No. 11-1525

In the Supreme Court of the United States

OSCAR ALEXANDER GRANADOS GAITAN, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether persons who resist recruitment by gangs in El Salvador constitute a "particular social group" under the asylum provisions of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 671 F.3d 678. The decisions of the Board of Immigration Appeals (Pet. App. 30a-33a) and the immigration judge (Pet. App. 17a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 2012. A petition for rehearing was denied on June 7, 2012 (Pet. App. 36a-39a). The petition for a writ of certiorari was filed on June 20, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security or the Attorney General may grant asylum to an alien who demonstrates that he is a "refu-

gee." 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien "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). The burden is on the alien to show that he qualifies as a refugee. 8 C.F.R. 208.13(a), 1208.13(a). An alien must show that one of the enumerated grounds is "at least one central reason" for his persecution. 8 U.S.C. 1158(b)(1)(B)(i); see *In re J-B-N- & S-M-*, 24 I. & N. Dec. 208, 212 (B.I.A. 2007).[1]

The INA does not further define "particular social group." In 1985, the Board of Immigration Appeals (Board) described that phrase as referring to 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." *In re Acosta*, 19 I. & N. Dec. 211, 233 (1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (1987). The Board suggested that the shared characteristic "might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership."

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[1] Similar to asylum, the provision of the INA addressing withholding of removal requires a showing that the alien's "life or freedom would be threatened" in the country of removal because of "the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). The source and meaning of these five grounds are the same under the asylum and withholding-of-removal provisions. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 440-441 (1987).

Acosta, 19 I. & N. Dec. at 233. The Board emphasized, however, that whether a proposed group qualifies "remains to be determined on a case-by-case basis." *Ibid.*

Between 1985 and 1997, the Board's precedential decisions identified four "particular social groups": persons identified as homosexuals by the Cuban government;[2] members of the Marehan subclan of the Darood clan in Somalia;[3] "young women of the Tchamba-Kunsuntu Tribe [of northern Togo] who have not had [female genital mutilation (FGM)], as practiced by that tribe, and who oppose the practice";[4] and Filipinos of mixed Filipino and Chinese ancestry.[5] The Board also suggested that, "in appropriate circumstances," an alien could establish a valid asylum claim based on persecution as a "former member of the national police" of El Salvador.[6] Some of those decisions relied not only on an immutable/fundamental group characteristic, but also on whether the group is generally recognizable in the pertinent society. See *In re V-T-S-*, 21 I. & N. Dec. 792, 798 (B.I.A. 1997) (relying on evidence that a percentage of the population had "an identifiable Chinese background") (citation omitted); *In re H-*, 21 I. & N. Dec. 337, 342-343 (B.I.A. 1996) (reasoning that "clan membership is a highly recognizable, immutable characteristic" and that clan members were "identifiable as a group based upon linguistic commonalities").

Between 2006 and 2008, in response to the evolving nature of claims presented by aliens seeking asylum and

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[2] *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 821-823 (B.I.A. 1990).

[3] *In re H-*, 21 I. & N. Dec. 337, 341-343 (B.I.A. 1996).

[4] *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

[5] *In re V-T-S-*, 21 I. & N. Dec. 792, 798 (B.I.A. 1997).

[6] *In re Fuentes*, 19 I. & N. Dec. 658, 662-663 (B.I.A. 1988).

developing case law in the courts of appeals, the Board issued four precedential decisions that were designed to provide "greater specificity" in defining the phrase "particular social group." *In re S-E-G-*, 24 I. & N. Dec. 579, 582 (B.I.A. 2008). Those decisions restated the immutable/fundamental characteristic requirement. See *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 73-74 (B.I.A.), aff'd *sub nom. Ucelo-Gomez* v. *Mukasey*, 509 F.3d 70 (2d Cir. 2007) (per curiam); *In re C-A-*, 23 I. & N. Dec. 951, 956 (B.I.A.), aff'd *sub nom. Castillo-Arias* v. *United States Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006), cert. denied, 549 U.S. 1115 (2007). They also "reaffirmed" (*A-M-E- & J-G-U-*, 24 I. & N. Dec. at 74) that, consistent with the Board's previous decisions, an important factor is whether the proposed social group possesses a recognized level of "social visibility," which describes "the extent to which members of a society perceive those with the characteristic in question as members of a social group." *In re E-A-G-*, 24 I. & N. Dec. 591, 594 (B.I.A. 2008). The Board explained that this approach was consistent with its prior decisions, which had considered the "recognizability" of a proposed group. See *id.* at 594 (citing *C-A-*, *supra*); *S-E-G-*, 24 I. & N. Dec. at 586-587 (same).

