second, the BIA has not provided any indication that it meaningfully considered the Protocol and Convention, the *Guidelines*, or other

relevant factors in adopting its new interpretation. And though the BIA cited the UNHCR *Guidelines* in some of its recent PSG decisions, it either misread or intentionally subverted them, as they provide no support for the BIA's social-visibility requirement. Third, the new social-visibility and particularity requirements are so incoherent and internally inconsistent that they are unreasonable, fail to put refugees on notice of what the law requires them to show at an asylum hearing, and produce arbitrary and inconsistent outcomes across circuits.

Finally, the social-visibility requirement, as further interpreted and applied by the BIA, produces incongruous results by denying protection to applicants who need it most: those who are forced to hide from their persecutors or attempt to obscure the relevant characteristic that makes them a target for persecution in their home country. As the Third and Seventh Circuits have recognized, members of such "invisible" groups—which include (at least in some parts of the world) homosexuals and women opposed to genital mutilation of themselves or their daughters—who were eligible for asylum under *Acosta*, would be hard-pressed to satisfy BIA's new "social-visibility" requirement.

The validity of *S-E-G-* is a recurring issue of national importance. The BIA's definition of "particular social group" affects thousands of asylum applicants every year, and is thus of paramount importance to the administration of the immigration laws. It has been invalidated by two courts of appeals. This case presents an excellent vehicle through which to consider the issue, which was pressed vigorously below. Had petitioner's case arisen in the Third or Seventh Circuits, his petition for review would have

been granted, and his proposed social group satisfies the Board's longstanding *Acosta* definition, to which the Third and Seventh Circuits adhere. Certiorari is warranted to resolve the circuit conflict and facilitate a uniform national standard for determining eligibility for asylum on the basis of membership in a particular social group.

I. THE EIGHTH CIRCUIT'S DECISION DEEPENS AN ENTRENCHED 7-2 CIRCUIT CONFLICT OVER THE VALIDITY OF THE BIA'S NARROWED DEFINITION OF "PARTICULAR SOCIAL GROUP"

After two decades of *Acosta*, which was adopted and applied nearly uniformly by the courts of appeals, the circuits are now in conflict over the validity of the BIA's new definition of "particular social group." The circuit conflict is now widely acknowledged. At least seven circuits now defer to the Board's new test, and two have squarely rejected it.[4]

A. Seven Circuits Defer to the BIA's Novel Social-Visibility and Particularity Requirements

The decision below aligns the Eighth Circuit with the First, Second, Sixth, Ninth, Tenth, and Eleventh Circuits in deferring to the Board's requirements that a PSG be "social visible" and possess sufficient "particularity."

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[4] The Fourth Circuit has acknowledged the conflict and stated that it "has not yet decided whether [the social-visibility] requirement comports with the INA." *Zelaya v. Holder*, 668 F.3d 159, 165 n.4 (4th Cir. 2012). But that court previously deferred to the Board's new social-visibility test, citing decisions of the First and Eleventh Circuits. *Contreras-Martinez v. Holder*, 346 F. App'x 956, 959 (4th Cir. 2009).

The First Circuit has repeatedly upheld the BIA's denial of asylum on the ground that the PSG is not socially visible or sufficiently particular. Approving the social-visibility 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 *Chevron*). *See also, e.g., Mendez-Barrera v. Holder*, 602 F.3d 21, 26-27 (1st Cir. 2010) (deferring to BIA's determination that the group of "young [El Salvadoran] women recruited by gang members who resist such recruitment" lacked the requisite social visibility and particularity to be a PSG).

The Second Circuit likewise has deferred to "social visibility" as a prerequisite for establishing membership in a PSG. That court has viewed the BIA's "social visibility requirement" as "consistent with" Second Circuit precedent holding that members of a PSG must possess a characteristic that "serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general." *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007) (*per curiam*) (citation and internal quotation marks omitted). The Second Circuit has likewise affirmed the Board's rejection of a PSG defined as those "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).

The Sixth Circuit also has deferred under *Chevron* to the BIA's "social visibility" and "particularity" requirements. *See Kante v. Holder*, 634 F.3d 321, 327

(6th Cir. 2011) (women raped as a form of government control do not constitute a PSG because the group is "generalized and far-reaching" and is not socially visible); *see also Castro-Paz v. Holder*, 375 F. App'x 586, 590-91 (6th Cir. 2010) (holding that individuals who are targeted by gang members because they possess sensitive information obtained through their employment were not a PSG because they lacked "the requisite 'social visibility'").

Both the Ninth Circuit and Tenth Circuits have likewise held that the BIA's particularity and social-visibility requirements merit *Chevron* deference. *Ramos-Lopez v. Holder*, 563 F.3d 855, 861-62 (9th Cir. 2009) (affirming rejection of proposed group of young Honduran men who have been recruited by gangs and refuse to join because the group is "broad and diverse" and "lack[s] the requisite social visibility"); *Rivera-Barrientos*, 658 F.3d at 1233-34 (accepting "social visibility" and "particularity" as prerequisites for defining a PSG and requiring an applicant to prove that her "community is capable of identifying an individual as belonging to the group").

Finally, the Eleventh Circuit has both explicitly adopted the social visibility requirement and implicitly approved a variation of the particularity requirement. That court held that "[a] group may qualify as a particular social group only if it has both immutability and social visibility" and added that a court must also account for "numerosity" (a reference to the BIA's new gloss on "particularity"). *Portillo v. U.S. Attorney Gen.*, 435 F. App'x 844, 847 (11th Cir. 2011); *id.* (holding that PSG of former Salvadoran military was "too broad," and would "creat[e] numerosity concerns"). And in *Velasquez-Otero*, the Eleventh Circuit reiterated that "[s]ocial groups must have sufficient

social visibility to be entitled to protection," upholding the BIA's determination that young Honduran men who resist gang recruitment are not a PSG. *Velasquez-Otero v. Holder*, 456 F. App'x 822, 826 (11th Cir. 2012), *petition for cert. filed*, 80 U.S.L.W. 3638 (U.S. May 1, 2012) (No. 11-1321) (pending).[5]

B. Two Circuits Hold That The BIA's New Interpretation Of PSG Is Not Entitled to Deference

The Third and Seventh Circuits have refused to defer to the BIA's newly articulated definition of PSG, explaining that the BIA failed to sufficiently explain its change of course, and that the new requirements would render ineligible for asylum specific groups that the BIA has already recognized as PSGs under *Acosta*.

While acknowledging that other circuits have largely followed the BIA's lead in requiring PSGs to be socially visible, the Seventh Circuit observed that the social-visibility requirement as defined by the BIA "makes no sense" and that the BIA has not provided a reasoned explanation for the change. *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009); *id.* at 613-14 (remanding to the BIA for reconsideration of its determination that defectors from the Mungiki tribe are not a PSG). The Seventh Circuit explained that social visibility is intrinsically flawed because individuals targeted for torture or persecution will "take pains to avoid being socially visible." *Id.* at 615. Moreover, the court determined that the new

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[5] In addition, the 5th Circuit has at least twice deferred to the Board's social-visibility requirement in unpublished opinions. *See Velasquez-Otero* Pet. at 18-19 (citing *Mendoza-Marquez v. Holder*, 345 F. App'x 31, 32 (5th Cir. 2009) (*per curiam*); *Soriano-Dominguez v. Holder*, 354 F. App'x 886, 887 (5th Cir. 2009)).

requirement flies in the face of BIA precedent identifying certain groups as "'particular social groups' without reference to social visibility." *Id.* Characterizing the BIA's new approach as "inconsistent" with its longstanding approach in such cases, the Seventh Circuit held the BIA's decision arbitrary and capricious and noted that any other result "would condone arbitrariness and usurp the agency's responsibilities." *Id.* at 616. The Seventh Circuit thus adheres to *Acosta*. *Id.* Rather than attempt to explain or refine its approach on remand, the BIA simply granted asylum to Gatimi. *In re Gatimi* (BIA Nov. 22, 2010), *available at* http://www.immigrantlawcentermn.org/litigation/BIA_Gatimi_Remand_Order.pdf.

In *Ramos v. Holder*, the Seventh Circuit again refused to apply the BIA's new requirements and held that former members of the MS-13 gang were a PSG under *Acosta* because that past shared experience "is a characteristic impossible to change." 589 F.3d 426, 429 (7th Cir. 2009). The court of appeals explained that the BIA's inability to explain the social-visibility requirement revealed confusion inherent in the requirement. The court also rejected as unreasonable the government's argument that social visibility requires personal, literal visibility—*i.e.*, 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. The court explained that the concept of literal visibility, which runs through the BIA's recent decisions, is different from the concept of using "'external' criteria to identify a social group," *id.* at 429, and observed that "[o]ften it

is unclear whether the Board is using the term 'social visibility' in the literal sense or in the 'external criterion' sense, or even whether it understands the difference," *id.* at 430.

