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MATTER OF M-E-V-G- AND THE BIA'S CONFOUNDING LEGAL STANDARD FOR "MEMBERSHIP IN A PARTICULAR SOCIAL GROUP"

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This *Briefing* reviews the legal standard the United States uses to assess whether a "particular social group" is cognizable for purposes of asylum or withholding of removal relief, and it provides an update on the new "social visibility" and "particularity" tests the Board of Immigration Appeals (Board or BIA) has imposed on top of the traditional "immutable characteristics" standard of *Matter of Acosta*. The Board introduced the new tests in a series of precedents between 2006 and 2008, culminating in the gang-asylum cases, *Matter of S-E-G-* and *Matter of E-A-G-*, where the Board announced that "social visibility" and "particularity" would be strict requirements for all particular social groups.

The United Nations High Commissioner for Refugees (UNHCR), asylum advocates, and asylum scholars challenged "social visibility" and "particularity" as unreasoned, confusing, and unfair tests that are inconsistent with the text and purpose of both the 1951 U.N. Refugee Convention and the U.S. Refugee Act. The Board's departure from *Acosta* triggered extensive litigation and created a sharp split among circuit courts, with the Seventh and Third Circuits rejecting the new tests, and the Ninth Circuit calling them into question. In February of this year the Board responded with two new social group precedents, *Matter of M-E-V-G-* and *Matter of W-G-R-*. The Board tries to overcome the Seventh, Third and Ninth Circuits' criticisms by relabeling the "social visibility" test as "social distinc-

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tion” and by claiming it has never required social groups to possess literal “ocular” visibility. In all other respects the Board only doubled down on its position.

The Board’s affirmation of flawed social group tests will perpetuate confusion in this important area of asylum law and ensures a new round of litigation and advocacy aimed at restoring the clarity of *Acosta*. The Board has advanced “social visibility/distinction” and “particularity” in results-oriented precedents denying claims involving gangs and resistance to criminal organizations, while it has failed to publish any decisions in other important contexts where positive guidance is long overdue, such as gender-related claims seeking protection for victims of domestic violence. The BIA purports that all of its earlier precedents applying *Acosta* also considered social distinction and particularity, but since first mentioning these new tests in 2006 the BIA has never *approved* any social group in a published decision that meaningfully explains how the tests are satisfied.

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Part one of this *Briefing* discusses the framework for humanitarian protection, the origin of the social group ground of protection, and the authorities and resources that should guide analysis of social group claims.

Part two traces the path of U.S. social group law from *Acosta*’s influential “immutable characteristics” test to *S-E-G-*’s controversial “social visibility” and “particularity” requirements.

Part three describes the circuit courts’ divided reaction to the Board’s departure from *Acosta*. While several courts have deferred to the social visibility and particularity tests, they have done so with varying degrees of clarity; the en banc Ninth Circuit has called the tests into question; and the Third and Seventh Circuits refuse to apply the new requirements at all.

Part four reviews the litigation on remand from the Third Circuit in *Valdiviezo-Galdamez* and the Board’s subsequent decision of that same case in *M-E-V-G-*. This part then summarizes *M-E-V-G-* and the companion precedent *W-G-R-*, with a critical analysis of the decisions.

Part five identifies more recent social group decisions and potentially significant social group litigation that practitioners should be aware of in the wake of *M-E-V-G-* and *W-G-R-*. Finally, while the focus of this briefing is the legal standard for claims based on particular social groups generally, it ends with some general strategic considerations for presenting social group claims and points practitioners to resources they can access for assistance when formulating social groups, while the appendix provides a list of additional resources to consult for guidance on specific types of social group cases.

LEGAL FRAMEWORK, AUTHORITIES, AND RESOURCES

Under U.S. law, an applicant for asylum or withholding of removal must meet the statutory definition of “refugee”:

The term ‘refugee’ means any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or

unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, *membership in a particular social group*, or political opinion.¹

Perhaps no part of the refugee definition has generated as much commentary and controversy² as the term “particular social group,” so it is useful to place the term in some context—historically, within the overall refugee definition, and in relation to the larger set of U.S. statutes and regulations that govern asylum and withholding relief.

Congress adopted the above definition through the Refugee Act of 1980³ in order to bring United States law into conformance with the 1967 Protocol and 1951 United Nations Convention Relating to the Status of Refugees.⁴ The U.S. refugee definition, including the five grounds of protection—race, religion, nationality, membership in a particular social group, and political opinion—is taken directly from the Convention’s refugee definition⁵ and these same five grounds anchor the Convention’s core provision, Article 33A(1), which imposes the duty of non-refoulement (“non-return”) on all parties to the treaty.⁶ Article 33A(1) prohibits contracting nations from returning refugees to any country where they face persecution on account of one of the five protected characteristics.⁷ Congress codified the same definition into U.S. law to give “statutory meaning to our national commitment to human rights and humanitarian concerns.”⁸

The protective function of the enumerated grounds is clear, but the drafting histories of the Convention and Refugee Act provide little information about what representatives to the Convention or members of Congress intended the scope of the “particular social group” ground to be.⁹ UNHCR explains that while “particular social group” is not a “catchall” in relation to the other four grounds of protection, and a valid group cannot be defined exclusively by the fact that members are targeted for persecution, the term is flexible and adaptable to changing human rights concerns.¹⁰ The greater ambiguity of “particular social group” as compared to the other four enumerated grounds is well-acknowledged.¹¹ While this ambiguity

has created space for cutting-edge advocacy that extends asylum to important classes of persons who deserve protection,¹² it has also created space for confusion and inconsistency in asylum adjudications and social group case law.¹³

For example, the ambiguity of the isolated term “particular social group” has often led asylum officers, immigration judges, the BIA, and federal courts to focus narrowly on the potential size or breadth of an asserted group when assessing whether it is cognizable, ignoring how the social group element operates within the overall refugee definition and the asylum statutes,¹⁴ and in turn conflating the social group element with separate elements of the refugee definition.¹⁵ Mere membership in a particular social group does not confer refugee status upon an applicant and does not otherwise entitle an applicant to relief.¹⁶ Rather, the applicant who fears persecution must satisfy multiple elements of the refugee definition by proving that he or she:

- (1) was harmed in the past or has a “well-founded fear” of future harm,
- (2) arising in severity to “persecution,”
- (3) that was or will be inflicted by either the government or a party the government was or is unable or unwilling to control,
- (4) and where the harm was “on account of” (referred to as the nexus requirement),
- (5) one or more of the five protected characteristics.¹⁷

