No. ___ – _____

# In the Supreme Court of the United States

WILFREDO GARAY REYES,
*Petitioner*,

v.

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,
*Respondent*.

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

## PETITION FOR A WRIT OF CERTIORARI

LORI ALVINO MCGILL
*Counsel of Record*
DAVID FRIEDMAN
RUTH VINSON
WILKINSON WALSH + ESKOVITZ LLP
1900 M Street, NW
Suite 800
Washington, DC 20036
(202) 847-4035
lalvinomcgill@wilkinsonwalsh.com

*Counsel for Petitioner*

[Additional counsel listed on inside cover]

ALMA L. DAVID
GLOBAL JUSTICE LAW GROUP, PLLC
216 First Ave. S.
Suite 420
Seattle, WA 98104
(206) 787-1406
adavid@globaljusticelawgroup.com

ZACHARY A. ALBUN
EISENBERG LAW FIRM, PLLC
75 Broad Street
Suite 2120
New York, NY 10004
(212) 951-0753
zack@lisaesq.com

BENJAMIN CASPER SANCHEZ
JAMES H. BINGER CENTER FOR NEW AMERICANS
UNIVERSITY OF MINNESOTA LAW SCHOOL
190 Mondale Hall
229 19th Ave. S.
Minneapolis, MN 55455
(612) 625-6484
caspe010@umn.edu

*Counsel for Petitioner*

## QUESTION PRESENTED

Under the Immigration and Nationality Act, an alien is eligible for asylum or withholding of removal, if, *inter alia*, the alien is unwilling or unable to return to his country of origin due to persecution "because of . . . membership in a particular social group." 8 U.S.C. § 1231(b)(3)(A); 8 U.S.C. § 1101(a)(42)(A).

For more than two decades, the Board of Immigration Appeals (BIA) interpreted the term "particular social group" to mean "a group of persons all of whom share a common, immutable characteristic" that "the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). But in 2006, the BIA departed from longstanding precedent, reinterpreting "particular social group" to require proof that the group possesses "social visibility" and "particularity." *In re C-A-*, 23 I. & N. Dec. 951, 957, 959-61 (BIA 2006). After several courts concluded that this new definition "ma[de] no sense," *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (Posner, J.), the BIA purported "to clarify" that "particular social group" claims require proof of "social *distinction*" and "particularity." App. 40a (emphasis added). Three circuits have rejected the BIA's new and ever-shifting requirements, while seven circuits have deferred to the agency. The question presented is:

Whether the Ninth Circuit erred in deferring to the BIA's interpretation of "particular social group" under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

## TABLE OF CONTENTS

**Page**

**TABLE OF CONTENTS..... Continued**

## APPENDIX TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases** **Pages**

**TABLE OF AUTHORITIES..... Continued**

**TABLE OF AUTHORITIES..... Continued**

**TABLE OF AUTHORITIES..... Continued**

**TABLE OF AUTHORITIES..... Continued**

**TABLE OF AUTHORITIES..... Continued**



**Statutes**

**TABLE OF AUTHORITIES..... Continued**



**Other Authorities**

## OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 842 F.3d 1125 (App. 1a-32a). The order denying rehearing and rehearing en banc is reproduced at App. 81a-82a. The opinion of the BIA is reported at 26 I. & N. Dec. 208 (App. 33a-63a).

## JURISDICTION

The Ninth Circuit issued its opinion on November 30, 2016. A petition for panel rehearing and rehearing en banc was denied on March 29, 2017. On June 26, 2017, Justice Kennedy extended the time to file this petition to August 11, 2017. *See* No. 16A1257. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS

8 U.S.C. § 1231(b)(3)(A) and 8 U.S.C. § 1101(a)(42)(A) are reproduced at App. 83a-84a.

## INTRODUCTION

Wilfredo Garay Reyes fled El Salvador in 2001 at age eighteen, seeking to escape the notorious Mara 18 gang. Garay had joined the gang at age seventeen, and renounced his membership less than a year later. After defecting, Garay was targeted for retribution; Mara 18 members twice attempted to kill him. Garay fled to the United States in fear for his life. He is now thirty-four and married with three daughters, two of whom are United States citizens.

Garay sought withholding of removal based on his well-founded fear that his "life or freedom would be threatened . . . because of [his] . . . membership in a particular social group," 8 U.S.C. § 1231(b)(3)(A),

former members of the Mara 18 gang in El Salvador who have renounced their gang membership.

Though he found Garay credible, the immigration judge (IJ) denied relief, making no factual findings on the features of Garay's proposed particular social group (PSG), the nexus between his proposed PSG and persecution, or the likelihood that he would be tortured if returned to El Salvador. Instead, the IJ erroneously concluded that inapposite precedent involving *current* gang members categorically barred recognition of Garay's claims.

The Board of Immigration Appeals (BIA) affirmed in a published, precedential decision. Re-labeling its recently announced requirements of "particularity" and "social visibility," the BIA held that a particular social group must possess "social distinction," and that Garay's proposed group—former gang members—failed that test.

The Ninth Circuit's published decision deferring to the BIA's reworked test for PSG claims deepens a widely acknowledged and entrenched circuit split. At least three circuits have explicitly or implicitly rejected the BIA's departure from the longstanding *Acosta* test for PSG claims, while seven others defer to the BIA. This persistent conflict has resulted in starkly disparate treatment of similarly situated asylum applicants—undermining Congress's stated goal of uniform application of the immigration laws.

The Ninth Circuit's decision is also wrong. The BIA's chameleon-like interpretation of what it means to be a member of a "particular social group" is incoherent, internally inconsistent, and fails to give applicants fair notice of what is required to prove their claims. Because the question presented raises

an important and recurring issue of national importance on which the courts of appeal are deeply divided, this Court's plenary review is warranted.

## STATEMENT OF THE CASE

### I. Relevant Statutory Provisions

The Immigration and Nationality Act (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." 8 U.S.C. § 1231(b)(3)(A). This relief is known as withholding of removal or statutory withholding. These five protected categories that may form the basis of a statutory withholding claim are the same as those enumerated in the asylum statute. *See* 8 U.S.C. § 1101(a)(42)(A); *see also, e.g.*, *Oliva v. Lynch*, 807 F.3d 53, 58 n.3 (4th Cir. 2015) ("Because both asylum and withholding of removal claims rely on the same factual basis, we may look to asylum cases when deciding whether a petitioner has asserted a valid particular social group . . . .").

