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

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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.

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[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

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[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

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[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*

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[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.

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[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,*

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[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

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[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.*

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[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,

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APPENDIX

APPENDIX TABLE OF CONTENTS

Page

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Wilfredo Garay REYES, Petitioner,

v.

Loretta E. LYNCH, Attorney General of the United States, Respondent.

No. 14-70686

Argued and Submitted: April 6, 2016
Filed: November 30, 2016

842 F.3d 1125

Before HAWKINS, RAWLINSON, and CALLAHAN, Circuit Judges.

CALLAHAN, Circuit Judge:

Wilfredo Garay Reyes, a native and citizen of El Salvador, petitions for review of a precedential Board of Immigration Appeals ("BIA") opinion in *Matter of W–G–R–*, 26 I. & N. Dec. 208 (BIA 2014), wherein the BIA dismissed Garay's appeal from an Immigration Judge's ("IJ") denial of Garay's applications for withholding of removal and relief from removal under Article 3 of the Convention Against Torture ("CAT

relief").[1] Garay claims he is entitled to withholding of removal because, if removed to El Salvador, he will more likely than not face persecution on account of his membership in a particular social group consisting of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" and, alternatively, a group consisting of deportees from the United States to El Salvador. Garay also maintains that he is entitled to CAT relief because he faces a clear probability of torture from the Mara 18 gang, Salvadoran death squads, and Salvadoran government actors.

We have jurisdiction under 8 U.S.C. § 1252. We deny Garay's petition in connection with his claims for withholding of removal. We conclude that the BIA's articulation of its "particularity" and "social distinction" requirements for demonstrating membership in a "particular social group" are entitled to *Chevron* deference. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We also conclude that the BIA reasonably determined that Garay's proposed particular social groups of "former members of Mara 18" and "deportees from the United States to El Salvador" are not cognizable. However, because the IJ committed legal error and the BIA employed an impermissible standard of review in assessing Garay's request for CAT relief, we grant

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[1] Withholding of removal, 8 U.S.C. § 1231(b)(3), and protection against removal under Article 3 of the Convention Against Torture ("CAT"), 1465 U.N.T.S. 85, G.A. Res. 39/46, 39th Sess., U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

Garay's petition with respect to the denial of his CAT claim.

I

A

In 2000, at the age of seventeen, Garay joined the Mara 18 gang in El Salvador. Upon joining Mara 18, Garay participated in three to five robberies of wealthy ranchers. Four months after Garay joined the gang, a new and more violent leader, named Francisco, took over, and the gang committed a string of armed bank robberies under his leadership. Garay, armed with a gun, served as a driver for two or three heists.

Disenchanted with Francisco's leadership style and not wishing to be further involved in bank robberies, Garay decided to leave the gang after being a member for less than a year. Garay went into hiding, moving to another town. Garay feared retribution or reprisals from Francisco, who had previously announced that anyone trying to leave could be punished with beatings or death.

After Garay fled, Francisco found Garay and shot him in the leg. Some months later, Garay was confronted in a billiard hall by machete-wielding assailants. He defended himself with his own machete and a handgun. In late 2000, Garay had his gang tattoo removed. Shortly thereafter, Garay left El Salvador and made his way to the United States.

Garay entered the United States without inspection in May 2001, at age eighteen. Now thirty-three years old, Garay has a wife and two daughters.

There is no indication that Garay has been involved with gangs since entering the United States.

B

On March 25, 2009, Immigration and Customs Enforcement ("ICE") issued a Notice to Appear, alleging that Garay was unlawfully present and should be removed. Garay conceded removability as charged. Garay, represented by counsel, testified before the IJ on January 14, 2010.

Following the hearing, the IJ issued an oral decision, in which he found Garay credible. The IJ pretermitted Garay's application for asylum because it had not been filed within a year of his entry into the United States.

Addressing Garay's withholding claim, the IJ concluded that, although Garay had been subjected to persecution in El Salvador, he had not established that he was persecuted on account of his membership in a particular social group consisting of "former members of Mara 18 in El Salvador who have renounced their gang membership." The IJ noted Garay's four-to-six month active membership in Mara 18 and reasoned that "[a]lthough the respondent has clearly indicated that he wishes to renounce his gang membership, he cannot disassociate himself from the volitional activities with which he was involved as a member of the Mara 18 gang." The IJ also noted that Garay had submitted background materials "which indicate that El Salvadoran gangs may have multiple motivations and modus operandi in their particular groups."

Denying Garay's withholding claim, the IJ cited *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007), and *Matter of E–A–G–*, 24 I. & N. Dec. 591 (BIA 2008), as authority for the proposition that membership in a violent criminal gang cannot serve as the basis for a particular social group. The IJ did not address whether Garay had demonstrated a nexus to his purported membership in a social group. The IJ also did not address Garay's alternative proposed social group of "deportees from the United States to El Salvador."

Addressing Garay's claim for CAT relief, the IJ noted that Garay had testified that he feared arrest by the police and that he could be subject to reprisals from his former fellow gang members if removed to El Salvador. The IJ concluded that Garay had not shown a likelihood that he would be arrested because Garay had failed to demonstrate that the police have been searching for him or that he had been charged with any crimes in El Salvador. Regarding reprisals from the gang, the IJ stated that Garay had "suggested in his written application for relief that if he is located by his former gang that he could be subject to various brutal forms of treatment, including having a tire placed on him being filled with gasoline." However, the IJ observed that Garay had not mentioned his fear of that specific threat during his hearing, but had "indicated that he believes that he would be killed by his former gang members." The IJ then stated that the materials Garay had submitted "contain little if any information concerning the treatment of former gang members such as [himself] upon their return to El Salvador beyond being killed." The IJ concluded

that Garay had "failed to demonstrate by any standard that he would be subjected to torture."

The IJ ordered Garay removed to El Salvador. Garay timely appealed to the BIA.

C

On February 7, 2014, the BIA panel dismissed Garay's appeal in a precedential decision, *Matter of W–G–R–*, 26 I. & N. Dec. 208 (BIA 2014). In *Matter of W–G–R–*, and in a companion precedential decision issued the same day, *Matter of M–E–V–G–*, 26 I. & N. Dec. 227 (BIA 2014), the BIA clarified the requirements that an applicant for asylum or withholding of removal must satisfy in order to demonstrate membership in a particular social group. The applicant must "establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." *M–E–V–G–*, 26 I. & N. Dec. at 237; *see also W–G–R–*, 26 I. & N. Dec. at 212.

In *Matter of W–G–R–*, the BIA reviewed its historical efforts to construe the statutory term "particular social group" as it applies in asylum and withholding cases. 26 I. & N. Dec. at 209–10. The BIA explained that its articulation of the "particularity" and "social visibility" requirements was not a departure from or abrogation of its construction of a "particular social group" in *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985).[2] *Id.* at 211–12 (citing

[2] The BIA did not discuss any changes to the immutability requirement.

Henriquez-Rivas v. Holder, 707 F.3d 1081, 1083 (9th Cir. 2013) (en banc)). Instead, the BIA explained, the requirements "clarified the definition of the term ['particular social group'] to give it more 'concrete meaning through a process of case-by-case adjudication.'" *Id.* at 212 (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999)). In *Matter of W–G–R–*, the BIA adhered to its previous holdings that "both particularity and social visibility are critical elements in determining" the cognizability of a particular social group, but re-named the "social visibility" criterion as "social distinction." *Id.*

The BIA observed that the term "particularity" is included in the plain language of the statute. *Id.* at 213. The BIA explained that "[t]he particularity requirement also derives from the concept of immutability . . . clarifying the point, at least implicit in earlier case law, that not every immutable characteristic is sufficiently precise to define a particular social group." *Id.* The BIA explained that "the focus of the particularity requirement is whether the group is discrete or is, instead, amorphous." *Id.* at 214.

The BIA clarified that the term "social distinction" was intended to replace the term "social visibility." "Social distinction" more accurately describes the function of the requirement and reflects that it is not intended to require "literal," "ocular," or "on-sight" visibility. *Id.* at 211, 216. Beyond that, the BIA clarified:

> To have the "social distinction" necessary to establish a particular social group, there must be evidence showing that *society in*

> *general perceives, considers, or recognizes persons sharing the particular characteristic to be a group*. Although the society in question need not be able to easily identify who is a member of the group, it must be commonly recognized that the shared characteristic is one that defines the group.

Id. at 217 (emphasis added).

The BIA explained that its decision not to focus the "social distinction" inquiry solely on the persecutor's perspective was based, in part, on the fact that the inquiry into whether a group is a "particular social group" is distinct from the inquiry into the "nexus" requirement, which considers whether a person is persecuted "on account of" membership in a particular social group.[3] *Id.* at 218.

Turning to Garay's withholding claim, the BIA agreed with the IJ that Garay's proposed group of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" was not cognizable. *Id.* at 221. The BIA reasoned that "[t]he group as defined lacks particularity because it is too diffuse, as well as being too broad and subjective." *Id.* The BIA commented that, "[a]s described, the group could include persons of any age, sex, or background. It is not limited to those who have had a meaningful

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[3] An asylum or withholding applicant's burden includes (1) "demonstrating the existence of a cognizable particular social group," (2) "his membership in that particular social group," and (3) "a risk of persecution on account of his membership in the specified particular social group." *Matter of W–G–R–*, 26 I. & N. Dec. at 223 (citing *Ayala v. Holder*, 640 F.3d 1095, 1097–98 (9th Cir. 2011)). The third element is often referred to as the "nexus" requirement.

involvement with the gang and would thus consider themselves—and be considered by others—as 'former gang members.'" *Id.*

Addressing the "social distinction" requirement, the BIA stated that "[t]he record contains scant evidence that Salvadoran society considers former gang members who have renounced their gang membership as a distinct social group." *Id.* at 222. The BIA concluded that Garay had not provided evidence demonstrating that his proposed particular social group is "perceived, considered, or recognized in Salvadoran society as a distinct group." *Id.*

Having determined that Garay had not demonstrated membership in a cognizable group, the BIA did not need to address the "nexus" requirement. However, it held in the alternative that Garay had "not demonstrated the required nexus between the harm he fears and his status as a former gang member." *Id.* at 223. The BIA noted that while persecution can be a factor in determining whether a group is recognized as a distinct group within the relevant society, "the persecutor's views play a greater role in determining whether persecution is inflicted on account of the victim's membership in a particular social group." *Id.* The BIA then determined that Garay 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."[4] *Id.* at 224.

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[4] As we affirm the BIA's determination that Garay failed to demonstrate membership in a cognizable group, *see infra*, we do not reach the BIA's treatment of nexus. We note, however, that

The BIA also rejected Garay's proposed social group of deportees from the United States to El Salvador. The BIA found that the proposed group is "too broad and diverse a group to satisfy the particularity requirement for a particular social group under the Act." *Id.* at 223 (citing *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1151–52 (9th Cir. 2010) (per curiam)). The BIA explained:

> The respondent's purported social group could include men, women, and children of all ages. Their removal from the United States could be based on numerous different factors. The length of time they were in the United States, the recency of their removal, and societal views on how long a person is considered a deportee after repatriation could vary immensely.

Id.

Finally, the BIA reviewed the IJ's denial of CAT relief for clear error, and affirmed. *Id.* at 224–26. It reviewed evidence in support of Garay's claims that he feared torture at the hands of rival gangs, the police, or clandestine death squads, *id.* at 224–25, but concluded that "the Immigration Judge's predictive

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the BIA's differentiation between the status of being a former gang member and the retributory acts of the gang has been criticized. *See Oliva v. Lynch*, 807 F.3d 53, 60 (4th Cir. 2015) ("[T]he 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. While it is true that Oliva's decision to stop paying rent … was the immediate trigger for the gang's brutal assault on Oliva, it was Oliva's status as a former gang member that led MS-13 to demand rent in the first place and to assault him for failure to pay it.").

findings with respect to the respondent's torture claim [we]re not clearly erroneous . . . ." *Id.* at 225.

In a footnote to its CAT analysis, the BIA addressed Garay's challenge to the IJ's statement that the background materials Garay had submitted contained little information about the treatment former gang members face "beyond being killed." *Id.* at 226 n.9. The BIA disagreed with Garay's characterization of the IJ's decision "as holding that [Garay] faces a danger of being killed but that death is not torture." *Id.* The BIA read the IJ's statement not as an assertion that killings are not torture but, rather, as "h[o]ld[ing] that the evidence was not sufficient to show a clear probability that the respondent would be tortured." *Id.*

Garay timely petitioned for review of the final order of removal entered by the BIA.

