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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of:	)	
Mauricio Edgardo Valdiviezo-Galdamez	)	File No.: A097 447 286
In removal proceedings	)	

DEPARTMENT OF HOMELAND SECURITY
BRIEF ON REMAND FROM
THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

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INTRODUCTION

The Department of Homeland Security ("Department" or "DHS") timely submits this brief to the Board of Immigration Appeals ("Board" or "BIA") in this matter, which is on remand from the U.S. Court of Appeals for the Third Circuit. *See Valdiviezo-Galdamez v. Att'y Gen. of U.S.*, 663 F.3d 582 (3d Cir. 2011). The Third Circuit granted, in part, the respondent's petition for review of the Board's October 22, 2008 decision dismissing the respondent's appeal from the Immigration Judge's denial of asylum, statutory withholding of removal, and protection under the regulations implementing Article 3 of the Convention Against Torture ("CAT").[1] The Third Circuit upheld those aspects of the Board's decision concerning the respondent's CAT claim and political opinion-based persecution claim, *see id.* at 609-12, but remanded to the Board for further consideration of the respondent's particular social group-based persecution claim, *see id.* at 609-12.

In regard to the respondent's particular social group claim, the Board had determined that the respondent's putative particular social group, "Honduran youth who have been actively recruited by gangs but have refused to join because they oppose the gangs," lacked "social visibility" and "particularity." *See id.* at 588-89. The Third Circuit, however, found that the Board's precedent enunciating these two particular social group elements, at least insofar as the court understood them, were not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), because the Board had not explained adequately its rationale for refining its construction of "particular social group." *See Valdiviezo-Galdamez*, 663 F.3d at 608. Accordingly, the Third Circuit remanded the case to the Board for further

[1] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. Res. 39/46. 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) (codified, in pertinent part, at 8 C.F.R. §§ 1208.16(c) - .18).

proceedings to allow the Board an opportunity to provide a "principled reason" for its adoption of the "social visibility" and "particularity" requirements. *Id.* at 608-09.

The underlying facts of this case have been amply recited in the prior Board and Third Circuit decisions, *see, e.g.*, *Valdiviezo-Galdamez*, 663 F.3d at 586-87, and therefore will not be repeated in the instant brief except as otherwise necessary.[2] In sum, the respondent's main fear stems from his interactions with the "'Mara Salvatrucha,' a/k/a 'MS–13'" criminal gang in Honduras.[3] *See id.* at 586-87.

ISSUES PRESENTED

When considering this case on remand, the Board should address the following issues:

(1) How "social visibility" and "particularity" are best understood, and whether they are separate requirements for a cognizable particular social group;

(2) Whether the respondent's putative particular social group is cognizable; and

(3) Even assuming *arguendo* that the respondent's particular social group is cognizable, whether he has established the requisite nexus between the claimed persecution and his membership in the putative particular social group.

SUMMARY OF THE ARGUMENT

Properly understood, "social visibility" and "particularity" are important and logical refinements to the particular social group standard set forth by the Board in *Matter of Acosta*, 19

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[2] The lengthy procedural history of this case is well summarized in the Third Circuit's most recent decision. *See Valdiviezo-Galdamez*, 663 F.3d at 587-90.

[3] The Third Circuit focused on the threat to the respondent from the Mara Salvatrucha gang. *See Valdiviezo-Galdamez*, 663 F.3d at 586-87; *see also Valdiviezo-Galdamez v. Att'y Gen. of U.S.*, 502 F.3d 285, 286-87 (3d Cir. 2007). Although his initial testimony generally referenced problems with other gangs besides Mara Salvatrucha, including Mara 18, *see* Tr. at 40, the respondent stated that "the Mara that would always go after [him] the most was Mara Salvatrucha," *see id.* at 43. He specifically testified that members of this gang attempted to recruit him in San Pedro Sula in March 2003, *see id.* at 41-42; that they frequently confronted him there starting in June 2003, following his return from living with his mother in Santa Rosa de Cupon, *see id.* at 42-43; and that it was members of this gang that kidnapped and beat him and other family members, including his mother, in Guatemala in September 2004, *see id.* at 44, 52-53, 58. In her supporting letter, however, the respondent's mother focused on only one gang-related incident involving herself and the respondent, and she advised that it occurred in San Pedro Sula and that it involved "MARA 18." *See* Group Exh. 6, Letter of Melinda Esperanza (May 4, 2005).

