No. 09-71571 (A098-660-718)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROCIO BRENDA HENRIQUEZ-RIVAS,
PETITIONER,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
RESPONDENT.

ON REHEARING EN BANC OF A PETITION FOR REVIEW
OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF AS *AMICI CURIAE* ON BEHALF OF NON-PROFIT ORGANIZATIONS AND LAW SCHOOL CLINICS AND CLINICIANS

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INTEREST OF *AMICI CURIAE*

Amici curiae are non-profit organizations and law school clinics and clinicians that represent asylum-seekers and other immigrants within the Ninth Circuit.[1] *Amici* include authors of scholarly works regarding asylum, experts who advise other attorneys representing asylum-seekers, and practicing attorneys who represent asylum-seekers. *Amici* include recognized experts in the field with a long-standing focus on the development of U.S. jurisprudence that accords with domestic and international refugee and human rights law. *Amici* have an interest in the questions under consideration in this appeal as they implicate fundamental principles of jurisprudence and statutory construction related to the definition of a "refugee," a subject of *amici*'s research and practice and matter of great consequence for those served by *amici*. The issues involved have broad implications for the equitable and just administration of refugee law. *Amici* thus offer this brief under Federal Rule of Appellate Procedure 29, Circuit Rule 29-2.[2]

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[1] A list of *amici* follows this brief.

[2] Pursuant to Fed. R. App. P. 29(a)(5), *amici* represent that Petitioner consents to the filing of this brief, while Respondent has taken no position on its filing. No person or entity other than *amici* authored this brief or provided any funding related to preparing or filing it.

INTRODUCTION

Petitioner Rocio Henriquez-Rivas seeks review of the ruling of the Board of Immigration Appeals (BIA or Board) reversing the immigration judge's (IJ) grant of asylum. The Board concluded that individuals who have testified against gang members in El Salvador do not constitute a "particular social group" within the meaning of the Immigration and Nationality Act (INA) § 208(b)(1)(B)(i), because such a group "lacks the requisite 'social visibility'" and "is too amorphous." Certified Administrative Record (CAR) at 3. The BIA did not disturb the IJ's findings that Ms. Henriquez-Rivas witnessed the murder of her father when she was twelve years old and then testified against the murderous gang members in open court, nor that if returned to El Salvador, she will most likely be killed by gang members whom the government is unwilling and unable to control. CAR at 69-71.

A Panel of this Court denied Ms. Henriquez-Rivas' petition for review. *Henriquez-Rivas v. Holder*, --- F. App'x ---, No. 09-71571, 2011 WL 3915529 (9th Cir. Sept. 7, 2011) (Mem.). The Panel relied upon prior precedent rejecting groups comprised of government informants and witnesses because they lack sufficient social visibility and/or particularity. *See id*. at *1. Judge Bea filed a concurrence, joined by Judge Ripple sitting by designation. Judge Bea explained that while he did not quarrel with the Panel's application of the Court's precedent, were he

writing on a blank slate, he would find that the proposed group had sufficient "social visibility" and "particularity" to qualify as a particular social group for asylum purposes. *Id*. at *2. At the same time, Judge Bea questioned whether the precedent on which the Panel relied was faithful to the INA and the Board's interpretation of the statute. *Id*. at *4. He noted that the factors of "social visibility" and "particularity" had not clarified "the 'particular social group' analysis," but instead "only compounded the confusion," and he observed that "[n]either this court's opinions, nor those of the BIA, have clearly defined [these] factors, nor provided reasoned applications of those factors to the facts of each case." *Id*. at *3.

Two Courts of Appeals have declined to defer to the Board's requirement that a "particular social group" possess "social visibility" and "particularity." *See Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 608 (3d Cir. 2011) (remanding to the Board for an explanation as to its inconsistent interpretation of "particular social group"); *Gatimi v. Holder*, 578 F.3d 611, 616 (7th Cir. 2009) (declining to defer to the BIA's social visibility requirement without remanding because it "makes no sense"). *Amici* respectfully urge this Court to do the same. *See United States v. Cabaccang*, 332 F.3d 622, 634 (9th Cir. 2003) (en banc) (noting that the en banc court is not bound by prior panel decisions).

ARGUMENT

I. STANDARD OF REVIEW.

Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 862 (1984), courts defer to authoritative agency interpretations of ambiguous statutory terms so long as they are "based on a permissible construction of the statute." *Ramos-Lopez v. Holder*, 563 F.3d 855, 859 (9th Cir. 2009). This Court has ruled that the term "particular social group" is ambiguous. *Id.* The BIA's interpretation of that term thus warrants deference "unless it is arbitrary, capricious, or manifestly contrary to the statute." *Id*. (quotation marks omitted).

