No-_____

IN THE
Supreme Court of the United States

YOLANDA SANCHEZ-OCHOA, JOSE PEREZ-MURILLO, AND HECTOR PEREZ-SANCHEZ,
Petitioners,

v.

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners seek asylum in the United States after receiving threats on their life from gang members. Petitioners' neighbors had received similar threats, and were brutally murdered when they refused to comply with the gang's demands. The Petitioners fled Mexico to escape death. The immigration judge found the Petitioners credible, and all agency and court decisions have recognized that this nuclear family faces a true, clear, and present danger to their safety and welfare upon their return to Mexico. But all agencies and courts have rejected Petitioners' claims, finding, among other things, that Petitioners' proposed "particular social group" was not cognizable under the Immigration and Nationality Act.

At issue in this case is the Board of Immigration Appeals' standard for determining when an applicant claims membership in a particular social group as a basis for asylum per 8 U.S.C. § 1101(a)(42)(A). In *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), the Board of Immigration Appeals held a particular social group (PSG) must share an immutable characteristic. In a series of cases in 2008 and 2014, the Board of Immigration Appeals added two requirements to this standard: a group must be socially visible or distinct, and it must be sufficiently particular. The questions presented are thus:

1) Whether the BIA's "particularity" and "social visibility" requirements, which have caused a circuit split, are unreasonable interpretations of the law and thus not entitled to deference under *Chevron*.

2) Whether a "particular social group" may arise from a voluntary association, or lack of association, as suggested by dicta in *Matter of Acosta*, expressly followed by the Ninth Circuit Court of Appeals, and implicitly affirmed in several others.

3) Whether the current BIA requirements violate the principle of non-refoulement and the United States' international law obligations by returning credible applicants to countries where they will suffer serious harm.

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Petitioners Yolanda Sanchez-Ochoa, Jose Perez-Murillo, and Hector Perez-Sanchez respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit denied review on May 24, 2017. The decision was not reported (App. No. 16-4041), but is available on the Sixth Circuit's website under File 17a0292n.06 and is reprinted in Appendix 1. The Board of Immigration Appeals entered its decision on August 26, 2016. The immigration judge issued his decision on January 22, 2015. Neither the Board of Immigration Appeals decision nor the decision of the immigration judge were published or reported, but are reprinted in Appendices 2 and 3, respectively.

JURISDICTION

The Sixth Circuit denied review on May 24, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1)

RELEVANT STATUTORY PROVISIONS

Section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A), provides that a refugee is:

> "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…"

Section 208(b) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b), provides the Secretary of Homeland Security and the Attorney General with the authority to grant asylum to an applicant "...if the Secretary of Homeland Security or the Attorney General determines that such an alien is a refugee within the meaning of Section 1101(a)(42)(A)…."

STATEMENT OF THE CASE

The United States of America voluntarily assumed an obligation to protect refugees by ratifying and implementing the 1967 Protocol to the 1951 Refugee Convention. Protocol Relating to the Status of Refugees, Jan. 31, 1967, T.I.A.S. No. 6577, 19 U.S.T. 6223 (entered into force Nov. 1, 1968). That obligation extends to those fleeing their country because of persecution, or a well-founded fear of persecution, on account of a protected ground. One of these protected grounds is membership in a particular social group.

The Board of Immigration Appeals first considered particular social groups in the landmark case *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). There, the Board noted that "it has been argued that the notion of a 'social group' was considered to be of a broader application… in order to stop a possible gap in the coverage of the U.N. Convention." *Id.*, 19 I. & N. Dec. at 232. The Board held that members of a particular social group share a "common, immutable characteristic…" that "members of the group cannot change, or should not be required to change…." *Id.,* 19 I. & N. Dec. at 233. In dicta, the Board suggested that these characteristics could be "sex, color, kinship ties… or in some circumstances it might be a shared past experience such as former military leadership or land ownership." *Id.*

Since that time, the Board of Immigration Appeals has attempted to constrict the relief available under these claims. In *Matter of S-E-G-,* 24 I&N Dec. 579 (BIA 2008), the Board held for the first time that a particular social group required "particular and well-defined boundaries, and that it possess a recognized level of social visibility." *Id.,* at 582, *see also Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008).

These new requirements were met with harsh criticism from several Circuit Courts. For instance, several Circuits noted that the new "social visibility" standard was at odds with prior administrative precedent which had found viable particular social groups that were not socially visible. *See e.g., Valdiviezo-Galdamez v. Attorney Gen. of U.S.,* 663 F.3d 582, 607 (3d Cir. 2011) (finding the social visibility requirement was not entitled to *Chevron* deference because it was inconsistent with past BIA decisions), and *Gatimi v. Holder*, 578 F. 3d 611 (7th Cir. 2009) ("…it makes no sense; nor has the Board

attempted, in this or any other case, to explain the reasoning behind the criterion of social visibility." *Gatimi*, 578 F. 3d at 615-16. Thus, the Board issued a revised approach, attempting to clarify that social visibility did not mean "ocular" visibility but "social distinction." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 236 (BIA 2014), and *Matter of W-G-R-,* 26 I&N Dec. 208, 212 (BIA 2014).

Despite this new administrative interpretation, the issue is far from settled in the courts below. The Circuit Courts that previously rejected the new requirements, namely the Third and the Seventh, have considered particular social group cases since 2014 without referencing or discussing the Board's clarification. *See, e.g., Sibanda v. Holder*, 778 F.3d 676 (7th Cir. 2015). The Ninth Circuit did not reject the social visibility requirement, but modified it according to that Court's own standards. The Ninth Circuit has also published decisions since the BIA's social distinction clarification, and has not discussed whether it was a substantial change from the social visibility requirement. *See Rojas v. Lynch*, 807 F.3d 1123 (9th Cir. 2015).

In practice, these requirements force practitioners, judges, and even the BIA itself, to fashion convoluted "particular social groups," which serve as post-hoc justifications rather than uniform judicial standards. The Board itself has applied these requirements in sporadic and wildly inconsistent ways. *Compare Matter of Kasinga,* 21 I&N Dec. 357 (BIA 1996) (finding women opposed to FGM are a particular social group), *and Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988) (finding that past employment with police was a particular social group) *with Matter of C-*

A-23, I&N Dec. 951 (BIA 2006) (arguing that the BIA's decision "have considered the… social visibility… of the group" and denying a claim based on being a government informant).

Practitioners often feel they are shooting darts in the dark, with little to no guidance from the Board or the Circuit Courts on what may or may not qualify as a particular social group.[1] These requirements have proved particularly inadequate to address the flow of migrants from Central America and Mexico who are fleeing incredible dangers and rampant violence. As set forth in this Petition, people like the Petitioners, who are fleeing persecution based on their membership in particular social group, often are unable to qualify for asylum because of the BIA's inconsistent and arbitrary precedent, requirements, and the current disarray of the Circuit Courts. This works a particular injustice where, as here, the Courts deny relief to people such as the petitioners, who credibly testified that they feared for their lives if returned to Mexico.

The Petitioners lived in a neighborhood in Ciudad Juarez, Mexico until they fled to the United States in the summer of 2012 after receiving threats on their lives. CAR, at 534. The cartels were active in their area and began to demand "rent" from each member of the community in turn. CAR, at 549-54. Each community member that refused to pay was brutally

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[1] *See, e.g.,* National Immigrant Justice Center, *Particular Social Group Practice Advisory: Applying for Asylum after Matter of M-E-V-G- and Matter of W-G-R-* (2016), *available at* https://www.immigrantjustice.org/sites/default/files/PSG%2520Practice%2520Advisory%2520and%2520Appendices-Final-1.22.16.pdf.

murdered. *Id.* The cartels executed one woman at her hamburger stand in broad daylight. CAR, at 549. They killed an attorney who refused to pay rent and dismembered him, scattering his body parts as a warning to anyone who would refuse to meet their demands. CAR, at 552. Cartel members murdered a cousin of the Petitioners' who lived across the street, and their neighbor Cesar who lived on the corner they also murdered. CAR, at 551-53. The cartel members even brazenly terrorized the principal of the local elementary school that the Petitioners' son attended. CAR, at 554. One couple survived an encounter like this with the cartel members, although only after they were brutally beaten with the butt of a shotgun. CAR, at 550. They provided the members with "rent," but then fled from their home. *Id.*

In this context, the Petitioners began receiving death threats between October of 2011 and April of 2012. During that time, the Petitioners received three demands for "rent." CAR, at 547-8. First, the cartel members called Ms. Sanchez-Ochoa's mother. CAR, at 545-6. They ordered her to pay a fee, or "rent" for each car parked outside of their house. *Id.* Two months later, Mr. Perez-Murillo received a phone call from cartel members demanding his truck and 20,000 pesos. CAR, 544-5. If he would not give them what they wanted, they said, things were going to go really bad for him. In fact, they said, he would die. *Id.* The cartel members would not give up, and they called Mr. Perez-Murillo's daughter in April of 2012. CAR, at 546-7. A man identified himself as the leader and told her their threats were serious. He said they were firm in their threats. *Id.*

This was the last straw for the Petitioners, who already feared for their lives. Petitioners knew well what would happen if they refused to comply with what these men wanted, and so they fled almost certain death, using their "border cards to lawfully enter the United States." CAR, at 532-7.

The Immigration Judge (IJ) found the Petitioners testimony credible, but denied their claim in part because they did not present a cognizable particular social group. CAR, at 109, 111. The IJ found that the proposed social group, "people in Mexico who are not associated with a cartel or with the government," lacked particularity and an immutable characteristic. CAR, at 111. The Board of Immigration Appeals affirmed the immigration judge's decision. CAR, at 484. The Sixth Circuit denied the petition for review, but stated "…we do not discount the dangers this family might face upon their return to Mexico." App. 1.

In sum, all agencies and judges have recognized and accepted as true the reality of harm this family is likely to face upon their return to Mexico. But their claims for relief have been denied under an arbitrary and unreasonable legal standard which has caused non-uniformity in federal law and a split between the Circuit courts. Petitioners now seek relief from this honorable Court.

REASONS FOR GRANTING THE PETITION

The Supreme Court should grant certiorari to a petition when it presents an unsettled issue of law or an issue of national importance. This case presents

both. There are two major points of unsettled law that this case presents: first, whether the particularity requirement as defined by the BIA is an unreasonable interpretation of the law, and second, whether voluntary associations may form particular social groups. The Petitioners' case hangs on these two issues, as do all other asylum cases, nationwide, that involve particular social group claims.