The Board's recent decisions also explained that the analysis of "particular social group" claims involves consideration of whether the group in question is defined with sufficient "particularity." *A-M-E- & J-G-U-*, 24 I. & N. Dec. at 74, 76; *C-A-*, 23 I. & N. Dec. at 957. The proposed group must be sufficiently defined to "provide an adequate benchmark for determining group membership." *A-M-E- & J-G-U-*, 24 I. & N. Dec. at 76; see *ibid.* (stating that "[t]he terms 'wealthy' and 'affluent' standing alone are too amorphous to provide an adequate

benchmark for determining group membership"). The Board further stated that it will consider whether the proposed group "share[s] a common characteristic other than their risk of being persecuted," or instead is "defined *exclusively* by the fact that [the group] is targeted for persecution." *C-A-*, 23 I. & N. Dec. at 956, 960 (citation omitted); see *id.* at 957 (finding group of "noncriminal informants" "too loosely defined to meet the requirement of particularity").

In the two most recent of its precedential decisions, the Board applied the above considerations in addressing, and rejecting, claims of asylum based on resistance to gang recruitment. In *S-E-G-*, the Board rejected a proposed social group of "Salvadoran youth who have been subjected to recruitment efforts by [MS-13 (the Mara Salvatrucha gang)] and who have rejected or 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 581, 588. And in *E-A-G-*, the Board rejected a proposed social group of young "persons resistant to gang membership" in Honduras. 24 I. & N. Dec. at 593.

2. Petitioner is a native and citizen of El Salvador who entered the United States without authorization in 2002. Pet. App. 1a-2a. The Department of Homeland Security initiated removal proceedings against petitioner in 2007. *Id.* at 2a. Petitioner admitted the factual allegations in the Notice to Appear and conceded that he was removable under 8 U.S.C. 1182(a)(6)(A)(i) as an alien present in the United States without being admitted or paroled. Pet. App. 2a, 18a. Petitioner applied for asylum, withholding of removal, and protection under the federal regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrad-

ing Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85, in the immigration context. Pet. App. 2a, 18a. As the basis for these forms of relief, petitioner claimed that he had been threatened with harm in El Salvador by members of MS-13 seeking to recruit him, whose entreaties he had resisted. *Id.* at 2a, 19a. Petitioner further claimed that he would again be pressured to join the gang if he returned to El Salvador and ultimately killed if he continued to refuse. See *id.* at 2a, 19a-20a.

The immigration judge (IJ) denied petitioner's applications for asylum, withholding of removal, and CAT protection. Pet. App. 17a-29a. The IJ concluded that petitioner's testimony about being approached by gang members in El Salvador was not sufficiently detailed, believable, or consistent to establish his eligibility for asylum, and that petitioner had not presented sufficient corroboration of his testimony to warrant a positive credibility finding. *Id.* at 22a-24a.