The Third Circuit likewise has refused to defer to the Board's decision in *S-E-G-* and thus continues to apply Circuit precedent adopting the standard from *Acosta*. *See Valdiviezo-Galdamez v. Attorney Gen. of the U.S.*, 663 F.3d 582, 617 (3d Cir. 2011); *id.* at 586, 608-09 (rejecting BIA's new test and remanding for reconsideration of whether Hondurans who refused to join MS-13 are a particular social group). That court explained that the Board's "requirement of 'social visibility' is inconsistent with a number of the BIA's prior decisions." *Id.* at 603. Because the BIA did not forthrightly acknowledge, much less explain, the change, its new interpretation is not entitled to deference under *Chevron*. *See id.* at 612 (Hardiman, J., concurring). Citing Board precedents expressly recognizing PSGs such as Cuban homosexuals, former Salvadoran national police officers, and women opposed to female genital mutilation, the court noted that "members of each of these groups have characteristics which 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 the characteristic known." *Id.* at 604. Thus, the Board's new test "would pose an unsurmountable obstacle" to refugee status for such individuals, "even though the BIA has already held that membership in any of these groups qualifies for refugee status." *Id.*

Finding itself "hard-pressed to discern any difference between the requirement of 'particularity' and the discredited requirement of 'social visibility,'"

the court also refused to defer to the Board's addition of the particularity requirement. *Id.* at 608.

C. The Circuit Split is Well-Developed And Entrenched

The circuit split is mature, entrenched, and should be resolved by this Court. Several circuits that defer to the BIA's new requirements have continued to apply them in subsequent cases, and others have denied petitions for rehearing en banc. *See, e.g.*, *Kante*, 634 F.3d at 327; *Fuentez-Hernandez*, 411 F. App'x at 439; *Mendez-Barrera*, 602 F.3d at 26; *Rivera-Barrientos*, 658 F.3d at 1233-34.

Having had the benefit of the reasoning of many of the circuits in the majority, both the Third and Seventh Circuits have nevertheless made clear that their position rejecting BIA's new PSG test is firm. Those circuits have pledged to continue to reverse BIA decisions applying those requirements, at least until the Board provides an adequate explanation for its change of course. *See, e.g.*, *Ramos*, 589 F.3d at 430-31; *Garcia v. Attorney Gen. of U.S.*, 665 F.3d 496, 504 n.5 (3d Cir. 2011) (reaffirming its refusal to defer to the BIA and reiterating its criticism that the BIA has "failed to sufficiently explain and justify its addition of 'particularity' and 'social visibility' to the traditional *Acosta* requirements"); *id.* ("Until the BIA provides an analysis that adequately supports its departure from *Acosta*, we remain bound by the well-established definition of 'particular social group' found in" Circuit precedent); *Mejia-Fuentes v. Attorney Gen. of the U.S.*, 463 F. App'x 76, 79-80 (3d Cir. 2012) (reiterating the holding of *Valdiviezo-Galdamez* and remanding case involving proposed social group of "young men who morally oppose criminal gangs and who lack family

ties"). And the Seventh Circuit denied the Government's petition for rehearing en banc in *Gatimi* and has since reaffirmed that decision in *Benitez Ramos* and *Sarhan v. Holder*, 658 F.3d 649, 654 (7th Cir. 2011).

If anything, the conflict is trending in a way that is likely to result in a more even—and just as entrenched—conflict. The Ninth Circuit, which currently follows the majority rule, is reconsidering its position en banc in light of the decisions of the Third and Seventh Circuits. *Henriquez-Rivas v. Holder*, 449 F. App'x 626 (9th Cir. 2011), *reh'g en banc granted*, 670 F.3d 1033 (9th Cir. 2012).[6]

The Third and Seventh Circuit's biting criticisms of the social visibility and particularity requirements on their merits suggest that they would likely continue to reject those requirements even if the BIA further explains its reasons for adopting them. The courts' remand of the issue to the agency is thus unlikely to resolve the conflict. Moreover, the Board squandered the opportunity it had to provide such an explanation on remand in *Gatimi*, and the Government has stated that it has no idea when or even if the Board intends to issue a published decision clarifying or explaining its

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[6] Because a deep conflict will persist on the exceptionally important and frequently recurring issue no matter what the Ninth Circuit does, there is no need to delay this Court's review any longer. *See, e.g., Mims v. Arrow Fin. Servs., LLC*, 131 S. Ct. 3063 (2011) (granting cert. to resolve mature conflict while Third Circuit was reconsidering its position en banc).

new definition of PSG in response to remand orders from the Third and Seventh Circuits.[7]

II. THE BOARD'S NARROWED DEFINITION OF PARTICULAR SOCIAL GROUP IS NOT ENTITLED TO DEFERENCE

For more than two decades, the BIA recognized PSGs under *Acosta* based on a "share[d] … common, immutable characteristic." *Acosta*, 19 I. & N. Dec. at 233. Since 2008, the BIA has imposed additional "social-visibility" and "particularity" requirements. The BIA has not provided an adequate explanation for its drastic narrowing of the PSG definition. Nor can the BIA's decision be sustained on the ground on which it ostensibly relied, because the BIA plainly misread the UNHCR *Guidelines*. Moreover, the new definition as articulated and applied by the Board is so incoherent that it leads to inconsistent outcomes for similarly situated applicants and fails utterly to apprise refugees of what they must prove to make their case.

A. The BIA's Unexplained Adoption Of The Social-Visibility And Particularity Requirements In *S-E-G-* Was Arbitrary And Capricious

The "social visibility" and "particularity" requirements mark a fundamental departure from the BIA's prior approach under *Acosta*. Although the BIA—and a few courts—have couched the new requirements as mere incremental "refine[ments]" of *Acosta*, *see, e.g.*, *Rivera-Barrientos*, 666 F.3d at 648,

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[7] Petition for Panel Rehearing or Rehearing *En Banc*, No. 10-1724 at Ex. B (8th Cir. Apr. 23, 2012) (Apr. 2012 letter from DOJ and amicus response).

that characterization does not withstand scrutiny. The Board's new standard cannot be squared with prior Board precedent recognizing PSGs that lack "visibility." *See Valdiviezo-Galdamez*, 663 F.3d at 604 (noting that many groups that were previously recognized as PSGs under *Acosta* would face "an unsurmountable obstacle to refugee status" under the new test); *see also* App. 8a-9a (Bye, J., concurring) (characterizing the particularity and social visibility requirements "very clearly inconsistent with the BIA's prior decisions"). And if it were true that all of the PSGs recognized under *Acosta* would be recognized under the new approach," then the BIA's definitions of "particularity" and "social visibility" become, "at best, muddled, and, at worst, incoherent." *Valdiviezo-Galdamez*, 663 F.3d at 616 (Hardiman, J., concurring).

The Board's insistence that these new requirements are consistent with past precedent suggests that the Board "does not recognize, or is not being forthright about, the nature of the change its new interpretation effectuates." *Id.* at 617. That itself is a reason why the Board's action cannot stand. "'[A]n agency changing its course must supply a reasoned analysis'"; failure to do so may make the change arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (citation omitted); *see also Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 981 (unexplained inconsistency is a reason for holding an agency's interpretation of a statute to be an arbitrary and capricious change from agency practice); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position.").

As Judge Posner has observed, "the Board [has not] attempted, in this or any other case, to explain the reasoning behind the criterion of social visibility." *Gatimi*, 578 F.3d at 615. In this case, the Board relied exclusively on *S-E-G-* for the proposition that any gang-related PSG claim (no matter the record in a particular case) is categorically foreclosed. *S-E-G-* marked a fundamental departure from *Acosta*, yet the Board claimed support for its new formulation in its prior decisions in *C-A-* and *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69 (BIA 2007), *pet'n for review denied sub nom. Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007). But in *C-A-*, the Board adopted social visibility as a "factor," citing the UNHCR *Guidelines* and claiming to "continue to adhere to" *Acosta*. 23 I. & N. Dec. at 955-57. The Board considered social visibility only after finding that the applicants did not satisfy *Acosta*. In other words, the Board's analysis in *C-A-* is consistent with the *Guidelines* (in the sense that it considered social visibility as an alternative to *Acosta*, not an additional requirement). A few months later, in *A-M-E- & J-G-U-*, the Board relied on *C-A-* as "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). But, as explained, the Board's decision in *C-A-* did not reaffirm (or even create) any social-visibility *requirement*.

Then, in *S-E-G-*, the Board claims 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," again mischaracterizing its prior decisions. 24 I. & N. Dec. at 582. The Board also claimed support from the UNHCR *Guidelines*, which it said "endorse an approach" that

treats social visibility as "an important factor." *Id.* at 586. The BIA's reliance on the *Guidelines* in this manner is at best unreasonable, as it turns their import completely upside-down. As UNHCR has repeatedly explained—including in its amicus brief in this case—the *Guidelines* set forth "social perception" as an alternative test that *broadens* rather than narrows *Acosta*. *See* UNHCR Br. at 15-16 (8th Cir. filed July 30, 2010).

It will not suffice for the BIA to justify its new approach by citing its own decisions and claiming that it had already adopted the social visibility requirement, when in fact it had not (and certainly had not previously *explained* such a requirement). Nor can the new definition be sustained based on the Board's plainly erroneous interpretation of the *Guidelines*. Because the Board departed from *Acosta* without a reasoned explanation, its interpretation is owed no deference.

B. *S-E-G-* Cannot Stand Because It Rests On A Misreading Of The UNHCR *Guidelines* And Fails To Account For Relevant Factors

"[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). Moreover, an agency action is arbitrary and capricious if it was not based on "consideration of the relevant factors." *State Farm*, 463 U.S. at 42. To the extent that the Board has offered any justification for "social visibility," it has pointed to the UNHCR *Guidelines*, which it plainly misread. BIA's failure to meaningfully consider the *Guidelines*, the text of the

U.N. Protocol and Convention, or sister signatories' interpretations of those agreements, renders its new interpretation of PSG arbitrary and capricious.