II

The primary issue in this case is whether we should accord deference to the BIA's "particularity" and "social distinction" requirements for establishing the existence of a "particular social group," as articulated in the precedential opinion in Garay's case, *Matter of W–G–R–*, 26 I. & N. Dec. 208.

The BIA's construction of ambiguous statutory terms in precedential decisions is entitled to deference under *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778. *Henriquez-Rivas*, 707 F.3d at 1087. We must accept the BIA's construction if it is reasonable, "even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S.

967, 980, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005) ("*Brand X*"). Consistency with the agency's past practice or precedent is not required for an agency interpretation to be due *Chevron* deference; a new or varying agency interpretation is permitted, if it is adequately explained. *Id.* at 981, 125 S.Ct. 2688.

Garay contends that the BIA's "particularity" and "social distinction" requirements are unreasonable, unreasoned, and impermissibly prevent individuals from seeking asylum. We disagree and conclude that BIA's present articulation of the "particularity" and "social distinction" requirements is consistent with the statute, reflects the agency's ongoing efforts to construe the ambiguous statutory phrase "particular social group," is reasonable, and is entitled to *Chevron* deference.

A

The phrase "membership in a particular social group" is not defined in the statute and has spawned extensive debate and litigation.[5] *Matter of W–G–R–* and *Matter of M–E–V–G–* are the latest in a long line of BIA decisions refining the contours of this ambiguous statutory provision.

The BIA first interpreted "persecution on account of membership in a particular social group" in *Matter of Acosta*, applying the doctrine of *ejusdem generis* to conclude that the phrase means "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common,

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[5] *See Valdiviezo–Galdamez v. Att'y Gen.*, 663 F.3d 582, 594 (3d Cir. 2011) ("The concept is even more elusive because there is no clear evidence of legislative intent.").

immutable characteristic." 19 I. & N. Dec. at 233, *overruled on other grounds in Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

In the ensuing years, *Acosta*'s immutable characteristic test "led to confusion and a lack of consistency as adjudicators struggled with various possible social groups, some of which appeared to be created exclusively for asylum purposes." *Matter of M–E–V–G–*, 26 I. & N. Dec. at 231. In response to calls for greater clarity, and in order to address the evolving nature of the claims presented by asylum applicants, "the BIA refined the *Acosta* standard by stating that an asylum applicant must also demonstrate that his proposed particular social group has 'social visibility' and 'particularity.'" *Henriquez-Rivas*, 707 F.3d at 1084 (quoting *Matter of C–A–*, 23 I. & N. Dec. 951, 957, 960 (BIA 2006)); *Matter of M–E–V–G–*, 26 I. & N. Dec. at 232. The "social visibility" requirement considered whether the proposed particular social group was "easily recognizable and understood by others to constitute [a] social group[]." *Matter of C–A–*, 23 I. & N. Dec. at 959–61.

In subsequent cases, the BIA further elaborated on the meaning of the "particularity" and "social visibility" requirements. In *Matter of S–E–G–*, 24 I. & N. Dec. 579, 584 (BIA 2008), the BIA stated "[t]he essence of the 'particularity' requirement, therefore, is 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." In *Matter of E–A–G–*, 24 I. & N. Dec. 591, 594 (BIA 2008), the BIA explained "[t]he 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."

The BIA's attempts to clarify its "social visibility" requirement received mixed reviews from the circuit courts. In *Henriquez-Rivas*, 707 F.3d at 1085, we noted that most circuits had accepted the BIA's "social visibility" and "particularity" criteria, but that the Third and Seventh Circuits had rejected the criteria as an unreasonable interpretation of the ambiguous statutory term.

In *Henriquez-Rivas*, we "clarif[ied] the 'social visibility' and 'particularity' criteria without reaching the ultimate question of whether the criteria themselves are valid," i.e., whether they were due *Chevron* deference. *Id.* at 1091.[6] We did, however, comment that "[s]o long as the 'social visibility' and 'particularity' criteria are applied in a way that did not directly conflict with prior agency precedent, we would be hard-pressed to reject the new criteria as unreasonable under *Chevron*." *Id.* at 1089.

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[6] Since *Henriquez-Rivas*, we have issued opinions in two cases involving the meaning of "membership in a particular social group." *Flores Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015); *Pirir-Boc v. Holder*, 750 F.3d 1077 (9th Cir. 2014). In both cases, we acknowledged that the BIA had revisited its interpretation of the phrase "particular social group" in *M–E–V–G–* and *W–G–R–*. *Flores Rios*, 807 F.3d at 1124, 1127; *Pirir-Boc*, 750 F.3d at 1079, 1082–84. However, in neither case did we address what deference was due the BIA's new articulation of its construction of "membership in a particular social group."

B

We now hold that the BIA's interpretation in *W–G–R–* and *M–E–V–G–* of the ambiguous phrase "particular social group," including the BIA's articulation of the "particularity" and "social distinction" requirements is reasonable and entitled to *Chevron* deference. We consider the requirements in turn.

1

We recognized in *Henriquez-Rivas* that the "particularity" requirement is distinct from the "social visibility" requirement. "The 'particularity' requirement is separate, and it is relevant in considering whether a group's boundaries are so amorphous that, in practice, the persecutor does not consider it a group." 707 F.3d at 1091.

The BIA's current articulation of its "particularity" requirement is reasonable and is consistent with its own precedent, which has long required that a particular social group have clear boundaries and that its characteristics have commonly accepted definitions. *See, e.g.*, *Matter of S–E–G–*, 24 I. & N. Dec. at 585 (rejecting as too amorphous a proposed group of "male children who lack stable families and meaningful adult protection, who are from middle and low income classes, who live in the territories controlled by the MS-13 gang, and who refuse recruitment"); *Matter of A–M–E– & J–G–U–*, 24 I. & N. Dec. 69, 76 (BIA 2007) (explaining that "affluent Guatemalans" did not qualify as a particular social group in part because the "characteristic of

wealth or affluence is simply too subjective, inchoate, and variable to provide the sole basis for membership"); *Matter of C–A–*, 23 I. & N. Dec. at 953, 959, 961 (rejecting a proposed group of "noncriminal drug informants working against the Cali drug cartel" due, in part, to the fact that the distinction between government informants who had been compensated for their services and those who acted out of civic motives was not sufficient to carve out a particular "subgroup" of uncompensated informants); *Matter of V–T–S–*, 21 I. & N. Dec. 792, 798 (BIA 1997) (holding "Filipino[s] of mixed Filipino-Chinese ancestry" cognizable as a particular social group in part because a country conditions report stated that 1.5% of the Philippine population had an "identifiable" Chinese background). The BIA's statement of the purpose and function of the "particularity" requirement does not, on its face, impose a numerical limit on a proposed social group or disqualify groups that exceed specific breadth or size limitations. Nor is it contrary to the principle that diversity within a proposed particular social group may not serve as the *sine qua non* of the particularity analysis. *Cordoba v. Holder*, 726 F.3d 1106, 1116 (9th Cir. 2013); *Henriquez-Rivas*, 707 F.3d at 1093–94. Rather, the BIA imposes the "particularity" requirement in order to distinguish between social groups that are discrete and those that are amorphous. *Matter of W–G–R–*, 26 I. & N. Dec. at 214. Recognizing that, in order to be "particular," a group must have some definable boundary is not unreasonable.

We thus find the definition of the "particularity" requirement articulated in *W–G–R–* and *M–E–V–G–* to be both reasonable and consistent with the BIA's

own precedent. *Brand X*, 545 U.S. at 980–81, 125 S.Ct. 2688.

The BIA's articulation of its "social distinction" requirement is also reasonable. The "social distinction" requirement is not, as Garay contends, a "new" requirement. Rather, the "social distinction" requirement is reasonably read to be precisely what the BIA characterizes it to be: a renaming of the "social visibility" requirement. *Matter of W–G–R–*, 26 I. & N. Dec. at 212.

In *Henriquez-Rivas*, we did not reject the erstwhile "social visibility" requirement as an "unreasoned concept," as alleged by Garay. Rather, we examined the concept and concluded that the "social visibility" inquiry cannot require "on-sight" visibility. We held that the proper inquiry is whether a proposed particular social group's shared characteristic or characteristics would "generally be recognizable by other members of the community," or whether there was "evidence that members of the proposed group would be perceived as a group by society." 707 F.3d at 1088–89 (internal quotation marks omitted). The BIA's explanation of its "social distinction" requirement is consistent with our articulation of the appropriate inquiry.

Additionally, although we commented in *Henriquez-Rivas* on the potential import of the persecutor's perspective in assessing "social visibility," *id.* at 1089 ("Looking to the text of the statute, in the context of persecution, we believe that the perception of the persecutors may matter the most."), the agency is not bound by our belief, as we did not hold that it was the only reasonable

construction of an unambiguous statutory term.[7] *Brand X*, 545 U.S. at 981, 125 S.Ct. 2688; *Pirir-Boc*, 750 F.3d at 1083 n.6 (noting that *Henriquez-Rivas* left the issue for the BIA to decide). Moreover, the BIA's articulation of the "social distinction" requirement does not preclude consideration of the persecutor's perspective. Rather, as we acknowledged in *Pirir-Boc*, the BIA has noted at least two ways in which the "perception of the applicant's persecutors may be relevant."[8] 750 F.3d at 1083 n.6. We noted that, "while the BIA did not give the persecutor's perspective the same role in the analysis as the one [this Court] had recommended [in *Henriquez-Rivas*], it did give that perspective an important place." *Id.* Accordingly, the BIA's "social distinction" requirement does not unreasonably discount the perceptions of persecutors.

Finally, the "social distinction" requirement is not redundant in light of the "nexus" requirement for asylum and withholding claims. Rather than conflate the "social distinction" and "nexus" requirements, the BIA's reasoning reflects an appreciation of the need to distinguish between the showing an applicant must make in order to demonstrate membership in a "particular social group" and the showing that is

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[7] Our belief was not unanimous. In a concurring opinion, Judge McKeown observed that "[d]efining social visibility from the perspective of society better comports with the case law" and "also makes common sense." *Henriquez-Rivas*, 707 F.3d at 1094 (McKeown, J., concurring).

[8] These are (1) when persecution may lead to a group's initial recognition, and (2) in cases of persecution on account of imputed grounds. *Pirir-Boc*, 750 F.3d at 1083 n.6 (citing *M–E–V–G–*, 26 I. & N. Dec. at 242–43).

necessary to demonstrate that he was persecuted, or fears persecution, "on account of" that membership. This is consistent with the Supreme Court's conception of the "nexus" requirement. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992) (explaining that "the statute makes motive critical" and an asylum applicant must provide direct or circumstantial evidence of his persecutors' motives in order to satisfy the "nexus" requirement).

Accordingly, we reject Garay's challenges to the BIA's construction of the phrase "particular social group" because we find that the BIA's articulation of the "particularity" and "social distinction" requirements in *Matter of W–G–R–* is reasonable and entitled to *Chevron* deference.[9] *Brand X*, 545 U.S. at 981, 125 S.Ct. 2688.

III

Having determined that the BIA's definition of particular social group is entitled to *Chevron* deference, we next consider Garay's contention that

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[9] Garay also argues that the BIA's analysis of international law is both incomplete and flawed, supporting rejection of its "social distinction" requirement. However, the BIA did consider international refugee standards and determined that its approach to defining a particular social group was not "fundamentally different from international standards." *Matter of W–G–R–*, 26 I. & N. Dec. at 221. Regardless, although the United Nations Protocol Relating to the Status of Refugees and United Nations High Commissioner for Refugees guidance may be useful in construing the provisions added to the Immigration and Nationality Act by the Refugee Act, they do not have the force of law. *Aguirre-Aguirre*, 526 U.S. at 427, 119 S.Ct. 1439; *Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009).

the BIA erred in finding that his proposed social group of "former members of the Mara 18 gang in El Salvador who have renounced their membership" did not fit within that definition.

"The Attorney General, while retaining ultimate authority, has vested the BIA with power to exercise the 'discretion and authority conferred upon the Attorney General by law' in the course of 'considering and determining cases before it.'" *Aguirre-Aguirre*, 526 U.S. at 425, 119 S.Ct. 1439 (quoting 8 C. F. R. § 3.1(d)(1)). As a general rule, we review the BIA's denial of withholding of removal for substantial evidence. *Garcia-Milian v. Holder*, 755 F.3d 1026, 1031 (9th Cir. 2014) (citing *Pagayon v. Holder*, 675 F.3d 1182, 1190 (9th Cir. 2011)). Under the substantial evidence standard, we may reverse the BIA only on a finding "'that the evidence not only supports [a contrary] conclusion, but compels it—and also compels the further conclusion' that the petitioner meets the requisite standard for obtaining relief." *Id.* (quoting *INS v. Elias-Zacarias*, 502 U.S. at 481 n. l, 112 S.Ct. 812.).

