

No. __-____

IN THE
Supreme Court of the United States

ERASMO ROJAS-PÉREZ AND
ANGÉLICA GARCÍA-ÁNGELES,
Petitioners,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Immigration and Nationality Act (“INA”), an alien may qualify for withholding of removal to a particular country if he demonstrates that his life or freedom would be threatened in that country because of his “membership in a particular social group.” INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A). The Board of Immigration Appeals (“BIA”) has interpreted “membership in a particular social group” to require some degree of “social visibility.” The courts of appeals are divided 7-2 on whether to apply the BIA’s social visibility requirement. Among those courts of appeals that do apply the requirement, there is further disagreement on its meaning.

The question presented is:

Is the BIA’s interpretation of “a particular social group” as requiring an element of “social visibility” entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as held by seven circuits, or is the requirement an arbitrary or impermissible interpretation of the statute, as the Third and Seventh Circuits hold?

PARTIES TO THE PROCEEDINGS

Petitioners Erasmo Rojas-Pérez and Angélica García-Ángeles were the respondents before the Immigration Judge and the Board of Immigration Appeals and the petitioners in the court of appeals proceedings.

The Honorable Eric H. Holder, Jr., Attorney General, was the respondent in the court of appeals proceedings.

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Petitioners Erasmo Rojas-Pérez (“Rojas”) and Angélica García-Ángeles (“García”) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

INTRODUCTION

The Immigration and Nationality Act (“INA”) prohibits the removal of an alien to a country in which his “life or freedom would be threatened . . . because of the alien’s . . . membership in a particular social group.” 8 U.S.C. § 1231(b)(3)(A). Similarly, under a different provision of the INA, an alien may be granted asylum as a refugee if he demonstrates past persecution or a well-founded fear of persecution “on account of . . . membership in a particular social group.” *Id.* §§ 1101(a)(42)(A), 1158(b)(1)(A).

Since 1985, the Board of Immigration Appeals (“BIA”) has held that a “particular social group” is a group that shares a characteristic that is either unchangeable or so fundamental to an alien’s individual identity or conscience that he should not be required to change it. Under this test, the BIA has upheld claims for withholding of removal based on a variety of “particular social groups,” including former members of a national police force, former military leaders or landowners, women facing threat of female genital mutilation, and homosexual men in certain societies. In 2006, however, the BIA stated that, to qualify for withholding of removal under the statute, a group not only must share an immutable characteristic, but also must exhibit “social visibility.”

The change in the BIA’s interpretation has created a split among the courts of appeals. Two circuits have rejected the social visibility requirement, while seven others apply it. Thus, whether an alien is

granted withholding or asylum may depend on which circuit's precedent governs the case. In removal or asylum cases, the government and the alien, respectively, have some ability to choose the venue that will apply the rule most favorable to their side. Resolving the conflict among the circuits will limit such forum-shopping and restore the Naturalization Clause's "explicit constitutional requirement of uniformity." *Graham v. Richardson*, 403 U.S. 365, 382 (1971).

If this Court determines that a "social visibility" requirement is a proper construction of the INA, this Court's review also will bring needed clarity to the standard that applies to judge visibility. Currently, the courts enforce a social visibility requirement that varies both on the perspective to be used in determining social visibility and on whether the individual or the group as a whole must be socially visible. These inconsistencies result in disparate treatment for similarly situated aliens and provide no clear rule on which aliens may rely in deciding whether to apply for asylum or withholding of removal. Because the question presented raises an important and recurring issue of immigration law on which the courts of appeals are in deep conflict, this Court's plenary review is warranted.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-21a) is reported at 699 F.3d 74. The opinion of the Board of Immigration Appeals (App. 22a-26a) and the oral decision of the Immigration Judge (App. 27a-33a) are not reported.

JURISDICTION

The First Circuit entered its judgment on November 5, 2012, and denied a timely petition for rehearing on March 8, 2013 (App. 34a). On May 24, 2013, Justice Breyer extended the time to file a petition for a writ of certiorari to and including August 5, 2013. App. 35a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 241(b)(3)(A) of the Immigration and Nationality Act (“INA”) provides in relevant part:

[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s . . . membership in a particular social group

8 U.S.C. § 1231(b)(3)(A).

STATEMENT

I. Statutory Context

The INA, as amended by the Refugee Act of 1980, prohibits returning an alien to a country in which “the alien’s life or freedom would be threatened . . . because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.” INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A). That prohibition is known as withholding of removal. The INA also uses persecution or fear of persecution based on those same factors to define a “refugee” for

asylum purposes.¹ INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). A “primary purpose[]” of the “entire 1980 [Refugee] Act” was “to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987).

II. Administrative Context

A. Removal Proceedings

Removal proceedings are governed generally by INA §§ 239-240, 8 U.S.C. §§ 1229-1229a. The alien may apply for withholding of removal under INA § 241(b)(3), 8 U.S.C. § 1231(b)(3), by filing Form I-589. *See* 8 C.F.R. § 1208.3(a)-(b). An immigration judge reviews the claim for withholding during the removal proceedings. *See* INA § 240(a)(1), 8 U.S.C. § 1229a(a)(1); 8 C.F.R. § 1208.16(a). The alien may appeal the immigration judge’s decision on withholding of removal to the BIA, *see* 8 C.F.R. § 1003.1(b), and appeal an adverse ruling by the BIA to the courts of appeals, *see* INA § 242(a)(1), 8 U.S.C. § 1252(a)(1).