"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. Although the *Guidelines* do not bind the Board, they deserve meaningful 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 *Guidelines*' disjunctive test rejects any social perception requirement, and provides absolutely no support for the Board's version of "social visibility"—which has been applied repeatedly in a manner that requires applicants to show that they would be *personally identifiable* (literally "visible") as a member of the group. *See Scatambuli*, 558 F.3d at 60; *see also C-A-*, 23 I. & N. Dec. at 959-60; *Ramos*, 589 F.3d at 430; *Rivera-Barrientos*, 666 F.3d at 650-51.

And, as this Court has recognized, "[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) (alterations in original) (citations and internal quotation marks omitted). If the BIA had considered those opinions, it would have discovered that other parties to the Convention either do not use or have expressly repudiated the social-visibility requirement. *See, e.g.*, *Applicant S v. Minister for Immigration and Multicultural Affairs*

(2004), 217 C.L.R. 387, 410-11, 421-22 (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), *available at* http://www.unhcr.org/419cbe1f4.html (Canada, the United Kingdom, New Zealand, and France do not require social visibility).

There is nothing in the BIA's decisions to suggest that it weighed the Convention, the *Guidelines*, or sister signatories' interpretations in requiring proof of social visibility. The BIA simply referred to its own past decisions that had cited the *Guidelines*, without any discussion of how the *Guidelines* support the decision it made (they plainly do not). Its decision to impose a social-visibility requirement, therefore, cannot be sustained.

C. *S-E-G-* Is Unreasonable Under *Chevron*

The BIA's reinvented approach to PSG claims is unreasonable under step two of *Chevron* because it is so muddled that it fails to apprise asylum applicants of what they must prove to make their case, as required by the Due Process Clause of the U.S. Constitution. As explained in the *Velasquez-Otero* Petition (at 33-37), it also is unreasonable because it produces absurd results in cases where asylum-seekers have taken care to hide from their persecutors.

Due process requires asylum applicants to have "'an opportunity to present their objections'" to removal

proceedings on the ground that they qualify for asylum. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978) (citation omitted); *see also Salgado-Diaz v. Ashcroft*, 395 F.3d 1158, 1162 (9th Cir. 2005) (holding that "[i]mmigration proceedings … must conform to the Fifth Amendment's requirement of due process"), *reprinted as amended sub nom. Salgado-Diaz v. Gonzales*, Nos. 02-74187, 03-73312, 2005 U.S. App. LEXIS 4015 (9th Cir. Mar. 10, 2005). Yet the "particular social group" test morphs from case to case at the whim of the agency, and the standards by which the BIA's actions are judged vary from circuit to circuit. The BIA's opaque requirements "unfairly force[] asylum applicants to shoot at a moving target." *Valdiviezo-Galdamez*, 663 F.3d at 617 (Hardiman, J., concurring); *see Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. Ruckelshaus*, 719 F.2d 1159, 1164 (D.C. Cir. 1983) ("Agency action is arbitrary and capricious if the agency has failed to meet statutory, procedural, or constitutional requirements ….").

1. The "social visibility" requirement is incoherent.

BIA decisions examining the social visibility criterion have left courts of appeals profoundly confused over whether the individual himself must be visible, or if the social visibility requirement is satisfied where society perceives the existence of group as a whole. The inconsistency from jurisdiction to jurisdiction, and sometimes from case to case, creates a formidable obstacle for individuals petitioning for asylum. *See* Michelle Foster, UNHCR Legal and Protection Policy Research Series, No. PPLA/2012/02, *The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to*

'Membership of a Particular Social Group' 32 (Apr. 2012), *available at* http://www.unhcr.org /4f7d8d189.html ("One of the difficulties with the 'social perception/visibility' approach developed in the US is that it is not clear how an applicant could successfully establish this essential element.").

Several circuits focus on whether society "perceives" the existence of the group. App. 7a (holding that "'a social group requires sufficient particularity and visibility such that the group is perceived as a cohesive group by society'") (quoting *Constanza v. Holder*, 647 F.3d 749, 753 (8th Cir. 2011)); *Mendez-Barrera*, 602 F.3d at 27 ("The relevant inquiry is whether the social group is visible in the society."); *Ramos-Lopez*, 563 F.3d at 862 (focusing on whether the "group, as a group" is "generally visible to society").

Yet the BIA has at times applied "social visibility" as if it requires an applicant *personally* identifiable by others as a member of a PSG. *See Scatambuli*, 558 F.3d at 60 (upholding BIA determination that noncriminal drug informants were not members of a particular social group because "*these particular informants* lacked social visibility"); *see also C-A-*, 23 I. & N. Dec. at 959-60. The government itself has argued "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 on the street." *Ramos*, 589 F.3d at 430. The Tenth Circuit's social visibility standard reflects this personal-visibility requirement, setting forth as "necessary conditions" visibility of both the group and the individual. *Rivera-Barrientos*, 666 F.3d at 650-51.

But, as Judge Posner pointed out in *Gatimi*, "[i]f 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." 578 F.3d at 615; *accord Valdiviezo-Galdamez*, 663 F.3d at 607 ("[B]y attempting to avoid persecution by blending in to the society at large, the Boards' rational[e] would cause them 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."). Under the BIA's new test, an individual's attempt to avoid persecution by escaping detection would have the absurd effect of thwarting his ability prove asylum eligibility. The BIA has long recognized refugee status based on a common characteristic that group members "should not be required to change because it is fundamental to their individual identities or consciences." *Acosta*, 19 I. & N. Dec. at 233. A visibility requirement severely undercuts an applicant's ability to seek asylum based on such characteristics if the applicant—or the group as a whole—has taken steps to remain invisible. *Id.* at 233-34.

The government has refined its appellate arguments in response to judicial criticism of *S-E-G-*. In *Valdiviezo-Galdamez*, "the government contend[ed] that 'social visibility' does not mean on-sight visibility," but instead "is a means to discern the necessary element of group perceptibility." 663 F.3d at 606. Noting the government's shifting approach, the Third Circuit stated that it had "a hard time understanding why the government's definition does not mean 'on-sight visibility,'" and it "join[ed] the Court of Appeals for the Seventh Circuit in wondering 'even-whether [the BIA] understands the difference.'" *Id.* at 606-07 (quoting *Ramos*, 589 F.3d at 430 (alteration in original)). The court explained that the government's "attempt to add gloss to the BIA's reliance on 'social

visibility'" was "little more than an attempt to avoid the tension arising from the BIA's various interpretations of that phrase." *Id.* at 607. And, of course, the Government's appellate briefs and argument cannot clarify the test on the Board's behalf. *Chenery*, 318 U.S. at 95.

2. The "particularity" requirement is incoherent.

The BIA's and courts' confusion over the meaning of the "particularity" requirement is just as profound. The BIA has said that "[t]he essence of the 'particularity' requirement … is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons." *S-E-G-*, 24 I. & N. Dec. at 584. The Board continued "[w]hile the size of the proposed group may be an important factor in determining whether the group can be so recognized, the key question is whether the proposed description is sufficiently 'particular,' or is 'too amorphous … to create a benchmark for determining group membership.'" *Id.* (citation omitted).

The BIA's description of particularity has caused confusion in at least two ways. First, it is often unclear what work "particularity" does in the PSG analysis. As courts and commentators have observed, in practice it often collapses into the social-visibility requirement. The Third Circuit has rejected the particularity requirement on the ground that it is just the "social visibility" requirement repackaged: "Indeed, they appear to be different articulations of the same concept and the government's attempt to distinguish the two oscillates between confusion and obfuscation, while at

times both confusing and obfuscating." *Valdiviezo-Galdamez*, 663 F.3d at 608. And even the government now takes the position that "'particularity' is best understood *not* as a separate, independent requirement." Dep't of Homeland Security Br. on Remand From the U.S. Court of Appeals for the Third Circuit at 10, *Matter of Valdiviezo-Galdamez*, File No. A097 447 286 (BIA May 29, 2012) (emphasis added).

The elusive distinction between "social visibility" and "particularity" is also apparent in the decisions of the circuits that have adopted the BIA's new standard. In *Ramos-Lopez*, for example, the Ninth Circuit held that the group defined as "young Honduran men who refused to join MS-13" did not meet the particularity requirement because they did not possess any particular "identifying factors." But it is not at all clear how the absence of "identifying factors" is different from an absence of "social visibility." 563 F.3d at 862.

The courts of appeals are also divided over the relevance of the size of the group to the particularity inquiry. The Eleventh Circuit considers the size of a group as a factor in determining "particularity." *See Portillo*, 435 F. App'x at 847-8 (holding that former members of the Salvadoran military were not a PSG because the size of the group created "numerosity concerns" and this, it was "too broad"). Yet the UNHCR *Guidelines* expressly state that "[t]he size of a purported social group" is not "a relevant criterion in determining whether a particular social group exists." *Guidelines* ¶ 18. And the Second Circuit has rejected the notion that "a group's size can itself be a sound reason for finding a lack of particularity." *Ucelo-Gomez*, 509 F.3d at 73 n.2.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING A FREQUENTLY RECURRING ISSUE OF NATIONAL IMPORTANCE

This case involves an issue at the core of the statutory framework used by the United States to satisfy its obligation, under the Protocol and Convention, to protect refugees. This issue is one of national importance. More than 50,000 refugees apply for asylum in the United States each year, and membership in a PSG is the second-most common ground raised by asylum applicants. Daniel C. Martin & James E. Yankay, DHS Office of Immigration Statistics, *Refugees and Asylees: 2011*, Annual Flow Report, at 1 (May 2012), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2011.pdf; Anna Marie Gallagher et al., 2 *Immigration Law Service 2d* § 10:138 (Updated 2012).