By contrast, to be entitled to CAT relief, an applicant need not show that he would be tortured because of his membership in one of the five protected categories. *See* 8 C.F.R. § 208.16(c)(2); *Settenda v. Ashcroft*, 377 F.3d 89, 94 (1st Cir. 2004); *Efe v. Ashcroft*, 293 F.3d 899, 907 (5th Cir. 2002); *Kamalthas v. I.N.S.*, 251 F.3d 1279, 1283 (9th Cir. 2001). Rather, to establish entitlement to CAT relief, the applicant has the burden to "establish that it is more likely than not that he or she would be tortured

if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2); *Kamalthas*, 251 F.3d at 1284.

For claims for CAT relief or statutory withholding, the IJ is the factfinder in the first instance. If an IJ's determination is appealed to the BIA, the BIA "will not engage in de novo review of findings of fact," but may only "determine whether the findings of the immigration judge are clearly erroneous." 8 C.F.R. § 1003.1(d)(3)(i). Further, "[e]xcept for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in fact-finding in the course of deciding appeals." *Id.* § 1003.1(d)(3)(iv).

The INA authorizes withholding of removal if the immigrant demonstrates a well-founded fear of persecution because of "membership in a particular social group." The phrase "particular social group" is not further defined. The BIA first interpreted the phrase in *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). Applying the canon of *ejusdem generis*, the BIA explained that the other protected categories—race, religion, nationality, and political opinion—all refer to immutable characteristics: "a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed." *Id.* at 233. Accordingly, the BIA "interpret[ed] the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a

common, immutable characteristic." *Id.* The BIA further explained that such a common characteristic could include "sex, color, or kinship ties, or in some circumstances it might be a *shared past experience* such as former military leadership or land ownership." *Id.* (emphasis added).

The BIA applied *Matter of Acosta* for two decades, recognizing, for example, claims of persecution based on former membership in the Salvadoran national police, *Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (BIA 1988), and based on the applicant's status as a Cuban homosexual, *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 823-24 (BIA 1990).

After decades of deciding PSG claims based on the *Acosta* standard, in 2006 the BIA departed drastically from its prior precedent, requiring applicants to demonstrate that their proposed groups possess sufficient "particularity" and "social visibility"—poorly explained concepts that the BIA seemed to fashion out of whole cloth. *See* App. 36a. The BIA defined "social visibility" as "the extent to which members of a society perceive those with the characteristic in question as members of a social group." *In re C-A-*, 23 I. & N. Dec. 951, 957 (BIA 2006). The BIA defined particularity as "whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons." *Matter of S-E-G-*, 24 I. & N. Dec. 579, 584 (BIA 2008).

The contours of these requirements have morphed from case to case, culminating in the BIA's precedential decision in this case, *Matter of W-G-R-*, 26 I. & N. Dec. 208 (BIA 2014), and a companion case

issued the same day, *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (BIA 2014). In these cases, the BIA renamed "social visibility" "social distinction," to "clarify that social visibility does not mean 'ocular' visibility." App. 46a. The BIA further "clarif[ied] that social distinction exists where the relevant society perceives, considers, or recognizes the group as a distinct social group." App. 48a.

**II. Petitioner's Claims**

Petitioner, a citizen and national of El Salvador, was raised in poverty and instability. He worked and lived on his own from ages twelve to fourteen, at one point eating out of garbage bins to survive. App. 70a-71a; Administrative Record (A.R.) 493-94. Garay joined the Mara 18 gang[1] in 2000, at age seventeen. App. 3a. Mara 18 is "one of the most notorious gangs in Central America." App. 77a. He was lured by the local leader's promise of camaraderie and the gang's reputation for helping poor children in his hometown. App. 71a; A.R. 140-41. Four months after Garay joined Mara 18, Francisco, a new and more violent leader took control. Francisco announced that anyone who attempted to leave the gang would be beaten or killed. Under Francisco's direction, Garay participated as a getaway driver in two or three bank robberies. App. 3a.

Just seventeen years old, Garay became disillusioned with gang life, and defected. He fled, hiding in a city three hours from his home. Francisco tracked him down and shot him. App. 3a; A.R. 496-97. Garay then fled to a different city, but he was discovered by Mara 18 members within a few months.

---

[1] Mara 18 is also known as the 18th Street Gang.

He was brutally attacked by machete-wielding gang members and narrowly escaped death. Garay then fled to the United States, fearing for his life. App. 73a-74a.

Garay entered the United States without inspection in May 2001. Upon entering the United States, he had just turned eighteen; Garay now is thirty-four, and married with three daughters, two of whom are U.S. Citizens. App. 3a. Garay has had no involvement with gangs since coming to the United States. App. 4a.

Garay was placed in removal proceedings in 2009. He applied for CAT relief, asylum[2] and withholding of removal based on past and future persecution by Mara 18, police, and death squads because of his membership in a PSG defined as "former members of Mara 18 in El Salvador who have renounced their gang membership." App. 4a.

Garay's merits hearing took place in January 2010, not long after the BIA issued its first decisions adding the "particularity" and "social visibility" requirements to the longstanding *Acosta* standard for PSG claims. Garay testified to his persecution by the gang and his fear of persecution on account of his status as a former gang member, noting that El Salvador is a small country, and that the gang would find out and kill him if he returned. A.R. 155-156. Garay explained that he would be identifiable in El Salvador by name, and that he had heard of people being tortured for desertion from Mara 18 by having

---

[2] The IJ found Garay's application for asylum to be untimely, App. 66a-68a, and this finding was not challenged on appeal to the BIA, App. 34a n.1.

a tire placed around them, being doused in gasoline, and set on fire. A.R. 498-499.

Garay submitted almost 300 pages of evidence to support his claims. A.R. 319-477, 581-700. These documents included a report by Harvard Law School recounting extensive in-country interviews wherein multiple segments of Salvadoran society discussed the particular dangers facing former gang members; a USAID report describing a Salvadoran government program designed specifically for former gang members; and several other reports detailing the social situation of former gang members in El Salvador and the extreme dangers they face for defecting. *See, e.g.*, A.R. 374, 380, 384-86, 390, 448-55, 588, 668-70.

