

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**

REPLY BRIEF FOR PETITIONERS

LYNN E. BLAIS
MICHAEL F. STURLEY
727 East Dean Keeton Street
Austin, Texas 78705
(512) 232-1350

ERIN GLENN BUSBY
411 Highland Street
Houston, Texas 77009
(713) 868-4233

January 22, 2014

DAVID C. FREDERICK
Counsel of Record
DREW A. NAVIKAS
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

TABLE OF CONTENTS

| | Page |
|----------------------------|------|
| TABLE OF AUTHORITIES | ii |
| ARGUMENT | 1 |
| CONCLUSION..... | 11 |

TABLE OF AUTHORITIES

| | Page |
|--|----------|
| CASES | |
| <i>A-M-E- & J-G-U-, In re</i> , 24 I. & N. Dec. 69 (BIA), <i>aff'd sub nom. Ucelo-Gomez v. Mukasey</i> , 509 F.3d 70 (2d Cir. 2007) | 3, 6, 7 |
| <i>A-T-, In re</i> : | |
| 24 I. & N. Dec. 296 (BIA 2007), <i>vacated</i> , | |
| 24 I. & N. Dec. 617 (Att'y Gen. 2008) | 3 |
| 24 I. & N. Dec. 617 (Att'y Gen. 2008) | 3 |
| <i>Acosta, In re</i> , 19 I. & N. Dec. 211 (BIA 1985) | 2 |
| <i>C-A-, In re</i> , 23 I. & N. Dec. 951 (BIA), <i>aff'd sub nom. Castillo-Arias v. United States Att'y Gen.</i> , 446 F.3d 1190 (11th Cir. 2006)..... | 3 |
| <i>Castillo-Arias v. United States Att'y Gen.</i> , 446 F.3d 1190 (11th Cir. 2006) | 2 |
| <i>Cece v. Holder</i> , 733 F.3d 662 (7th Cir. 2013) | 8 |
| <i>Chavez v. Attorney Gen.</i> , 500 F. App'x 165 (3d Cir. 2012)..... | 2, 4, 9 |
| <i>Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984) | 6, 8, 10 |
| <i>Crespin-Valladares v. Holder</i> , 632 F.3d 117 (4th Cir. 2011)..... | 8 |
| <i>Delgado-Ortiz v. Holder</i> , 600 F.3d 1148 (9th Cir. 2010) | 7 |
| <i>E-A-G-, In re</i> , 24 I. & N. Dec. 591 (BIA 2008) | 3 |
| <i>Fatin v. INS</i> , 12 F.3d 1233 (3d Cir. 1993)..... | 2 |
| <i>Gaitan v. Holder</i> , 683 F.3d 951 (8th Cir. 2012) | 9 |
| <i>Garcia v. Attorney Gen.</i> , 665 F.3d 496 (3d Cir. 2011)..... | 2 |

| | |
|---|------------|
| <i>Garcia-Camacho v. Holder</i> , 443 F. App'x 633 (2d Cir. 2011) | 7 |
| <i>Gatimi v. Holder</i> , 578 F.3d 611 (7th Cir. 2009)..... | 1, 3, 8, 9 |
| <i>Gatimi, In re</i> , 2010 Immig. Rptr. LEXIS 7845 (BIA Nov. 22, 2010) | 3 |
| <i>Henriquez-Rivas v. Holder</i> , 707 F.3d 1081 (9th Cir. 2013) | 9 |
| <i>Lizama v. Holder</i> , 629 F.3d 440 (4th Cir. 2011) | 8 |
| <i>Melendez v. Attorney Gen.</i> , 481 F. App'x 777 (3d Cir. 2012) | 8 |
| <i>Monterroso v. Attorney Gen.</i> , 476 F. App'x 973 (3d Cir. 2012) | 7 |
| <i>Orejuela v. Gonzales</i> , 423 F.3d 666 (7th Cir. 2005)..... | 7 |
| <i>Orellana-Monson v. Holder</i> , 685 F.3d 511 (5th Cir. 2012) | 9 |
| <i>Palma-Romero v. Holder</i> , 525 F. App'x 482 (7th Cir. 2013)..... | 2, 9 |
| <i>Rivera-Barrientos v. Holder</i> , 666 F.3d 641 (10th Cir. 2012)..... | 9 |
| <i>S-E-G-, In re</i> , 24 I. & N. Dec. 579 (BIA 2008) | 3, 4, 9 |
| <i>Santos v. Attorney Gen.</i> , 2014 WL 128686 (3d Cir. Jan. 15, 2014)..... | 4, 5 |
| <i>Sarhan v. Holder</i> , 658 F.3d 649 (7th Cir. 2011) | 1 |
| <i>Swart v. United States Att'y Gen.</i> , 2014 WL 128595 (11th Cir. Jan. 15, 2014)..... | 1-2 |
| <i>Temu v. Holder</i> , 2014 WL 169932 (4th Cir. Jan. 16, 2014) | 2 |