In *Aguirre-Aguirre*, the Supreme Court stated that "the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'" 526 U.S. at 425, 119 S.Ct. 1439 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448–49, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987)). In *Henriquez-Rivas*, we held that we review the BIA's findings for substantial evidence, but that "[t]he BIA's construction of ambiguous statutory terms . . . is entitled to deference under *Chevron*." 707 F.3d at 1087. In this case, whether we apply a "*Chevron*

deference" or "substantial evidence" standard of review—assuming they might in some instances be different—makes no difference, because the BIA's application of the "particularity" and "social distinction" criteria to Garay's withholding claims was reasonable.

The BIA's application of the "particularity" requirement to Garay is reasonable in light of the absence of record evidence demonstrating that Salvadoran society recognizes the boundaries of a group comprised of former Mara 18 members who have renounced their membership, regardless of the length and recency of that membership. *Matter of W–G–R–*, 26 I. & N. Dec. at 221 ("The boundaries of a group are not sufficiently definable unless the members of society generally agree on who is included in the group, and evidence that the social group proposed by the respondent is recognized within the society is lacking in this case.").

Similarly, we agree that substantial evidence supports the BIA's conclusion that Garay's proposed group lacks social distinction. *Id.* at 222–23. The record evidence does, as Garay points out, include some 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. The record evidence does not, however, compel the conclusion that Salvadoran society considers former gang members as a distinct social group, e.g., distinct from current gang members who may also avail themselves of government programs or from suspected gang members who face discriminatory treatment and other challenges in Salvadoran society. *See Vitug v. Holder*, 723 F.3d

1056, 1062 (9th Cir. 2013) ("We review for substantial evidence the factual findings underlying the BIA's determination that a petitioner is not eligible for withholding of removal . . . .").

Accordingly, we reject Garay's challenges to the BIA's determination that his proposed social group of "former members of the Mara 18 gang in El Salvador who have renounced their membership" is not cognizable.[10]

IV

Garay also purports to challenge the BIA's denial of his withholding claim based on his membership in a particular social group consisting of "deportees from the United States to El Salvador." This assertion

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[10] Garay made two additional arguments, neither of which are persuasive. First, he argues that the BIA erred in relying on *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007), to find Garay's proposed social group was not cognizable. Although the IJ relied on *Arteaga*, the BIA did not and only mentioned *Arteaga* in a footnote. *Matter of W–G–R–*, 26 I. & N. Dec. at 215 n.5. Since *Arteaga* was not crucial to the BIA's decision, we express no opinion on the correctness of the BIA's footnote.

Second, Garay argues that the BIA's articulation of the "particularity" and "social distinction" requirements imposed a new evidentiary standard and the BIA's failure to give him an opportunity to meet that new standard denied him due process. We note that Garay submitted extensive country conditions evidence in support of his application and has identified no additional evidence that he would have submitted that might change the outcome. Thus, even if the BIA had articulated a new standard, Garay would still have failed to show prejudice, and thus would not be entitled to relief. *See Padilla-Martinez v. Holder*, 770 F.3d 825, 830 (9th Cir. 2014) ("To prevail on a due-process claim, a petitioner must demonstrate both a violation of rights and prejudice.").

appears to have been an afterthought as his brief only asserts that the BIA's decision turned exclusively on particularity. The BIA's decision is entitled to deference, *see supra* page 1137, and we conclude that the BIA's denial of withholding based on a particular social group of "deportees from the United States to El Salvador" is reasonable.

As we have explained in Section II B 1, the BIA imposes the particularity requirement in order to distinguish between social groups that are discrete and those that are amorphous. *See supra* page 1135. In *W–G–R–*, the BIA explained that particularity "chiefly addresses the question of delineation, or as earlier court decisions described it, the need to put 'outer limits' on the definition of 'particular social group.'" *Matter of W–G–R–*, 26 I. & N. Dec. at 214.[11]

Although we have recognized that "social visibility" and "particularity" tend to blend together, we have not merged the two prongs. *Henriquez-Rivas*,

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[11] The BIA referred in its opinion to its decision in *Matter of M–E–V–G*, 26 I. & N. Dec. 227, decided the same day. In *M–E–V–G*, the BIA explained:

> A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group. *Matter of A–M–E– & J–G–U–*, 24 I. & N. Dec. at 76 (holding that wealthy Guatemalans lack the requisite particularity to be a particular social group). It is critical that the terms used to describe the group have commonly accepted definitions in the society of which the group is a part. *Id.* (observing that the concept of wealth is too subjective to provide an adequate benchmark for defining a particular social group).

Id. at 239. The BIA further held that a "group must also be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective." *Id.*

707 F.3d at 1090–91. As noted, we held that "[t]he 'particularity' requirement is separate, and it is relevant in considering whether a group's boundaries are so amorphous that, in practice, the persecutor does not consider it a group." *Id.* at 1091. We stated that "the 'particularity' consideration is merely one factor as to whether a collection of individuals is considered to be a particular social group in practice." *Id.*

The BIA's application of the "particularity" requirement to Garay's purported class of "deportees from the United States to El Salvador" was reasonable. The BIA found that a proposed class of deportees was too amorphous, overbroad and diffuse because it included men, women, and children of all ages, regardless of the length of time they were in the United States, the reasons for their removal, or the recency of their removal. *Matter of W–G–R–*, 26 I. & N. Dec. at 223. Garay presented scarcely any contrary evidence.[12] Viewing all the evidence, the BIA's

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[12] Garay's only testimony in support of his proposed particular social group of deportees was: "Because almost all the time the people that are returned from here, or they are deported from here, they stay in detention for investigation purposes." However, Garay then qualified his statement by indicating that the government was most interested in individuals who have criminal records. In his brief to the BIA, Garay alleged in a footnote that he "faces a danger of future persecution based on his membership in a particular social group of deportees from the United States to El Salvador," and objects that the IJ "did not address this social group definition at all." In the next section of his brief, which addresses his claim for relief under the CAT, Garay argued that he will be tortured because he is a former gang member and a deportee. He asserts that deportees are mistreated upon their return because they are presumed to be

rejection of Garay's proposed class was reasonable, if not compelled.

Indeed, the BIA's determination is supported by case law declining to recognize much more circumscribed purported groups of deportees.[13] Most recently, in *Ramirez-Munoz v. Lynch*, 816 F.3d 1226 (9th Cir. 2016), we affirmed the BIA's determination that a purported class of "imputed wealthy Americans" deported to Mexico did not constitute a particular social group. Citing *Henriquez-Rivas*, 707 F.3d at 1090, we held that the proposed group was not "sufficiently particular that it can be described with passable distinction that the group would be recognized as a discrete class of persons." *Ramirez-Munoz*, 816 F.3d at 1229.

As in *Ramirez-Munoz*, the BIA's rejection of Garay's purported class of "deportees from the United States to El Salvador" is not contrary to our holding in *Henriquez-Rivas* that "considerations of diversity of lifestyle and origin" may not be "the *sine qua non* of 'particularity' analysis." 707 F.3d at 1093–94. To go so far would come close to doing away with the particularity requirement, which was included in the plain language of the statute enacted by Congress.

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gang members. Taking Garay's assertions at face value, they do not" support a finding that all deportees from the United States constitute a "discrete class of persons." *Matter of S– E–G–*, 24 I. & N. Dec. at 584.

[13] *See, for example, Delgado-Ortiz v. Holder*, 600 F.3d at 1151–52 (holding that "returning Mexicans from the United States" are "too broad" to qualify as a particular social group); *Lizama v. Holder*, 629 F.3d 440, 446– 48 (4th Cir. 2011) (holding that "deportees with criminal histories" returning to El Salvador from the United States are "too broad" to constitute a particular social group).

Aguirre-Aguirre, 526 U.S. at 419, 119 S.Ct. 1439. However, this was not our intent. Where a petitioner makes a prima facie showing of a "discrete class of persons," neither diversity of lifestyle nor origin will undermine that group. But where, as here, a petitioner proffers a group that is amorphous rather than discrete, he can hardly be heard to argue that the BIA may not consider the proposed group's lack of cohesion in determining that it is not particular.

Applying the deference due to the BIA's decision and reviewing the entire record, we reject Garay's challenge to the BIA's determination that his proposed group of "deportees from the United States to El Salvador" is not cognizable.

V

Garay challenges the BIA's denial of his CAT claim as based on legal error and on facts not found by the IJ. The Government responds that substantial evidence supports the agency's decision and any error in the BIA's assessment of Garay's CAT claim was invited because he asked the BIA to undertake plenary review of his CAT claim. We find that the denial of Garay's CAT claim was premised on legal error and vacate the denial of CAT relief.

We review de novo issues of law regarding CAT claims. *Edu v. Holder*, 624 F.3d 1137, 1142 (9th Cir. 2010). "The BIA's findings underlying its determination that an applicant is not eligible for relief under the CAT are reviewed for substantial evidence." *Arteaga*, 511 F.3d at 944. Under that standard, we "uphold[] the BIA's determination unless the evidence in the record compels a contrary

conclusion." *Id.* Where the BIA conducts its own review of the evidence and law rather than adopting the IJ's decision, "our review is limited to the BIA's decision, except to the extent that the IJ's opinion is expressly adopted." *Hosseini v. Gonzales*, 471 F.3d 953, 957 (9th Cir. 2006) (internal quotation marks omitted).

To qualify for CAT relief, an applicant must show that "'it is more likely than not that he . . . would be tortured if removed . . . .'" *Cole v. Holder*, 659 F.3d 762, 770 (9th Cir. 2011) (quoting 8 C. F. R. § 208.16(c)(2)). "Acts constituting torture are varied, and include beatings and killings." *Bromfield v. Mukasey*, 543 F.3d 1071, 1079 (9th Cir. 2008); *see also Cole*, 659 F.3d at 771 (same). An applicant for CAT relief does not need to show that he would be tortured on account of a protected ground. *Kamalthas v. INS*, 251 F.3d 1279, 1283 (9th Cir. 2001); *see also Cole*, 659 F.3d at 770 ("[T]he provision for deferral of removal under CAT applies to all applicants, even those who . . . are former gang members convicted of an aggravated felony.").

Reviewing Garay's claim on appeal, the BIA stated that it reviewed the IJ's decision for clear error. *Matter of W–G–R–*, 26 I. & N. Dec. at 224–26. After reviewing evidence related to Garay's claims that he feared torture at the hands of rival gangs, the police, or clandestine death squads, *id.* at 224–25, the BIA concluded that "the Immigration Judge's predictive findings with respect to the respondent's torture claim are not clearly erroneous." *Id.* at 225.

In a footnote, the BIA addressed the IJ's statement that the materials "contain little if any information concerning the treatment of former gang

members . . . beyond being killed." *Id.* at 226 n.9. The BIA read the IJ's statement to reflect not that the IJ believed killings are not torture, but "[r]ather, the Immigration Judge held that the evidence was not sufficient to show a clear probability that the respondent would be tortured." *Id.*

A

We are troubled by the BIA's conclusion that the IJ's "predictive findings with respect to [Garay]'s torture claim are not clearly erroneous." *Matter of W–G–R–*, 26 I. & N. Dec. at 225. The BIA did not identify any specific "predictive findings" in the IJ's decision. At oral argument, counsel for the Government was unable to point to any language in the IJ's decision that can be read to constitute "predictive findings."[14]

If the BIA was referring to the IJ's conclusion that Garay had not established that the El Salvadoran police were looking for him, the BIA's conclusion is sound. This, however, is not enough to support the denial of Garay's CAT claim, which also identified gang members and clandestine death squads as possible sources of feared torture. *See Cole*, 659 F.3d at 775 (remanding where the BIA failed to "consider the aggregate risk that Cole would face from police, death squads, and gangs if returned to Honduras").

