**No. 10-1724**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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**OSCAR ALEXANDER GRANADOS GAITAN,**

**Petitioner,**

**v.**

**ERIC H. HOLDER, JR.,**
**Attorney General of the United States,**

**Respondent.**

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**ON PETITION FOR REVIEW FROM AN ORDER**
**OF THE BOARD OF IMMIGRATION APPEALS**
**Agency No. 096 056 637**

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# BRIEF FOR RESPONDENT

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## SUMMARY OF THE CASE

This is an immigration case. Petitioner Gaitan challenges the agency's denial of asylum and withholding of removal. Gaitan claims that he would face persecution in El Salvador because he is young, male, and resisted recruitment by a gang in 2002. The agency determined that Gaitan failed to establish his membership in a particular social group. He, and amicus curiae, urge that the Board has misconstrued the factors for determining the existence of a particular social group. Gaitan also claims that he established membership in a particular social group under the Board's standards.

As this Court has recognized, the Board's interpretation of the otherwise undefined term "particular social group" is reasonable, permissible, and entitled to deference. The Board properly rejected Gaitan's claim that young males who resist gang recruitment constitute a particular social group. The Board and all Circuits that have addressed the issue have rejected similar claims. Because of the importance of the issues raised in this case, oral argument of 20 minutes would be appropriate in this case.

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## I. STATEMENT OF JURISDICTION

This is an immigration case in which Petitioner Oscar Alexander Granados Gaitan ("Gaitan") seeks review of a final order of the Board of Immigration Appeals ("BIA"). The Board's jurisdiction arises under 8 C.F.R. §§ 1003.1(b)(3) and 1240.15 (2010), which grant it appellate jurisdiction over decisions of

immigration judges in removal proceedings. The jurisdiction of this Court arises under section 242 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252 (2006), which confers exclusive jurisdiction in the Court of Appeals to review final orders of removal. The removal proceedings were completed in Bloomington, Minnesota, and venue in this Court is proper. INA § 242(b)(2), 8 U.S.C. § 1252(b)(2). The Board's final order was entered March 3, 2010, and the petition for review was timely filed on April 1, 2010. INA § 242(b)(1), 8 U.S.C. § 1252(b)(1).

## II. STATEMENT OF THE ISSUES

A. Whether the Board's "particularity" and "social visibility" requirements for "particular social group" determinations are entitled to *Chevron* deference, where this is a reasoned, permissible interpretation of the statute.

*INS v. Aguirre-Aguirre,* 526 U.S. 415 (1999)

*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984)

*Matter of S-E-G-,* 24 I. & N. Dec. 579 (BIA 2008)

*Matter of E-A-G-,* 24 I. & N. Dec. 591 (BIA 2008)

B. Whether Gaitan has failed to establish that young men who have resisted gang recruitment constitute a particular social group under the immigration statutes.

*Barrios v. Holder,* 581 F.3d 849 (9th Cir. 2009)

*Larios v. Holder,* 608 F.3d 105 (1st Cir. 2010)

*Matter of S-E-G-,* 24 I. & N. Dec. 579 (BIA 2008)

*Matter of E-A-G-,* 24 I. & N. Dec. 591 (BIA 2008)

## III. STATEMENT OF THE CASE

Gaitan, a native and citizen of El Salvador, unlawfully entered the United States in April 2002. Administrative Record ("A.R.") 119, 135, 359, 383.[1/] A Notice to Appear ("NTA") dated August 10, 2007, alleged that Gaitan is removable because he was not admitted or paroled after inspection by an immigration officer when he entered the United States. A.R. 383-384; *see* INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i). Gaitan conceded removability, and he does not

[1] The entire Certified Administrative Record is reproduced in Petitioner's Appendix. Thus, the page references to the Administrative Record also apply to the Appendix.

contest his removability before this Court. A.R. 119, 130. Gaitan applied for asylum, withholding of removal, and protection under the regulations implementing the Convention Against Torture ("CAT protection") before an Immigration Judge on June 8, 2008.[2] A.R. 123-124, 359-369.

After the removal hearing, the Immigration Judge denied Gaitan's applications for asylum and related protection and ordered him removed from the United States. A.R. 103-117. The Board dismissed Gaitan's appeal. A.R. 3-4. This petition for review followed.[3]

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[2] *See* INA §§ 208(a), 241(b)(3), 8 U.S.C. §§ 1158(a) (asylum), 1231(b)(3) (withholding of removal); 8 C.F.R. §§ 1208.16(c) – 1208.18 (CAT protection). Because Gaitan filed his asylum application after May 11, 2005, the amendments made by the REAL ID Act apply in this case. *See* REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 101(h)(2), 119 Stat. 231, 305.

[3] The United Nations High Commissioner for Refugees has filed a brief as amicus curiae on behalf of Gaitan ("UNHCR Br.").

## IV. STATEMENT OF FACTS

### A. Gaitan's Asylum Application

In his asylum application, Gaitan claimed to fears the gangs and the government in El Salvador. A.R. 363. He stated that the government cannot control the gangs, which inflict harm on those who are not gang members. *Id.* He alleged that he feared for his life in El Salvador if he continued to refuse to join a gang. *Id.* He also fears persecution because the government would "stereotype" him as a gang member because he has been in the United States, or because of his age and gender. A.R. 363, 364. He alleged that the Salvadoran government targets young people his age as being gang members without reason and detains and imprisons them for alleged gang participation. *Id.* He stated that he fears corrupt police, who collaborate with gangs, and fears that his refusal to join a gang would result in extortion, continued threats, and even death. A.R. 363. His claim was based on his nationality, political opinion, and membership in a particular social group. A.R. 363. Although he was never involved with a gang, he stated that the

Salvadoran government might torture him because of alleged gang membership. A.R. 364.

Gaitan's mother applied for asylum, but her removal case was administratively closed because she has Temporary Protected Status.[4] A.R. 365. His father also had an asylum application pending, in which Gaitan might be named as a derivative beneficiary. *Id.*

**B. The Removal Hearing**

Gaitan, the only witness to testify, stated that he entered the United States sometime in 2002 at age 13. A.R. 135. At that time, his mother was in Minnesota and his father was in Iowa. A.R. 136. According to his attorney, Gaitan's parents came to the United States in the late 1980s or early 1990s. A.R. 143-144. Both parents applied for asylum. A.R. 143. Gaitan's sister, age 15, is living in the United States. A.R. 142. His brothers were born in the

[4] Temporary Protected Status is a temporary immigration benefit granted by the Secretary of Homeland Security to citizens of designated countries suffering specified hardships. 8 U.S.C. § 1254a.

United States. *Id.*

Gaitan testified that he came to the United States to have freedom from gangs. A.R. 137. He said that he was told by members of the Mara Salvatrucha (known as MS-13) that the gangs would do something to him or his family if he did not get involved with them. *Id.* He stated that a gang member threatened that, if he did not join, they would beat him up, kill him, or do something to his sister. A.R. 138. Gaitan said he would not join a gang because he does not want to end up in jail or get into trouble. A.R. 139.

Gaitan stated that he was asked to join a gang in 2002, when he was age 12, and that he was solicited many times at school. A.R. 140. Nothing happened to him because he was always accompanied by an adult when he went to his house. *Id.* Nevertheless, he stated that something might happen to him now because gangs look for Hispanics returning to El Salvador. *Id.*

According to Gaitan, one of the gang members who tried to recruit him is still in the place where he lived. A.R. 141. Gaitan stated that they said they would do something to him if he returns.

*Id.* If he was asked to join a gang and refused, according to Gaitan, he would be beaten or killed. A.R. 139.

Gaitan stated that other young people in his neighborhood were solicited by gangs. A.R. 142. He initially testified that he did not report the gangs' activities to the police because he lived one and one-half hours from the police station. A.R. 146. When asked again about reporting the gangs to the police, Gaitan said he reported them once, when he was 12 years of age, apparently after a gang member showed him a list of young men his age. *Id.* Gaitan did not join the gang, reported the incident to the police, and stopped going to school. *Id.* Gaitan testified he did not know the gang members' names, but he described them, and the police did not take a report. *Id.*

Gaitan submitted a number of documents discussing gangs in El Salvador. A.R. 167-345. The United States Department of State *Country Report on Human Rights Practices* for 2006 for El Salvador states that there is widespread violence, including gang violence, in that country, in which impunity and corruption are also problems.

A.R. 167. The Ministry of Public Security spearheaded the government's anti-gang task force, and gang members comprised 34 per cent of the prison population. A.R. 168.

Gaitan also submitted a number of reports relating to, among other things, gangs and gang violence in El Salvador. A.R. 176-345. A February 2007 report on gang, state, and clandestine violence in El Salvador noted that gangs had become more sophisticated organizations seeking wealth and power. A.R. 212. For example, organized extortion against businesses and individuals was increasingly widespread. A.R. 212-213. Gangs have become more violent, according to that report. A.R. 213. In certain regions of El Salvador, young people are increasingly coerced into association with a gang, and resistance often results in being targeted for physical abuse or death. A.R. 214. Inter-gang conflict, at least between the two major gangs, MS-13 and Mara 18, has become increasingly frequent and violent. A.R. 217-218. Internal gang discipline or attempts to withdraw from a gang may result in death. A.R. 218.

The government of El Salvador has enacted legislation and undertaken military-law enforcement initiatives against gangs since 2003, although the government's policies have been viewed by some as ineffective or counter-productive. A.R. 221-229. The report states that a consequence of the government's laws and policies has been "profiling enforcement efforts" against, among others, those with tattoos. A.R. 230-231. Deportees from the United States are, according to the report, "frequently subject to social discrimination and police abuse in El Salvador." A.R. 231-232. There were reports from active gang members, former gang members, and non-gang members of police abuse and physical violence accompanying arbitrary stops and arrests. A.R. 236-237. There were reports of several instances in which law enforcement officials targeted deportees with no criminal records in El Salvador for investigation and arrest. A.R. 243. The document contains reports of human rights violations and violence by gangs, law enforcement officials, and death squads against (1) people who refuse to join gangs; (2) people who try to leave a gang; (3) other

people targeted for living in the same territory as gangs or refusing to comply with gang demands; (4) actual or imputed gang members; and (6) deportees. A.R. 260-286.