I&N Dec. 211, 232-34 (BIA 1985), *modified on other grounds, Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). Under this refined standard, the respondent's putative particular social group is not cognizable. In addition, even assuming that the respondent's putative particular social group is cognizable, he has failed to establish the required nexus.

ARGUMENT

I. PROPERLY UNDERSTOOD, "SOCIAL VISIBILITY" AND "PARTICULARITY" ARE IMPORTANT AND LOGICAL REFINEMENTS TO THE PARTICULAR SOCIAL GROUP STANDARD SET FORTH IN *MATTER OF ACOSTA.*

A. The Third Circuit's explanation of the need for further clarification of "social visibility" and "particularity."

In declining to accord *Chevron* deference to Board precedent regarding the "social visibility" and "particularity" requirements, the Third Circuit explained that it was "hard-pressed to understand" precisely "how the 'social visibility' requirement was satisfied in prior cases" in which the Board found cognizable particular social groups "using the *Acosta* standard." *See Valdiviezo-Galdamez*, 663 F.3d at 604 (referring to "women who are opposed to female genital mutilation (*Matter of Kasinga*[, 21 I&N Dec. 357 (BIA 1996)]), homosexuals required to register in Cuba, (*Matter of Toboso–Alfonso*[, 20 I&N Dec. 819 (BIA 1990)]), and former members of the El Salvador national police (*Matter of Fuentes*[,19 I&N Dec. 658 (BIA 1988)])"). The Third Circuit noted that "neither anything in the Board's opinions in those cases nor a general understanding of any of those groups, suggests that the members of the groups are 'socially visible'" because the "members of each of these groups have characteristics which are completely internal to the individual and cannot be observed or known by other members of the society in question (or even other members of the group) unless and until the individual member chooses to make that characteristic known." *See id.* at 604.

The Third Circuit also noted *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009), in which the Seventh Circuit opined that it was at times unclear whether the Board used the term "social visibility" in the "'literal sense, or in the 'external criterion' sense, or even whether it understands the difference."[4] *See Valdiviezo-Galdamez*, 663 F.3d at 606-07. The Third Circuit observed that the U.S. Government argued in this case that social visibility did not require literal visibility, but the court found that contention to be at odds with the way the Board has applied it. *Id.* The Third Circuit also suggested that a reading of social visibility that does require the protected trait to be visible literally would have excluded some previously recognized social groups.[5] *Id.* at 607.

The Third Circuit also expressed concern with the Board's current explanation and application of the "particularity" criterion insofar as the court was "hard-pressed to discern any difference" between it and "social visibility," observing that "particularity" appeared "to be little more than a reworked definition of 'social visibility.'" *Id.* at 608. The court then went on to find that "the former suffers from the same infirmity as the latter" insofar as the particularity requirement "is inconsistent with the prior BIA decisions discussed in the 'social visibility' portion of [the court's] opinion." *Id.*

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[4] Like the Third Circuit, the Seventh Circuit did not outright reject the validity of "social visibility," but rather ruled that the Board's explanation was insufficient. *See Benitez Ramos*, 589 F.3d at 430 (describing the Board's application of "social visibility" as "unclear"); *see also Gatimi v. Holder*, 578 F.3d 611, 616 (7th Cir. 2009) (noting that "[w]e just don't see what work 'social visibility' does").

[5] As the Third Circuit indicated, however, the "First, Second, Eighth, Ninth and Eleventh Circuits, have all approved the BIA's 'social visibility' requirement for a 'particular social group' and have accorded it *Chevron* deference." *See Valdiviezo-Galdamez*, 663 F.3d at 603 n.16. *But see Henriquez-Rivas v. Holder*, 670 F.3d 1033 (9th Cir. 2012) (ordering a case reheard en banc in which the "social visibility" and "particularity" elements are at issue). Moreover, subsequent to the Third Circuit's most recent decision in *Valdiviezo-Galdamez*, the Tenth Circuit accorded *Chevron* deference to Board precedent on "social visibility" (as well as "particularity") and disagreed with the Seventh Circuit decisions in *Gatimi*, 578 F.3d 611, and *Benitez Ramos*, 589 F.3d 426. *See Rivera-Barrientos v. Holder*, 666 F.3d 641, 648-53 (10th Cir. 2012).