The Board of Immigration Appeals' current interpretation of what constitutes a particular social group flies in the face of the original intent of the provision. That intent, as noted by the UN and by the BIA itself in *Matter of Acosta*, was to provide a way for the justice systems of member countries to protect refugees who may not qualify under the four other named bases for protection. Nothing has highlighted the insufficiency of the BIA's approach more than the recent refugee crisis of Latin America and the influx of migrants fleeing incredible levels of violence.

Furthermore, an issue underlying this case and other similar cases is the extent to which the Circuit Courts must defer to the BIA's interpretation. *Chevron* only allows a Circuit Court to question an administrative agency's interpretation of a statute if Congress has not provided direct guidance. 467 U.S. at 842-3. If Congress has left room for interpretation, Courts must defer to the administrative agencies interpretation unless it is not "permissible." *Id.* This doctrine of administrative deference gives the BIA broad interpretative power. Circuit Courts often uphold the BIA's decision in immigration cases based on *Chevron* deference alone, despite acknowledging that the applicant may have very real fears and may

face very real dangers. The Circuit Courts have become rubber stamps for the BIA, with some infrequent exceptions. In rare cases, the Circuit Courts will overturn a BIA decision because the factual situation is such that an extreme injustice will occur. However, these limited times that the Courts intervene contribute to the unsettled nature of asylum law and particular social group analysis, as outlined in this petition. This case presents a unique opportunity for the Court to address deference to an administrative agency when peoples' lives may truly be on the line.

While this is not the primary issue in this case, this issue defines and dictates the outcome of immigration law appeals countrywide. The Petitioners argue that this deference is inappropriate when it comes to asylum law, and that "transferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process… and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016). These concerns play out every day in the immigration courts and in the Circuit Courts. The courts deny justice and protection to credible applicants solely because the judiciary is unable to review meaningfully the decisions of the executive.

In sum, the court should grant review to this petition for the following reasons. First, there is a 8-2 circuit split over the BIA's requirements for a particular social group and the BIA has been unable to resolve the conflict. Second, there is an implicit

circuit split over whether voluntary associations may form particular social groups. Third, the BIA's current standard violates the principle of non-refoulement, which the United States is internationally obligated to follow. Fourth, this case presents an excellent opportunity for the court to review issues of national importance.

I. THERE IS AN 8-2 CIRCUIT SPLIT OVER THE BIA'S REQUIREMENTS FOR "PARTICULAR SOCIAL GROUP" CLAIMS AND THE BIA HAS BEEN UNABLE TO RESOLVE THE CONFLICT AT AN AGENCY LEVEL.

The BIA's particular social group standard has caused widely divergent and sometimes outcome-determinative holdings in the Circuit courts below. The First, Second, Fourth, Sixth, Eighth, Tenth, Ninth, and Eleventh Circuits have all considered the BIA's particular social group requirements and found that they were due *Chevron* deference.[2] As a result, practitioners know that these Circuits are less likely to approve cases of particular social groups. The Circuit Courts, as outlined below, are deeply divided on this issue.

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[2] The Ninth Circuit is not always included in the split since it modified the requirements in *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013), arguing that social visibility referred to perception and suggesting that the "perception of the persecutors matters most." *Id.,* at 1089. However, the court did affirm the social visibility and particularity criterions, applying *Chevron* deference to the BIA's requirements, and the Second Circuit suggested a similar focus on the persecutor in *Ucelo-Gomez v. Mukasey,* 509 F.3d 70 (2d Cir. 2007)

The First Circuit considered the issue in *Scatambuli v. Holder,* 558 F.3d 53 (1st. Cir. 2008), and found that social visibility was "relevant to the particular social group analysis." *Id.,* at 60. The Court later expressly countered an applicant's arguments against the BIA's particular social group requirements by referring to *Scatambuli* and stating that the requirements "…do not signal an abandonment of the common and immutable characteristic… we have found this elaboration to be not only reasonable but within the BIA's purview." *Mendez-Barrera v. Holder*, 602 F. 3d 21, 26 (1st Cir. 2010).

The Second and Ninth Circuits both suggested that social visibility might be construed as visibility to the persecutor, but ultimately deferred to the BIA's requirements of social visibility and particularity. *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013), and *Ucelo–Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007). While the Ninth Circuit has attempted to bypass the question of deference, or whether the BIA's interpretation of the statute is reasonable, it continues to apply the social visibility and particularity requirements. *See Rojas v. Lynch*, 807 F.3d 1123 (9th Cir. 2015).

The Fourth Circuit adopted the social visibility and particularity requirements with little to no discussion of whether they are reasonable. *See Lizama v. Holder*, 629 F. 3d 440 (4th. Cir. 2011) (finding that "young, Americanized, Salvadoran male deportees with criminal histories who oppose gangs" was not a cognizable social group based on the BIA's requirements from *Matter of E-A-G-*). The Eighth

Circuit considered a challenge to the BIA's requirements in 2012, but found that previous their previous decisions applying the BIA's requirements bound them in finding they were not arbitrary or capricious. *Gaitan v. Holder*, 671 F. 3d 678, 681 (8th Cir. 2012). Both the Fifth and Sixth Circuits accepted the social visibility and particularity requirements without reviewing whether they were reasonable additions to the *Matter of Acosta* standard. *See Al–Ghorbani v. Holder,* 585 F.3d 980 (6th Cir. 2009), and *Orellana-Monson v. Holder*, 685 F.3d 511, 520 (5th Cir. 2012).

The Tenth Circuit applied the BIA's requirements of particularity and social distinction in *Rivera-Barrientos v. Holder*, 666 F.3d 641 (10th Cir. 2012). The Court upheld those requirements again in a case in 2015, after *Matter of M-E-V-G-*, stating that they had interpreted the requirements in line with the new decisions issued by the BIA. *Rodas-Orellana v. Holder*, 780 F.3d 982 (10th Cir. 2015). The Eleventh Circuit considered social visibility in a case that occurred prior to *Matter of S-E-G-* and *Matter of E-A-G-*, when the BIA had not yet clarified that social visibility and particularity were requirements for a particular social group claim. *Castillo–Arias v. U.S. Att'y Gen.,* 446 F.3d 1190 (11th Cir. 2006). However, the Court has not yet considered if the requirements are unreasonable and continues to apply the BIA's standard.

The two circuits that have not found the BIA's requirements are entitled to deference have been venomous in their denunciations. The Seventh Circuit stated that this "formula… makes no sense." *Gatimi,*

578 F. 3d at 614. The Seventh Circuit noted, in particular, that the BIA's past decisions were neither consistent with each other nor with the BIA's new requirements. The Third Circuit expressly rejected both the social visibility and particularity portions of the BIA's requirements, noting "…we are hard-pressed to discern any difference between the requirement of 'particularity' and the discredited requirement of 'social visibility.'" *Valdiviezo-Galdamez,* 663 F.3d at 608. The Court rejected the social visibility requirement because they found it was inconsistent with the BIA's prior decisions, adding that the government's argument seemed to be "an attempt to avoid the tension arising from the BIA's various interpretations of that phrase." *Valdiviezo-Galdamez,* 663 F.3d at 607. Both Circuits have decided cases since the BIA revised its requirements, but neither Circuit has indicated it believes the revision cured the defects.

Each Circuit appears to have applied the supposedly uniform criteria inconsistently, and the Circuits are unable to agree on the level of deference that should be given to the BIA's interpretation. Case law has evolved in a splintered fashion. *Compare Pirir-Boc v. Holder,* 750 F.3d 1077 (9th Cir. 2014) (finding that "persons taking concrete steps to oppose gang membership and gang authority" may be a valid particular social group) *with Gaitan v. Holder,* 671 F.3d 678 (8th Cir. 2012) (rejecting a particular social group based on gang opposition). Thus, a particular social group may be viable in one Circuit but not in another.. Justice should not depend upon location, but it can for asylum seekers. It is a cruel twist of irony that Petitioners' street address not only caused their

persecution, but also may cause their claims to be denied.

The Second Circuit illustrated this in dicta in their decision in *Paloka v. Holder*, 762 F.3d 191 (2d Cir. 2014). Discussing the evolution of Circuit case law after *Matter of E-A-G-* and *Matter of S-E-G-*, the Court noted that young women living alone in Albania was a viable particular social group in the Seventh Circuit. *Cece v. Holder,* 733 F.3d 662 (7th Cir. 2013). However, a similar group of "young… attractive Albanian women who are forced into prostitution" was not a viable particular social group in the Sixth Circuit. *Rreshpja v. Gonzales*, 420 F.3d 551, 555 (6th Cir. 2005). The Second Circuit had previously considered a similar group in *Gjura v. Holder*, 502 Fed. Appx. 91 (2d Cir. 2012), and found that "young, attractive Albanian women" was not a particular social group. However, the Second Circuit considered the issue again in *Paloka* and remanded the case in order for the BIA to determine if the proposed particular social group was cognizable after *Matter of M-E-V-G-*, suggesting that gender and age could be factors used to formulate viable particular social groups. *Paloka*, 762 F.3d 191 at 198-99.

The BIA has taken an inconsistent and unreasonable approach to these issues. This problem has been exacerbated by the Circuit split that has resulted from the several Courts' struggles to implement this flawed framework. As it stands, a claim viable in one circuit may not be not viable in another—despite identical factual situations.

Furthermore, the BIA's standard, fragmented by Circuit treatment, promotes arbitrary results and post hoc justifications for result-oriented outcomes. In effect, the BIA gave immigration judges the tools to grant or deny an asylum petition based solely on their own personal opinion. Strict judges can deny every petition and still be within the bounds of the law.[3] Lenient judges can grant every petition and be within the bounds of the law.[4] Particular social group claims cause a significant portion of this disparity, and the Circuit courts have proven insufficient to resolve the conflicts.

This petition presents an opportunity for this honorable Court to consider an issue of national importance, and to clarify an issue of national judicial confusion. Asylum seekers are fleeing for their lives, and yet they cannot have confidence in the courts or the law when the courts themselves are unable to apply that law consistently. The law for what constitutes a particular social group must be clarified, because the current standard is unworkable and unfair. It is of nationwide importance to the uniform administration of the US Immigration system.

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[3] *See*, *e.g.,* Transactional Records Access Clearinghouse (TRAC), *Immigration Judge Earle B. Wilson,* Syracuse University (2016), which shows Judge Wilson has an overall denial rate of 97.7 percent, weighed against a national denial rate of 49.8 percent.