And even the applicant who can meet all elements of the refugee definition is by no means assured relief. Refugees face other statutory and regulatory obstacles to winning asylum or withholding. For example, in some cases an applicant’s presumption of future persecution may be rebutted with evidence of a fundamental change of circumstances in the home country or evidence that he or she could reasonably relocate.¹⁸ A refugee can be disqualified from asylum or withholding by any one of numerous criminal and national security related bars.¹⁹ Also, refugees applying for

protection more than one year after arrival in the United States are excluded from asylum and face the more onerous eligibility standards of withholding.²⁰ Finally, the government has broad discretion to deny asylum to otherwise qualified refugees, again leaving them with the more difficult remedy of withholding.²¹ This overall legal framework has been aptly described as a set of legal “filters” that effectively regulate access to relief.²² Any of the five protected grounds—including “particular social group”—may encompass potentially large numbers of individuals of diverse backgrounds, and the applicant who proves membership in a cognizable social group is a mere candidate for relief, so it is the other elements of the refugee definition that operate together with the additional statutory and regulatory provisions to filter out the much smaller number of persons who can ultimately win protection in the United States.²³

In addition to having a contextualized understanding of the statutes, practitioners need to be familiar with binding case law on social group claims. As elaborated below, almost 35 years have gone by since Congress passed the Refugee Act, but the executive branch has never issued final regulations to interpret “particular social group.”²⁴ This has left the Board to explain the term through case-by-case adjudication²⁵—a process detailed below that started with the clarity of *Acosta* but declined into confusion with more recent decisions. In the absence of contrary circuit court or Supreme Court authority, BIA social group precedents are generally binding on immigration judges and asylum officers nationwide, so it is essential for practitioners to understand the standards these precedents set forth, attempt to satisfy those standards whenever possible, but at the same time preserve arguments against their validity in any case where your client might benefit from a future appeal to federal court.²⁶ In the eight years since the BIA first introduced its social visibility and particularity tests, circuit courts have become divided on the fundamental question of whether they represent an unreasonable departure from *Acosta*.²⁷ The Supreme Court has not yet stepped in to resolve the issue.²⁸ For all of these reasons, it is crucial to carefully research the social group decisions of the circuit where your client’s claim will be decided.²⁹

There are a number of other resources to draw on for support in social group claims. These include social group decisions of other circuit courts, Department of Homeland Security (DHS) policy memoranda, and the DHS Asylum Officer Training Manual.³⁰ Unpublished BIA and immigration judge decisions can provide important persuasive support.³¹ Because Congress adopted the refugee definition to align U.S. law with international standards, the Supreme Court has acknowledged that the United Nations High Commissioner for Refugees’ (UNHCR’s) interpretations of the Convention are an important source of guidance for understanding the U.S. refugee definition.³² UNHCR has published guidelines on the particular social group standard and the proper application of that standard in a variety of social group contexts.³³ Further, under the rules of treaty interpretation, adjudicators should give “considerable weight” to the social group interpretations of other nations bound by the Convention, so practitioners should research the views of these countries that may support a client’s social group claim.³⁴ Deborah Anker’s *Law of Asylum in the United States* is the leading treatise on U.S. refugee law and it offers comprehensive analysis of the social group ground.³⁵ Finally, because social group issues are heavily litigated, practice advisories and other materials produced by leading asylum advocacy organizations, such as the Center for Gender and Refugee Studies (CGRS)³⁶ and the National Immigrant Justice Center (NIJC)³⁷ provide invaluable guidance in bringing these claims. The appendix to this briefing includes citations and links to resources from UNHCR, CGRS, NIJC, and other organizations concerning specific types of social group claims.

THE PARTICULAR SOCIAL GROUP STANDARD: FROM ACOSTA TO S-E-G-

Acosta and Immutable Social Groups: *Fuentes, Toboso-Alfonso, Kasinga*

The BIA first addressed the particular social group ground of protection almost 30 years ago in the 1985 precedent *Matter of Acosta*.³⁸ *Acosta* claimed past persecution in El Salvador on account of his membership in a social group of taxi drivers who refused to

take part in guerrilla-sponsored work stoppages. Noting a lack of guidance in the legislative histories of the Refugee Act and Convention, the BIA turned to the interpretive cannon of ejusdem generis (“of the same kind”) and construed “particular social group” in relationship to the other four enumerated grounds.³⁹ The BIA reasoned that race, religion, nationality, and political opinion, each describe an “immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.”⁴⁰ The Board thus concluded that particular social groups are likewise defined by immutable characteristics.⁴¹ The Board pointed to “sex, color, or kinship ties,” as paradigmatic examples of innate characteristics that could unite a particular social group, and to “shared past experience, such as former military service or land ownership[,]” as examples of characteristics that are immutable historical associations beyond the power of former members to change after they have left the group.⁴² Importantly, the BIA held that adjudicators must evaluate proposed social groups on a “case-by-case basis” by considering the specific evidence of immutability presented.⁴³ On the record before it, the BIA found Acosta’s proposed social group was not cognizable because his voluntary employment as a taxi driver was not immutable—that is, such employment was not so fundamental to Acosta’s identity or conscience that he should not be expected to change it to avoid persecution.⁴⁴

In the following two decades the Board applied *Acosta* in a series of precedents that approved important social groups based on immutable characteristics alone. *Matter of Fuentes* (1988),⁴⁵ *Matter of Toboso-Alfonso* (1990),⁴⁶ and *Matter of Kasinga* (1996),⁴⁷ are especially notable given the role they would later play in litigation challenging the Board’s moves to impose “social visibility” and “particularity” tests on top of *Acosta*.⁴⁸

In *Fuentes*, the applicant sought asylum as a former member of the Salvadoran national police.⁴⁹ Fuentes had served in the national police during El Salvador’s civil war—a war still raging when the Board decided his appeal—but then left the police and fled to the

United States to escape a guerrilla organization that had targeted his unit and whose members lived in Fuentes’ home town and knew of his prior service.⁵⁰ The Board stated without qualification that Fuentes’ shared past membership in the police force “is in fact an immutable characteristic, as it is one beyond the capacity of the respondent to change.”⁵¹ However, it denied asylum and withholding on the separate statutory prong of nexus after concluding that Fuentes did not provide adequate evidence guerrillas would be motivated to persecute him “on account of” his former service with the police in the context of El Salvador’s ongoing civil conflict.⁵²