The Supreme Court has recently reiterated that while "[a]gencies, the BIA among them, have expertise and experience in administering their statutes that no court can properly ignore," the courts "retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking." *Judulang v. Holder*, 132 S. Ct. 476, 483-84 (2011). Consistent with this important role, courts will not defer to agency interpretations that are irrational or that conflict with congressional intent. *See, e.g.*, *Navarro-Aispura v. INS*, 53 F.3d 233, 235-36 (9th Cir. 1995) (recognizing the Court is "not obligated . . . to accept an agency's interpretation that is demonstrably irrational or clearly contrary to the plain and sensible meaning of the statute" (quotation marks omitted)); *Montecino v. INS*, 915

F.2d 518, 520 (9th Cir. 1990) (rejecting as arbitrary the BIA's interpretation of "persecution").

In determining whether an "agency's interpretation is permissible, [the Court] will take into account the consistency of the agency's position over time." *Natural Resources Defense Council v. EPA*, 526 F.3d 591, 602 (9th Cir. 2008). Although *Chevron* deference "still applies to an agency's reversal of position," *New Edge Network, Inc. v. FCC*, 461 F.3d 1105, 1113 (9th Cir. 2006), both the Supreme Court and this Court have stated that "'[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view,'" *Natural Resources Defense Council*, 526 F.3d at 605 (quoting *INS v. Cardoza-Fonseca*, 408 U.S. 421, 446 n.30 (1987)).

This Court will uphold a new agency position under *Chevron* "so long as the agency acknowledges and explains the departure from its prior views." *Resident Councils of Wash. v. Leavitt*, 500 F.3d 1025, 1036 (9th Cir. 2007) (quotation marks omitted); *cf. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (explaining that if an agency "adequately explains the reasons for a reversal of policy," the change can still merit *Chevron* deference). Where the agency fails to adequately explain its departure, this Court has held an agency's interpretation to be unreasonable under *Chevron*. *See, e.g.*, *Mercado-Zazueta v.*

Holder, 580 F.3d 1102, 1112 (9th Cir. 2009) (rejecting the BIA's interpretation because its "explanation of its inconsistent imputation practices remains 'so unclear or contradictory that we are left in doubt as to the reason for the change in direction'" (quoting *Marmolejo-Campos v. Holder*, 558 F.3d 903, 914 (9th Cir. 2009) (en banc))).

II. THE BIA'S REQUIREMENTS OF "SOCIAL VISIBILITY" AND "PARTICULARITY" ARE NOT ENTITLED TO *CHEVRON* DEFERENCE.

For over twenty years, the Board interpreted the term "particular social group" to include a group defined by immutable characteristics that members of the group could not change, or by characteristics that they should not be required to change because they are fundamental to their individual identities or consciences. In 2006, the BIA departed from its longstanding interpretation when it held that social groups must not only be defined by immutable or fundamental characteristics, but they also must demonstrate "social visibility" and "particularity." The Board provided no reasoned explanation for its abrupt departure. Moreover, the Board failed to clearly and rationally define the new requirements, which has caused inconsistent and arbitrary decisionmaking at all levels of the immigration adjudication system, including this Court. The Board's unreasoned and irrational departure thus does not warrant this Court's deference under *Chevron*.

A. The BIA Departed From *Acosta* Without Reasoned Explanation.

1. *The* Acosta *Standard*.

One of the five grounds upon which asylum may be granted to an individual fleeing persecution is membership in a particular social group. INA § 208(b)(1)(B)(i). The seminal case interpreting "particular social group" is *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985), overruled on other grounds by *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). In *Acosta*, the BIA held that a group could be defined by immutable characteristics that members of the group could not change, or by characteristics that they should not be required to change because they are fundamental to their individual identities or consciences. *Id*.

For over twenty years, the Board applied *Acosta* faithfully, relying solely upon its immutable or fundamental characteristics criteria to determine social group membership. The *Acosta* approach was widely accepted by all of the U.S. Courts of Appeals, including the Ninth Circuit, as well as the United Nations High Commissioner for Refugees (UNHCR), and foreign jurisdictions.[3] Following

[3] Initially the Ninth Circuit took a different approach, requiring particular social groups to be defined by voluntary associational relationships. *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986). However, in 2000, with its decision in *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092-93 (9th Cir. 2000), the Court reconciled its position by adopting the *Acosta* criteria, and ruling that a particular social group "is one united by a voluntary association, including a former association, *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it." *See also Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993);

Acosta, the Board applied its interpretation and recognized a number of groups as cognizable under the INA. *See, e.g.*, *Matter of Fuentes*, 19 I. & N. Dec. 658 (BIA 1988) (former members of the Salvadoran national police); *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990) (homosexuals in Cuba); *Matter of H-*, 21 I. & N. Dec. 337 (BIA 1996) (Marehan clan members in Somalia); *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996) (young women of the Tchamba-Kunsuntu tribe who have not undergone female genital mutilation and who oppose the practice); *Matter of V-T-S-*, 21 I. & N. Dec. 792 (BIA 1997) (Filipinos of Chinese ancestry); *Matter of X*, 22 Immig. Rptr. B1-123 (BIA 1998) (deaf people in Thailand); *Matter of X*, 22 Immig. Rptr. B1-152 (BIA 1998) (members of a labor union at a government-owned company); *Matter of Moscoso-Zuniga*, File No. A72-110-031 (BIA 2005) (those suffering from mental disorders in Peru); *Matter of F-L-*, at 4 (BIA June 3, 2003) (attached as Appendix A) ("children whose parents have abandoned them and who lack a surrogate form of protection"); *Matter of J-*,

