No. 10-9527

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Minta Del Carmen RIVERA BARRIENTOS,
Petitioner,

v.

Eric H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,
Respondent.

BRIEF OF *AMICUS CURIAE* NATIONAL IMMIGRANT JUSTICE CENTER IN SUPPORT OF PETITION FOR REHEARING OR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

The National Immigrant Justice Center (NIJC) is a Program of the Heartland Alliance for Human Needs and Human Rights, a 501(c)(3) non-profit corporation located in Chicago, Illinois. No person or corporation owns any percentage of either NIJC or the Heartland Alliance, nor is the organization publicly held.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National Immigrant Justice Center (NIJC), a program of the Heartland Alliance for Human Needs and Human Rights, is a Chicago-based non-profit organization that provides legal representation and consultation to immigrants, refugees and asylum-seekers of low-income backgrounds across the country. Each year, together with its network of over 1000 pro bono attorneys, NIJC represents hundreds of asylum-seekers before the immigration courts, Board of Immigration Appeals (Board), and the Courts of Appeals. NIJC has subject matter expertise in this area that it believes can assist this Court in its consideration of the present appeal.

SUMMARY OF THE ARGUMENT

Amicus writes in support of Petitioner's request for Rehearing for two principal reasons. First, the Board of Immigration Appeals (BIA) decision on which Petitioner's case rests, *Matter of S-E-G-*, is premised on a misreading of the United Nations High Commissioner for Refugees (UNHCR) Guidelines construing the term "particular social group." While the BIA is not bound to construe the asylum statute in accord with the UNHCR Guidelines, Amicus urges that the BIA's misapprehension – rather than conscious distinction – cannot serve as the basis to alter its prior rule under *Matter of Acosta*, particularly where the BIA purports to rely on the UNHCR Guidelines in construing the statute. Here, where the BIA's departure from the UNHCR Guidelines is based on an incorrect understanding, Petitioner's case should be remanded to the agency under the ordinary remand rule for it to clarify its misapprehension in the first instance.

Second, the BIA's "social visibility" test represents an unexplained departure from its long-standing "immutable characteristic" test, which had governed for over two decades. Because the BIA has never acknowledged or explained its departure from a long-standing rule or reconciled the two tests – as the Seventh and, most recently, the Third Circuit have opined - the BIA's decision in not entitled to *Chevron* deference. The Court should remand on this basis as well, and permit the BIA to address these inconsistencies.

ARGUMENT

I. The agency's most recent construction of the term "particular social group" is premised on an erroneous interpretation of the UNHCR Guidelines

Under Supreme Court precedent, published decisions of the BIA receive deference under the rule announced in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 437 U.S. 837 (1984). *INS v. Aguirre-Aguirre*, 526, U.S. 415, 426-427 (1999). However, where the BIA's exercise of its interpretive authority was premised on an underlying misapprehension of law, the Supreme Court has applied an "Ordinary Remand Rule" whereby the federal courts remand the matter to permit the BIA to address the matter free from the misapprehension in the first instance. *See Negusie v. Holder*, 555 U.S. 511, 520 (2009); *INS v. Orlando Ventura*, 537 U.S. 12, 16-17 (2002)*; Gonzalez v. Thomas,* 547 U.S. 183, 186 (2006). Because the BIA rule interpreting the meaning of "particular social group" in this case is based on a misapprehension of, rather than a reasoned departure from, the UNHCR Guidelines, the Court should grant re-hearing and permit the BIA to address its misapprehension. *Negusie v. Holder*, 555 U.S. at 520 ("[w]hatever

weight or relevance these various authorities may have in interpreting the statute should be considered by the agency in the first instance, and by any subsequent reviewing court, after our remand").

The UNHCR has long been recognized as a persuasive authority in interpreting the asylum laws, which were enacted by Congress explicitly to bring the United States into compliance with various international treaty obligations related to refugees. *INS v. Aguirre-Aguirre*, 526, U.S. 415, 427 (1999), *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438-39 (1987); *Negusie v. Holder*, 555 U.S. at 518. In fact, the BIA has often considered UNHCR guidance in interpreting U.S. asylum statutes. One such instance was in *Matter of Acosta*, the case in which the BIA first construed the term "particular social group" over 25 years ago, to arrive at its "immutable characteristic" test. *Matter of Acosta*, 19 I&N Dec. 211, 221 (BIA 1985). In *Acosta*, the BIA relied extensively on the UNHCR Handbook to provide a thoughtful, well-reasoned definition for the term "refugee," including the term "particular social group." *Id.* (noting that while not binding, the UNHCR Handbook is a "useful tool" in providing "one internationally recognized interpretation of the Protocol.")