If the "predictive findings" the BIA was referring to include the IJ's discounting of Garay's written

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[14] Before us, the Government does not adopt the BIA's reading of the IJ's statement, but posits that the IJ "apparently meant that the materials were no more specific than [Garay's testimony] about how the death of former gang members might come about."

description of the torture he feared at the hands of gang members, this is problematic for a number of reasons. First, the IJ's discounting of Garay's description of the torture he feared cannot reasonably be characterized as a "predictive finding." Second, the BIA did not acknowledge or correct the IJ's apparent disregard of Garay's written declaration describing Mara 18's practice of killing defectors by placing tires around them and setting them on fire. Garay's failure to reiterate this assertion in his testimony does not negate the assertion. *See, e.g.*, *Lai v. Holder*, 773 F.3d 966, 971 (9th Cir. 2014) ("It is well established that 'the mere omission of details is insufficient to uphold an adverse credibility finding.'" (quoting *Singh v. Gonzales*, 403 F.3d 1081, 1085 (9th Cir. 2005))); *Tekle v. Mukasey*, 533 F.3d 1044, 1053 (9th Cir. 2008) (finding legal error where IJ failed to provide the petitioner with an opportunity to explain a perceived inconsistency).

Most importantly, however, the BIA's interpretation of the IJ's statement as a "predictive finding" is problematic because it does not correct the IJ's inference that killings are not torture. Whether reviewed for clear error as a factual finding or reviewed de novo as a question of law or judgment,[15] we cannot read the IJ's statement as reflecting

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[15] In *Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012), we agreed with the Third Circuit that the "likelihood of torture" encompasses two inquiries: "'(1) what is likely to happen to the petitioner if removed; and (2) does what is likely to happen amount to the legal definition of torture." *Id.* 915–16 (quoting *Kaplun v. Att'y. Gen.*, 602 F.3d 260, 271 (3d Cir. 2010)). The first is a factual question and subject to clear error review; the second is a legal question subject to de novo review. *Id.*

anything other than an erroneous view that killings are not torture.[16] *Bromfield*, 543 F.3d at 1079 ("Acts constituting torture are varied, and include beatings and killings.").

The BIA should have acknowledged and corrected the IJ's error and remanded the matter to the IJ. *See Figueroa v. Mukasey*, 543 F.3d 487, 498 (9th Cir. 2008) (reversing and remanding where the BIA failed to correct an IJ's legal error). Further, it appears that the IJ's error prevented the IJ from undertaking the necessary review of all the record evidence, including evidence that former gang members are killed, and from assessing whether Garay demonstrated a probability that he would be killed or otherwise tortured.[17]

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[16] Garay alleges in his Reply Brief that the same IJ that heard Garay's case concluded in another case that killing is not torture. It appears that in an unpublished decision, the BIA remanded in light of our opinion in *Bromfield*, 543 F.3d 1071, to permit the IJ to conduct further fact-finding in order to determine "whether the killings at issue in [that] case constituted torture." *See In re Dionicio Ziranda-Ambriz*, File No. A088-738-879 (BIA Jan. 22, 2013) at 3.

[17] We also reject the BIA's alternative basis for denying CAT relief. The BIA purported to find that there was insufficient evidence of government acquiescence to any torture by gang members. *W–G–R–*, 26 I. & N. Dec. at 226; *see* 8 C. F. R. § 208.18 (defining torture in relevant part as "pain or suffering . . . 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."). However, the IJ did not make any findings about acquiescence and the BIA's own regulations prevent the BIA from making its own factual findings and require it to remand cases to the IJ if further fact-finding is needed. 8 C. F. R. § 1003.1(d)(3)(I), (iv). The BIA followed this principle in the withholding context when it declined to discuss whether the

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The Government maintains that, despite the BIA being generally precluded from undertaking its own fact finding in the first instance, it could do so on Garay's appeal because he requested plenary review of his CAT claim. We reject this argument.

As the Government concedes, the BIA was not empowered to undertake the necessary fact finding to decide Garay's claim in the first instance.[18] Moreover, the invited error doctrine, which the Government invokes, does not relieve the agency of its obligation to follow its own regulations and apply the correct standard of review. *Cf. Amado v. Gonzalez*, 758 F.3d 1119, 1133 n.9 (9th Cir. 2014) ("'[I]t is one thing to

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Salvadoran government was unable or unwilling to control the Mara 18 gang members because the IJ had not made findings on it, but oddly, it did not follow the same rule in the CAT context. *Compare W–G–R–*, 26 I. & N. Dec. at 224 n.8 *with id.* at 226.

[18] Under 8 C. F. R. § 1003.1(d)(3)(I) and (iv), "(1) the Board will not engage in de novo review of findings of fact determined by the immigration judge; and (2) except for the taking of administrative notice of commonly known facts, the Board will not engage in factfinding in the course of deciding appeals." *Brezilien v. Holder*, 569 F.3d 403, 412 n.3 (9th Cir. 2009); *Ridore*, 696 F.3d at 911. "Rather, '[f]acts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.'" *Id.* (quoting 8 C. F. R. § 1003.1(d)(3)(I)). "[T]he BIA cannot disregard the IJ's findings and substitute its own view of the facts. Either it must find clear error, explaining why; or, if critical facts are missing, it may remand to the IJ." *Id.* at 919. "In contrast to these substantive limitations on factfinding, '[t]he Board may review questions of law, discretion, and judgment on all other issues in appeals from decisions of immigration judges de novo.'" *Brezilien*, 569 F.3d at 412 n.3 (quoting 8 C. F. R. § 1003.1(d)(3)(ii)).

allow parties to forfeit claims, defenses, or lines of argument; it would be quite another to allow parties to stipulate or bind us to application of an incorrect legal standard, contrary to the congressional purpose.'" (quoting *Gardner v. Galetka*, 568 F.3d 862, 879 (10th Cir. 2009))); *United States v. Lindsey*, 634 F.3d 541, 555 (9th Cir. 2011) ("[I]n order for the invited error doctrine to apply, a defendant must both invite the error and relinquish a known right.").

VI

Accordingly, we deny Garay's petition with respect to his withholding claims, and grant only with respect to the denial of his application for CAT relief, which we vacate and remand to allow the agency to reconsider the application for CAT relief recognizing that killings can constitute torture and to undertake the requisite fact finding in accordance with the agency's regulations.

PETITION FOR REVIEW GRANTED in part and DENIED in part; denial of CAT relief VACATED and REMANDED.

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: 26 I. & N. Dec. 208 (BIA), Interim Decision 3794, 2014 WL 524498

Date: Feb 7, 2014

In re: MATTER OF W-G-R-, RESPONDENT

IN REMOVAL PROVEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Alma L. David, Esquire

ON BEHALF OF DHS:
Marci L. Ellsworth
Senior Attorney

APPLICATION: Asylum; withholding of removal; Convention Against Torture

BEFORE: Board Panel: GRANT, MALPHRUS, and MULLANE, Board Members.

GRANT, Board Member:

In a decision dated January 14, 2010, an Immigration Judge pretermitted the respondent's application for asylum, denied his applications for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3) (2006), and protection under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, 198, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) ("Convention Against Torture"), and ordered him removed from the United States. The respondent has appealed from that decision.[1] The Department of Homeland Security has filed a brief in opposition to the appeal. The respondent's appeal will be dismissed.

I. FACTUAL AND PROCEDURAL HISTORY

The respondent is a native and citizen of El Salvador who was a member of the Mara 18 gang in that country. He testified before the Immigration Judge that he decided to leave the gang after being a member for less than a year. According to the respondent, members of his former gang confronted him after he left the gang, and he was shot in the leg during one of two attacks he suffered. He fled to the United States after he was targeted for retribution for

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[1] The respondent does not challenge the Immigration Judge's decision to pretermit his asylum application as untimely filed, so that issue is not before us. *See Matter of Kochlani*, 24 I&N Dec. 128, 129 n.3 (BIA 2007).

leaving the gang. The respondent claimed that he feared persecution on account of his membership in a particular social group consisting of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership." The Immigration Judge found the respondent credible, but he concluded that the respondent had not established that he was persecuted on account of his membership in a particular social group within the meaning of the Act.

II. ISSUE

The primary issue on appeal is whether former Mara 18 gang members in El Salvador who have renounced their gang membership constitute a particular social group.

III. PARTICULAR SOCIAL GROUP

A. Background

"The term 'particular social group' is ambiguous." *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1083 (9th Cir. 2013) (en banc). Determining whether a specific group constitutes a particular social group under the Act is often a complicated task. While the analysis of a particular social group claim is based on the evidence presented and is often a fact-specific inquiry, the ultimate determination whether a particular social group has been established is a question of law.

We first attempted to define the contours of the term "particular social group" in *Matter of Acosta*, 19 I&N Dec. 211, 232 (BIA 1985). In that case, we concluded that any characteristic that defines a particular social group must be immutable, meaning

it must be a 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." *Id.* at 233.

At the time we decided *Matter of Acosta*, only 5 years had passed since enactment of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, and relatively few particular social group claims had been presented to the Board. As numerous and varied persecution claims were later asserted, we continued to refine the definition of a particular social group, including the concepts of particularity and social visibility. *See Orellana-Monson v. Holder*, 685 F.3d 511, 521 (5th Cir. 2012) (stating that the Board "may make adjustments to its definition of 'particular social group' and often does so in response to the changing claims of applicants").

We first enunciated the concepts of particularity and social visibility in *Matter of C-A-*, 23 I&N Dec. 951, 959–61 (BIA 2006), *aff'd sub nom. Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006), *cert. denied*, 549 U.S. 1115 (2007). *See also Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 73–76 (BIA 2007), *aff'd sub nom. Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007). They were subsequently defined further in two companion cases relating to gang-based claims of persecution. *Matter of E-A-G-*, 24 I&N Dec. 591, 595–96 (BIA 2008); *Matter of S-E-G-*, 24 I&N Dec. 579, 582–88 (BIA 2008).

"Particularity" refers to whether the group is "sufficiently distinct" that it would constitute "a discrete class of persons." *Matter of S-E-G-*, 24 I&N Dec. at 584. The "social visibility" requirement mandates that "the shared characteristic of the group

should generally be recognizable by others in the community." *Id.* at 586. Noting that the "concepts of 'particularity' and 'social visibility' give greater specificity to the definition of a social group," we held in *Matter of S-E-G-* that the definition of a particular social group "requires that the group have particular and well-defined boundaries, and that it possess a recognized level of social visibility." *Id.* at 582.

Our articulation of these requirements has been met with approval in the clear majority of the Federal courts of appeals. *See Umana-Ramos v. Holder*, 724 F.3d 667, 671 (6th Cir. 2013); *Henriquez-Rivas v. Holder*, 707 F.3d at 1087–91 (clarifying the criteria while reserving assessment of their validity); *Orellana-Monson v. Holder*, 685 F.3d at 521; *Gaitan v. Holder*, 671 F.3d 678, 681 (8th Cir. 2012); *Zelaya v. Holder*, 668 F.3d 159, 165–66 & n.4 (4th Cir. 2012) (deferring to our particularity requirement); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 649–53 (10th Cir. 2012); *Scatambuli v. Holder*, 558 F.3d 53, 59–61 (1st Cir. 2009); *Ucelo-Gomez v. Mukasey*, 509 F.3d at 74; *Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d at 1196–99. However, it has not been universally accepted. *See Valdiviezo-Galdamez v. Att'y Gen. of U.S.*, 663 F.3d 582, 603–09 (3d Cir. 2011) (holding that our adoption of the particularity and social visibility requirements is inconsistent with our prior decisions and that we did not articulate a principled reason for the departure); *Gatimi v. Holder*, 578 F.3d 611, 615–16 (7th Cir. 2009) (rejecting the social visibility requirement); *see also Cece v. Holder*, 733 F.3d 662, 668–69 & n.1 (7th Cir. 2013) (en banc).

The primary source of disagreement with, or confusion about, our interpretation of the term

"particular social group" relates to the social visibility requirement. *See Umana-Ramos v. Holder*, 724 F.3d at 672–73; *Henriquez-Rivas v. Holder*, 707 F.3d at 1087. Contrary to our intent, the term "social visibility" has led some to believe that literal, that is, "ocular" or "on-sight," visibility is always required for a particular social group to be cognizable under the Act. *See Valdiviezo-Galdamez v. Att'y Gen. of U.S.*, 663 F.3d at 606.

The respondent urges us to reconsider our recent decisions regarding particularity and social visibility, arguing that they are inconsistent with our prior precedent and the standards of international refugee law. We disagree.

The well-known challenges in interpreting the term "particular social group" stem from its inherent ambiguity and the lack of supporting legislative history in international and domestic law. *See Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1575–76 & n.5 (9th Cir. 1986); *Matter of Acosta*, 19 I&N Dec. at 232. Two principles of legislative interpretation have guided our analysis: (1) To the extent possible, the plain language of the term is applied, and (2) the term "particular social group" is construed consistently with the other protected grounds specified in the "refugee" definition in section 101(a)(42) of the Act, 8 U.S.C. § 1101(a)(42) (2012). *See Matter of Acosta*, 19 I&N Dec. at 233–34; *see also* United Nations Convention Relating to the Status of Refugees, art. 33, *adopted* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954), *available at* http://www.unhcr.org/3b66c2aa10.html.