Garay pointed to the Seventh Circuit's decision in *Benitez Ramos v. Holder*, 589 F.3d 426, 429-31 (7th Cir. 2009), which reversed a BIA decision holding that former Salvadoran gang members did not constitute a PSG, and noted the BIA's confusing and shifting PSG requirements. A.R. 563-64.

The IJ entered an oral decision finding Garay credible and finding that he had suffered harm rising to the level of persecution at the hands of Mara 18. App. 75a. The IJ nevertheless denied all relief, based on erroneous legal reasoning. On Garay's claim for CAT relief, the IJ held that murder does not constitute torture. App. 78a-79a. On Garay's claim for withholding of removal, the IJ erroneously ruled that *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007), categorically precluded recognition of a PSG based on former gang membership. App. 76a-77a. The IJ conducted no further analysis or review of the evidentiary record, and did not make *any* factual or

legal findings regarding the particularity or social visibility of Garay's proposed group, the nexus between his proposed group and persecution, or the risk of persecution if he were returned to El Salvador.

On appeal, the BIA ignored the IJ's woefully inadequate factual findings and instead used Garay's case to further "clarify" its ever-evolving views on "particular social group" claims, in a published, precedential decision. The BIA re-labeled "social visibility" "social distinction," which it explained meant that "society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group." App. 48a. The BIA "clarified" that the persecutors' perception is not sufficient. With respect to its new gloss on "particularity," the BIA explained that the group must be sufficiently "discrete." It further declared that "when a former association is the immutable characteristic that defines a proposed group, the group will often need to be further defined with respect to the duration or strength of the members' active participation in the activity and the recency of their active participation if it is to qualify as a particular social group under the Act." App. 55a-56a.

Despite the fact that the BIA has significantly altered its standard for evaluating particular social group claims, it has insisted that its new requirements are consistent with *Matter of Acosta* and merely reflect a refinement or "clarification" of its prior decisions. App. 50a-54a.

Rather than remand for the IJ to make factual findings in the first instance—as required by regulation, 8 C.F.R. § 1003.1(d)(3)(iv)—the BIA made its own factual findings, and also purported to affirm

factual findings that the IJ never made. With respect to Garay's withholding claim, the BIA found that the proposed group lacked particularity "because it is too diffuse, as well as being too broad and subjective." App. 54a. It explained: "As described, the group could include persons of any age, sex, or background. It is not limited to those who have had a meaningful involvement with the gang and would thus consider themselves—and be considered by others—as 'former gang members.'" App. 55a. The BIA also found a lack of "evidence that the social group proposed by the respondent is recognized within the society." *Id.*[3]

Finally, the BIA found that Garay had failed to show that there was a nexus between his claimed social group and the persecution he feared, reasoning that he had "not shown that any acts of retribution or punishment by gang members would be motivated by his status as a former gang member, rather than by the gang members' desire to enforce their code of conduct and punish infidelity to the gang." App. 59a-60a. With respect to Garay's CAT claim, the BIA purported to affirm the IJ's "predictive findings" as not clearly erroneous. App. 62a.

Garay petitioned for review, and a panel of the Ninth Circuit granted in part and denied in part in a published opinion. App. 32a. With regard to Garay's claim for withholding, the Ninth Circuit held that the BIA's interpretation of "particular social group" is

---

[3] By contrast, in the companion case, *Matter of M-E-V-G,* the BIA remanded to the IJ on the immigrant's withholding claim, noting that "[a] remand will enable the Immigration Judge to engage in any fact-finding that may be necessary to resolve the issues in this case, consistent with standard Immigration Court practice and procedure." 26 I. & N. Dec. at 252.

entitled to *Chevron* deference. App. 11a-19a. The Ninth Circuit also rejected Garay's alternative argument that his proposed group of "former members of the Mara 18 gang in El Salvador who have renounced their membership" is cognizable under the BIA's new PSG test. App. 19a-22a. The court of appeals recognized, however, that the BIA had ignored record evidence tending to show social distinction, namely "evidence of rehabilitation programs run for the benefit of former gang members and of threats former gang members face from members of their own and other gangs." App. 21a.

The Ninth Circuit did not reach the issue of the BIA's treatment of nexus, but noted that "the BIA's differentiation between the status of being a former gang member and the retributory acts of the gang has been criticized." App. 9a-10a n.4 (citing *Oliva*, 807 F.3d at 60).

The court of appeals vacated and remanded to the BIA with respect to Garay's CAT claim, explaining that it was "troubled by the BIA's conclusion that the IJ's 'predictive findings . . . are not clearly erroneous,'" and noting that the BIA "did not identify any specific 'predictive findings' in the IJ's decision." App. 28a. The court also noted that the BIA had failed to account for evidence of Mara 18's practice of killing defectors by putting a tire around them and setting them on fire, and failed to correct the IJ's erroneous conclusion that killing is not torture. App. 28a-30a. Recognizing that the BIA was not authorized to undertake the necessary fact-finding to decide

Garay's CAT claim in the first instance, the court of appeals remanded in part. App. 31-32a.[4]

Final judgment was entered on Garay's claim for withholding of removal. App. 81a-82a.

## REASONS FOR GRANTING THE PETITION

### I. THERE IS A DEEP AND ENTRENCHED CIRCUIT CONFLICT CONCERNING THE BOARD'S INTERPRETATION OF "PARTICULAR SOCIAL GROUP"

The courts of appeals are now deeply divided over the validity of the BIA's new definition of "particular social group." Two circuits have squarely rejected the BIA's new test, and a third has implicitly done so, while at least seven circuits now defer to it. After more than a decade of percolation in the courts of appeals, this conflict is mature, entrenched, and results in starkly disparate outcomes for similarly situated individuals. This Court's plenary review is warranted.

#### A. Three Circuits Have Held That Former Gang Membership Is A Cognizable "Particular Social Group," And At Least Two Circuits Have Explicitly Refused To Defer To BIA's New Interpretation

The Third and Seventh Circuits have explicitly refused to defer to the BIA's novel definition of PSG, reasoning that the BIA failed to sufficiently explain its change of course, and that the new requirements are inconsistent with past decisions applying *Matter of*

---

[4] The Ninth Circuit failed to acknowledge that the BIA had also impermissibly conducted fact-finding on Garay's claim for withholding of removal.