An April 2006 Central American and Mexican Gang Assessment reports that El Salvador is one of the most dangerous countries in Central America and that a hardline enforcement approach by the government has not curbed violence or gang recruitment. A.R. 290, 292. The majority of those in gangs are youths, and most gangs are involved in economic, social, and institutional violence. A.R. 294-295.

A May 2008 article reported that violence against rival gangs, gangs' own members, and citizens had increased dramatically, and that young people frequently were coerced into joining gangs and may be assaulted, harassed, or threatened with death. A.R. 306-307.

### C. The Immigration Judge's Decision

In an oral decision following the hearing, the Immigration Judge found Gaitan to be removable and then addressed his

asylum application. A.R. 104. The Immigration Judge found that, although Gaitan's application for asylum was not filed within one year after he entered the United States, he may have been a derivative beneficiary on one or both parents' asylum applications, and he had only recently reached the age of majority. A.R. 108; *see* INA § 208(a)(2)(B), (D), 8 U.S.C. § 1158(a)(2)(B), (D). The Immigration Judge therefore concluded that the request for asylum was not time barred. A.R. 108-109.

After reviewing the testimony and considering the documentary evidence, the Immigration Judge found that Gaitan's testimony was not sufficiently detailed, believable, and consistent. A.R. 109. The Immigration Judge observed that Gaitan provided no specific information about the incidents in which he was allegedly approached by gang members, changed his testimony about whether he ever went to the police, provided little detail about his report to the police, and provided no evidence about what happened thereafter. A.R. 109-110. The Immigration Judge found that, in light of the scant account in his asylum application and

vague testimony, Gaitan's testimony was not credible. *Id.* In addition, Gaitan presented no corroboration of his claim that he was recruited by gang members. A.R. 110. The Immigration Judge nevertheless recognized that gang activity is widespread in El Salvador. A.R. 111.

In the alternative, the Immigration Judge found that, even if Gaitan's account was true, he failed to establish eligibility for relief from removal. A.R. 111. Relying on the Board's decisions in *Matter of S-E-G-,* 24 I. & N. Dec. 579 (BIA 2008), and *Matter of E-A-G-,* 24 I. & N. Dec. 591 (BIA 2008), the Immigration Judge concluded that aliens who have been recruited by gang members, or who have resisted such recruitment, do not constitute a particular social group under the Act. A.R. 111-114.

Although Gaitan did not identify the social group in which he alleged membership, the Immigration Judge assumed that his claim was based on a group comprised of those who do not want to join a gang and who are recruited for gang membership. A.R. 112. As in *S-E-G-,* Gaitan did not establish that gang members limited

recruitment to similarly-situated male children, and noted that Gaitan said that many people in his neighborhood had been approached by gang members for recruitment. A.R. 112-113. Gang members may have many motivations for recruiting young males, and those motivations may not include the perception that the males belong to a particular class. A.R. 113.

In *S-E-G-*, the Board also adopted guidelines of the United Nations High Commissioner for Refugees ("UNHCR"), under which the factfinder assesses whether the proposed social group is perceived as a group by society. A.R. 113. As in *S-E-G-*, Gaitan presented no evidence that those who resist gang recruitment would be perceived as a group by Salvadoran society, or that they suffer a higher incidence of crime than the rest of the population. *Id.* The Immigration Judge also observed that the background material submitted, particularly the State Department reports, do not suggest that victims of gang recruitment are subject to more violence or human rights violations than other segments of society. A.R. 113-114. In light of the determination in *S-E-G-* that the

proposed group consisting of young Salvadorans who have been subject to gang recruitment but have refused join does not qualify as a particular social group, the Immigration Judge concluded that Gaitan failed to show that he belongs to a qualifying group. A.R. 114.

Addressing Gaitan's claim of persecution on account of his political opinion, the Immigration Judge assumed that Gaitan was asserting an anti-gang political opinion. A.R. 114. In the absence of any evidence that the gang sought or would seek to punish him because of his political opinion, or any other protected ground, the Immigration Judge found that Gaitan failed to establish that he was persecuted or has a well-founded fear of persecution on account of any actual or imputed political opinion. A.R. 114-115. The Immigration Judge therefore determined that Gaitan failed to establish eligibility for asylum in the absence of evidence of past or future persecution on account of a protected ground. A.R. 115.

For the same reasons, the Immigration Judge found that Gaitan failed to qualify for withholding of removal. A.R. 115-116.

Absent any evidence that Gaitan would likely be tortured in El Salvador, the Immigration Judge found that he did not establish eligibility for CAT protection. A.R. 116. The Immigration Judge therefore denied Gaitan's applications for asylum, withholding of removal, and CAT protection, and ordered him removed to El Salvador. A.R. 116-117.

**D. Gaitan's Appeal to the Board**

In his appeal to the Board, Gaitan challenged the Immigration Judge's adverse credibility finding. A.R. 49-60. He also argued that the Immigration Judge erred in finding that he failed to establish membership in a particular social group. A.R. 60-66. He apparently identified the particular social group as young, able-bodied males from El Salvador who were threatened by gang members if they failed to join gangs . A.R. 62. He claimed that his refusal to comply with gang recruitment establishes that he is a member of a socially visible group recognized by the Salvadoran government. A.R. 63. According to Gaitan's argument, the Salvadoran government has targeted gangs and those it believes to

be affiliated with gangs. A.R. 63. Because the government targets gangs and youth, the argument goes, a socially visible and particular social group exists. *Id.* Gaitan alleged that he also fears persecution by the government. A.R. 63.

Gaitan claimed that his evidence established the social visibility of gangs in El Salvador, those who are targeted for gang recruitment, and those who the government perceives as gang members. A.R. 64. He sought to distinguish the Board's precedent decisions determining that those who resist gang recruitment do not comprise a particular social group under the INA. A.R. 64-65. Gaitan asserted that, unlike the asylum applicants in *S-E-G-* and *E-A-G-*, he presented evidence that "the Salvadoran government has singled out individuals to be members of socially recognizable group relating to gangs or whom they believe are affiliated with gangs . . . ." A.R. 64-65. He relied on government policies that target youth and young adults based on their affiliation or perceived affiliation with gangs, and based on their deportation from the United States. A.R. 65 (citing A.R. 221-251, 268-286).

Gaitan subsequently submitted a supplemental memorandum to the Board briefly addressing the recent decision in *Benitez Ramos v. Holder,* 589 F.3d 426 (7th Cir. 2009), in which the Seventh Circuit criticized the Board's criteria for analyzing claims based on membership in a particular social group. A.R. 5-7.

**E. The Decision of the Board of Immigration Appeals**

The Board first addressed Gaitan's challenge to the Immigration Judge's adverse credibility finding. A.R. 3. Because the Immigration Judge failed to specify discrepancies or inconsistencies sufficient to support that determination, the Board presumed that Gaitan's claim was credible. *Id.*

Addressing Gaitan's social group claim, the Board observed that the Immigration Judge relied on its "recent precedent decisions finding that gang recruitment, in general, does not constitute a proper basis for asylum in this country." A.R. 3. The Board further noted that this Court has affirmed its approach in determining that resistance to gang recruitment does not constitute a proper basis for asylum. A.R. 3 (citing *Marroquin-Ochoma v. Holder,* 574 F.3d

574, 578 (8th Cir. 2008)). The Board concluded that the Immigration Judge's denial of asylum was appropriate. A.R. 3.

As to Gaitan's argument that the Salvadoran government mistreats those associated and those believed to be associated with gangs, the Board observed that, other than his age, Gaitan provided no evidence that he would be a victim of such mistreatment, and the record did "not support the conclusion that a 21-year old Salvadoran would face mistreatment on that basis alone." A.R. 4. The Board did not consider the Seventh Circuit's decision in *Benitez Ramos* to be controlling, particularly in light of this Court's precedent, and also observed that *Benitez Ramos* involved a former gang member, rather than a claim based on resistance to gang recruitment. *Id.*

In light of its determination that Gaitan failed to demonstrate persecution on account of a protected ground, the Board did not address Gaitan's remaining claims relating to the Immigration Judge's corroboration requirement and his consideration of the evidence. A.R. 4. While recognizing the differences in the eligibility

requirements for CAT protection, the Board concluded that Gaitan failed to demonstrate eligibility for that protection. *Id.* The Board therefore dismissed Gaitan's appeal. A.R. 4.

## V. SUMMARY OF ARGUMENT

As this Court has recognized, the Board's interpretation of the otherwise undefined term "particular social group" is reasonable and permissible and is entitled to *Chevron* deference. Applying its experience and expertise, the Board has determined that a "particular social group" must possess "social visibility" and "particularity" in addition to its members sharing an "immutable" or "fundamental" characteristic. The Board's approach is consistent with the asylum statute, its own precedents, and the reasoning of the various courts of appeals.

An applicant for asylum and withholding of removal cannot prevail unless he establishes past or future persecution on account of a protected characteristic. The Board properly rejected Gaitan's claim that young males who resist gang recruitment constitute a particular social group under the Act. The Board and all Circuits

that have addressed the issue have rejected similar claims. The group identified by Gaitan is too broad and lacks the particularity and social visibility required to qualify as a particular social group. The Board's conclusion, that Gatain failed to demonstrate persecution on account of membership in a cognizable social group, is consistent with its own decisions and the decisions of this Court and should not be disturbed.

## VI. ARGUMENT

### A. The Court Should Accord *Chevron* Deference To The Board's "Particularity" And "Social Visibility" Requirements For A Social Group, As Set Forth In *Matter Of S-E-G-* And Related Board Precedents

#### 1. Standard of Review

This Court reviews the BIA's determinations on questions of law *de novo,* but gives substantial deference to its statutory interpretations. *Ngengwe v. Mukasey,* 543 F.3d 1029, 1033 (8th Cir. 2008); *Vue v. Gonzales,* 496 F.3d 858, 859 (8th Cir. 2007).