| | |
|---|------------|
| <i>Umaña-Ramos v. Holder</i> , 724 F.3d 667 (6th Cir. 2013) | 1, 9 |
| <i>Valdiviezo-Galdamez v. Attorney Gen.</i> , 663 F.3d 582 (3d Cir. 2011) | 2, 5, 8, 9 |
| <i>Zelaya v. Holder</i> , 668 F.3d 159 (4th Cir. 2012) | 8 |

STATUTES

| | |
|---|---------|
| Immigration and Nationality Act, 8 U.S.C. § 1101 <i>et seq.</i> | 1, 6, 9 |
|---|---------|

OTHER MATERIALS

| | |
|--|---|
| Br. in Opp., <i>Contreras-Martinez v. Holder</i> , No. 09-830 (U.S. filed Apr. 14, 2010) | 5 |
| Br. in Opp., <i>Velasquez-Otero v. Holder</i> , No. 11-1321 (U.S. filed Aug. 15, 2012) | 5 |

A deep and well-entrenched circuit conflict exists on whether the Immigration and Nationality Act (“INA”) supports a “social visibility” requirement for determining whether an alien is a member of a “particular social group” and, if so, what that requirement entails. As the government acknowledges, the Board of Immigration Appeals (“BIA” or “Board”) has done nothing to clarify the law, with the consequence that two circuits are unalterably aligned against seven others on the appropriate legal standard. The government urges continued delay in this Court’s resolution of that conflict, notwithstanding the BIA’s repeated failure to address the issue. Because the petition raises an important question of immigration law that warrants this Court’s review, certiorari should be granted.

1. The government’s central argument is that the BIA can resolve the circuit split by refining its definition of “particular social group,” *see* Opp. 17, but the Board has declined every such opportunity since the split arose. Courts of appeals have confirmed their positions on either side of the divide. *See, e.g., Sarhan v. Holder*, 658 F.3d 649, 654 (7th Cir. 2011) (“[W]e rejected [the social visibility criterion] as inconsistent with the Board’s and our own past cases.”) (citing *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009)); *Umaña-Ramos v. Holder*, 724 F.3d 667, 671 (6th Cir. 2013) (“*Bonilla-Morales* disposes of Umaña-Ramos’s suggestion that this court has not already adopted the social-visibility and particularity requirements.”). Just last week, the Eleventh Circuit reaffirmed its deference to the Board on the social visibility requirement. *See Swart v. United States Att’y Gen.*, 2014 WL 128595, at *2 & n.1 (11th Cir. Jan.

15, 2014) (per curiam) (citing *Castillo-Arias v. United States Att’y Gen.*, 446 F.3d 1190 (11th Cir. 2006)).

And still the Board gives no indication that it is willing or able to resolve the conflict, instead continuing to apply the requirement inconsistently and irrationally. See *Temu v. Holder*, 2014 WL 169932, at *5 (4th Cir. Jan. 16, 2014) (holding that the BIA applied the social visibility requirement in a manner that “would lead to absurd conclusions that flout the case law of this Court, other circuit courts, and the BIA itself”). Indeed, the Board has not issued a precedential opinion on the issue since 2008.