*Acosta*.[5] The Sixth Circuit has also implicitly rejected the BIA's cramped interpretation, recognizing that former gang membership is a cognizable PSG, based on reasoning long applied by the agency under its landmark *Acosta* decision.

Following the BIA's decision in *In re C-A-*, the Seventh Circuit observed that the BIA had not provided a reasoned explanation for adding a novel element—then labeled "social visibility"—to its longstanding definition of PSG. Further, the Court concluded that this reinterpretation simply "ma[de] no sense." *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (Posner, J.). Though the Seventh Circuit acknowledged that other circuits had deferred to the BIA's new definition of PSG, the court explained that the social-visibility requirement was intrinsically flawed, because individuals targeted for torture or persecution will "take pains to avoid being socially visible." *Id.* Moreover, the court determined that the new requirement was flatly inconsistent with BIA precedent identifying certain groups as "'particular social groups' without reference to social visibility." *Id.* As a result, the Seventh Circuit held that the BIA's decision was arbitrary and capricious and noted that any other result "would condone arbitrariness and usurp the agency's responsibilities." *Id.* at 616.

---

[5] Although the Fourth Circuit has "endorsed both the immutability and particularity criteria," it has "explicitly declined to determine whether" the social distinction criterion "is a reasonable interpretation of the INA." *Martinez v. Holder*, 740 F.3d 902, 910 (4th Cir. 2014); *see also Zelaya v. Holder*, 668 F.3d 159, 165 n.4 (4th Cir. 2012). But the Fourth Circuit has twice suggested that a PSG similar to petitioner's proposed group—former gang members in El Salvador—is cognizable under the INA. *See Martinez*, 740 F.3d at 911-13; *Oliva*, 807 F.3d at 61-62.

Since *Gatimi*, the Seventh Circuit has reaffirmed its refusal to defer to the BIA's definition of PSG on several occasions. In *Benitez Ramos v. Holder*, for example, the Seventh Circuit held that a PSG similar to the one proposed in this case—former members of the MS-13 gang—was cognizable because past membership in a gang "is a characteristic impossible to change." 589 F.3d 426, 429 (7th Cir. 2009). Although the government argued that the group lacked social visibility, the Seventh Circuit held that it had already "rejected" this novel addition to the PSG test "in *Gatimi* and other cases." *Id.* at 430.

The Seventh Circuit has also reaffirmed this view while sitting en banc. *See Cece v. Holder*, 733 F.3d 662, 668 n.1, 668-75 (7th Cir. 2013) (en banc). In *Cece*, the Seventh Circuit explained that it continues to apply "the Board's *Acosta* formulation of social group," which recognizes "groups whose membership is defined by a characteristic that is either immutable or is so fundamental to individual identity or conscience that a person ought not be required to change." *Id.* at 669. In addition, the Seventh Circuit (again) rejected the BIA's particularity requirement—and the BIA's refusal to recognize PSGs that are too "broad"—because "[t]he breadth of the social group says nothing about the requirements for asylum." *Id.* at 673. The court noted that "[m]any of the groups recognized by the Board and courts are indeed quite broad." *Id.* at 675-75.

And just a few weeks ago, the Seventh Circuit yet again reaffirmed its refusal to defer to the BIA's particularity requirement in a published decision. *See Orellana-Arias v. Sessions*, — F.3d —, 2017 WL 3138309, at *3 n.2 (7th Cir. July 25, 2017). Consistent with its prior decisions, the Seventh Circuit flatly

rejected the government's argument that the proposed social groups in *Orellana-Arias* were "overly broad and not sufficiently particularized," because "[a]s [the court has] noted time and again, in this circuit we reject the notion that the breadth of a social category per se makes it non-cognizable under the Act." *Id.* (citing *Cece*, 733 F.3d at 674; *Gutierrez v. Lynch*, 834 F.3d 800, 805 (7th Cir. 2016); *N.L.A. v. Holder*, 744 F.3d 425, 438 (7th Cir. 2014)).

The Third Circuit has also explicitly rejected the BIA's new approach to PSG claims. In *Valdiviezo-Galdamez v. Attorney General*, the Third Circuit explained that the BIA's new addition to the PSG test, which again was called "social visibility" at the time, was "inconsistent with a number of the BIA's prior decisions." 663 F.3d 582, 603 (3d Cir. 2011). Specifically, the court noted that the BIA has previously recognized many PSGs—such as Cuban homosexuals, former Salvadoran national police officers, and women opposed to female genital mutilation—that would not pass muster under the new test, "even though the BIA has already held that membership in any of these groups qualifies for refugee status." *Id.* at 604.

Much like the Seventh Circuit, the Third Circuit also faulted the BIA for failing to forthrightly acknowledge, much less explain, the change represented by its new interpretation of PSG. *See id.* at 612 (Hardiman, J., concurring). The Third Circuit also found itself "hard-pressed to discern any difference between the requirement of 'particularity' and the discredited requirement of 'social visibility,'" rejecting both. *Id.* at 608.

And in *Urbina-Mejia v. Holder*, the Sixth Circuit held that "former 18th Street gang members" is a cognizable PSG. 597 F.3d 360, 366-67 (6th Cir. 2010). The court of appeals cogently explained that

> it [wa]s impossible for [the alien] to change his membership in the group of former 18th Street gang members. It is not that he is unwilling to cast off gang membership; indeed, he came to the United States in order to escape the gang. However, once one has left the gang, one is forever a former member of that gang.

*Id.* at 366. By reaching this conclusion based on immutability alone, the Sixth Circuit also implicitly rejected the BIA's recent additions to the PSG test.[6]

### B. At Least Seven Circuits Defer To The BIA's Novel Social-Distinction And Particularity Requirements

With the decision below, the Ninth Circuit has now joined the First, Second, Fifth, Eighth, Tenth, and Eleventh Circuits in deferring to the BIA's ever-shifting definition of "particular social group."

The First Circuit has repeatedly deferred to the BIA's post-*Acosta* requirements for PSG claims. *See,*

---

[6] The Sixth Circuit has suggested in some subsequent decisions that it defers to the BIA's new definition of PSG. *See, e.g.*, *Zaldana Menijar v. Lynch*, 812 F.3d 491, 498 & n.3 (6th Cir. 2015). But under the rule of orderliness, "[i]t is firmly established that one panel of [the Sixth Circuit] cannot overturn a decision of another panel." *United States v. Lanier*, 201 F.3d 842, 846 (6th Cir. 2000). And "[w]hen a later decision of [the Sixth Circuit] conflicts with the holding of a prior decision, it is the earlier case that controls." *Dupont Dow Elastomers, LLC v. NLRB*, 296 F.3d 495, 506 (6th Cir. 2002). Here, *Urbina-Mejia* is the "earlier case," so it is the one "that controls."