[4] *See*, *e.g.,* Transactional Records Access Clearinghouse (TRAC), *Immigration Judge Brigitte Laforest,* Syracuse University (2016), which shows that Judge Laforest denied only 10 percent of her asylum cases, weighed against a national denial rate of 49.8 percent.

The principles of good justice require that the law be clearly interpreted and provide protection to those who need it. The BIA's current requirements for a particular social group achieve neither aim. Such equal justice requires that the law be clearly interpreted and produce reasonably uniform results across a nationwide system of federal courts. This Court should grant this petition in order to address and clarify whether or not a particular social group requires social visibility and particularity.

II. THE BIA'S FRACTURED ANALYSIS HAS CREATED AN ADDITIONAL IMPLICIT CIRCUIT SPLIT OVER WHETHER VOLUNTARY ASSOCIATIONS MAY FORM PARTICULAR SOCIAL GROUPS.

The problems with the BIA's particular social group analysis do not end with the explicit Circuit split discussed above. Instead, an implicit circuit split regarding "voluntary association" claims further complicates these issues.

As discussed above, the BIA first addressed particular social groups in the landmark case *Matter of Acosta*. The BIA noted a particular social group should share "an innate [characteristic] such as sex, color, or kinship ties, or in some circumstances it might be shared past experience such as former military leadership or land ownership." 19 I. & N. Dec. at 233. The BIA emphasized that this should lead to a case-by-case approach, and not a one-standard-fits-all test.

While almost every Circuit court immediately adopted the *Acosta* standard, the Ninth Circuit initially used a different metric, often termed the "voluntary associational relationship" test. *Sanchez-Trujillo v. INS,* 801 F.2d 1571 (9th Cir. 1986). In *Sanchez-Trujillo*, the Court stated that a particular social group was "…a collection of people closely affiliated with each other, who are actuated by some common impulse or interest." 801 F.2d at 1576. The Court emphasized that the "central concern" was "the existence of a voluntary associational relationship among the purported members." *Id.* However, the Ninth Circuit clarified in *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000) that the voluntary associational relationship standard should be used only as an alternative to the *Acosta* standard and not in place of it.

While this explicit Circuit split no longer exists, there is an implicit Circuit split as to whether or not a voluntary association such as gang membership can create a particular social group. In the present case, the immigration judge emphasized that "…associations that people may or may not have are not immutable" because they are a matter of "…individual choice." CAR, at 111.

However, there is language in *Acosta* that would suggest that shared past experiences, even associations made by choice, are immutable. Some courts have relied on that language to find that various particular social groups founded on common associations qualify for protection. *See Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014) ("married women… unable to leave their relationship" could be a

particular social group); *Henriquez-Rivas v. Holder,* 707 F.3d 1081 (9th Cir. 2013) (upholding as a particular social group witnesses who testify against gangs); *and Sepulveda v. Gonzales,* 464 F.3d 770 (7th Cir. 2006) (former employees of the attorney general).

A clear example of this inconsistency is the way in which Courts have treated past gang membership for the purposes of establishing a particular social group. The Board of Immigration Appeals has refused to recognize past gang membership as a particular social group. In *Matter of S-E-G-*, the BIA rejected a particular social group based on people that gangs actively recruited but who refused to join. The BIA considered that their past experience "cannot be changed," but concluded that "this does not necessarily mean their shared past experience suffices to define a particular social group…." 24 I&N Dec. at 584. In *Matter of W-G-R-*, the BIA found that past gang membership did not constitute a particular social group because it was not particular and could include "persons of any age, sex, or background." 26 I&N Dec. at 221.

Some circuits seem to agree with the BIA's approach. For example, the Sixth Circuit cited *Matter of W-G-R-* in uphold the BIA's denial of asylum to an applicant claiming a social group consisting of past gang members, stating that the group was not socially distinct. *Zaldana Menijar v. Lynch*, 812 F.3d 491, 500 (6th Cir. 2015). However, the Sixth Circuit has also found that a past voluntary membership could be an immutable characteristic. The Sixth Circuit found in *Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010) that being a past member of the 18th Street gang in

Honduras was an immutable characteristic and that the BIA erred as a matter of law in striking down the applicant's particular social group for purposes of withholding. The Court stated "…it is impossible for Urbina-Mejia to change his membership in the group of former 18th Street gang members," and compared former membership in a gang to former military or police. 597 F.3d at 366.

However, several other Circuits have found otherwise. The Fourth Circuit considered a similar case in *Martinez v. Holder*, 740 F. 3d 902 (4th Cir. 2014). There, the Court found that the BIA had erred in finding that *former* gang membership was not an immutable characteristic of a particular social group. 740 F.3d at 913. The Court agreed with the BIA that current membership in a gang would not qualify but agreed with the applicant that "…his repudiation of gang membership, along with its violence and criminality, is a critical aspect of his conscience that he should not be forced to change." 740 F.3d at 912. The Seventh Circuit similarly found that "tattooed, former Salvadoran gang members" could constitute a particular social group, noting the group was "neither unspecific nor amorphous" and that "…being a former member of a group is a characteristic impossible to change." *Benitez Ramos v. Holder*, 589 F.3d 426, 429 (7th Cir. 2009).

Similar disagreements are frequent. For example, courts are unable to agree on the handling of

unmarried women in domestic violence situations.[5] Likewise, courts are split as to whether witnesses of crimes who testify may be members of a particular social group. *Compare Henriquez-Rivas,* 707 F.3d 1081 (witnesses who testify against gang members are a particular social group) *with Carvalho-Frois v. Holder*, 667 F.3d 69, 73 (1st Cir. 2012) (witnesses to serious crimes who the government cannot protect are not member of a particular social group).

The case law is not clear when it comes to whether a voluntary association can be an immutable characteristic for the purposes of a particular social group. This ambiguity causes an implicit Circuit split, where some Circuit courts will grant particular social groups and yet others will deny an applicant with a similar or identical claim.

In the present case, the Petitioners were in a horrible situation. The gangs, or cartels, were killing their neighbors, one-by-one, as they refused to pay rent. People who worked for the government had access to protection from these cartels. CAR, at 583. People who worked for the cartels did not face these threats. However, the Petitioners could not change the fact that they were not members of the government, or that they were not members of the cartel. They were religious people who tried to keep their heads low and avoid any trouble. Trouble sought them out, because they were unable to associate themselves with any group that offered protection.

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[5] *See* Blaine Bookey, *Gender Based Asylum Post-Matter of A-R-C-G-: Evolving Standards and Fair Application of the Law*, 22 SW. J. INT'L L. 1 (2016).

Yet the immigration judge found that they did not present a cognizable particular social group in part because these associations were voluntary. Because they could change these voluntary associations, they were not immutable characteristics. However, the Petitioners are unable to change these characteristics. They are unable to compromise their morality by joining the cartel, and they do not have the power or influence to obtain an affiliation with the government. They are stuck as members of the middle, caught in the crossfire, and they are unable to change their situation.

Therefore, the petitioner's situation presents an excellent opportunity for the court to address whether or not voluntary associations may form the basis of a particular social group. While *Acosta* suggested they could, there is no consensus among the Circuit Courts and the Board of Immigration Appeals has not consistently ruled one way or the other.

III. THE BIA'S CURRENT STANDARD VIOLATES THE PRINCIPLE OF NON-REFOULEMENT, WHICH THE UNITED STATES IS INTERNATIONALLY OBLIGATED TO FOLLOW.

A. *International law and Legislative History*

The United Nations adopted the Refugee Convention, in 1951. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force April 22, 1954) [hereinafter Refugee Convention]. The United Nations adopted a Protocol to the Refugee Convention

in 1967. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) [hereinafter Protocol]. The United Nations adopted the Protocol in response to a changing situation in the world. While the Refugee Convention provided protection to specific groups of people, namely displaced people from World War II and refugees from the Soviet Union, its restrictions were proving inadequate to provide for refugee protection. The Protocol removed the restrictions and broadened the scope of the Refugee Convention. *See* Lung-chu Chen, *The United States Supreme Court and the Protection of Refugees*, 67 St. John's L. Rev. 469 (2012). The United States became a party to the Protocol in 1968. Since the Protocol incorporated the Refugee Convention, Articles 2 to 34, both the Refugee Convention and the Protocol bind the United States' with certain international obligations. Protocol, supra note 8, art. I.1.

The international law principle of non-refoulement undergirds both the Refugee Convention and the Protocol. *See* Refugee Convention, Art. 3, and Paul Weis, *The Refugee Convention, 1951: the travaux préparatoires analysed, with a commentary* (1995). Indeed, the principle of non-refoulement has been called the "cornerstone of refugee protection." *Id.*, at 8. The principle of non-refoulement is stated in the Refugee Convention Article 33(1) as "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The

principle of non-refoulement applies to both recognized refugees and "those who have not had their status formally declared," making it of "… particular relevance to asylum-seekers." UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Jan. 26, 2007). The UNHCR High Commissioner wrote, "…the most essential component of refugee status and of asylum is protection against return to a country where a person has reason to fear persecution…. This protection has found expression in the principle of non-refoulement…." UNHCR, *Note on Non-Refoulement (Submitted by the High Commissioner on Human Rights)*, EC/SCP/2 (Aug. 23, 1977).

The United States adopted implementing legislation in 1980 when Congress passed the Refugee Act. Pub. L. No. 96-212, 94 Stat. 102 (1980). The Refugee Act modified and added to the Immigration and Nationality Act. The definition of a refugee in US law is found in the Immigration and Nationality Act Section 101(42)(a), which states that a refugee is a person who cannot return to their home 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." 8 U.S.C. § 1101(a)(42)(A). This definition comes from the Refugee Convention and the Protocol, and incorporates the principle of non-refoulement. The procedures for asylum, found in Section 208 of the Immigration and Nationality Act, more directly incorporate the idea that a person who is a refugee may not be sent back to their home country should

they have a valid claim. However, certain classes of aliens are not able to apply for asylum because of various statutory bars. These aliens are often still able to apply for withholding of removal, a remedy found in Immigration and Nationality Act Section 243(h), which directly incorporates the principle of non-refoulement for those that qualify as refugees but are unable to seek asylum. 8 U.S.C. § 1253(h).

