Case No. 11-2706

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

N.L.A., H.O.P.M., & S.L.P.L.

Petitioners,

v.

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

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

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Dated: November 30, 2011

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STATEMENT OF JURISDICTION

Petitioners [redacted], [redacted], and [redacted] ("Petitioners") jurisdictional statement is incomplete and incorrect. *See* Seventh Circuit Rule 28(b). Petitioners, natives and citizens of Colombia, appeal a final order of removal issued by the Board of Immigration Appeals ("Board") on June 28, 2011. A.R. 3-8.[1] The Board's decision affirmed an Immigration Judge's finding that Petitioners failed to meet their burden of proof for asylum, withholding of removal, or protection under the Convention Against

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[1] "A.R." refers to the Certified Administrative Record on file with the Court. "Pet'r. Br." refers to Petitioner's Brief.

Torture ("CAT"). A.R. 96-108. The Board had jurisdiction to review the Immigration Judge's decision pursuant to 8 C.F.R. §§ 1003.1(b)(3) and 1240.15.

This Court's jurisdiction is governed by 8 U.S.C. § 1252, as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106, 119 Stat. 231 (May 11, 2005), which confers exclusive jurisdiction upon the Courts of Appeals to review final orders of removal issued by the Board. The instant petition for review was timely filed on July 26, 2011, within 30 days of the Board's June 28, 2011, decision, and venue properly lies in this Court because the removal proceedings were completed in Chicago, Illinois. 8 U.S.C. § 1252(b)(2); *see* A.R. 96.

STATEMENT OF THE ISSUES

1. Whether any reasonable factfinder would be compelled to conclude that Petitioners demonstrated past persecution by the Revolutionary Armed Forces of Colombia ("FARC"), where they were never directly threatened, harmed, or otherwise mistreated while they lived in Colombia?

2. Whether any reasonable factfinder would be compelled to conclude that Petitioners harbor well-founded fear of future persecution, by FARC where members of Petitioners' family have lived unharmed in Colombia for years?

STATEMENT OF THE CASE

Petitioners are natives and citizens of Colombia who were admitted as visitors to the United States on January 13, 2004. A.R. 96, 1227. On January 11, 2005, the lead Petitioner filed an application for asylum and withholding of removal with the Department of Homeland Security ("DHS"). A.R. 368-376.[2] The DHS declined to grant the application and instead, personally served Petitioners with a Notice to Appeal ("NTA") on February 16,

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[2] Asylum is available to aliens through two administrative routes. An alien who is not in removal proceedings may file an asylum application with the Department of Homeland Security ("DHS"). See 8 C.F.R. § 1208.4(b)(1)-(2). This "affirmative" application is adjudicated by a trained asylum officer in a non-adversarial interview. 8 C.F.R. § 208.9; *see Matter of S-M-J-*, 21 I. & N. Dec. 722, 723-24 (BIA 1997); *Ramos v. INS*, 246 F.3d 1264, 1266 (9th Cir. 2001). In 2009, DHS granted nearly 12,000 applications. *See* DHS Office of Immigration Statistics, 2009 Yearbook of Immigration Statistics, Table 16, p.43, available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf. If DHS does not grant the application, the case is referred to the Department of Justice (Executive Office for Immigration Review ("EOIR")) where the alien receives a de novo hearing before an immigration judge. 8 C.F.R. §§ 208.14(c)(1), 208.19, 1208.13, 1240.1(a)(1)(ii), 1240.11(c). In 2010, immigration judges granted 61% of the affirmative applications referred by DHS. *See* U.S. Dept. of Justice, EOIR, FY 2010 Statistical Yearbook, at Figure 17, page K2, available at http://www.usdoj.gov/eoir/statspub/fy10syb.pdf. In addition, an alien who is in removal proceedings may file a "defensive" asylum application as relief against removal. In 2010, immigration judges granted 35% of defensive applications. Id. at Figure 18, page K2. The overall grant rate by immigration judges in 2010 for all asylum applications (affirmative and defensive) was 51%. Id. at Figure 16, page K1. An alien has an opportunity to appeal an adverse decision to the Board of Immigration Appeals, where a decision may be rendered by either one or three Board members. 8 C.F.R. § 1240.15. Thus, by the time an applicant seeks judicial review of the denial of asylum in the court of appeals, the application has been heard, considered, and rejected by two or three different agency adjudicators.

2005, and filed it with the Immigration Court on February 22, 2005, thus formally commencing removal proceedings. *See* 8 C.F.R. § 1003.14(a) (stating that proceedings commence before an Immigration Judge when a charging document is filed with the Immigration Court).

The NTA charged Petitioners with removability under Immigration and Nationality Act section 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B) as aliens illegally present in the United States. A.R. 1227. Through counsel, Petitioners admitted the factual allegations against them, and conceded that they were removable from the United States. A.R. 120. The Immigration Judge held a merits hearing on October 13, 2009.[3] The Immigration Judge denied their applications on that date, and Petitioners appealed to the Board. The Board dismissed Petitioner's appeal on June 28, 2011. A.R. 3-8. This petition for review followed.

[3] During the period between the asylum application and referral, Petitioners changed attorneys, and the Immigration Judge initially assigned to their case retired. A.R. 146, 198.

STATEMENT OF RELEVANT FACTS

I. Petitioners' asylum application and supporting affidavits

The lead Petitioner's asylum application stated that her uncle was killed by members of the FARC[4] in September of 2003, and that two months later her father was kidnapped for eleven days, during which time he was ordered to pay a tax, or hand over title to the family farm. A.R. 372. Petitioner stated that girls from her daughters' school had been kidnapped by the FARC, and that she feared returning to Colombia because she had been informed by her father that the FARC had threatened her. A.R. 372, 383. There were four affidavits submitted as part of the Petitioners' asylum application.[5] A.R. 378-385, 976-984 (lead Petitioner); 388-394, 987-994 (lead Petitioner's husband); 397-400, 996-1000 (lead Petitioner's youngest daughter); 403-407, 1002-1006 (lead Petitioner's oldest daughter, not a party to this case).

A. Lead Petitioner's affidavit

The lead Petitioner's affidavit stated that she worked in four different pharmacies in Bogota, while her husband was a bus driver. A.R. 379, 977. Petitioner indicated in her affidavit that on September 19, 2003, her uncle, who

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[4] The FARC is a "free-standing leftist revolutionary organization attempting to overthrow the Colombian civil government." *See generally Escobar v. Holder*, 657 F.3d 537, 540 (7th Cir. 2011).