*e.g., Paiz-Morales v. Lynch*, 795 F.3d 238, 243 (1st Cir. 2015); *Mendez-Barrera v. Holder*, 602 F.3d 21, 26-27 (1st Cir. 2010). In *Cantarero v. Holder*—a case involving facts analogous to those presented here—the First Circuit deferred to the BIA's determination that "former members of the 18th Street gang" are not a cognizable PSG because "this type of shared past experience is not a cognizable group characteristic for the purposes of the INA." 734 F.3d 82, 85-86 (1st Cir. 2013). Although openly acknowledging that this position was in conflict with decisions of the Sixth and Seventh Circuits, the First Circuit held that the INA "provides enough support under a *Chevron* review to sustain a different answer." *Id.* at 86-87.

The Second Circuit has likewise deferred to the BIA's new definition of PSG on several occasions. *See, e.g.*, *Paloka v. Holder*, 762 F.3d 191, 195-96 (2d Cir. 2014). The Second Circuit has reasoned that the BIA's new definition of PSG "is consistent with" its longstanding precedent "that a 'particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general.'" *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007) (per curiam) (quoting *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991)).

The Fifth, Eighth, Tenth, and Eleventh Circuits have similarly held that the BIA's particularity and social-distinction requirements merit *Chevron* deference. *See, e.g., Hernandez-De La Cruz v. Lynch*, 819 F.3d 784, 786-87 & n.1 (5th Cir. 2016); *Ngugi v. Lynch*, 826 F.3d 1132, 1138 (8th Cir. 2016); *Rodas-Orellana v. Holder*, 780 F.3d 982, 990-92 (10th Cir.

2015); *Gonzalez v. U.S. Att'y Gen.*, 820 F.3d 399, 405-06 (11th Cir. 2016) (per curiam); *Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190, 1196-99 (11th Cir. 2006).[7]

Indeed, the Eleventh Circuit recently reaffirmed that view in a case "quite similar to this one," involving whether "former Mara-18 gang members" can constitute a PSG. *Gonzalez*, 820 F.3d at 403-04. Although the court openly acknowledged that the Fourth, Sixth, and Seventh Circuits have held that similar groups are cognizable PSGs, it deferred to the BIA's determination that the group lacked both particularity and social distinction. *See id.* at 405-06.

### C. The Circuit Conflict Is Mature, Entrenched, And Widely Acknowledged

Since the BIA first departed from *Acosta* in *In re C-A-*, almost every circuit has weighed in on the BIA's new definition of PSG. After more than a decade of percolation, the conflict appears intractable, and this Court's review is warranted.

Courts on both sides of the issue have acknowledged the conflict and the reasoning of the decisions with which they disagree. *See, e.g., Benitez Ramos*, 589 F.3d at 430-31 (discussing cases on the other side of the split); *Valdiviezo-Galdamez*, 663 F.3d at 603 n.16 (same); *Orellana-Monson*, 685 F.3d at 520

---

[7] The Tenth Circuit, however, has suggested (as Garay argued below) that the BIA has taken an unduly narrow and restrictive view of these requirements as applied to particular cases. *See Rivera-Barrientos v. Holder*, 666 F.3d 641, 650 (10th Cir. 2012) (rejecting "the BIA's conclusion that El Salvadoran women between the ages of 12 and 25 who have resisted gang recruitment do not make up a group that can be described with sufficient particularity to meet the standard for a 'particular social group.'").

(rejecting the decisions of the "Third and Seventh Circuit [that] have declined to apply the BIA's framework"); *Rojas-Perez v. Holder*, 699 F.3d 74, 80 (1st Cir. 2012) (recognizing the "cogency and persuasiveness of both the reasoning and the outcomes of the Seventh and Third Circuits' decisions," but concluding that the panel was bound by precedent to defer to the BIA's new definition of PSG). Several judges have also expressly recognized that the BIA's "new approach to defining 'particular social group' [has] split the circuits." *Gaitan v. Holder*, 671 F.3d 678, 685 (8th Cir. 2012) (Bye, J., concurring); *see also Rojas-Perez*, 699 F.3d at 82 (noting the "circuit split on the issue").

The BIA's attempt "to clarify" its new definition of PSG in petitioner's case has done nothing to ameliorate this entrenched conflict. App. 40a. Every circuit to consider the BIA's most recent decisions—*Matter of W-G-R-* and *Matter of M-E-V-G*—has hewed to its prior precedent, either deferring or refusing to defer to the BIA's PSG requirements. The circuits that have deferred to the BIA have credited the BIA's explanation that the agency merely "intended to clarify" the new definition of PSG first announced in *In re C-A-. Matter of M-E-V-G*, 26 I. & N. Dec. 227, 247 (BIA 2014); *see, e.g.*, *Hernandez-De La Cruz*, 819 F.3d at 787 n.1; *Zaldana Menijar*, 812 F.3d at 498 ("[T]he definition of 'social distinction' in *M-E-V-G-* is simply meant to clarify the Board's previous requirement of 'social visibility' and is fully consistent with the Board's construction we accepted [previously]."). And the Seventh Circuit recently reaffirmed that it still refuses to defer to the BIA's particularity requirement. *See Orellana-Arias*, 2017 WL 3138309, at *3 n.2 (citing

*Cece*, 733 F.3d at 674; *Gutierrez*, 834 F.3d at 805; *N.L.A.*, 744 F.3d at 438).

Review is warranted to resolve this entrenched conflict and restore uniformity in this important area of the law.

## II. THE BIA'S NEW DEFINITION OF PARTICULAR SOCIAL GROUP IS NOT ENTITLED TO *CHEVRON* DEFERENCE

The Ninth Circuit erroneously deferred to the BIA's new "social distinction" and "particularity" requirements. First, the requirements are plainly arbitrary, incoherent, and internally contradictory—as illustrated by the BIA's continued recognition of some PSGs that would fail its newly-minted "particularity" and "social distinction" requirements—and by the disparate treatment of similar PSG claims under those new requirements. Second, the agency's new requirements are so restrictive that applicants hoping to establish membership in certain PSGs face a nearly insurmountable hurdle. And third, the BIA's new, cramped approach to PSG claims constitutes an unexplained departure from the agency's longstanding approach to such claims under *Acosta*.

