No. 11- 1525

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

REPLY BRIEF FOR PETITIONER

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QUESTION PRESENTED

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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The government's opposition brief underscores the need for this Court's review. The government ultimately concedes (at 16) that the circuits are divided (at least 8-2) on the question presented: the validity of the BIA's test for determining membership in a particular social group (PSG). It offers nothing to suggest that the circuits on either side will change their entrenched views, it identifies no persuasive objection to this particular case as an appropriate vehicle for resolving the conflict, and it does not dispute that the issue is important and recurring. Review is warranted.

I. THE MATURE CIRCUIT CONFLICT WILL NOT RESOLVE ABSENT THIS COURT'S INTERVENTION

1. The government first argues that the decision below does not actually "conflict" with the decision of any other court of appeals, because no court has held that petitioner's proposed group constitutes a PSG under the INA. Opp. 9, 13. That argument is specious. The question squarely presented in this case, which (the government concedes) has divided the circuits, is whether the new test for PSG that the BIA announced in *Matter of S-E-G-*, 24 I. & N. Dec. 579 (BIA 2008), is entitled to deference, or is instead arbitrary and capricious, as the Third and Seventh Circuits have held. There can be no doubt that this case squarely implicates that conflict. And neither the Third nor the Seventh Circuit was free to decide in the first instance whether the petitioners in those cases belonged to a PSG or were eligible for asylum; those courts were constrained to remand the case to the agency. *See Gonzales v. Thomas*, 547 U.S. 183, 185, 187 (2006)

(summarily reversing because court of appeals failed to remand to the BIA); *INS v. Ventura*, 537 U.S. 12, 16 (2002) (same). The absence of a "split" on the ultimate question of petitioner's eligibility for asylum is, therefore, obviously not a reason to deny certiorari.

2. The government also attempts to minimize the importance of the circuit conflict, claiming that the Third and Seventh Circuits did not take issue with the "validity of the Board's criteria" but merely concluded that the Board's reasoning was deficient. Opp. 16. But those courts' holdings were not so limited, and neither court embraced the BIA's new requirements as a permissible construction of the statute. To the contrary, the Seventh Circuit stated that the Board's interpretation "makes no sense." *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009). The Third Circuit agreed with the Seventh Circuit's sober assessment. *Valdiviezo-Galdamez v. Attorney Gen. of the U.S.*, 663 F.3d 582, 606-07 (3d Cir. 2011) (stating that the court had a "hard time" understanding the government's definition of social visibility and joining the "Seventh Circuit in wondering 'even-whether [the BIA] understands the difference'" between the two competing versions of "social visibility") (quoting *Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009)).

3. The government speculates that this square circuit conflict on the validity of the Board's PSG definition "may resolve" itself without this Court's intervention. Opp. 15, 19-20. But the government's wishful thinking does not make it so. There is nothing to suggest that the circuits on either side of the split—several of which have been urged, and have declined, to review the issue en banc—are poised to align themselves. Indeed, the Ninth Circuit's decision to

reconsider the issue en banc suggests only that the split will become less "lopsided" (Opp. 15) and more entrenched.

The government weakly offers that review is nevertheless premature because the BIA might refine its interpretation or provide a reasoned explanation in response to the Third Circuit's vacatur in *Valdiviezo-Galdamez*. Opp. 16-17. But the Board's actions to date suggest that it is not interested in attempting such corrective action unless or until it is forced to do so by this Court. The Board expressly declined to reconsider its approach on remand in *Gatimi*, and instead simply granted asylum to the applicant, "leav[ing] the law in disarray." *In re Gatimi* (BIA Nov. 22, 2010) (R. Pauley, dissenting), *available at* http://www.ilcm.org/litigation/BIA_Gatimi_Remand_Order.pdf. And the Justice Department has candidly conceded to the en banc Ninth Circuit that it has no idea "when [*Valdiviezo-Galdamez*] will be decided or whether the decision will be precedential." Pet. for Panel Reh'g or Reh'g *En Banc* No. 10-1724 at Ex. B (8th Cir. Apr. 23, 2012) (Apr. 2012 letter from U.S. Dep't of Justice and amicus response in *Henriquez-Rivas v. Holder*).[1] Moreover, even if the BIA did