[5] Petitioners submitted updated affidavits, dated approximately four and a half years later. Citations to each set of affidavits are listed in the text.

lived four hours away from her in a town called [redacted], was killed by the FARC. A.R. 379-380, 977-978. She stated that he owned a coffee farm, where he also raised and sold cows. A.R. 379, 977. Petitioner further claimed that the FARC had been previously demanding payment from her uncle on a regular basis, but that he had refused. A.R. 380, 978. After resisting the FARC's demands, he was eventually shot and killed. A.R. 379-380. 977-978. Fearing for their lives, her uncle's wife and son moved to [redacted]. A.R. 381, 979. Petitioner's affidavit contained no indication that her uncle's wife and son were ever contacted by the FARC. A.R. 378-385; 976-984.

According to Petitioner's affidavit, after her uncle's death, she and her husband continued to work at their jobs. A.R. 381, 979. She wrote that on November 18, 2003, her father, who also lived in [redacted], had not returned from his work on his own coffee farm. A.R. 381, 979. Her mother reported that a masked man came to her house later that night, and told her that her husband, Petitioner's father, was giving information to the FARC, and that he had previously been asked for payments by them. A.R. 381-382, 979-980.

Lead Petitioner stated that the family left their house in [redacted], moved in with a relative, and waited for her father's return. A.R. 382, 980. Petitioner's father appeared at his home eleven days later. *Id.* The FARC had not beaten her father, but he was malnourished, and had to walk a great deal. A.R. 382, 980-981.

The lead Petitioner's father reported that the FARC had demanded a monthly tax from either him or his children, and that if no one would pay, that they wanted the title to his farm. A.R. 383, 981. FARC informed him that his children's lives would be in danger if he did not comply. *Id.* Petitioner's father told the family that he had provided the FARC with the names and addresses of his children, and told the FARC that his children held the title of the farm, and that they would pay the money asked of him. *Id.*

The lead Petitioner's sister became fearful after learning this, and moved north with her parents to the town of [redacted], farther to the north of [redacted]. *Id.* She and her family changed their names, and now run a pharmacy in that town. *Id.* Petitioner's affidavit stated that neighbors had reported seeing "suspicious-looking people" at their father's farm, but they went on their way when they saw that the farm was abandoned. *Id.*

Petitioner did not report that anyone from the FARC had contacted either her, her husband, any of their children, her sister, or her parents after the events of November 2003. Petitioner and her husband began to live elsewhere in Bogota, and did not seek police assistance. They traveled to the United States in January of 2004.

B. Affidavit of Petitioner's husband

The lead Petitioner's husband's affidavit was consistent with that of her own. A.R. 388-394; 987-994. He stated in his affidavit that his wife's uncle was killed in September 2003, but that "life continued as normal" after that. A.R. 390, 989. He likewise stated that during his father-in-law's kidnapping, he gave "very specific information" about Petitioners, even telling the FARC where his grandchildren went to school. A.R. 391, 990. Upon leaving Colombia, Petitioner's husband continued to pay off their apartment in [redacted] with the money from his business. A.R. 393, 992. Petitioner's husband did not say that he had ever been personally contacted, approached or threatened by the FARC. A.R. 388-394; 987-994.

C. Affidavits of Petitioner's children

Petitioner's two daughters, only one of whom is a party to this appeal, submitted affidavits as well. A.R. 397-400; 996-1000 (lead Petitioner's youngest daughter); 403-407; 1002-1006 (lead Petitioner's oldest daughter, not a party to this case). Each affidavit was consistent with their mother's affidavit, although each affiant specifically stated that they personally had not been contacted or threatened by the FARC either before or after their uncle and grandfather were harmed. A.R. 399, 405, 1004.

II. The Lead Petitioner's testimony before the Immigration Judge

A. Direct examination

Only the lead Petitioner testified before the Immigration Judge. A.R. 161-198. Her testimony was consistent with her affidavit. Specifically, Petitioner testified that her uncle was murdered by the FARC for failing to pay taxes to them, and that her father was kidnapped. A.R. 161. She testified that while her father was kidnapped, he told the FARC that he did not hold the title to the farm, and that his daughters did instead. A.R. 168. Her father then provided them with information about Petitioner and her family, including their business operations. A.R. 170.

Petitioner testified that she personally had no direct contact with the FARC, and that both her elderly parents had since died. A.R. 174, 179, 180-181. She testified that the family farm was abandoned. *Id.* She also testified that her sister, who remained in Colombia, but moved north of [redacted] to [redacted][6], operated a pharmacy under a different name. A.R. 175. Petitioner's sister had not been contacted by the FARC. *Id.* Petitioner added that, subsequent to his kidnapping and relocation within Colombia, her father did not receive any more threats from the FARC. A.R. 178-179.

[6] [redacted] is approximately seven hours north of Petitioner's parents' farm. A.R. 183.

The Immigration Judge asked Petitioner whether she could relocate as her sister and parents had done, in order to avoid possible harm. A.R. 179. Petitioner stated that she would still be afraid of returning to Colombia. *Id.* She explained that while she had not been directly threatened, her father had been told that if the FARC was not paid, that she or her sister would be killed. A.R. 181.

The Immigration Judge also questioned Petitioner about her title to the farm, and Petitioner stated that when her parents died, she and her sister "automatically are now the new owners." A.R. 194. Her father's name is still on the title to the land, however. A.R. 195. According to Petitioner, her sister has never visited the farm. *Id.* Petitioner claimed that her sister frequently changed phone numbers and home addresses, but had consistently worked in the same pharmacy. A.R. 196-197.

B. Colloquy Before the Immigration Judge

There was no cross-examination in the usual sense. A.R 191-193. Instead, when Petitioner completed her direct examination, the Immigration Judge noted that he did not "see any credibility issues," but that the case was "really a legal issue." A.R. 191. DHS counsel agreed, and declined to question Petitioner, but noted that a supporting affidavit had described Petitioners as "upper middle class" in Colombia (referring to A.R. 1004), a group that lacked "immutable characteristics" and was too large to constitute a particular social

group for purposes of asylum or withholding of removal eligibility. A.R. 191-192. DHS counsel also pointed out that Petitioners had never received any direct, personal threats, and that her sister, who is also a title holder to the farm, has never been threatened. *Id.*

In response, Petitioners' counsel argued that Petitioner was part of a particular social group, as "the child of a wealthy land-owner farmer," and also argued that "in some ways [lead Petitioner] is the owner of the farm herself." A.R. 194. After further argument, Petitioners' counsel stated that "despite the lack of direct threats to [Petitioners]," they experienced past persecution. A.R. 197.