B. The Legal Standard For Withholding Of Removal On The Basis Of Persecution Because Of Membership In A “Particular Social Group”

Withholding of removal is available on the basis of persecution “because of . . . membership in a particular social group,” but the term “particular social group” is undefined by the statute. The BIA initially

¹ “[M]embership in a particular social group” applies in the same way to asylum and withholding of removal. Many of the conflicting cases addressing the role of social visibility in establishing membership in a particular social group involve asylum claims, and, although petitioners made no asylum claim, their request for withholding of removal implicates the same inter-circuit conflict.

defined the term as “a group of persons all of whom share a common, immutable characteristic.” *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). The BIA clarified that the shared characteristic need not be literally immutable, but rather “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.* at 233-34. The BIA went beyond *Acosta* in *In re C-A-*, 23 I. & N. Dec. 951 (BIA), *aff’d sub nom. Castillo-Arias v. United States Att’y Gen.*, 446 F.3d 1190 (11th Cir. 2006), to require a particular social group not only to share an immutable characteristic, but also to possess “social visibility.” *Id.* at 959-60. The BIA has subsequently reaffirmed and applied the “social visibility” requirement as a predicate to withholding of removal in four precedential decisions, although the meaning of the term remains unclear. *See In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74-75 (BIA), *aff’d sub nom. Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007); *In re A-T-*, 24 I. & N. Dec. 296, 303 (BIA 2007), *vacated on other grounds*, 24 I. & N. Dec. 617 (Att’y Gen. 2008); *In re S-E-G-*, 24 I. & N. Dec. 579, 586-87 (BIA 2008); *In re E-A-G-*, 24 I. & N. Dec. 591, 594-96 (BIA 2008).

III. Facts And Procedural History

Petitioners Rojas and García live in Central Falls, Rhode Island. AR 184.² Although native Mexican citizens, they have lived in the United States for 12 and 10 years, respectively. AR 8, 162, 217. Rojas is 31 years old and entered the United States without inspection in 2001. AR 16, 75, 218. García, 29,

² “AR” refers to the Administrative Record.

joined him in 2003. AR 217. Neither has since returned to Mexico. AR 77. Their seven-year-old child, Iker Rojas, is a U.S. citizen. AR 229. Petitioners are both employed in Rhode Island. AR 165, 220.

The government charged Rojas with removability under INA § 212(a)(6)(A)(i)³ and § 212(a)(7)(A)(i)(I),⁴ AR 39, 191, and García under § 212(a)(6)(A)(i), AR 40. Petitioners applied for withholding of removal under § 241(b)(3) based on their belief that, if the family returned to Mexico, their son would be kidnapped because he is a U.S. citizen, and also that they would be persecuted for having lived in the United States for an extended period and for being perceived as wealthy because of that residency. AR 79.

More specifically, they feared that the family would be targeted by one of the criminal gangs active in Mexico that kidnap for profit. AR 79; *see also* AR 90-112 (newspaper articles and State Department press releases confirming kidnappings in Mexico). On his I-589, Rojas wrote that he “fear[ed] that any of [his] family could be kidnapped and extorted and especially [that he] fear[ed] of threats for [his] child since [the child] is a U.S. citizen.” AR 167. Petitioners contended that the combination of having a United States citizen son and having lived in the United States for an extended period of time were sufficient characteristics to constitute a “particular social group” under INA § 241(b)(3). AR 16.

³ “An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.” 8 U.S.C. § 1182(a)(6)(A)(i).

⁴ “[A]ny immigrant . . . (i) who is not in possession of a . . . valid entry document . . . (ii) is inadmissible.” 8 U.S.C. § 1182(a)(7)(A)(i)(I).

The Immigration Judge expressly found petitioners' testimony credible, App. 32a, but nevertheless denied their application because under BIA precedent they could not establish membership in a particular social group. "[T]he [BIA] has held that those who are returning from the United States and who may be looked upon as having money and therefore are fearful of being targets do not comprise a particular social group." *Id.*

The BIA dismissed their appeal on similar grounds. See App. 24a ("[Petitioners] have not demonstrated that their fear of harm in Mexico constitutes a fear of persecution based on a particular social group under the Act."). In reaching this decision, the BIA relied in part on cases in which the social visibility requirement was determinative. App. 23a-24a.

In denying the petition for review, the First Circuit acknowledged that "[t]he social visibility requirement undergirds the cases on which the agency relied in denying the petitioners' applications for withholding." App. 8a. The court followed its prior precedent deferring to the BIA's social visibility requirement. App. 5a. The court also, however, questioned its own precedent and the BIA's reliance on the concept of "social visibility" in defining a "particular social group." App. 12a-16a. The court cited with approval decisions from the Third and Seventh Circuits criticizing the BIA's reasoning on this issue. It quoted Judge Posner's conclusion "that the social visibility requirement 'ma[de] no sense,'" App. 9a (quoting *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009)), and detailed reasons for that conclusion, App. 9a-10a. The court below similarly discussed the Third Circuit's criticism that the social visibility require-

ment was inconsistent and unreasonable. App. 10a-11a (citing *Valdiviezo-Galdamez v. Attorney General*, 663 F.3d 582 (3d Cir. 2011)). Nonetheless, although it “recogniz[ed] the cogency and persuasiveness of both the reasoning and the outcomes of the Seventh and Third Circuits’ decisions,” App. 12a, the court below concluded that it was “bound by its own precedent regarding the reasonableness of the BIA’s social visibility requirement,” *id.*, and denied the petition for review.