### A. The BIA's Interpretation Of Particular Social Group Is Arbitrary And Unreasonable

The BIA's new and evolving interpretation of PSG is not entitled to *Chevron* deference because it is both an unexplained departure from the agency's prior approach and is "arbitrary or capricious in substance." *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011) (explaining when a court can disturb an agency rule under

*Chevron* step two); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984).

Moreover, because the BIA's requirements are both vague and ever-shifting, the agency's approach fails to apprise applicants of the standard they must meet, in violation of basic Due Process principles. *See Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1162 (9th Cir. 2005) (recognizing that immigration proceedings "must conform to the Fifth Amendment's requirement of due process"); *Colmenar v. I.N.S.*, 210 F.3d 967, 971 (9th Cir. 2000) (Due Process requires the applicant to be permitted a "reasonable opportunity to present evidence on his behalf"); *cf. Valdiviezo-Galdamez*, 663 F.3d at 617 (Hardiman, J., concurring) (recognizing that the BIA's approach "unfairly forces asylum applicants to shoot at a moving target").[8]

An "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." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987); *accord Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993). As the Third Circuit explained in *Valdiviezo-Galdamez*, "[a]gencies are *not* free, under *Chevron*, to generate erratic, irreconcilable interpretations of their governing statutes." 663 F.3d at 604 (internal quotation marks omitted). To the contrary, if an agency's interpretation of a statute is not consistent "over time and across subjects," then it may be unreasonable under *Chevron*. *Id.*

---

[8] Garay argued below, and maintains, that the BIA ignored record evidence establishing that he has a well-founded fear of persecution on account of his membership in a particular social group, even under the BIA's new approach. App. 19a-22a.

Here, not only has the BIA fundamentally changed its interpretation of PSG since *Matter of Acosta* by adding the requirements of particularity and social distinction, the precise contours of these requirements have changed over time. In the BIA's first interpretation of "membership in a particular social group" in *Matter of Acosta*, the BIA applied the canon of *ejusdem generis* to construe the phrase "particular social group." *See Matter of Acosta*, 19 I. & N. Dec. at 233. The BIA reasoned that each of the other grounds of persecution listed—race, religion, nationality, and political opinion—are aimed at immutable characteristics: "a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed." *Id.* Accordingly, the BIA defined membership in a PSG to mean "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic." *Id.* The BIA emphasized that determining membership in a PSG would require a case-by-case factual determination, grounded in the concept of immutability. *Id.*

As is evident from the BIA's decisions in *Matter of W-G-R-* and *Matter of M-E-V-G-*, the BIA's analysis has become essentially untethered to the immutability analysis that was key to *Matter of Acosta*. Indeed, in petitioner's case, the BIA suggested that former gang membership cannot be an immutable characteristic, but it did not resolve this question or decide the case on that ground. App. 44a-45a n.5.

The BIA's arbitrary and inconsistent application of these vague requirements undermines the agency's request for deference. Since introducing the notion of "social visibility," renamed "social distinction" in petitioner's case, the standard for establishing it has changed. For example, the BIA has given inconsistent weight to the views of the perpetrators in assessing social distinction or social visibility. *Compare* App. 49a-50a ("[D]efining a particular social group from the perspective of the persecutor is in conflict with our prior holding that a social group cannot be defined exclusively by the fact that its members have been subjected to harm. The perception of the applicant's persecutors may be relevant because it can be indicative of whether society views the group as distinct. But the persecutors' perception is not itself enough to make a group socially distinct." (citation and internal quotation marks omitted)), *with In re C-A-*, 23 I. & N. Dec. at 960 ("Recognizability or visibility is limited to those informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members."); *see also Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1090 (9th Cir. 2013) ("[E]vidence of perceptions in society as a whole is not the exclusive means of demonstrating social visibility. When a particular social group is not visible to society in general (as with a characteristic that is geographically limited, or that individuals may make efforts to hide), social visibility may be demonstrated by looking to the perceptions of persecutors. Such perceptions may be highly relevant to, or even potentially dispositive of, the question of social visibility."); *Gomez v. I.N.S.*, 947 F.2d 660, 664 (2d Cir. 1991) ("A particular social group is comprised of

individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general.").

*Matter of W-G-R-* also represents a shift in how the BIA has treated particularity. In *Matter of Fuentes*, the BIA considered a claim brought by a former member of the Salvadoran national police. There, the BIA reasoned that this former membership was "in fact an immutable characteristic, as it is one beyond the capacity of the respondent to change." 19 I. & N. Dec. at 662. That was the extent of the BIA's social group analysis; it did not require any further definition of the group. Similarly, in *In re C-A-*, in evaluating the proposed group of "former noncriminal government informants working against the Cali drug cartel," the BIA reasoned that neither a "'voluntary associational relationship' among group members" nor "an element of 'cohesiveness' or homogeneity among group members" was required under *Matter of Acosta*. 23 I. & N. Dec. at 956-57. In *Matter of W-G-R-*, however, the BIA asserted that "when a former association is the immutable characteristic that defines a proposed group, the group will often need to be further defined with respect to the duration or strength of the members' active participation in the activity and the recency of their active participation if it is to qualify as a particular social group under the Act." App. 55a-56a.

The malleability of the BIA's new test for PSG is evident in its application. After *Matter of W-G-R-*, the BIA considered a proposed group of "married women in Guatemala who are unable to leave their relationship." *Matter of A-R-C-G-*, 26 I. & N. Dec. 388,

389 (BIA 2014). In finding that the group was sufficiently socially "distinct," the BIA relied on evidence that Guatemala has a culture of machismo and family violence, that sexual offenses, including rape, are a serious problem, and that laws are in place to prosecute domestic violence, although enforcement can be problematic. *Id.* at 394. If such evidence is indeed sufficient to establish social distinction and particularity, there is no principled reason for rejecting PSG claims like Garay's. The disparate treatment of these two groups—married women unable to leave relationships and former gang members—seems to lie in the BIA's statement, without citation or explanation, that "cases arising in the context of domestic violence generally involve unique and discrete issues not present in other particular social group determinations, which extends to the matter of social distinction." *Matter of A-R-C-G-*, 26 I. & N. Dec. at 394. Examination of these cases together reveals that that the BIA's standard is a "know it when I see it" vague and subjective determination, masquerading as an interpretation of statutory text.