B. The Third Circuit's parameters for the Board's particular social group analysis on remand.

In declining to accord *Chevron* deference to Board precedent on "social visibility" and "particularity," the Third Circuit's decision contains a number of parameters to help guide the Board on remand. As a primary matter, the court specifically rebuffed, as "problematic," the respondent's argument that the "two requirements are contrary to the intent of the statute." *See Valdiviezo-Galdamez*, 663 F.3d at 603. Specifically, the court cited its decision in *Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir.1993), for the propositions that the statutory language "standing alone is not very instructive" as to the meaning of the term "particular social group," and that "neither the legislative history of the relevant United States statutes nor the negotiating history of the pertinent international agreements sheds much light of the meaning of the phrase 'particular social group.'" *See Valdiviezo-Galdamez*, 663 F.3d at 603.

In addition, the Third Circuit specifically noted that it did "not suggest that the BIA cannot add new requirements to, or even change, its definition of 'particular social group'" set forth in *Acosta*. *See id.* at 608. Rather, the court simply held that "the BIA's addition of the requirements of 'social visibility' and 'particularity' to its definition of 'particular social group' is inconsistent with its prior decisions, and the BIA has not announced a 'principled reason' for its adoption of those inconsistent requirements." *Id.*

C. *Acosta*'s particular social group framework alone is insufficient.

With this background in mind, the Department avers that *Acosta*'s "common, immutable characteristic" requirement, 19 I&N Dec. at 233, set forth a sound foundation for giving meaning to the statutory term "particular social group." Yet, the Board retained authority to refine its conception of the ambiguous statutory term and has exercised that authority by adopting the

requirement of social visibility. When this requirement is properly understood as capable of satisfaction when society meaningfully distinguishes between individuals who have the asserted trait and those who do not, it is rational and consistent with prior Board precedent.

Even the Seventh Circuit – which has been critical of the Board's application of "social visibility," *see Valdiviezo-Galdamez*, 663 F.3d at 604-07 (citing *Gatimi v. Holder*, 578 F.3d 611, and *Benitez Ramos*, 589 F.3d 426) – has recognized that a strict application of the *Acosta* test may lead to absurd results. *See Sepulveda v. Gonzales*, 464 F.3d 770, 772 (7th Cir. 2006) (observing that the Board "has never taken literally" the *Acosta* "shared past experience" example of a common, immutable characteristic because taken to an extreme, it could lead to absurd results). The Seventh Circuit has implicitly acknowledged with its reference to an "external criterion" in *Benitez Ramos* that the particular social group ground can include factors beyond the *Acosta* standard. 589 F.3d at 431 (noting that only those groups "having distinctive characteristics," such as the middle class under Pol Pot, can be described as a particular social group).

In addition, in *Ucelo-Gomez v. Mukasey*, 464 F.3d 163, 171 (2d Cir. 2006), the Second Circuit noted that while *Acosta*'s particular social group definition "is not unhelpful . . . it is general and its application does not reliably control particular instances, leading to a wellspring of differing (and often irreconcilable) interpretations by different courts of appeals." The Second Circuit urged the Board to "discharge its singular responsibility to expand upon *Acosta*." *Id.* at 172.

The Board thus had principled reasons for continuing to refine the original *Acosta* particular social group standard vis-à-vis "social visibility" and "particularity." *See also Matter of C-A-*, 23 I&N Dec. 951, 958 (BIA 2006), *aff'd, Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d

1190 (11th Cir. 2004)[6] (noting the limitations of *Acosta*, insofar as a "past experience is, by its very nature, immutable, as it has already occurred and cannot be undone. However, that does not mean that any past experience that may be shared by others suffices to define a particular social group . . . ."); *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 73 (BIA 2007) (following the Second Circuit's directive to "expand upon" *Acosta*), *aff'd*, *Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007). As the Board explained in *Matter of E-A-G-*, 24 I&N Dec. 591, 595 (BIA 2008), "'social group' analysis must focus on fundamental characteristics and social visibility within the country in question. The focus is not with statistical or actuarial groups, or with artificial group definitions." The Board has instructed that "social visibility" means "the extent to which members of a society perceive those with the characteristic in question as members of a social group." *Id.* at 594. "Particularity," according to the Board, concerns "whether the proposed description is sufficiently 'particular,' or is too amorphous . . . to create a benchmark for determining group membership." *Matter of S-E-G-*, 24 I&N Dec. 579, 584 (BIA 2008) (internal quotations and citations omitted).

D. The Board should take this opportunity to clarify that "social visibility" and "particularity" should be read as a single "social distinction" requirement.