The BIA repeatedly has acknowledged the circuits rejecting its reasoning. See, e.g., *Chavez v. Attorney Gen.*, 500 F. App’x 165, 167 (3d Cir. 2012) (per curiam) (“On appeal, the Board . . . noted that this Court had ‘declined to defer . . . to the Board’s consideration of “social visibility.”’”); *Palma-Romero v. Holder*, 525 F. App’x 482, 483 (7th Cir. 2013) (“The Board . . . acknowledg[ed] our rejection of the ‘social visibility’ test.”).

The BIA also has ignored multiple requests from courts of appeals for clarification of the social visibility requirement, see, e.g., App. 13a (“[T]he requirement of social visibility at the very least merits additional examination by and clarification from the BIA.”); *Garcia v. Attorney Gen.*, 665 F.3d 496, 504 n.5 (3d Cir. 2011) (“Until the BIA provides an analysis that adequately supports its departure from [*In re Acosta*, 19 I. & N. Dec. 211 (BIA 1985)], we remain bound by the well-established definition of ‘particular social group’ found in [*Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993)].”); *Valdiviezo-Galdamez v. Attorney Gen.*, 663 F.3d 582, 608 (3d Cir. 2011) (noting that “the BIA has not announced a ‘principled reason’ for its

adoption of . . . inconsistent [social visibility] requirements”); *Gatimi*, 578 F.3d at 615 (“the Board [has not] attempted, in this or any other case, to explain the reasoning behind the criterion of social visibility”), even though it has had frequent opportunities to weigh in on the matter, *see, e.g., In re Gatimi*, 2010 Immig. Rptr. LEXIS 7845, at *4 (BIA Nov. 22, 2010) (non-precedent decision) (“[T]o the extent that the Amici Curiae for the lead respondent urge us to reconsider our precedent decisions discussing the social visibility requirement, we decline to reconsider those cases at this time.”).

The Board’s actions prior to 2009 also offer little hope that it will resolve the conflict. The Board’s four precedential decisions¹ implicating the social visibility requirement between 2006 and 2008, *In re C-A-*, 23 I. & N. Dec. 951 (BIA 2006); *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69 (BIA 2007); *In re S-E-G-*, 24 I. & N. Dec. 579 (BIA 2008); *In re E-A-G-*, 24 I. & N. Dec. 591 (BIA 2008), proffer no reasoned explanation of the requirement. *See* Pet. 22-27. Moreover, the Board itself has applied the social visibility requirement inconsistently. *See* Pet. 24-25. In *E-A-G-*, the BIA rejected the proposed social group because the group “lack[ed] the social visibility that would allow others to identify its members as part of such a group,” thus requiring literal visibility.² 24 I. & N. Dec. at 594. In *S-E-G-*, the BIA declined to recognize as a social group “Salvadoran youth who are recruited by gangs” because there was no evidence that they

¹ A fifth precedential decision, *In re A-T-*, 24 I. & N. Dec. 296 (BIA 2007), was vacated. 24 I. & N. Dec. 617 (Att’y Gen. 2008).

² Literal visibility requires that “the alien must be visually recognizable on sight as a member of the alleged social group.” Pet. 8, 19-20.

“would be ‘perceived as a group’ by society,” thus requiring abstract visibility.³ 24 I. & N. Dec. at 587. In the succeeding five years, the Board has done nothing to turn that inconsistency into a clear, reasoned interpretation.