The IJ further concluded that even if petitioner's testimony had been credible, he still would not be entitled to relief from removal. Pet. App. 24a. The IJ assumed that petitioner was claiming he belonged to a "particular social group" of people who resist gang recruitment. *Id.* at 25a. Citing the Board's decisions in *S-E-G-*, *supra*, and *E-A-G-*, *supra*, the IJ concluded that petitioner had not shown that gang members recruited people with any specific characteristics. Pet. App. 25a-26a. The IJ further explained that petitioner had not shown that the members of his claimed social group "are perceived as a group by society" or would "suffer from a higher incidence of crime than the rest of the population." *Id.* at 26a. The IJ further concluded that petitioner was not

entitled to asylum based on an "anti-gang political opinion." *Id.* at 27a. The IJ denied petitioner's applications for asylum, withholding of removal, and CAT protection. *Id.* at 28a-29a.[7]

The Board dismissed petitioner's appeal. Pet. App. 30a-33a. The Board presumed petitioner to be credible but agreed with the IJ that "gang recruitment activities do not, in general, constitute a proper basis for asylum in this country." *Id.* at 31a-32a (citing *S-E-G-*, *supra*; *E-A-G*, *supra*; *Marroquin-Ochoma* v. *Holder*, 574 F.3d 574, 578 (8th Cir. 2009)). The Board further rejected for lack of evidence petitioner's argument that he would be mistreated by the Salvadoran government because it would believe that he was associated with a gang. *Id.* at 32a.

3. a. The court of appeals denied a petition for review. Pet. App. 1a-8a. The court noted that the phrase "particular social group" is not defined in the INA, and that the court would "give *Chevron* deference to the BIA's reasonable interpretation of the phrase * * * unless it is arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 4a (internal quotation marks and citation omitted) (citing *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-844 (1984)).

The court explained that it had previously held 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), that "a social group requires sufficient particularity and visibility such that the group is perceived as a cohesive group by society," and that "persons resistant to gang violence are too diffuse to be recognized as a particular social group." Pet. App. 6a-7a (internal

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[7] Petitioner does not challenge the agency's denial of his applications for withholding of removal or CAT protection. See Pet. i.

quotation marks and citations omitted). The court thus concluded that the Board's definition of "particular social group" could not be considered arbitrary or capricious. *Id.* at 7a. The court explained that petitioner's proposed 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," and that petitioner "is no different from any other Salvadoran . . . [who] has experienced gang violence." *Id.* at 7a-8a (internal quotation marks and citation omitted).

b. Judge Bye concurred. Pet. App. 8a-16a. He believed that the Board's addition in *S-E-G-*, *supra*, and *E-A-G-*, *supra*, of the "particularity" and "social visibility" criteria to the "particular social group" definition conflicted with the Board's definition of that term in *Acosta*, *supra*. Pet. App. 15a. Judge Bye stated that he was "in no way suggesting" that the Board could not modify that definition over time, but that doing so "without providing a reasonable explanation for its choice" was arbitrary and capricious. *Id.* at 15a-16a. Judge Bye nevertheless agreed that the petition for review should be denied based on circuit precedent. *Id.* at 8a.

c. The court of appeals denied a petition for rehearing. Pet. App. 36a-39a. Judge Colloton concurred in the denial. *Ibid.* Judge Colloton believed that the panel should have considered and ruled on the validity of the Board's "particularity" and "social visibility" criteria because those criteria had not been directly challenged in prior Eighth Circuit cases. *Id.* at 36a. Although Judge Colloton expressed no view on the merits of that question, he noted that other courts had rejected the Board's requirements "based on deficiencies in the reasoning of the agency," and that "[t]he Board, therefore,

might respond to th[o]se decisions with a new opinion that would change the framework for future litigation." *Id.* at 38a. Judge Colloton further explained that if the Board did not revisit the matter, the court of appeals would remain free to consider the validity of the Board's criteria "in a future case when the Board's approach seems more likely to affect the outcome," noting that petitioner's proposed gang-recruitment social group had been "uniformly rejected by those courts that have reached the ultimate merits." *Ibid.*

Judges Murphy, Bye, and Melloy would have granted the petition for rehearing en banc.

ARGUMENT

Petitioner seeks further review (Pet. 12-34) of the court of appeals' conclusion that he failed to demonstrate membership in a "particular social group" for purposes of the INA's asylum provisions. The decision of the court of appeals is correct, and it does not conflict with any decision of another court of appeals. In addition, to the extent that there is disagreement among the circuits about the validity of the Board's general approach to assessing "particular social group" claims, that disagreement leans heavily in favor of the government's position, it is limited to the clarity of the Board's reasoning rather than error in the standard, and any review by this Court would be premature until the Board has responded to the courts of appeals that have looked for greater clarity in its decisions and the courts then have an opportunity to consider the matter further. In any event, this case would be a poor vehicle for further review of the question presented, because petitioner has not demonstrated that he would be persecuted on account of his membership in a "particular social group"

even without considerations of "social visibility" and "particularity."