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[1] The BIA has not yet scheduled oral argument in *Valdiviezo-Galdamez*—and if the Court grants certiorari in this case, those proceedings would very likely be stayed pending this Court's decision. In the unlikely event that the BIA instead charged ahead and issued a new precedential opinion attempting to cure its defective decision in *S-E-G-*, however, this Court could either take notice of that later decision in resolving the merits of this case or, alternatively, could vacate the Eighth Circuit's decision and remand to allow that court to consider petitioner's claims afresh in light of the BIA's new decision. *See Long Island Care at Home*,

attempt to cure its defective reasoning, there is no reason to suppose that it is poised to abandon the "social visibility" and "particularity" criteria, especially where (as the government points out) the circuit majority has deferred to those requirements.

On the government's view, there would almost never be a "ripe" circuit conflict concerning whether agency action is arbitrary and capricious—as the circuits on one side of the split (vacating agency action as arbitrary and capricious, or holding a particular interpretation of an ambiguous statute unreasonable under *Chevron*) must remand the case to the agency. *Thomas*, 547 U.S. at 185, 187; *Ventura*, 537 U.S. at 16. It is therefore not at all unusual for this Court to undertake plenary review of agency action where related cases have been remanded and are pending before the agency as a result of a court of appeals' vacatur. *See, e.g.*, *Holder v. Martinez Gutierrez*, 132 S. Ct. 71 (2011); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009); *see also Dada v. Mukasey*, 554 U.S. 1, 20 (2008) (granting review over the government's opposition even though the Department of Justice was in the midst of promulgating regulations, Congress had acted, and the Board was actively considering cases that could resolve the question presented).

4. That the Court previously has denied petitions presenting similar questions does not diminish the certworthiness of this case. *Contra* Opp. 10. All but one of those petitions were filed before the Third Circuit joined the Seventh Circuit in rejecting *S-E-G-*; some were filed years ago, when the issue was still

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Ltd. v. Coke, 546 U.S. 1147, 1147 (2006); *Slekis v. Thomas*, 525 U.S. 1098, 1099 (1999).

nascent. *E.g.*, *Contreras-Martinez v. Holder*, 346 F. App'x 956 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 3274 (2010). Two of those cases had substantial vehicle defects not present here. *Hernandez-Navarrete v. Holder* rested on alternative holdings that would have prevented the Court from reaching the question presented. 433 F. App'x 251 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1910 (2012). And the petitioner in *Pierre v. Holder* sought review of an unpublished opinion that addressed only the "social visibility" requirement, and not the "particularity" requirement, where it was unclear whether the issue had been fully aired before the court of appeals. 432 F. App'x 845 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 2771 (2012). The government successfully opposed certiorari in those cases on the ground that further percolation was warranted, and that there were serious vehicle defects. But the issue is now fully brewed, and this case is an excellent vehicle through which to resolve the mature circuit conflict.

II. THE BIA'S DEFINITION OF "PARTICULAR SOCIAL GROUP" IS NOT ENTITLED TO DEFERENCE

1. The government concedes that the Board has added social visibility and particularity as prerequisites for the existence of a PSG, Opp. 11, but it does not—and cannot—point to any reasoned explanation by the BIA for this change. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (agency action arbitrary and capricious where it changes course without reasoned analysis). The BIA's new definition of PSG does not warrant deference.

For the reasons explained in the petition (at 24-25), the government's argument that the Board previously considered literal visibility as a factor in *C-A-* is irrelevant. In *Matter of Acosta* the Board defined PSG 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." 19 I. & N. Dec. 211, 233 (BIA 1985). In *C-A-*, the Board held that the asylum applicant did not satisfy that test. 23 I. & N. Dec. 951, 958-59 (BIA 2006). Recognizing that "social perception" was an *alternative* means by which to establish a PSG under the UNHCR Guidelines, the Board concluded that the proposed group was also not sufficiently visible (by which it meant *personally identifiable* by others as a member of the group) to qualify as a PSG. *Id.* at 959-60. The Board's subsequent decision in *S-E-G-* mandated that an applicant's proposed PSG must be socially visible and sufficiently particular. Whether the shift from *Acosta*'s definition arose suddenly or incrementally (as the government contends) is irrelevant. The Board is required to acknowledge the change and provide a reasoned explanation for it. *FCC v. FOX Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Its failure to do so renders its decision arbitrary and capricious.