In *Toboso-Alfonso*, the BIA recognized Cuban homosexuals as a particular social group.⁵³ The Cuban government required Toboso-Alfonso to register as a homosexual, and because of his sexual orientation made him report for exams, jailed him, and subjected him to forced labor.⁵⁴ During the 1980 Mariel boat lift the Cuban government fomented threatening protests against homosexuals aiming to drive them out of Cuba, and a government official told Toboso-Alfonso he could leave for the United States or else be imprisoned for four years.⁵⁵ An IJ granted withholding of deportation and the INS appealed to the BIA, arguing that recognition of homosexuals as a social group would allow too many individuals to qualify for relief and would be tantamount to awarding discretionary relief to this entire class of persons.⁵⁶ The BIA properly rejected this argument and explained the INS failed to address the relevant question: whether the social group was immutable.⁵⁷ The Board found that Toboso-Alfonso’s status as a homosexual and the fact he could not undo his registration as a homosexual with the Cuban government made his social group immutable and affirmed the grant of withholding.⁵⁸ The Board also noted that the INS’ concern for the breadth of the social group was misplaced because mere recognition of a group’s immutability does not make all group members eligible for relief—each individual applicant must meet all the elements of refugee definition, including nexus.⁵⁹

Kasinga approved the social group of “young women of the Tchamba-Kunsuntu tribe who have not

had female genital mutilation (FGM), as practiced by that tribe, and who oppose the practice.”⁶⁰ Kasinga fled Togo at age 17 after the death of her father, who had protected her from being subjected to FGM and forced marriage, both widespread practices in her tribe.⁶¹ The parties had offered somewhat different particular social group formulations, but the BIA adopted the above version, which it found to satisfy *Acosta*, as it combined gender with other immutable characteristics.⁶² The BIA explained that the characteristics of being a young woman and a member of the particular tribe could not be changed, and that the characteristic of having intact genitalia was so fundamental to a young woman’s identity she could not be required to change it by submitting to FGM.⁶³

Circuit Court Approval of *Acosta*

Following the BIA, circuit courts, applying *Chevron*⁶⁴ principles, have deferred to *Acosta*’s immutable characteristics standard as a reasonable interpretation of the ambiguous term “particular social group.”⁶⁵

One of the most often cited affirmations of *Acosta* is the Third Circuit’s 1993 decision *Fatin v. I.N.S.*,⁶⁶ authored by future Supreme Court Justice Samuel Alito. Fatin, a citizen of Iran and a feminist who fled to the United States at the time the Shah fell from power, sought asylum and withholding of deportation based on her membership in a social group of “Iranian women who refuse to conform to the government’s gender-specific laws and social norms.”⁶⁷ The Third Circuit ruled *Acosta* was a permissible interpretation that requires an applicant to “(1) identify a group that constitutes a ‘particular social group’ . . . (2) establish that he or she is a member of that group, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that membership.”⁶⁸ The court then explained Fatin could establish a cognizable social group based on her gender alone:

Acosta . . . specifically mentioned ‘sex’ as an innate characteristic that could link the members of a “particular social group.” Thus, to the extent that the petitioner in this case suggests that she would be persecuted or has a well-founded fear that she would be persecuted in Iran simply because she is a woman, she has satisfied the first of the three elements that we have noted.⁶⁹

The Third Circuit’s analysis reflects the principle that large and internally diverse social groups—such as women in a given country—should be cognizable under *Acosta* without further qualification since other elements of the statute, like nexus,⁷⁰ serve to limit the number of group members who qualify for asylum.⁷¹

In contrast to the Third and other circuits, the Ninth and Second Circuits initially adopted alternative standards based on concerns about the potential breadth of social groups. In the 1986 case *Sanchez-Trujillo v. INS*, the Ninth Circuit rejected “young, working class[, urban] males who have not served in the military of El Salvador.”⁷² In doing so, the court never mentioned *Acosta* or applied ejusdem generis principles to the five grounds of protection, but instead read the words “particular” and “social” in isolation to imply “a collection of people closely affiliated with each other, who are actuated by some common impulse or interest.”⁷³ The court explained that immediate members of a specific family would form a valid social group while a statistical group of males taller than six feet could not.⁷⁴ It went on to adopt a “voluntary associational relationship” test for particular social groups and found the membership of petitioners’ proposed group lacked a unifying characteristic and was not sufficiently “cohesive” and “homogeneous.”⁷⁵

In 1990, the Second Circuit in *Gomez v. INS*,⁷⁶ denied the claim of an applicant who claimed membership in the group, “women who have been previously battered and raped by Salvadoran guerrillas.”⁷⁷ The Second Circuit referred to the Ninth Circuit’s voluntary associational standard, and went on to say that social group members share “some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general.”⁷⁸ The Second Circuit stated “broadly-based characteristics,” such as youth or gender, wouldn’t be enough to establish a valid group.⁷⁹ Like the Ninth Circuit, the Second did not cite *Acosta*.⁸⁰

The Ninth Circuit harmonized its standard with *Acosta* in the 2000 decision *Hernandez-Montiel v. I.N.S.*, in which it approved “gay men with female sexual identities in Mexico.”⁸¹ There, the Ninth Circuit

acknowledged the Seventh Circuit's criticism that requiring a "voluntary associational relationship," conflicts with the BIA's immutable characteristics approach, and also could not be squared with *Sanchez-Trujillo's* own logic, since family members are not related by a "voluntary" relationship.⁸² *Hernandez-Montiel* concluded 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."⁸³ The Ninth Circuit would later quote *Sanchez-Trujillo* again in *Ochoa v. Gonzales*, where it vowed to continue rejecting broad social groups that "manifest a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings."⁸⁴ But more recently, in *Perdomo v. Holder*, the Ninth Circuit remanded a BIA decision that had relied on the very same language in *Sanchez-Trujillo* in order to reject the group of "all women in Guatemala." In *Perdomo*, the Ninth Circuit explained that the BIA failed to consider both prongs of *Hernandez-Montiel's* test and provided no principled explanation why this social group—though large and internally diverse—was not unified for *Acosta* purposes by the immutable characteristic of sex.⁸⁵ *Perdomo* explained that *Ochoa* was distinguishable for denying a group deemed to lack any unifying characteristic.⁸⁶ The Second Circuit similarly harmonized its language in *Gomez* regarding overbroad social groups with *Acosta* in *Gao v. Gonzales*.⁸⁷

International Acceptance of *Acosta* and the UNHCR Definition of "Particular Social Group"

Acosta quickly became a dominant standard internationally, shaping the particular social group law of many nations around the world, including leading common-law countries also party to the Protocol.⁸⁸ In 1993, the Supreme Court of Canada used *Acosta* as the basis for its own test which recognizes three alternative types of particular social groups:

- (1) groups defined by an innate or unchangeable characteristic,
- (2) groups whose members voluntarily associate

for reasons so fundamental to their human dignity that they should not be forced to forsake the association, and

- (3) groups associated by a former voluntary status, unalterable due to its historical permanence.⁸⁹

The United Kingdom,⁹⁰ New Zealand,⁹¹ and Australia⁹² also embraced the *Acosta* approach. Notably, in the 1997 case *Applicant A v. Minister of Immigration and Ethnic Affairs*,⁹³ one judge on Australia's High Court indicated cognizable social groups may require an element of societal perception in addition to a common characteristic.⁹⁴ Then, in 1999, the Federal Court of Australia interpreted *Applicant A* to mean that members of a particular social group *must* share both a common characteristic and recognition by society as being set apart.⁹⁵ Australia stood alone among the common-law countries in its imposition of a social perception requirement on top of the immutability test.