III. Supporting documentation provided by the parties

In addition to the affidavits, Petitioners submitted articles addressing the FARC conflict, dated from August 2001 to mid-2005. A.R. 448-657. Petitioners also included an Amnesty International Report from 2006, A.R. 630, and an incomplete copy of the 2008 U.S. State Department Human Rights report on Colombia. A.R. 1008-1011. Finally, Petitioners submitted an affidavit, dated September 2009, from an expert witness, Dr. W. John Green, who wrote that in his opinion, Petitioners would be targeted by FARC for failing to pay a "war tax," and that "FARC has every incentive to make an example out of them." A.R. 1030-1034. Dr. Green did not testify on Petitioners' behalf at their merits hearing and there is no indication in his statement that he ever

personally interviewed lead Petitioner or any of her family members.

Counsel for the DHS submitted a report from the Council on Foreign Relations dated less than two months prior to the merits hearing date. A.R. 220-226. The Immigration Judge also admitted the U.S. State Department profile on Colombia, dated May 2009, A.R. 210-219, as well as a BBC profile dated July 2008. A.R. 208–209.

In general, the older documentation painted a bleaker picture for Colombians than the more recent submitted materials, which noted that the FARC had "suffered a series of blows" as recently as 2008. A.R. 207. Some analysts have described the FARC as "finished as a potent force, although they may fight on, perhaps as a smaller and more divided insurgency." A.R. 207-208. The thrust of the various documents bore out that the FARC indeed committed various abuses and crimes, and that the government of Colombia continued to both negotiate a cease-fire, as well as actively pursue and kill FARC members. A.R. 221(noting that while FARC has been "depleted in numbers and resources," peace talks remain problematic); 222-223 (stating that the FARC operates in roughly one-third of Colombia, mostly in the jungles of the south and east, but noting that it remains well funded).

IV. The Immigration Judge's decision

After the conclusion of the lead Petitioner's testimony, the Immigration Judge issued an oral decision denying Petitioners' applications for relief. A.R. 96-108. The Immigration Judge recounted the lead Petitioner's testimony, including the killing of her uncle in September 2003, and the kidnapping of her father in November 2003. A.R. 99. The Immigration Judge further noted that Petitioner and her family, who lived four hours away at the time of the events in late 2003, were never contacted by the FARC. A.R. 100. The Immigration Judge noted Petitioner's statement that her sister and parents moved even farther away, that her parents eventually died of natural causes, and that her sister has continued to live and work in the same city, [redacted], for several years without incident. A.R. 100. The Immigration Judge credited Petitioner's testimony that she moved away from Colombia out of fear, but concluded that she had not met her burden of proof.

Specifically, the Immigration Judge first held that Petitioners had not experienced past persecution in Colombia, as they had experienced only indirect threats not rising to the level of harm constituting persecution. A.R. 102. Citing Seventh Circuit caselaw, the Immigration Judge noted that a claim of "derivative persecution," that is, persecution based on the experiences of lead Petitioner's father and uncle, was likewise untenable here. A.R. 103, citing *Firmansjah v. Gonzales*, 424 F.3d 598, 605 (7th Cir. 2005). Moreover,

the Immigration Judge concluded that Petitioners had not proven an objectively reasonable fear of future persecution. The Immigration Judge first noted that Petitioners had not demonstrated an imputed political opinion, as she never spoke to the FARC, received no direct threats from them, and even her father's kidnapping did not appear to be politically motivated. A.R. 103. However, in assessing whether her fear could be based on membership in a particular social group, the Immigration Judge acknowledged that the social group question was "more clouded and different." A.R. 103. Based on a "broad reading" of this Court's decision in *Tapiero de Orejuela v. Gonzales*, 423 F.3d 666 (7th Cir. 2005), the Immigration Judge concluded that lead Petitioner was a member of a particular social group consisting of "children of a land owner who had been kidnapped by the FARC." A.R. 104 (noting that the group seemed "overly broad").

However, the Immigration Judge further found that there was not a reasonable possibility that Petitioners would be persecuted on account of their social group membership. A.R. 104-105. Considering that Petitioner's sister and parents continued to live in northern Colombia without incident, the Immigration Judge did not find an objectively reasonable basis to fear return to that area of Colombia. A.R. 105. The Immigration Judge considered the opinions of Dr. Green, but concluded that the family's specific experiences in

Colombia since the kidnapping, as well as more recent State Department evidence "that the FARC has been weakened as a result of [the] government's military and police operations" effectively countered his prediction of a future risk of persecution. A.R. 104-106. Accordingly, the Immigration Judge denied the applications for relief, and Petitioners appealed to the Board.

V. The Board's decision

The Board, in a lengthy unpublished decision, dismissed Petitioners' appeal. A.R. 3-8. The Board first noted that Petitioners had abandoned their CAT claim. A.R. 3. The Board stated that it would review the case under a clear error standard as to findings of fact, but *de novo* as to all other issues. *Id.* The Board then affirmed the Immigration Judge's conclusion that lead Petitioner had raised a derivative claim, since her claim of past persecution was primarily based on the harm suffered by Petitioner's uncle and father, and not any harm she personally experienced in Colombia. A.R. 4. The Board noted that lead Petitioner and her family "resumed their normal routine" after her uncle's murder, as undercutting the claim that FARC members were actually targeting the lead Petitioner when they killed her uncle. *Id.* The Board observed that "[t]he record does not support [Petitioner's] claim that in murdering her uncle, and kidnapping her father, the FARC actually intended to target" Petitioner. *Id.* The Board distinguished *Taperio* on the ground that Petitioner here was never personally subject "to direct and repeated death

threats and extortion attempts," and in fact had no direct contact with the FARC. *Id.*

The Board affirmed the Immigration Judge's conclusion that Petitioners had failed to demonstrate an objectively reasonable fear of future persecution, given that the evidence that Petitioners' family lived unharmed in Colombia for years, after relocating to an area north of where the incidents involving the father and uncle took place. On this score, the Board was unpersuaded that the lead Petitioner's sister has been living "in hiding," given that "both the sister and her husband work openly as pharmacists and their children attend school outside the home." A.R. 5. The Board disagreed with the Immigration Judge's conclusion that Petitioners fell into a particular social group, citing both Board and Seventh Circuit precedent. A.R. 5-6. However, the Board affirmed the Immigration Judge's ultimate conclusion that Petitioners had failed to meet their burden of proof regarding a well-founded fear. The Board addressed numerous arguments of Petitioners, in each case concluding that they had not met their burden of proof, and therefore dismissed the appeal. This petition for review followed.