By defining the requirements of particularity and social visibility in *Matter of C-A-* and the cases that followed it, we did not depart from or abrogate the definition of a particular social group that was set forth in *Matter of Acosta*; nor did we adopt a new approach to defining particular social groups under the Act. *See Henriquez-Rivas v. Holder*, 707 F.3d at 1084 (describing our refinement of the definition of a particular social group). Instead, we clarified the definition of the term to give it more "concrete meaning through a process of case-by-case adjudication." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987)) (internal quotation marks omitted); *see also Orellana-Monson v. Holder*, 685 F.3d at 521 (stating that "case-by-case adjudication is permissible and that such adjudication does not necessarily follow a straight path").

As the United States Court of Appeals for the Fifth Circuit has stated, "[T]he BIA's current particularity and social visibility test is not a radical departure from prior interpretation, but rather a subtle shift that evolved out of the BIA's prior decisions on similar cases and is a reasoned interpretation, which is therefore entitled to deference." *Orellana-Monson v. Holder*, 685 F.3d at 521; *see also Mendez-Barrera v. Holder*, 602 F.3d 21, 26 (1st Cir. 2010); *Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d at 1197 ("In [the] process of filling any gap left, implicitly or explicitly, by Congress, the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program." (quoting *INS*

v. Cardoza-Fonseca, 480 U.S. at 448 (internal quotation marks omitted))).

We adhere to our holdings that both particularity and social visibility are critical elements in determining whether a group is cognizable as a particular social group under the Act, but we now rename the "social visibility" element as "social distinction." By renaming this requirement, we intend to clarify that the criteria of particularity and social distinction are consistent with both the language of the Act and our earlier precedent decisions.[2]

B. Immutable Characteristics

In *Acosta* we determined that any characteristic that defines a particular social group must be immutable, meaning it is 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." *Matter of Acosta*, 19 I&N Dec. at 233. The defining characteristic can be an innate characteristic or a shared past experience. The critical requirement is that the defining characteristic of the group must be something that either cannot be changed or that the group members should not be required to change in order to avoid persecution.

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[2] The Supreme Court has stated that administrative agencies may adopt a new or changed interpretation as long as it is based on a "reasoned explanation." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009). Our decision in this case is not a new interpretation, but it further explains the importance of particularity and social distinction as part of the definition of the phrase "particular social group."

We held that the two characteristics defining the purported particular social group in that case—taxi drivers in San Salvador who refused to participate in guerrilla-sponsored work stoppages—were not immutable. We found they were not immutable because "the members of the group could avoid the threats of the guerrillas either by changing jobs or by cooperating in work stoppages." *Id.* at 234. The issue of immutability was dispositive. We therefore had no need to address other aspects of the proposed group and thus no need to discuss its particularity or its social distinction.

C. Particularity

The term "particularity" is included in the plain language of the Act and is consistent with the specificity by which race, religion, nationality, and political opinion are commonly defined.[3] The Tenth Circuit recently noted that "the particularity requirement flows quite naturally from the language of the statute, which, of course, specifically refers to membership in a '*particular* social group." *D' Rivera-Barrientos v. Holder*, 666 F.3d at 649.[4] The

[3] However, there is a critical difference between a political opinion or religious belief, which may in theory be entirely personal and idiosyncratic, and membership in a particular social group, which requires that others in society share the characteristics that define the group.

[4] Although the Tenth Circuit affirmed the requirement of particularity, it disagreed with our conclusion that the petitioner's proposed group—young women, aged 12 to 25, who had resisted recruitment from criminal gangs—was not defined with sufficient particularity to meet the standard. *Rivera-Barrientos v. Holder*, 666 F.3d at 650. The court ultimately

particularity requirement also derives from the concept of immutability set forth in *Matter of Acosta*, clarifying the point, at least implicit in earlier case law, that not every immutable characteristic is sufficiently precise to define a particular social group. *See, e.g.*, *Escobar v. Gonzales*, 417 F.3d 363, 367–68 (3d Cir. 2005) (finding that the characteristics of poverty, homelessness, and youth are too vague and all-encompassing to set perimeters for a protected group within the scope of the Act). Clearly then, the requirement of "particularity" does not represent a significant departure from the language of the Act or our prior case law.

A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group. *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. at 76 (holding that wealthy Guatemalans lack the requisite particularity to be a particular social group). It is critical that the terms used to describe the group have commonly accepted definitions in the society of which the group is a part. *Id*. (observing that the concept of wealth is too subjective to provide an adequate benchmark for defining a particular social group). The group must also be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective. *See Ochoa v. Gonzales*, 406 F.3d 1166, 1170–71 (9th Cir. 2005) (stating that a particular social group must be narrowly defined and that major segments of the population will rarely, if ever, constitute a distinct social group).

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determined, however, that the proposed group lacked the requisite social visibility.

Only the Third Circuit has rejected the particularity requirement, concluding that it was "hard-pressed to discern any difference between the requirement of "particularity' and the discredited requirement of 'social visibility." *D' Valdiviezo-Galdamez v. Att'y Gen. of U.S.*, 663 F.3d at 608. However, we respectfully disagree with this concern for the reasons explained in *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), which we decide today. We recognize that there is some overlap between the two requirements. This occurs because both "particularity" and "social visibility" take account of the societal context specific to the claim for relief. But they each emphasize different analytical aspects of a "particular social group," and it is necessary to address both elements to properly determine whether the group is cognizable under the Act.

"Particularity" chiefly addresses the question of delineation, or as earlier court decisions described it, the need to put "outer limits" on the definition of "particular social group." *See Castellano-Chacon v. INS*, 341 F.3d 533, 549 (6th Cir. 2003); *Sanchez-Trujillo v. INS*, 801 F.2d at 1576. The definition of a particular social group is not addressed in isolation, but rather in the context of the society out of which the claim for asylum arises. In assessing a claim, it may be necessary to take into account the social and cultural context of the alien's country of citizenship or nationality. This is why we require inquiry into whether the group can be described in sufficiently distinct terms that it "would be recognized, in the society in question, as a discrete class of persons." *Matter of S-E-G-*, 24 I&N Dec. at 584. In context, however, it is clear that the focus of the particularity

requirement is whether the group is discrete or is, instead, amorphous. Societal considerations will necessarily play a factor in that determination. For example, a class of "landowners" in an underdeveloped, oligarchical society could be sufficiently discrete to meet the criterion of particularity. In Canada or the United States, however, such a group would be far too amorphous to meet this requirement.

Persecutory conduct aimed at a social group cannot alone define the group, which must exist independently of the persecution. *See Matter of A-M-E- & J-G-U-*, 24 I&N Dec. at 74. Circuit courts have long recognized that a social group must have "defined boundaries" or a "limiting characteristic," other than the risk of being persecuted, in order to be recognized. *See, e.g.*, *Sanchez-Trujillo v. INS*, 801 F.2d at 1576–77 (finding that the proposed group of young, working class urban males of military age constitutes a "sweeping demographic division" manifesting a plethora of different lifestyles, interests, cultures, and political leanings and "is not that type of cohesive, homogenous group to which we believe the term 'particular social group' was intended to apply"); *Castellano-Chacon v. INS*, 341 F.3d at 548 (finding that the proposed group of "tattooed youth" falls outside the "outer limit" of the particular social group definition).[5]

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[5] We agree with the Immigration Judge that, as a general rule in the Ninth Circuit, in whose jurisdiction this case arises, present or past experience in criminal activity cannot be the defining characteristic of a particular social group. *See Arteaga v. Mukasey*, 511 F.3d 940, 945–46 (9th Cir. 2007). Gang members willingly involved in violent, antisocial behavior are more akin to

D. Social Distinction

Like particularity, the requirement of "social visibility" has roots in the earliest articulations defining the term "particular social group." For example, in 1986 the Ninth Circuit stated that a persecutor's perception of a proposed social group is neither irrelevant nor conclusive in determining whether the group is "cognizable." *Sanchez-Trujillo v. INS*, 801 F.2d at 1576 n.7. Five years later, the Second Circuit was more explicit, holding that members of a social group must share a "fundamental characteristic" that is "recognizable and discrete" such

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persecutors and criminals, who are barred from establishing eligibility for asylum and withholding of removal, than to refugees, whom the Act is intended to protect. And refugee protection is generally only provided to those whose government does not offer protection against serious harm inflicted on account of one of the five protected grounds. "Treating affiliation with a criminal organization as being protected membership in a social group is inconsistent with the principles underlying the bars to asylum and withholding of removal based on criminal behavior." *Matter of E-A-G-*, 24 I&N Dec. at 596. The Ninth Circuit explained in *Arteaga v. Mukasey*, 511 F.3d at 945–46, that gang membership, whether a present or a past shared experience, generally will not define a particular social group, because serious criminal activity is not the type of conduct normally protected as an immutable characteristic. Other circuits disagree as to whether former gang membership is an immutable characteristic. *Compare Cantarero v. Holder*, 734 F.3d 82, 85–86 (1st Cir. 2013) (holding that former gang membership is not an immutable characteristic), *with Martinez v. Holder*, No. 12-2424, 2014 WL 243293 (4th Cir. Jan. 23, 2014) (holding that former gang membership is an immutable characteristic), *Urbina-Mejia v. Holder*, 597 F.3d 360, 366 (6th Cir. 2010) (same), *and Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009) (same).

that it "distinguish[es] them in the eyes" of others. *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991). We later cited *Gomez* on this point in determining that, in Somali society, clan membership is a "highly recognizable" characteristic that is "inextricably linked to family ties." *Matter of H-*, 21 I&N Dec. 337, 342 (BIA 1996).

Our definition of "social visibility" clarified the importance of "perception" or "recognition" in the concept of the particular social group. The term was never meant to be read literally, but our use of the word "visibility" unintentionally promoted confusion. We now rename that requirement "social distinction" to clarify that social visibility does not mean "ocular" visibility—either of the group as a whole or of individuals within the group—any more than a person holding a protected religious or political belief must be "ocularly" visible to others in society.[6] *Henriquez-Rivas v. Holder*, 707 F.3d at 1087–89 (recognizing that social visibility means that members of the group would be perceived as a group by society).

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[6] In *Merriam-Webster's Collegiate Dictionary* 1316 (10th ed. 2002), the first definition of the word "visible" is "capable of being seen." While another definition is "capable of being discovered or perceived," *id.*, the word "visible" is often associated with ocular visibility, *see Black's Law Dictionary* 1602 (8th ed. 2004) (defining "visible" to mean "[p]erceptible to the eye; discernable by sight"). In contrast, the primary definition of "distinct" is "distinguishable to the eye or mind as discrete." *Merriam-Webster's Collegiate Dictionary, supra*, at 337. The word "distinct" better captures this element of the test because it includes both types of visibility: it encompasses not only whether the members of a group can be identified by sight but also how the group is perceived or recognized by others in society.

Social distinction refers to recognition by society, taking as its basis the plain language of the Act—in this case, the word "social." To be socially distinct, a group need not be *seen* by society; it must instead be *perceived* as a group by society. *Matter of C-A-*, 23 I&N Dec. at 956–57 (citing guidelines adopted by the United Nations High Commissioner for Refugees ("UNHCR")).[7] Members of the group may be visibly recognizable, but society can also consider persons to be a group without being able to identify the members by sight.

In fact, for decades we have recognized particular social groups that are clearly not ocularly visible. *See, e.g.*, *Matter of Kasinga*, 21 I&N Dec. 357, 365–66 (BIA 1996) (determining that young tribal women who are opposed to female genital mutilation ("FGM") constitute a particular social group); *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822–23 (BIA 1990) (holding that homosexuals in Cuba were shown to be a particular social group); *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988) (holding that former national police members could be a particular social group in certain circumstances). Our precedents have collectively focused on the extent to which the group is understood to exist as a recognized component of the society in question. *See Matter of E-A-G-*, 24 I&N Dec.

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[7] *In Matter of C-A-*, 23 I&N Dec. at 960, we referred to groups being "highly visible" and described the group at issue—drug informants—as acting "out of the public view" and remaining "unknown and undiscovered." This language has been construed by some to require ocular visibility. We therefore clarify that we did not intend in *Matter of C-A-* to define "social visibility" in terms of ocular visibility.

at 594 (describing social visibility as "the extent to which members of a society perceive those with the characteristic in question as members of a social group").