### 2. Principles Governing Review

*Chevron* deference applies to the BIA's precedential decisions[5] interpreting "particular social group," because this phrase occurs in the statute defining the term "refugee," 8 U.S.C. § 1101(a)(42), which the Board administers. *INS v. Aguirre-Aguirre,* 526 U.S. 415, 424 (1999).

The statute does not define "particular social group." *See* 8 U.S.C. § 1101(a)(42). The term is universally recognized to be ambiguous and the subject of varying interpretations. *See, e.g., Lwin v. INS,* 144 F.3d 505, 510 (7th Cir. 1998) (acknowledging the legislative history is "uninformative," and the term subject to "divergent" interpretations); *Matter of Acosta,* 19 I. & N. Dec. 211, 233 (BIA 1985) (concluding the phrase is ambiguous), *overruled in*

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[5] The Court reviews the Board's precedential decisions to determine whether the agency's interpretation is entitled to deference, because these decisions have been designated as having the force of law. *See United States v. Mead Corp.,* 533 U.S. 218, 223-24 (2001) (only agency decisions with force and effect of law are entitled to *Chevron* deference, such as formal agency adjudications); 8 C.F.R. § 1003.1(g) (designating published BIA decisions as precedential, that is, having the force of law).

*part on other grounds by Matter of Mogharrabi,* 19 I. & N. Dec. 439 (BIA 1987). Accordingly, the BIA's interpretation of, and requirements for, a "particular social group" are reviewed under *Chevron* step two, and are binding as long as this is a "'permissible construction of the statute.'" *Aguirre-Aguirre,* 526 U.S. at 424 (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842 (1984)).

An agency may change or refine its interpretation. *FCC v. Fox Television Stations, Inc.,* 129 S. Ct. 1800, 1811 (2009). A new or refined interpretation should be upheld so long as it is "permissible under the statute," a "reasoned explanation" is given, and "the agency *believes* [the changed position] to be better, which the conscious change of course adequately indicates." *Id.* (emphasis in original). A "reasoned explanation" means that the agency has acknowledged it is departing from its prior approach and does not "sub silentio" change course. *Id.* An agency is not required to explain why the reasons for its prior approach "are no longer dispositive," nor why the new approach "effectuates the statute as

well as or better than the old rule." *See id.* at 1810 (internal quotation marks and citations omitted).

While the statutory terms "refugee" and "particular social group" occur against the backdrop of the 1967 Refugee Protocol (which incorporates the 1951 Refugee Convention), international interpretations are not controlling. *Aguirre-Aguirre,* 526 U.S. at 427-28. Congress has directed that the Attorney General has primary responsibility for construing ambiguous provisions in the immigration laws, and he has delegated that responsibility to the Board. *Id.* at 424-25; *see* 8 U.S.C. § 1103(a) ("Th[e] determination and ruling by the Attorney General with respect to all questions of law shall be controlling.").

While the Supreme Court has stated that the views of the UNHCR "may be a useful interpretative aid," the Court has held that the UNHCR's views are "not binding on the Attorney General, the BIA, or United States courts." *Aguirre-Aguirre,* 526 U.S. at 427. Indeed, the UNHCR has disclaimed that its views have such force, and has taken the position that determination of "refugee" status is

left to each contracting state. *Id.* at 428 (citing Office of UNHCR, *Handbook On Procedures And Criteria For Determining Refugee Status* (1979)).

Similarly, other countries' interpretations of "particular social group" are not binding on the United States. However, it is noteworthy that, as shown below, the Board's current approach to "particular social group" is consistent with the European Union's ("EU's") approach.

### 3. Varying Interpretations Of "Particular Social Group" 1985-2006

The Board's current interpretation of "particular social group" has evolved out Board, court, and international approaches of the past 25 years, and is best understood by reviewing those approaches.

#### a. Board's Approach 1985-2006

In 1985, in *Acosta,* the Board issued its seminal decision defining what constitutes a "particular social group." *See* 19 I. & N. Dec. at 233-34. The Board observed that this ground "was added as an afterthought" to the definition of a refugee in the U.N.

Convention, and that "Congress did not indicate what it understood this ground of persecution to mean, nor is its meaning clear in the [1967 Refugee] Protocol." 19 I. & N. Dec. at 232. The Board applied the statutory-construction principle of *ejusdem generis* ("of the same kind") to the text of the statute to construe "particular social group" consistently with the other four grounds of persecution in the "refugee" definition (race, religion, nationality, and political opinion). *Id.* at 233-34.

The Board construed the term "particular social group" as consisting of individuals who share a common "immutable" characteristic that either cannot be changed or is so "fundamental to individuals' identity or conscience" that individuals should not be required to change the characteristic. *Acosta,* 19 I. & N. Dec. at 233. The Board explained that when this is the case, the fact of membership in a group becomes "comparable to the other four grounds of persecution under the Act, namely, something that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be

required to be changed." *Id.* at 233-34. As guidance for how the immutable/fundamental characteristic requirement could be applied, the Board suggested that this could refer either to an innate characteristic "such as sex, color, or kinship ties," or "in some circumstances" it might refer to a "shared past experience such as former military leadership or landownership." *Id.* The Board emphasized, however, that whether an asserted group qualifies "remains to be determined on a case-by-case basis." *Acosta,* 19 I. & N. Dec. at 233.

Applying this approach, the Board in *Acosta* rejected a claim that members of a Salvadoran taxi-driver organization or collective were a particular social group, reasoning that the job of being a taxi-driver could be changed, and that working in a job of one's choice is not a "fundamental" characteristic. *Id.* ("the internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice").

Between 1985 and 2006, the Board issued several decisions addressing or applying the *Acosta* "immutable/fundamental"

characteristic approach, while also developing concepts of discrete recognizable characteristics and societal perception as a group. Echoing the language in *Acosta* suggesting that in some circumstances a past, shared experience might establish a social group, the Board stated in *Matter of Fuentes,* 19 I. & N. Dec. 658, 662-63 (BIA 1988), that, "in appropriate circumstances," it may be "possible" to establish a valid asylum claim based on persecution as a "former member of the national police" of El Salvador. However, the Board did not dispose of the case on the basis of a social group, leaving the Board free in future decisions to resolve under what circumstances a shared, past experience might establish a social group. *Id.*

In *Matter of Toboso-Alfonso,* 20 I. & N. Dec. 819, 821-23 (BIA 1990), the Board concluded that persons identified as homosexual by the Cuban government constituted a particular social group. The Board reasoned that homosexuality is an "immutable characteristic," *id.* at 822-23, and relied on evidence that homosexuality was a distinct "status" in Cuba, relying on laws

singling homosexuals out from the rest of society for registration, reporting, monitoring, and physical examinations. *Id.*

In *Matter of H-,* 21 I. & N. Dec. 337 (BIA 1996), the Board held that the Marehan subclan of the Darood clan in Somalia was a particular social group. The Board reasoned that clan members not only shared immutable "ties of kinship," but that country conditions evidence showed that "clan membership is a highly recognizable . . . characteristic" in Somalia, with members "identifiable as a group based on linguistic commonalities." *Id.* at 342-43.

In *Matter of Kasinga,* 21 I. & N. Dec. 357, 365 (BIA 1996), the Board held that future female genital mutilation ("FGM") would amount to "persecution" on account of membership in a social group of young women in a particular tribe in Northern Togo who had not been subjected to the practice and opposed it. The Board reasoned that being a female member of the tribe was immutable, and that the group members' "characteristic of having intact genitalia" is "fundamental" to a young woman's identity and should

not have to be changed. *Id.* at 365-66.

In *Matter of V-T-S-,* 21 I. & N. Dec. 792, 798 (BIA 1997), the Board decided that "Filipinos of mixed-Chinese ancestry" were a particular social group. The Board reasoned that Chinese ethnicity was "immutable," and that these individuals were a recognizable segment of the society, because evidence showed 1.5 per cent of the population "'has an identifiable Chinese background.'" *Id.* (citation omitted).

Finally, in *Matter of R-A-,* 22 I. & N. Dec. 906, 917-20 (BIA 1999), *vacated and remanded,* 22 I. & N. Dec. 906 (A.G. 2001),[6]

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[6] *Matter of R-A-* was vacated by the Attorney General on January 19, 2001, in anticipation of regulations defining the term "particular social group" and other terms, which was proposed at 65 Fed. Reg. 76,588 (Dec. 7, 2000), but never finalized. 23 I. & N. Dec. 694 (A.G. 2005); *see* 24 I. & N. Dec. 629, 630-31 (A.G. 2008). The case was again remanded to the Board in 2008, with instructions to "proceed as [the Board] sees fit . . . because the proposed rule has not been made final." *Id.* at 630-632.

Although *R-A-* is not precedential because it was vacated, the case shows the Board's evolving focus on the existence of a discrete group set apart from others in the society. *See Al-Ghorbani v. Holder,* 585 F.3d 980, 994 (6th Cir. 2009) (explaining the Board's current "social visibility" criterion by citing and quoting *R-A*);

(continued...)

the Board modified its social group approach in a case rejecting a claim that domestic violence was persecution on account of membership in a social group of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination." *Id.* The Board explained that the immutable/fundamental characteristic approach is the "starting point" for a social group analysis, but not necessarily the "ending point," *id.,* and added that how Guatemalans might "identify" subdivisions within their society, or "perceive individuals either to possess or to lack an important characteristic or trait" is a relevant factor in assessing whether a viable social group exists. *Id.* at 918-19. The Board invoked the *ejusdem generis* principle in explaining the need to assess how a putative group is perceived or "understood" in the pertinent society:

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[6](...continued)
*Castellano-Chacon v. INS,* 341 F.3d 533, 548-49 (6th Cir. 2003) (observing that in light of *R-A-* the Board appeared to be moving toward recognizing external perception of a group is a relevant factor in assessing a social group).