SUMMARY OF ARGUMENT

This petition should be denied. This case turns on the standard of review. Petitioners did not experience any direct harm while in Colombia, and the record does not compel the conclusion that any Petitioner suffered persecution there. While the lead Petitioner's uncle was killed in 2003, by her own admission, she resumed her normal routine after that unfortunate incident. Her father, who lived four hours to the south, was kidnapped for eleven days and released. He reported that the FARC wanted title to the family farm, and threatened to harm Petitioner and other family members, so they all moved further north in Colombia. Following the family's relocation, the FARC took no action against Petitioner or any of her family members in Colombia, nor have they done so to date. That is the total extent of past persecution claimed in this case. The Board correctly found this to be a derivative asylum claim, as no Petitioner was ever directly contacted, threatened, or even targeted by FARC.

Next, the record does not compel the conclusion that Petitioners harbor an objectively reasonable fear of future harm, where the lead Petitioner's sister, also a titleholder of their father's farm, has lived for over seven years without incident in northern Colombia. Additionally, the record does not compel the conclusion, that the family in Colombia "lives in hiding," particularly

considering that they have openly operated a pharmacy in the same city for years without incident.

In sum, reasonable minds may differ over this case, but the testimony and evidence presented were not so weighted in Petitioners' favor that no reasonable factfinder would have denied relief. Thus, because the evidence does not compel a contrary conclusion, the Court should affirm the agency's decision and deny the petition for review.

ARGUMENT

I. Standard and Scope of Review

As stated above, standard of review is paramount in this case. This Court reviews the Board's decision under a "highly deferential version of the substantial evidence test." *Karapetian v. INS*, 162 F.3d 933, 936 (7th Cir. 1998) (citing *Elias-Zacarias*, 502 U.S. 478, 483-84 (1992)); *see also* INA § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B) (providing that the administrative findings of fact are "conclusive unless any reasonable factfinder would be compelled to conclude to the contrary"). This Court has explained how this standard should be applied in various asylum cases.

Specifically, the standard of review is not whether this Court would have ruled differently than the Board. *Chen v. Holder*, 604 F.3d 324, 330 (7th Cir. 2010) (citing *Balogun v. Ashcroft*, 374 F.3d 492, 498 (7th Cir. 2004)); *Yadegar-Sargis v. INS*, 297 F.3d 596, 601 (7th Cir. 2002) (citation omitted).

Indeed, this Court has repeatedly recognized that the standard of review requires an appellant to demonstrate that the conclusions of the Board are so contrary to the record that any other reasonable factfinder would reach a different conclusion. *See*, *e.g.*, *Vahora v. Holder*, 626 F.3d 907, 913 n.4 (7th Cir. 2010); *Krisnapillai v. Holder*, 563 F.3d 606, 614 (7th Cir. 2009); *Margos v. Gonzales*, 443 F.3d 593, 597 (7th Cir. 2006). The record must compel a contrary conclusion, not simply be open to differing ones. *See* 8 U.S.C. § 1252(b)(4)(B). Regarding this Court's scope of review, this Court reviews the decision of the Board. *Moab v. Gonzales*, 500 F.3d 656, 659-60 (7th Cir. 2007) (noting that ordinarily, the Court reviews on appeal the Board's decision, not the decision of the Immigration Judge).

II. Statutory framework

Under the INA, the Attorney General has discretion to grant asylum to an alien who meets the statutory definition of a refugee. *See* 8 U.S.C. § 1158(a). A refugee is defined as a person who is outside the country of his nationality and is unable or unwilling to return "because of persecution or a well-founded fear of persecution on account of" various traits and beliefs, including political opinion, or membership in a particular social group. 8 U.S.C. § 1101(42). An applicant claiming a well-founded fear of future persecution must demonstrate that the applicants bear both a subjectively genuine fear of return, and an objectively reasonable fear. 8 C.F.R. § 1208.13(b)(2). The term "persecution,"

however, is not defined in the INA. Consistent with Board precedent and decisions of other courts, this Court has defined persecution as "punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate." *Tamas–Mercea v. Reno*, 222 F.3d 417, 424 (7th Cir. 2000). Although the concept of persecution is not rigid, this Court has distinguished it from "mere harassment." *Bereza v. INS*, 115 F.3d 468, 472 (7th Cir. 1997) (quotation marks omitted). A person seeking asylum bears the burden of establishing eligibility for it. *See* 8 C.F.R. § 1208.13(a). An alien who fails to demonstrate eligibility for asylum, necessarily also fails to meet the more stringent requirements for withholding of removal. *Toure v. Holder*, 624 F.3d 422, 428 (7th Cir. 2010).

III. The Record does not compel the conclusion that Petitioners suffered past persecution in Colombia

A. Petitioners' claims of past persecution are based on a derivative persecution theory that has been rejected by this Court

1. Lead Petitioner's uncle

Petitioners base their claims of past persecution on two incidents. The first involves the killing of their uncle, who lived four hours to their south. Petitioners' uncle was reportedly killed by the FARC in September 2003, after FARC demanded monthly fees from him. A.R. 162-163. Following his murder, the uncle's immediate family moved four hours north to [redacted], and Petitioners are no longer in contact with them. A.R. 164-65. Petitioners, however, did

nothing to alter their normal routine, and went so far as to state in their initial asylum affidavits that "life continued as normal" after the killing. A.R. 390. *See also* A.R. 381 (stating that "we knew we had to continue with our everyday lives"). Therefore, while no doubt distressing to Petitioners, it strains credulity to suggest that the killing was somehow (1) directed at them or (2) constituted persecution of them. In fact, this Court has rejected similar claims of "derivative persecution." *See Ambati v. Reno*, 233 F.3d 1054, 1057-60 (7th Cir. 2000) (declining to find that applicant for religion-based asylum demonstrated persecution based on evidence that his father and brothers were attacked, even though applicant and his family adhered to the same religion). *See also Ni v. Holder*, 635 F3.d 1014, 1018 (7th Cir. 2011) (reaffirming that "an asylum applicant cannot rely on 'derivative persecution' to establish that he was persecuted in the past" and collecting cases). While the *Ni* case left open the possibility that the killing of a relative – if meant to harm an asylum applicant – could still constitute persecution, *Id.* at 1018,[7] the record does not compel the conclusion that the uncle's murder was within that limited exception to the "no derivative persecution" axiom, where Petitioners continued their lives as normal after their uncle's death, and Petitioners offered no substantive reason why their uncle would be targeted as a means of harming *them*, four hours

[7] The Court termed such situations "persecution by proxy" and gave as an example the killing of a child to punish a parent. *Ni*, 635 F.3d at 1018.

away, and not a titleholder to his farm. Indeed, Petitioners never even alleged that the FARC *claimed* that their uncle's murder was committed to harm them.