Although the Board's current iterations of "social visibility" and "particularity" may be reasonable refinements of the foundational *Acosta* standard, *see, e.g.*, *Rivera-Barrientos v. Holder*, 666 F.3d 641, 647-53 (10th Cir. 2012) (according *Chevron* deference in this regard and disagreeing with the Seventh Circuit decisions in *Gatimi*, 578 F.3d 611, and *Benitez Ramos*, 589 F.3d 426), they could benefit from further clarification given the perceived tension in the case law. The Department submits that these requirements are best considered as a single "social

[6] The Board published its 2004 decision in 2006, subsequent to its affirmation by the Eleventh Circuit. *See* 24 I&N Dec. at 951 n.1.

distinction" requirement to complement *Acosta*'s "common, immutable characteristic" requirement.

Specifically, in order for a putative particular social group to be found cognizable, an applicant for asylum and/or statutory withholding of removal must establish that: (1) the group is composed of members who share a common, immutable characteristic; (2) the group must be perceived by the society in question[7] as distinct,[8] and (3) the social group must exist independently of the fact of persecution[9]. In assessing whether a putative particular social group is socially distinct, the focus should be on whether the society meaningfully distinguishes persons with the shared characteristic from persons who do not possess the trait. Accordingly, the individual alien applicant may, but does not necessarily have to, be literally visually identifiable as a group member (or be otherwise identifiable by means of other physical senses, such as by accent).[10] The lack of such physical visibility, however, may bear on the risk of future harm on account of group membership.

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[7] The pertinent society may be that of "the country of concern and the persecution feared." *Matter of S-E-G-*, 24 I&N Dec. at 586-87; *see also Matter of E-A-G-*, 24 I&N Dec. at 595.

[8] *Cf. United States v. Weaver*, 267 F.3d 231, 237 (3d Cir. 2001) (citing *Duren v. Missouri*, 439 U.S. 357 (1979), and noting that in order for a criminal defendant to establish a prima facie violation of the Sixth Amendment right to have a jury selected from a fair cross-section of the community, he or she must show, *inter alia*, that the group allegedly excluded is a "'distinctive' group in the community"); *United States v. Raszkiewicz*, 169 F.3d 459, 463 (7th Cir. 1999) (same). DHS acknowledges the limited relevance of precedent addressing constitutional, criminal issues with respect to the civil immigration law issue before the Board. Nevertheless, such precedent is useful insofar as it demonstrates that federal courts, including the Third and Seventh Circuits, have recognized the general concept of a group's "distinctiveness" within a given community.

[9] The "common, immutable characteristic" cannot solely be based on the shared characteristic of having suffered, or being targeted for, persecution. Otherwise, the particular social group would suffer from impermissible circularly. *See, e.g., Lukwago v Ashcroft*, 329 F3d 157, 172 (3d Cir 2003); *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. at 74. A history of persecution of a group may, however, be relevant in considering whether the group is socially distinct.

[10] The "social distinction" test as articulated here avoids the terms "visible" or "recognizable," which addresses a concern of both the Third and Seventh Circuits. *See Valdiviezo-Galdamez*, 663 F.3d at 606-07.

The "social distinction" test as articulated here preserves the Board's intent of requiring an examination of societal perceptions towards members of the group. *See Matter of E-A-G-*, 24 I&N Dec. at 594 (examining "the extent to which members of a society perceive those with the characteristic in question as members of a social group"); *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. at 75 (finding no evidence of a "general societal perception" of affluent Guatemalans that subjects them to more crime and violence than the general population); *Matter of C-A-*, 23 I&N Dec. at 959 ("Social groups based on innate characteristics such as sex or family relationship are generally easily...understood by others to constitute social groups"); *see also* Memorandum from Lynden Melmed, Chief Counsel, U.S. Citizenship and Immigration Services ("USCIS"), to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations, USCIS, Guidance on *Matter of C-A-* 4 (Jan. 12, 2007) (interpreting the Board's opinion in *C-A-* as requiring a social distinction element: "A particular social group is not cognizable in cases where, although the persecutor personally views the victim's characteristic as significant, there are no broader social perceptions of the victim's status.")[11]. "Social distinction" is also consistent with some circuit court decisions that considered how a society perceives a set of individuals. *See Benitez Ramos*, 589 F.3d at 430 ("If society recognizes a set of people having certain common characteristics as a group, this is an indication that being in the set might expose one to special treatment, whether friendly or unfriendly."); *Castellano-Chacon v. INS*, 341 F.3d 533, 548 (6th Cir. 2003) ("[S]ociety's reaction to a 'group' may provide evidence in a specific case that a particular group exists, as long as the reaction by persecutors to members of a particular social group is not the touchstone defining the group.").