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Koudriachova v. Gonzales, 490 F.3d 255, 262 (2d Cir. 2007); *Fatin v. INS*, 12 F.3d 1233, 1239-40 (3d Cir. 1993); *Argueta-Rodriguez v. INS*, 129 F.3d 116 (4th Cir. 1997) (unpublished table decision), *available at* 1997 WL 693064; *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir. 2002); *Castellano-Chacon v. INS*, 341 F.3d 533, 547 (6th Cir. 2003), *overruled in part on other grounds by Almuhtaseb v. Gonzales*, 453 F.3d 743 (6th Cir. 2006); *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998); *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994), *superseded by statute on other grounds as recognized by Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008); *Niang v. Gonzales*, 422 F.3d 1187, 1198-99 (10th Cir. 2005); *Castillo-Arias v. Att'y Gen.*, 446 F.3d 1190, 1196-97 (11th Cir. 2006).

at 1 (BIA Jan. 20, 1999) (per curiam) (attached as Appendix B) ("minors without resources who have been abused by a custodial parent/guardian").

The *Acosta* approach provided clear boundaries for determining what characteristics formed an acceptable group under the Act. In several cases, including *Acosta* itself, the application of the *Acosta* criteria resulted in a rejection of the proposed social groups. *See, e.g.*, *Matter of Vigil*, 19 I. & N. Dec. 572 (BIA 1988) (young, male, unenlisted, urban Salvadorans); *Matter of Jairo Ouintero Rivera*, 2005 Immig. Rptr. LEXIS 10177 (BIA 2005) (long-time members of the business community); *Matter of Coky Henry Sidabutar a.k.a. Coky Paruliah*, 2006 Immig. Rptr. LEXIS 6961 (BIA 2006) (persons presumed to possess black magic powers).

In none of these cases, either accepting or rejecting the proffered social group, did the BIA require or refer to a group's "social visibility" or "particularity."

2. *The Board Has Departed from* Acosta.

In 2006, in a marked departure from its earlier interpretation in *Acosta*, the Board stated that social groups must not only be defined by immutable or fundamental characteristics, but they also must demonstrate "social visibility" and "particularity." *See Matter of C-A-*, 23 I. & N. Dec. 951 (BIA 2006), *aff'd sub nom. Castillo-Arias v. Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006). Applying this new standard, the Board held in *C-A-* that the group of "former noncriminal

informants working against the Cali drug cartel" was not a "particular social group" because the group did not have "social visibility." *Id*. at 960. The Board reasoned that confidential informants do not have the requisite visibility because the "very nature" of being a confidential informant "is such that it is generally out of the public view." *Id*. The Board also held that the proposed group of "noncriminal informants" was "too loosely defined to meet the requirement of particularity." *Id.* at 957.

In *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 75-76 (BIA 2007), *aff'd sub nom.*, *Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007), the Board again employed "social visibility" and "particularity" to reject a proposed social group, this time holding that "affluent Guatemalans" "fail[ed] the 'social visibility'" test and did not satisfy the particularity requirement. Subsequently, the BIA has applied the new requirements to reject proposed groups whose members resisted gang recruitment efforts and family members of those who resisted recruitment. *See Matter of S-E-G-*, 24 I. & N. Dec. 579 (BIA 2008); *Matter of E-A-G-*, 24 I. & N. Dec. 591 (BIA 2008).

3. *The Board Provided No Reasoned Explanation for the Change*.

The Board provided no explanation for its change of course. It did not explain, for example, how the new requirements could be reconciled with the *ejusdem generis* principle it relied on in *Acosta* to interpret the term "particular

social group." Instead, the Board claimed, incorrectly, that the requirements were found in Guidelines promulgated by UNHCR and were supported by a Second Circuit decision. *Matter of C-A-*, 23 I. & N. Dec. at 956. The Board failed even to recognize its departure from *Acosta*, claiming that groups it found to be cognizable solely under the immutable/fundamental approach were defined by characteristics that easily met the requisite social visibility and particularity, *id.* at 959-60, a claim at odds with the Board's precedent under *Acosta* and common sense.

When the BIA decided *Acosta*, 19 I. & N. Dec. at 233, it observed that the *ejusdem generis* principle of statutory construction was "most helpful" in interpreting the phrase "particular social group." It reasoned that it should interpret "particular social group" in a manner consistent with the other four enumerated grounds—all of which are based on immutable (race and nationality) or fundamental (religion and political opinion) characteristics for which an individual should not be punished. The BIA has not required a showing of social visibility and particularity for these four enumerated grounds – all that is required is a showing that the individual has a well-founded fear of persecution on account of the specific ground. The BIA has not explained why the "particular social group" ground should now be analyzed differently than the other four grounds, or why it departed from the principle of *ejusdem generis*.