2. Lead Petitioner's father

Likewise, the kidnapping of lead Petitioner's father does not compel the conclusion that the action was somehow taken to harm Petitioners, who were four hours to the north in [redacted] at the time. Petitioners were never directly contacted by the FARC during their time in Colombia, and only learned of threats communicated to their father after he was released. A.R. 383, 981. Yet no further contact took place between the FARC and *any* member of Petitioners' family. A.R. 388-394, 987-994. It was entirely reasonable for the Board and the Immigration Judge to conclude that the kidnapping of lead Petitioner's father was done to coerce *him* into supporting the FARC, not to somehow harm, or otherwise persecute Petitioners in [redacted]. To be sure, the record would not compel any reasonable factfinder to view the evidence as Petitioners insist. This was not a case of *Petitioners* being kidnapped to coerce the lead Petitioner's father, a situation contemplated by this Court in *Tamas-Mercea v. Reno*, 222 F.3d 417, 424-425 (7th Cir. 2000).[8] Rather, this was harm

[8] In *Tamas-Mercea*, *supra*, the Romanian applicant contended that his three infant sons were killed deliberately by a hospital, and government authorities resisted his efforts to discover the circumstances behind the deaths. *Tamas-Mercea*, 222 F.3d at 420. This Court noted that the deaths, while certainly tragic, still required the applicant to "come forward with some evidence of motive, that the persecution was inflicted" on account of a protected ground.
(continued...)

inflicted upon Petitioner's father, which resulted in not a single instance of contact, conflict, or subsequent threat to Petitioners. This Court has squarely held that such "derivative," or as the Court has referred to them, "persecution by proxy" claims, are "unlikely-to-persuade." *See Ni*, *supra*, 635 F.3d at 1018. Indeed, the regulations governing asylum specifically recognize that an applicant for asylum must establish that *he or she* has suffered persecution in the past, or has a well-founded fear of future persecution. *See* 8 C.F.R. §§ 1208.13(b), (b)(1), and (b)(2)(i). The regulations leave no room for persecution claims based on the experience of others.

Additionally, the threats as to Petitioners communicated to the lead Petitioner's father were not of the "most immediate and menacing nature" which this Court has frequently held is necessary for threats to constitute persecution. *See Hernandez-Baena v. Gonzales*, 417 F.3d 720, 723 (7th Cir. 2005) (citing *Ahmed v. Ashcroft*, 348 F.3d 611, 616 (7th Cir. 2003); *Boykov v. INS*, 109 F.3d 413, 416-417 (7th Cir. 1997)). *See also Nzeve v. Holder*, 582 F.3d 678, 683 (7th Cir. 2009); *Bejko v. Gonzales*, 468 F.3d 482, 486 (7th Cir. 2006). For unfulfilled threats alone to constitute persecution, they must be "extraordinarily ominous." *Pathmakanthan v. Holder*, 612 F.3d 618, 623 (7th Cir. 2010) (holding that an applicant for asylum who had been repeatedly

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[8](...continued)
Id. at 425-26. Recently, this Court reaffirmed this point. *See Bueso-Avila v. Holder*, --- F.3d ----, 2011 WL 5927504, *4-*5 (7th Cir. Nov. 29, 2011).

arrested, and threatened with death while in the custody of his alleged persecutors had not proven that he suffered past persecution due to the threat alone).

This case may be contrasted with *Tapiero De Orejuela*, 423 F.3d 666 (7th Cir. 2005), in which this Court considered a claim of persecution by FARC in Colombia based on events which took place from 1999 to 2001. In *Tapiero*, an applicant for asylum suffered the murder of her husband, after various death threats against him for refusal to aid the FARC. *Id.* at 673. The threats continued even after the killing. *Id.* at 668, 670. This Court ruled that the harm inflicted upon the family did constitute past persecution. *Id.* But the present case is a far cry from *Tapiero*, as the Board recognized. A.R. 4. Here, the lead Petitioner's father was kidnapped, during which time FARC communicated to him a threat against his family. Despite Petitioners' noncompliance with FARC's demand for title to the family farm, nothing happened to Petitioners again. The record does not compel the conclusion that the threats Petitioners received stood on the same footing as those received by the applicants in *Tapiero*. In *Tapiero* the threats were actually coupled with action, not silence.[9]

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[9] Likewise, in *Martinez-Buendia v. Holder*, 616 F.3d 711, 712 (7th Cir. 2010), this Court held that an alien who came to the United States in 2005 suffered past persecution in Colombia, where she resisted the FARC's threats for years, resulting in escalation of action against her, ultimately including a FARC

(continued...)

This Court's decision in *Hernandez-Baena*, *supra*, similarly involved Colombians who, like Petitioners, failed to prove past persecution based on the threats by the FARC. *Hernandez-Baena*, 417 F.3d at 721. In *Hernandez-Baena,* the threats took place on multiple instances, with one threat reaching the applicants after they had already moved. *Hernandez-Baena,* 417 F.3d at 721-22. Yet this Court rejected the argument that the applicants had suffered past persecution, despite one applicant being told by the FARC that his "death sentence" had been signed. *Id.* at 723. This Court noted that the threat was not of an immediate nature, and that it was significant that the applicants had lived for several more months in their location without any harm, or even further *threat* of harm. *Id.*

This case is analogous, although unlike in *Hernandez-Baena*, the Petitioners here did not even experience a single threat after they moved (and never were directly threatened before then). Indeed, nothing about this record suggests Petitioners were subjected to anything approaching this Court's definition of persecution. *See also Vahora v. Holder*, 626 F.3d 907, 913-914 (7th Cir. 2010) (citing *Bhatt v. Reno*, 172 F.3d 978, 981-82 (7th Cir. 1999) (denying petition for review of Indian citizen after noting he was beaten several times, and was threatened)).

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[9](...continued)
guerilla holding a gun to her head. Petitioners here have not remotely experienced the same "immediate," "menacing," or "ominous" threat. *Id.*

Petitioners nevertheless argue to this Court that each of the two incidents on which their claim rests would somehow *compel* a reasonable factfinder to conclude that they personally suffered past persecution at the hands of FARC. This is simply not a tenable argument. It conflicts with caselaw of this Circuit, and is undercut by Petitioners' own evidence about their response to their uncle's killing, the lack of any contact from the FARC after their father's kidnapping, and the subsequent failure by Petitioners to comply with any of the FARC's demands, which resulted in no response, much less a threat, from the FARC. In light of controlling caselaw in this Circuit, and the deferential standard of review applied by this Court, Petitioners' arguments regarding past persecution must be rejected, and the Board's decision affirmed.