> The[] other four [statutory] characteristics [race, religion, nationality, and political opinion] are ones that typically separate various factions within countries. They frequently are recognized groupings in a particular society. The members of the group generally understand their own affiliation with the grouping, as do other persons in the society.

*Id.* at 918 (citing *Acosta,* 19 I. & N. Dec. at 233). Applying these principles, the Board ruled in *R-A-* that the applicant failed to qualify for asylum because she did not show that her proposed social group "is recognized and understood to be a societal faction, or is otherwise a recognized segment of the population, within Guatemala." *Id.*

*R-A-* also harmonized the Board's prior decision in the FGM case, *Kasinga.* The Board explained that *Kasinga* had involved an "important societal attribute" in the particular culture (not having undergone FGM), and illustrated that the "prominence or importance of a characteristic within a society" can be an "important factor" in establishing the existence of a particular social group. *Id.* at 925. That is, *Kasinga* showed that if a characteristic is prominent or important in the society, it is "more

likely that distinctions will be drawn within that society between those who share and those who do not share the characteristic." *Id.* at 919. By contrast, in *R-A-*, the Board concluded that the applicant did not establish that spousal abuse "is . . . an important societal attribute." *Id.* at 919. The Board found no showing that the proposed social group was "recognized and understood to be a societal faction" within Guatemala, that the alleged members viewed themselves as group members, or that the alleged persecutors had such a perception. *Id.*

**b. Varying Circuit Approaches**

Both before and after *R-A-*, courts had varying interpretations of "particular social group." This Circuit and several others endorsed *Acosta*'s immutable/fundamental characteristic approach.[7]

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[7] *Mwembie v. Gonzales,* 443 F.3d 405, 415 n.13 (5th Cir. 2006); *Niang v. Gonzales,* 422 F.3d 1187, 1199 (10th Cir. 2005); *Castellano-Chacon,* 341 F.3d 533, 546-48 (6th Cir. 2003); *Hernandez-Montiel v. INS,* 225 F.3d 1084, 1093 (9th Cir. 2000); *Safaie v. INS,* 25 F.3d 636, 640 (8th Cir. 1994); *Fatin v. INS,* 12 F.3d 1233, 1239 (3d Cir. 1993); *Gebremichael v. INS,* 10 F.3d 28, 36 (1st

(continued...)

The Ninth Circuit applied a variant of the *Acosta* approach, requiring either (1) "a voluntary associational relationship" among members "which imparts some common characteristic that is fundamental to their identity as a member of that discrete group," or (2) persons who share a common immutable, fundamental trait.[8] Under this approach, broad "demographic segment[s]" and "diverse and disconnected group[s]" did not constitute a social group.[9]

The Seventh Circuit initially adopted the *Acosta* approach, *Lwin,* 144 F.3d 512, but then departed from it, holding a social group existed if individuals shared common characteristics that were "not easily changed or hidden" (instead of immutable) and were "distinguishing markers within a given society" (instead of

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[7](...continued)
Cir. 1993).

[8] *Hernandez-Montiel,* 225 F.3d at 1093 & n.6; *Sanchez-Trujillo v. INS,* 801 F.2d 1571, 1576 (9th Cir. 1986).

[9] *See Delgado-Ortiz v. Holder,* 600 F.3d 1148, 1151-52 (9th Cir. 2010); *Ochoa v. Gonzales,* 406 F.3d 1166, 1177 (9th Cir. 2005); *Sanchez-Trujillo,* 801 F.2d at 1576-77.

fundamental). *Tapiero de Orejuela v. Gonzales,* 423 F.3d 666, 672 (7th Cir. 2005).

The Second Circuit developed a societal distinction approach for "particular social group," based on the principle of *ejusdem generis*. *Gomez v. INS,* 947 F.2d 660, 664 (2d Cir. 1991). That court ruled that, "[l]ike the traits which distinguish the other four enumerated categories – race, religion, nationality and political opinion – the attributes of a particular social group must be recognizable and discrete" and "distinguish [members] in the eyes of the persecutor – or in the eyes of the outside world in general." *Id.*; *see also Saleh v. U.S. Dep't of Justice,* 962 F.2d 234, 240 (2d Cir. 1992). Under this approach the attributes of a "particular social group" had to be "recognizable and discrete." *Id.* (quoting *Gomez,* 947 F.2d at 664). "[P]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular social group." *Id.*

Other circuits held that, in addition to an immutable or fundamental characteristic, a particular social group must be

circumscribed and "narrowly defined," *Ochoa,* 406 F.3d at 1170 170, not "extremely large and diverse," *Lukwago v. Ashcroft,* 329 F.3d 157, 172 (3d Cir. 2003), or not "diverse and disconnected." *Ochoa,* 406 F.3d at 1171. The Eighth Circuit rejected proposed social groups as "too large and diverse," *Raffington v. INS,* 340 F.3d 720, 723 (8th Cir. 2003), or "overbroad," *Safie,* 25 F.3d at 640.

Courts also concluded a particular social group "must exist independently of the persecution," *Lukwago,* 329 F.3d at 172; *Rreshpja v. Gonzales,* 420 F.3d 551, 556 (6th Cir. 2005), *i.e.,* "must have existed before the persecution began," and "cannot be created by" it, *Lukwago,* 329 F.3d at 172. Some circuits also concluded that certain criminal or other undesirable groups cannot be particular social groups.[10]/

**c. Two Dominant International Interpretations**

Internationally, two principle approaches developed: the *Acosta* immutable/fundamental characteristic approach or variants

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[10] *Elien v. Ashcroft,* 364 F.3d 392, 397 (1st Cir. 2004); *United States v. Aranda-Hernandez,* 95 F.3d 977, 980-81 (10th Cir. 1996); *Bastanipour v. INS,* 980 F.2d 1129, 1132 (7th Cir. 1992).

thereof (referred to internationally as the "protected" or "internal" characteristics approach),[11] and an external or "social perception" approach.

According to the UNHCR, the external or "social perception" approach was established by Australia, which is the "only common law country to emphasize the 'social perception' approach." UNHCR Brief at 11. Under this approach Australia construed a social group as requiring both particularity and that a group is perceived as distinct and set apart from others in the society. *Applicant A and Another v. Minister for Immigration and Ethnic Affairs,* 190 CLR 225, 142 ALR 331 (Aust. High Ct. 1997) ("Applicant A"). Australia concluded that the refugee definition's joining of the word "social" to "group" "suggests . . . [a] collection of persons . . . [that] must be cognisable as a group in the society such that its members share something which unites them and sets them apart from society at large." *Applicant A,* 190 CLR at 226,

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[11] *See, e.g., Islam v. Sec'ty of State for the Home Department* and *Regina v. Immigration Appeal Tribunal and Another, Ex Parte Shah* [1999], 2 A.C. 629; *Canada v. Ward* [1993] 2 S.C.R. 689 (Can).

241 (per Dawson, J.).

Australia also concluded that use of the word "particular" connotes that "there must be an identifiable social group such that a group can be pointed to as a particular social group." *Id.* at 241. The Australian High Court held that group members must "exhibit some common element" that "unite[s] them" and "make[s] those who share it a cognisable group within their society." 190 CLR at 241 (per Dawson, J.).

The Court also concluded that a "disparate collection" of persons throughout a country with "no social attribute or characteristic linking them," and "nothing external that would allow [the persons] to be perceived" as a group does not constitute a social group. *Id.* at 270 (per McHugh, J.).

### d. Differing International Guidelines

In 2002, the UNHCR adopted *Guidelines*[12] to provide guidance regarding the meaning of a "particular social group." Adopting the universal rule prohibiting circular or tautological social groups, the *Guidelines* stated that "particular social group" cannot be defined "exclusively by the fact that it is targeted for persecution," although the *Guidelines* suggested that "persecution" may be a "relevant element in determining the visibility of a particular social group." *Id.* ¶ 3.

The UNHCR *Guidelines* observed that varying approaches have been used to define a social group but that two "dominant" approaches had emerged – what the *Guidelines* labeled, in shorthand terms, an "immutability" or "protected characteristics" approach (the *Acosta* approach) and a "social perception" approach (the Australian approach). *Id.* ¶¶ 5-7. The social perception

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[12] 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,* U.N. Doc. HCR/GIP/02/02 (May 7, 2002), *available at* http://www.unhcr.org/3d58de2da.html ("*Guidelines*").

approach is described as ascertaining whether persons "share[] a common characteristic which makes them a cognizable group or sets them apart from society at large," and requires an assessment of "the circumstances of the society" and whether putative members are "perceived as a social group in their societies." *Id.* ¶¶ 7, 9.

The UNHCR adopted what it describes as an "alternative" meaning of "particular social group," using either an immutable/fundamental approach, or a group or social perception approach. The *Guidelines* define a "particular social group" as:

> a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.

*Id.* ¶11. Under UNHCR's standard, immutability and group perception are sequential, alternative requirements, either of which can establish a social group. *Id.* ¶ 13. Thus, under the UNHCR's approach (contrary to longstanding United States law), satisfaction

of the "immutable" or "fundamental" characteristic requirement is not necessary. *Id.* ¶ 13. A group that does not meet that test can nonetheless constitute a social group so long as the group is "perceived as a cognizable group in [the] society." *Id.* As the UNHCR *Guidelines* state, this permits "groups or associations based on a characteristic that is neither immutable nor fundamental . . . such as, perhaps, occupation or social class" to constitute a "particular social group." *Id.* ¶ 9.

The European Union, which represents 27 western countries, has not adopted the UNHCR's "either/or" approach permitting a social group to either satisfy the "immutable" or "fundamental" approach, or a "social" perception approach. Rather, like the Board's current approach (see below), the EU's *Guidelines* require a particular social group to satisfy *both* the immutable or fundamental characteristic requirement, and a social perception requirement.[13]/

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[13] *See Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country*

(continued...)