In 2002, UNHCR issued vital social group Guidelines interpreting "particular social group" under the Convention.⁹⁶ In summarizing state practices, the UNHCR observed two approaches: the ubiquitous immutable characteristics approach inspired by *Acosta*, and the "social perception" concept reflected in Australian case law.⁹⁷ UNHCR explained the "protected characteristics" approach looks to whether a group is united "(1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it."⁹⁸ "Social perception" looks at whether a group's common characteristic sets its members apart from society at large.⁹⁹ The Guidelines noted that while the two approaches may often converge (as both should recognize women, homosexuals, and families), there are certain situations where the social perception approach might recognize characteristics, such as occupation or social class, that the protected characteristics approach would not.¹⁰⁰ Accordingly, the UNHCR officially adopted a *disjunctive* definition:

A particular social group is a group of persons who share a common characteristic other than their risk of

being persecuted, *or* who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.¹⁰¹

UNHCR further clarified this analysis is undertaken in separate, sequential steps—the characteristic uniting the proposed social group should first be assessed for immutability, and only if the characteristic is not immutable should a decision-maker proceed to consider whether it is nonetheless perceived as a group by the society.¹⁰² The Guidelines also explained that there is no requirement of cohesiveness, and that size is not a relevant consideration.¹⁰³ UNHCR noted with approval that a number of countries recognized “women” as a valid social group, and cautioned that such recognition does not mean all women in the society qualify for relief since “[a] claimant must still demonstrate a well-founded fear of being persecuted based on her membership in the particular social group, not be within one of the exclusion grounds, and meet other relevant criteria.”¹⁰⁴

Two years after the social group guidelines, Australia's High Court clarified that social perception “is not a requirement[,]” and aligned its case law with the UNHCR approach. The Court stated that where the alternative social perception test does come into play, it is an objective one. An applicant only has to show that a group is objectively perceptible, not that the population of the applicant's home country has actual subjective awareness of the group.¹⁰⁵ Cultural or religious norms may prevent the population of some societies from subjectively perceiving the existence of groups like homosexuals or religious minorities.¹⁰⁶ In such cases a society may “not recognize or perceive the existence of the particular social group, but it cannot be said that the particular social group does not exist.”¹⁰⁷ Canada,¹⁰⁸ New Zealand,¹⁰⁹ and the UK¹¹⁰ have all refused any requirement of social perception too, and each has kept standards in line with the UNHCR Guidelines.¹¹¹

The BIA Departs From *Acosta*

***R-A-* and the Proposed Social Group Rule.** During the same period the international community was

moving towards *Acosta*, the Board signaled a step in the opposite direction with *Matter of R-A-*.¹¹² There, the BIA denied asylum to Guatemalan citizen Rody Alvarado, despite searing evidence proving that she had endured extreme physical, sexual, and psychological violence at the hands of her husband, and would face similar violence or death if returned to Guatemala where the police had ignored her repeated pleas for help.¹¹³ It is important to understand that this 1999 BIA decision was vacated by Attorney General Reno soon after its publication so it has zero precedential value and cannot be used in any way to decide asylum or withholding claims.¹¹⁴ Indeed, an immigration judge would eventually grant asylum to Ms. Alvarado in 2010 with the agreement of DHS.¹¹⁵ But Ms. Alvarado's case is important because it became a rallying point for recognition of social groups based on domestic violence and other forms of gender related violence.¹¹⁶

Widespread criticism of *R-A-* prompted the Department of Justice (DOJ) to propose social group regulations in December of 2000 that it claimed would eliminate “certain barriers that the *R-A-* decision seems to pose” for asylum claims based on domestic violence.¹¹⁷ As to what constitutes a “particular social group,” the preamble stated that the “crucial aspect” of the definition was immutability, that the common trait be “unchangeable or truly fundamental to an applicant's identity.”¹¹⁸ But the rule also included a list of additional factors that could be considered in addition to *Acosta*.¹¹⁹ They included “close affiliation actuated by common impulse or interest” and “voluntary associational relationship among members[,]”¹²⁰ both drawn from the Ninth Circuit's *Sanchez-Trujillo v. INS*.¹²¹ Other factors were drawn from *R-A-*: societal recognition or understanding of the group as a segment of the population, self-perception by group members of group status, and whether distinctions are drawn within the society between those who have the characteristic at issue and those who do not.¹²² While none of the factors were proposed as determinative, they would have allowed asylum adjudicators to deny recognition to social groups that satisfied *Acosta*'s immutability test.¹²³

As noted, Attorney General Reno definitively erased

R-A- as precedent in January 2001 by vacating the Board's decision and remanding the case to the Board to await a final regulation.¹²⁴ No final regulation was published, however. After September 11, 2001, and the creation of the Department of Homeland Security, it became necessary for DHS and DOJ to finalize the rule jointly. While the rule sat pending agreement, Attorney General Ashcroft certified *R-A-* back to himself in 2003 and instructed the parties to submit new briefs. DHS filed its brief in 2004 arguing in favor of Alvarado's asylum claim under alternative social formulations, including "married women in Guatemala who are unable to leave the relationship."¹²⁵ DHS urged the Attorney General to order a summary grant of asylum instead of issuing a precedential decision because it favored the "rational and uniform framework" the final rule would provide over "uneven" and "piecemeal" development of social group law through case-by-case adjudication.¹²⁶ DHS argued that *Acosta* was the correct standard for evaluating cognizable social groups and should not be altered.¹²⁷ It then contended that "married women in Guatemala who are unable to leave the relationship" satisfied *Acosta* because it was united by gender plus Alvarado's marriage status, which was immutable due to cultural constraints.¹²⁸ Also important, DHS relied on UNHCR guidance and relevant decisions of other nations to argue that the size of a social group is irrelevant.¹²⁹ On this score, DHS offered that the concerns about the size and diversity of social groups raised by the Ninth Circuit in *Sanchez-Trujillo* and the Second Circuit in *Gomez* were properly understood not as relevant to the *cognizability* of the social groups advanced in those cases, but rather as relevant to the separate statutory element of nexus, because under the facts of those cases the courts did not believe the applicants could show the persecutors would actually target them "on account of" the elements of the social groups the applicants advanced.¹³⁰ DHS concluded Alvarado could prove the cognizability of her social group and establish nexus under the facts of her case, in addition to the other required elements for asylum, and recommend a grant of relief.¹³¹ Attorney General Ashcroft never rendered a decision, however. In 2005 he returned the case to the Board once more with instructions to wait for the final social group rule.