The Court has recently denied review in other cases seeking review of the Board's reliance on social visibility to define a "particular social group." See *Pierre* v. *Holder*, 132 S. Ct. 2771 (2012) (claimed particular social group of security guards employed by the United States Embassy in Haiti); *Hernandez-Navarrete* v. *Holder*, 132 S. Ct. 1910 (2012) (claimed membership in a particular social group of "young Salvadoran men who refuse to join gangs"); *Contreras-Martinez* v. *Holder*, 130 S. Ct. 3274 (2010) (claimed membership in a particular social group of "adolescents in El Salvador who refuse to join the gangs of that country because of their opposition to the gangs' violent and criminal activities").[8] The same result is appropriate here.

1. The court of appeals' decision is correct. As explained above, in exercising its authority to interpret the INA, the Board has, through a series of decisions, developed and refined its interpretation of the term "particular social group." Based upon its experience and the types of social group claims it has reviewed, the Board has determined that a "particular social group" generally is a group of persons: (1) sharing a common, immutable characteristic that members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences; (2) whose members are perceived as a group by the relevant society due to the shared characteristic;

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[8] A similar question is presented in the pending petition in *Velasquez-Otero* v. *Holder*, petition for cert. pending, No. 11-1321 (filed May 1, 2012) (claimed particular social group of Hondurans who have been recruited by, and have refused to join, gangs based on their opposition to gang membership).

(3) that is sufficiently defined to provide an adequate benchmark for delineating the group; and (4) that is not defined exclusively by the fact that its members have been targeted for persecution. See *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 73, 74, 76 (B.I.A.), aff'd *sub nom. Ucelo-Gomez* v. *Mukasey*, 509 F.3d 70 (2d Cir. 2007) (per curiam); *In re C-A-*, 23 I. & N. Dec. 951, 957, 960 (B.I.A.), aff'd *sub nom. Castillo-Arias* v. *United States Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006), cert. denied, 549 U.S. 1115 (2007); see also pp. 3-5, *supra*.

Because the INA does not define the term "particular social group," see Pet. App. 4a (stating that the term "is not expressly defined in the INA"), the Board's interpretation of that term is entitled to deference so long as it is a "fair and permissible" reading of the statute. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 428 (1999); see *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-845 (1984); see also *Holder* v. *Martinez Gutierrez*, 132 S. Ct. 2011, 2017 (2012) (explaining that under *Chevron*, the Board's "position prevails if it is a reasonable construction of the statute, whether or not it is the only possible interpretation or even the one a court might think best"). As relevant here, the Board has reasonably concluded that particularity and social visibility are relevant criteria in deciding whether to recognize a proposed social group. The Board explained that the "particularity" and "social visibility" criteria are designed to "give greater specificity to the definition of a social group," which was initially defined as "a group whose members '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.'" *In re S-E-G-*, 24 I. & N. Dec. 579, 582-583 (B.I.A. 2008) (quoting *In re*

Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987)). The Board further explained that the phrase "particular social group" should be construed such "that the shared characteristic of the group should generally be recognizable by others in the community." *S-E-G-*, 24 I. & N. Dec. at 586-587; see *C-A-*, 23 I. & N. Dec. at 959-960. The Board also relied on guidelines adopted by the Office of the United Nations High Commissioner for Refugees (UNHCR), which "confirm that 'visibility' is an important element in identifying the existence of a particular social group." *Id.* at 960.[9] The Board's consideration of particularity and social visibility in assessing an alien's claim of membership in a particular social group is therefore reasonable.