REASONS FOR GRANTING THE PETITION

I. THE SOCIAL VISIBILITY REQUIREMENT HAS GENERATED CONFLICTING DECISIONS WITHIN THE BOARD OF IMMIGRATION APPEALS AND AMONG THE COURTS OF APPEALS

The circuit split over whether to defer to the BIA’s requirement of “social visibility” is rooted in the BIA’s inconsistent application of the term to mean that either (1) the alien must be visually recognizable on sight as a member of the alleged social group (“literally visible”); or (2) the alleged group must be recognized in the abstract as a distinct segment of society (“abstractly visible”). To complicate matters further, the BIA has been inconsistent in holding – where it gives “social visibility” the second, abstract meaning – whether society at large must recognize the group as distinct or whether it is sufficient for persecutors to recognize the group. To put the circuit conflict into proper perspective, it is important first to set out the BIA’s confusion on the social visibility requirement, which in turn has caused the courts of appeals to diverge when sitting in review of BIA cases.

A. The BIA Applies The Social Visibility Requirement Inconsistently

The BIA has vacillated between meanings for “social visibility” without acknowledging the changes, as to both whether it requires literal or abstract visibility and whether the alien must be visible to society at large or to his alleged persecutor(s). The distinctions are well illustrated by homosexuality. In most societies, gay men are recognized as a separate social group (abstractly visible), but a particular gay man, especially one trying to hide his sexuality, would not necessarily be recognized as a member of that group (not literally visible). Even in a society that did not recognize homosexuals as a group, a segment of homophobic persecutors could still exist and recognize homosexuals as an abstract group with the intent to persecute them. The decisions between literal versus abstract visibility, and between social recognition versus persecutor recognition, can be outcome-determinative – yet the BIA has not come to a consistent conclusion on either point.

Early social visibility cases suggest a requirement of literal visual identification. In *C-A-*, the BIA denied particular social group status to criminal informants because their defining trait – informing – was hidden from public view. 23 I. & N. Dec. at 960. According to the BIA, the relevant trait would have to be discovered in order to be “socially visible.” *Id.* To illustrate this requirement, the BIA pointed to a series of past decisions affirming particular social groups, describing them as “easily recognizable” “[s]ocial groups based on innate characteristics such as sex or family relationship,” and “highly visible and recognizable characteristics” such as “Filipinos of mixed Filipino-Chinese ancestry,” “young women of a

particular tribe who were opposed to female genital mutilation,” “persons listed by the government as having the status of a homosexual,” “former members of the national police,” and “former military leadership or land ownership.” *Id.* at 959-60. Without explaining how those groups were more “socially visible” than informants, the BIA posited that each group “involved characteristics that were highly visible and recognizable by others in the country in question.” *Id.* at 960.

Shortly after *C-A-*, the BIA changed its interpretation of the requirement, describing the “social visibility” test as being whether “the members of the group are ‘perceived as a group by society.’” *A-M-E- & J-G-U-*, 24 I. & N. Dec. at 74 (quoting the guidelines of the United Nations High Commissioner for Refugees (“UNHCR”)). Thus, the BIA denied protection to a group of “wealthy” Guatemalans, not because members’ net worth was non-public information, but because the core characteristic of “wealth” was “not so readily ‘identifiable’ or sufficiently defined as to meet the requirements of a *particular* social group.” *Id.* The BIA cited *C-A-* without attempting to explain the shift from literal to abstract visibility. *See id.*

The unexplained change was short-lived. Later in 2007, in *A-T-*, the BIA reverted back to a literal conception of social visibility, finding it “doubtful that young Bambara women who oppose arranged marriage have the kind of social visibility that would make them readily identifiable to those who would be inclined to persecute them.” 24 I. & N. Dec. at 303. The BIA cited *A-M-E-*, again without explaining the shift from abstract to literal visibility, and cited *C-A-* without explaining the distinction between

“Bambara women who oppose arranged marriage” and the particular social group of “young women of a particular tribe who were opposed to female genital mutilation” cited positively in *C-A-*. *See id.*

The inconsistency in the BIA’s approach to literal versus abstract visibility is particularly apparent in two companion cases in which the BIA simultaneously adopted opposing viewpoints. In *S-E-G-*, the BIA applied an abstract conception of social visibility, stating that the proposed group must be “perceived as a group by society.” 24 I. & N. Dec. at 586; *see id.* at 587 (refusing protection to a group of “Salvadoran youth who are recruited by gangs,” for lack of evidence they “would be ‘perceived as a group’ by society”). But, in *E-A-G-*, the BIA conflated literal and abstract visibility, articulating the standard as one of abstract visibility but then refusing protection because of a lack of evidence of literal visibility. 24 I. & N. Dec. at 594. First, the BIA explained that past cases had “emphasized that the purported group’s social visibility – i.e., the extent to which members of a society perceive those with the characteristic in question as members of a social group – is of particular importance in determining whether an alien is a member of a claimed particular social group.” *Id.* Then, rather than question whether Honduran society recognized a group of “persons resistant to gang membership,” the BIA rejected the proposed social group because the group “lacks the social visibility that would allow others to identify its members as part of such a group.” *Id.* Thus, between companion cases, and even within the same case, the BIA has given two different and inconsistent meanings to the “social visibility” requirement.

The *C-A-* literal visual identification approach not only is inconsistent with cases that focus on society's perception of a group, but also would compel a different result in prior cases. *C-A-* stated that previously defined social groups, such as gay persons and landowners, remained valid particular social groups. 23 I. & N. Dec. at 959-60. But, under the *C-A-* approach requiring literal visual identification, "the BIA's 'social visibility' requirement would pose an [i]nsurmountable obstacle to refugee status, even though the BIA has already held that membership in any of these groups qualifies for refugee status." *Valdiviezo-Galdamez*, 663 F.3d at 604. The *C-A-* approach, as evidenced by *A-T-*, *S-E-G-*, and *E-A-G-*, therefore produces inconsistent results.