As noted above and detailed below, Alvarado's case would not be resolved for several more years, during which time the Board would return to the social group standard in a series of confusing cases departing from *Acosta*.

Social Visibility and Particularity: *C-A-*, *A-M-E-*, *S-E-G-*, *E-A-G-*. The first of these was the 2006 precedent *Matter of C-A-*¹³² which rejected the proposed group of "noncriminal drug informants working against the Cali drug cartel." The respondent had gained access to information about the Cali drug cartel in Colombia through his personal relationship with the head of security for the cartel and passed along what he learned to another friend of his within the government who was responsible for investigating and prosecuting narco-traffickers.¹³³ The cartel learned of this, brutally beat the respondent's son, and promised to return.¹³⁴ The only issue in the case was whether the proposed social group was cognizable.¹³⁵ The Board said no. The Board introduced the term "social visibility" into social group analysis for the first time, stated it reaffirmed *Acosta*, and claimed the new element was compatible with the traditional immutable characteristics test by dubiously recasting earlier social group cases as though considerations of social visibility had somehow been relevant to their outcome.¹³⁶ The Board said "cohesiveness" and "homogeneity" were not required but found no visibility because "the very nature of the conduct at issue is such that it is generally out of the public view," and that an informant typically "intends to remain unknown and undiscovered."¹³⁷

C-A- was followed the next year by *Matter of A-M-E- & J-G-U-*,¹³⁸ in which the BIA denied "wealthy Guatemalans." The Board injected the elements of "social visibility" and "particularity" into social group analysis but used ambiguous language when describing how social visibility and particularity related to the *Acosta* test. Like *C-A-*, *A-M-E-* generally spoke of the new elements as additional factors to be considered after applying the traditional immutable characteristics rule, but at other points the Board seemed to suggest the elements of visibility and particularity might serve as independent tests for all social groups.¹³⁹

Finally, in 2008, the BIA issued its landmark gang-recruitment precedent, *Matter of S-E-G-*, and a companion case, *Matter of E-A-G-*,¹⁴⁰ imposing social visibility and particularity as distinct “requirements” for the PSGs proposed in those cases, while insisting that these new tests would provide “greater specificity” to *Acosta*’s rule.¹⁴¹ The BIA again disclaimed the Ninth Circuit’s “voluntary associational relationship” test and said it would not demand “cohesiveness” or “homogeneity,” but asylum advocates agreed an equivalent concern for the size of social groups based on gang resistance animated both the new visibility and particularity tests, as they seemed designed to force applicants to formulate social groups in narrower terms than *Acosta* would require, thereby limiting the number of persons who could qualify for relief.¹⁴²

In *S-E-G-*, adolescent twin brothers refused to join the notorious MS-13 gang, which retaliated by beating them and threatening to kill them and rape and kill their older sister. The three siblings fled El Salvador when MS-13 escalated its threats and killed another youth in their neighborhood who also refused recruitment.¹⁴³ The BIA rejected the proposed PSGs “Salvadoran youth who have been subjected to recruitment efforts by the MS-13 gang and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang’s values and activities” and “the family members of such Salvadoran youth[.]”¹⁴⁴ The BIA explained a proposed PSG only has “social visibility” where its members, “considered in the context of the country of concern and the persecution feared[.]” share some “discrete” characteristic by which they are “perceived as a group by society.”¹⁴⁵ Applying this standard to the background evidence the sibling respondents had presented, the BIA concluded the evidence was insufficient to prove social visibility because those who refuse recruitment are “not in a substantially different situation from anyone who has crossed the gang, or who is perceived to be a threat to the gang’s interests.”¹⁴⁶

The BIA also explained, “[t]he essence of the particularity requirement [. . .] is whether the proposed social group can accurately be described in a manner

sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.”¹⁴⁷ The group must possess “particular and well-defined boundaries” and be described in terms that provide an “adequate benchmark for determining group membership.”¹⁴⁸ A social group lacks particularity when it is defined by terms like “wealth”¹⁴⁹ that are “too amorphous”, such that “people’s ideas of what those terms mean can vary.”¹⁵⁰ Looking to the record, the BIA ruled that although the twin siblings further limited their PSG to male children who lack stable families and come from middle or lower class families in areas controlled by the gangs, these characteristics were both deemed amorphous and not ones the gang would focus on in recruiting or targeting youth.¹⁵¹ The BIA also stated that the sister’s PSG was amorphous because “family members” was an undefined category that could potentially include distant relatives.¹⁵²

L-R- Leads to Resolution of R-A- The long pending and closely watched domestic violence claim of Rodi Alvarado would enter its final chapter after the Board had broken from *Acosta* in the series of precedents that culminated with *S-E-G-*. In 2008, Attorney General Mukasey once more certified her case from the Board where it had been sitting (again) for years awaiting publication of a final social group regulation that would never come.¹⁵³ This time, the Attorney General immediately remanded with instructions that the Board proceed to a decision in light of its most recent social group decisions, including *S-E-G-*.¹⁵⁴

Alvarado’s case was still pending at the Board in 2009 when DHS submitted an important brief in a separate domestic violence case also before the Board, *Matter of L-R-*.¹⁵⁵ DHS objected to L-R-’s proposed social group “Mexican women in an abusive domestic relationship who are unable to leave” and “children of women in abusive relationships in Mexico who are unable to leave,” because it considered them “impermissibly circular.”¹⁵⁶ However, it advanced two alternative social groups: “Mexican women in domestic relationships who are unable to leave” and “Mexican women who are viewed as property by virtue of their positions within a domestic relationship.”¹⁵⁷ DHS offered a legal roadmap for recognition of social groups

based on domestic violence, asserting that its own formulations could satisfy immutability, social visibility and particularity, depending on the evidence presented.¹⁵⁸