2. The Board has long been of the view that whether a proposed group qualifies as a "particular social group" must "be determined on a case-by-case basis." *C-A-*, 23

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[9] Petitioner contends (Pet. 6-7, 12-13, 25-27) that the Board's decision is unreasonable because the UNHCR's guidelines adopted a disjunctive test in which groups that either have an immutable characteristic or are socially visible constitute a "particular social group." There is no requirement that the Board, which has interpretive authority under the INA, must follow the broadest interpretation of the UNHCR guidelines—especially UNHCR guidelines, like those here (Pet. 6), that were adopted long after enactment in 1980 of the asylum provisions of the INA—for its interpretation of the INA to be reasonable. This Court has recognized that the UNHCR's guidelines may be "useful interpretive aid[s]," but they are "not binding on the Attorney General, the BIA, or United States courts." *Aguirre-Aguirre*, 526 U.S. at 427. The Board's interpretation is binding if it is a "permissible construction of the statute." *Id.* at 424; see *Rivera-Barrientos* v. *Holder*, 666 F.3d 641, 650 (10th Cir. 2012) (concluding that "any variation from the [UNHCR] Guidelines does not in itself establish that the BIA's interpretation is unreasonable").

I. & N. Dec. at 955 (quoting *Acosta*, 19 I. & N. Dec. at 233); cf. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) (stating that "[t]here is obviously some ambiguity in a term like 'well-founded fear,'" which is used in the INA provisions governing asylum, and it "can only be given concrete meaning through a process of case-by-case adjudication").

No court of appeals has held that people who refuse to join a gang constitute a "particular social group" under the INA. The circuits that have directly addressed that question in published opinions have all reached the same conclusion as the Eighth Circuit reached here. See *Mendez-Barrera* v. *Holder*, 602 F.3d 21, 26-27 (1st Cir. 2010) (young women recruited by gang members who resist such recruitment in El Salvador);[10] *Zelaya* v. *Holder*, 668 F.3d 159, 167 (4th Cir. 2012) (young Honduran males who refuse to join MS-13, have notified the police of MS-13's harassment tactics, and have an identifiable tormentor within the gang); *Orellana-Monson* v. *Holder*, 685 F.3d 511, 516 (5th Cir. 2012) ("Salvadoran males, ages 8 to 15, who have been recruited by Mara 18 but have refused to join due to a principled opposition to gangs"); *Ortiz-Puentes* v. *Holder*, 662 F.3d 481, 483 (8th Cir. 2011) (young Guatemalans who refused to join gangs and were harmed as a result);[11] *Ramos-Lopez* v. *Holder*, 563 F.3d 855, 858 (9th Cir. 2009) (young Honduran men who have been recruited by MS-13, but who re-

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[10] See also *Garcia-Callejas* v. *Holder*, 666 F.3d 828, 829-830 (1st Cir. 2012) (per curiam) (young male targets of gang recruitment); *Larios* v. *Holder*, 608 F.3d 105, 108-109 (1st Cir. 2010) (young Guatemalan men recruited by gang members who resist such recruitment).

[11] See also *Constanza* v. *Holder*, 647 F.3d 749, 754 (8th Cir. 2011) (per curiam) (persons resistant to gang violence).

fuse to join);[12] *Rivera-Barrientos* v. *Holder*, 666 F.3d 641, 647 (10th Cir. 2012) (Salvadoran women between the ages of 12 and 25 who resisted gang recruitment).

In dicta, the Seventh Circuit has noted that resistance to gang recruitment is not a protected ground for asylum. See *Gatimi* v. *Holder*, 578 F.3d 611, 616 (2009) (observing that it has "no quarrel with" the view that "young Honduran men who resist being recruited into gangs" do not constitute a "particular social group") (citing *Ramos-Lopez*, *supra*); *Bueso-Avila* v. *Holder*, 663 F.3d 934, 938 (2011) (observing that gang members "may have threatened and attacked [petitioner] in an attempt to recruit him into the gang because he was one of several local youths who were potential recruits—which is not a protected basis under the [INA]"). And the Third Circuit in *Valdiviezo-Galdamez* v. *Attorney Gen. of the U.S.*, 663 F.3d 582 (2011), rendered no holding either way regarding the validity of a social group of Honduran youth who refused recruitment by gangs, but instead remanded to the Board questioning its explanations for its standards in defining a "particular social group." *Id.* at 608-609. There is thus no conflict in the circuits with respect to the specific question of whether resistance to gang membership is a ground for asylum.[13]

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[12] See also *Barrios* v. *Holder*, 581 F.3d 849, 854-856 (9th Cir. 2009) (young males in Guatemala who are targeted for gang recruitment but refuse because they disagree with the gang's criminal activities).