Rather than acting to resolve the conflict, the Board has avoided the application of the requirement in the courts of appeals that reject the social visibility requirement. In *Chavez*, for example, the Board considered the Chavezes’ claim for withholding of removal based on their wealth and association with highly influential and wealthy people in the United States. 500 F. App’x at 166. The immigration judge found that the Chavezes were not members of a cognizable social group, in part because they did not meet the “social visibility” requirement. *Id.* at 166-67. On appeal, the Board noted that the Third Circuit “had ‘declined to defer . . . to the Board’s consideration of “social visibility” and “particularity” as additional factors relevant to determining whether a proposed particular social group is legally cognizable.’” *Id.* at 167. Rather than rehabilitate its “particular social group” standard in response to the Third Circuit’s decision, the Board simply “held . . . that even without consideration of those factors, the proposed social group was not legally cognizable.” *Id.*

Similarly, in *Santos v. Attorney General*, 2014 WL 128686 (3d Cir. Jan. 15, 2014) (unpublished), the immigration judge initially held that Santos was not a member of a particular social group because he lacked “social visibility” and the Board denied Santos’s appeal. *Id.* at *2. While Santos’s appeal was

³ Abstract visibility requires that “the alleged group must be recognized in the abstract as a distinct segment of society.” Pet. 8, 19-20.

pending, the Third Circuit in *Valdiviezo-Galdamez* “rejected the BIA’s use of ‘social visibility.’” *Id.* Santos moved for reconsideration in light of *Valdiviezo-Galdamez*. Instead of taking this opportunity to clarify the social visibility requirement, the Board concluded that Santos failed to establish that he feared persecution on account of group membership regardless of whether he was a member of a cognizable social group. *Id.* at *3. This avoidance tactic further exacerbates the lack of uniformity in the application of the immigration laws caused by the long-standing conflict among the courts of appeals.

While the Board has left the circuit split intact, the government has urged this Court’s forbearance in reviewing the conflict for almost four years. *See* Br. in Opp. 11, *Contreras-Martinez v. Holder*, No. 09-830 (U.S. filed Apr. 14, 2010) (“It is thus not accurate to state . . . that the ‘overwhelming majority of the circuits have squarely addressed the issue,’ and this Court’s review would be premature at this time.”); Br. in Opp. 14, *Velasquez-Otero v. Holder*, No. 11-1321 (U.S. filed Aug. 15, 2012) (“[T]o the extent there is disagreement among the circuits regarding the permissible methodology for evaluating ‘particular social group’ claims, that conflict . . . may resolve itself as the Board refines and shapes the particular social group definition.”). The government’s position is stale. The Board has failed to act, and the brief in opposition offers no reason to believe that the Board can or will take any action that will resolve the conflict. This Court should not accept the government’s continued calls for further percolation to permit the Board to resolve the problem. The Board has had ample opportunity to address the issue but has consistently failed to exercise its authority.

2. The government’s attempt to deny the existence of the conflict is similarly unpersuasive. First, the government makes the peculiar argument that, for a conflict to arise concerning a requirement applied on a “case-by-case basis,” at least two “materially indistinguishable” cases must apply the requirement to conflicting effect. That argument is wrong for the simple reason that the courts of appeals are split over whether the “social visibility” requirement itself, not its application to particular facts, is entitled to *Chevron* deference. *See* Pet. 13-18. The government’s characterization of the “material” facts in the case law is thus irrelevant.

Moreover, the government misconstrues the material facts by focusing solely on perceptions of wealth. *See* Opp. 15 (“No court of appeals has held that people who may be perceived as wealthy in their home countries because of their prior residence in the United States constitute a ‘particular social group’ under the INA.”). Petitioners’ claims for withholding of removal do not rely solely on their wealth or perceptions of their wealth. Rather, they have consistently claimed membership in a particular social group comprised of Mexican nationals who have long lived in the United States, are perceived to be wealthy, and have a child who is a U.S. citizen. *See* App. 6a. Those details matter.