Similar to its 2004 *R-A-* brief, DHS explained in *L-R-* that a social group based domestic violence could satisfy *Acosta* because gender is immutable and the woman's status in the relationship, once entered, can be too.¹⁵⁹ DHS then argued that social visibility was best understood as an objective perception standard that may be met with evidence that a woman who enters into a domestic relationship is seen by her abuser as his property to mistreat with impunity, and where the larger society including the government understands and tolerates such abuse.¹⁶⁰ Particularity could be satisfied if the record, including relevant laws of the country in question, showed that the group of persons in domestic relationships was sufficiently defined. The DHS brief also addressed nexus and said that where there is a failure of government protection and a woman cannot escape violence, the persecutor's understanding of this may "play a central role in that persecutor's choice" of the applicant as his victim.¹⁶¹

DHS asked the Board to remand *L-R-*'s claim to an immigration judge to give her a fair opportunity to build an adequate record under the detailed new position it was advocating in her case.¹⁶² DHS's position in *L-R-* led to the remand of Rodi Alvarado's asylum claim, and Alvarado was finally granted asylum with the agreement of DHS in 2009.¹⁶³ *L-R-*'s own asylum case was also granted by an immigration judge in 2010, at which time a DHS spokesman confirmed that "the department continues to view domestic violence as a possible basis for asylum in the United States[.]"¹⁶⁴ These important victories did not result in any binding precedents or regulations further defining "particular social group." Many women with similar claims have had success in their cases since, but adjudication has been uneven and a large number of domestic violence related asylum claims are pending at the Board now.¹⁶⁵ And more generally, while these inspiring cases provided some guide as to how at least some social group claims might meet the Board's troublesome social visibility and particularity tests, the tests them-

selves caused great confusion and triggered litigation in federal courts across the country that eventually produced a sharp circuit split.

CIRCUIT COURTS SPLIT ON SOCIAL VISIBILITY AND PARTICULARITY

Neither *S-E-G-* nor *E-A-G-* and the requirements these decisions imposed were reviewed by the federal courts. No appeal was filed in *E-A-G-*. The respondents in *S-E-G-* did seek review but the case settled without a decision from the Eighth Circuit on the Board's new standard.¹⁶⁶

With the addition of "social visibility" and "particularity" to *Acosta*'s immutability test, federal circuit courts were forced to again review the Board's interpretation of "particular social group." Under *Chevron*'s framework, courts had agreed that "particular social group" was ambiguous and that *Acosta*'s standard was reasonable. Courts now had to determine whether the Board's additional social group criteria were also reasonable interpretations of the social group ground in the INA. Here they disagreed.

Various Degrees of Deference to Social Visibility and Particularity

The Eleventh and Second Circuits deferred to the social visibility and particularity factors even before the Board elevated them to requirements. In *Castillo-Arias*, the Eleventh Circuit reviewed the direct appeal of *Matter of C-A-*.¹⁶⁷ The Eleventh Circuit decided the social visibility requirement was reasonable to ensure that the group's treatment by the cartel was distinct from the cartel's treatment of the rest of the population.¹⁶⁸ It also agreed with the Board's concerns about the numerosity and inchoateness of the group, relying here on the Ninth Circuit's requirement for a unifying characteristic or relationship to narrow an otherwise broad and diverse group.¹⁶⁹

The Second Circuit deferred to social visibility and particularity in the direct appeal of *Matter of A-M-E- & J-G-U-*.¹⁷⁰ The court, however, notably described social visibility as requiring consideration of the perspective of the persecutor—a criterion which the Board later returned to and rejected in its most recent

decisions. In *Ucelo-Gomez*, the Second Circuit considered the group of “affluent Guatemalans” and stated that the Board’s social visibility requirement was consistent with its own holding in *Gomez* that the group “possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general.”¹⁷¹ It deferred to the particularity requirement based on the need for a group to have well-defined boundaries, which cannot be achieved by “subjective, inchoate, and variable” characteristics.¹⁷² In a statement that foreshadows the problems raised by *M-E-V-G-* and *W-G-R-*, the Second Circuit stated disparagingly, “If ‘wealth’ defined the boundaries of a particular social group, a determination about whether any petitioner fit into the group (or might be perceived as a member of the group) would necessitate a sociological analysis as to how persons with various assets would have been viewed by others in their country.”¹⁷³ Yet, as the next section elaborates, the Board’s new decisions appear to require a similar sociological analysis. The court applied *C-A-* and *Ucelo-Gomez* to a claim in 2012, again emphasizing the importance of the persecutors’ perception to demonstrating social visibility.¹⁷⁴ The Second Circuit’s decisions applying the new tests do not explicitly defer to *S-E-G-*, and with litigation pending, the court may revisit the reasonableness of the Board’s additional requirements in the coming months.

The First, Fifth, Sixth, and Tenth Circuits have deferred to the “social visibility” and “particularity” requirements in full—all in the context of claims by gang resisters as in *S-E-G-*. The Eighth Circuit routinely applies the tests but has noted that they may still be open to challenge under *Chevron*. The Fourth and Ninth Circuits have been somewhat more hesitant. And the Seventh and Third Circuits have been openly critical of the Board’s new interpretation, refusing to defer to the additional standards.

The First Circuit accepted social visibility and particularity in a claim involving the group of “young [Salvadoran] women recruited by gang members who resist such recruitment.”¹⁷⁵ The court decided that the requirements did not constitute a new standard but

rather elaborated on the requirement of a common and immutable characteristic. It determined that to be socially visible the group “must be generally recognized in the community as a cohesive group,” resurrecting this controversial criteria, and that to be particular the group must be defined in a way so as to distinguish between who is and is not a member.¹⁷⁶

In *Orellana-Monson v. Holder*, the Fifth Circuit described the particularity and social visibility requirements as a shift in interpretation and determined that they merited deference under *Chevron*.¹⁷⁷ As a result, the court rejected the claims of two brothers, Jose and Andres, each with different social groups.¹⁷⁸ Jose claimed persecution on account of membership in the group of “Salvador[an] males between the ages of 8 and 15 who have been recruited by Mara 18 but have refused to join the gang because of their principal opposition to the gang and what they want.”¹⁷⁹ Andres’ claim was based on the group of “young Salvadoran males who are siblings of a member of the aforementioned social group,” or, alternatively, as “family member[s] of Jose Orellana-Monson.”¹⁸⁰ The court described Jose’s group as “exceedingly broad and encompass[ing] a diverse cross section of society” and found Andres’ group to be even broader.¹⁸¹ In rejecting Andres’ claim, the court seemed to consider only his first proposed social group and not the more specific group of Jose’s family. In contrast, the Fourth Circuit recognized a social group based on membership in a specific family in a gang-related claim.¹⁸²