Here, the BIA purported to apply the UNHCR Guidelines[1], but in doing so, it misapprehended the UNHCR's social visibility test. The BIA first referred to the UNHCR particular social group analysis as "combin[ing] elements of the *Acosta*

[1] UN High Commissioner for Refugees, *Guidelines on International Protection No. 2: "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*, 7 May 2002, HCR/GIP/02/02, available at: http://www.unhcr.org/refworld/docid/3d36f23f4.html

immutable or fundamental characteristic approach, as well as the "social perception" approach." *See Matter of C-A-*, 23 I&N Dec. 951, 956 (BIA 2006) (emphasis added). This *sub silentio* merger of the immutable/fundamental characteristic test and the social perception test into codependent elements portended a dramatic and unsupported shift in the BIA's "particular social group" analysis. In its subsequent decision in *Matter of S-E-G-*, the BIA repeated its citation to the UNHCR Guidelines, but more clearly turned social visibility test into a requirement for asylum eligibility:

> In reaffirming the *requirement* that the shared characteristic of the group should generally be recognizable by others in the community, we relied, in part, on the Second Circuit's view that 'the attributes of a particular social group must be recognizable and discrete"… In addition, we referred to the 2002 guidelines of the United Nations High Commissioner for Refugees, which endorse an approach in which an *important factor* is whether the members of the group are 'perceived as a group by society.'

24 I&N Dec. 579, 586 (BIA 2008). But the UNHCR Guidelines, as the UNHCR itself noted in its brief as *amicus curiae* in Petitioner's case, do not *combine* elements of *Acosta* and the "social perception" approach. Brief of Amicus Curiae United Nations High Commissioner for Refugees at 11-12, *Rivera Barrientos v. Holder*, 658 F.3d 1222 (10th Cir. 2011). Instead, they create alternate means of demonstrating a cognizable particular social group. *Id.*

Amicus agrees with the Panel that the BIA is free to disagree with the UNHCR, whose guidance is persuasive, but not binding, authority. *INS v. Aguirre-Aguirre*, 526, U.S. 415 at 427. However, when the BIA has disagreed with the UNHCR in the past, the BIA has usually acknowledged and explained its disagreement. *See e.g., Acosta* at 228 (discussing the UNHCR's interpretation of the term "well-founded fear," but declining to

fully adopt it as "inconsistent with Congress' intention and with the meaning of the Protocol"). But here, the BIA did not purport to disagree with the UNHCR; to the contrary, the BIA professed to rely on the UNHCR Guidelines in creating a new requirement that alters a 25-year old rule. *See Matter of C-A-*, 23 I&N Dec. 951 at 956, *Matter of S-E-G-*, 24 I&N Dec. 579 at 586. The BIA has no obligation to defer to international law; but here, the BIA amended a decades-old test based on an erroneous interpretation of those Guidelines, a misapprehension which the BIA itself has never confronted. See *Valdiviezo-Galdamez v. Holder*, No. 08-4564, WL 5345436 at * 26 (Hardiman, J., concurring) (noting that the "problem" with the BIA's interpretation is that the "…the Board has failed to acknowledge a change in course and forthrightly address how that change affects the continued validity of conflicting precedent….")

For *Chevron* deference to apply, an agency must correctly understand the contours of its authority and must consciously exercise that authority. The Supreme Court's recent decision in *Negusie v. Holder,* illustrates the point. In *Negusie*, the BIA applied a prior Supreme Court decision to Negusie's case, though that case turned on a different statute. *Negusie* at 522-523. The Supreme Court, after finding that the BIA had failed to "appreciate" the distinctions of the two statutes at issue in the cases, then found it appropriate to remand the matter to the BIA, without addressing the matter substantively. *Id*. It found this approach (over Justice Stevens' objections) to be required by the Ordinary Remand Rule which the Supreme Court enunciated in *INS v. Ventura*, 537 U.S. at 16-17 (Stevens, J., concurring).