Indeed, the Board has made clear that the role of a particular characteristic in establishing membership in a particular social group “must be considered in the context of the country of concern and the persecution feared.” *A-M-E-*, 24 I. & N. Dec. at 74. Critically, the Board itself has noted that, “in appropriate circumstances, ‘wealth’ may be a shared characteristic of a social group” when the group is more

“defined.” *Id.* at 75 n.6. Courts rejecting the “social visibility” requirement have recognized that cognizable particular social groups can be based on wealth plus other shared characteristics. *See, e.g., Monterroso v. Attorney Gen.*, 476 F. App’x 973, 975 (3d Cir. 2012) (remanding for reconsideration of claim based on membership in particular social group “defined as children of wealthy parents who have been threatened with kidnapping or murder if extortion money is not paid”); *Orejuela v. Gonzales*, 423 F.3d 666, 672 (7th Cir. 2005) (concluding that particular social group of educated, landowning cattle farmers targeted by FARC is “not defined merely by wealth”).⁴ Thus, even if they were relevant, none of the government’s citations establishes an absence of conflict over whether petitioners’ proposed social group is a cognizable “particular social group.” *See* Opp. 15-16 & n.9.⁵

Second, the government inexplicably argues that the Seventh and Third Circuits have not rejected the

⁴ The Third and Seventh Circuits’ holdings that wealth plus other characteristics may define a cognizable particular social group, as that term is applied without the social visibility requirement, suggest that the circuit split on the requirement’s validity has substantive significance that the government is not acknowledging.

⁵ In *Delgado-Ortiz v. Holder*, 600 F.3d 1148 (9th Cir. 2010), the proposed particular social group was “returning Mexicans from the United States,” with no mention of wealth or perceptions of wealth. *Id.* at 1151. In *Garcia-Camacho v. Holder*, 443 F. App’x 633 (2d Cir. 2011), the claimant proposed a particular social group comprised of returning Mexican nationals who feared kidnapping because of perceived wealth. While the court rejected this proposed group, it declined to rule on a proposed group that included the characteristic of having immediate family members in the United States because that group had not been asserted below.

social visibility requirement but have merely “concluded that the Board’s explanation of the social visibility criterion was insufficiently clear and remanded . . . for further proceedings.” Opp. 18. This assertion ignores the plain language of those courts’ opinions. Both the Seventh and Third Circuits have unequivocally rejected the social visibility requirement. *See, e.g., Cece v. Holder*, 733 F.3d 662, 668 n.1 (7th Cir. 2013) (en banc) (“[T]his Court rejected a social visibility analysis . . .”); *id.* at 682 (Easterbrook, C.J., dissenting) (“Our court has discarded . . . another component of the Board’s definition: social visibility.”); *Melendez v. Attorney Gen.*, 481 F. App’x 777, 780 (3d Cir. 2012) (per curiam) (“In [*Valdiviezo-Galdamez*], we held that BIA opinions defining a [sic] ‘particular social groups’ in terms of ‘social visibility’ and ‘particularity’ were inconsistent with prior BIA opinions and were not entitled to *Chevron* deference.”).

Other courts of appeals have confirmed that the Third and Seventh Circuits have done more than simply seek clarification of the Board’s social visibility requirement and that their rejection of that requirement is in conflict with other circuits’ decisions. *See* App. 9a (“[T]he Seventh Circuit’s decision in *Gatimi* . . . invalidated the BIA’s social visibility requirement in the asylum context.”); *Zelaya v. Holder*, 668 F.3d 159, 165 n.4 (4th Cir. 2012) (“[T]he Seventh Circuit has rejected the BIA’s social visibility requirement”); *Crespin-Valladares v. Holder*, 632 F.3d 117, 129 n.5 (4th Cir. 2011) (“[T]he Seventh Circuit has rejected the BIA’s ‘social visibility’ requirement.”); *Lizama v. Holder*, 629 F.3d 440, 447 n.4 (4th Cir. 2011) (“While . . . the majority of our sister circuits have deferred to the BIA’s social visibility criterion, the Seventh Circuit recently rejected the visibility requirement.”);