[11] The USCIS memo is available at http://www.uscis.gov/USCIS/Laws/Memoranda/Archive%201998-2008/2007/Jan%202007/c_a_guidance011207.pdf.

In the Department's view, "particularity" is best understood not as a separate, independent requirement, but as part of the "social distinction" inquiry. To be socially distinct, a particular social group must have well-defined boundaries, such that it is generally clear to members of the society in question that individuals who possess a particular trait are distinguished from individuals who do not possess the trait. Such an approach is also supported by the Board's analysis of particularity and its relevance to social distinction. *See Matter of S-E-G-*, 24 I&N Dec. at 586 ("while recognizing a social group that in other contexts might be considered broad and diffuse, and certainly is large, the defining characteristics of the group [in *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007)]—being female and subject to FGM [female genital mutilation]—are sufficiently distinct in the context of Somali culture to meet the requirement of particularity").

That there may be some difficulty at the very outer margins in assessing whether specific individuals possess the immutable trait will not ordinarily negate a group's "social distinction." It is nonetheless necessary for the group to possess well-defined boundaries, which the Third Circuit itself would appear to support. As the court reiterated in *Valdiviezo-Galdamez*, 663 F.3d at 598 (citing *Escobar v. Gonzales*, 417 F.3d 363, 368 (3d Cir. 2005)), some characteristics "are far too vague and all encompassing to be characteristics that set the perimeters" of a cognizable particular social group.[12] *See also Benitez Ramos*, 589 F.3d at 430-31 (citing with approval the Ninth Circuit's position in *Arteaga v. Mukasey*, 511 F.3d 940, 946 (9th Cir. 2007), that, although

[12] The full quote from *Escobar*, 417 F.3d at 368, is as follows:

> As we commented in *Fatin*, the phrase 'particular social group' is almost completely open-ended. *Fatin*, 12 F.3d at 1238. That appraisal applies to the particular group Escobar claims here. Poverty, homelessness and youth are far too vague and all encompassing to be characteristics that set the perimeters for a protected group within the scope of the Immigration and Naturalization Act. The lack of an outer limit counsels against a designation that would appear to be contrary to congressional intent.

It is noteworthy that the Third Circuit's 2005 decision in *Escobar* pre-dates the 2006 publication of the Board's decision in *Matter of C-A-*, 23 I&N Dec. 951, which first set forth "social visibility" and "particularity" in tandem.

external context is important, some putative collections of individuals may be "far too unspecific and amorphous to be called a social group").

Further, given that there may be some confusion as to whether the current elements of "social visibility" and "particularity" are "requirements" or simply nondispositive "relevant factors," *see, e.g.*, *Gaitan v. Holder*, 671 F.3d 678, 681 (8th Cir. 2012), the Department's position is that the "social distinction" element should be a dispositive requirement for a cognizable particular social group along with a "common, immutable characteristic." Otherwise, it is difficult to understand how the described limitations to the foundational *Acosta* standard, *see, e.g., Sepulveda*, 464 F.3d at 772, can be resolved. *Cf.* European Union ("EU") Council Directive 2004/83/EC, *Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, Art. 10.1(d) (2004), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML (stating that, in order to be considered a "particular social group," members of the group must share an "innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, *and* " the group must possess "a distinct identity in the relevant country, because it is perceived as being different by the surrounding society") (emphasis added).[13]

Finally, although the Department believes that its proposed refinement will help to bring greater clarity to the standard for a cognizable particular social group, it also recognizes that such

[13] By the setting forth "minimum standards," the EU Qualification Directive permits but does not compel member states to require satisfaction of both the immutable/fundamental characteristic criterion and the social distinction criterion.

refinement is not necessarily the end of the development of that standard.[14] The social distinction element, as described above, would be reasonably drawn so as to avoid imposing an excessively exacting evidentiary burden or requiring the applicant to establish literal "visibility" of a particular trait in the society in question.