2. The government concedes that these new requirements conflict with the definition of PSG set forth in the UNHCR Guidelines, Opp. 12 n.9, but in the same breath argues that the Board's definition merits deference because it is based on those very Guidelines, Opp. 12. The government cannot have it both ways.

The Guidelines sought to expand asylum eligibility, recognizing that social perception may give rise to a PSG, even where the group's members do not share an "immutable characteristic." The Board has done just the opposite. It used social visibility to *narrow* the longstanding PSG definition. The point is not that the Board is *bound* to follow the Guidelines. But the Board itself invoked them as persuasive authority—and it is fundamental that where an agency's analysis relies on a misreading of relevant authority, it is not entitled to deference. *See Judulang v. Holder*, 132 S. Ct. 476, 487 (2011) (rejecting the BIA's "comparable-grounds" approach to deportation proceedings because it rested on "an inaccurate description of the [governing] statute").

3. Finally, the government offers no meaningful defense of the Board's inconsistent application of the PSG standard, nor does it even address petitioner's contention that the Board's approach violates asylum applicants' right to due process (Pet. 27-28). The Board's social visibility requirement has been variously interpreted to require "literal" visibility of the affected individual, or merely "social perception" of the applicant's proposed group. *Compare Rivera-Barrientos v. Holder*, 666 F.3d 641, 650-51 (2012), *with Constanza v. Holder*, 647 F.3d 749, 753 (8th Cir. 2011). The confusion spawned by the Board's decision in *S-E-G-* is evident within a single circuit. *Compare Scatambuli v. Holder*, 558 F.3d 53, 60 (1st Cir. 2009), *with Mendez-Barrera v. Holder*, 602 F.3d 21, 27 (1st Cir. 2010). Likewise, the BIA's new concept of "particularity" has left courts and litigants profoundly confused about whether "particularity" and "social visibility" are distinct concepts at all (*compare*

Valdiviezo-Galdamez, 663 F.3d at 608, *with Ramos-Lopez v. Holder*, 563 F.3d 855, 862 (9th Cir. 2009)), and, if so, and whether the mere size of a group is relevant to whether it is sufficiently "particularized" (*compare Portillo v. U.S. Atty. Gen.*, 435 F. App'x 844, 847-48 (11th Cir. 2011), *with Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 n.2 (2d Cir. 2007)).

In response, the government can say only that the PSG analysis must be undertaken on a "'case-by-case basis.'" Opp. 12. That is surely correct—but the Board must use a uniform definition and apply that definition to the facts of each case, in a way that yields similar outcomes for similarly situated applicants. *See Thomas*, 547 U.S. at 186 (whether the claimed PSG "presents the kind of 'kinship ties' that constitute a 'particular social group'" "requires determining the facts and deciding whether the facts as found fall within a statutory term"); *Njuguna v. Ashcroft*, 374 F.3d 765, 771 n.4 (9th Cir. 2004) ("The INS must give each asylum case individualized scrutiny, but it is a foundation of the rule of law that similarly situated individuals be treated similarly."). The Board has done neither.

The murkiness of the Board's PSG requirements improperly leaves asylum applicants at sea as to the standard under which their claims will be judged. *See Valdiviezo-Galdamez*, 663 F.3d at 617 (Hardiman, J., concurring) (noting that the BIA's "new interpretation … forces asylum applicants to shoot at a moving target"). And the Board has entirely abdicated its responsibility to consider the facts of each case in making a determination whether an applicant has demonstrated membership in a PSG. Instead, as petitioner argued below, the Board has treated *S-E-G-*

as a categorical rule that "gang recruitment activities do not, in general, constitute a proper basis for asylum in this country," foreclosing any individualized determination based on the facts of a particular applicant's case. *See* App. 31a; *Garcia-Callejas v. Holder*, 666 F.3d 828, 830 (1st Cir. 2012); *Mayorga-Vidal v. Holder*, 675 F.3d 9, 15 (1st Cir. 2012); *Velasquez-Otero* Reply 10 (No. 11-1321).