Orellana-Monson v. Holder, 685 F.3d 511, 520 (5th Cir. 2012) (“Only the Third and Seventh Circuit have declined to apply the BIA’s framework.”); *Umaña-Ramos*, 724 F.3d at 673 (“The Third and Seventh Circuits . . . rejected the social-visibility requirement as inconsistent with prior BIA precedent as well as an arbitrary interpretation of the INA.”); *Gaitan v. Holder*, 683 F.3d 951, 952 (8th Cir. 2012) (Colloton, J., concurring in denial of rehearing en banc) (“[I]t appears that a conflict in the circuits regarding the validity of *Matter of S-E-G* will exist no matter how this court decides the question. Compare *Valdiviezo-Galdamez v. Holder*, 663 F.3d 582, 603-09 (3d Cir. 2011), and *Gatimi v. Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009), with *Rivera-Barrientos v. Holder*, 666 F.3d 641, 650-52 (10th Cir. 2012).”); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1085 (9th Cir. 2013) (en banc) (“Most circuits have accepted the BIA’s ‘social visibility’ and ‘particularity’ criteria. But the Third and Seventh Circuits have rejected ‘social visibility’ as an unreasonable interpretation of the ambiguous statutory term.”) (citations omitted); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 651 (10th Cir. 2012) (“In *Gatimi* . . . , the Seventh Circuit rejected the social visibility test.”). Even the Board itself has acknowledged the Third and Seventh Circuits’ positions. See *Chavez*, 500 F. App’x at 167 (“[o]n appeal, the Board . . . noted that this Court had ‘declined to defer . . . to the Board’s consideration of “social visibility” and “particularity””’); *Palma-Romero*, 525 F. App’x at 483 (“The Board . . . acknowledg[ed] our rejection of the ‘social visibility’ test.”). The split is simply too widely acknowledged for the government’s continued denial of its existence to be credible.

3. Moreover, the government’s argument that this case is not a good vehicle for addressing the entrenched conflict misapprehends the full scope of the basis for petitioners’ claims for withholding of removal and relies on assertions that are inconsistent with the proceedings below. The government first repeats (at 23-24) its erroneous suggestion that petitioners would not be able to establish membership in a particular social group because they seek withholding of removal based solely on their wealth or perceptions of their wealth. As already noted (*supra* p. 6), however, petitioners consistently have claimed membership in the particular social group defined by wealth plus other factors: that they are Mexican nationals who have lived in the United States for a long time, are perceived to be wealthy, and have a child who is a U.S. citizen and therefore is at heightened risk of being kidnapped. *See* App. 6a. Next, the government claims that petitioners have failed to establish that any persecution would be “on account of” a protected ground, Opp. 25, or that it is “more likely than not” that they would be persecuted, Opp. 26. But the Board did not address either of these factors below. The Board denied petitioners’ appeal based on its view that petitioners could not establish membership in a cognizable particular social group. *See* App. 23a-24a; *see also* App. 8a (“The social visibility requirement undergirds the cases on which the agency relied in denying the petitioners’ applications for withholding.”) (court of appeals decision).

4. Finally, much of the government’s brief in opposition is devoted to the merits. The government argues (at 11-15) that the Board’s adoption of the social visibility requirement is reasonable and entitled to *Chevron* deference, and therefore the decision below is correct. Seven courts of appeals agree. *See*

Pet. 16-18 (discussing the holdings of the circuits that have deferred to the Board and adopted the social visibility requirement). Two courts of appeals, however, disagree. *See* Pet. 14-16 (discussing holdings of Third and Seventh Circuits, which have rejected the social visibility requirement). Even if, as the government argues (at 19-23), the Third and Seventh Circuits misconstrued the Board's precedent, this does not mitigate the harm being caused by the circuit split. The government's suggestion that there is a simple resolution to the merits of the conflict is also belied by the Board's failure to resolve the purported misunderstanding in more than four years. The fact that the government agrees with the majority of the courts of appeals in this clear, entrenched, and important conflict is no reason for this Court to decline to resolve it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LYNN E. BLAIS
MICHAEL F. STURLEY
727 East Dean Keeton Street
Austin, Texas 78705
(512) 232-1350

ERIN GLENN BUSBY
411 Highland Street
Houston, Texas 77009
(713) 868-4233

January 22, 2014

DAVID C. FREDERICK
Counsel of Record
DREW A. NAVIKAS
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)