The Board's reliance in *C-A-* on the UNHCR's Guidelines on the interpretation of the term particular social group to justify its requirement of social visibility beyond the *Acosta* test is patently erroneous.[4] As set forth in the *amicus* brief to be submitted by UNHCR, adopted herein by reference, the UNHCR Guidelines do not establish an *Acosta*-plus standard at all. They indicate only that, if the applicant cannot meet the immutable or fundamental characteristics standard, then, *in the alternative*, the court may consider whether a "social perception" test has been met. *See* Br. for *Amicus Curiae* UNHCR at Part I.C & III.A. Moreover, and significantly, the "social perception" test is far different from the confusing "social visibility" standard adopted by the BIA. *See id.* at Part III.B. UNHCR has clarified its position numerous times, yet the Board continues to adhere to its contrary position. *See* Br. for *Amicus Curiae* UNHCR filed in Support of Respondent B before the BIA (dated Aug. 17, 2010) (attached as Appendix J).

The Board also purported to rely on the Second Circuit's decision in *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991). This approach fares no better. In *Matter of C-A-*, 23 I. & N. Dec. at 956, the Board noted that the *Gomez* court required that members of a social group "be externally distinguishable." In so doing, the BIA

[4] *See* 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).

misunderstood the Second Circuit, which has since affirmed its adherence to *Acosta* and explained that the language in *Gomez* concerned the likelihood of being targeted for future persecution on the basis of social group membership, and was not intended to set forth a rule on the cognizability of social groups. *See Koudriachova v. Gonzales*, 490 F.3d 255, 262 (2d Cir. 2007) ("we have recently clarified that the best reading of *Gomez* is one that is consistent with *Acosta*"). The Board is aware that the Second Circuit has distanced itself from *Gomez* and affirmed *Acosta*, *see Matter of A-M-E- & J-G-U*, 24 I. & N. Dec. at 75 n.7, yet the BIA has not changed its approach.

The BIA claimed that groups it previously found to be cognizable had "characteristics that were highly visible and recognizable by others in the country in question." *Matter of C-A-*, 23 I. & N. Dec. at 960. However, there is no evidence of these "requirements" in the prior decisions, and the BIA failed to explain how previously accepted groups were "visible" and "recognizable" to others. With good reason, the Third Circuit has questioned the BIA's assertion on this point, stating that it was "hard-pressed to understand how the 'social visibility' requirement was satisfied in prior cases using the *Acosta* standard." *Valdiviezo-Galdamez*, 663 F.3d at 604. As Judge Hardiman put it bluntly in his concurrence, "the BIA's analysis comes undone when it states in conclusory fashion that all of

the groups recognized as 'particular social groups' in earlier cases would meet the 'particularity' and 'social visibility' requirements." *Id*. at 616.

The Board's subsequent decisions make plain that the new approach is a radical departure from *Acosta*. Perhaps the most illustrative example of the Board's unreasoned departure from *Acosta* is the agency's inconsistent treatment of family-based social groups before and after its decision in *C-A-*. In *Acosta*, 19 I. & N. Dec. at 233, the Board expressly stated that "kinship ties" could be an immutable characteristic that defines a particular social group. In cases following *Acosta*, but prior to *C-A-*, the BIA consistently recognized families as social groups, albeit in non-precedential opinions. *See, e.g.*, *Matter of Sukhrajkaur Harbhajan Heer*, 27 Immig. Rptr. B1-112 (BIA 2003) ("The family is recognized as a particular social group." (quotation marks omitted)); *Matter of Sako Khachikyan*, 2005 Immig. Rptr. LEXIS 18155 (BIA 2005) ("family is recognized as a particular social group"); *Matter of Khacik Hagopyan a.k.a. Aramais Barsegyan*, 2006 Immig. Rptr. LEXIS 3505 (BIA 2006) ("family can constitute a particular social group for asylum purposes").[5]

Once the Board adopted the requirements of "social visibility" and "particularity," it began to reject family-based social groups, without any

[5] Notably, "every circuit to have considered the question has held that family ties can provide a basis for asylum." *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011).

meaningful explanation for its inconsistent interpretation. *See, e.g.*, *Matter of F-N-*, at 2 (BIA Apr. 16, 2010) (attached as Appendix C) (asserting without elaboration that the proffered family social group "lack[ed] the necessary particularity and social visibility"); *Matter of G-M-*, at 2 (BIA Mar. 24, 2010) (attached as Appendix D) (stating that while the BIA "agree[s] that a family may constitute a particular social group . . . respondents have failed to demonstrate that their family has any recognized level of social visibility"); *Matter of R-N-*, at 2 (BIA Jan. 28, 2008) (attached as Appendix E) (holding that "respondent has not shown that Mexican society, or any substantial segment of it, perceives his immediate family to constitute a discrete 'social group' in any sense, so as to satisfy the social visibility criteria elucidated in this Board's precedents").