Article 10.1(d) of the EU's *Guidelines* describes a "particular social group" as one in which:

> members of th[e] group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and th[e] group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

**e. *S-E-G-* And Related Precedents Adding "Social Visibility" And "Particularity" Criteria In Addition To "Immutablity"**

With this state of the law, the Board issued four precedential decisions between 2006 and 2008 refining the requirements of a "particular social group." Those decisions restated the immutable/fundamental characteristic requirement. *See Matter of E-A-G-,* 24 I. & N. Dec. 591 (BIA 2008); *Matter of S-E-G-,* 24 I. & N. Dec. 579 (BIA 2008); *Matter of A-M-E- & J-G-U-,* 24 I. & N. Dec. 69

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[13](...continued)
*nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted,* Official Journal L 304, 30/09/2004 P. 0012–0023, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX: 32004L0083:EN:HTML.

(BIA), *aff'd sub nom. Ucelo-Gomez v. Mukasey,* 509 F.3d 70 (2d Cir. 2007); *Matter of C-A-,* 23 I. & N. Dec. 951 (BIA 2006), *aff'd sub nom. Castillo-Arias v. U.S. Att'y Gen.,* 446 F.3d 1190 (11th Cir. 2006).

Those decisions also "reaffirmed" (*A-M-E-,* 24 I. & N. Dec. at 74) that, consistent with the Board's previous decisions, a qualifying social group must possess a recognized level of "social visibility," which describes "the extent to which members of a society perceive those with the characteristic in question as a member of a social group." *E-A-G-,* 24 I & N Dec at 594.

The Board explained that this approach was consistent with its prior decisions, which had considered the "recognizability" of a proposed group. *See C-A-,* 23 I. & N. Dec. at 959. The Board referred to the Second Circuit's *ejusdem generis* reasoning in *Gomez,* that like the other four grounds of persecution in the statutes, a social group must be "recognizable" by others in the community. *C-A-,* 23 I. & N. Dec. at 956 (citing *Gomez,* 947 F.2d at 667). The Board also referred to the UNHCR's *Guidelines,* discussing the "visibility" of a proposed group and requiring a

group of "'persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by the [pertinent] society.'" *Id.* at 956, 960 (quoting UNHCR *Guidelines,* ¶¶ 3, 11).

Echoing the language of the statute and circuit decisions rejecting broad or diverse social-group formulations, or sweeping demographic segments of a society, the Board's recent precedents also concluded that a social group must meet a "particularity" criterion. *A-M-E-,* 24 I. & N. Dec. at 74, 76; *C-A-,* 23 I. & N. Dec. at 957. The Board explained that this means a proposed social group cannot be too "amorphous" or "indeterminate" or be defined by a characteristic "too subjective, inchoate, and variable to provide the sole basis for membership." *A-M-E-,* 24 I. & N. Dec. at 76; *see id.* (stating that "[t]he terms 'wealthy' and 'affluent' standing alone are too amorphous to provide an adequate benchmark for determining group membership").

The Board also stated that it will consider whether the proposed group "share[s] a common characteristic other than their

risk of being persecuted," or instead is "defined exclusively by the fact that [the group] is targeted for persecution." *C-A-*, 23 I. & N. Dec. at 956, 960; *see id.* at 957 (finding group of "noncriminal informants" "too loosely defined to meet the requirement of particularity").

**f. Board's Gang-Recruitment Decisions**

In the two most recent of the Board's precedential decisions, the Board applied the "social visibility" and "particularity" criteria in addressing, and rejecting, claims of asylum based on resistance to gang recruitment. In *S-E-G-*, the Board rejected a proposed social group of "Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities." 24 I. & N. Dec. at 581, 588. And in *E-A-G-*, the Board rejected a proposed social group of young "persons resistant to gang membership" in Honduras. 24 I. & N. Dec. at 593. In both cases, the Board concluded that the putative social groups failed to satisfy the

"particularity" and "social visibility" criteria.

#### 4. The "Particularity" And "Social Visibility" Criteria Are A Permissible Interpretation That Is Entitled To Deference As A Matter Of *Stare Decisis*.

Judged by *Aguirre-Aguirre*'s standard of a "permissible" construction of an ambiguous statute, and *Fox*'s requirements that a change in agency position must simply be acknowledged and reasonably explained, the Board's current particular social group approach should be accorded *Chevron* deference.

First, as the First Circuit has correctly observed, the Board's current approach has evolved out of its prior decisions and is a reasoned and explained interpretation entitled to deference. *Mendez-Barrera v. Holder,* 602 F.3d 21, 26 (1st Cir. 2010); *see also Chevron,* 467 U.S. at 863-864 ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis"). This is amply demonstrated by the Board's precedents prior to 2006, which, as shown above at 25-33, relied on developing concepts of societal recognition and identification, in

addition to principles of immutability and fundamentality.

Second, while international interpretations are not binding, *Aguirre-Aguirre,* 526 U.S. at 424, the Board's refined approach requiring a social group to satisfy both the immutable/fundamental characteristic criterion and its so-called "social visibility" criterion criterion are consistent with the EU's approach, which also requires both criteria to be met. *See supra* at 41-42. Thus, to the extent that Gaitan and the UNHCR seek to portray the Board as an international outlier, this is not accurate.

Third, the UNHCR's "either/or" approach construing a social group to exist if a group meets either the "immutability" approach or a social perception approach is inconsistent with longstanding United States law, and the law of this Circuit, requiring a social group to meet the *Acosta* immutable or fundamental characteristic requirement. The UNHCR's approach permits a social group to be established without meeting that test, so that changeable characteristics, such as, for example, "occupation or social class" can establish a social group. UNHCR *Guidelines* ¶ 9, 11, 13. Thus

the UNHCR has untethered the concept of "social group" from the basic principle underlying *Acosta* – that like the other four grounds in the statute, "particular social group" refers to persons who are deserving of the international protection, because they are subject to persecution on account of shared characteristics that are "either . . . beyond the power of [the] individual[s] to change or that is so fundamental to [their] identit[ities] or conscience[s] that it ought not be required to be changed." *Acosta,* 19 I. & N. Dec. at 233-34.

Fourth, this Court should accord deference to the "social visibility" and "particularity" criteria under the rule of *stare decisis.* This is because the Court has already accorded "substantial deference" to the Board's "particularity" and "social visibility" requirements and applied them in three published decisions. *See Malonga v. Mukasey,* 546 F.3d 546, 553 (8th Cir. 2008); *Ngengwe v. Mukasey,* 543 F.3d 1029, 1034 (8th Cir. 2008); *Davila-Mejia v. Mukasey,* 531 F.3d 624, 629 (8th Cir. 2008). This Court has also consistently described the "social visibility" criterion as meaning that the defined social group must be "perceived by society" as a

group. *See Ngengwe,* 543 F.3d at 1034[14]; *Davila-Mejia,* 531 F.3d at 629-30.

Therefore, Gaitan's, the UNHCR's, and the Seventh Circuit's contentions that the "social visibility" criterion necessarily requires that members must literally be "seen" by the naked eye to be a member of the social group, is not consistent with the Eighth Circuit's case law, nor, as shown below, required by the Board's precedents. *See* UNHCR Brief at 13-14; Pet'r Br. at 27-32.

Lastly, four other circuits in addition to the Eighth Circuit have accorded deference to the Board's current approach in precedent decisions. *Scatambuli v. Holder,* 558 F.3d 53, 59-60

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[14] Gaitan's brief implies that this Court concluded in *Ngengwe* that "Cameroonian widows" constitute a social group solely on the basis of possession the immutable/fundamental characteristics of female gender and the absence of a husband. *See* Brief for Petitioner ("Pet'r Br.") at 28. This is incorrect. The Court cited as a requirement "[a] group's visibility – the extent to which members of the applicant's society perceive those with the characteristics as members of a social group," and concluded that the evidence showed that "[f]emale widows in Cameroon *are viewed by society as members of a particular social group,*" citing book or pamphlet discussing "rituals" and "societal treatment" of Cameroonian widows. 543 F.3d at 1034 (emphasis added).

(1st Cir. 2009); *Ucelo-Gomez,* 509 F.3d at 73; *Ramos-Lopez v. Holder,* 563 F.3d 855, 861 (9th Cir. 2009); *Castillo-Arias,* 446 F.3d at 1196. Four circuits (the Third, Fourth, Fifth, and Tenth) have affirmed the approach in unpublished decisions.[15] The Sixth Circuit has indicated it accepts the Board's approach, although its case law is somewhat ambiguous.[16]

While the Seventh Circuit has criticized and declined to accord deference to the Board's refined approach, *see Benitez Ramos v. Holder,* 589 F.3d 426, 428-29 (7th Cir. 2009); *Gatimi v. Holder,* 578 F.3d 611, 614-17 (7th Cir. 2009), the Seventh Circuit's position is contrary to the law of this Circuit. In addition, as shown in the following section, the Seventh Circuit's rejection of the Board's approach is erroneous.

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[15] *See, e.g., Galindo-Torres v. Att'y Gen.,* 348 F. App'x 814 (3d Cir. 2009); *Contreras-Martinez v. Holder,* 346 F. App'x 956 (4th Cir. 2009); *Mendoza-Marquez v. Holder,* 345 F. App'x 31 (5th Cir. 2009); *Nkwonta v. Mukasey,* 295 F. App'x 279 (10th Cir. 2008).

[16] The Sixth Circuit endorsed and appeared to have applied the "social visibility" and "particularity" criteria in *Al-Ghorbani,* 585 F.3d at 994, but did not appear to apply them in *Urbina-Mejia v. Holder,* 597 F.3d 360, 367 (6th Cir. 2010).

### 5. The Seventh Circuit's Rejection Of The Board's Approach Is Erroneous And Based On Several Misperceptions.

The Seventh Circuit has criticized, and declined to accord deference to, the Board's refined interpretation. That court has taken the positions that the Board has arbitrarily departed from the *Acosta* approach without explanation and must either repudiate that approach or the "social visibility" approach. That court has also taken the position that "social visibility" criterion unreasonably requires passers-by literally to see individuals as members of the particular social group. *Benitez Ramos,* 589 F.3d at 428-29; *Gatimi,* 578 F.3d at 614-17. These criticisms have no merit. *Benetez Ramos'* criticisms are *dicta*, because the Seventh Circuit acknowledged the "social visibility" criterion was not properly before the Court. *Benitez Ramos,* 589 F.3d at 430. Furthermore, the Seventh Circuit's criticisms in *Gatimi* rest on several incorrect premises.