To have the "social distinction" necessary to establish a particular social group, there must be evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group. Although the society in question need not be able to easily identify who is a member of the group, it must be commonly recognized that the shared characteristic is one that defines the group.

The examples of particular social groups in *Kasinga, Toboso-Alfonso*, and *Fuentes* illustrate this point. It may not be easy to identify who is opposed to FGM or who is homosexual or a former member of the national police. Such facts may take some effort to reveal. Nonetheless, it could still be easy for society to perceive such individuals as being a member of a particular group because of, for example, the sociopolitical conditions in the country. For this reason, the fact that members of a particular social group may make efforts to hide their membership to avoid persecution does not deprive the group of its protected status as a particular social group. *See Rivera-Barrientos v. Holder*, 666 F.3d at 652 (stating that the social distinction requirement "does not exclude groups whose members might have some measure of success in hiding their status in an attempt to escape persecution").

We also clarify that social distinction exists where the relevant society perceives, considers, or recognizes the group as a distinct social group. *See Henriquez-*

Rivas v. Holder, 707 F.3d at 1089 ("Neither we nor the BIA has clearly specified whose perspectives are most indicative of society's perception of a particular social group . . . ."); *see also Rivera-Barrientos v. Holder*, 666 F.3d at 650–51 (referencing the relevant society as both "citizens of the applicant's country" and "the applicant's community"). Social distinction may therefore not be determined solely by the perception of an applicant's persecutors.

Defining a social group based on the perception of the persecutor is problematic for two significant reasons. First, it is important to distinguish between the inquiry into whether a group is a "particular social group" and the question whether a person is persecuted "on account of" membership in a particular social group. In other words, we must separate the assessment whether the applicant has established the existence of one of the enumerated grounds (religion, political opinion, race, ethnicity, and particular social group) from the issue of nexus. The structure of the Act supports preserving this distinction, which should not be blurred by defining a social group based solely on the perception of the persecutor.

Second, defining 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." *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. at 74. 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. *Id.*

E. Consistency with Prior Board Precedent

This articulation of the particularity and social distinction requirements is consistent with our prior decisions involving claims of persecution on account of membership in a particular social group. For example, in *Matter of V-T-S-*, 21 I&N Dec. 792, 798 (BIA 1997), we found "Filipino[s] of mixed Filipino-Chinese ancestry" to be a particular social group. This group had clear boundaries, and its characteristics had commonly accepted definitions. It therefore met the particularity requirement. The social distinction requirement was met since the evidence in that case showed that Filipino-Chinese were categorized as a group in background country information and that they were directly targeted for various types of mistreatment. *Id.* at 794–95, 798. These factors showed that members of the group were perceived as a distinct group in society.

In Matter of Kasinga, 21 I&N Dec. at 365, we found that "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice" were a particular social group. This group had particularity because it was discrete, with definable boundaries. The group also had social distinction. The evidence established that women in the respondent's tribe were expected to undergo FGM prior to marriage. *Id.* at 360. As we noted, "FGM is practiced, at least in some significant part, to overcome sexual characteristics of young women of the tribe" in order to assure male dominance. *Id.* at 366–67. Moreover, women who did not undergo FGM were socially ostracized. *Id.* at 361. These factors indicate that the tribe perceived young

women who opposed and had not been subjected to FGM as a distinct group.

We also held in *Matter of H-*, 21 I&N Dec. at 343, that members of the "Marehan subclan" in Somalia were a particular social group. Because its members shared linguistic commonalities and kinship ties, that group was easily definable and therefore sufficiently particular. *Id*. The record also showed that the group had social distinction. The documentary evidence of country conditions described "the presence of distinct and recognizable clans and subclans in Somalia" and specified that the Marehan subclan was a small, once-privileged segment of the population. *Id*. We found that clan membership was "highly recognizable" and that the members were "identifiable as a group based upon linguistic commonalities." *Id.* at 342–43. These factors showed that the group was recognized in Somali society as a distinct group, giving it the requisite social distinction.

Similarly, we held that homosexuals in Cuba constituted a cognizable social group in *Matter of Toboso-Alfonso*, 20 I&N Dec. at 822. The group had sufficient particularity because it was discrete and readily definable. The evidence in that case also established social distinction. The Cuban Government classified homosexuals as a group and criminalized homosexuality. It also maintained files on them and required them to register and periodically appear for a hearing and physical exam. *Id.* at 820–21. The Union of Communist Youth held a protest against homosexuals. *Id.* at 821. For these reasons, it was apparent that Cuban society perceived homosexuals as a distinct group.

In *Matter of Fuentes*, 19 I&N Dec. at 662, we determined that "former member[s] of the national police" could be a particular social group. However, since we held that the respondent did not show that the harm he feared bore a nexus to his status as a former member of the national police, we did not fully assess the factors that underlie particularity and social distinction. With regard to particularity of the group, we now note that the respondent had served in the national police for 15 years during a period of civil conflict. *Id.* at 659. His service had ceased not long before he sought asylum. Therefore, at that time he would clearly have been considered a former member of the national police. A group of similarly situated former national police members could be considered a discrete group with defined boundaries. The length and recency of active membership in a group can be important factors in determining whether a group of "former" members is a social group with sufficiently discrete and definable boundaries to make it a *particular* social group.

Our holding in *Fuentes* that the group *could* be a cognizable particular social group was also informed by evidence showing that there was some societal perception of former national police officers as a distinct group, at least during the period of the civil strife from which the respondent was fleeing. The national police played a high-profile role in combating guerrilla violence. *Id.* at 661. A witness testified that "guerrillas had the names of the people who had been in the service" and targeted and killed former service members. *Id.* at 659. Thus, there was evidence of social distinction.

The respondent argues that our approach to defining a "particular social group" is inconsistent with international refugee standards. We acknowledged in *Matter of C-A-*, 23 I&N Dec. at 956, that our approach differs somewhat from guidelines adopted by the UNHCR for defining the term "particular social group." As we noted there, the UNHCR *Guidelines* define a "particular social group" as

> 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.

Id. (quoting UNHCR's *Guidelines* at ¶ 11) (emphasis added). The UNHCR's interpretations of principles related to refugee law "may be a useful interpretative aid, but [they are] not binding on the Attorney General, the BIA, or United States courts." *INS v. Aguirre-Aguirre*, 526 U.S. at 427.

Notably, our approach to defining a particular social group is similar to that adopted by the European Union, which also declines to follow the bifurcated definition set forth by the UNHCR. The European Union defines a particular social group as a group where:

> — members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or

> conscience that a person should not be forced to renounce it, and
>
> — that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

Directive 2011/95/EU, of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast), art. 10, 2011 O.J. (L 337) 9, 16, *available at* http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4f197df02. We therefore do not view our approach to defining a particular social group to be fundamentally different from international standards.

IV. RESPONDENT'S CLAIM FOR WITHHOLDING OF REMOVAL UNDER THE ACT

A. Particular Social Group

We agree with the Immigration Judge that the putative group of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" does not constitute a particular social group for purposes of establishing the respondent's eligibility for withholding of removal under the Act. The group as defined lacks particularity because it is too diffuse, as well as being too broad and subjective. *See Mayorga-Vidal v. Holder*, 675 F.3d 9, 15 (1st Cir. 2012) (stating that "loose descriptive phrases that are

open-ended and that invite subjective interpretation are not sufficiently particular"). 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."

For example, it could include a person who joined the gang many years ago at a young age but disavowed his membership shortly after initiation without having engaged in any criminal or other gang-related activities; it could also include a long-term, hardened gang member with an extensive criminal record who only recently left the gang. It is doubtful that someone in the former category would consider himself, or be considered by others, as a "former gang member" or could be said to have any but the most peripheral connection to someone in the latter category. Even if some in the former category might consider themselves "former gang members" in a general sense, this does not mean that they would perceive themselves as part of a discrete group within society or be so perceived. The boundaries of a group are not sufficiently definable unless the members of society generally agree on who is included in the group, and evidence that the social group proposed by the respondent is recognized within the society is lacking in this case.

In this regard, the boundaries of the group of "former gang members who have renounced their gang membership" are not adequately defined. The group would need further specificity to meet the particularity requirement. Our analysis illustrates the point 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.

The respondent also has not shown that his proposed social group meets the requirement of social distinction. The record contains scant evidence that Salvadoran society considers former gang members who have renounced their gang membership as a distinct social group. The record contains documentary evidence describing gangs, gang violence, and the treatment of gang members but very little documentation discussing the treatment or status of former gang members.

The only evidence of any societal view of former gang members is a report stating that there is a societal stigma against former gang members because of their tattoos, which makes it difficult for them to find employment. The International Human Rights Clinic, Human Rights Program, Harvard Law School, *No Place to Hide: Gang, State, and Clandestine Violence in El Salvador* 101 (2007). However, the report does not clarify whether such discrimination occurs because of their status as known former gang members or because their tattoos create doubts or confusion about whether they are, in fact, former, rather than active, gang members.

Other parts of the report also indicate that such discrimination and various forms of harassment are directed at a broader swath of young people who are, for one reason or another, suspected of being gang members, even if they have never had any affiliation

with a gang. *Id*. at 84–95. This broader grouping suggests that former gang members are not considered to be a distinct group by Salvadorans.

The country reports do not address former gang members as a distinct group. *See* Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, *El Salvador Country Reports on Human Rights Practices – 2008* (Feb. 25, 2009), *available at* http://www.state.gov/j/drl/rls/hrrpt/2008/wha/119159.htm. The only mention of former gang members is a prison population statistic that groups together gang members and former gang members.

For these reasons, we conclude the respondent has not provided evidence demonstrating that former Mara 18 gang members who have renounced their gang membership are perceived, considered, or recognized in Salvadoran society as a distinct group. Because the respondent has not shown membership in a cognizable social group, neither the harm he suffered nor the future harm he fears from gang members or the police on account of his status as a former gang member provides a basis for withholding of removal under the Act.

The respondent also claims to fear persecution on account of his status as a deportee from the United States to El Salvador, which he asserts is another particular social group. Deportees are too broad and diverse a group to satisfy the particularity requirement for a particular social group under the Act. *See Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1151–52 (9th Cir. 2010) (per curiam) (holding that "returning Mexicans from the United States" are "too broad" to qualify as a particular social group); *see also Lizama v. Holder*, 629 F.3d 440, 446–48 (4th Cir.

2011) (holding that "deportees with criminal histories" returning to El Salvador from the United States are "too broad" to constitute a particular social group). The respondent's purported social group could include men, women, and children of all ages. Their removal from the United States could be based on numerous different factors. The length of time they were in the United States, the recency of their removal, and societal views on how long a person is considered a deportee after repatriation could vary immensely. Because of these factors, deportees lack the particularity required to make them a cognizable social group.

B. Nexus

Even if the respondent's purported social groups were cognizable under the Act, he has not demonstrated the required nexus between the harm he fears and his status as a former gang member. An applicant's burden includes demonstrating the existence of a cognizable particular social group, his membership in that particular social group, and a risk of persecution *on account of* his membership in the specified particular social group. *See Ayala v. Holder*, 640 F.3d 1095, 1097–98 (9th Cir. 2011) (affirming a finding that persecution was personally motivated, not on account of group membership, where a former military law enforcement officer was targeted for retribution by members of a gang whom he had previously arrested when he was in the military). Because the persecution of members of a particular social group can be a factor (but not the sole consideration) in determining whether the group is

recognized as a distinct group within the relevant society, the question whether a cognizable social group exists may improperly be conflated with the question whether the feared harm would be inflicted on account of membership in that group.

While the views of the persecutor might play a role in causing members of society to view a particular group as distinct, the persecutor's views play a greater role in determining whether persecution is inflicted on account of the victim's membership in a particular social group. Whether that nexus exists depends on the views and motives of the persecutor. *See Matter of N-M-*, 25 I&N Dec. 526 (BIA 2011). The respondent bears the burden of showing that his membership in a particular social group was or will be a central reason for his persecution. Section 208(b)(1)(B)(i) of the Act, 8 U.S.C. § 1158(b)(1)(B)(i) (2012). Thus, in this case, even if the respondent had demonstrated a cognizable particular social group, and his membership in it, he also must show that those he fears would harm him because he belongs to that social group.