The current circuit conflict leads to arbitrary and inconsistent outcomes across circuits, making some applicants categorically ineligible for asylum based solely on geographical happenstance. Uniformity is necessary not only to avoid inconsistent outcomes for similarly situated applicants, but also to avoid the risk of forum shopping. *Cf.* Pub. L. No. 99-603, § 115, 100 Stat. 3359, 3384 (1986) ("It is the sense of Congress that … the immigration laws of the United States should be enforced vigorously and uniformly ….").

This case provides an excellent vehicle for the Court to resolve the conflict. The validity of the Board's new social-visibility test was squarely raised and vigorously pressed below. The Eighth Circuit deferred to and relied on the BIA's social-visibility test in denying Gaitan's petition for review in a published

opinion, producing a thoughtful concurring opinion that examined the recent decisions of the circuits that have held the test arbitrary and capricious. The validity of that test is the sole question presented, and there are no threshold issues that could prevent this Court from reaching it.

Moreover, although asylum relief is always discretionary, Gaitan's *eligibility* for asylum turns on the resolution of the question presented. The BIA found Gaitan credible and based its decision solely on its recent precedents requiring "social visibility" and "particularity." And Gaitan's proposed group satisfies the BIA's longstanding *Acosta* definition of PSG, which remains the law in the Third and Seventh Circuits. Young Salvadoran men who face persecution on account of having refused recruitment by MS-13 share a characteristic that is both immutable (because they cannot change this past shared experience) *and* fundamental to their consciences (because they ought not to have been required to instead join the gang in order to avoid persecution).

CONCLUSION

The petition should be granted, and the case should be set for briefing and argument.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

Oscar Alexander Granados GAITAN,
Petitioner,

v.

Eric H. HOLDER, Jr., Attorney General of the United States, Respondent.

No. 10-1724.

Submitted: May 12, 2011.
Filed: March 1, 2012.

671 F.3d 678

Before WOLLMAN, BYE, and SHEPHERD, Circuit Judges.

SHEPHERD, Circuit Judge:

Oscar Alexander Granados Gaitan, a native and citizen of El Salvador, entered the United States in 2002 to escape recruitment into a gang in his home country. Gaitan now faces removal and has petitioned this Court to review the decision of the Board of Immigration Appeals (BIA) that affirmed an immigration judge's (IJ) denial of Gaitan's petition for asylum, withholding of removal, and relief under the Convention Against Torture. We deny the petition for review.

I.

In April 2002, Gaitan entered the United States without inspection in order to escape recruitment into the notorious gang "Mara Salvatrucha" or "MS–13." Approximately two years earlier, when Gaitan was twelve years old, Gaitan was approached by members of MS–13 who attempted to recruit Gaitan into their gang. Gaitan refused this initial invitation as well as subsequent bids from gang members. He was never physically harmed during his interactions with MS–13. However, the gang members threatened to harm Gaitan and his family if he did not join.

On August 10, 2007, the United States Department of Homeland Security (DHS) initiated removal proceedings against Gaitan by filing a Notice to Appear with the immigration court. DHS charged Gaitan with being removable under 8 U.S.C. § 1182(a)(6)(A)(i), for being present in the United States without being admitted or paroled. Gaitan appeared before an IJ for an individual merits hearing. In responding to the Notice to Appear, Gaitan admitted the factual allegations and conceded the charge of removability. However, Gaitan sought relief from removal in the form of asylum, withholding of removal, and under the Convention Against Torture. Gaitan claimed that he was a member of a "particular social group" composed of young males that have been previously recruited by MS–13 and are opposed to the nature of gangs. To support this claim, Gaitan testified about his experience in El Salvador and gang members' efforts to recruit him. Gaitan also submitted written documentation regarding the ongoing struggle in El Salvador for schoolaged males to resist coerced recruitment by gangs.

The IJ issued an oral decision rejecting Gaitan's claims for relief. The IJ found that Gaitan's testimony was not sufficiently detailed or cohesive to make a positive credibility finding. The IJ then stated that even if Gaitan was credible, he failed to show eligibility for asylum on the basis of membership in a particular social group. In making this finding, the IJ relied heavily on the BIA's decision in *Matter of S–E–G–*, 24 I. & N. Dec. 579 (BIA 2008), which the IJ found controlling in Gaitan's case.

Gaitan appealed to the BIA. Following a single-member review, the BIA overturned the IJ's ruling on credibility but upheld the IJ's decision regarding the merits of Gaitan's claims for relief. Like the IJ, the BIA cited *Matter of S–E–G–* in support of its denial of Gaitan's appeal.

II.

"[T]his court has jurisdiction of 'constitutional claims or questions of law raised upon a petition for review.'" *Solis v. Holder*, 647 F.3d 831, 832 (8th Cir.2011) (quoting 8 U.S.C. § 1252(a)(2)(D)), *cert. denied*, —— U.S. ——, 132 S.Ct. 1032, 181 L.Ed.2d 739 (2012). "Where … the BIA issues an independent decision without adopting the IJ's conclusions, we review only the BIA decision." *Constanza v. Holder*, 647 F.3d 749, 753 (8th Cir.2011) (per curiam). "A denial of asylum is reviewed for abuse of discretion; underlying factual findings are reviewed for substantial support in the record." *Hassan v. Gonzales*, 484 F.3d 513, 516 (8th Cir.2007). "We review questions of law de novo but accord substantial deference to the BIA's interpretation of immigration statutes and regulations." *Puc–Ruiz v. Holder*, 629 F.3d 771, 777 (8th Cir.2010).

III.

To qualify for asylum under the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, the burden is on Gaitan to show that he is a refugee, in other words, to show that he is a person who is outside the country of his nationality "'who is unable or unwilling to return to, and is unable or unwilling to avail himself … of the protection of, that country because of persecution or a well-founded fear or persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.'" *Davila–Mejia v. Mukasey*, 531 F.3d 624, 627–28 (8th Cir.2008) (quoting 8 U.S.C. § 1101(a)(42)(A)). The phrase "particular social group" is not expressly defined in the INA. *Ngengwe v. Mukasey*, 543 F.3d 1029, 1033 (8th Cir.2008). As a result, we give *Chevron* deference to the BIA's reasonable interpretation of the phrase and will not overturn the BIA's conclusion unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Ngengwe*, 543 F.3d at 1033; *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842–44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

In 1985, the BIA defined a "particular social group" as "a group of persons all of whom share a common, immutable characteristic. … 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." *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). The BIA subsequently expounded on the meaning of "particular social group," finding that factors such as "social visibility" and "particularity"

were relevant in determining whether a purported social group warrants protection under the INA. *See In re A–M–E & J–G–U–*, 24 I. & N. Dec. 69, 74–76 (BIA 2007); *In re C–A–*, 23 I. & N. Dec. 951, 957–61 (BIA 2006).

In *Matter of S–E–G–*, 24 I. & N. Dec. at 582, the BIA further refined its definition of a "particular social group" as "requir[ing] that the group have particular and well-defined boundaries, and that it possess a recognized level of social visibility." According to the BIA, "[t]he essence of the 'particularity' requirement … is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons." *Id.* at 585. Similarly, social visibility asks "whether the members of the group are perceived as a group by society," such that "these individuals suffer from a higher incidence of crime than the rest of the population." *Id.* at 586–87 (citation and internal quotation marks omitted).

In his petition for review, Gaitan focuses his challenge on the BIA's finding that he was not eligible for asylum because he was not a member of a particular social group.[1] Gaitan argues that our precedent does

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[1] Gaitan does not address the denial of relief under the Convention Against Torture in his brief. Any argument based on that ground is therefore deemed waived. *See Tinajero–Ortiz v. United States*, 635 F.3d 1100, 1103 n. 3 (8th Cir.), *cert. denied*, —— U.S. ——, 132 S.Ct. 315, 181 L.Ed.2d 194 (2011). Gaitan notes that he does not waive his claim that he is otherwise eligible for relief in the form of withholding of removal under the INA. However, "[t]he standard for withholding of removal, a clear probability of persecution, is more rigorous than the well-founded fear standard for asylum. An alien who fails to prove eligibility for asylum

not mandate that we affirm the decision of *Matter of S–E–G–* because *Matter of S–E–G–* unreasonably transformed social visibility and particularity from relevant factors to be considered into requirements that must be met to show membership in a particular social group. Gaitan asserts that these requirements are not entitled to deference by this Court because they are "conflicting, confusing, and illogical."

At the time that he filed his appeal, Gaitan was correct that no panel of this Court had gone so far as to refer to social visibility and particularity as requirements. Yet our recent decisions in *Constanza v. Holder*, 647 F.3d at 753–54, and *Ortiz–Puentes v. Holder*, 662 F.3d 481 (8th Cir.2011), adopted such a reading. In *Constanza*, we denied a petition for review by a native and citizen of El Salvador who applied for asylum on the basis that he would be persecuted by MS–13 gang members because of "his membership in social groups defined as persons resistant to gang membership, persons who have returned from the United States and are perceived as affluent, and persons who fear harm to their families from gangs." 647 F.3d at 752. The BIA rejected Constanza's petition and found that his articulated social groups were "too broad and indeterminate for immigration purposes." *Id.* at 752. In denying Constanza's petition for review, we were "persuaded by the BIA's conclusion, as well as authority from other circuits, that 'persons resistant to gang violence' are too diffuse to be recognized as a

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cannot meet the standard for establishing withholding of removal." *Turay v. Ashcroft*, 405 F.3d 663, 667 (8th Cir.2005) (internal citations omitted). Because we find that Gaitan is not eligible for asylum, Gaitan is unable to meet the standard for establishing withholding of removal.

particular social group." *Id.* at 754 (citing *Matter of S–E–G–*, 24 I. & N. Dec. at 588). Accordingly, we stated that "a social group requires sufficient particularity and visibility such that the group is perceived as a cohesive group by society." *Id.* at 753.