B. The record does not compel the conclusion that Petitioners have an objectively reasonable fear of future persecution in Colombia

The next question is whether the record compels the conclusion that Petitioners sustained their burden of proving a well-founded fear of future persecution on account of a protected ground. If the answer to this question is in the negative, then Petitioners' arguments regarding whether they are members of a cognizable social group are moot. Petitioners advance two claims: (1) that they reasonably fear persecution on account of their political opinion, actual or imputed, and (2) that they reasonably fear persecution on account of their membership in a particular social group. However, Petitioners fail to demonstrate, under this Court's standard of review, that any reasonable

factfinder would have granted their applications for relief. It is not enough that Petitioners can articulate subjective fears about their return, or concerns about conditions in Colombia. "[T]he hard truth [is] that unpleasant and even dangerous conditions do not necessarily rise to the level of persecution." *Meghani v. INS*, 236 F.3d 843, 847 (7th Cir. 2001). "[C]onditions of political upheaval which affect the populace as a whole or in large part are generally insufficient to establish eligibility for asylum." *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir. 1995).

Petitioners' claims of a well-founded fear of future persecution include certain common facts, regardless of which prong (political opinion or social group) they use to advance it. First, Petitioners themselves lived four hours away from their father's coffee farm, and after the killing of their uncle, they took no action. Therefore, there is little room for them to claim that this constituted persecution of them, or that it serves as a basis for their objectively reasonable fear, when the killing of their uncle did little to nothing, by their own admission, to change their day-to-day activities. Next, after their father's return from his eleven-day kidnapping, members of their family moved farther to the north, or approximately seven hours from the coffee farm. A.R. 183. The FARC never contacted Petitioners, either prior to, or after this move, despite their failure to comply with the FARC's demands to pay taxes, or transfer the farm's title. Moreover, lead Petitioner's sister remains in Colombia,

with no contact from the FARC, much less any harm befalling her. She works in the same pharmaceutical profession as she did in Bogota, and has experienced no difficulties there.

Petitioners' claim that the lead Petitioner's sister "lives in hiding" is not supported by the facts. The lead Petitioner testified that her sister still works in the same pharmacy daily, but that she does so under a different name. A.R. 196-197. This is not compelling evidence of "hiding," nor does it rise to the level of persecution, and likewise would not compel any reasonable factfinder to conclude that it is indicative of an objectively reasonable fear. This Court, in *Firmansjah v. Gonzales*, 424 F.3d 598, 605 (7th Cir. 2005), specifically stated, in the context of a case involving an ethnically Chinese Indonesian asylum applicant whose family was *required* to change their name pursuant to Indonesian law, that "the name change does not rise to the level of persecution." *Id.* Here, the fact that the lead Petitioner's sister changed her name is only indicative of her *own* subjective fear, not of any persecutory act committed by the FARC. Put another way, while Petitioners advance the argument that the FARC are everywhere, the FARC have not located lead Petitioner's sister who has "hidden" in plain sight, through the use of an assumed name, and different telephone numbers, yet who works in the same vocation, at the same place of business daily, and has done so for years. This could mean anything, ranging from the possibility that the efforts at "hiding"

were successful, that the FARC are not interested in the whereabouts of lead Petitioner's sister, that she has moved too far to the north, and thus out of their zone of control, or a host of other things. The record does not compel any one conclusion, and thus Petitioners' claims regarding the lead Petitioner's sister are not dispositive. In sum, years have passed since the single event involving lead Petitioner's father, and no harm has befallen the family members who remain in Colombia. A.R. 5 (citing *Bhatt v. Reno*, *supra*, 172 F.3d at 982 (absence of harm to similarly situated family members remaining in a country undermines an applicant's claim of an objectively reasonable fear of future persecution).

Additionally, Petitioners failed to show that they could not relocate within Colombia, as the other members of their family did, to avoid persecution. A.R. 8. Relatives of Petitioners routinely leave home to attend work or school, and no harm has befallen them since the lead Petitioner's father was kidnapped in November 2003. *Id.* The sister of the lead Petitioner in this case, who became a co-titleholder with the lead Petitioner upon the natural deaths of their parents, A.R. 194, has suffered no harm, much less persecution in northern Colombia. While a trier of fact could possibly conclude that there was an objectively reasonable basis for them to fear harm from the FARC, the record does not compel that conclusion.

Petitioners have sought to make much hay out of the claim that "suspicious persons" have come to the family farm since their departure. A.R. 183, 383, 981. This simply inflates far too much into the evidence the Petitioners actually presented, and relies on speculation. Specifically, the affidavits state *first* that FARC is still seeking out Petitioners. A.R. 383, 981. However, the next sentence explains how this is known: that Petitioners were informed by neighbors that "suspicious looking" individuals have come to the farm asking for Petitioners. *Id.* For Petitioners to declare that these individuals must be FARC, out to harm Petitioners, is to not only read too much into several levels of hearsay, it is to patently make numerous imaginative leaps for their own benefit. There is literally *no* evidence in the record who these individuals were, how they were dressed, what they sought, or what their motivations were for coming to the farm. A.R. 183. The lead Petitioner declared that FARC was "looking for [them]" in her testimony, based on neighbor accounts, yet offered no specifics. *Id.* Yet Petitioners argue to this Court that the Board erred by not affording this evidence controlling weight, and that any reasonable factfinder would have viewed the evidence as they demand. But that relies on far too much conjecture for any reasonable factfinder, and should be rejected by this Court.

At bottom, Petitioners have also sought to rely on the reputation of the FARC, as described by this Court in other published cases, to bootstrap their

own claims of a well-founded fear of future harm. Pet'r Br. at 25 (stating "[n]otably, this Court has repeatedly recognized asylum claims based on persecution by the FARC."). But this Court does not rule on cases categorically, as each case must stand or fall on its own merit. The record evidence submitted by the parties, coupled with the testimony of lead Petitioner (describing no actual contact between FARC and *any* of the Petitioners in this case), is at best mixed. Thus, under this Court's standard of review, Petitioners' claims fail, regardless of whether they assert that the harm would be based on either political opinion or membership in a particular social group. However, as discussed *infra*, despite Petitioners' efforts to seek this Court's reversal of the Board's decision, which they base largely on the FARC's reputation, each of the two individual bases of Petitioners' specific claims do not stand up to scrutiny.