[13] In addition, four other circuits, including the Third Circuit prior to *Valdiviezo*, have, in unpublished decisions, rejected similar claims. Cf. *Aguilar-Guerra* v. *Holder*, 343 Fed. Appx. 640, 641 (2d Cir. 2009) (young Salvadoran men actively pressured to join gangs and who refuse to do so); *Aquino-Rivas* v. *Attorney Gen. of the U.S.*, 431 Fed. Appx. 200, 202 (3d Cir. 2011) (per curiam) (Salvadoran teenage boys who refuse to join gangs); *Zavaleta-Lopez* v. *Attorney Gen. of the U.S.*, 360 Fed. Appx. 331, 332 (3d Cir. 2010) (per curiam) (young men

3. Petitioner contends (Pet. 8, 12-22) that there is disagreement in the circuits regarding whether it is permissible for the Board to consider social visibility and particularity in evaluating "particular social group" claims. To the extent there is disagreement among the circuits regarding the permissible methodology for evaluating "particular social group" claims, that conflict is lopsided and may resolve itself as the Board refines and shapes the "particular social group" definition.

The court of appeals in this case relied in part on the Board's precedential decision in *S-E-G-*, which explains 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." 24 I. & N. Dec. at 582; see Pet. App. 5a-7a. Altogether, nine circuits have, in published opinions, deferred to *S-E-G-*, or accepted parts of the methodology employed by the Board in *S-E-G-* without addressing other parts. See *Scatambuli* v. *Holder*, 558 F.3d 53, 59-60 (1st Cir. 2009); *Ucelo-Gomez* v. *Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007) (per curiam); *Zelaya*, 668 F.3d at 165-

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who have been targeted by gangs for membership and who have refused to join gangs); *Flores* v. *Mukasey*, 297 Fed. Appx. 389, 399 (6th Cir. 2008) (young men who are targeted for conscription into Salvadoran gangs); *Portillo* v. *United States Att'y Gen.*, 435 Fed. Appx. 844, 846 (11th Cir. 2011) (per curiam) (former Salvadoran military veterans facing persecution by gangs); *Turcios-Avila* v. *United States Att'y Gen.*, 362 Fed. Appx. 37, 42 (11th Cir. 2010) (per curiam) (young Honduran men who refuse to join gangs); *Vasquez* v. *United States Att'y Gen.*, 345 Fed. Appx. 441, 445-447 (11th Cir. 2009) (per curiam) ("poor girls who come from fatherless homes, with no adult male protective figures . . . who resist recruitment or criticize [a criminal gang in El Salvador called] the Maras") (citation omitted).

167;[14] *Orellana-Monson*, 685 F.3d at 519-522; *Kante* v. *Holder*, 634 F.3d 321, 327 (6th Cir. 2011); *Davila-Mejia* v. *Mukasey*, 531 F.3d 624, 629 (8th Cir. 2008); *Arteaga* v. *Mukasey*, 511 F.3d 940, 945 (9th Cir. 2007); *Rivera-Barrientos*, 666 F.3d at 650; *Castillo-Arias*, 446 F.3d at 1197.