The BIA also has been inconsistent as to whether the relevant third-party views are those of society as a whole or of potential persecutors. The core of social visibility centers on how some external party relates to the group member, regardless of whether the test requires that group to be socially visible or its individual members to be literally visually identifiable. On this issue of perspective, the companion cases *S-E-G-* and *E-A-G-* again point in opposite directions. *S-E-G-* asked if there had been any evidence of persecutors considering their victims as a group. *See* 24 I. & N. Dec. at 588 ("[V]ictims of gang violence come from all segments of society, and it is difficult to conclude that any 'group,' as actually perceived by the criminal gangs, is much narrower than the general population."). Yet *E-A-G-* conducted the social visibility analysis through the eyes of society as a whole, asking about "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.

In sum, the BIA has not articulated a consistent or coherent meaning for the “social visibility” requirement. In the wake of that inconsistency, the courts of appeals have become intractably divided over whether and how to apply the requirement.

B. The Courts Of Appeals Are Split Over Whether To Defer To The BIA’s Inconsistent Decisions

The courts of appeals disagree about whether the BIA’s inconsistent statements about the role of “social visibility” in the interpretation of the statutory phrase “membership in a particular social group” warrant deference. In addition, the courts of appeals that do defer to the BIA’s interpretation disagree over what the social visibility requirement entails. The Third and Seventh Circuits have rejected the social visibility requirement outright, holding that it represents an unexplained departure from prior BIA precedent that is not entitled to deference and that it is, in any event, an unreasonable interpretation of the governing statute. In contrast, the First, Second, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits defer to the BIA’s interpretation and have expressly adopted the social visibility requirement. In the Fourth and Ninth Circuits, the status of the requirement remains ambiguous. Moreover, the circuits that defer to the social visibility requirement do not give it a single shared meaning; they evaluate social visibility from different viewpoints and may require that the individual, the group, or both be socially visible.

C. The Seventh And Third Circuits Reject The Social Visibility Requirement

The Seventh and Third Circuits reject the social visibility requirement as an unexplained departure from prior BIA decisions and as an unreasonable interpretation of the statute. Both circuits have held that the BIA's social visibility requirement is not entitled to deference, and upon de novo review both have rejected it as arbitrary and capricious.

1. The Seventh Circuit has rejected the social visibility requirement

The Seventh Circuit, acknowledging its divergence from other circuits, rejected the BIA's social visibility requirement in *Gatimi v. Holder*, 578 F.3d at 615-16. Based on the government's position "that secrecy disqualifies a group from being deemed a particular social group," *id.* at 616, Judge Posner reasoned for the court that social visibility required literal visibility, and thus that applicants had to "pin[] a target to their backs" to be eligible for asylum or withholding, *id.* Those facing persecution "will take pains to avoid being socially visible." *Id.* at 615. To the extent they succeed, they "will not be 'seen' by other people in the society 'as a segment of the population,'" and thus fail the BIA's test. *Id.* Judge Posner concluded that the social visibility requirement accordingly "makes no sense." *Id.*

The *Gatimi* court further reasoned that the literal social visibility requirement urged by the government in that case was inconsistent with the BIA's own precedent. Judge Posner noted several socially *invisible* groups that the BIA had nevertheless held to be "particular social groups without reference to social visibility." *Id.* (citing *In re Kasinga*, 21 I. & N. Dec. 357, 365-66 (BIA 1996) (women facing female

genital mutilation); *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822-23 (BIA 1990) (homosexuals); *In re Fuentes*, 19 I. & N. Dec. 658, 662 (BIA 1988) (former members of El Salvador’s national police); *Acosta*, 19 I. & N. Dec. at 233-34 (former military leaders or landowners)). Declining to “pick one of the inconsistent lines and defer to that one,” the court rejected the BIA’s social visibility requirement. *Id.* at 616.

The Seventh Circuit subsequently has reaffirmed *Gatimi*. See *Benitez Ramos v. Holder*, 589 F.3d 426, 429-30 (7th Cir. 2009); *Sarhan v. Holder*, 658 F.3d 649, 654 (7th Cir. 2011).

2. The Third Circuit has rejected the social visibility requirement

The Third Circuit, following the Seventh Circuit, rejected the social visibility requirement in *Valdiviezo-Galdamez*, 663 F.3d at 603-07. Closely following Judge Posner’s opinion in *Gatimi*, Chief Judge McKee’s opinion for the court explained that several recent BIA decisions applied the social visibility requirement to insist on “highly visible and recognizable” characteristics and emphasized the literal social visibility requirement’s inconsistency with prior BIA decisions affording protection to groups with “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 that characteristic known.” *Id.* at 603-04 (citing *Kasinga*, *Toboso-Alfonso*, and *Fuentes*). The Third Circuit also expressly agreed with Judge Posner’s conclusion that the social visibility requirement “makes no sense.” *Id.* at 605 (quoting *Gatimi*, 578 F.3d at 615). The Third Circuit accordingly held that the requirement

is both “inconsistent with past BIA decisions” and “unreasonable.” *Id.* at 604.

The Third Circuit subsequently has referred to and reaffirmed *Valdiviezo-Galdamez*’s rejection of the social visibility requirement. *See Garcia v. Attorney General*, 665 F.3d 496, 504 n.5 (3d Cir. 2011); *Mejia-Fuentes v. Attorney General*, 463 F. App’x 76, 78 (3d Cir. 2012).