Apparently realizing that a "literal visibility" requirement cannot be sustained as a permissible construction of the statute, the government now argues—contrary to its briefs and argument in the courts of appeals—that that interpretation of the Board's decisions "is *not required.*" Opp. 18. In other words, the government concedes, as it must, that the Board and the Justice Department have interpreted it that way (as have two courts of appeals)—but suggests a saving construction of the Board's precedents. Opp. 18-19. That exercise well demonstrates the necessity of this Court's intervention. The Solicitor General cannot "clarify" *S-E-G-* before this Court. *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943); *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 721 (2001) (Court "may not enforce [the BIA's] order by applying a legal standard the Board did not adopt"). And, in any event, eliminating literal visibility would not cure the other defects in the Board's decision (Pet. 22-28, 31-32).[2]

Only the BIA can sort out the confusion and only the BIA can adopt a permissible and uniform construction of "particular social group" in the first

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[2] The government fails entirely to address petitioner's argument that the Board's "particularity" requirement is incoherent and unreasonable. *See* Pet. 31-32.

instance. The time has come for this Court to force its hand.

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

The government does not dispute that the issue is important and recurring—affecting tens of thousands of refugees and asylum seekers each year—and breeds forum-shopping. The question presented was pressed and passed upon before the agency and the court of appeals. It was the sole ground of the Board's decision. The Eighth Circuit expressly deferred to the BIA in a published opinion holding that "the social visibility and particularity requirements articulated in … *S-E-G* are [not] arbitrary or capricious." App. 7a-8a. Judge Bye's separate opinion thoughtfully explains why the Third and Seventh Circuits correctly refused to defer to the BIA (App. 8a-16a), and the issue garnered several votes for rehearing en banc. There are no threshold issues or alternative holdings that could preclude this Court's review of the question presented.[3]

The government nevertheless contends that this case is a "poor vehicle" because petitioner would not be eligible for asylum even under the *Acosta* standard. Opp. 20. That of course is an argument about the ultimate merits of petitioner's claim, not a vehicle

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[3] *Compare Velasquez-Otero v. Holder*, 456 F. App'x 822, 825-26 (11th Cir. 2012) (addressing only "social visibility"); *Velasquez-Otero* Pet. i (challenging only the "social visibility" requirement). In order to address fully the Board's decision in *Matter of S-E-G-*, the Court should grant this petition and hold *Velasquez-Otero*, or grant both petitions.

problem. But it is also wrong, and belied by the government's concession that the social visibility and particularity requirements laid out in *S-E-G-* were a "response" to claims like petitioner's. Opp. 3-4. Salvadoran youth who have a well-founded fear of persecution on account of their persistent refusal to join the MS-13 gang share an immutable characteristic that is fundamental to their consciences. That characteristic is not defined solely by reference to *past persecution* (*contra* Opp. 20); rather, it is defined by a "past shared experience" that they could not reasonably have avoided.[4] They have as much in common as other groups recognized under *Acosta*, such as young women who have refused to undergo FGM because they oppose the practice. *In re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996). But even if there were some doubt on that score, it would not pose any impediment to the Court's resolution of the question presented. Whether petitioner is ultimately eligible for asylum is an issue for the Board to decide on remand, applying a permissible construction of the term "particular social group."

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[4] The fact that MS-13 also terrorizes members of the public for reasons unrelated to their membership in a PSG is not relevant to whether petitioner is a member of a PSG. And petitioner presented evidence (not considered in *S-E-G-* itself) that the Salvadoran MS-13 singles out for special mistreatment those who have been recruited but refuse to join. *See* AR 260 (Harvard Law School Human Rights Program, *No Place to Hide: Gang, State and Clandestine Violence in El Salvador* 76 (2007)).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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