II. THE RESPONDENT'S PUTATIVE PARTICULAR SOCIAL GROUP LACKS "SOCIAL DISTINCTION" AND, THEREFORE, IS NOT COGNIZABLE.

Applying the Department's proposed "social distinction" requirement to the instant case, the record lacks persuasive evidence to establish that Honduran society meaningfully distinguishes its "youth who have been actively recruited by gangs but have refused to join because they oppose the gangs" from those members of society who do not share this collection of characteristics. This is consistent with the Board's past treatment of societal perceptions toward youth who are recruited to join a gang but refuse. *See Matter of S-E-G-*, 24 I&N Dec. at

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[14] With these clarifications in mind, the Department's position is that, subject to case-by-case analysis in the context of the society in question, the particular social groups previously found cognizable by the Board in *Kasinga*, 21 I&N Dec. 357; *Toboso-Alfonso*, 20 I&N Dec. 819; and *Fuentes*, 19 I&N Dec. 658, would be cognizable under the Board's "social visibility" and "particularity" requirements as properly understood, or under the Department's best reading of these requirements as a single "social distinction" requirement. *See, e.g., Rivera-Barrientos*, 666 F.3d at 652 ("[W]e cannot find the BIA's recognizability requirement is either inconsistent or illogical. As the BIA asserted in *Matter of C-A-*, this requirement does not deviate from past precedent, since those populations the BIA has recognized as "particular social groups" meet the relatively undemanding standard of recognizability. And, in contrast to the stricter standard discussed by the Seventh Circuit, this requirement does not exclude groups whose members might have some measure of success in hiding their status in an attempt to escape persecution.").

In any event, under *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), an agency is not necessarily required to explain how a new approach squares with a prior approach as long as the new approach is reasonable. Properly understood under the Department's best reading, the Board has provided a "reasoned explanation for its action" in further refining the *Acosta* particular social group standard insofar as it "display[ed] awareness" of the refinement in its relevant precedent as opposed to acting "*sub silentio* or simply disregard[ing]" that standard. *Id.* at 515. Indeed, far from disregarding the foundational *Acosta* standard, the Board built upon it. Further, the Board showed that "there are good reasons" for the refinement given the described limitations of the foundational *Acosta* standard per se. *Id.* Moreover, the Board "need not demonstrate to a [reviewing] court's satisfaction that the reasons for" its refinement "are *better* than" its reasons for the foundational *Acosta* standard. *Id.* Rather, "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Id.* (In any event, the Board has, in fact, established that its refinement to the *Acosta* particular social group standard is indeed "better" than the original standard per se.) Finally, in the Department's view, the Board's refinement of the foundational *Acosta* standard did not "contradict" the underpinnings of that standard. *Id.*

587 ("There is little in the background evidence of record to indicate that Salvadoran youth who are recruited by gangs but refuse to join (or their family members) would be 'perceived as a group' by society"). Even the Seventh Circuit, which has been critical of the Board's refinement of the particular social group standard, has noted in dicta that resistance to gang recruitment does not form the basis of a cognizable particular social group. *See Gatimi*, 578 F.3d at 616 (observing that it has "no quarrel with" the view that "young Honduran men who resist being recruited into gangs" do not constitute a "particular social group"); *see also Rivera Barrientos*, 666 F.3d at 653 (in which the Tenth Circuit found "no evidence to suggest that Salvadoran society considers young women who have resisted gang recruitment to be a distinct social group").

The extensive background evidence in this case focuses primarily on non-recruitment based gang violence, as well as the reaction of the authorities and anti-gang vigilante groups to such violence. *See generally* Group Exhs. 4, 6, and 7. The references to gang recruitment do not appear persuasively to support the proposition that Honduran society meaningfully distinguishes between its "youth who have been actively recruited by gangs but have refused to join because they oppose the gangs" and other individuals. For example, although one report describes the murder of the mother and grandmother of a boy who refused to join a gang in Honduras, another observes that children in Honduras are generally not physically forced to join gangs, but peer pressure and other social factors may attract them to do so. *Compare* Group Exh. 4, Central American/Mexico Report, *Gang Violence Spreads Through Latin America* (Nov./Dec. 2003), *with* Group Exh. 7, United Nations Commission on Human Rights, *Addendum, Mission to Honduras, Report of the Special Rapporteur, Civil and Political Rights, Including the*

Question of Disappearances and Summary Executions, et al., U.N. Doc. E/CN.4/2003/3/Add.2, 14 Jun. 2002 ("*Report of the Special Rapporteur*"), ¶ 36.

Other evidence shows that Honduran youth who do belong to gangs and those who have resisted (like the respondent) or may have resisted gang recruitment often are lumped together by some members of Honduran society, rather than meaningfully distinguished.