This Court should not defer to the Board's requirements of "social visibility" and "particularity." The Board has provided no reasonable explanation for its abrupt shift in its interpretation of the statutory term particular social group.

B. The BIA's "Social Visibility" and "Particularity" Requirements Are Unreasonable.

The year after the BIA issued its decision in *C-A-*, this Court stated that the BIA's addition of the "social visibility" and "particularity" requirements was the agency's attempt to "clarify[] the definition of 'particular social group.'" *Arteaga v. Mukasey*, 511 F.3d 940, 944 (9th Cir. 2007); *see also Matter of S-E-G-*, 24 I. & N. Dec. at 582 (social visibility and particularity "give greater specificity to the

definition of a social group"). If the BIA's goal was to provide clarity to the definition of "particular social group," it has failed completely. The last five years have demonstrated that the addition of the requirements "has only compounded the confusion." *Henriquez-Rivas*, 2011 WL 3915529, at *3 (Bea, J., concurring). Confusion over the requirements has extended to all levels of the immigration adjudication system.

1. *The BIA's Requirements Are Incoherent and Inconsistent*.

By failing to provide clear, workable standards, the Board has disregarded its obligation to issue precedential decisions that provide "clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations." 8 C.F.R. § 1003.1(d)(1) (2011). This Court has noted that consistent and reasoned decisionmaking by the agency "serves a critical purpose: the provision of fair notice to those subject to the agency's decisions." *Marmolejo-Campos*, 558 F.3d at 935 (quotation marks omitted); *see, e.g.*, *Su Hwa She v. Holder*, 629 F.3d 958, 963 (9th Cir. 2010) (individuals in removal proceedings are denied due process when the Board fails to set forth a "minimum degree of clarity" in its decisions); *Husyev v. Mukasey*, 528 F.3d 1172, 1182 (9th Cir. 2008) (individuals in removal proceedings are denied due process "where they are not given adequate notice of procedures and standards that will be applied to their

claims for relief"). Given that a substantial number of asylum seekers are unrepresented, there is an even greater need for clarity. *See* Br. for *Amicus Curiae* NIJC. Moreover, "the BIA's refusal to provide 'clear and uniform guidance' makes [the Court's] task as a reviewing court immeasurably harder." *Marmolejo-Campos*, 558 F.3d at 935.

To begin, the BIA has not clearly explained whether the showing of social visibility and particularity are "requirements" or merely "factors." For example, in *Matter of A-M-E- & J-G-U*, 24 I. & N. Dec. at 74, the BIA states that social visibility is a "factor" in the particular social group analysis, but in the very next sentence states that it is a "requirement." In practice, the Board has treated social visibility and particularity as requirements, which has resulted in a restrictive reading of the INA to deny asylum to individuals who share common characteristics of the kind expressly recognized in *Acosta*. *See, e.g.*, *Matter of A-T-*, 24 I. & N. Dec. 296 (BIA 2007) (questioning the social visibility of a group defined by gender, tribe affiliation and opposition to cultural practice), *vacated by* 24 I. & N. Dec. 617 (BIA 2008).[6] In fact, the BIA has not found any proposed

[6] The BIA ultimately denied the case based on the applicant's failure to establish a clear probability of persecution and not the lack of a cognizable social group. Though the Attorney General later vacated the BIA's decision, the case is illustrative of the restrictive impact of the social visibility requirement and the BIA's departure from pre-*C-A-* case law. *See Matter of Kasinga*, 21 I. & N. Dec. 357 (recognizing social group defined by gender, tribe affiliation and opposition to cultural practice without reference to social visibility).

social groups to be cognizable since it imposed the requirements of social visibility and particularity. The BIA's restrictive construction of the statute is inconsistent with congressional intent to bring U.S. law into compliance with the 1951 Refugee Convention (Convention) and 1967 Protocol (Protocol). *See* Br. for *Amicus Curiae* UNLV, adopted here by reference; *see also, e.g.*, *Khan v. Holder*, 584 F.3d 773 (9th Cir. 2009) (explaining that the purpose of the 1980 Refugee Act was to bring United States refugee law into conformity with the Protocol); *Yusupov v. Att'y Gen.*, 650 F.3d 968, 979 (3d Cir. 2011) ("Congress intended to protect refugees to the fullest extent of our Nation's international obligations." (quotation marks omitted)).

With respect to "social visibility," the Board has not clearly stated whether it is using the term in the literal sense (*i.e.*, group members would be readily identifiable to a stranger on the street) or in the general sociological sense (*i.e.*, although individual members are not readily identifiable, the existence of such a group is recognized by members of the society), "or even-whether it understands the difference." *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009).