D. Seven Circuits Have Deferred To The BIA And Adopted The Social Visibility Requirement

The First, Second, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits have deferred to the BIA’s interpretation of the phrase “particular social group” as containing a social visibility requirement.⁵ As noted above, the First Circuit acknowledged “the cogency and persuasiveness of both the reasoning and the outcomes of the Seventh and Third Circuits’ decisions,” but followed binding circuit precedent and applied the social visibility requirement. App. 12a. In *Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir.

⁵ The Fourth Circuit has acknowledged the social visibility requirement without adopting or rejecting it in a precedential opinion. *See Zelaya v. Holder*, 668 F.3d 159, 166 n.4 (4th Cir. 2012) (“Although the Seventh Circuit has rejected the BIA’s social visibility requirement, the Fourth Circuit has not yet decided whether such requirement comports with the INA.”) (citation omitted). The Ninth Circuit previously had recognized the social visibility requirement, but earlier this year an en banc decision left the question open. *See Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1091 (9th Cir. 2013) (en banc) (“We clarify the ‘social visibility’ and ‘particularity’ criteria without reaching the ultimate question of whether the criteria themselves are valid. . . . [W]e need not decide . . . whether we should align ourselves with the Third and Seventh Circuits and invalidate these requirements.”).

2007), the Second Circuit upheld a BIA determination that “affluent Guatemalans who suffered persecution fueled by class rivalry” were not a particular social group under the statute. *Id.* at 71-72. In doing so, the court deferred to the BIA’s articulation of the social visibility requirement. *Id.* at 72-73. Similarly, in *Orellana-Monson v. Holder*, 685 F.3d 511 (5th Cir. 2012), the Fifth Circuit deferred to the BIA’s articulation of the social visibility requirement and upheld its determination that Salvadoran young adults who were subjected to, and rejected, recruitment efforts of gangs were not sufficiently socially visible to qualify as members of a particular social group. *Id.* at 521.

Just last week, the Sixth Circuit followed the lead of the *Orellana-Monson* court, holding that Salvadoran youths who are threatened because they refused to join a gang are “not sufficiently socially visible” to constitute a particular social group. *Umaña-Ramos v. Holder*, No. 12-4274, 2013 WL 3880207, at *6 (6th Cir. July 30, 2013). In *Gaitan v. Holder*, 671 F.3d 678 (8th Cir.), *cert. denied*, 133 S. Ct. 526 (2012), the Eighth Circuit clarified any uncertainty that might have existed about its prior holdings on the issue of the social visibility requirement, concluding that two prior decisions had, indeed, embraced the social visibility requirement (albeit not expressly) and that it was bound to follow those decisions. *Id.* at 680-81.

In *Rivera-Barrientos v. Holder*, 666 F.3d 641 (10th Cir. 2012), the Tenth Circuit “join[ed] those circuits that have accepted the BIA’s social visibility test in interpreting the statute.” *Id.* at 652. In doing so, the court rejected the Seventh Circuit’s arguments that the requirement was inconsistent and illogical. *Id.* Finally, in *Castillo-Arias v. United States Attorney General*, 446 F.3d 1190 (11th Cir. 2006), the Elev-

enth Circuit deferred to the BIA’s interpretation of “particular social group” as including a social visibility requirement and upheld its determination that “informants who remain anonymous are not visible enough to be considered a ‘particular social group,’ as the very nature of the activity prevents them from being recognized by society at large.” *Id.* at 1197.

E. The Courts Of Appeals Have Frequently Acknowledged The Conflict

The court below explicitly acknowledged the circuits’ disagreement about the validity of the social visibility requirement. Indeed, it discussed the Seventh and Third Circuits’ holdings in detail, App. 8a-12a, “recognize[d] the cogency and persuasiveness of both the reasoning and the outcomes of the Seventh and Third Circuits’ decisions,” App. 12a, and applied the social visibility requirement only because it was bound by prior circuit precedent, App. 12a-13a.

Both the Seventh and Third Circuits, when they rejected the BIA’s social visibility requirement, acknowledged that they were disagreeing with the majority of the other circuits. *See Gatimi*, 578 F.3d at 616; *Valdiviezo-Galdamez*, 663 F.3d at 603 n.16. And subsequent court of appeals decisions (in addition to the decision below) have acknowledged the conflict. *See, e.g., Henriquez-Rivas v. Holder*, 707 F.3d at 1085; *Gaitan*, 671 F.3d at 685 (Bye, J., dissenting) (discussing the circuit split and “agree[ing] with the circuits which hold the BIA’s addition of the ‘social visibility’ . . . requirement[] to the definition of ‘particular social group’ is arbitrary and capricious”); *Umaña-Ramos*, 2013 WL 3880207, at *5 (adopting the social visibility requirement while noting that the “Third and Seventh Circuits have . . . rejected the social-visibility requirement as inconsistent with

prior precedent as well as an arbitrary interpretation of the INA”).

F. The Circuits That Apply The Social Visibility Requirement Diverge On How To Apply It

Circuits that have adopted or recognized the social visibility requirement disagree about its proper application. *See* App. 15a n.6 (noting “a tendency by the circuit courts to establish their own standards of what the social visibility requirement consists of”). As in the BIA decisions discussed above, two areas of inconsistency predominate. First, the courts of appeals that apply the social visibility requirement disagree about whether the group, the individual, or both must be socially visible; and, second, these courts disagree about whether the entity must be socially visible to society at large or to its alleged persecutors.