> [T[wo thirds [sic] of all children and youth who die violently do not belong to gangs and have no criminal background. It is suggested that they have been 'labelled' [sic] because of the way they dress or their appearance, which is similar to that of members of *maras*, and that it was for this reason alone that they were murdered.

Group Exh. 4, Amnesty International, *Honduras, Zero tolerance... for impunity: Extrajudicial executions of children and youths since 1998* 3 (2003) (citing the Human Rights Commissioner's Preliminary Report on extrajudicial executions of boys, girls and teenagers in Jan. 2002); *see also* Group Exh. 7, *Report of the Special Rapporteur*, ¶ 29 (noting that "every child with a tattoo and street child is stigmatized as a criminal"); Group Exh. 4, *Youth killings in Honduras are escalating; Gangs, police being blamed*, Houston Chronicle (Apr. 22, 2001). There does not appear to be record evidence that Honduran society perceives "youth who have been actively recruited by gangs but have refused to join because they oppose the gangs" as distinct. Moreover, a determination to the contrary would be problematic in that it could permit particular social groups for almost any other collection of Hondurans who have incurred a gang's wrath in some common manner despite the lack of evidence to support a finding of social distinction.

Similarly, the record evidence does not reflect that the respondent's putative particular social group provides well-defined boundaries necessary for social distinction, such that it is possible to analyze whether Honduran society distinguishes individuals who possess the shared

characteristics from individuals who do not possess them. For example, the record does not demonstrate a uniform understanding within Honduran society as to the parameters of the key characteristic of opposition to the gangs. Indeed, such a characteristic would appear to be exceedingly subjective in nature and, therefore, fail to set adequate group boundaries. *See Valdiviezo-Galdamez*, 663 F.3d at 598 (citing *Escobar*, 417 F.3d at 367, for the proposition that "homeless street children in Honduras" does not constitute a particular social group because "[p]overty, homelessness and youth are far too vague and all encompassing to be characteristics that set the perimeters for a protected group within the scope of the [INA]").

III. THE RESPONDENT HAS FAILED TO ESTABLISH THE REQUIRED NEXUS BETWEEN THE CLAIMED PERSECUTION AND MEMBERSHIP IN THE PUTATIVE PARTICULAR SOCIAL GROUP.

Even assuming, *arguendo*, that the respondent's particular social group is cognizable, he still has failed to establish the required nexus between it and the persecution he suffered[15] and fears at the hands of the Mara Salvatrucha. Specifically, while the respondent need not establish that his putative particular social group was the sole reason why he was targeted, he has failed to establish that it was a "significant part" of the gang's motivation to do so. *See Amanfi v. Ashcroft*, 328 F.3d 719, 727 (3d Cir. 2003) (citing the Board's "mixed motive" nexus standard from *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996), with approval).[16]

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[15] Although the issue is debatable, in a good-faith effort to limit the number of outstanding issues in this particular case, the Department will not contest that the past harm suffered by the respondent at the hands of the MS-13 gang rose to the level of persecution.

[16] The respondent's asylum application was filed on March 18, 2005. *See* I.J. at 2 (Jun. 15, 2005). Accordingly, the nexus analysis in this case is not governed by the "at least one central reason" standard set forth in section 101(a)(3) of the REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, 119 Stat. 302, 303 (codified at Immigration and Nationality Act § 208(b)(1)(B)(i)), effective for applications filed on or after May 11, 2005. *See Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 209 n.1 (BIA 2007); *see also Ndayshimiye v. Att'y Gen. of U.S.*, 557 F.3d 124, 129 (3d Cir. 2009).

The respondent asserts that he was targeted by the gang due to his membership in the putative particular social group of "Honduran youth who have been actively recruited by gangs but have refused to join because they oppose the gangs." He simply stated that he told the gang during its initial recruitment attempt that he "denied" or "wouldn't even consider" its proposal to join in exchange for the return of valuables that the gang had just stolen from him. *See* Tr. at 41; Exh. 2B at ¶ 5. While the respondent testified that he was subsequently chased and harassed by the gang, he failed to indicate that the gang ever imputed "opposition" to him. Rather, he testified that the gang members simply taunted: "Don't run. Don't be afraid. Sooner or later you will join us." Tr. at 42-43, 77. Likewise, in September 2004, when gang members kidnapped the respondent in Guatemala, he testified that the gang members "thought [that he] was abandoning the country so that [he] would avoid being a member of their group. They thought [he] was trying to get out of being a member of their group." *Id.* at 44-45. The respondent also stated that "[t]hey targeted [him] because . . . [he] had denied them the opportunity of becoming a member of their gang," and that "[he is] scared that they will kill [him] for [his] refusal to join them." *See* Exhs. 2A at ¶¶ 9 and 12, 2B at ¶¶ 10 and 14.[17]