The particularity standard enunciated in *Matter of W-G-R-* is also arbitrary and incoherent. The BIA stated that the PSG "must also be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective." App. 42a. The social group proposed here—former members of the Mara 18 gang in El Salvador—is none of those things. If the purpose of the particularity requirement is, as the BIA stated, to provide a "clear benchmark for determining who falls within the group," *Matter of M-E-V-G-*, 26 I. & N. Dec. at 239, it is hard to imagine how the PSG proposed in *Matter of W-G-R-* fails that

test, especially compared to other PSGs the BIA has previously approved. *See, e.g.*, *In re Kasinga*, 21 I. & N. Dec. 357, 365-66 (BIA 1996) (PSG of young women of a particular tribe who are opposed to female genital mutilation); *Matter of Fuentes*, 19 I. & N. Dec. at 662 (PSG of former members of the Salvadoran national police).

Further, the BIA's definitions of particularity and social distinction are "different articulations of the same concept," *Valdiviezo-Galdamez*, 663 F.3d at 608, with "social distinction exist[ing] where the relevant society perceives, considers, or recognizes the group as a distinct social group," App. 48a, and particularity "refer[ring] to whether the group is 'sufficiently distinct' that it would constitute 'a discrete class of persons,'" App. 36a.

Moreover, the new particularity standard enunciated in this case will make it impossible for certain groups of applicants to meet the particularity requirement while also meeting the requirements of social distinction and nexus. The BIA has declared that "when a former association is the immutable characteristic that defines a proposed group, the group *will often* need to be further defined with respect to the duration or strength of the members' active participation in the activity and the recency of their active participation if it is to qualify as a particular social group under the Act." App. 55a-56a (emphasis added). This provides no real guidance as to the standard applicants must meet.

Indeed, the BIA's various shifting requirements are at war with each other. If an alien claims membership in a PSG based on former gang membership in a particular country, the BIA will no

doubt say, as it did here, that the group is not defined with sufficient particularity. But if the group is further defined based on the individualized characteristics BIA identified here—e.g., duration and/or strength of participation, recency of active participation—the BIA will say that the group lacks "social distinction." It thus will often be the case that the more "particularized" and discrete the group definition, the less likely that group is to be perceived as a "group" by society—much less be able to mount evidence tending to prove such perception.

Similarly, the BIA's approach to the "nexus" requirement means that each "modifier" in the PSG definition creates an additional (and often insurmountable) evidentiary burden. *See Oliva*, 807 F.3d at 61 n.4 (noting that "the BIA often requires petitioners to add modifiers onto their social group definition to meet the particularity requirement" and reasoning that "[r]equiring each modifier to be an independent, central reason for the persecution could make it nearly impossible for petitioners to successfully navigate the legal requirements for asylum and withholding of removal").

### B. The Board's Decision Lacks A "Reasoned Explanation"

Agency action requires a "reasoned explanation." *Judulang v. Holder*, 565 U.S. 42, 45 (2011). Consequently, if an agency changes position, the need for a reasoned explanation requires that the agency "display awareness that it *is* changing position," and not "depart from a prior policy *sub silentio*." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Here, the BIA not only has changed position without reasoned explanation, but asserts that it is

not changing position at all. App. 50a-54a. This characterization cannot withstand scrutiny. In fact, a closer look reveals that the BIA is rewriting prior decisions so that they appear to conform to the new requirements.

The BIA claims, for example, that its decision in this case is consistent with *Matter of Fuentes*, decided twenty-six years earlier. In reality, the BIA is simply rewriting history. The BIA asserts that the former service members recognized in *Fuentes* were socially distinct because the national police played a high-profile role in combating guerilla violence and because former service members were targeted by guerillas. App. 52a. But that attempt to reconcile the two decisions ignores BIA's stated view that social distinction must be proved with respect to society *at large*. App. 49a.

As to particularity, the BIA again rewrote portions of *Matter of Fuentes* to make its case—making its own factual findings twenty-six years after the fact. The BIA wrote that "at that time [Fuentes] would clearly have been considered a former member of the national police," and that "[a] group of similarly situated former national police members could be considered a discrete group with defined boundaries." App. 52a. This reimagining of *Matter of Fuentes* bears no resemblance to the reasoning actually applied in that case. As noted above, the extent of the BIA's social group analysis was that former membership in the national police was "in fact an immutable characteristic, as it is one beyond the capacity of the respondent to change." 19 I. & N. Dec. at 662. There was no discussion of social visibility, social

distinction, or particularity—terms that the BIA had not yet invented.

Although the BIA is entitled to change its interpretation, it may not do so while pretending it is adhering to precedent. *See Fox Television Stations*, 556 U.S. at 515.

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

This is an excellent vehicle through which to resolve the entrenched and acknowledged circuit conflict. The question presented has been fully and vigorously litigated at each stage of this proceeding, and there are no threshold issues that could prevent this Court from reaching it.

The record establishing petitioner's claims is also well-developed. Before the IJ, Garay submitted hundreds of pages of evidence establishing that former members of the Mara 18 gang in El Salvador are a PSG, including the comprehensive Harvard report, which recounts multiple interviews about the particular dangers facing former gang members; a USAID report describing a Salvadoran government program designed specifically for former gang members; and several other reports detailing the social situation of former gang members in El Salvador and the extreme dangers they face for defecting. The record is also clear that Garay has permanently and definitively defected from the gang.