First, the Seventh Circuit incorrectly stated in *Gatimi* that the Board has not "attempted, in this or any other case, to explain the

reasoning behind the criterion of social visibility," and that the Board "has been inconsistent rather than silent," because it has not "repudiat[ed]" earlier decisions that recognized particular social groups without referring to social visibility. 578 F.3d at 615-616.

But the Seventh Circuit did not discuss the Board's 2006 precedential decision in *C-A-*. That decision explained that the Board's previous "decisions involving social groups *have* considered the recognizability, *i.e.,* the social visibility of the group in question," and that the "particular social group[s]" previously recognized by the Board "involved characteristics that were highly visible and recognizable by others in the country in question." 23 I. & N. Dec. at 959-960 (emphasis added).

*Gatimi* likewise did not discuss the Board's precedential decision in *A-M-E-,* which described *C-A-* as having "*reaffirm[ed]* the requirement that the shared characteristic of the group should generally be recognizable by others in the community," 24 I. & N. Dec. at 74 (emphasis added).

Nor did *Gatimi* discuss the Board's more recent precedential

decision in *S-E-G-,* which contains a detailed discussion of the Board's views regarding social visibility and particularity.

Second, the Seventh Circuit's decisions in *Gatimi* and *Benitez Ramos* are based on the incorrect premise that the Board's "social visibility" criterion necessarily requires members of a particular social group to be literally visible to the naked eye to others in society. *See Benitez Ramos,* 589 F.3d at 430 (describing the BIA's view as being "that you can be a member of a particular social group only if a complete stranger could identify you as a member if he encountered you in the street"); *Gatimi,* 578 F.3d at 616 ("The only way, on the Board's view, that the Mungiki defectors can qualify as members of a particular social group is by pinning a target to their backs with the legend 'I am a Mungiki defector.'").

That interpretation is not required by the Board's precedential decisions.[17] In *E-A-G-,* the Board defined "social visibility" as "the extent to which members of a society perceive those with the

[17] It appears that the government's briefs and oral argument in those cases may have contributed to the confusion. *See Benitez Ramos,* 589 F.3d at 430; *Gatimi,* 578 F.3d at 616,

characteristic in question as members of a social group." 24 I. & N. Dec. at 594. Consistent with that statement, the Board's precedential decisions have equated "social visibility" with the extent to which the relevant society perceives there to be a group in the first place, rather than the ease with which one may necessarily be able to identify particular individuals as members of such a group. *See S-E-G-*, 24 I. & N. Dec. at 586-588 (discussing "general societal perception" and finding little evidence that Salvadoran youth who resist gang recruitment "would be 'perceived as a group' by society"); *A-M-E-*, 24 I. & N. Dec. at 74 (finding little evidence that "wealthy Guatemalans" "would be recognized as a group that is at a greater risk of crime in general or extortion or robbery in particular").[18/] This Court has also consistently described the

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[18] This understanding of the "social visibility" requirement is also supported by the Board's 1999 decision in *R-A-*, 22 I. & N. Dec. 906, which addressed this criterion under the heading of "Cognizableness." *Id.* at 917-920. The Board explained that the purported group must be "recognized and understood" as a separate "societal faction" by the population of the relevant country, and the Board stated that the analysis included whether members of the putative group "view themselves as members of this group"

(continued...)

"social visibility" criterion as requiring that persons are "perceived by society" as a group. *See Ngengwe,* 543 F.3d at 1034; *Davila-Mejia,* 531 F.3d at 629-30.

Third, the Seventh Circuit in *Gatimi* has incorrectly taken the position (which is also urged by Gaitan and the UNHCR) that the Board has arbitrarily departed from its *Acosta* line of cases which recognized the following social groups without requiring literal naked-eye "visibility": homosexuals in Cuba, women in a particular tribe in Togo who had not had FGM, and "former members of the national police" in El Salvador. This misses the mark.

This argument rests on the incorrect premise that the Board's current approach requires literal visibility. This argument also fails to take into account the actual holdings and decisional rationales of the earlier *Acosta* cases. Those show that the Board considered the

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[18](...continued)
and whether "their . . . oppressors see their victim[s] . . . as part of this group." *Id.* at 918. The Board did not, however, require that individual members of a group be immediately recognizable, but rather focused on whether "distinctions [are drawn] within [the pertinent] society between those who share and those who do not share the characteristic." *Id.* at 919.

existence of identifiable or identified characteristics and focused on societal recognition of a group as set apart from others in its earlier decisions. *See Toboso-Alfonso,* 20 I. & N. Dec. at 821-23 (recognizing social group of persons identified as homosexual by the Cuban government and relying on evidence that homosexuality was a distinct legal "status" in that society); *R-A-*, 22 I. & N. Dec. 919 (harmonizing *Kasinga*'s recognition of a social group of women in a tribe who had not had FGM with group-perception concepts; discussing correlation between the societal importance of an attribute and distinctions drawn in society based on possession of the attribute).

While the Board did suggest in *Fuentes* that "in appropriate circumstances" it might be possible to establish asylum on the basis of persecution as a "former member of the national police" of El Salvador, the Board disposed of *Fuentes* on the grounds of ability to relocate elsewhere, and a conclusion that any future harm feared as a former member of the police would not be "persecution," but harm inflicted on former combatants in an ongoing civil war. 19

I. & N. Dec. at 662-63.

Thus, in *Fuentes* the Board did not actually hold what "circumstances" establish an asylum claim on the basis of former status, although several circuits including the Seventh Circuit have subsequently elevated the Board's suggestion in *Fuentes* to a rule, treating former status as a social group.[19]/

However, between 2006 and 2008, the Board tackled the question whether a social group can be based on a shared, past experience is that is immutable due to historical permanence. The Board issued its recent precedents holding that in addition to immutability, a "particular social group" must also meet "particularity" and "social visibility" criteria. On this basis, the Board rejected putative social groups based on shared, past

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[19] The Seventh, Second, and Ninth Circuits elevated the conditional statements in *Fuentes* (and similar conditional statements in *Acosta*) to a rule that a past experience shared by others is immutable and necessarily establishes a social group. *See Gatimi,* 578 F.3d at 615 (collecting cases and holding that former members of Mungiki criminal gang in Kenya are a social group); *Sepulveda v. Gonzales,* 464 F.3d 770, 772 (7th Cir. 2006) (collecting cases).

experiences that did not meet these criteria. *E-A-G-,* 24 I. & N. Dec. at 593 (rejecting putative social group of "persons resistant to gang membership" in Honduras); *S-E-G-,* 24 I. & N. Dec at 581 (rejecting putative social group of Salvadoran youth subjected to gang recruitment); *see C-A-,* 23 I. & N. Dec. at 957-961 (rejecting putative social group of former noncriminal drug informants).

For these reasons, the *Gatimi* court's position that the Board's "social visibility" criterion is an arbitrary, unreasoned, and unreasonable departure from past precedent is unsound, contrary to the law of the Eighth Circuit, and should not be deemed persuasive.

### 6. Gaitan's And The UNHCR's Remaining Contentions Have No Merit

Gaitan contends that the Board has not explained the reasoning behind the "social visibility" criterion. Pet'r Br. at 26. This is incorrect. The Board's precedential decisions explain that criterion arises out of prior Board precedents; the *ejusdem generis* principle as set forth in both the Second Circuit's *Gomez* decision;

and the Board also referred to the UNHCR *Guidelines'* view that the "visibility" of a group is "relevant" and the pertinent inquiry is whether persons are "perceived as a group" by the pertinent society. *See C-A-,* 23 I. & N. Dec. at 956, 959-60. In addition, although vacated, the Board's decision in *R-A-* shows that societal perception or recognition as a group is founded in the *ejusdem generis* principle. *R-A-,* 22 I. & N. Dec. at 917-20.

Gaitan argues that the Board has taken inconsistent positions about whether the "social visibility" is a "factor" or "requirement." This attributes too much to the Board's language. In *S-E-G-,* the Board used the words "factor" and "requirement" in same paragraph, and also used "concept" and "standard" when referring to the "social visibility" criterion. *See* 24 I. & N. Dec. at 582, 583, 586. The other three precedential Board decisions addressing "social visibility" interchangeably use "factor," "consideration," "requirement," "standard," "test," and "concept."[20] Although these

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[20] *See C-A-,* 23 I. & N. Dec. at 951, 957 (using "factor" and "consideration" to describe the "social visibility" criterion); *A-M-E &*

(continued...)

words differ in their denotations, the Board's interchangeable usage shows they are intended to be synonymous. Courts have also affirmed the "social visibility" criterion using different terms interchangeably to describe the criterion.[21]/

It is unclear what point Gaitan is making by asserting that courts have "pooled multiple factors to identify a particular social group with little visibility," citing *Tapiero de Orejuela v. Gonzales,* 423 F.3d 666, 672 (7th Cir. 2005). Pet'r Br. 32. In that case the Seventh Circuit overturned the Board's rejection of a putative social

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[20](...continued)
*J-G-U-*, 24 I. & N. Dec. at 75-77 (using "test," "factor," and "requirement" to describe "social visibility"); *E-A-G-,* 24 I. & N. Dec. 591, 593 -594 (BIA 2008) (using "standard" and "consideration" to describe "social visibility").