This Court first considered refugee protection under the 1980 Refugee Act in the cases of *INS v. Stevic*, 467 U.S. 407 (1984), a case concerning withholding of removal, and *INS v. Cardoza-Fonseca,* 480 U.S. 421 (1987), a case concerning asylum. The Court examined the burden of proof for the applicant in each case, deciding that the burdens of proof differed for an asylum applicant and an applicant for withholding of removal. While the holdings are not essential to this discussion, it is important to note that this Court discussed that "…one of Congress' primary purposes was to bring United States refugee law into conformance with… [the Protocol]." *Id.,* at 436-7. This Court cited both the United Nations High Commissioner for Refugees, and the opinions of "…many scholars who have studied the matter." *Id.*, at 439-40. This Court, taking into account the underlying humanitarian concerns of refugee protection and the history of the Refugee Convention and the Protocol, suggested that a person could have a well-founded fear of persecution even if they only have a 10% chance of "… being shot, tortured, or otherwise persecuted…." *Id.*, at 440.

This Court, therefore, has already recognized that the underlying humanitarian concerns of refugee

protection are central to asylum law in the United States. As set forth below, however, the current analytical framework for particular social group claims violates these international norms, and the prior pronouncements of this honorable Court.

B. *Domestic and international interpretations of the requirements for a particular social group are in conflict.*

In *Matter of Acosta,* the BIA found that there are four elements to an asylum claim "(1) …a 'fear' of persecution; (2) the fear must be "well founded"; (3) the persecution feared must be on account of [a protected ground]; and 4) the alien must be unable or unwilling to return… because of persecution…." 19 I&N Dec. at 219. The BIA discussed each element in turn, noting that Congress intended to conform the definition of a refugee to the Protocol, and therefore "…it is appropriate for [the BIA] to consider various international interpretations of that agreement." *Id*., at 220. The BIA considered the fourth element and the Respondent's claim that he was a member of a particular social group.

The BIA noted that membership in a particular social group was added to the Refugee Convention as an "afterthought, and that "international jurisprudence interpreting this ground is sparse." *Id.,* at 232. The BIA mentioned that the UNHCR had suggested that this ground "…connotes persons of similar background, habits, or social status…." *Id.*, at 233 (referencing UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1979)). Applying the doctrine of ejusdem generis, the

Board interpreted this ground of persecution similarly to the other four grounds. The Board concluded that a particular social group, like the other grounds, must be formed of people who share an "immutable characteristic… that either is beyond the power of an individual to change or is so fundamental… that it ought not be required to be changed." *Id.* This created the *Matter of Acosta* standard, which generally every Circuit adopted until the BIA's addition of particularity and social visibility as criterion.

In 2002, the United Nations issued additional guidance on the interpretation of the Refugee Convention and Protocol concerning particular social groups. UNHCR, *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/02 (May 7, 2002) [hereinafter 2002 UN Guidelines]. While the UNHCR recognized the immutable characteristic approach of *Acosta*, the UNHCR advocated for a practice that mixed several different state approaches. Specifically, the guidance provided that a particular social group is "a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society." *Id.*, at 3. In advocating this approach, the UNHCR a way for a domestic court to determine a particular social group on two alternative bases: either on the basis that the group shares an immutable characteristic or on the basis that society perceives the group to be a particular group. The UNHCR emphasized that size is not a relevant criterion in determining a particular social group, nor

is whether every member of the group would face persecution. *Id.*, at 4-5.

The BIA's decisions following *Matter of Acosta* re-interpreted and narrowed the definition of a particular social group. Section I of this petition adequately explains the confused state of the law about particular social groups, both in theory and in practice. The BIA issued these decisions after the United Nations High Commissioner for Refugees had provided guidance on the issue, but the decisions do not adequately address why the BIA chose to veer away from the international interpretation of what may form a particular social group. In *Matter of S-E-G-*, the BIA referenced the 2002 UN Guidelines to support the addition of the social visibility requirement. However, the Board did not acknowledge a critical aspect the 2002 UN Guidelines, which is in direct conflict with the current state of the law. Namely, the BIA did not acknowledge that the requirement that a group be both socially visible *and* have an immutable characteristic was in conflict with the United Nations approach, where a group could be either socially visible *or* share an immutable characteristic.

This difference is crucial and is the root of much of the confusion that exists today in asylum law. These requirements exist in contrast to one another, as outlined earlier in this petition. Judges, practitioners, and applicants struggle to create particular social groups that fit the BIA's requirements, which are partially in conflict with each other. Indeed, the United Nations standard recognizes that groups based on social perception may not share an

immutable characteristic. As Judge Posner points out in *Benitez-Ramos*, a "Stalin or Pol Pot" who decides to "exterminate the bourgeoisie" has created a particular social group, despite the middle or upper class sharing few immutable characteristics. 589 F.3d at 431. The BIA's requirements, strictly interpreted, are unable to adapt to that situation.

C. *The lawful protection of refugees fleeing indescribable levels of violence in Mexico and Central America is an issue of national importance.*

The need to correct the lack of uniformity on national legal issues is explored above. However, the current refugee crisis in the United States creates a separate and distinct reason why this is an issue of national importance. This crisis began in the spring of 2014. Thousands of women, children, and men began appearing at the southern border of the United States.[6] While these people understand the dangers of traveling over land to the United States from countries such as Guatemala, Honduras, El Salvador, or various parts of Mexico, they continue to come. In fact, between October of 2015 and January of 2016, the number of people detained at the border more than doubled. Many of these people were fleeing catastrophic levels of violence caused by gangs,

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[6] *See, e.g.,* Jonathon T. Hiskey, Abby Cordova, Diana Orces, and Mary Fran Malone, *Understanding the Central American Refugee Crisis*, The American Immigration Council (Feb. 2016); Nina Lakhami, *Central America's Rampant Violence Fuels an Invisible Refugee Crisis*, The Guardian (Oct. 13, 2016); Kirk Semple, *Fleeing Gangs, Central American Families Surge Toward U.S.*, N.Y. Times (Nov. 12, 2016).

transnational criminal organizations, and cartels. The New York Times reported in November of 2016 that people in El Salvador were "fleeing—and dying—at the same rate now as they did during the country's 12-year civil war…."[7]

Once these migrants reach the borders of the United States they must apply for asylum. While some circuits have entertained gang-based political opinion claims, the majority of applicants pursue asylum claims based on their membership in a particular social group. Many of these applicants do not qualify for asylum based on the present state of the law. For example, many of these applicants are fleeing gang violence. Gang-based asylum claims often include horrific descriptions of brutality, but are extremely hard cases to win.[8] Practitioners often share anecdotal stories of asylum applicants who were deported after losing their asylum claim, and who became victims of the violence they feared.[9] These applicants are very afraid, very upset, and seeking a better life where they believe they may be able to find it.

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[7] Lakhami, *supra* note 2.

[8] *See* Lisa Frydman and Neha Desai, *Beacon of Hope or Failure of Protection? U.S. Treatment of Asylum Claims Based on Persecution by Organized Gangs*, 12–10 Imm. Briefings (2012) (surveying case law and arguing that their analysis "…reveals widespread failure of immigration courts, the BIA, and federal courts of appeals to recognize fear of gang violence as a basis for asylum."

[9] *Id.,* at 49, note 346.

The underlying principle, as described above, of refugee protection is that a state must not return someone to a place of persecution. The humanitarian concerns evoked in the Refugee Convention, the Protocol, and in the 1980 Refugee Act should serve to protect those who will face persecution in their home country for a specific reason. However, the BIA's particular social group jurisprudence fails to meet these international norms. Instead, the BIA has provided an overly restrictive interpretation of the requirements for a particular social group, and the Circuit courts have not been able to correct the interpretation because of administrative deference. This overly restrictive interpretation is more important than ever as the flood of refugees at the southern border continues. If this Court does not correct the BIA's flawed interpretation, the United States will continue to violate its international obligations by returning refugees to countries where they will face persecution.

The Supreme Court is the proper authority to interpret and apply international law obligations to the United States. Therefore, this Court must step in to correct a faulty interpretation of asylum law that bars many credible applicants from qualifying for asylum—sending back many who will be victimized or killed—in violation of domestic and international law.

IV. THE PETITIONERS' CASE PRESENTS AN EXCELLENT OPPORTUNITY FOR THE COURT TO REVIEW ISSUES OF NATIONAL IMPORTANCE.

The Petitioners' story is a tragic one. They watched as the gangs brutally murdered their neighbors. Each

neighbor received a demand for rent, and the price for non-payment was death. When the Petitioners' finally received their own demands, three in a matter of months, they fled for their lives. They fled to a place that was close by, safe, and where they felt they could survive—the United States. They felt there was no other choice. To stay was to die.

Yet their case has proceeded through every level of appeal available to an asylum applicant. Each agency and court that considered their petition refused to reverse the immigration judge's decision. This petition follows, and it follows because the Petitioners are still terrified to return. They are exactly the type of person that Congress intended asylum law to protect. Yet they could not qualify for asylum because, among other reasons, of the BIA's overly restrictive requirements for a particular social group.

The Sixth Circuit upheld the decision of the Board of Immigration Appeals on these grounds, finding that the BIA did not err in striking down the Petitioners' proposed particular social group. Thus, this Petition provides a chance for this honorable Court to address this fractured area of law directly and remand it to the Circuit court. The Petitioners' have shown that the immigration judge was incorrect, but they have also shown that the law must change in order to protect refugees like them. Granting this petition gives this honorable Court a chance to correct this defect and implement a uniform standard in asylum law for particular social groups.

The judge also found that there claimed particular social group rested on associations that were

voluntary and could be changed. This, too, is an issue of contention across the country. Some Circuit courts admit that voluntary associations are immutable characteristics since they are a shared past experience, yet others disagree. The BIA itself has found both ways.

Using this case as a vehicle for this Court to clarify the above points of law would provide the petitioners with relief and this Court with an opportunity to address an issue of national importance. There is a refugee crisis in the United States that the current asylum system is unable to handle. People such as the Petitioners are fleeing very real threats of violence, fearing for their lives. However, the asylum system does not provide them with protection. They return to their home countries, some to die and some to escape again. This not only violates domestic and international law, but the foundational principles of humanitarian assistance that first led the United States to sign the Refugee Convention.

The Petitioners respectfully request that this court grant this petition for review. They will then ask the court to reverse the decision of the Sixth Circuit and remand for further proceedings.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 17a0292n.06

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 16-4041

[Filed May 24, 2017]

YOLANDA SANCHEZ-OCHOA, et al., Petitioners,

v.

JEFFERSON B. SESSIONS, III, Attorney General, Respondent.