A wide range of opinion exists on whether the social visibility requirement demands that the group be socially visible or the individual be socially visible as a member of the group. *Compare, e.g., Pierre v. United States Att’y Gen.*, 432 F. App’x 845, 847-48 (11th Cir. 2011) (describing the test as requiring that the group have social visibility), *cert. denied*, 132 S. Ct. 2771 (2012), *with, e.g., Rivera-Barrientos*, 666 F.3d at 651 (“The second, distinct component of social visibility is that the applicant’s community is capable of identifying *an individual* as belonging to the group.”) (emphasis added). Sometimes, a single circuit expresses both views. *Compare, e.g., Scatambuli v. Holder*, 558 F.3d 53, 60 (1st Cir. 2009) (upholding “the BIA’s determination that *these particular informants* lacked social visibility”), *with, e.g., Mendez-Barrera v. Holder*, 602 F.3d 21, 27 (1st Cir. 2010)

(“The relevant inquiry is whether the social group is visible in the society, not whether the alien herself is visible to the alleged persecutors.”). Indeed, sometimes a single panel expresses both views. *See, e.g., Orellana-Monson*, 685 F.3d at 522 (affirming the BIA’s decision “that Jose and Andres did not possess characteristics that would cause others to recognize them as members of the claimed social groups,” but later in the opinion affirming “the decision of the BIA that the Orellana-Monsons’ proposed *group* lacked social visibility”) (emphasis added).

The Ninth Circuit explained the second area of disagreement this way:

Neither we nor the BIA has clearly specified whose perspectives are most indicative of society’s perception of a particular social group: the Petitioner herself? Her social circle? Her native country as a whole? The United States? The global community?

Henriquez-Rivas, 707 F.3d at 1089 (citation omitted). At various times, the Ninth Circuit has suggested that the answer might be the persecutors, *id.* at 1089–90; the society in question, *Santos-Lemus v. Mukasey*, 542 F.3d 738, 745 (9th Cir. 2008); or other members of the social group, *id.* at 746. The Second Circuit has indicated that the answer is “a persecutor” or “the outside world in general.” *Ucelo-Gomez*, 509 F.3d at 73. The First, Fifth, Eighth, Tenth, and Eleventh Circuits have indicated that the perception of society is relevant. *See Beltrand-Alas v. Holder*, 689 F.3d 90, 93 (1st Cir. 2012); *Orellana-Monson*, 685 F.3d at 522; *Malonga v. Mukasey*, 546 F.3d 546, 553 (8th Cir. 2008); *Rivera-Barrientos*, 666 F.3d at 650; *Castillo-Arias*, 446 F.3d at 1197.

II. WHETHER “MEMBERSHIP IN A PARTICULAR SOCIAL GROUP” INCLUDES A SOCIAL VISIBILITY REQUIREMENT IS AN IMPORTANT QUESTION THAT WARRANTS THIS COURT’S ATTENTION

The Constitution charges Congress with “establish[ing] an uniform Rule of Naturalization.” U.S. CONST. art. I, § 8, cl. 4. For decades, this Court has cited uniformity as a significant consideration when ruling upon immigration matters. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 700 (2001); *Graham v. Richardson*, 403 U.S. 365, 382 (1971); *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941); *Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1875).

The current inter-circuit conflict creates incentives for both the government and aliens to shop for a favorable forum. The government can forum-shop in removal cases (such as this one) because it can transport a detained alien to any location prior to filing the charging documents, which determines the venue for any judicial review. *See Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1092 (7th Cir. 1994) (“Since the INS has the authority to detain aliens in circuits other than the one in which they were apprehended, the INS may establish venue in its chosen circuit by transferring an alien to a remote detention site and instigating administrative proceedings in that circuit.”) (citation omitted).

As noted above, *see supra* p. 4 & note 1, the issue of social visibility regularly arises in the asylum context, too, and the standard is the same as for withholding of removal. Because asylum applicants have some flexibility in where they may file their applications, *see* 8 C.F.R. § 1208.4(b)(1), an alien can shop for a forum that will not impose the

social visibility requirement by seeking asylum in the Third or Seventh Circuit before the government commences removal proceedings. *See also Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 8 (2006) (statement of Judge Carlos T. Bea) (“In asylum cases the Fifth Circuit . . . has had [a] 125 percent rise over the last 5 years. But the Ninth Circuit has had a 590 percent rise over the last 5 years. Now, why is that? The Fifth Circuit grants 9 percent of the Board of Immigration denials by reversing them. The Ninth Circuit grants 33 percent. If I were representing one of my old clients, I would do everything in the world to have him given up and proceed in the Ninth Circuit rather than in the Fifth Circuit.”).

In sum, the lack of uniformity in the application of a “social visibility” requirement, coupled with the ability of the party that initiates the proceeding to choose the forum, creates the incentive to shop for a forum that applies a favorable standard. Clarifying the legal standard, therefore, would eliminate the incentives for such forum-shopping in this context.

III. MEMBERSHIP IN A “PARTICULAR SOCIAL GROUP” DOES NOT REQUIRE “SOCIAL VISIBILITY”

The First Circuit erroneously deferred to the BIA’s creation of a social visibility requirement in the context of membership in a “particular social group.” The BIA’s adoption of the “social visibility” test does not deserve deference because it represents a significant departure from its long-standing *Acosta* rule, and the new rule was adopted without explanation, *Valdiviezo-Galdamez*, 663 F.3d at 604; *see also id.* at 612-16 (Hardiman, J., concurring) (discussing the need for the BIA to “display[] an awareness that it

is changing its position’ and ‘provide[] a reasoned explanation for its actions’”) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). The BIA’s formulation of social visibility is inconsistent and confused, and therefore is unreasonable. As Judge Posner explained, the BIA’s formula for showing social visibility “makes no sense.” *Gatimi*, 578 F.3d at 615.