The Sixth Circuit in *Umana-Ramos* upheld the social visibility and particularity requirements for social group claims under *Chevron* and rejected a claim by a “young Salvadoran males who refused recruitment by ‘Maras’ [or gangs].”¹⁸³ The court described its precedent as using “social visibility to refer to the social salience of the group in a society” not its “on-sight visibility.”¹⁸⁴ It agreed with the statements of other courts that any requirement for on-sight visibility would be inconsistent with Board precedent and likely unreasonable.¹⁸⁵ The court also rejected the group’s particularity as the group could not “accurately be described in a manner sufficiently distinct that [it] would be recognized, in the society in question, as a discrete class of persons.”¹⁸⁶

The Tenth Circuit rejected the claim based on the proposed group of “women in El Salvador between the ages of 12 and 25 who resisted gang recruitment” in *Rivera-Barrientos* and deferred to both of the Board’s additional requirements.¹⁸⁷ Although the court agreed that the group was not socially visible, it rejected the Board’s finding that it was not sufficiently particular. The court contrasted the group to the one formulated in *S-E-G-* and found that a group defined by the combined characteristics of age, gender, and the shared past experience of resisting a gang is not vague or overbroad.¹⁸⁸ The Tenth Circuit also determined that the Board was not requiring on-sight visibility to satisfy its social visibility test but instead requiring “the relevant trait [to] be potentially identifiable by members of the community, either because it is evident or because the information defining the characteristic is publically accessible.”¹⁸⁹ In response to the UNHCR’s amicus brief that discussed the Board’s inconsistency with UNHCR’s guidelines, the court stated only that this inconsistency is not enough to show that the interpretation is unreasonable.¹⁹⁰

The Eighth Circuit applies the social visibility and particularity requirements to social group claims,¹⁹¹ but some judges on the court have maintained that there is room for future challenges as to the reasonableness of the additional requirements, particularly in the event that the Board revisits the standard in a new decision.¹⁹² In the meantime, that court has rejected gang-related social group claims including “young Guatemalan men who have opposed the MS–13 [gang], have been beaten and extorted by that gang, [and] reported those gangs to the police”¹⁹³; “persons resistant to gang membership, persons who have returned from the United States and are perceived as affluent, and persons who fear harm to their families from gangs”¹⁹⁴; and “young males from El Salvador who have been subjected to recruitment by MS–13 and who have rejected or resisted membership in the gang based on personal opposition to the gang.”¹⁹⁵ Notably, the court held that “Mungiki defectors” from Kenya is a cognizable social group because the shared past experience of membership in the Mungiki is immutable and the act of defection makes former members a target for murder and other crimes.¹⁹⁶ This decision

provides an opening for claims in the circuit based on shared former associations even when that association was with a criminal organization.

The Fourth Circuit has so far agreed that the Board’s particularity requirement is reasonable but has repeatedly declined to decide whether to defer to social visibility, citing the Seventh Circuit’s criticism.¹⁹⁷ The court has read particularity to require that the group has “well-defined boundaries” that are limiting and not broad or amorphous.¹⁹⁸ Applying this standard, it rejected a claim based on membership in the group of “young Honduran males who (1) refuse to join the Mara Salvatrucha 13 gang (MS–13), (2) have notified the authorities of MS–13’s harassment tactics, and (3) have an identifiable tormentor within MS–13”¹⁹⁹ as well as the group of “young, Americanized, well-off Salvadoran male deportees with criminal histories who oppose gangs.”²⁰⁰ The Fourth Circuit has however recognized the social group of “family members of those who actively oppose the gangs in El Salvador by agreeing to be prosecutorial witnesses” because the “self-limiting” nature of the family unit provides particularity.²⁰¹ The court later clarified that the person who agreed to be a witness was not part of a cognizable group, but his family members were.²⁰² In this circuit then family-based claims may succeed even where claims based on the underlying reason for the persecution do not.

Rejection and Skepticism: the Third, Seventh, and Ninth Circuits

The Seventh Circuit’s First Critiques: *Gatimi* and *Benitez Ramos*. The first repudiation of *S-E-G-* or its predecessors came from the Seventh Circuit in *Gatimi v. Holder*, which involved former members of the Mungiki sect.²⁰³ The court there focused on social visibility and took issue with the government’s position that an individual’s success in hiding a characteristic defeats her claim of membership in a particular social group defined by that characteristic.²⁰⁴ Because the Board’s line of “social visibility” cases in which it rejected groups with invisible characteristics was inconsistent with its earlier decisions in *Kasinga*, *Toboso*, and *Fuentes* and the Seventh Circuit’s decision in *Sepulveda v. Gonzales*,²⁰⁵ the court determined that

accepting social visibility would “condone arbitrariness.”²⁰⁶ The court again returned to social visibility in *Benitez Ramos v. Holder* and criticized the government’s continued position that the characteristic defining a proposed group must be literally visible to a complete stranger on the street.²⁰⁷ Neither this decision nor the decision in *Gatimi* explicitly addresses particularity, but the *Ramos* court discussed the concept. It agreed there may be characteristics like “middle-class” that are so ill-defined they do not constitute a group. But, like several other courts, it observed that once a persecutor identifies a group based on a common characteristic—an external indicator that the proposed group is truly a group—the concern over boundaries dissipates.²⁰⁸ *Ramos* was a former member of the Mara Salvatrucha and subject to death for leaving. The court concluded that this group of former gang members was characterized by a shared past experience impossible to change and was neither unspecific nor amorphous.²⁰⁹

The Third Circuit follows the Seventh: *Valdiviezo-Galdamez II*. The Third Circuit followed suit. That court twice considered the claim based on membership in the group of “Honduran youth/young Honduran men who have been actively recruited by gangs but have refused to join because they oppose the gangs.”²¹⁰ In its second opinion in *Valdiviezo-Galdamez*, the court conducted a detailed review of the Board’s opinions preceding its articulation of social visibility and particularity and the subsequent criticism leveled at the Board by the Seventh Circuit.²¹¹

Starting with social visibility, the court found that the Board’s decisions in *Kasinga*, *Toboso-Alfonso*, and *Fuentes* were inconsistent with its articulation of social visibility in *C-A-* to limit particular social groups to those defined by “characteristics that were highly visible and recognizable by others in the country in question.”²¹² Because the defining characteristics in the Board’s cases were completely internal and unknown to the public and other members of the group, the court found the social visibility test to create an “insurmountable” hurdle for members of groups the Board had previously recognized.²¹³ Following *Gatimi*, the Third Circuit agreed that the requirement for social visibility made no sense because asylum claims will

commonly be based on membership in a group defined by characteristics that are not externally visible and that its members take pains to hide.²¹⁴ It agreed as well that the Board had provided no rationale for the requirement.²¹⁵ Noting the government’s wavering position on whether social visibility meant literal visibility, the court concluded that a requirement that the group be recognized by society seemed to require this kind of visibility even if the Board’s attorney said it did not.²¹⁶ As such, the Board’s interpretation of particular social group to require literal visibility or disclosure of a hidden trait was at odds with its precedent and unworthy of deference.