ON PETITION FOR REVIEW FROM THE UNITED STATES BOARD OF IMMIGRATION APPEALS

Before: DAUGHTREY, KETHLEDGE, and STRANCH, Circuit Judges.

KETHLEDGE, Circuit Judge. Yolanda Sanchez-Ochoa, Jose Perez-Murillo, and their son Hector Perez-Sanchez—all Mexican citizens—petition for review of a final order of removal issued by the Board of Immigration Appeals. Specifically, they challenge the Board's refusal to grant them asylum, withholding of

removal, and protection under the Convention Against Torture. We deny the petition for review.

In 2012, the petitioners entered the United States using border-crossing cards, which allow Mexican citizens to visit the United States for a few days at a time. The family did not plan on returning home to Juarez, Mexico. Instead, they settled in Ohio, where Jose began working as a waiter. A few months later, he was caught selling alcohol to an underage customer and pleaded guilty to disorderly conduct. Immigrations and Customs Enforcement began deportation proceedings against him. Yolanda thereafter filed an application for asylum, withholding of removal, and protection under the Convention Against Torture for herself, Jose, and their son.

An immigration judge held a hearing on that application. Jose testified that he was worried about returning to Mexico because he believed that a drug cartel was targeting him for extortion. According to Jose, before the family left Juarez, unidentified men had threatened to kill him if he did not hand over his truck and 20,000 pesos. Jose said that the threats had continued even after the family fled to the United States: about a year after they left, one of their Juarez neighbors told Jose that men in a black truck had come looking for the family. Jose took these threats seriously, because he knew that other neighbors had been beaten or murdered after refusing to comply with extortionists' demands. He believed that a drug cartel was orchestrating all the extortion attempts, threats, and attacks. The immigration judge found that Jose was credible, but denied the family's application. The

Board of Immigration Appeals affirmed. Thereafter, the petitioners filed this petition for review.

We review the Board's factual findings for substantial evidence, and its legal conclusions de novo. *Marikasi v. Lynch*, 840 F.3d 281, 286 (6th Cir. 2016). To prove eligibility for asylum, applicants must show that they are "refugees" under the Immigration and Nationality Act. *Id.* at 287; *see* 8 U.S.C. § 1158(b)(1)(A). The definition of refugee includes persons who have a "well-founded fear" that, if they returned to their home country, they would be persecuted "on account of . . . [their] membership in a particular social group[.]" 8 U.S.C. § 1101(a)(42). To qualify as a particular social group, the alleged group must be, among other things, distinct enough "that the community would recognize it as a discrete class of persons." *Menijar v. Lynch*, 812 F.3d 491, 498 (6th Cir. 2015).

Jose and his family argue that, if they returned to Mexico, they would be persecuted because they belong to a particular social group—one that, they say, encompasses all persons "in Mexico who are not associated with either a cartel or the Mexican government." But that group is not distinct enough to qualify as a particular social group under 8 U.S.C. § 1101(a)(42). In *Umana-Ramos v. Holder*, an asylum applicant argued that he belonged to a group of "young Salvadorans who [had] been threatened because they refused to join" a specific gang. *See* 724 F.3d 667, 673-74 (6th Cir. 2013). The court held that the group was not particular enough, "because it could include all Salvadoran youth who are not members" of the gang. *Id.* Here, the petitioners' alleged group appears even broader; it includes all people in Mexico who are

neither cartel members nor government employees. Although the petitioners might have well-founded fears about returning to Mexico, we may not grant them asylum on the basis of a "country-wide risk of victimization" through extortion. *Lopez-Castro v. Holder*, 577 F.3d 49, 54-55 (1st Cir. 2009); *cf. Koliada v. I.N.S.*, 259 F.3d 482, 488 (6th Cir. 2001). Thus, the petitioners' alleged social group "does not have sufficient particularity" to satisfy the Act, and their asylum claim fails. *Umana-Ramos*, 724 F.3d at 674. The petitioners' claim for withholding of removal fails for the same reason. *Id.*; *see* 8 U.S.C. § 1231(b)(3)(A).

The petitioners also argue that they are entitled to protection under the Convention Against Torture. To succeed on this claim, they must show that, "more likely than not," they would be tortured if removed to Mexico. *Menijar*, 812 F.3d at 501 (citation omitted). Torture includes severe pain and suffering inflicted by government officials, or inflicted by other persons with the encouragement, consent, or acquiescence of government officials. *Id.*

The Board rejected the petitioners' claim under the Convention because they had not proven that the Mexican government would acquiesce in (or be willfully blind to) a private person torturing the petitioners. The Board's conclusion was based on substantial evidence. Jose admitted that he never called the police to seek their help. And the petitioners presented no proof that the police were involved in the threats against them or in the attacks on their neighbors. Instead, the petitioners rely on Jose's belief that the Juarez police are "the same as the cartels" and thus would not protect him. The petitioners also emphasize that the

United States Department of State, in a countrywide report on human rights abuses in Mexico, concluded that the Mexican police and military had been involved in "serious abuses, including unlawful killings, physical abuse, torture, and disappearances." But neither Jose's belief nor a general countrywide report on police abuses proves that the Juarez police—or any other police department in Mexico—would be more likely than not to acquiesce in cartel members torturing the petitioners. *See Cruz-Samayoa v. Holder*, 607 F.3d 1145, 1155 (6th Cir. 2010). Thus, the Board reasonably concluded that the petitioners are not entitled to protection under the Convention Against Torture.

In sum, we do not discount the dangers this family might face upon their return to Mexico. But those dangers are faced by many people in Mexico; and in any event we have no lawful basis to set aside the decision of Board. The petition for review is therefore denied.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

[Filed August 26, 2016]

Files: A205 998 676 – Cleveland, OH
A205 537 233
A205 998 677

Date: AUG 26 2016

In re: YOLANDA SANCHEZ OCHOA
JOSE PEREZ-MURILLO
HECTOR MANUEL PEREZ SANCHEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:

Blake P. Somers, Esquire

ON BEHALF OF DHS:

Jeremy Santoro
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondents,[1] natives and citizens of Mexico, appeal from the January 22, 2015, decision of the Immigration Judge, which denied the respondents' application for asylum and denied the adult respondents' applications for withholding of removal, and for protection under the Convention Against Torture.[2] Sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act (Act), 8 U.S.C. §§ 1158(b)(1)(A), 1231(b)(3)(A); 8 C.F.R. §§ 1208.16(c), 1208.18. The respondents' appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We

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[1] The respondents are a family. The mother is the lead respondent (A205 998 676), and the other respondents, and derivative beneficiaries are her husband (A205 537 233) and her son (A205 998 677) (I.J. at 1-3, 9; Tr. at 7). The application for asylum filed by the lead respondent applies to her husband and her son. *See* 8 C.F.R. § 1208.3(a). Unlike the lead respondent's son, her husband has filed a separate application for withholding of removal and protection under the Convention Against Torture (CAT). The lead respondent's son is not entitled to assert derivative claims for withholding of removal or protection under the CAT. *See Matter of A-K-*, 24 I&N Dec. 275, 279 (BIA 2007) (although section 208(b)(3)(A) of the Act provides for derivative asylum, it does not provide for derivative withholding of removal). All references to "the respondent" refer to the lead respondent's husband unless otherwise indicated.

[2] The respondents on appeal do not challenge the Immigration Judge's finding them ineligible for voluntary departure (I.J. at 9; Tr. at 3, 28). Therefore, this issue is waived. *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n. 2 (BIA 2012) (when a respondent fails to substantively appeal an issue addressed in an Immigration Judge's decision that issue is waived before the Board).

review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

We affirm the Immigration Judge's conclusion that the respondent did not meet his burden of proving eligibility for asylum (I.J. at 14). Section 208(b)(1)(B)(i) of the Act; 8 C.F.R. §§ 1003.1(d)(3)(ii); 1208.13(a). The Immigration Judge's factual findings based on the evidence of record are without clear error. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of J-Y-C-*, 24 I&N Dec. 260, 263 (BIA 2007) (a factual finding is not "clearly erroneous" merely because there are two permissible views of the evidence). The Immigration Judge concluded that although the respondent's testimony was credible, he did not meet his burden to establish a well-founded fear of future persecution in Mexico on account of his membership in a particular social group composed of "people who are in Mexico who are not associated with a cartel or the government" (Resp. Br. at 10, 16, 18-19; I.J. at 8-11; Tr. at 27). *See* section 101(a)(42) of the Act, 8 U.S.C. § 1101(a)(42).

As the respondent does not claim past persecution, it is his burden to establish a well-founded fear of future persecution in Mexico on account of his membership in a particular social group (Resp. Br. at 12; I.J. at 9·10; Tr. at 27·28). *See* 8 C.F.R. § 1208.13(b)(1). We agree with the Immigration Judge that the respondent did not establish a well-founded fear of persecution by his alleged persecutors in Mexico (I.J. at 10-11, 14). 8 C.F.R. §§ 1003.1(d)(3)(ii), 1208.13(b)(2). The Immigration Judge properly concluded that there is insufficient evidence in the record to support the respondent's claim that he faces

a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b)(2).

We agree with the Immigration Judge that the respondent did not meet his burden to establish that the threats or harm he fears would be inflicted either by the government or by individuals or groups that are either aligned with the government or that the government is unable or unwilling to control (I.J. at 13-14). *See Khalili v. Holder*, 557 F.3d 429, 436 (6th Cir. 2009) (to qualify as persecution for the purpose of asylum, an act must be inflicted either by the government or by individuals or groups the government is unable or unwilling to control). The Immigration Judge correctly found that the respondent did not report any of the incidents he or members of his family experienced by alleged drug cartel members to the police in Mexico (I.J. at 4-5, 14; Tr. at 54-55). Thus, we conclude, based on this record, the Immigration Judge's factual findings that the respondent failed to establish that the Mexican government is unable or unwilling to control the drug cartel is not clearly erroneous, as it was a permissible view of the evidence. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of D-R-*, 25 I&N Dec. 445, 455 (BIA 2011) (explaining that an Immigration Judge may make reasonable inferences from direct and circumstantial evidence in the record as a whole and is not required to accept a respondent's account where other plausible views of the evidence are supported by the record).

Further, the Immigration Judge noted that the respondent's daughter apparently continues to reside in Mexico without any indication of being threatened since April 2012, physically harmed, or persecuted even

though his alleged persecutors asked for her whereabouts in April 2013, which undercuts his claimed fear (I.J. at 4, 6-7, 12; Tr. at 46-48, 55, 57, 72-74, 76). *See Bonilla-Morales v. Holder*, 607 F.3d 1132 (6th Cir. 2010) (no well-founded fear of persecution where family members remained in native country unharmed). The respondent has not shown that the Immigration Judge's factual determinations are clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015).