A. The BIA’s Adoption Of A Social Visibility Requirement Is Not Entitled To Deference

The BIA’s adoption of a “social visibility” requirement is not entitled to deference. As this Court unanimously declared last Term, “[w]hen an administrative agency sets policy, it must provide a reasoned explanation for its action. That is not a high bar, but it is an unwavering one.” *Judalang v. Holder*, 132 S. Ct. 476, 479 (2011).

The requirement of a “reasoned explanation for its action” is particularly important when an agency changes its long-standing policy. This Court has explained that “[a]n agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.” *Cardoza-Fonseca*, 480 U.S. at 447 n.30 (citations omitted). Thus:

Though the agency’s discretion is unfettered at the outset, if it announces and follows – by rule or by settled course of adjudication – a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as “arbitrary, capricious, [or] an abuse of discre-

tion” within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

INS v. Yueh-Shaio Yang, 519 U.S. 26, 32 (1996).

At the very least, an agency that departs from a settled policy must “display awareness that it is changing position.” *Fox Television Stations*, 556 U.S. at 515. It “may not . . . depart from a prior policy *sub silentio*.” *Id.*

The BIA’s current social visibility requirement is a significant departure from its *Acosta* policy. In fact, the BIA’s current policy would require *reversal* of a number of its prior decisions in which it found proposed groups to constitute particular social groups even though the groups and their members clearly lacked social visibility. See *Valdiviezo-Galdamez*, 663 F.3d at 604 (discussing cases). Further, the BIA has never “attempted, in this or any other case, to explain the reasoning behind the criterion of social visibility.” *Gatimi*, 578 F.3d at 615. Thus, the policy does not warrant judicial deference.

B. Even Under *Chevron*, The BIA’s Interpretation Is Unreasonable

The BIA’s interpretation fails *Chevron*’s second requirement because it is not “based on a permissible construction of the statute.” *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). First, the BIA’s policy is confused and applied inconsistently, both currently and across time, and is thus arbitrary and capricious. See, e.g., *Gatimi*, 578 F.3d at 615. Second, that policy ignores congressional intent by divorcing it from the international understanding of “membership in a particular social group.” Cf. *Cardoza-Fonseca*, 480 U.S. at 436-37 (describing

congressional purpose to conform U.S. law to international understanding).

1. The BIA's policy is confused and unclear, because the BIA has required literal on-sight visibility on several occasions and has rejected proposed social groups for failing this requirement. As noted by three courts of appeals, a policy that requires the alien's membership in a particular group to be recognizable on sight "makes no sense." *Gatimi*, 578 F.3d at 615; *Valdiviezo-Galdamez*, 663 F.3d at 605; *Umaña-Ramos*, 2013 WL 3880207, at *5. In essence, that requirement demands that, to qualify for asylum or withholding of removal, aliens must bring themselves to the attention of their persecutors and thus expose themselves to persecution. Any sane person would "tr[y] hard, one can be sure, to become invisible and . . . [thus remain] unknown to . . . society as a whole." *Gatimi*, 578 F.3d at 615. Moreover, the BIA's "test" is inconsistently applied, which makes the policy both unworthy of deference, *see supra* pp. 23-24, and unreasonable under *Chevron's* step two, *see Umaña-Ramos*, 2013 WL 3880207, at *5 (acknowledging that "there are some BIA opinions that equivocate between the two possible meanings of social visibility" and that one of the possible meanings, the "on-sight" requirement, would not make sense).

2. The BIA erred when it divorced the statute from the international understanding of the term, as expressed in the UNHCR's interpretation, on which the Congress relied when enacting the statute. Although the phrase "particular social group" is left undefined in the statute, *see Fatin v. INS*, 12 F.3d 1233, 1238-39 (3d Cir. 1993), Congress's intention in passing the law is clear. The "particular social group" language was first added to the INA by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat.

102. The Refugee Act's definition of "refugee" was intended "to bring the United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . to which the United States acceded in 1968." *Cardoza-Fonseca*, 480 U.S. at 436-37; *see also* CONG. RES. SERV., REVIEW OF U.S. REFUGEE RESETTLEMENT PROGRAMS AND POLICIES 15, 37 (1980) ("REFUGEE RESETTLEMENT REVIEW"). To achieve that result, Congress based its definition of refugee on the Protocol's definition of refugee. *See* H.R. Conf. Rep. No. 96-781, at 19 (1980) (noting that both the Senate bill and the House amendment based their definitions of "refugee" on the U.N. Protocol definition, and ultimately adopting the House version of the definition).

In recent guidelines, the UNHCR acknowledged that different countries interpreted the statutory language differently. *See* 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* 2-3 (2002) ("Guidelines"); *cf. Cardoza-Fonseca*, 480 U.S. at 439 n.22 (noting that the UNHCR "provides significant guidance in construing the Protocol"). To reconcile the discrepancies, the UNHCR explicitly incorporated both the *Acosta* formulation (based on protected characteristics) and the "social perception approach," which holds that "the defining characteristics of a particular social group are a common attribute and a societal perception that the group is set apart from other members of society." 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, 58 (2008). Thus, the UNHCR stated that

a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, *or* who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.

Guidelines at 3 (emphasis added).

The UNHCR incorporates both approaches, but does not make them both necessary. Rather, either approach is sufficient to prove the existence of a particular social group. Indeed, “[i]f a claimant alleges a social group that is based on a characteristic determined to be neither unalterable [n]or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society.” *Id.* at 4. The two tests should be considered sequentially as alternatives. See Marouf, 27 Yale L. & Pol’y Rev. at 61-62.