Nor does the fact that the Ninth Circuit remanded in part pose a vehicle problem, as Garay would benefit significantly from being able to press his withholding

claim in addition to his CAT claim.[9] First, the burden of proving torture, required for CAT relief, is higher than the burden of proving persecution, required for statutory withholding. *See, e.g.*, *Nuru v. Gonzales*, 404 F.3d 1207, 1224 (9th Cir. 2005) (holding that "torture is more severe than persecution"); *Efe*, 293 F.3d at 907 ("CAT does not require persecution, but the higher bar of torture."); *see also* 8 C.F.R. § 208.18(a)(2) (defining torture as "an extreme form of cruel and inhuman treatment [that] does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to

[9] Neither does the fact that the BIA held that Garay had not met the nexus requirement, requiring him to show a nexus between his "status as a former gang member, as opposed to his acts in leaving the gang." App. 60a. The Ninth Circuit did not reach the issue of nexus, although it noted that "the BIA's differentiation between the status of being a former gang member and the retributory acts of the gang has been criticized." App. 9a-10a n.4; *see also Oliva*, 807 F.3d at 59-60 (holding that "[b]ecause it is undisputed that MS-13 extorted Oliva on account of his leaving the gang, the record compels the conclusion that his persecution was on account of his status as a former member of MS-13," and that "the BIA drew too fine a distinction between Oliva's status as a former member of MS-13 and the threats to kill him for breaking the rules imposed on former members"); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949-50 (4th Cir. 2015) (holding that the BIA's holding that a mother was persecuted not because of her membership in a nuclear family but because she exercises control over her son's activity "draws a meaningless distinction" and is "therefore unreasonable"). The BIA's finding on nexus therefore does not present an impediment to reaching the question presented in this petition for certiorari; if this Court reverses on the question presented, it may remand the question of nexus to the Ninth Circuit for consideration in the first instance. *Cf. Barajas-Romero v. Lynch*, 846 F.3d 351, 356-60 (9th Cir. 2017) (holding the nexus requirement is less onerous for statutory withholding claims than it is for asylum claims).

torture"). Further, to be entitled to CAT withholding, an applicant must prove that the severe pain or suffering is inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Id.* § 208.18(a)(1). Thus, if the government wants to control the non-state actor, but is unable to do so, the applicant is eligible for statutory withholding but not CAT withholding. *Compare id.* § 208.18(a)(7) ("Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity."), *with Rizal v. Gonzales*, 442 F.3d 84, 92 (2d Cir. 2006) (holding that persecution can be found when "the government, although not itself conducting the persecution, is *unable* or unwilling to control it" (emphasis added)); *Singh v. I.N.S.*, 94 F.3d 1353, 1360 (9th Cir. 1996) (same).

Relatedly, if an immigrant is granted statutory withholding based on the government's inability and unwillingness to control non-state actors, and the government becomes willing to control the non-state actor, but is still unable to do so, the immigrant would remain entitled to statutory withholding. *See* 8 C.F.R. § 1208.24(b)(1), (f) (permitting termination of statutory withholding if the "alien's life or freedom no longer would be threatened" on account of one of the five protected categories). However, if that immigrant had CAT withholding, he would lose that protection because he is not likely to be *tortured* upon return, under the statutory definition of torture requiring government acquiescence. *See Id.* § 208.18(a)(7); *Wanjiru v. Holder*, 705 F.3d 258, 263-64

(7th Cir. 2013) (explaining that CAT withholding can be terminated if the Department of Homeland Security establishes that an alien is not likely to be tortured); *accord Siwe v. Holder*, 742 F.3d 603, 613 n.61 (5th Cir. 2014).

The question presented is important and frequently recurring. More than 80,000 refugees apply for asylum in the United States each year. Nadwa Mossaad, DHS Office of Immigration Statistics, Refugees and Asylees: 2015, Annual Flow Report, at 5 (Nov. 2016), *available at* https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2015.pdf. Membership in a PSG is the second-most common ground raised by applicants. Shane Dizon & Nadine K. Wettstein, Immigration Law Service 2d § 10:137 (West 2017).

The current circuit conflict leads to arbitrary and inconsistent outcomes across circuits. Uniformity is necessary not only to avoid inconsistent outcomes for similarly situated applicants, but also to maintain "the constitutional and statutory requirement for uniform immigration law and policy." *Washington v. Trump*, 847 F.3d 1151, 1166-67 (9th Cir. 2017) (citing *Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2016), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016)).

The current circuit conflict has real and life-altering consequences. As the Eleventh Circuit has explained, no circuit has "quarrel[ed] with th[e] conclusion" that being a former gang member is "an immutable characteristic." *Gonzalez*, 820 F.3d at 405. The viability of claims like petitioner's thus rests entirely on whether the BIA's new "particularity" and "social distinction" requirements are permitted to

stand. *See id.* at 405-06; App. 19a-22a. And for those applicants who, by happenstance, are in the wrong circuit, the consequences can be grave. *See* A.R. 445-458 ("Death by Deportation: A Denver Judge Denied a 16-year-old's Political Asylum Application—and Sentenced Him to Death").

The stakes are often the highest for the most vulnerable and worthy applicants, such as the tens of thousands of unaccompanied children who make their way to the United States each year—many of them fleeing gang violence just like Garay. As courts have recognized, "thousands of [these] children are left to thread their way alone through the labyrinthine maze of immigration laws, which, without hyperbole, 'have been termed second only to the Internal Revenue Code in complexity.'" *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1040 (9th Cir. 2016) (McKeown, J., concurring) (footnote omitted) (quoting *Castro-O'Ryan v. INS,* 847 F.2d 1307, 1312 (9th Cir. 1987)). The BIA has only exacerbated this humanitarian crisis by fashioning poorly articulated, ever-evolving, and arbitrary hurdles to establishing membership in a particular social group—further underscoring the urgent need for this Court's intervention.

## CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

LORI ALVINO MCGILL
*Counsel of Record*
DAVID FRIEDMAN
RUTH VINSON
WILKINSON WALSH + ESKOVITZ LLP
1900 M Street, NW, Suite 800
Washington, DC 20036
(202) 847-4035
lalvinomcgill@wilkinsonwalsh.com

ALMA L. DAVID
GLOBAL JUSTICE LAW GROUP, PLLC
216 First Ave. S., Suite 420
Seattle, WA 98104
(206) 787-1406
adavid@globaljusticelawgroup.com

ZACHARY A. ALBUN
EISENBERG LAW FIRM, PLLC
75 Broad Street, Suite 2120
New York, NY 10004
(212) 951-0753
zack@lisaesq.com

BENJAMIN CASPER SANCHEZ
JAMES H. BINGER CENTER FOR NEW AMERICANS
UNIVERSITY OF MINNESOTA LAW SCHOOL
190 Mondale Hall
229 19th Ave. S.
Minneapolis, MN 55455
(612) 625-6484
caspe010@umn.edu

*Counsel for Petitioner*