1. Petitioners' political opinion claim

The Court need not tarry long over Petitioners' claim of a well-founded fear of future persecution based on political opinion, as Petitioners themselves do not devote a great deal of attention to that claim in their opening brief. Pet'r Br. at 22. This is understandable, as Petitioners offered no testimony below to establish that they were opposed to the FARC for any political reason, that they voiced opposition to the FARC as a reason for their refusal to pay taxes to them, or that their "political" views were even known to others. In this Court's

decision in *Tapiero*, *supra*, the Court noted that the applicants there, unlike this case, had actually testified to the Immigration Judge that a family member disagreed with FARC's communist ideology. *Tapiero*, 423 F.3d at 674. However, the Court concluded that the facts did not compel the Immigration Judge to reach the conclusion that the applicants were persecuted on the account of their political opinion. *Id.* There is nothing even approaching that type of evidence here. Petitioners offered nothing substantive to suggest that their political ideology had anything to do with their resistance to paying a revolutionary tax to FARC, or to signing over title to the family farm. As this Court concluded, the "critical question for persecution based on political opinion is the opinion of the victim, not of the persecutor." *Id.* at 673. Petitioners have not shown that they themselves harbored any political opinion against the FARC, or that FARC has imputed any political opinion to Petitioners. Indeed, the record does not support, much less compel, that conclusion.[10]

2. Petitioners' particular social group claim

The starting point for asylum cases involving particular social groups is the Board's decision in *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985)

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[10] Petitioner's "political neutrality" claim, to the extent it survives on appeal to this Court, fails because Petitioners have not shown that the FARC imputed any political opinion to Petitioners, or that they even expressed one in the first place.

(defining "social group" as "a group of persons all of whom share a common, immutable characteristic"). "Immutable" has been described by the Board as a characteristic so fundamental to an individual, such as their religion, that he should not be required to change it. *See Sepulveda v. Gonzales*, 464 F.3d 770, 771 (7th Cir. 2006) (citing *Matter of Acosta*). *See also Ahmed v. Ashcroft*, 348 F.3d 611, 617 (7th Cir. 2003) (citing *Lwin v. INS*, 144 F.3d 505 (7th Cir. 1998)) (discussing characteristics that an individual is either unable to change, or should not be required to change as a matter of conscience). As demonstrated below, Petitioners have failed to show that they are members of a cognizable social group under the standards that have evolved in this Court and at the Board, or that they have been targeted for persecution on account of such group membership.

a. Petitioners are not members of a cognizable particular social group

Petitioners fault the Board for declining to place them in either of two social groups. Each proposed group has certain fundamental flaws which support the Board's finding. Among other things, Petitioners' arguments are largely attempts to fit themselves into a social group defined by the harm its members have suffered, an approach this Court has recently rejected. *See Jonaitiene v. Holder*, 660 F.3d 267, 271-72 (7th Cir. 2011) (reaffirming that a social group "cannot be defined merely by the act of persecution.").

i. Petitioner's proposed social group of "landowners of means who refuse to support the FARC" fails

Petitioner argued to the Immigration Judge that they fall into a social group consisting of "landowners of means who refuse to support the FARC." A.R. 350. They specifically repeated that argument to the Board. A.R. 41-42. However, they do not raise that proposed social group to this Court, and therefore that argument is waived. *United States v. Lupton*, 620 F.3d 790, 807 (7th Cir. 2010). Even apart from the waiver, however, Petitioners' proposed group below was flawed, because land ownership is not an "immutable" characteristic. *Ahmed v. Ashcroft*, *supra*, 348 F.3d at 617. Indeed, in this very case, Petitioner and her sister have abandoned their ownership of the family farm, as neither has attempted to have the title transferred from their deceased father's name.

Moreover, as the Board recognized, the proposed social group fails because the term "of means" is not particular or specific in its description. A.R. 5 (citing *Ramos v. Holder*, 589 F.3d 426, 430-31 (7th Cir. 2009)) (also citing *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2007) ("affluent Guatemalans" are not a particular social group because "affluent" and "wealthy" are too amorphous and subjective to provide an adequate benchmark for evaluating group membership claims). Petitioners proposed a similar term to "affluent," and "wealthy," i.e., "means." According deference to the Board's published decision in *Matter of A-M-E-*, *supra*, the Court should sustain the

Board's determination that the term "of means" lacks the particularity to support a cognizable social group.

Additionally, the component of Petitioner's proffered group referencing individuals who "refuse to support" the FARC is equally amorphous. There are different ways an individual can "refuse to support" an organization like FARC, and not all resisters to FARC's demands necessarily face the same risk. Thus, Petitioners initially proffered group suffered from multiple flaws, and was correctly rejected by the Board.

ii. Petitioners' proposed social group of "children of a landowner who has been kidnapped by the FARC" fails

While Petitioners proposed a social group consisting of "children of upper-middle class landowners" the Immigration Judge only recognized a narrower class within that broad group. Specifically, the Immigration Judge concluded that Petitioners might, under this Court's decision in *Tapiero*, *supra*, fall into a particular social group consisting of "children of a land owner who has been kidnapped by the FARC." A.R. 104 (noting that even that characterization appeared "overly broad"). The Board concluded, in the course of affirming the Immigration Judge's decision, that the Petitioners did *not* fall into this social group, noting that the group was circularly defined by its members' common experience of persecution (or, more accurately, the members' parents' persecution). A.R. 5 (citations omitted).

This was correct on the Board's part, and Petitioner's particular reliance on *Tapiero* (Pet'r Br. at 20-21) is flawed, because a prerequisite to the particular social group definition is persecution by the FARC in the first place. This Court rejected this means of defining a social group. *See Jonaitiene*, *supra*, 660 F.3d at 271-72. But even apart from that, Petitioners read too much into *Tapiero*, as they claim that this Court concluded that it approved as a social group cattle farmers "targeted by FARC." Pet'r Br. at 20-21 (citing *Tapiero v. Gonzales*, *supra*, 423 F.3d at 672). But the targeting by FARC was *not* a basis of this Court's *Taperio* decision, and this Court should make clear, consistent with its recent *Jonaitiene* decision and prior decisions, that it is impermissible to use prior harmful acts to define a social group. *See generally Escobar v. Holder*, 657 F.3d at 555 (Easterbrook, C.J., concurring).

In *Tapiero*, this Court found that it was more than simply the members' status as wealthy cattle farmers that defined them as a particular social group. *Tapiero v. Gonzales*, 423 F.3d at 672. Rather, the Court specifically noted that wealth alone could not support social group membership, but when combined with the applicants' "ownership of land, their social position as cattle farmers, and their education," they could be characterized as a social group. *Id.* The Court's decision in *Taperio* repeatedly noted that the applicants there had testified that even after the father of the family had been killed (he himself was targeted by the FARC because of his "renown" as a cattle farmer), the children

were targeted because of their education, and because they were perceived as a "privileged group." *Id.* at 670, 672, 673.