The Immigration Judge correctly stated that the respondent has not established membership in a cognizable particular social group under the Act (I.J. at 11). Section 101(a)(42) of the Act, 8 U.S.C. § 1101(a)(42). We agree with the Immigration Judge that the respondent's group lacks particularity and a shared immutable characteristic (I.J. at 8, 11; Tr. at 79). *See Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014).

Further, contrary to the respondent's appellate assertion, the record does not show that he belongs to a particular social group because he is believed to have money (I.J. at 6, 11; Tr. at 57). Wealth is generally too subjective to serve as a boundary of a cognizable social group. *See Matter of S-E-G-*, 24 I&N Dec. 579, 585 (BIA 2008). Moreover, "perceived wealth" is not sufficient, without more, to establish membership in a particular social group. *Matter of S-V-*, 22 I&N Dec. 1306, 1310 (BIA 2000), *overruled on other grounds by Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003). Therefore, we agree with the Immigration Judge that the respondent has not established membership in a cognizable particular social group within the meaning of the Act.

The Immigration Judge correctly determined that the respondent's asylum claim lacks the required nexus between any feared harm in Mexico and one of the protected grounds enumerated in the definition of "refugee" (I.J. at 12). Section 101(a)(42) of the Act. We agree with the Immigration Judge that the respondent did not present direct or circumstantial evidence that his alleged membership in a particular social group, or any other protected ground enumerated in the Act, would be at least one centra] reason why his alleged persecutors would threaten or harm him. Section 208(b)(1)(B)(i) of the Act; *Umana-Ramos v. Holder*, 724 F.3d 667, 671 (6th Cir. 2013); *Matter of N-M-*, 25 I&N Dec. 526, 529 (BIA 2011) (an applicant must prove that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for the claimed persecution); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 212 (BIA 2007). A "persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by us for clear error." *Matter of N-M-*, *supra,* at 532; *Matter of E-R-M-F- & A-S-M-*, 25 I&N Dec. 580, 587 (BIA 2011).

There is no clear error in the Immigration Judge's findings pertaining to the motives of the respondent's alleged persecutors in Mexico. 8 C.F.R. § 1003.1(d)(3)(i). Based on the evidence of record, including the respondent's testimony, the respondents fear criminal extortion threats, which do not constitute a basis for asylum (I.J. at 4-8, 10, 12; Tr. at 44-46, 49-51-53, 60, 64-65, 68-70, 73-74, 76, 78-81). *See Matter of N-C-M-*, 25 I&N Dec. 535, 536 n.1 (BIA 2011) ("Victims of gang violence and unwilling gang recruits do not describe a particular social group."); *Matter of V-T-S-*,

21 I&N Dec. 792 (BIA 1997) (holding that evidence that perpetrators were motivated by their victim's wealth, in the absence of evidence to suggest other motivations, will not support a finding of persecution within the meaning of the Act); *Matter of T-M-B-*, 21 I&N Dec. 775 (BIA 1997) (extortion by individuals acting in their personal capacity is not persecution on account of an enumerated ground).

As the Immigration Judge found, the evidence shows that the respondents fear generalized violence from drug cartels and crime affecting the population at large, which is not sufficient to establish a claim for asylum (I.J. at 7, 12; Tr. at 70, 77, 81). 8 C.F.R. § 1208.13(b)(2); *Umana-Ramos v. Holder*, *supra*, at 674 (gang violence is widespread and affects population of country and is not limited to proposed particular social group); *see also Matter of M-E-V-G-*, *supra*, at 235 (asylum and refugee laws do not protect people from general conditions of strife, such as crime and other societal afflictions; an applicant must be targeted on a protected basis to establish a claim).[3]

For these reasons, we affirm the Immigration Judge's determination that the respondent has not met his burden of proof to establish eligibility for asylum.[4]

---

[3] We need not address the respondent's arguments regarding internal relocation (I.J. at 13). The respondent has not otherwise met his burden of proof with respect to his application for asylum. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.").

[4] As the lead respondent is not eligible for asylum, her husband and her son are not eligible for derivative asylum status.

8 C.F.R. § 1208.13(a). As the lead respondent has not established eligibility for asylum, the adult respondents cannot satisfy the more stringent clear probability standard required for withholding of removal (I.J. at 14-15). *See* 8 C.F.R. § 1208.16(b).

We also agree with the Immigration Judge that the adult respondents did not establish their eligibility for protection under the CAT (I.J. at 15). The respondent has not shown that it is more likely than not that they would be tortured by or at the instigation of or with the consent or acquiescence or willful blindness of a public official or other person acting in an official capacity in Mexico (I.J. at 15). *See generally Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006); *see also Amir v. Gonzales*, 467 F.3d 921 (6th Cir. 2006). The respondent claims on appeal that pursuant to *Comollari v. Ashcroft*, 378 F.3d 694 (7th Cir. 2004), the anticipation of death by drug cartel members can be a source of acute mental anguish or torture. The respondent's reliance however on a decision from the Seventh Circuit is misplaced because we are only bound by precedents from the Sixth Circuit when adjudicating cases arising within the Sixth Circuit *See Matter of Ponce De Leon-Ruiz*, 21 I&N Dec. 154, 159 (BIA 1996). Further, the general evidence of country conditions is not sufficient to establish a claim for protection under the CAT. The respondent did not establish that specific grounds exist which indicate the adult respondents would be personally at risk of torture. *See Matter of J-E-*, 23 I&N Dec. 291, 303 (BIA 2002), *overruled on other grounds by Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004). Accordingly, the following order will be entered.

ORDER: The respondents' appeal is dismissed.

_____

FOR THE BOARD

APPENDIX C

IMMIGRATION COURT
801 W. SUPERIOR AVE, STE13-100
CLEVELAND, OH 44113

Case No.: A205-998-676

[Dated January 22, 2015]

In the Matter of
SANCHEZ OCHOA, YOLANDA
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on JANUARY 22, 2015 This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to MEXICO ~~or in the alternative~~.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to MEXICO or in the alternative to.

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to MEXICO.

Respondent's application for:

[X] Asylum was ( ) granted (X) denied ( ) withdrawn.

[X] Withholding of removal was ( ) granted (X) denied ( ) withdrawn.

[ ] A Waiver under Section ___ was ( ) granted ( ) denied ( ) withdrawn.

[ ] Cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

Respondent's application for:

[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation under section 240A(b)(2) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of Status under Section __ was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[X] Respondent's application of (X) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted (X) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a ___ until ___.

[ ] As a condition of admission, respondent is to post a $ ___ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.
[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.
[ ] Proceedings were terminated.
[ ] Other:_____
Date: Jan 22, 2015

/s/ D. William Evans, Jr.
D. WILLIAM EVANS, JR.
Immigration Judge

	GVT	RESP
Appeal:	**Waived**	**Reserved**

Appeal Due By: FEBRUARY 23, 2015

[*Certificate of Service Omitted in Printing of Appendix.*]

APPENDIX D

IMMIGRATION COURT
801 W. SUPERIOR AVE, STE13-100
CLEVELAND, OH 44113

Case No.: A205-537-233

[Dated January 22, 2015]

In the Matter of
PEREZ-MURILLO, JOSE
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on JANUARY 22, 2015 This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to MEXICO ~~or in the alternative~~.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to MEXICO or in the alternative to.

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to MEXICO.

Respondent's application for:

[X] Asylum was ( ) granted (X) denied ( ) withdrawn.

[X] Withholding of removal was ( ) granted (X) denied ( ) withdrawn.

[ ] A Waiver under Section ___ was ( ) granted ( ) denied ( ) withdrawn.

[ ] Cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

Respondent's application for:

[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation under section 240A(b)(2) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of Status under Section __ was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[X] Respondent's application of (X) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted (X) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a ___ until ___.

[ ] As a condition of admission, respondent is to post a $ ___ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.
[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.
[ ] Proceedings were terminated.
[ ] Other:_____
Date: Jan 22, 2015

/s/ D. William Evans, Jr.
D. WILLIAM EVANS, JR.
Immigration Judge

	GVT	RESP
Appeal:	**Waived**	**Reserved**

Appeal Due By: FEBRUARY 23, 2015

[*Certificate of Service Omitted in Printing of Appendix.*]

APPENDIX E

IMMIGRATION COURT
801 W. SUPERIOR AVE, STE13-100
CLEVELAND, OH 44113

Case No.: A205-998-677

[Dated January 22, 2015]

In the Matter of
PEREZ SANCHEZ, HECTOR MANUEL
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on JANUARY 22, 2015 This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to MEXICO ~~or in the alternative~~.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to MEXICO or in the alternative to.

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to MEXICO.

Respondent's application for:

[X] Asylum was ( ) granted (X) denied ( ) withdrawn.

[X] Withholding of removal was ( ) granted (X) denied ( ) withdrawn.

[ ] A Waiver under Section ___ was ( ) granted ( ) denied ( ) withdrawn.

[ ] Cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

Respondent's application for:

[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation under section 240A(b)(2) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of Status under Section __ was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[X] Respondent's application of (X) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted (X) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a ___ until ___.

[ ] As a condition of admission, respondent is to post a $ ___ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.
[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.
[ ] Proceedings were terminated.
[ ] Other:_____
Date: Jan 22, 2015

/s/ D. William Evans, Jr.
D. WILLIAM EVANS, JR.
Immigration Judge

	GVT	RESP
Appeal:	**Waived**	**Reserved**

Appeal Due By: FEBRUARY 23, 2015

[*Certificate of Service Omitted in Printing of Appendix.*]

APPENDIX F

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
CLEVELAND, OHIO

[Filed January 22, 2015]

Files: A205-998-676
A205-537-233
A205-998-677

In the Matters of	)
	)
YOlANDA SANCHEZ OCHOA	)
JOSE PEREZ-MURILLO	)
HECTOR MANUEL PEREZ SANCHEZ	)
	)
RESPONDENTS	)
	)

IN REMOVAL PROCEEDINGS

CHARGES:

> Section 237(a)(1)(B) of the Immigration and Nationality Act as amended, in that after admission as a non-immigrant under Section 101(a)(15) of the Act you have remained in the United States for a time longer than permitted.

APPLICATIONS:

Asylum, withholding of removal pursuant to Section 241(b)(3)(A) of the Immigration and Nationality Act, withholding or deferral of removal pursuant to Article 3 of the United Nations Convention Against Torture.