The BIA’s prevailing approach is inconsistent with the UNHCR’s interpretation of the treaty, because it misconstrues the disjunctive nature of the *Guidelines*.

IV. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE CIRCUIT CONFLICT

A. No Extraneous Issues Would Prevent This Court From Reaching The Social Visibility Issue

This case offers the Court an excellent opportunity to address the circuit conflict on whether “social visibility” is a requirement for membership in a “particu-

lar social group.” First, the issue is one of pure statutory interpretation and deference to administrative decisionmaking. No factual questions would hinder the Court’s ability to reach the social visibility issue.

Second, the issue was raised and considered below. The First Circuit thoroughly evaluated arguments on both sides of the split and ultimately concluded that it was bound by circuit precedent to follow the BIA’s interpretation. App. 8a-13a. Indeed, the court of appeals devoted more than half of its opinion to an in-depth discussion of the social visibility issue. *Id.* The First Circuit even went so far as to request guidance to understand “how courts are to square the BIA’s more recent statements regarding the social visibility requirement with its former decisions.” App. 13a. The issue has been preserved for appeal and is clearly presented for this Court’s review.

Finally, the applicability and meaning of the social visibility requirement is outcome-determinative in this case. As discussed *infra* at pp. 29-31, if petitioners do not need to establish the social visibility of their proposed social group, the BIA and First Circuit would consider their claims under the correct interpretation of the statutory term.⁶ Social visibility was the key to the First Circuit’s decision, and thus this Court could easily reach and resolve that issue.

⁶ The concurrence below incorrectly maintained that petitioners’ claims would not succeed regardless of the social visibility requirement. App. 20a (Howard, J., concurring). The concurrence ignored the majority’s analysis of circuit and BIA precedent that connects the failure of applications for withholding of removal based in part on wealth with the social visibility requirement. The concurrence also mischaracterized the other circuits’ approach to claims based in part on wealth. App. 20a-21a (Howard, J., concurring); *see also infra* pp. 30-31.

B. If This Court Rejects The Social Visibility Requirement, Petitioners' Claims Would Be Evaluated Under The Appropriate Formulation Of The Particular Social Group Requirement

If this Court rejects the BIA's social visibility requirement, the BIA and First Circuit could no longer use social visibility as an automatic bar to petitioners' claims but would instead evaluate petitioners' claims based on a proper understanding of the definition of a particular social group.

In reaching their decisions below, both the BIA and the First Circuit relied on opinions applying the social visibility requirement to reject particular social groups like the one in which petitioners claim membership. *See* AR 3-4; App. 7a-8a. As the First Circuit explained, "[t]he social visibility requirement undergirds the cases on which the agency relied in denying the petitioners' application for withholding." App. 8a. In the cases on which the BIA and the First Circuit relied to reject petitioners' claims, such as *Sicaju-Diaz v. Holder*, 663 F.3d 1 (1st Cir. 2011), and *A-M-E- & J-G-U-*, 24 I. & N. Dec. 69 (BIA 2007), the applicants' claims failed in large part due to the application of the social visibility requirement. Without that requirement, the outcomes likely would have been different, and the BIA's and the First Circuit's approach to petitioners' claims would change. Instead of simply rejecting the claimed "particular social group," the decisionmakers below would have to consider whether petitioners had shown that they would be persecuted because of their membership in a group with shared immutable characteristics (lengthy residence in the United States and being

parents of a United States citizen) that they either cannot, or should not be forced to, change.

In fact, the First Circuit itself suggested that the evaluation of petitioners' claim would change if social visibility were not required. The court "recognize[d] the cogency and persuasiveness of both the reasoning and the outcome of the Seventh and Third Circuits' decisions," but ultimately felt constrained by its own precedent to follow the BIA's social visibility requirement. App. 12a. Absent the binding circuit precedent, the First Circuit presumably would have evaluated petitioners' claims differently.

Moreover, the Third and Seventh Circuits left open the possibility that claims of membership in a particular social group may prevail even if they are based, in part, on wealth. *See, e.g., Tapiero de Orejuela v. Gonzales*, 423 F.3d 666, 672 (7th Cir. 2005) (recognizing as a "distinct social group" "the educated, landowning class of cattle farmers targeted by FARC"); *Serna-Garcia v. Attorney General*, 346 F. App'x 778, 781-82 (3d Cir. 2009) (per curiam) (remanding for consideration of the proposed social group of "young, single women with financial means who are vulnerable to kidnaping and have been threatened by FARC"), and *Ramirez v. Attorney General*, 187 F. App'x 228, 231 (3d Cir. 2006) (noting that "there is support for the proposition that certain manifestations of property holding, such as owning land, could constitute the type of 'immutable characteristic' that would make up a 'particular social group' under the BIA's definition of that term"). As in those cases, the group in which petitioners claim membership is based on more than wealth alone. *See* App. 5a (describing the claimed group as "persons who have lengthy residence in the United States and

are parents of a United States citizen”) (internal quotation marks omitted); *see also A-M-E- & J-G-U-*, 24 I. & N. Dec. at 75 n.6 (“We do not rule out the possibility that, in appropriate circumstances, ‘wealth’ may be a shared characteristic of a social group.”). By removing the artificial “social visibility” roadblock, reversal in this case would permit petitioners to make their claim for withholding under the appropriate standard instead of barring it outright. Applying the appropriate standard, as applied by the Third and Seventh Circuits in the cases discussed above, to petitioners’ claims based in part on wealth (but on more than wealth alone), the court below may likewise find that petitioners can establish their membership in a particular social group under the statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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