By contrast, in this case, Petitioners offered no testimony suggesting that the FARC targeted them because of "renown" or perceived privilege. They suggested there was nothing out of the ordinary about them beyond their status as titleholder to their father's coffee farm through operation of law. Thus, while Petitioners claim that *Tapiero* recognized a social group claim based on targeting by FARC, that is not what the case actually held. Furthermore, consistent with this Court's decision in both *Jonaitiene*, as well as concerns expressed by Chief Judge Easterbrook's concurrence in *Escobar*,[11] this Court should make clear that to use prior harmful, or even persecutory acts as a foundation of a particular social group definition is impermissible, as the Board likewise concluded here

This Court's decision in *Escobar*, *supra*, is likewise distinguishable from Petitioners' case. Escobar had been threatened repeatedly by the FARC, unlike Petitioners, and at least one of his threats was at gunpoint. *Escobar*, 657 F.3d at 541, 544. Moreover, Escobar asserted that he was a member of *former*

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[11] In his concurring opinion in *Escobar*, Chief Judge Easterbrook observed under some recent decisions in this Court, "any person mistreated in his native country can specify a 'social group' in a circular fashion and then show that the mistreatment occurred because of membership in that ad hoc group." *Escobar*, *supra*, 657 F.3d at 551. The Court's more recent decision in *Jonaitiene* rejects that approach. *Jonatiene*, 660 F.3d at 271-72.

truckers who, because of their anti-FARC views, collaborated with law enforcement and had refused to cooperate with the FARC. *Id.* at 545. Again, in this case, Petitioners do not rely on *their* actions, or other group members, to define their proposed social group, but instead rely entirely on the persecutory actions of the FARC. Escobar, on the other hand, relied on his own resistance, which went beyond an amorphous "refusal to support," and included his collaboration with law enforcement, and anti-FARC views. *Id.*

Petitioners made no such showing here. They did not describe any anti-FARC views they held, nor did they argue that they collaborated in any way with law enforcement against the FARC.[12] To be sure, this Court stated in *Escobar* that there could conceivably be a *link* between a persecutor's conduct and a social group definition. *Id.* However, it also made clear in that case, as it did likewise did in *Jonaitiene*, that "[w]here a proposed group is defined only by the characteristic that it is persecuted, it does not qualify as a social group." *Escobar*, 657 F.3d at 545 (citation omitted).

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[12] Chief Judge Easterbrook observed in his concurring opinion in *Escobar* that the group recognized in that case – "truckers who refused to collaborate with FARC and who collaborated with law enforcement authorities" – suffered from the same infirmities as the political opinion theory rejected in *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). *See Escobar*, 657 F.3d at 549-50 (Easterbrook, C.J., concurring). That is, the majority opinion, like the Ninth Circuit's opinion in *Elias-Zacarias*, extends asylum eligibility to "everyone threatened by rebels [the] nation's government cannot control." *Id.* But here, as discussed in the text, Petitioners' proposed group does not even include the few criteria for membership required by the group upheld in *Escobar*.

Moreover, it is one thing to be a former trucker, or a former military leader, or former police officer. *See*, *e.g.*, *Ramos*, 589 F.3d at 429*; Gatimi v. Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009) (collecting examples). But these categories do not include, as part of their definition, harmful or persecutory acts against the group members and thus those groups are unlike the one proposed in the case at bar. Even in *Escobar*, where the Court found that "former truckers who resisted FARC and collaborated with the authorities can be a group," the emphasis was on the *applicant's* actions, not those of the persecutors, which this Court has recognized is impermissible. *Escobar v. Holder*, 657 F.3d at 545-46.

Finally, even taking Petitioners' originally proffered particular social group definition, "entire landowning families," A.R. 41, this again relies on their presumption that they would all be persecuted, or, in other words, again relies on the actions of a persecutor to place them in a particular social group. And a social group consisting of "children of upper-middle class landowners" would simply rely on perceived wealth on the part of the victim, which this Court, citing the Board's published precedent, has recognized is not a valid means of defining a social group. *See Arteaga v. Holder*, 511 F.3d at 945-46 (citing *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74-76 (BIA 2007)). Moreover, the record does not support the inference that members of the proposed social group of *all* children of upper-middle class landowners are targeted throughout

Colombia. A.R. 208 (stating that the rebels still have control over areas in the south and east of Colombia, where the presence of the state is weak). This belies Petitioners' attempt to use the mere potential for harm to some members of the group as a means of defining the group itself, and should be rejected by this Court, consistent with its precedent.

b. Petitioners' arguments regarding the Board's scope of review are without merit

In the course of attacking the Board's rationale for declining to recognize their proffered social groups, Petitioners advance an ancillary argument. Specifically, they assert that the Board failed to afford them notice that it would evaluate the particular social group recognized by the Immigration Judge in the course of his decision denying their applications for relief. Petitioners argue that they did not have a fair opportunity to be heard on the question. Pet'r Br. at 18-19.

But Petitioners fail to recognize that they *argued* to the Board that their applications should have been granted, and their claim of membership in a particular social group was a foundational point of their argument. A.R. 41-42. Indeed, Petitioners went so far as to affirmatively assert that they were members of a *different* particular social group than the one the Immigration Judge recognized, and argued as much. A.R. 41. Petitioners raised the social group issue to the Board, which considered the question. The Board has *de novo* review of matters of law, and the validity of a proposed particular social

group fits within that category. *See* 8 C.F.R. § 1003.1(d)(3)(ii). For Petitioners to argue that the Board was unable to speak to the issue of particular social group membership, or only in the capacity *they* dictated through their briefing, stands the scope of review on its head. What the record reveals is that Petitioners placed the social group issue front-and-center before the Board, which it addressed throughout its decision as part of its *de novo* review authority. That Petitioners' arguments regarding their *broader* proposed definition were rejected, together with the Immigration Judge's narrower one, is not a basis for a due process claim, not when they themselves raised the social group issue before the Board. Regardless, Petitioners have not asserted what arguments they would have made had the Board asked for further briefing, and have fully briefed their social group claim before this Court, and thus cannot demonstrate prejudice.

C. Petitioners' remaining arguments are without merit

Because Petitioners failed to demonstrate eligibility for asylum, the Board correctly found that they did not meet the more stringent requirements for withholding of removal. *Toure v. Holder*, *supra*, 624 F.3d at 428. Petitioners' remaining arguments are unavailing, and otherwise should be rejected, as they have failed to demonstrate that any reasonable factfinder would have concluded differently than the Board ruled. Under this Court's deferential standard of review, this petition for review should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for review.

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Dated: November 30, 2011

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I certify that the foregoing has been prepared in a proportionally spaced typeface using WordPerfect 12 in 12-point Bookman Old Style and the brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9789 words, apart from tables, and certifications that may be excluded under the rule.

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Dated: November 30, 2011

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

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