[21] *See Castillo-Arias,* 446 F.3d at 1194 (affirming *C-A-*) (referring to social visibility and immutability as "two major considerations" for a social group); *Scatambuli,* 558 F.3d at 59-60 (referring to social visibility as an "analysis," "criterion," as one of the "factors" or "considerations" for a social group, and as "requir[ing] social visibility"); *Davila-Mejia,* 531 F.3d at 629 (referring to social visibility without characterizing it); *Ucelo-Gomez,* 509 F.3d at 73 (affirming *A-M-E- & J-G-U-)* (referring to social visibility as a "factor" and "requirement" for a social group); *Santos-Lemus v. Mukasey,* 542 F.3d 738, 745-46 (9th Cir. 2008) (referring to the criterion as a "factor" and describing it as "requiring" social visibility).

group and held that "educated, landowning class of cattle farmers" in Colombia was such a group. A careful reading of *Tapiero* shows the Seventh Circuit misapplied the *Acosta* approach. The court treated the defining characteristics of occupation and social class as immutable, which even the UNHCR currently acknowledges they are not. *Compare Tapiero de Orejuela,* 423 F.3d at 672, *with* UNHCR Guidelines ¶ 9 (neither occupation nor social class are immutable or fundamental, but could establish a social group under a social-perception approach).

Indeed, the Seventh Circuit in *Tapiero* relied on classic social-perception reasoning. That court took the position that the defining traits (social class, occupation, education) were "distinguishing markers within a given society" and focused on the persecution as "differentiating [members] from the rest of the population," giving a "social group identity." *Id.* at 672-73.

The UNHCR's discussion of its Gang-Recruitment Guidance Note (UNHCR Br. at 21-26), and assertions of how, in the UNHCR's view, a claim of gang violence might be framed in terms of an

"immutability" or a "social perception" analysis, are inapposite and have little bearing on this case. The UNHCR posits various theories of why someone might resist gang recruitment, which are immaterial because they are not the evidence in this particular case. UNHCR Br. at 24-25. The UNHCR also asserts that a refusal to join a gang may be an immutable characteristic – which, even if plausible, alone is not sufficient under the Board's refined approach to establish a social group. A social group must also meet the "particularity" and "social visibility" criteria.

The UNHCR's discussion of how a "social perception" claim might be framed has the following flaws: (1) the UNHCR argues characteristics such as living in a certain area or neighborhood that are not immutable or fundamental, so they would not satisfy the necessary "immutability" requirement under United States law; and (2) the UNHCR characteristics that lack particularity and are too subjective, amorphous, variable, to provide an adequate benchmark for a social group under United Stats law, such as "being poor," "youth who are vulnerabl[e]," "social background."

UNHCR Br. at 25-28. As advocated by UNHCR, this stand-alone "social perception" approach would dispense *Acosta* and, with it, Eighth Circuit and BIA precedents.

In sum, neither Gaitan nor amicus have presented any valid reason for this Court to depart from its precedents, and have not identified any basis for concluding that the Board has exceeded its authority in interpreting and applying the statute it administers. *See National Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 980-985 (2005); *Aguirre-Aguirre,* 526 U.S. at 424-425; *Chevron,* 467 U.S. at 842-43.

## B. The Record Does Not Compel A Conclusion that Gaitan Established Eligibility For Asylum Or Withholding Of Removal To El Salvador.

### 1. Scope and Standard of Review

Because the BIA's decision is the final decision of the agency, it is the subject of this Court's review. *Falaja v. Gonzales,* 418 F.3d 889, 894 (8th Cir. 2005). However, to the extent that assessment of the factual findings is needed, this Court should review both the Board's decision and the immigration judge's decision. Where,

under the current regulations, the Board is not acting as a *de novo* factfinder, the Court should look to the immigration judge's decision, as well as any additional analysis added by the Board, to determine the basis for the final agency determination on factual matters.[22] *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,886 (Aug. 26, 2002).

Judicial review of immigration matters is limited. *See INS v. Ventura,* 537 U.S. 12, 16-18 (2002) (per curiam); *Aguirre-Aguirre,* 526 U.S. at 424; *INS v. Elias-Zacarias,* 502 U.S. 478, 483-484 (1992). Pursuant to 8 U.S.C. § 1252(b)(4)(B), the agency's "findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." In order to reverse the agency's administrative findings of fact, the Court "must find that the evidence not only *supports* [such a] conclusion, but *compels* it . . . ." *Elias-Zacarias,* 502 U.S. at 481 n.1. Reversal of the Board's

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[22] The Board may review "questions of law, discretion, and judgment and all other matters de novo." 8 C.F.R. § 1003.1(d)(3)(ii).

decision is not proper if the evidence, and reasonable inferences arising therefrom, supports more than one interpretation. *See Arkansas v. Oklahoma,* 503 U.S. 91, 113 (1992) (The Court "may not supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence."); *Khrystotodorov v. Mukasey,* 551 F.3d 775, 783 (8th Cir. 2008) ("A reviewing court may not supersede an agency finding simply because an alternative finding could also be supported.").

As noted, *supra* at 21, the Court reviews constitutional claims and questions of law *de novo*, with deference to the agency's statutory interpretations.[23]/

**2. Burden of Proof**

The applicant for asylum and withholding of removal bears the burden of proof for establishing his statutory eligibility. INA §§ 208(b)(1)(B), 240(c)(4)(A), 241(b)(3)(C), 8 U.S.C. §§ 1158(b)(1)(B), 1229a(c)(4)(A), 1231(b)(3)(C); 8 C.F.R. §§ 1208.13(a), 1208.16(b); *see*

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[23] In *Malonga,* 546 F.3d at 553, this Court stated that "[w]hether a group is a 'particular social group' presents a question of law, which we review de novo." (citation omitted).

*Tawm v. Ashcroft,* 363 F.3d 740, 743 (8th Cir. 2004).

Section 208(a) of the INA, 8 U.S.C. § 1158(a), permits the Attorney General, in his discretion, to grant asylum to any alien who demonstrates that he is a "refugee" within the meaning of section 101(a)(42) of the Act, 8 U.S.C. § 1101(a)(42). *Elias-Zacarias,* 502 U.S. at 481; *INS v. Cardoza-Fonseca,* 480 U.S. 421, 428 n.5 (1987); *Mwangi v. Ashcroft,* 388 F.3d 623, 627 (8th Cir. 2004). The term "refugee" is defined as an alien "who is unable or unwilling to return to . . . [his] country [of nationality] 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 . . . ." (the "protected grounds"). INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

If an applicant establishes past persecution, a rebuttable presumption arises that the alien has a well-founded fear of persecution and that the alien's life or freedom would be threatened in the future in the country of removal. 8 C.F.R. § 1208.13(b)(1); *see* 8 C.F.R. § 1208.16(b)(1)(I) (withholding of removal); *De Brenner*

*v. Ashcroft*, 388 F.3d 629, 636 (8th Cir. 2004). However, if past persecution is not established, the applicant must prove a well-founded fear of future persecution on account of a protected ground. 8 C.F.R. § 1208.13(b)(2); *see* 8 C.F.R. § 1208.16(b)(2).

The alien's burden of proof for withholding of removal is more stringent than for asylum, and requires the applicant to show that it is more likely than not that he will be persecuted on account of a protected ground if returned to the country of removal. *See* INA § 241(b)(3), 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 1208.16(b); *Cardoza-Fonseca,* 480 U.S. at 423; *Mamana v. Gonzales,* 436 F.3d 966, 969 (8th Cir. 2006). That is, the applicant must establish a clear probability of persecution on account of a protected ground to qualify for withholding of removal.[24] *See INS v. Stevic,* 467 U.S. 407, 424 (1984).

[24] Gaitan does not challenge the agency's denial of his request for CAT protection before this Court.

### 3. The Board Properly Concluded That Gaitan Failed To Establish Persecution On Account Of Membership in a Particular Social Group.

The agency determined that Gaitan failed to demonstrate membership in a particular social group because he failed to demonstrate social visibility or particular and well-defined boundaries for the proposed group. A.R. 4, 111-114. Consistent with the Board's previous decisions, a qualifying social group must possess a recognized level of "social visibility," which describes "the extent to which members of a society perceive those with the characteristic in question as a member of a social group." *E-A-G-*, 24 I. & N. Dec. at 594 (citing *A-M-E-*, 24 I. & N. Dec. at 74). The Board explained that this approach was consistent with its prior decisions, which had considered the "recognizability" of a proposed group. *See C-A-*, 23 I. & N. Dec. at 959.

The Board's recent decisions also stated that the analysis of "particular social group" claims involves consideration of whether the group in question is defined with sufficient "particularity." *A-M-E-*, 24 I. & N. Dec. at 74, 76; *C-A-*, 23 I. & N. Dec. at 957. The

proposed group cannot be too "amorphous" or "indeterminate" or be defined by a characteristic "too subjective, inchoate, and variable to provide the sole basis for membership." *A-M-E-,* 24 I. & N. Dec. at 76; *see id.* (stating that "[t]he terms 'wealthy' and 'affluent' standing alone are too amorphous to provide an adequate benchmark for determining group membership"). The Board also stated that it will consider whether the proposed group "share[s] a common characteristic other than their risk of being persecuted," or instead is "defined exclusively by the fact that [the group] is targeted for persecution." *C-A-,* 23 I. & N. Dec. at 956, 960; *see id.* at 957 (finding group of "noncriminal informants" "too loosely defined to meet the requirement of particularity").

Gaitan claims that he satisfies the social visibility and particularity requirements because he is a young male who resisted gang recruitment. Pet'r Br. 33. His social group claim has drifted in the course to the proceedings: before the Immigration Judge, he did not identify the group in which he alleged membership (A.R. 112); before the Board, he claimed that the Salvadoran government

had created a social group consisting of the those in gangs and those who the government believes are affiliated with gangs (A.R. 63); and before this Court, he claims that his recruitment by a gang or gangs was the genesis of his membership in a social group (Pet'r Br. 34-37). Thus, Gaitan has switched from a claim of a government-created social group to a claim of a gang-created social group, reflecting the variability of the identified group.