Likewise, in *Ortiz–Puentes*, we denied a petition for review by three natives and citizens of Guatemala who claimed their social group was comprised of "young Guatemalans who refused to join gangs and were persecuted—beaten—as a result." 662 F.3d at 483. We again noted with approval the BIA's decision in *Matter of S–E–G–*, and stated that "[a] group of persons defined as those who suffer violence because they refused to join criminal gangs 'lacks the visaibility and particularity required to constitute a social group' for purposes of 8 U.S.C. § 1101(a)(42)(A)." *Id.* (quoting *Constanza*, 647 F.3d at 753–54).

We are bound by the decision of the earlier panels. *Owsley v. Luebbers*, 281 F.3d 687, 690 (8th Cir.2002) (per curiam) ("It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel."). As a result, this Court cannot find that the social visibility and particularity requirements articulated in *Matter of S–E–G* are arbitrary or capricious.

In the present case, Gaitan sought relief from removal based on his membership in a particular social group that he characterized as "young males from El Salvador who have been subjected to recruitment by MS–13 and who have rejected or resisted membership in the gang based on personal opposition to the gang." After a careful review of the record, we agree with the BIA that Gaitan's articulated social group is not sufficiently narrowed to cover a discrete class of persons who would be perceived as a group by the rest

of society. Instead, Gaitan "is no different from any other Salvadoran … that has experienced gang violence." *Constanza*, 647 F.3d at 754. Accordingly, Gaitan has failed to establish that any mistreatment by MS–13 "occurred because of his membership in a particular social group." *Id.*

IV.

We deny the petition for review.

BYE, Circuit Judge, concurring.

Based upon our recent decisions in *Constanza v. Holder*, 647 F.3d 749 (8th Cir.2011) (per curiam) and *Ortiz–Puentes v. Holder*, 662 F.3d 481 (8th Cir.2011), I concur in the result reached by the majority. I do so reluctantly, however, and write separately to express my disagreement with our circuit's as-a-matter-of-course adoption of "social visibility" and "particularity" as requirements for establishing "membership in a particular social group." *See* 8 U.S.C. § 1101(a)(42)(A). While both decisions cited with approval the BIA's new approach to defining "particular social group," neither had before it the issue raised in this appeal: did the BIA act arbitrarily and capriciously in adding the requirements of "social visibility" and "particularity" to its definition of "particular social group." While I am convinced it did, I am nonetheless bound by circuit precedent and therefore concur in the result.

Our circuit only recently addressed the BIA's new approach to defining "particular social group." While both *Constanza* and *Ortiz–Puentes* grafted the requirements of "social visibility" and "particularity" to petitioners' social groups claims, neither panel offered any explanation as to why the addition of these new requirements—which are very clearly inconsistent

with the BIA's prior decisions—should not be deemed arbitrary and capricious. Neither panel inquired as to whether the BIA had provided a good reason, or any reason at all, for departing from established precedent. Neither asked if the BIA's new approach to defining "particular social group" amounted to an arbitrary and capricious change from agency practice. Instead, we simply adopted the new approach, as a matter of course, offering no substantial reason ourselves for this shift in direction. As a result, I fear we have chosen the wrong direction.

In order to understand why the BIA's addition of the "social visibility" and "particularity" requirements to the definition of "particular social group" is arbitrary and capricious, some background information is necessary. The BIA first attempted to define "particular social group" in *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A.1985). In *Acosta*, the BIA relied on the canon of *ejusdem generis* to construe "membership in a particular social group" in a way which most closely resembles the definition of the other four grounds of persecution under the Immigration and Nationality Act (Act): race, religion, nationality, and political opinion. *Id.* at 233. After deducing commonalities between the five bases of persecution cognizable under the Act, the BIA defined "particular social group" as a "group of persons all of whom share a common, immutable characteristic," which may be either "an innate one such as sex, color, or kinship ties" or a "shared past experience such as former military leadership or land ownership." *Id.* In all such circumstances, BIA explained, the characteristic uniting the group 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." *Id.* Because an occupation is not something individuals are either unable to change or, as a matter of conscience, should not be required to change, the BIA rejected an asylum claim by a taxi driver in the city of San Salvador premised on his membership in a taxi cooperative whose members were targeted by the guerillas for having refused to participate in guerrilla-sponsored work stoppages. *Id.* at 234.

During the next twenty years, the BIA applied the immutability definition of *Acosta* in a variety of contexts. The BIA's published decisions recognized as a "particular social group" former members of Salvadorian national police (who could not change their past experience of serving in the police), *see In re Fuentes*, 19 I. & N. Dec. 658 (B.I.A.1988); members of the Marehan subclan of the Darood clan in Somalia (who shared kinship ties and linguistic commonalities), *see In re H–*, 21 I. & N. Dec. 337 (B.I.A.1996); Filipinos of mixed Filipino–Chinese ancestry (because their traits were immutable), *see In re V–T–S–*, 21 I. & N. Dec. 792 (B.I.A.1997); young women of a certain Togo tribe who have not yet had a female genital mutilation (FGM) and who opposed the practice on moral grounds (because 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"), *see In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A.1996); and homosexuals in Cuba (based on the Board's recognition of homosexuality as an immutable characteristic), *see In re Toboso–Alfonso*, 20 I. & N. Dec. 819, 822 (B.I.A.1990). With some variations, all circuits adopted the *Acosta* definition of "particular

social group." *See generally* 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, 53 & n. 24 (2008) (stating federal courts "generally have followed *Acosta*" and cataloging relevant precedents) (hereinafter "The Emerging Importance of Social Visibility"). Our circuit adopted the *Acosta* definition as well, although it seemingly expanded it following the Ninth Circuit's lead to also permit social groups based on a "voluntary associational relationship among the purported members." *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir.1994) (theorizing a group of Iranian women who refuse to conform to Iranian customs relating to dress and behavior and whose opposition is so profound that they would choose to suffer the severe consequences of noncompliance "may well satisfy the definition") (citing the standard in *Sanchez–Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir.1986)).

Beginning in 2006, however, the BIA started deviating from the *Acosta* definition of "particular social group" by emphasizing the importance of social visibility of a given group. In *Matter of C–A–*, for example,[2] the BIA reiterated its adherence to *Acosta*,

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[2] The BIA signaled its intention to break away from the *Acosta* standard as early as 2001, in its decision in *Matter of R–A–*, 22 I. & N. Dec. 906 (B.I.A.2001). There, the BIA refused to accord a social group status to a group of "Guatemalan women who have been involved intimately with Guatemalan male companions who believe that women are to live under male domination." *Id.* at 917–18. Although the outcome of the opinion was unobjectionable even under the traditional *Acosta* standard, its logic was noteworthy for the BIA's insistence that the applicant

but listed "the extent to which members of a society perceive those with the characteristic in question as members of a social group" as a "relevant factor" in the analysis. 23 I. & N. Dec. 951, 956–57 (B.I.A.2006). Applying this standard, the BIA rejected the proposed social group of noncriminal drug informants working against the Cali drug cartel in Colombia in part because "the very nature of the conduct at issue is such that it is generally out of the public view." *Id.* at 960.

The BIA continued the trend in *Matter of A–M–E & J–G–U–*, 24 I. & N. Dec. 69 (B.I.A.2007), by refusing to recognize a social group of "affluent Guatemalans" targeted for ransom. The BIA acknowledged the petitioners should not be expected to divest themselves of their wealth under the second prong of *Acosta*, but denied the claim on the basis of the applicants' inability to show "social visibility," *id.* at 75 (lamenting the lack of evidence to demonstrate "the general societal perception" of wealthy people was different from the common perception of groups at different socio-economic levels), and "particularity," *id.* at 76

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demonstrate "how the characteristic is understood in the alien's society" and how "the potential persecutors … see persons sharing the characteristic as warranting suppression or the infliction of harm." *Id.* at 918. Because at the time *R–A–* was issued, the Immigration and Naturalization Service was in the process of finalizing a rule defining "membership in a particular social group," the Attorney General vacated the BIA's opinion pending the publication of that rule. *In re R–A–*, 22 I. & N. Dec. 906 (B.I.A.2001). The proposed rule would incorporate *R–A–'s* consideration of social visibility, but only as one of several non-exclusive factors. Asylum & Withholding Definitions, 65 Fed.Reg. 76,588, 76,594 (Dec. 7, 2000). Ultimately, the rule was never formalized, and the ball was back in the BIA's court to define the "particular social group" incrementally, on a case-by-case basis.

(criticizing the proposed group for being "too amorphous" and "indeterminate"). In its reasoning, the BIA drew on the Second Circuit opinion in *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir.1991), where the court required members of a cognizable social group to possess "some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general."