Likewise, in situations where an agency has not correctly apprehended the scope of its authority – such as where it incorrectly believes a statute to have a plain meaning – the federal courts have found *Chevron* deference inappropriate. *See*, *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006) ("[D]eference to an agency's interpretation of a statute is not appropriate when the agency wrongly believes that interpretation is compelled by Congress." (internal quotation marks omitted)); *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

It may be that the BIA has good reasons for amending or clarifying its "immutable characteristic" rule, announced over 25 years ago in *Matter of Acosta*.[2] However, the BIA has never reconciled the social visibility rule (whether or not external visibility is required) with its long-standing approach under *Acosta*. *See Valdiviezo-Galdamez v. Holder*, No. 08-4564, 2011 WL 5345436, *18 (3d Cir. 2011) ("[s]ince the "social visibility" requirement is inconsistent with past BIA decisions, we conclude that it is an unreasonable addition to the requirements for establishing refugee status where that status turns upon persecution on account of membership in a particular social group"). The proper course for the Panel to take is to remand the case back to the BIA so the agency itself can clarify what appears to be an abrupt change in position that has given rise to inconsistent rulings.

[2] Following the Seventh Circuit's remand to the agency in *Gatimi v. Holder*, which itself was remanded by the BIA to the Immigration Court, one BIA member dissented, believing the *Gatimi* decision to constitute "a finding that the Board has failed adequately to explain why social visibility is a necessary element (or at least an important consideration in determining the existence) of a particular social group." (internal citations omitted). *See Matter of Gatimi*, at 2 (BIA November 22, 2010) (Pauley, Board member, dissenting), available at http://www.ilcm.org/litigation/BIA_Gatimi_Remand_Order.pdf.

II. The BIA's social visibility requirement is an unexplained departure from a long-held rule

Where an agency announces an interpretation that is a departure from a long-established rule, the agency must provide an explanation for its change in position. *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 129 S.Ct. 1800, 1811 173 L.Ed.2d 738 (2009) ('[a]n agency may not…depart from a prior policy *sub silentio* or simply disregard rules that are still on the books…the agency must show that there are good reasons for the new policy"); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 41-43 (1983)("[a]gencies must follow, distinguish, or overrule their own precedent…an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."); *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1306 (10th Cir. 1999) ("When an agency departs from a prior interpretation of a statute…the agency must justify the change of interpretation with a reasoned analysis.") (internal citations omitted).

The BIA may have unintentionally altered its particular social group test without appreciating its effect on the traditional *Acosta* formulation.[3] Moreover, it is possible the inconsistencies between the new social visibility rule and prior precedent may be resolved through further development of that test. But, as Petitioner details in her Petition for Rehearing, the BIA has not addressed or reconciled the contradictions in law beyond describing in a conclusory fashion that past successful social group claims under

[3] In *Matter of C-A-*, for instance, the BIA concluded, "[ha]ving reviewed the range of approaches to defining particular social group, we continue to adhere to the *Acosta* formulation," *Matter of C-A-* at 956.

the *Acosta* formulation could likewise meet its social visibility requirements. See Petitioner's Petition for Rehearing *En Banc* or Panel Rehearing, *Rivera-Barrientos v. Holder*, 658 F.3d 1222 (10th Cir. 2011) filed November 23, 2011 at 13-14 (Petitioner's Rehearing Petition); *see also Matter of C-A-*, at 960; *Valdiviezo-Galdamez* at * 21 ("…[t]he government's position appears to be little more than an attempt to avoid the tension arising from the BIA's various interpretations of that phrase, and the fact that the BIA's present interpretation would have excluded the asylum claims that were granted in *In re Kasinga, In re Toboso–Alfonso,* and *In re Fuentes.…") .* And a clear explanation describing the change in its "particular social group" interpretation is precisely what is required here.

The Panel suggests that the *Chevron* standard "is not more searching where the agency's decision is a change from prior policy." *Rivera Barrientos v. Holder*, 658 F.3d 1222 at 1227. However, an agency's new interpretation which conflicts with an earlier one is entitled to 'considerably less deference' than a consistently held agency view. *INS v. Cardoza-Fonseca*, 480 U.S. at 446; *Efagene v. Holder*, 642 F.3d 918, 922 (10th Cir. 2011); *Federal Election Com'n v. Colorado Republican Federal Campaign Committee*, 59 F.3d 1015 (10th Cir. 1995); *Exxon Corp. v. Lujan*, 970 F.2d 757 (10th Cir. 1992). As the Supreme Court noted, "it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox v. FCC*, 129 S.Ct. 1800 at 1811.