Gaitan's claim that he established membership in a particular social group is almost identical to the claim found by the Board to be insufficient in *S-E-G-*, 24 I. & N. Dec. 579 (holding that Salvadoran youths who have been subjected to recruitment efforts by the MS-13 gang and who have resisted membership in the gang do not constitute a particular social group). *See E-A-G-*, 24 I. & N. Dec. 591 (holding that a young Honduran male failed to establish membership in particular social group of persons resistant to gang membership, as evidence failed to establish that Honduran society, including gang members themselves, would perceive those opposed to gang membership as members of a social group). In addition, all

circuits that have considered the question have rejected claims of social group persecution based on gang recruitment.

Although this Court has not directly addressed the issue, Gaitan's claim is similar to the claim in *Davila-Mejia,* where the Court agreed with the agency's rejection of a proposed social group of "competing family business owners," for failure to meet the Board's "social visibility" and "particularity" criteria. *See* 531 F.3d at 629. In *Malonga,* this Court concluded that an ethnic group with a tribe that is identifiable by accent, dialect, home region, and surname, constituted a particular social group. 546 F.3d at 553-554; *see also Ngengwe,* 543 F.3d at 1034 ("Female widows in Cameroon are viewed by society as members of particular social group."). The social group Gaitan posits displays no analogous characteristic that would lead to the conclusion that young, gang-recruited males are perceived as an identifiable social group.

No court of appeals has held that people who refuse to join a gang because they object to the gang's violent activities constitute a "particular social group" under the INA. Two circuits have

considered that question in published opinions, and they have repeatedly rejected challenges like those raised by Gaitan. *See Larios v. Holder,* 608 F.3d 105, 109 (1st Cir. 2010) (agency did not err in concluding that Guatemalan youth resistant to gang recruitment does not constitute a particular social group); *Mendez-Barrera,* 602 F.3d at 25 (First Circuit holding that "young [El Salvadoran] women recruited by gang members who resist such recruitment" do not constitute a legally cognizable social group because the proposed group lacks social visibility and is not sufficiently particular); *Barrios v. Holder,* 581 F.3d 849, 854 (9th Cir. 2009) (declining to recognize group consisting of "young males in Guatemala who are targeted for gang recruitment but refuse because they disagree with the gang's criminal activities"); *Ramos-Lopez,* 563 F.3d at 861-862 (Ninth Circuit holding that "young Honduran men who have been recruited by the MS-13, but who refuse to join" did not constitute a "particular social group"); *Santos-Lemus v. Mukasey,* 542 F.3d 738, 745-746 (9th Cir. 2008) ("[b]ased on the Board's decision in *Matter of S-E-G-* and our

relevant case law," the proposed group of young men in El Salvador resisting gang violence "fails to qualify as a particular social group because it lacks social visibility"). Other circuits have rejected similar claims in unpublished decisions.[25] Even the circuit whose decisions form the sole basis for Gaitan's challenge to the Board's

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[25] *See, e.g., Zavaleta-Lopez v. Att'y Gen.,* 360 F. App'x 331, 333-334 (3d Cir. 2010) (per curiam) ("young men who have been targeted by gangs for membership and who have refused to join gangs"); *De Vasquez v. United States Att'y Gen.,* 345 F. App'x 441, 445-447 (11th Cir. 2009) (per curiam) ("poor girls who come from fatherless homes, with no adult male protective figures . . . who resist recruitment or criticize [a criminal gang in El Salvador called] Maras") (citation omitted); *Vasquez v. Holder,* 343 F. App'x 681, 682 (2d Cir. 2009) (Summary Order) ("individuals who have been actively recruited by gangs, but who have refused to join because they oppose the gangs"); *Chay-Zapeta v. Mukasey,* 304 F. App'x 259, 260-261 (5th Cir. 2008) (per curiam) (applicant's "contention that as a young Guatemalan woman, she is a member of a social group that gangs are targeting to recruit is overly broad and does not establish a meaningful basis for distinguishing her from other people"); *see also Castro-Paz v. Holder,* No. 09-3707, 2010 WL 1741096, at *5 (6th Cir. May 3, 2010) (per curiam) ("The agency . . . reasonably concluded that being a member of a particular social group consisting of 'young, unprotected women who have received gang threats' did not qualify as a 'particular social group' under the INA."); *Galindo-Torres v. Att'y Gen.,* 348 F. App'x 814, 817-818 (3d Cir. 2009) (per curiam) (business people who refused aid, join or support a Columbian guerrilla group and claimed "refusal status" failed to establish social visibility and particularity of the group).

interpretation of "particular social group" has stated – in one of the decisions on which Gaitan relies – 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."[26] *Gatimi,* 578 F.3d at 616.

Gaitan asserts that this case is different because (1) he was visible, at least to the gang (Pet'r Br. 35-36); and (2) he presented evidence that gangs target young people for recruitment (Petr' Br. 36-38). The first claim mistakes the nature of the inquiry. The question is whether those with some common characteristic are perceived by members of a society as a member of a social group. *See E-A-G-,* 24 I. & N. Dec. at 594. That Gaitan's own experiences, age or gender were visible does not shed light on whether young men recruited by gangs are perceived as a particular social group. *See Ramos-Lopez,* 563 F.3d at 862-62.

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[26] In light of the weight of authority, this case would be a particularly unsuitable vehicle to resolve Gaitan's assertion that the Board has impermissibly applied the "social visibility" and "particularity" criteria too rigidly. *See* Pet'r Br. 19, 23.

Gatitan's assertion that he presented evidence that gangs target young people for recruitment and may engage in violent retaliation against those who resist similarly does not aid him. Pet'r Br. 36-37; *see S-E-G-,* 24 I. & N. Dec at 580 (recounting evidence of gang recruitment of young males). The decisions cited above (at 72-73 & n.24) did not rest on a dispute whether gangs recruit young people, but on the conclusion that such recruitment, and resistance to recruitment, does not create a cognizable social group. Moreover, where Gaitan's evidence shows that gangs engage in actions against a broad swath of society (A.R. 212-213, 265-266, 295, 306), it is difficult to see how young people comprise a recognizable social group distinct from, for example, others who run afoul of gang activity.

Gaitan's claim that the Board erred in failing to determine whether he suffered past persecution, and to consider his age at the time, is without merit. Pet'r Br. 14, 39-40. In his brief to the Board, Gaitan asserted that he suffered past persecution in El Salvador, but he presented no argument to support his claims, and

did not identify anything that he experienced that would amount to persecution. A.R. 47, 66. The record does not compel this conclusion; Gaitan testified that he was not harmed in El Salvador, and stated only that he was once threatened by a gang member. A.R. 138, 140; *see Quomsieh v. Gonzales,* 479 F.3d 602, 606 (8th Cir. 2007) ("Absent physical harm, . . . incidents of harassment [and] unfulfilled threats of injury . . . are not persecution."). Where Gaitan presented no evidence that he suffered any harm, much less past persecution, and no argument to the Board that he suffered past persecution, the Board was not required to address the issue. *Cf. Satcher v. Univ. of Ark. at Pine Bluff Bd. of Trustees,* 558 F.3d 731, 734-35 (8th Cir. 2009) (it is not district court's responsibility to sift through record to see if, perhaps, there was issue of fact). Likewise, in his brief to this Court, Gaitan asserts that he suffered past persecution but does not present any argument and does not identify anything in the record that would support that claim. Pet'r Br. 14. Gaitan's unfounded claim of past persecution is therefore waived. *See, e.g., Karim v. Holder,* 596 F.3d 893, 894 n.1 (8th Cir.

2010); *Averianova v. Holder,* 592 F.3d 931, 395 (8th Cir. 2010) (issue waived absent meaningful argument). Because he failed to present any argument before the Board to support his claim of past persecution, he failed to exhaust available administrative remedies, and this Court may not address the issue.[27] INA § 242(d)(1), 8 U.S.C. § 1252(d)(1).

Gaitan's claim that the Board declined to review the record is meritless. Pet'r Br. 39-40. The Board stated that, because Gaitian failed to establish persecution on account of a protected characteristic, it was not necessary to resolve his arguments that the Immigration Judge erred in requiring corroboration and failed to consider the evidence of country conditions. A.R. 4. The Board is not required to resolve issue that are unnecessary to the

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[27] Gaitan challenges the Board's citation to *Maroquin-Ochoma v. Holder,* 574 F.3d 574 (8th Cir. 2009), where this Court declined to disturb the agency's rejection of a claim of persecution on account of the applicant's political opinion arising from resistance to gang recruitment and criminal activity. Pet'r Br. 40-41; *see* A.R. 3. Where the Board relied on its precedents in *S-E-G-* and *E-A-G-,* and where there is no reason to believe that the Board was confused as to the nature of Gaitan's claim, the reference to *Maroquin-Ochoma* provides no basis for disturbing the Board's decision.

disposition of the case.[28] *See INS v. Bagamasbad,* 429 U.S. 24, 25 (1976) (per curiam) ("[a]s 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"). The assertion that the Board consequently did not review the record is entirely unsupported.

[28] For the same reason, Gaitan's claim that the Board was required to determine whether he met the *Acosta* immutable or fundamental characteristic requirement is without merit where he otherwise failed to establish a cognizable social group. Pet'r Br. 35.

## VII. CONCLUSION

For the foregoing reasons, the Petition for Review should be denied.

Respectfully submitted,

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Dated: September 7, 2010

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Eighth Circuit Rule 28A(c), I hereby certify that the foregoing Brief for Respondent contains 13,978 total words. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in WordPerfect version 9 using Bookman Old Style, a proportional typeface, with a type size of 14 points.

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Dated: September 7, 2010

**CERTIFICATE OF FILING DISKETTE**

Pursuant to Eighth Circuit Rule 28A(d), counsel for Respondent certifies that attached for filing with this brief is a 3-1/2 inch diskette containing the full text of the Brief for Respondent. Counsel for Respondent further certifies that this diskette has been scanned for viruses and is virus free.

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Dated: September 7, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that on this 7th day of September 2010, I caused two paper copies and a digital version on a diskette of the foregoing Brief for Respondent to be served on Petitioner by mailing them, first class postage prepaid, to:

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