The record indicates that the gang was motivated to target the respondent in order to fill its ranks. *See, e.g., Matter of S-E-G-*, 24 I&N Dec. at 589 ("There is no indication that the MS-13 gang members who pursued the respondents had any motives other than increasing the size and influence of their gang."). Indeed, the respondent indicated that gang threat to local youth in

[17] If the Board remands the case to the Immigration Judge for further proceedings, it may be useful for the parties to further explore the nature and risk of harm to the respondent at the hands of the gang and the various threats made by the gang against the respondent (including the extent to which the gang sought to actualize those threats). For example, the record reflects that following the respondent's rejection of the gang's recruitment efforts, he had repeated contact with gang members in San Pedro Sula, "[t]wo or three time a week," Tr. at 43, over the course of one year, *id.* at 76, and that they threw objects, fired shots, and otherwise "offend[ed]" him, *id.* at 42. According to the respondent, the gang continued to taunt the respondent, *id.* at 42-43, 77, but each time the respondent was able to escape without injury, *id.* at 76-78.

this regard was very simple: "either join with them or they would hurt them in any way they could." *See* Exhs. 2A at ¶ 4, 2B at ¶ 4. As the U.S. Supreme Court noted in *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992), in an analogous nexus context, "[e]ven a person who supports a guerrilla movement might resist recruitment for a variety of reasons – fear of combat, a desire to remain with one's family and friends, a desire to earn a better living in civilian life, to mention only a few." In this case, the respondent has failed to provide persuasive "direct or circumstantial" evidence that the gang targeted him on account of his putative particular social group membership. *See id.* at 483. As suggested by *Elias-Zacarias*, even if the respondent is a member of a cognizable particular social group, he "still has to establish that . . . [the gang] will persecute him *because of* that [membership], rather than because of his refusal to [join its ranks]." *Id.*

CONCLUSION

In conclusion, the Board has provided a reasoned explanation for further refining the *Acosta* "common, immutable characteristic" standard by means of the "social visibility" and "particularity" elements. Pursuant to the Department's best reading of those elements, they are logical and reasonable. Nevertheless, further clarification that these elements are best read as a single "social distinction" requirement is appropriate.

On the merits, the record reflects that the respondent's putative particular social group is not cognizable and that the respondent has failed to demonstrate the requisite nexus between the alleged harm and his putative group membership. Accordingly, the respondent has failed to

establish eligibility for either asylum or withholding of removal under the Immigration and Nationality Act, and the Board should once again dismiss his appeal.[18]

Respectfully submitted on this 29th day of May, 2012,

George R. Martin
Associate Legal Advisor
Field Legal Operations
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security[19]

[18] DHS would not object to further remand of this case to the Immigration Judge for further fact-finding and a new decision on the respondent's particular social group-based persecution claim in light of any clarifications to the particular social group standard that the Board may adopt. Remand also would allow the respondent to clarify, with respect to his hearing testimony and affidavits, and his mother's letter, precisely which gang or gangs may have confronted him and his family, as well as further details about such confrontations. *See supra* notes 3 and 17.

[19] The Department respectfully requests that all correspondence to DHS in this matter continue to be directed, in the first instance, to the local U.S. Immigration and Customs Enforcement (ICE) Office of the Chief Counsel in Elizabeth, New Jersey, with copies to the Deputy Director, ICE Field Legal Operations.

Mauricio Edgardo Valdiviezo-Galdamez
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PROOF OF SERVICE

On May 29th, 2012, I, George R. Martin, Associate Legal Advisor, U.S. Immigration and Customs Enforcement, mailed a copy of this Department of Homeland Security Brief on Remand from the U.S. Court of Appeals for the Third Circuit and any attached pages to the respondent's counsel, Martin Duffey, Esquire, at Cozen O'Connor, 1900 Market Street, 3rd Floor, Philadelphia, PA 19103, by placing such copy in my office's outgoing mail system in an envelope duly addressed.

George R Martin — 29 May 2012