ON BEHALF OF RESPONDENTS:

BLAKE P. SOMERS, ESQUIRE

ON BEHALF OF DHS:

MICHAEL TRIPI, ESQUIRE
ASSISTANT CHIEF COUNSEL

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondents are, lead respondent, a 44-year-old female born August 13, 1970, she is a native and citizen of Mexico. The respondent was issued a Notice to Appear on September 10, 2013, which was served on her by regular mail on September 11, 2013. At a master calendar hearing conducted February 19, 2014, the respondent appeared with counsel and admitted the truth of factual allegations 1 through 4 in the Notice to Appear and conceded the 237(a)(1)(B) charge of removability. Mexico has been designated as the country for removal. The rider respondents in the 233 case ~~are~~ is a 44-year-old male born October 19, 1970, a native and citizen of Mexico, who was issued a Notice to Appear on December 6, 2012, which was personally served on him on that date. At a master calendar hearing conducted on August 14, 2013 the respondent appeared with counsel and admitted the truth of factual allegations 1 through 4 in the Notice to Appear

and conceded the 237(a)(1)(B) charge of removability. Mexico has been designated as the country for removal. With regard to the 677 case, the respondent is a 14-year-old male born August 20, 2000. The respondent is a native and citizen of Mexico. The respondent was issued a Notice to Appear on September 10, 2013, which was served on him by ordinary United States mail on September 11, 2013. At a master calendar hearing conducted on February 19, 2014, the respondent appeared with counsel, he admitted the truth of factual allegations 1 through 4 in the Notice to Appear, and conceded the 237(a)(1)(B) charge of removability. Mexico, again, has been designated as the country for removal. The Court finds that removability has been established by clear and convincing evidence with regard to each respondent. The issues remaining for a determination by this Court have to do with the applications for relief.

SUMMARY OF THE EVIDENCE

The evidence in this case consisted of the testimony of rider respondent Jose Perez-Murillo. In addition to the testimony of Mr. Murillo the Court has admitted documentary evidence into the record, and has considered that documentary evidence in reaching its decision. The documentary evidence admitted and considered consists of Exhibits 1A through C, those being the respondents' respective Notices to Appear, Exhibit 2, the I-589 of the rider respondent Mr. Perez-Murillo with 138 pages of attached documents, Exhibit 3, the respondent's evidentiary submission of June 2, 2014 containing pages 140 through 163 under Tabs L through R, Exhibit 4, the lead respondent's Form I-589, and Exhibit 5 consists of conviction

records, a total of four pages which were submitted by the Government on June 16, 2014, on the date of the individual hearing in this matter, this is ~~an~~ evidence of a conviction for sale of beer to an underaged person.

The respondent, Mr. Perez-Murillo, testified that he was born October 19, 1970, in Mexico, and last entered the United States on May 3, 2012. He testified that he entered the United States at the point of entry at El Paso, Texas, pursuant to a visa. He testified that he had been to the United States previously on approximately six occasions. The actual number of entries is set forth on page 13 of Exhibit 2. The respondent testified that prior to his last entry he had never overstayed his visa and did not work illegally in the United States. He testified that the trips to the United States were for family parties and get-togethers, and for shopping or visiting friends.

The respondent testified that after the May 3, 2012 entry he remained in the United States due to conditions in his home city of Juarez and due to death threats that he had received.~~, someone threatening to kill him.~~

The witness testified that he was employed in Mexico by a security company as a security guard, and had what he described as a good income. He testified that he is married to the lead respondent, Yolanda. He testified that she worked as a distributor for a company called Herbal Life in Mexico. He testified that he is now employed in the United States at a Mexican restaurant in Cincinnati. His wife is employed at ~~the~~ a Taco Bell restaurant. He testified that neither of them had work authorization. He testified that his son Hector at the time of the individual hearing was

13 years of age and attends middle school in Norwood, Ohio.

The witness testified that he has one criminal conviction, this is evidenced by the documents in Exhibit 5.~~;~~ ~~h~~He inadvertently sold a customer an alcoholic drink without checking the person's ID, and the customer was in fact under 21 years of age. He has no other criminal record. Neither his wife nor his son has any criminal record. The witness testified that he is an adherent to the Jehovah's Witness faith.

He testified that, aside from a death threat that he received in Mexico, neither he, his wife, nor his son have ever had any other problems in Mexico.

The witness testified that ~~in~~ in December of 2011, he received a telephone call. The caller told the witness that he wanted the witness's truck and 20,000 pesos. He was told that if he did not comply, it "will go really badly for you and your family." He testified that the caller also said "you're going to die."

The respondent testified that in October 2011, prior to the threat that he received, his mother-in-law had received a phone call. She told him that the caller asked about the respondent's wife.~~;~~ ~~t~~The caller wanted a "fee" for each car parked in front of the respondent's home.

In April of 2012, the witness testified that his daughter also received a phone call. The caller told her that he was the "commander," and told her to "take these threats seriously." The caller told her that it was going to go very bad because the respondent had made a complaint about the other telephone calls. The respondent's personal statement at page 14 indicates

that he did not report the death threat to the police, but the respondent testified that the caller was misinformed about whether or not he had made a complaint to the police.

The respondent testified that he is afraid of these callers. He testified that several residents of their neighborhood had received similar threats and were killed.

He testified that a neighbor named Rosie refused to pay a demand for "rent". The gang members then returned and killed her. There is no death certificate in the record for this individual.

He testified that a person named Patricia and her husband were beaten up when they refused to pay the "rent" to the gang members.~~,~~ He testified they were beaten with a gun butt and~~;~~ testified that they then paid the "rent" and left the area. There are no statements from these two individuals in the record.

The respondent testified that a neighbor named Cezar refused to pay "rent" and was killed outside his house. Exhibit 3 tab P is a video about an individual who was killed and dismembered by gang members. The video is a copy of media reports about gang killings.

The respondent testified that in 2011, at his son's school, the individuals came to the school about paying "rent." Children at the school were then put through training as to how to react if a shooter came to the school. The respondent testified that his wife's cousin was also killed in Mexico.

Respondent testified that he did not report these threats to the police. He explained that to him the police are "the same as the cartel."

Asked about living somewhere other than Juarez, the respondent testified that he could not relocate from Juarez to another part of Mexico because, in his opinion, everything is the same everywhere in Mexico.

The witness testified that he is not associated with the Mexican government in any way.; ~~h~~He was not in the military or associated with the military. He testified that he is also not associated with any cartel in Mexico.

After May of 2012, he testified that he came to the United States and no one called the respondent or his wife personally. In April of 2013, he was told by neighbors that people in a pickup truck came asking about the whereabouts of the respondent, his wife, and ~~the respondent's~~ daughter.~~'s whereabouts~~. This neighbor was also asked if the respondent and his family had money. The respondent speculated that this inquiry was made at the neighbors because the respondent and his family lived in a fairly large house and had several automobiles.

Exhibit 4 Tab O, page 150, is a photo of the respondent's house, a satellite photo downloaded from the Internet. The circle in the center of the photo is where the respondent lived. The circle near the number 150 is where the couple who was beaten for not paying the rent lived. The houses with X's drawn on them are places where neighbors were killed, according to the respondent. The house with one line drawn is where his wife's cousin lived, who was killed. Exhibit 4,

page 151, the photo at the top of this page is where a woman lives whose son was killed and dismembered.

The respondent testified that if he returns to Mexico, he does not know what would happen, but he is worried.

On cross-examination the witness testified that he believes that the caller who threatened him in December of 2011 was a member of a drug cartel. He believes that they called to extort money from him, and for no other reason. He testified that these calls started in October of 2011, but doesn't know the name of the caller. The callers never came to his house. He testified that he was at home when this call was received. This happened in Ciudad Juarez. Ciudad Juarez is in the state of Chihuahua. He believes that all of the calls were from drug cartel members, and that these are also the people who called his mother-in-law. He believes, according to his testimony, that these people were calling to extort money from him, and for no other reason.

He testified that in April of 2012 his daughter received a call and, again, believes this was made by drug cartel members and was to extort money. The call was for no other reason.

He testified on cross-examination that the neighbors who had problems had problems with drug cartel members and no one else. Their problems also occurred in Juarez. He testified that the neighbors that were killed were killed due to efforts to extort money from them.

He testified, however, that President Calderon had declared war on drug cartels, and that this curtailed

their drug trafficking activities and they turned then to kidnapping and extortion for other sources of money.

He testified that the neighbors that were beaten up left the area to live in the United States.; ~~t~~This is what he was told by other neighbors.

He testified that his mother lives in the United States.; ~~h~~However, his daughter still resides in Mexico, but has moved to a different house across the street from the house where the respondent lived. He testified that no one has called his family since he left Mexico.

He testified that in 2011 his wife's cousin was killed. He believes that the killing was performed by drug cartel members. He believes that he was killed because they were trying to extort money, and for no other reason.

After the respondent left Mexico, he was told that people in a black truck came looking for him in April of 2013. He believes that these persons were drug cartel members, and believes they were looking for him to extort money from, and for no other reason. In response to questioning by the Court, the respondent testified that there was nothing in the course of the calls or threats that led him to believe that the caller was motivated in any way by the fact that he doesn't work for the Mexican government or was not associated with drug cartels.

The respondent agreed that the population of Mexico was over 100 million people. He is not aware of how many of those people work for the Mexican government. He does not know how many of those people might be affiliated in some way with drug cartels.

The respondent testified that people whom he knows that were threatened, beaten, or killed had this happen due to extortion efforts in connection with trying to extort money from them. Those who didn't pay were killed. These people were not threatened, beaten, or killed because were not associated with the government. He testified that association with the government has nothing to do with whether or not people are targeted for extortion. He testified that extortionists targeted people because they can get money from them.

On redirect examination the witness testified that government officials can obtain protection that others in Mexico are unable to obtain.

STATEMENT OF THE LAW

In order to be eligible for asylum under Section 208 of the Act, respondents must prove that they are refugees as that term is defined in Section 101(a)(42)(A) of the Immigration and Nationality Act. In other words, they must prove that they either unable or unwilling to return to Mexico due to either past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The respondents have identified membership in a particular social group defined as "people in Mexico who are not associated with either a cartel or the Mexican government" as basis upon which they have been or sure they will be persecuted.