In its brief, the Government contends that it and the BIA have "rejected the suggestion . . . that 'social visibility' requires a characteristic that is 'identifiable to a stranger on the street.'" Resp't's Opp'n to Pet'r's Pet. for Reh'g En Banc at 10 n.3 (quotation marks omitted). However, in prior cases the Government has taken

the opposite position. For example, before the Seventh Circuit, the Government was "emphatic" that one "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, because of your appearance, gait, speech pattern, behavior or other discernable characteristic." *Benitez Ramos*, 589 F.3d at 430 (emphasis added). Before the Third Circuit, the Government "contend[ed] that 'social visibility' *does not mean* on-sight visibility," and then proceeded to provide an explanation that the court could not distinguish from on-sight visibility. *Valdiviezo-Galdamez*, 663 F.3d at 606 (emphasis added). This led the Third Circuit to "join the Court of Appeals for the Seventh Circuit in wondering 'even-whether [the BIA] understands the difference.'" *Id.* at 606-07 (quoting *Benitez Ramos*, 589 F.3d at 430). It is telling that even the Government's lawyers cannot seem to take a consistent view on what social visibility means.

The Board's own precedents are also in conflict with the position the Government now takes here. In *C-A-*, 23 I. & N. Dec. at 960, the BIA applied visibility in the literal sense when it rejected the proposed social group of former noncriminal drug informants because "the very nature of the conduct at issue is such that it is generally out of the public view." *See also Matter of E-A-G-*, 24 I. & N. Dec. at 594 (holding that group lacked social visibility because the applicant did

not allege that he "possesses any characteristics that would cause others in Honduran society to recognize him as one who has refused gang recruitment").[7]

Understood in either sense, in *Gatimi*, the Seventh Circuit observed that the requirement of social visibility simply "makes no sense." 578 F.3d at 615. The Third Circuit agreed. *See Valdiviezo-Galdamez*, 663 F.3d at 605. Indeed, members of groups targeted for persecution "will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they will not be 'seen' by other people in society 'as a segment of the population.'" *Gatimi*, 578 F.3d at 615. Moreover, while visibility of the group might be relevant to nexus or the likelihood of persecution, "[i]t remains unclear . . . why 'social visibility' should be used to define the group in the first place." *Valdiviezo-Galdamez*, 663 F.3d at 615 n.4 (Hardiman, J., concurring); *see also*

[7] IJs regularly apply social visibility in the literal sense and demonstrate a lack of understanding for the term. *See, e.g.*, *Matter of X*, at 19 (IJ Dec. Nov. 2008) (attached as Appendix F) (holding that applicant's group was not visible in her country because "like [the] very nature of confidential informants, women who assert independence from domineering and abusive male partners are generally outside public view" and "respondent's independence against her abusive partner took place in the United States"); *Matter of X*, at 8 (IJ Dec. Mar. 2, 2011) (attached as Appendix G) (holding group did not have sufficient visibility because "it is difficult to see how the respondent can argue that she was in some sense socially visible in the society she lived in in El Salvador if even close relatives did not actually recognize" she was in an abusive relationship); *Matter of X*, at 12 (IJ Dec. Feb. 1, 2011) (attached as Appendix H) (holding group was not be distinguishable or recognizable to Kenyan society at large because the "plight of women remains altogether ignored").

Benitez Ramos, 589 F.3d at 430 (noting that while visibility "might be relevant to the likelihood of persecution," the Board failed to explain its relevance for determining if persecution "will be on the ground of group membership").

The BIA has similarly provided inconsistent and irrational interpretations of the "particularity" requirement. The Third Circuit concluded that "'[p]articularity' appears to be little more than a reworked definition of 'social visibility' and the former suffers from the same infirmity as the latter." *Valdiviezo-Galdamez*, 663 F.3d at 608. Assuming *arguendo* that the particularity requirement has any independent significance, the Board has failed to provide a consistent definition of the term. At times, the Board suggests that particularity goes to the size of the group. *See Matter of S-E-G-*, 24 I. & N. Dec. at 585 (a group lacks particularity if its membership is "potentially large and diffuse").[8] At other times, the Board suggests that particularity requires that a group be defined so that it is clear who is in, and who is outside, the group, thus avoiding groups which are too "subjective, inchoate, and variable" to be cognizable. *Matter of A-M-E- & J-G-U*, 24 I. & N. Dec. at 76; *see also Matter of S-E-G-*, 24 I. & N. Dec. at 584 ("[t]he essence of the 'particularity' requirement . . . is whether the proposed group can accurately be

[8] IJs also interpret particularity to restrict the size of the group. *See, e.g.*, *Matter of* X, at 12 (IJ Dec. Sept. 6, 2007) (attached as Appendix I) (concluding that "the large size of the respondent's proposed group relative to the general population of Honduras tends to undermine the argument that her group is perceived as socially distinct").

described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons").

To the extent the BIA intends for the particularity requirement to constrict social group status to small groups, that limitation would violate the principle of *ejusdem generis*, as the other enumerated grounds in the INA are not so limited.[9] *See* Br. for *Amicus Curiae* UNHCR (arguing that a group need not be small to qualify as a particular social group adopted herein by reference); Br. for *Amicus Curiae* NIJC (same).