The biggest transformation in the BIA's "particular social group" jurisprudence, however, came in its two most recent decisions issued on the same day in 2008: *Matter of S–E–G–*, 24 I. & N. Dec. 579 (B.I.A.2008), and *Matter of E–A–G–*, 24 I. & N. Dec. 591 (B.I.A.2008). Both confronted claims of gang-related persecution under the rubric of membership in a particular social group. In *E–A–G–*, the BIA refused to recognize social groups of "young persons who are perceived to be affiliated with gangs (as perceived by the government and/or the general public)" and "persons resistant to gang membership (refusing to join when recruited)" because these groups "have not been shown to be part of a socially visible group within Honduran society, and the respondent [does not] possess[ ] any characteristics that would cause others in Honduran society to recognize him as one who has refused gang recruitment." 24 I. & N. Dec. at 593–94. In *S–E–G–*, the unsuccessful group was that of Salvadorian youth who have been subjected to recruitment efforts by the MS–13 and who have rejected and resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities. 24 I. & N. Dec. at 579. Their claim for asylum failed because, according to the BIA, it did not

fare well under the "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." *Id.* In essence, the decisions elevated the requirements of "social visibility" and "particularity" from merely some of the many factors in the holistic analysis of the issue to absolute prerequisites to establishing membership in a particular social group.

This 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." *Compare Valdiviezo–Galdamez v. Holder*, 663 F.3d 582, 603–09 (3d Cir.2011) (concluding the BIA's "social visibility" and "particularity" requirements are inconsistent with prior BIA decisions and rejecting the government's attempt to graft these additional requirements onto petitioner's social group claims); *Gatimi v. Holder*, 578 F.3d 611, 615–16 (7th Cir.2009) (criticizing the BIA's decisions in *S–E–G–* and *E–A–G–* for being "inconsistent" with the BIA's precedents in *Acosta* and *Kasinga* and for failing to explain the reasons for adopting the "social visibility" criterion); *Benitez Ramos v. Holder*, 589 F.3d 426, 430–31 (7th Cir.2009) (denouncing the BIA's insistence on "social visibility," sometimes in its literal form, and charging the BIA might not understand the difference between visibility in a social sense and the external criterion sense); *Urbina–Mejia v. Holder*, 597 F.3d 360, 365–67 (6th Cir.2010) (noting being a former gang member is an immutable characteristic and defining former members of the 18th Street gang as a "particular social group" based on their inability to change their past and the

ability of their persecutors to recognize them as former gang members), *with Lizama v. Holder*, 629 F.3d 440, 447 (4th Cir.2011) (upholding the BIA's definition of a particular social group as requiring that "(1) its members share common immutable characteristics, (2) these common characteristics give members social visibility, and (3) the group is defined with sufficient particularity to delimit its membership"); *Ramos–Lopez v. Holder*, 563 F.3d 855, 862 (9th Cir.2009) (upholding the BIA's adoption of the "social visibility" requirement); *Scatambuli v. Holder*, 558 F.3d 53, 60 (1st Cir.2009) (rejecting petitioners' claims the BIA is precluded from considering the visibility of a group); *and Fuentes–Hernandez v. Holder*, 411 Fed.Appx. 438, 438–39 (2d Cir.2011) (stating individuals who resisted gang recruitment in El Salvador do not constitute a "particular social group" because their proposed group lacked "social visibility" and "particularity" and because the alleged persecution "did not bear the requisite nexus to a protected ground").

I agree with the circuits which hold the BIA's addition of the "social visibility" and "particularity" requirements to the definition of "particular social group" is arbitrary and capricious. First, as discussed above, these newly added requirements are inconsistent with prior BIA decisions. Specifically, they are in direct conflict with the definition of "particular social group" announced in *Acosta*. By stating this, I am in no way suggesting the BIA must continue to adhere to the *Acosta* definition. I am of course cognizant the BIA may "add new requirements to, or even change, its definition of 'particular social group' " over time. *Valdiviezo–Galdamez*, 663 F.3d at 608; *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v.*

State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (stating an agency may change its interpretation of a stature or regulation over time). The BIA, however, must explain its choice for doing so because an unexplained departure from established precedent is generally "a reason for holding [the departure] to be an arbitrary and capricious change from agency practice[.]" *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S.Ct. 1800, 1811, 173 L.Ed.2d 738 (2009) (stating "the agency must show that there are good reasons for the new policy"); *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1123 (8th Cir.1999) (noting "a sudden and unexpected change in agency policy" may be characterized as arbitrary and capricious).

Because the BIA departed from its well-established *Acosta* definition without providing a reasonable explanation for its choice, the departure is arbitrary and capricious. Thus, although I am bound by our decisions in *Constanza* and *Ortiz–Puentes*, I cannot agree with our circuit's as-a-matter-of-course adoption of the BIA's new approach to defining "particular social group"—an approach which not only represents a stark departure from established precedent, but also eviscerates protections for many groups of applicants eligible under the agency's prior definition.

Therefore, I reluctantly concur in the result.

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

Bloomington, Minnesota

File A 96 056 637 Date: August 27, 2008

In the Matter of

OSCAR ALEXANDER GRANADOS GAITAN	)))))	IN REMOVAL PROCEEDINGS
Respondent	)	

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, an Alien present in the United States without having been admitted or paroled after inspection by an immigration officer.

APPLICATION: Asylum, Withholding of Removal, Withholding of Removal under the Torture Convention

APPEARANCES:

ON BEHALF OF RESPONDENTS:	ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:
Melee Ketelsen, Esquire	Terry M . Louie, Esquire Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent is a male native and citizen of El Salvador. The Respondent entered the United States at San Ysidro, California, on or about April 10, 2002, and at that time he was neither admitted, nor paroled after inspection by an immigration officer. The Respondent conceded removability in accordance with Section 212(a)(6)(A)(i) of the Immigration and Nationality Act. On the basis of the Respondent's admissions and supporting documents in the record, I find his removability as charged. The Respondent declined to designate a country for removal, and El Salvador was directed. He pled for relief from removal in the form of Asylum. That application's also considered one for Withholding of Removal. He requests Withholding of Removal under the Torture Convention in the alternative. The Respondent does not request Voluntary Departure.

The documents in the record include the Respondent's application for political asylum, and certain supportive elements of documentary evidence, which include the Respondent's birth certificate, employment authorization, his high school ID card. We also have various background materials as they relate to country conditions in El Salvador. All of these documents, including the Respondent's amended application for political asylum, have been carefully considered for this oral decision. In his written applications for relief, the Respondent briefly set forth the facts and circumstances surrounding his claim, although they are not particularly specific. The Respondent also testified in behalf of his claim, again, not in a particularly specific fashion. Today the

Respondent indicated that he is 19 years old, and that he was born in El Salvador, and that he came to the United States in 2002 when he was 15 years of age. He traveled with unknown individuals. The Respondent traveled through Guatemala and Mexico. His parents are in Minnesota, and the Respondent also has a sister in the United States, and other brothers who were born in the United States. The Respondent stated that he left El Salvador because he is afraid of the gangs that operate there. Specifically, the Respondent indicated that he's afraid of the MS, or Mara Salvatrucha, gang. The Respondent indicated very generally the gang members tried to get him to join their gang while he was still living in El Salvador. He indicated that he felt pressure to join this gang, and that he was threatened by a member of the Mara Salvatrucha, and told that either he or his sister would be injured if he didn't join the gang. The Respondent stated that he is against gang membership. He also indicted that he believes that if he is returned to El Salvador, he will again be pressured to join a gang, and if he refuses he will be beaten, and then he will be ultimately again searched for, and then again threatened, and then ultimately killed if he refuses to join the gang. Respondent stated that he was asked to belong to a gang when he was 12 years old. He did not give any specifics about that request. The Respondent basically stated that nothing happened to him because, fortunately, every time that he was somehow around any gang members he was with adults who apparently protected him. The Respondent stated that here in the United States he was enrolled in a construction school, and he wants to continue to further his education.

On cross examination he was asked whether others in his neighborhood were recruited by gang members, and he stated that they were. He also explained to us that his mother has TPS, and his father has an Asylum application pending, and that he believed his mother had an Asylum application pending. He was asked whether or not he reported any of these interactions with gang members to the police, and initially he stated no, and then stated that, yes, once he did report the information to the police, and was shown a list of gang members who he identified, not by name, but by description. He gave no other specifics. Earlier, when he had stated that he did not report any of the gang membership to the police, he stated that it would have been too difficult to do so because the police station's apparently one and a half hours away from his home.

Analysis and Finding

The burden of proof is on the Respondent to show that he's eligible for Asylum, Withholding of Removal. To qualify for Asylum the Respondent has to show the subjective fear of persecution, and the objective basis of this fear, which is described in the regulations as a reasonable possibility of actually suffering persecution if the Respondent was forced to return to his home country. The objective component has to be supported by credible, direct, and specific evidence in the record, and the Respondent has to be unable or unwilling to return to, or avail himself of the protections of, his home country because of his fear, and he has to establish that he merits Asylum as an exercise of discretion. See Matter of Pula, 19 I&N Dec. 467 (BIA 1987). In evaluating a claim of future persecution an Immigration Judge does not have to require Respondent to provide evidence that he'd be singled

out individually for persecution, if he can establish a pattern of practice in his home country of persecuting those similarly situated to him on one of the five enumerated grounds, and that he's identified or included with this group. With respect to past persecution, one who establishes he has suffered past persecution within the meaning of the Act is presumed to have well-founded fear of future persecution. However, that presumption's rebuttable by a preponderance of the evidence showing that since the persecution occurred, conditions in the Respondent's home country have changed to such an extent that the Respondent no longer has a well-founded fear of being persecuted if he were forced to return.