The respondent has 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. *See Matter of E-A-G-*, 24 I&N Dec. at 594 (noting that harm to a person who resisted gang recruitment "would arise from the individualized reaction of the gang to the specific behavior of the prospective recruit" and not from his general status as one who resisted recruitment). Thus, even if the respondent were a member of a cognizable particular social group,

the record does not show that the retributive harm the respondent fears would bear a nexus to his status as a former gang member, as opposed to his acts in leaving the gang.[8] We therefore find that the respondent did not establish eligibility for withholding of removal under the Act on this basis.

V. CONVENTION AGAINST TORTURE

We also conclude that the respondent did not meet his burden of proof to establish eligibility for withholding of removal under the Convention Against Torture. The Ninth Circuit has held that the likelihood of torture is a question of fact that we review for clear error. *Vitug v. Holder*, 723 F.3d 1056, 1063 (9th Cir. 2013); *Ridore v. Holder*, 696 F.3d 907, 915–16 (9th Cir. 2012).

The respondent was shot in the leg during one of two attacks he suffered when members of his former gang confronted him after he left the gang. Acts of past torture must be considered when evaluating the likelihood of future torture. 8 C.F.R. § 1208.16(c)(3)(i) (2013). However, the respondent has not established that it is more likely than not that gang members would torture him if they encountered him now, more

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[8] Additionally, to be eligible for withholding of removal under the Act, the respondent would have to establish that the Salvadoran Government is unable or unwilling to control Mara 18 gang members. *See Matter of Acosta*, 19 I&N Dec. at 222 (construing persecution as requiring that the claimed harm must be inflicted by the government of a country or by persons that the government is unable or unwilling to control). The Immigration Judge did not make findings on this issue, so we do not reach it.

than 13 years after he left the gang, or even that they still remain involved in the gang. *See Canales-Vargas v. Gonzales*, 441 F.3d 739, 746 (9th Cir. 2006) (stating that the age of threats the applicant received are relevant to the reasonableness of the claimed fear). The respondent does not know of any explicit threat to him by gang members since he left El Salvador. The documentary evidence does not address how long retaliation may occur after one leaves a gang, and it does not show that the respondent would face torture.

The respondent had his gang tattoo removed and states that it is no longer visible. He is not being removed on criminal removal grounds. He has not shown, in light of these factors, why he believes he is likely to be identified as a former gang member by rival gangs, the police, or clandestine death squads. As the Immigration Judge found, the respondent presented no evidence that he has been charged with a crime or that the police have any interest in him. Even if the respondent were detained for questioning upon his removal, as he fears, he has not shown that it is more likely than not that he will be identified by authorities as a former gang member or, even if he is, that he will be tortured while detained. The record does not contain any evidence of deportees being detained by the Salvadoran Government and tortured upon their return to El Salvador.

The respondent also has not shown it is more likely than not that he will be imprisoned upon his return. Furthermore, even if he were, he has not shown that it is more likely than not that he will suffer torture stemming from poor prison conditions. Some documentation in the record describes poor conditions and gang violence in prisons, but it does not establish

that mistreatment rising to the level of torture occurs with such frequency as to make it more likely than not that the respondent will be tortured if he is imprisoned. It also does not show that the Salvadoran Government would acquiesce in his torture in prison.

For these reasons, the Immigration Judge's predictive findings with respect to the respondent's torture claim are not clearly erroneous, and the respondent has not met his burden of proving the requisite likelihood of torture. *See Matter of J-F-F-*, 23 I&N Dec. 912, 917–18 & n.4 (A.G. 2006) (holding that each link in the hypothetical chain of events leading to the claim of likely torture must be established as more likely than not to occur); *Matter of M-B-A-*, 23 I&N Dec. 474, 479–80 (BIA 2002) (rejecting a claim based on "a chain of assumptions and a fear of what might happen, rather than evidence that meets [the] burden of demonstrating that it is *more likely than not* that [the respondent] will be subjected to torture").[9]

The respondent also has not asserted that the Salvadoran Government was in any way involved in, or failed to respond to, the prior retaliatory harm he suffered by gang members. Withholding of removal under the Convention Against Torture requires a

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[9] We do not agree with the respondent's characterization of the Immigration Judge's decision as holding that the respondent faces a danger of being killed but that death is not torture. The Immigration Judge noted that the record contained evidence of former gang members being killed upon their return to El Salvador, but he did not conclude that such killings are not torture. Rather, the Immigration Judge held that the evidence was not sufficient to show a clear probability that the respondent would be tortured.

clear probability of torture "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1) (2013); *see also Zheng v. Ashcroft*, 332 F.3d 1186, 1196 (9th Cir. 2003) (defining acquiescence as willful blindness). The respondent has not met his burden of showing that the Government would acquiesce to the torture he fears from gang members in the future. *See Mayorga-Vidal v. Holder*, 675 F.3d 9, 20 (1st Cir. 2012) (affirming a determination that the applicant did not show that the Salvadoran Government would acquiesce to torture by gangs even though "El Salvador's efforts at managing gang activity have not been completely effectual").

Accordingly, the respondent's appeal will be dismissed.

ORDER: The appeal is dismissed.

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

Seattle, Washington

File A 094 330 535 Date: January 14, 2010

In the Matter of

WILFREDO GARAY REYES Respondent	) IN REMOVAL) PROCEEDINGS)

CHARGE:	Section 212(a)(6)(A)(i), an alien present in the United States without having been admitted or paroled.
APPLICATIONS:	Asylum; Withholding of removal; Relief pursuant to Article 3 of the UN Torture Convention.

APPEARANCES:

ON BEHALF OF THE RESPONDENT:	ON BEHALF OF THE SERVICE:
Alma David, Esquire	Marci Ellsworth, Esquire Senior Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 26-year-old married, male, native and citizen of El Salvador. On March 25, 2009, the Bureau of Immigrations and Customs Enforcement issued a Notice to Appear alleging that the respondent was unlawfully present in the United States and that he should be ordered removed from that country. See Exhibit 1.

At a master calendar proceeding conducted before the undersigned on June 8, 2009, the respondent, through counsel, admitted the factual allegations contained in the Notice to Appear and conceded removability as charged. The Court will note that the master calendar proceeding conducted on June 8, 2009 was beset by technical problems with the Court's recording system. However, the Court, upon review of the record of proceedings, is unequivocally satisfied that pleadings, through counsel, were made on that date and on that date the respondent, through counsel, did admitted the factual allegations in the Notice to Appear and concede removability as charged. Also on that date the respondent, through counsel, did not seek to designate a country for prospective removal. The Court has designated El Salvador as the country of prospective removal in the event that removal should be required based on the respondent's admission on El Salvadoran citizenship.

Based on the respondent's admissions of the factual allegations contained in the Notice to Appear and the concession of removability, I find that removability has been established by clear, convincing and unequivocal evidence as required by Woodby v. INS, 385 U.S. 276 (1966).

In lieu of removal, the respondent has applied for asylum, withholding of removal to El Salvador, and relief pursuant to Article 3 of the US Torture Convention.

THE SERVICE MOTION TO PRETERMIT

At a master calendar proceeding conducted before the undersigned on June 8, 2009, the Service orally moved to bar or pretermit the respondent's asylum application pursuant to the provisions of the UNA section 208(a)(2)(B).

Pursuant to that measure, an asylum applicant must demonstrate by clear and convincing evidence he submitted his asylum application within one year of entry into the country. Failure to so demonstrate results in the asylum application being barred or pretermitted.

It is undisputed in the instant case that the respondent has submitted his asylum application well beyond the one-year period set by the statute. Respondent has admitted to entering the United States without inspection in May of 2001. See Form I-589, Exhibit 9-A, at page 1. The asylum application was received in Court before the undersigned in July of 2009. See receipt stamp affixed to Form I-589, Exhibit 4-A herein.

Notwithstanding the late submission of the I-589, the statute permits a late filing if the respondent can demonstrate change or extraordinary circumstances in support of the late filing. See INA Section 208(a)(2)(D); Matter of Y-C-, Int. Dec. 3465 (BIA 2002).

The Court notes at the time of the respondent's claimed entry into the country in 2001 that he was a minor under the age of 21. See birth certificate, Exhibit 9-E. The regulations provide for extraordinary circumstances excusing the late filing of an asylum claim if the respondent was an unaccompanied minor. See 8 C.F.R. Section 1208.4(a). However, the respondent attained the age of 21 in May of 2004. As previously noted, the respondent did not file his asylum application until it was presented in Court in July of 2009. The Court finds that the respondent failed to submit his asylum application within a reasonable time after achieving the age of majority in May of 2004. No further explanation has been advanced by the respondent for the late filing of the asylum application besides ignorance of the law, fear of his application not being successful, and ineffective assistance of prior counsel.

With regard to the latter point, the respondent has testified during cross-examination that he did consult with a lawyer at some point after his entry into the country but that the lawyer did not advise the respondent of the importance of applying for asylum. The respondent testified that the lawyer effectively allowed the respondent to file a fraudulent application for temporary protected status.

While the regulations do recognize ineffective assistance of counsel as an extraordinary circumstance excusing the late filing of an asylum claim, the respondent has failed to comply with any of the requirements of the regulations where ineffective assistance of counsel is claimed. See 8 C.F.R. Section 1208.4(a)(5)(iii).

Accordingly, in view of the failure of the respondent to comply with the requirements for a claimed ineffective assistance of counsel as an extraordinary circumstance, the Court finds that extraordinary circumstances related to ineffective assistance of counsel do not exist in this case.

The Court further finds that the remaining explanations advanced by the respondent to wit, his ignorance of the law and his fear of deportation if his application was unsuccessful, are not extraordinary circumstances as recognized by the regulations or case law.

Accordingly, the Court finds that as neither changed nor extraordinary circumstances excusing the late filing of the asylum application exist in this exist, the Service motion to pretermit will be granted and the respondent's asylum application will be pretermitted and denied.

In view of the respondent's ineligibility for asylum pursuant to INA Section 208(a)(2), the respondent is ineligible to qualify for humanitarian asylum as sought by the respondent in the respondent's brief. See 8 C.F.R. Section 1208.13(b). Accordingly, the Court need not address the respondent's claim of qualifying for humanitarian asylum.

STATEMENT OF THE LAW

Separate standards of proof apply to the respondent's applications for asylum and withholding of removal. In order to qualify for removal to a particular country, an applicant must demonstrate that his life or freedom would be threatened there on account of his race, religion, nationality, membership

in a particular social group, or political opinion. INA Section 241(b)(3). The Supreme Court has held that this requires an applicant to show that there is a clear probability that he will be persecuted or, in other words, to show that persecution is more likely than not the occur. INS v. Stevic, 467 U.S. 407 (1984). If that standard is met, a grant of withholding of removal is mandatory.

The Supreme Court has held that the well-founded fear standard required for asylum cases is less stringent than the clear probability standard for cases involving withholding of removal. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

Past persecution alone is sufficient to meet the refugee definition applicable to such cases. Desir v. Ilchert, 840 F.2d 723 (9th Cir. 1988). Once past persecution is demonstrated, the Service may rebut the claim of past persecution by showing changed circumstances or possibility of intern relocation. See 8 C.F.R. Section 1208.16(b)(1).

An applicant's testimony is extremely important since individuals applying for relief are often limited in the addition evidence they can obtain to prove past persecution. Plateros-Cortez v. INS, 804 F. 2d 1127 (9th Cir. 1986). An alien's own testimony, without corroborative evidence, may be sufficient to prove past persecution where that testimony is believable, consistent and sufficiently detailed to provide a plausible and coherent account of the basis of the claim. Qui v. Ashcroft, 329 F. 3d 140 (2d Cir. 2003). However, it is not inappropriate to require corroborating testimony or documentation when it could reasonably be assumed to be available. Matter of Dass, Int. Dec. 3122 (BIA 1989).

However, persecution, standing alone, is insufficient to establish eligibility for the relief sought. The statute requires that such harm be on account of one of the specific grounds enumerated in the Act. In other words, a nexus to a protected ground must be shown. INS v. Elias-Zacharias, 502 U.S. 478 (1992); Matter of Y-B-, Int. Dec. 3337 (BIA 1998).

Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment provides that an alien shall not be returned to his country of origin if the substantial grounds exist for believing that he would be in danger of being subjected to torture on his return. The Convention mandates the finder of fact take into account all relevant considerations, including the existence of a consistent pattern of gross, flagrant, or mass violations of human rights. Torture is defined in the regulations as an act causing severe pain or suffering, physical or mental in nature, which is intentionally inflicted. Torture is described as an extreme of cruel and inhuman treatment.

STATEMENT AND FINDINGS OF FACT

The respondent testified in Court today in support of his applications for relief.

He testified that at the age of 17 he joined the Mara 18 gang in El Salvador.