Petitioner is correct that two Seventh Circuit decisions have criticized the Board's "social visibility" criterion, and the Third Circuit recently reversed the deference it had previously extended to the Board's social group reasoning. See Pet. 17-20 (discussing *Gatimi*, *supra*; *Benitez Ramos* v. *Holder*, 589 F.3d 426 (7th Cir. 2009); and *Valdiviezo-Galdamez*, *supra*). In each of those cases, the court did not reject the validity of the Board's criteria, but rather concluded that the Board's explanation of its criteria was insufficient or insufficiently clear, and remanded the case to the Board for further proceedings. See *Gatimi*, 578 F.3d at 616 (noting that the court cannot understand "what work 'social visibility' does"); *Benitez Ramos*, 589 F.3d at 430 (describing the agency's application of "social visibility" as "unclear"); *Valdiviezo-Galdamez*, 663 F.3d at 606-607 (having a "hard time understanding" the explanation offered for "social visibility" and why the requirement is not inconsistent with prior precedent). Accordingly, the Board will have the opportunity to provide further explanation in response to those decisions. In light of those remands, it would be premature for this Court to consider the application of the term "particular social group" before the Board has done so and before the

[14] Although the Fourth Circuit has repeatedly deferred to the Board's social group reasoning, see *Zelaya*, 668 F.3d at 165-167 (citing cases), it is not clear that the court has addressed the "social visibility" criterion. See *Lizama* v. *Holder*, 629 F.3d 440, 447 n.4 (2011).

courts of appeals have had an opportunity to consider the Board's further elaboration.[15]

Contrary to petitioner's suggestion that the Board's "social visibility" and "particularity" requirements were a sudden and unexplained change (Pet. 7, 12, 22-25), an explanation for the change is furnished by reference to pre-existing Board precedent that addresses those courts' concerns. See *Orellana-Monson*, 685 F.3d at 521 ("[T]he BIA's current particularity and social visibility test is not a radical departure from prior interpretation, but rather a subtle shift that evolved out of the BIA's prior decisions on similar cases and is a reasoned interpretation, which is therefore entitled to deference."). First, the Seventh Circuit stated in *Gatimi* that the Board has not "attempted, in this or any other case, to explain the reasoning behind the criterion of social visibility" and that the Board "has been inconsistent rather than silent" because it has not "repudiat[ed]" earlier decisions that recognized particular social groups without referring to social visibility. 578 F.3d at 615-616; see also *Valdiviezo-Galdamez*, 663 F.3d at 606-607. But the Seventh Circuit in *Gatimi* did not discuss the Board's 2006 precedential decision in *C-A-*, which explained that the Board's previous "decisions involving social groups have considered the recognizability, i.e., the social visibility, of the group in question," and that the "particular social groups" previously recognized by the Board "involved characteristics that were highly visible and recognizable by others in the country in question." 23 I. & N. Dec. at 959-960. The Seventh Circuit in *Gatimi* likewise did not discuss the Board's 2007 precedential decision in

[15] On May 29, 2012, both parties filed briefs on remand in *Valdiviezo-Galdamez*; the Board has not yet scheduled oral argument.

A-M-E- & J-G-U-, which described *C-A-* as having "reaffirm[ed] the requirement that the shared characteristic of the group should generally be recognizable by others in the community," 24 I. & N. Dec. at 74, or the Board's more recent 2008 precedential decision in *S-E-G-*, which contained a detailed discussion of the Board's views regarding social visibility and particularity. See pp. 3-5, *supra* (discussing *S-E-G-*, *supra*, and the Board's companion decision in *E-A-G-*, *supra*).

Furthermore, *Gatimi* and *Benitez Ramos* assumed that the Board views its "social visibility" criterion as requiring that members of a particular social group must literally be visible to the naked eye. See *Benitez Ramos*, 589 F.3d at 430 (describing the Board's view as being "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"); *Gatimi*, 578 F.3d at 616 ("The only way, on the Board's view, that the Mungiki defectors can qualify as members of a particular social group is by pinning a target to their backs with the legend 'I am a Mungiki defector.'"). Petitioner also assumes that this is the Board's interpretation. Pet. 13, 29-31. Although it appears that the government's briefs and oral argument in those cases may have contributed to the confusion, see *Benitez Ramos*, 589 F.3d at 430; *Gatimi*, 578 F.3d at 616, that narrow interpretation is not required by the Board's precedential decisions.