One who establishes past persecution, but not a well-founded fear of future persecution, is denied Asylum unless there are compelling reasons not to return him arising out of the severity of the past persecution. Matter of Chen, 20 I&N Dec. 16 (BIA 1989). The Respondent's testimony for political asylum sometimes is the only evidence available, and can suffice where it's believable, consistent, and sufficiently detailed in light of country conditions to provide a plausible account for the fear. See Matter of Dass, 20 I&N Dec. 120, 124 (BIA 1989). This is very true in Respondents who flee their countries unable to carry evidence, or are unable now to procure evidence without endangering themselves or others. However, Respondent's are well advised that corroborating material's not superfluous or optional, and it must be presented when it is available. See Matter of S-M-J-, Int. Dec. 3303 (BL~ 1997), and Matter of Dass, supra. However, always a successful Asylum claim is based on competent, credible evidence, and it is reasonable to

expect an applicant for Asylum to present whatever he can in support of his request, and one who does not has to carry his request through his testimony alone.

In this particular case, the first threshold issue is whether or not the Respondent is eligible to go forward with his Asylum claim. Respondent entered the United States in 2002. However, we do not have an application specifically from the Respondent until 2008. However, it is important to note that the Respondent entered the United States as a child, and may very well have been either on his father's, or on his mother's Asylum application, or on both of their Asylum applications. I have no corroborative evidence of this, but the Respondent's attorney has so speculated. The Respondent has recently hit the age of majority, and it is, therefore, reasonable that the Respondent has now applied for political asylum. Therefore, his application for Asylum is not deemed to be pretermitted, and will be accepted as filed within the statutory period required to file an application for political asylum.

However, despite the fact that the Respondent has been able to show that he can for forward with his Asylum application, has not established that the Respondent has presented the claim that is sufficiently detailed, believable, and consistent to stand in support of his petition for relief. See N-Y-B-, Int. Dec. 3337 (BIA 1988). See also In re E-P-, Int. Dec. 3311 (BIA 1997), and Matter of Dass, supra. The whole of the Respondent's application for political asylum, both in written form and in oral testimony, is very vague and devoid of detail. The Respondent, for example, in testimony today basically stated that at age 12 several times he was approached by gang members who wanted him to join the Mara Salvatrucha gang, but he

was with adults and nothing happened to him. There was no other specific information given about these incidences as to when exactly was the Respondent approached, and what exactly transpired during this approach. The Respondent also first indicated that he never reported these gang altercations to the police, because the police headquarters was an hour and a half away and, presumably, it would have been difficult for him to get to the police, though he then immediately thereafter stated that one time he did report to the police his altercation with a gang member, and he was shown a list of gang members, and he identified them by description, but not by name. The Respondent, again, did not provide any details, did not tell us when he had this interview with the police, nor what transpired thereafter.

This was the only testimony the Respondent gave, and did not offer anything else more cohesive in the line of testimony. His two applications for political asylum are also very scant and devoid of detail. I, therefore, cannot make a positive credibility finding in this case. The Respondent simply has not put forth a petition for political asylum that can be considered detailed, believable, and consistent to adequately support his claim. Since the petitions for relief and Respondent's oral testimony do not meet the criteria necessary to make a positive credibility finding, it behooves the Respondent to present additional information in support of his petition for relief. The Respondent, unfortunately, has not met his burden to provide that type of corroborative evidence. He certainly could have been able to provide letters or affidavits from individuals who witnessed his altercations with the gang members. The Respondent

had testified that some adults were involved and, presumably, protected him from these gang members when they approached him. He has not submitted any letters or affidavit from these individuals, nor has he explained why this material has not been presented. There is nothing to corroborate the Respondent's claim. He does, however, have in the record some background material, which indicates that there is widespread gang membership in El Salvador, and that material will, in fact, be considered as proof that there is a widespread gang activity in El Salvador.

While the Court has not been able to make a positive credibility finding in this case, the Court will find in the alternative that even if the Respondent's testimony and his written applications for political asylum are found to be sufficient to establish the facts and circumstances of his claim, the Respondent still has not been able to show that he is eligible for political asylum as either one who's a member of a particular social group who has resisted gang members or, two, as one who has a political opinion against the gangs of El Salvador. The Board of Immigration Appeals has recently issued two precedent decisions. See Matter of S-E-G-, 24 I&N Dec. 579 (BIA 2008), and Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008), which deals specifically with gang membership, and the definitions of a particular social group as they relate to individuals who either are recruited by gang members, or are perceived to be affiliated with gang members. In Matter of S-E-G-, supra, the Board of Immigration Appeals held that neither Salvadorian youth who have been subjected to recruitment efforts by the MS-13 gang, and those who have rejected or resisted membership in the gang based on their own personal

moral and religious opposition to the gang values and activities, nor their family members, would constitute a particular social group. In Matter of E-A-G-, supra, the Board of Immigration Appeals held that membership in a criminal gang cannot constitute membership in a particular social group, and that the Respondent in that particular case could not establish that he was a member of a particular social group of young people who are perceived to be affiliated with gangs, based on the incorrect perception of others that he is such a gang member. These two companion cases clearly establish necessary precedent for the facts and circumstances surrounding the Respondent's claim for political asylum.

On the issue of a particular social group, while the Respondent himself has not developed his analysis very much either in his testimony, or in his written application for political asylum, the Court will presume that the Respondent is suggesting that he is a member of particular social group because he is one who does not want to belong to a gang, and has been recruited for gang membership. In Matter of S-E-G-, supra, the Court found that individuals similarly situated to our Respondent in this particular case would not be considered a social group which is defined with any form of particularity. The Court went on to indicate that there really is no evidence in the record to show the gang members limit recruitment to male children that fit a particular description, or they do so in order to punish them for these characteristics. In this particular case, the Respondent also has not establish in his record that gang members limited recruitment to male children similarly situated to the Respondent and, as a matter of fact, he indicated that many people in his

neighborhood had been approached by gang members in order to recruit these individuals for gang membership. Also, the Court in that particular case stated that there were many motivations of gang members in recruiting and targeting young males, and those motivations could be very different from the perception that these males belong to a particular class. In that case, the Court held that no class could be delineated by the facts and circumstances presented in Matter of S-E-G-. Again, in this particular case the facts are very similar, and in this particular case also it is impossible to establish that a class has been delineated based on the facts and circumstances as presented.

Additionally, the Court in S-E-G- adopted the 2002 guidelines of the United Nations High Commissioner for Refugees, which endorses an approach in judging whether or not the members of a group are perceived as a group by society. Again, the Court found that the Respondents in S-E-G- would not be so perceived, because there was little evidence in the record to indicate that Salvadorian youth who are recruited by gangs but refuse to join, would be perceived as a group by the society there, or that those people would suffer from a higher incidence of crime than the rest of the population. The Respondent in this particular case has also failed to establish that he and other individuals in his purported group would suffer from a higher incidence of crime than the rest of the population from these gang members. The Court relied on background material, specifically the State Department reports, that do not suggest that victims of gang recruitment are exposed to more violence or human rights violations than other segments of society. The Court

concluded that the proposed group, which, presumably, would consist of young Salvadorians who have been subject to recruitment efforts by criminal gangs but have refused to join, does not qualify as a particular social group. The Court went further to say that the family members of these individuals also would not constitute a particular social group. The facts in this particular case are very similar. Matter of S-E-G- appears to be controlling, and as such, with respect to a particular social group, I find that the Respondent has not established that he belongs to a particular social group.

On the issue of political opinion, the Respondent seems to have suggested also that he is against gangs and, therefore, has in some very vague fashion attempted to establish that he has a anti-gang political opinion. The Court in Matter of S-E-G- touched also on this issue of political opinion, and found that there was no indication that the gang members pursued the Respondents in that case because of their alleged political opinion, either actual, or imputed. The Court went on to state that the motivation of the gang members was not to punish the Respondents in that case based on their social group, political opinion, or other protected characteristics, and that the Respondents in that case have not shown the nexus required by the definition of a refugee. The same holds true in this particular case. The Respondent here has failed to demonstrate that he has been persecuted, or has a well-founded fear of persecution, based on any either actual, or imputed, political opinion. Therefore, his petition for Asylum must be denied on both of these grounds. The Respondent has failed to make a showing that he has suffered past persecution, and also failed to

make a showing that he will be subjected to future persecution if forced to return to his home country. The Respondent's application for Asylum is denied.

Withholding of Removal as to El Salvador

The Respondent, in the alternative, has made petition for Withholding of Removal as to El Salvador. In order to establish the elements required for Withholding of Removal, the Respondent's facts have to show a clear probability that his life or freedom would be threatened in the country directed for removal, because of race, religion, nationality, membership in a particular social group, or political opinion. See INS v. Stevic, 467 U.S. 407 {1984). This means that the Respondent's facts have to establish that it is more likely than not that he'd be subject to persecution under one of these specified grounds. The Respondent has set forth no facts or circumstances to show that it's more likely than not that he would be persecuted under one of these specified grounds. The Respondent has not been able to establish that he has membership in a particular social group, nor has he been able to establish that he has a political opinion either direct, or imputed to him, which would qualify him for the relief of Withholding of Removal as to El Salvador. As such, his applications for relief under Withholding of Removal is denied.