He testified that he joined the gang of his own volition, as he had essentially lost his self-respect and was looking for a way to improve his situation. He testified that friends introduced him to the Mara 18 gang but he was not coerced into joining the gang. The respondent specifically testified that he was promised

an easy life and more things if he became associated with the gang.

The respondent provided testimony as to his difficult childhood, including a period of time in which he was unemployed in the country of Guatemala and felt compelled to eat garbage to sustain himself.

The respondent has testified that he felt driven to join the gang as he did not see any other possibilities for a wholesome life.

In any event, the respondent testified that he was involved in various criminal enterprises while a member of the Mara 18 gang. He testified that under his initial leader, identified by the respondent as one Carlos, that the respondent was involved in the robbing of wealthy ranchers who had large tracts of land and owned cattle. The respondent testified that he was involved in highway robberies of these individuals of their money. He testified that the money was distributed to an orphanage that had been frequented by Carlos as a child and that the balance of the funds were shared among the gang members.

The respondent testified that he was involved in three to five such robberies over the course of approximately four months. He testified that after four months, Carlos died and the respondent's Mara 18 was taken over by a new leader identified by the respondent as one Francisco.

The respondent testified that Francisco's leadership skills were markedly different from those of Carlos. Respondent testified that robberies for the benefit of the orphanage and the gang no longer occurred. Respondent testified that under the regime of Francisco, the respondent's Mara 18 group became involved in a string of bank robberies in which the

respondent was personally involved. The respondent testified that he was involved in two to three bank robberies in which he served as a driver of the getaway vehicle. Respondent testified that he was armed with a gun while driving but that he did not become involved in any violent activities with the Mara 18 gang, either under Carlos or Francisco.

The respondent has suggested that although he was involved in multiple robberies of both individuals and banks, that he was no violent background.

In any event, the respondent testified that he became disenchanted with the leadership style of Francisco and with the Mara 18 gang as he did not wish to become further involved in bank robberies.

The respondent testified that he left the gang before reaching the age of 18 and essentially went into hiding.

He testified that he feared retribution or reprisals from Francisco, who has previously announced to the gang that anyone trying to leave could be punished with beatings or being killed.

The respondent testified that he feared Francisco and did not wish to incur any revenge.

Respondent testified that he fled his locality and resided with an aunt for some period of time.

Despite these precautions, the respondent was found by Francisco and shot at in 1999 or 2000. The respondent testified that he recognized Francisco with other individuals driving by in an automobile. He testified that Francisco then fired at the respondent with a gun, hitting him in the leg. The respondent testified that he received some measure of medical attention and was not further hampered by the injury.

There is some measure of inconsistency between the respondent's testimony and his written application for relief with regard to the period of hospitalization following this incident. The respondent has testified that he was released from the clinic the following day. However, both his written application for relief, prepared with the assistance of counsel, and the report from a psychologist indicate that the respondent was hospitalized for a two-week period of time. See supplemental statement, Exhibit 4-B, as well as Schneir report, Exhibit 8 herein.

The respondent was confronted both by the Assistant Chief Counsel and by the Court with regard to the inconsistency. The respondent has suggested that he was, in fact, not kept at the hospital for two weeks and that the information contained in his application and in the report are erroneous. The respondent has suggested that he may have mis-communicated this incident.

In any event, the respondent testified that after recovering from his wound he continued to reside near the locality of the attack. He testified that some months later he was confronted in a billiard hall by machete-wielding assailants. He testified that he sought to flee after defending himself but was then encountered by two more assailants waiting for him downstairs. He testified that he defended himself with his own machete and hand gun, cutting off the hand of one of the assailants and shooting the other assailant near the neck.

The respondent testified that he was able to flee the scene once dispatching his assailants.

There is some measure of inconsistency between the respondent's testimony and his written

application for relief with regard to this incident. There is no reference whatsoever in the respondent's written application for relief to cutting off the hand of one of his assailants or shooting the other assailant. Furthermore, there is no reference in the respondent's written application for relief to fleeing in his automobile as described in his testimony. The respondent expressed surprise at the absence of the shooting in his written application. Nevertheless, the respondent has otherwise failed to adequately explain the omission of the shooting from the written application. The respondent has sought to explain that there may have been some misunderstanding with regard to the level of injury caused by the machete on the other assailant. In any event, the respondent testified that that at this juncture he sought to flee El Salvador.

He testified that after some months he made his way to the United States and resided with his sister.

He testified that he encountered a lawyer who encouraged him to file a fraudulent application for temporary protected status with the immigration authorities, which was eventually denied.

The respondent has presented evidence to the effect that he has married in the United States and that he is the father of the U.S. citizen children. See marriage certificate and birth certificates attached to Group Exhibit 6.

The respondent has testified that he is no longer involved with gangs, does not wish to be involved with gangs, and has turned over a new leaf in his life. He has testified that he fears returning to El Salvador, as he believes that he will be arrested by the police based on his prior affiliation and criminal activities with the

gang. He has testified that he also fears retribution from his former gang as he believes that they would kill him.

The Court has had the opportunity to observe the respondent during the course of his testimony today. The respondent has been confronted with the various inconsistencies and omissions present in his case. The Court will make an overall positive credibility determination in this case. The Court recognizes the inconsistencies and omissions previously mentioned, but finds given the totality of the respondent's testimony that these inconsistences and omissions do not warrant and overall negative credibility determination.

ANALYSIS AND FINDINGS OF LAW

I am satisfied that the respondent has suffered persecution in El Salvador. The respondent has testified to multiple violent incidents directed at him by the former chief of his gang and the individuals believed by the respondent to be acting at the behest of the former chief of his gang.

The remaining issue for the Court is whether the respondent has demonstrated a nexus to an enumerated ground for this persecution.

The respondent has claimed in his written application for relief, prepared with the assistance of counsel, that he fears persecution based on his political opinion and on his membership in a particular social group. See Form I-589, Exhibit 9-A herein.

The respondent has at no time articulated a political opinion which would appear to be the

motivation for the violent incidents directed against him. The respondent has merely indicated that his former gang chief and those acting at his behest were seeking to persecute or injure the respondent as a consequence of the respondent leaving the gang without permission. The Court finds no reason in fact or in law to find that this is an articulation of a political opinion by the respondent, express or imputed.

Accordingly, the Court finds that the respondent's claim of political opinion as the nexus for his persecution is without merit.

The respondent also alleges, through counsel, that he is a member of a particular social group defined by the respondent as former members of Mara 18 in El Salvador who have renounced their gang membership. See respondent's brief at page 17.

The respondent has unequivocally testified to being an active member of the Mara 18 gang in EL Salvador for at least four to six months. He has testified to being involved in robberies of individuals at least three to five times and being involved in armed robberies of banks as a driver on at least two to three occasions.

Although the respondent has clearly indicated that he wishes to renounce his gang membership, he cannot disassociate himself from the volitional activities with which he was involved as a member of the Mara 18 gang. In this regard, the Court notes that the respondent was not coerced into joining the Mara 18 gang, he has clearly testified that he joined the gang of his own volition based on the promise of an easy life and more things.

The Board of Immigration Appeals has previously held that membership in a criminal gang cannot constitute a particular social group for purposes of relief under the INA. See Matter of E-A-G-, Int. Dec. 3618 (BIA 2008).

The Board has adopted this rule based on a decision on the Ninth Circuit Court of Appeals, the circuit in which this case arises, which has similarly held that an alien's membership in a violent criminal gang cannot constitute membership in a particular social group. See Arteaga v. Mukasey, 511 F.3d 940 (9th Cir. 2007).

The respondent seeks to mitigate the effect of the case law on his situation by essentially claiming rehabilitation since his flight from El Salvador in 2001. Respondent has emphatically sought to renounce his activities with the gang as having been engendered by the partially beneficent activities he undertook while under the regime of the gang leader Carlos.

Notwithstanding this claim, the fact remains that the respondent was a member of the one of the most notorious gangs in Central American, the Mara 18, and that he was involved in multiple armed robbery incidents.

The Court recognizes the background materials presented by the respondent which indicate that the El Salvadoran gangs may have multiple motivations and modus operandi in their particular groups. See generally, background materials attached to Group Exhibit 6. However, the fact remains that neither the Board of Immigration Appeals nor the Ninth Circuit Court of Appeals, the circuit in which this case arises,

have recognized rehabilitated members of gangs as a particular social group.

Accordingly, the Court finds although the respondent has been subjected to persecution in El Salvador, that he has failed to demonstrate a nexus to a protected ground which would qualify him for relief under the INA.

Accordingly, the request for withholding of removal pursuant to the INA must and will be denied.

Although previously noted by the Court that the respondent is not eligible to qualify for humanitarian asylum in view of the pretermission of his asylum claim, the Court finds, in the alternative, that even were the respondent eligible to qualify for humanitarian asylum that he has failed to demonstrate a case deserving of humanitarian asylum.

The Ninth Circuit Court of Appeals has recognized various situations where humanizing asylum is warranted. See generally, Belishta v. Ashcroft, 378 F.3d 1078 (9th Cir. 2004); Silaya v. Mukasey, 524 F.3d 1066 (9th Cir. 2008). However, the fact patterns in those cases were far more compelling than in the instant case, where the respondent's past persecution has been limited to having been shot in the leg and involved in a fight in the billiard hall. Accordingly, even were the Court to recognize the respondent's eligibility to apply for humanitarian asylum, it would find that he has failed to sate a claim worthy thereof.

The respondent has also sought withholding of removal pursuant to Article 3 of the UN Torture Convention.

The respondent has testified that he fears that he could be arrested by the police and that he could be subject to reprisals from his former gang should he be compelled to return to El Salvador.

The respondent has failed to demonstrate that the police have been searching for the respondent or that he has been charged with any crimes in El Salvador. Accordingly, the Court cannot determine if the respondent would be subject to arrest in that country by the authorities should he be compelled to return to that country. Furthermore, the respondent has suggested in his written application for relief that if he is located by his former gang that he could be subject to various brutal forms of treatment, including having a tire placed on him being filled with gasoline. However, the respondent has made no reference to any of this during the course of his testimony and has indicated that he believes that he would be killed by his former gang members should be return to El Salvador.

Background materials presented by the respondent contain little of any information concerning the treatment of former gang members such as the respondent upon their return to El Salvador beyond being killed. Accordingly, the Court finds that respondent has failed to demonstrate by any standard that he would be subjected to torture should he be compelled to return to El Salvador. Accordingly, the request for relief pursuant to Article of the UN Torture Convention will be denied.

For all of the foregoing reasons, the Court enters the following order:

ORDERS

IT IS HEREBY ORDERED that the respondent's application for asylum be and hereby is pretermitted and denied pursuant to INA Section 208(a)(2)(B).

IT IS FURTHER ORDERED that the respondent's application for withholding of removal to El Salvador pursuant to INA Section 241(b)(3) be and hereby is denied.

IT IS FURTHER ORDERED that the respondent's application for relief pursuant to Article 3 of the US Torture Convention be and hereby is denied.

IT IS FURTHER ORDERED that the respondent be removed to El Salvador in the charge contained in the Notice to Appear.

_____

PAUL A. DEFONZO
Immigration Judge
January 14, 2010

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILFREDO GARAY REYES,
Petitioner,

v.

JEFFERSON B. SESSIONS III, Attorney General of the United States,
Respondent.

No. 14-70686

March 29, 2017

Agency No. A094-330-535

Before: HAWKINS, RAWLINSON, and CALLAHAN, Circuit Judges.

The motions by the Harvard Immigration and Refugee Clinical Program and the Center of Gender & Refugee Studies, et. al. for leave to file amici briefs are granted the amici briefs are ordered filed.

The panel has voted to deny the petition for rehearing. Judge Rawlinson and Judge Callahan vote to deny the petition for rehearing en banc, and Judge Hawkins so recommends. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

8 U.S.C. § 1231(b)(3)(A)

United States Code
Title 8. Aliens and Nationality
Chapter 12. Immigration and Nationality
Subchapter II. Immigration
Part IV. Inspection, Apprehension, Examination, Exclusion, and Removal

§ 1231. Detention and removal of aliens ordered removed

***

(b) Countries to which aliens may be removed

***

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the 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 race, religion, nationality, membership in a particular social group, or political opinion.

***

8 U.S.C. § 1101(a)(42)(A)

United States Code
Title 8. Aliens and Nationality
Chapter 12. Immigration and Nationality
Subchapter I. General Provisions

§ 1101. Definitions

(a) As used in this chapter –

***

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .

***