In *E-A-G-*, the Board defined "social visibility" as "the extent to which members of a society perceive those with the characteristic in question as members of a social group." 24 I. & N. Dec. at 594. Consistent with that statement, the Board's precedential decisions generally have equated "social visibility" with the extent to which

the group "would be 'perceived as a group' by society," rather than the ease with which one may necessarily be able to identify by sight particular individuals as having a particular characteristic shared by members of that group. *S-E-G-*, 24 I. & N. Dec. at 586-588 (discussing "general societal perception" and finding little evidence that Salvadoran youth who resist gang recruitment "would be 'perceived as a group' by society"); see *A-M-E- & J-G-U-*, 24 I. & N. Dec. at 75 (finding no evidence "that the general societal perception would be" that the affluent in Guatemala would be more exposed to violence and crime than other segments of society). The historical development of the Board's interpretation of "particular social group" reflects this distinction. Before *S-E-G-*, the Board recognized as a "particular social group" women from the Tchamba-Kunsuntu Tribe of northern Tongo who had not yet been subjected to FGM and who opposed the practice, *In re Kasinga*, 21 I. & N. Dec. 357, 365-366 (B.I.A. 1996), two characteristics that also are not necessarily outwardly visible. In *Benitez Ramos*, the Seventh Circuit recognized that "social visibility," when properly understood as not necessarily requiring literal visibility, may be a legitimate basis for defining a particular social group. See 589 F.3d at 430 ("If society recognizes a set of people having certain common characteristics as a group, this is an indication that being in the set might expose one to special treatment, whether friendly or unfriendly.").

Furthermore, the Ninth Circuit recently granted en banc rehearing in a particular social group case to determine, *inter alia*, whether the Board's "social visibility" and "particularity" criteria are entitled to deference. See *Henriquez-Rivas* v. *Holder*, 670 F.3d 1033 (2012) (whether people testifying against or otherwise

opposing gang members constitute a cognizable particular social group). In addition, as explained above (n.14, *supra*), the Fourth Circuit may or may not have accepted the Board's "social visibility" reasoning yet. Accordingly, quite aside from the absence of a circuit conflict on the specific question whether resistance to gang membership is a basis for asylum (see pp. 13-14, *supra*), because administrative and lower-court decisions may further refine the social group criteria, the issues concerning those criteria are not ripe for certiorari review.

4. In any event, this case would be a poor vehicle for further review of the social visibility and particularity factors, because petitioner's proposed social group—one based on resistance to gang recruitment—would not fit within the "particular social group" category even without those considerations. Both the Board and the courts have expressed doubts that a social group can "be defined exclusively by the fact that its members have been subjected to harm in the past (i.e., forced gang recruitment and any violence associated with that recruitment)." *S-E-G-*, 24 I. & N. Dec. at 584; see *Gatimi*, 578 F.3d at 616 ("The Board has a legitimate interest in resisting efforts to classify people who are targets of persecution as members of a particular social group when they have little or nothing in common beyond being targets."); *Orellana-Monson*, 685 F.3d at 521-522 ("The gangs target a wide swath of society, and we have no evidence before us that they target young men with any particular political orientation, interests, lifestyle, or any other identifying factors.") (citation omitted); *In re Sanchez & Escobar*, 19 I. & N. Dec. 276, 286 (B.I.A. 1985) (declining to find a particular social group where "the resulting risk of persecution is not limited to young urban males but equally affects all segments of the rural

and urban populations of El Salvador"), aff'd *sub nom. Sanchez-Trujillo* v. *INS*, 801 F.2d 1571 (9th Cir. 1986).

Moreover, even the courts that have not yet deferred to the "social visibility" or "particularity" criteria nevertheless defer to the Board's precedents, and no court has accepted a gang-recruitment social group. See, *e.g.*, *Gatimi*, 578 F.3d at 616 (expressing "no quarrel with" the view that claims such as petitioner's should ultimately fail); *Bueso-Avila*, 663 F.3d at 938 (noting that attempted gang recruitment is not a protected ground under the INA). Review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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