Withholding of Removal Under the Torture Convention

In the alternative, the Respondent has made application for Withholding of Removal under the Torture Convention. It is the Respondent who bears the burden of showing that it is more likely than not that he would be tortured if forced to return to his home country. Again, the Respondent has set forth no

facts or circumstances to show that it is more likely than not that he would be tortured if forced to return to El Salvador, and as such, his application for Withholding of Removal under the Torture Convention must also be denied. The Respondent has not petitioned for Voluntary Departure.

ORDERS

IT IS HEREBY ORDERED that the Respondent's application for Asylum be denied.

IT IS FURTHER ORDERED that Respondent's application for Withholding of Removal as to El Salvador be denied.

IT IS FURTHER ORDERED the Respondent's application for Withholding of Removal under the Torture Convention be denied.

IT IS FURTHER ORDERED that the Respondent be removed from the United States to El Salvador on all of the charges as they are contained in his Notice to Appear.

s/ Roxanne Hladylowycz
ROXANNE HLADYLOWYCZ
Immigration Judge

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A096 056 637 – Bloomington, MN

Date: Mar -3 2010

In re: OSCAR ALEXANDER GRANADOS GAITAN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
David L. Wilson, Esquire

ON BEHALF OF DHS: Terry M. Louie
Senior Attorney

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent has appealed from an Immigration Judge decision denying his application for asylum, withholding of removal and protection under the Convention Against Torture. The appeal will be dismissed.

We review the findings of fact, including determinations of credibility, made by the Immigration Judge under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including

whether or not the parties have met the relevant burden of proof, and issues of discretion, under a *de novo* standard. 8 C.F.R. § 1003.1(d)(3)(i). As the asylum application was filed after May 11, 2005, our assessment of this case is governed by the REAL ID Act. *See Matter of S-B-*, 24 l&N Dec. 42 (BIA 2006).

The respondent, a native and citizen of El Salvador, testified to problems in that country with the Mara Salvatrucha (MS-13) criminal gang. The respondent testified that when he was 12 years old, the gang attempted to recruit him into their ranks, threatening him and his family. He left the country shortly thereafter and has been living in the United States since that time. He is now 21-years old. The Immigration Judge found the respondent lacked credibility due to the vague and nonspecific nature of his testimony and that he failed to provide sufficient corroboration for his claim. Because the Immigration Judge failed to specify discrepancies or inconsistencies sufficicnt to support an adverse credibility determination, we will presume the respondent to be credible.

The Immigration Judge also cited our recent precedent decisions finding that gang recruitment activities do not, in general, constitute a proper basis for asylum in this country. *See Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008) (stating that Salvadoran youths who reject or resist membership in MS-13 are neither socially visible nor part of a group with "particular and well-defined boundaries"); *Matter of E-A-G-*. 24 I&N. Dec. 591, 594-95 (BIA 2008) ("Persons who resist joining gangs have not been shown to be part of a socially visible group within Honduran society."). The Eighth Circuit has affirmed the Board's

approach in these cases. *Marroquin-Ochoma v. Holder*, 574 F.3d 574, 578 (8th Cir. 2009). We conclude that the Immigration Judge correctly denied asylum on this basis.

The respondent attempts to distinguish our precedents by arguing that the government of El Salvador mistreats those associated with gangs or those believed to be associated. Nothing in the record, other than his age, indicates that the respondent would be the victim of such mistreatment and the record does not support the conclusion that a 21-year old Salvadoran would face mistreatment on this basis alone. The Seventh Circuit decision cited by the respondent is not controlling, particularly in light of *Marroquin-Ochoma v. Holder*, *supra*. In addition, the cited case involved a former gang member, whereas the respondent bases his claim on having resisted gang recruitment. *Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

On appeal, the respondent argues that the Immigration Judge erred in requiring corroboration to find him credible and that the Immigration Judge did not consider the extensive evidence he did submit concerning country conditions in El Salvador. As the respondent has not presented evidence that the problems he had in El Salvador were on account of a ground protected under the Act, we need not address these issues at this time. Moreover, while recognizing the differences in eligibility requirements, the respondent has also failed to demonstrate eligibility for protection under the Convention Against Torture. *See Marroquin-Ochoma v. Holder*, *supra*.

ORDER: The appeal is dismissed.

s/ Edward R. Grant
FOR THE BOARD

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 10-1724

Oscar Alexander Granados Gaitan

Petitioner,

v.

Eric H. Holder, Jr., Attorney General of the United States,

Respondent.

United Nations High Commissioner for Refugees

Amicus Curiae

Appeal from Board of Immigration Appeals
(A096-056-637)

JUDGMENT

This cause was submitted on petition for review of an order from the Board of Immigration Appeals, on the original record and briefs of the parties, and argued by counsel.

After consideration, it is hereby ordered and adjudged that the petition for review is denied in accordance with the opinion of this court.

March 01, 2012

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Oscar Alexander Granados GAITAN,
Petitioners,

v.

Eric H. HOLDER, Jr. Attorney General of the United States,
Respondents.

No. 10-1724.

June 7, 2012

2012 WL 2036972

The petition for rehearing en banc is denied. The petition for panel rehearing is also denied.

COLLOTON, Circuit Judge, concurring in denial of rehearing en banc.

I believe the panel opinion and dissent, *Gaitan v. Holder*, 671 F.3d 678 (8th Cir.2012), erred in refusing to decide whether the Board of Immigration Appeals in *Matter of S–E–G–*, 24 I & N. Dec. 579, 582 (BIA 2008), validly declared "social visibility" and "particularity" to be "requirements" of a "particular social group" for purposes of 8 U.S.C. § 1101(a)(42)(A). As the petition for rehearing details, the argument advanced by the petitioner in this case was not raised in either *Costanza v. Holder*, 647 F.3d 749 (8th Cir.2011), or *Ortiz–Puentes v. Holder*, 662 F.3d 481 (8th Cir.2011). Even the

government, while urging denial of rehearing, acknowledges that this court "was not confronted with a direct challenge to the adoption of those considerations as 'requirements' in the prior cases." Opp'n to Pet. for Panel Reh'g or Reh'g En Banc at 8–9. The prior panel decisions are thus comparable to *Zelaya v. Holder*, 668 F.3d 159 (4th Cir.2012), where the alien petitioner did "not challenge *Matter of S–E–G–* as wrongly decided," but rather argued that his proposed social group was distinguishable from the proposed group rejected in *Matter of S–E–G–*. *Id.* at 165. As such, the Fourth Circuit had no occasion to decide whether *Matter of S–E–G–* passed muster under the arbitrary or capricious standard of the Administrative Procedure Act or was a permissible interpretation of the Immigration and Nationality Act. *Id.* at 165 n. 4. So too with our prior panel decisions. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37–38 (1952) (stating that a prior decision's implicit resolution of an issue that was not "raised in briefs or argument nor discussed in the opinion of the Court" is "not a binding precedent"); *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."); *Streu v. Dormire*, 557 F.3d 960, 964 (8th Cir.2009) ("[W]e are generally not bound by a prior panel's implicit resolution of an issue that was neither raised by the parties nor discussed by the panel.").

The panel, however, has denied rehearing, so the full court must decide whether to address the validity of *Matter of S–E–G* in the first instance in an en banc proceeding. Reserving judgment on the merits, I vote

to deny rehearing en banc for four principal reasons. First, while the panel overstated the precedential effect of our circuit precedents, the decision does not expressly hold that panel opinions must be considered binding on points that are not actually litigated. The threat to uniformity of this court's decisions is thus not sufficiently great to warrant rehearing en banc on that basis alone. Second, it appears that a conflict in the circuits regarding the validity of *Matter of S–E–G–* will exist no matter how this court decides the question. *Compare Valdiviezo–Galdamez v. Holder*, 663 F.3d 582, 603–09 (3d Cir.2011), and *Gatimi v. Holder*, 578 F.3d 611, 615–16 (7th Cir.2009), with *Rivera–Barrientos v. Holder*, 666 F.3d 641, 650–52 (10th Cir.2012). Third, the courts that have rejected *Matter of S–E–G–* have done so based on deficiencies in the reasoning of the agency. The Board, therefore, might respond to these decisions with a new opinion that would change the framework for future litigation. *Cf. Valdiviezo–Galdamez*, 663 F.3d at 615–18 (Hardiman, J., concurring in judgment). Fourth, if the Board does not revisit the matter, then this court remains free to consider the validity of *Matter of S–E–G–* in a future case when the Board's approach seems more likely to affect the outcome. Petitioner's proposed social group (young males who refused to join a particular gang in El Salvador because of moral or religious opposition to gangs) and its variants have been uniformly rejected by those courts that have reached the ultimate merits. *See Zelaya*, 668 F.3d at 167; *Ortiz–Puentes*, 662 F.3d at 483; *Mendez–Barrera Holder*, 602 F .3d 21, 26–27 (1st Cir.2010); *Ramos–Lopez v. Holder*, 563 F.3d 855, 858–62 (9th Cir.2009); *see also Gatimi*, 578 F.3d at 616 (expressing "no quarrel" with the rejection of proposed social group in *Ramos–Lopez*).

For these reasons, I concur in the denial of rehearing en banc.

Judges MURPHY, BYE and MELLOY would grant the petition for rehearing en banc.

8 U.S.C. § 1101

United States Code
Title 8. Aliens and Nationalit
Chapter 12. Immigration and Nationality
Subchapter I. General Provisions

§ 1101. Definitions

(a) As used in this chapter--

* * *

(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, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion,

nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

* * *