That *Acosta's* "immutable characteristic" test was a well-settled, relied-upon rule that was disrupted by the BIA's introduction of "social visibility" as an additional and irreconcilable requirement .[4] The apparently inconsistent explanation and application of the "social visibility" requirement has been noted by other Courts of Appeals in declining to extend *Chevron* deference to the BIA on this point. *Valdiviezo-Galdamez v. Att'y Gen*. at 31 (BIA's inconsistent interpretation "unfairly forces asylum applicants to shoot at a moving target") (Hardiman, J., concurring).[5] As Judge Posner wrote in *Gatimi v. Holder*, "[w]hen an administrative agency's decisions are inconsistent, a court cannot pick one of the inconsistent lines and defer to that one…[s]uch picking and choosing would condone arbitrariness and usurp the agency's responsibilities." *Gatimi v. Holder*, 578 F.3d 611, 616 (7th Cir. 2009); *see also Smiley v. Citibank*, 517 U.S. 735, 741 (1996) (noting that, in addition to "[s]udden and unexplained change," "change that does not take account of legitimate reliance on prior interpretation…may be "arbitrary, capricious [or] an abuse of discretion….")

[4] Following the publication of the decision, counsel for *S-E-G-* filed a request for certification with the Attorney General asking the agency to re-visit its decision *See* Request for Certification to the Attorney General in *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008) (filed February 23, 2009), found at http://www.immigrantlawcentermn.org/documents/SEG-AG_Certification_request_final.pdf; Letter of *Amici Curiae* Law Professors in Support of Certification in *Matter of S-E-G,* (filed January 27, 2010), found at http://www.immigrantlawcentermn.org/litigation/AG_certification_amicus_law_professors.PDF; Letter of *Amici Curiae* Organizations in Support of Certification in the *Matter of S-E-G-*, (filed January 27, 2010), found at http://www.immigrantlawcentermn.org/litigation/AG_certification_amicus_NIJC.pdf. In *S-E-G-* itself, the Department of Homeland Security agreed to a joint reopening request at the Board of Immigration Appeals, forestalling an appeal in that case. *See Amicus Curiae* in Support of Attorney General Certification of *Matter of S-E-G* at 3 (Jan. 27, 2010) (found at http://www.ilcm.org/litigation/AG_certification_amicus_NIJC.pdf).

[5] See Pauley Dissent, noting that the BIA's social group jurisprudence is in "disarray" and "inconsistent with" the BIA's "obligation to provide uniform guidance throughout the country as to the meaning of the ambiguous term "particular social group." *Matter of Gatimi*, *supra*, fn. 1.

(internal citations omitted); see also *United States v. Pennsylvania Industrial Chemical Corp.,* 411 U.S. 655, 670-675 (1973) (remanding where the agency decision was contrary to its earlier decisions, legislative history and "subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals…."); *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 295 (1974) (remanding for trial court to ascertain whether company relied on agency regulations subsequently amended). In this regard, the Court should remand to the agency.

CONCLUSION

While the BIA is certainly entitled to deference when it interprets the asylum statute, it cannot modify rules in a vacuum. Where the agency changes course on a well-established rule, particularly where there is persuasive international guidance that is directly relevant to the BIA's interpretation that the BIA has misapprehended, *Chevron* principles require it to acknowledge its departure and explain itself. Under the ordinary remand rule, re-hearing should be granted and the Court should remand Petitioner's case to the agency for it to correct itself.

Respectfully submitted

s/Claudia Valenzuela

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Dated: November 29, 2011

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32 AND 10th CIRCUIT RULE 32

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,462 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This 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) and 10th Cir. R. 32 because it has been prepared in a proportionally spaced typeface using Microsoft Office 2007 in 13 point Times New Roman Font.

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CERTIFICATE OF COMPLIANCE
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Pursuant to Fed.R.App.P. 29(c)(5), undersigned counsel for *Amicus Curiae* on behalf of Petitioner Minta Rivera Barrientos' Petition for Panel Rehearing and Rehearing *En Banc* certifies that no party's counsel authored *Amicus Curiae*'s brief in whole or in part; no party or a party's counsel contributed money that was intended to fund preparing or submitting *Amicus Curiae*'s brief; and no person, other than *Amicus Curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief for *Amicus Curiae*.

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CERTIFICATE OF SERVICE

I, Claudia Valenzuela, do hereby certify that on this 29th day of November, 2011, I electronically filed the foregoing Motion for Leave to Appear as *Amicus Curiae* and Brief of *Amicus Curiae* in support of rehearing – attached thereto as an exhibit – with the Clerk of the Court for the United States of Appeals for the Tenth Circuit by using the CM/ECF system. Participants in this case are registered CM/ECF users. I also caused paper copies to be served on all participants to this case by Federal Express 2-Day Delivery Service.

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