To the extent the Board intends to deny protection to social groups with defining characteristics that involve some measure of subjectivity, such an interpretation is inconsistent with precedent and violates the principle of *ejusdem generis*. In *Kasinga*, the Board found that the social group was defined in part by the members' opposition to the cultural practice of female genital cutting. Ideas about what opposition means, just as ideas about the other enumerated grounds, for example race, may vary and thus involve some degree of subjectivity.

Acosta's immutable and fundamental criteria approach provides sufficient guidance to define and delineate group membership. Indeed, a separate

[9] Importantly, establishing membership in a particular social group does not make one automatically eligible for protection. An applicant must also show a well-founded fear of persecution on account of that trait, establish that internal relocation is not possible, and merit protection in the exercise of discretion.

requirement of "particularity" adds little to the analysis; groups deemed to lack sufficient particularity, *see, e.g.*, *Matter of A-M-E- & J-G-U*, 24 I. & N. Dec. 69 (holding group defined by wealth lacks particularity); *Ochoa v. Gonzales*, 406 F.3d 1166, 1171(9th Cir. 2005) (holding group defined in part by status as business owner lacks particularity), might likewise flunk the *Acosta* approach, *see, e.g.*, *Matter of Jairo Ouintero Rivera*, 2005 Immig. Rptr. LEXIS 10177 (rejecting group defined in part by status as a member of the business community under *Acosta*).

The lack of clear definitions has led the Board to conflate social visibility and particularity with the separate requirements of well-founded fear and nexus. Well-founded fear and nexus are separate from the "particular social group" analysis. *See, e.g.*, *Ayala v. Holder*, 640 F.3d 1095, 1096-98 (9th Cir. 2011) (court reviews de novo whether a group constitutes a "particular social group," but reviews for substantial evidence whether persecution was or will be on account of applicant's membership in such group). However, the Board incorrectly conflates the elements looking to the persecutor's motives, for example, to determine if a group exists rather than looking to the characteristics of the group itself. *See, e.g.*, *Matter of S-E-G-*, 24 I. & N. Dec. at 585 (looking to whether persecutors target members of group "in order to punish them" for the group's shared characteristics to determine if group has particularity rather than to characteristics themselves); *Matter of A-M-E- & J-G-U*, 24 I. & N. Dec. at 75 (relying on the fact that

individuals of all socioeconomic levels are targets of violence to reject the social visibility of "wealthy Guatemalans").

The Board has not provided a rational and consistent explanation of what is meant by "social visibility" and "particularity" nor why it has imposed these requirements or how the requirements could possibly be met. *See Henriquez-Rivas*, 2011 WL 3915529, at *3 (Bea, J., concurring) ("[n]either this court's opinions, nor those of the BIA, have clearly defined [these] factors, nor provided reasoned applications of those factors to the facts of each case"). The Board's interpretation therefore is not entitled to *Chevron* deference.

2. *The Ninth Circuit Has Applied the Requirements Inconsistently*.

The BIA's confusion regarding the "social visibility" and "particularity" requirements has been replicated in the Courts of Appeals, including this Court. For example, this Court has not clearly stated whether they should be treated as factors or criteria or hard and fast requirements. *See Perdomo v. Holder*, 611 F.3d 662, 667 (9th Cir. 2010) (factors); *Ramos-Lopez v. Holder*, 563 F.3d 855, 860-61 (9th Cir. 2009) (requirements); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 744-45 (9th Cir. 2008) (factors and requirements); *see also Scatambuli v. Holder*, 558 F.3d 53, 59 (1st Cir. 2009) (factors and criterion); *Ucelo-Gomez*, 509 F.3d at 73 (requirements); *Faye v. Holder*, 580 F.3d 37, 41 (1st Cir. 2009) ("tests").

Moreover, as Judge Bea put it, this Court has "practically ignored" social visibility, a standard "which Judge Posner, writing for the Seventh Circuit, has concluded 'makes no sense,'" and has not "specified whether 'social visibility' requires that the immutable or fundamental characteristic particular to the group be readily identifiable to a stranger on the street, or must simply be 'recognizable' in some more general sense to the community at-large." *Henriquez-Rivas*, 2011 WL 3915529, at *3. For example, in *Santos-Lemus*, the Court defined social visibility in a general societal sense. However, the Court's reasoning suggests it was applying the requirement literally. The Court held that the social group of "young men in El Salvador resisting gang violence" lacks social visibility. *Santos-Lemus*, 542 F.3d at 745-46. The Court reasoned that because "the only people who appear to know about Santos-Lemus's anti-gang stance are his own family and some members of the Mara gang," and "[n]othing in the record establishes he was a well-known anti-gang activist or even outspoken about gangs," "there does not appear to be anything about Santos-Lemus's actions that would distinguish him from the rest of the population or cause others who oppose gang violence to recognize him as a member of their 'group.'" *Id*. at 746.