In order to be eligible for withholding of removal pursuant to Section 241(b)(3)(A) of the Immigration and Nationality Act the respondents must prove that

there is a clear probability, in other words that it is more likely than not, that their lives or freedom would be threatened in Mexico on account of their membership in their defined particular social group.

To establish eligibility for withholding or deferral of removal pursuant to Article 3 of the United Nations Convention Against Torture the respondents must prove that it is more likely than not that they would be subjected to torture in Mexico by, at the instigation of, or with the consent or acquiescence of the government of Mexico, a public official of that government, or a person acting in an official capacity.

The respondents, through counsel, concede that the respondents are not eligible for a grant of post-conclusion voluntary departure.

FINDINGS OF THE COURT

The threshold issue with regard to any application for relief from removal has to do with the credibility of witnesses. In this case, the rider respondent Jose Perez-Murillo was the sole witness, and the Court finds that he was a credible witness.

ONE-YEAR ISSUE

The Government agrees that the lead respondent, Yolanda Sanchez Ochoa, timely filed her application for asylum, and that Jose Perez-Murillo and Hector Manuel Perez Sanchez are derivative applicants under her I-589.

PAST PERSECUTION

The respondents, through counsel, informed the Court that they make no claim that they were

persecuted in the past in Mexico. As the respondents have not proven that they have been persecuted in the past on account of a protected characteristic, they therefore do not gain the benefit of a presumption of a well-founded fear of future persecution. The Court must therefore examine the evidence in the record and determine whether or not the record contains sufficient credible evidence upon which to conclude that the respondents have a well-founded fear of future persecution in Mexico.

WELL-FOUNDED FEAR

A well-founded fear of future persecution must be shown to be a fear that is both subjectively real and objectively reasonable.

The respondent's claim of a well-founded fear of future persecution is based upon the respondent's fear that death threats made to them in connection with extortion attempts will be carried out if they are forced to return to Mexico. In support of their claim of a well-founded fear of future persecution, the respondents point to neighbors and acquaintances who have been beaten and/or killed for refusing to comply with extortion requests by cartel members in Mexico.

While it is not clear form the evidence that the extortion attempts and accompanying death threats were made by cartel members, the Court is satisfied that the threats were actually made. The only evidence of cartel involvement, however, is Jose Perez-Murillo's testimony that he believes that the threats, beatings, and killings about which he testified were carried out by cartel members. The basis of his belief is not clear from his testimony.

NEXUS

Respondents must prove that any feared persecution is on account of a protected characteristic. See INA Section 101(a)(42)(A). The respondents assert membership in particular social group defined as "people in Mexico who are not associated with either a cartel or the Mexican government." They assert that this is the basis upon which they will be persecuted in the future in Mexico.

A particular social group refers to persons who share a common immutable characteristic. See Matter of Acosta, 19 I&N Dec. 211 (BIA 1985). Here the respondent's particular social group does not set forth a group of persons who share an immutable characteristic. The basis of a particular social group is a lack of association with either the Mexican government or a cartel. Associations that people may or may not have are not immutable. While the fact of past association cannot be changed, future associations are a matter of individual choice and subject to change at any time. The Court finds, therefore, that the lack of association with either the Mexican government or cartels is not an immutable characteristic, and therefore cannot form the basis of a cognizable particular social group. Consequently, the Court finds that the respondent's particular social group defined as "people in Mexico who are not associated with either a cartel or the Mexican government" is not a cognizable particular social group, with the result that the respondent has not proven that any feared persecution is on account of a protected characteristic.

The Court would also note that this particular social group is, in the judgement of the Court, too broad and

amorphous to constitute a cognizable particular social group. This group by its terms could include men, women, adults, children, Mexican citizens and non-Mexican citizens, and as a result the Court finds that this particular social group does not meet the particularity requirement of a cognizable particular social group. See Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014).

PERSECUTION

Persecution is defined as a threat to the life or freedom of, or the infliction of suffering or harm upon those who differ in a way regarded as offensive. See Matter of Acosta, 19 I&N Dec. 211 (BIA 1985).

The evidence in support of the respondent's claim of a well-founded fear of future persecution is that his family fears that they will become victims of extortion or robbery or kidnapping if returned to Mexico.

The rider respondent, Mr. Perez-Murillo, conceded that extortionists target people whom they believe have money. He testified that affiliation with gangs or the Mexican government has little or nothing to do with an extortionist's decision to target any particular individual.

The respondents have experienced only threats in the past in Mexico. One of those threats was communicated to the respondent's daughter in April of 2012. This daughter continues to reside in Mexico in a house across the street from the house where the respondent and his family lived. This daughter has had no further problems since she received a threatening phone call in April of 2012. This fact, in the judgement

of the Court, undermines the respondent's claim of a well-founded fear of future persecution.

The danger that the respondents fear in Mexico is not persecution. The respondents were not targeted for an extortion attempt because they differed in a way regarded by the extortionists as offensive. Mr. Perez-Murillo was targeted, as are thousands of others in Mexico, because he was thought to have money, not because he differed in a way regarded by the callers as offensive. Therefore, in the judgement of the Court, he has not experienced persecution as that term is defined in Matter of Acosta.

The respondents justifiably fear that they will become victims of extortion and violent crime that is pervasive in Mexico today. The Court is sympathetic to the respondent's fears in this regard. However, such fear does not form the basis of an asylum claim without more. Matter of VTS, 21 I&N Dec. 792 (BIA 1997). This fear is no doubt shared by most, if not all, of the hundred million plus people who reside in Mexico today.

As the respondents have failed to prove that they have been persecuted in the past in Mexico, they therefore bear the burden of proving that it would not be reasonable to expect that they relocate to another part of Mexico, thereby avoiding the feared persecution. See 8 C.F.R. 1208.13(b)(B) and 8 C.F.R. 1208.13(b)(3)(i). In determining the reasonableness of internal relocation the Court considers the fact as set forth at 8 C.F.R. 1208.13(b)(3).

In his testimony Mr. Perez-Murillo only asserted that they could not live elsewhere in Mexico aside from

Ciudad Juarez because things are the same all over Mexico. This, in the judgement of the Court, does not answer the question as to whether or not they could relocate to another part of Mexico and avoid the feared persecution. Consequently, the Court finds that the respondents have not proved that it would be unreasonable to expect that they relocate to another part of Mexico, thereby avoiding the feared persecution.

PRIVATE ACTOR

The respondents claim that they will be persecuted by a private non-governmental actor.~~;~~ ~~t~~They must, therefore, ~~therefore~~ prove that the government of Mexico is either unwilling or unable to control their alleged persecutor.

In this case, the respondents alleged that their persecutors are members of cartels whose primary activity involves trafficking in controlled substances. The government of Mexico has made substantial efforts to control these organizations, and the prisons of Mexico are filled with persons associated with drug trafficking cartels. It therefore cannot be said that the government of Mexico is unwilling to take steps to control those whom the respondents fear will persecute them. While ~~a~~ persons of good faith can differ as to the efficacy of the Mexican government's efforts in this regard, certainly their intent is not reasonably open to question.

The other question is whether or not the government of Mexico is unable to control those whom the respondent fears will persecute them. There is no government of which this Court is aware anywhere in the world today that is able to guarantee the safety of

its citizens or residents. The practical effect of governments having limited resources is that they are able ~~enabled them~~ to hire limited numbers of law enforcement agents. This ~~means or~~ results in the fact that the actions of law enforcement are generally reactive rather than proactive. However, in the judgement of the Court, this does not compel the conclusion that a government is unable to control those who might persecute others.

The respondent Mr. Perez-Murillo testified that he did not report the threats and extortion attempts to the police in Mexico.~~,~~ Consequently, ~~so~~ it is impossible to know what steps government agents in Mexico may have taken in response to the request for aid by the respondents.

The Court finds that there is insufficient evidence in the record upon which to conclude that the government of Mexico is either unable or unwilling to control those whom the respondents fear will persecute them.

The Court finds that the respondents have proven neither past persecution nor well-founded fear of future persecution on account of a protected characteristic. They have therefore failed to prove that they are refugees as that term is defined in Section 101(a)(42)(A) of the Immigration and Nationality Act. Consequently, the Court finds the respondents have failed to prove their eligibility for a grant of asylum.

As the respondents have failed to meet the relatively low threshold of proof required to demonstrated eligibility for a grant of asylum, it necessarily follows that they have failed to meet the

higher standard of proof necessary to demonstrate eligibility for a grant of withholding of removal, namely that there is a clear probability, in other words that it is more likely than not, that their lives or freedom would be threatened in Mexico on account of their membership in their defined particular social group. Consequently, the Court finds that the respondents have failed to demonstrate their eligibility for a grant of withholding of removal pursuant to Section 241 (b)(3)(A) of the Immigration and Nationality Act.

The respondent<u>s</u> have<u>s</u> ~~s~~ not presented evidence to establish that it is more likely than not that they would be subjected to torture in Mexico today by<u>, at</u> the instigation of<u>,</u> or with the consent or acquiescence of the government of Mexico, a public official of that government, or a person acting in an official capacity. The evidence in the record, in the judgement of the Court, does not prove that the government of Mexico makes a practice of torturing its citizens. Likewise, the evidence does not prove that it is more likely than not that an official of the Mexican government<u>,</u> having knowledge that one or more of the respondents was being<u>,</u> or ~~is~~ <u>was</u> about to be tortured would thereafter willfully turn a blind-eye and allow that torture to either commence or continue. Consequently, the Court finds that the respondents have not proven that it is more likely than not that they would be subjected to torture in Mexico by, at the instigation of, or with the consent or acquiescence of the government of Mexico, or a person acting in an official capacity. Therefore, they have not demonstrated their eligibility for a grant of withholding of removal pursuant to Article 3 of the United Nations Convention Against Torture.

ORDERS

IT IS THEREFORE ORDERED that the respondents be removed from the United States to Mexico.

IT IS FURTHER ORDERED that the respondent's applications for asylum be denied for the reasons set forth above.

IT IS FURTHER ORDERED that the respondent's applications for withholding of removal pursuant to Section 241(b)(3)(A) of the Immigration and Nationality Act be denied for the reasons set forth above.

IT IS FURTHER ORDERED that the respondent's applications for withholding or deferral of removal pursuant to Article 3 of the United Nations Convention Against Torture be denied for the reasons set forth above.

Please see the next page for electronic signature

D. WILLIAM EVANS, JR.
Immigration Judge

January 22, 2015

//s//

Immigration Judge D. WILLIAM EVANS, JR.

evansw on April 30, 2015 at 9:54 AM GMT