This Court has applied the particularity requirement inconsistently, employing reasoning that is "frequently at odds" with the BIA's published opinions on the matter that hold a "particular social group need *not* share kinship ties or

origin, or have identical interests, lifestyles, or political leanings to qualify for asylum." *See Henriquez-Rivas*, 2011 WL 3915529, at *4. In some cases, the Court "take[s] as a touchstone for the 'particularity' requirement, some aspect of identity (birth location, sexual orientation, kinship), which may be immutable, but reject[s] others (such as voluntary inclusion in an informant group) that, *once accomplished*, are similarly immutable." *Id*. at *5. In *Perdomo*, 611 F.3d at 667, the Court clarified that a group's numerosity is not fatal, but it still has not provided an explanation for why identity characteristics are particular, but other immutable characteristics are not.[10]

C. Courts of Appeals That Have Deferred to the BIA Have Not Engaged in a Persuasive *Chevron* Analysis.

While two Courts of Appeals that have most deeply delved into this subject have declined to defer to the Board's approach, the Tenth Circuit recently deferred to the BIA's social visibility and particularity requirements in a decision that illustrates the requirements' confusion. *See Rivera Barrientos v. Holder*, 658 F.3d 1122 (10th Cir. 2011), as corrected on denial of rehearing en banc, 666 F.3d 641 (10th Cir. 2012). The court recognized that social groups prior to *C-A-* would not meet social visibility if interpreted in the literal sense, but took the BIA at its word

[10] If "social visibility" and "particularity" are to have any coherent meaning at all, the group proffered by Ms. Henriquez Rivas must satisfy the requirements. *See* Pet'r's Supp. Br. on Reh'g En Banc (adopted herein by reference).

that the groups recognized prior to *C-A-* were "highly . . . recognizable" in the general societal sense. The court thus concluded that the BIA could not have meant the requirement to be applied literally and, as such, it does not represent a departure from *Acosta* and its progeny. The court stated that if it believed the BIA interpreted social visibility in the literal sense, the court "might also find it problematic." *Id*. at 1232.

The Tenth Circuit's analysis is unpersuasive. The court failed to grapple with how the groups deemed cognizable before *C-A-* would fare under the societal perception definition of visibility and the BIA's inconsistent application of the requirement. Further, like the BIA, it is not at all clear that the Tenth Circuit grasps the difference. In *Rivera Barrientos*, the Tenth Circuit explained that "social visibility requires that the relevant trait be potentially identifiable by members of the community, either because it is evident or because the information defining the characteristic is publically accessible." *Id*. This definition appears to be no different than the literal approach.

Other Courts of Appeals have applied the new requirements, but without explicitly adopting them or without engaging in a full or persuasive analysis of the agency's unreasoned departure from *Acosta*. *See, e.g.*, *Mendez-Barrera v. Holder*, 602 F.3d 21 (1st Cir. 2010); *Ucelo-Gomez*, 509 F.3d 70; *Al-Ghorbani v. Holder*,

585 F.3d 980 (6th Cir. 2009); *Davila-Mejia v. Mukasey*, 531 F.3d 624 (8th Cir. 2008); *Castillo-Arias*, 446 F.3d 1190.

* * * * *

The Board has interpreted the particular social group ground for asylum in an inconsistent and irrational manner that is unworthy of *Chevron* deference. The BIA's unreasonable interpretation of the statute has led to confusion and inconsistent and arbitrary adjudication at all levels of the immigration system. It has left asylum seekers to navigate a system "governed . . . by the vagaries and policy preferences" of the particular adjudicator(s) she draws, rather than the consistent application of clearly defined rules. *Henriquez-Rivas*, 2011 WL 3915529, at *5 (Bea, J., concurring). This Court should exercise its important role to ensure that the agency engages in reasoned decisionmaking. As the Seventh Circuit has done, the Court could reject the new requirements as an impermissible interpretation of the Act. The Board has had ample opportunity to explain its departure from *Acosta* in a rational and reasonable way, and it has failed to do so at every turn. *See Gatimi*, 578 F.3d at 615-17 (rejecting the BIA's requirement of social visibility and remanding for consideration of social group claim).

At a minimum, the Court should remand to the BIA and require that the agency provide a reasoned explanation for its departure from *Acosta* as well as clear guidance regarding the new requirements of "social visibility" and

"particularity." *See Valdiviezo-Galdamez*, 663 F.3d at 612 (Hardiman, J., concurring) (declining to defer to BIA's requirements of social visibility and particularity and affording BIA opportunity to provide reasoned explanation on remand); *see also Watson v. Holder*, 643 F.3d 367, 370 (2d Cir. 2011) (per curiam) (remanding for the BIA to explain "the legal and/or logical basis for [its] interpretation" of "legitimated" under 8 U.S.C. § 1101(c)(1)).

CONCLUSION

Amici respectfully submit that the BIA's requirements of "social visibility" and "particularity" are not entitled to *Chevron* deference.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 29-2(c)(2), that the foregoing Brief of *Amici Curiae* is proportionally spaced, has a typeface of 14 points, and is 6970 words per the word count feature of Microsoft Word.

s/ Karen Musalo

Karen Musalo

Dated: February 21, 2012

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 21, 2012. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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