Particularity fared no better. The Third Circuit agreed with the government that the criterion was not being used to limit the size of a group, but instead appeared to be an alternative articulation of social visibility. According to the court, “the government’s attempt to distinguish the two oscillates between confusion and obfuscation, while at times both confusing and obfuscating.”²¹⁷ Because the court concluded that particularity was another way of requiring social visibility, it concluded that the test was also inconsistent with the Board’s precedent, had no discernible rationale in determining asylum eligibility, and did not merit deference.²¹⁸

The court remanded the case, stating that social visibility and particularity are “inconsistent with [the BIA’s] prior decisions, and the BIA has not announced a principled reason for its adoption of those inconsistent requirements.”²¹⁹

The Ninth Circuit has Second Thoughts: *Henriquez-Rivas*. After deferring to social visibility and particularity in several published opinions,²²⁰ the Ninth Circuit reviewed the requirements again en banc in *Henriquez-Rivas v. Holder*.²²¹ The court discussed the requirements at length but ultimately declined to decide whether or not they were valid, reasoning that the social group there, “people who testified against gang members,”²²² would be cognizable under either *Acosta* or *S-E-G*.²²³ Nonetheless the court described its view of the meaning of social visibility and particularity in considerable detail. It first dispensed with “on-sight visibility” as a requirement for social visibility

and stated that while the Board's first articulation of the standard in *C-A-* was not entirely clear, the common thread in its pre-*C-A-* decisions requires a group to be "understood by others to constitute a group." The court had similarly required that the shared characteristic defining a social group "generally be recognizable" and that the proposed group would be "perceived as a group by society."²²⁴ The court explained that absent an on-sight requirement, the Board's social visibility standard from *C-A-* was consistent with its prior precedent and that so long as the new requirements were consistent with its case law, the court would be hard pressed to reject them under *Chevron*.²²⁵

The Ninth Circuit left open the question of to whom the group must be visible but observed that the perception of the persecutor may "matter the most"—particularly when the defining characteristic is geographically limited or one that members try to hide.²²⁶ It went on to say that consequently the perception of the persecutor may be "highly relevant to, or even potentially dispositive of, the question of social visibility."²²⁷ The court explained that by taking into account the perception of the persecutor, if there is a characteristic that "defines a finite collection of individuals as a group" then the fact that these individuals may vary in their other characteristics and may belong to different, additional groups does not defeat their claim of membership in a particular social group defined by a characteristic for which they are persecuted.

Discussing particularity, the Ninth Circuit agreed with the criticism that the Board has blended the two criteria so that particularity requires the social perception of a group's distinct boundaries. But again returning to the view of the persecutor, the court determined that the requirement functioned separately to determine whether "a group's boundaries are so amorphous that, in practice, the persecutor does not consider it a group." Ultimately, it concluded that particularity "is merely one factor" to consider in determining whether society would consider a collection of individuals to be a discrete class of persons and therefore a particular social group.²²⁸

The Seventh Circuit's Comprehensive Debunk-

ing of Social Visibility and Particularity: Cece. The Seventh Circuit offered the last word from the federal courts before the Board issued *M-E-V-G-* and *W-G-R-*. In *Cece v. Holder*, the full court recognized the group of "young Albanian women who live alone" in its most thorough opinion on the social group standard.²²⁹ Having rejected the Board's additions to *Acosta*, the court looked only to whether the group was defined by an immutable and fundamental characteristic, but in doing so it discussed the proper functioning of the asylum statute and addressed the floodgates concern that seems to animate the Board's additional restrictions on particular social groups.²³⁰

Cece feared she would be kidnapped and trafficked for prostitution.²³¹ The Board rejected Cece's social group on the ground that it was defined by the persecution she feared.²³² The Seventh Circuit explained that the fact that individuals share an increased risk or experience of persecution does not mean they do not share other protected characteristics and that a group can be defined in part by persecution so long as that is not the only characteristic defining the group.²³³ If underlying, immutable characteristics account for an individual's fear of or vulnerability to persecution, those who share that characteristic can form a cognizable social group even though they also share an elevated risk of persecution. The court explained that recognizing groups that are united by a combination of fundamental and immutable characteristics as well as characteristics that do not receive protection is consistent with the case law and statute establishing that a protected characteristic must be one reason for the persecution but it need not be the only reason.²³⁴ A social group claim thus does not fail because some of the uniting characteristics do not receive protection so long as the others do.²³⁵ Because Cece's age, gender, nationality, and living status were unalterable and fundamental (as the court rejected the government's suggestion that she could be required to marry to avoid harm), Cece's proposed social group satisfied *Acosta*.²³⁶

The en banc court also discussed how membership in a social group is only the first step toward asylum and that the requirement of nexus is "where the rubber

meets the road.”²³⁷ According to the court, the breadth of a particular social group says little about the number of people who actually qualify for asylum because an applicant must demonstrate she fears persecution on account of her protected characteristic; here, the court analogized the asylum framework to Title VII.²³⁸ Under that statute, the protected groups of women or African Americans are large, but the number of people within those groups who have legitimate claims for discrimination is not. Putting a nail in the coffin of overbreadth as a legitimate concern, the full court declared, “[i]t would be antithetical to asylum law to deny refuge to a group of persecuted individuals who have valid claims merely because too many have valid claims.”²³⁹ Consequently, a social group does not fail simply because it is “too broad and sweeping of a classification.”²⁴⁰

Addressing Cece’s gender-based claim, the court recognized that other federal courts and agency adjudicators have considered that gender alone may be able to form the basis of a social group.²⁴¹ It concluded that it need not decide that question because Cece’s group “is defined by gender plus one or more narrowing characteristics” and the Board had recognized a similar group in *Kasinga*.²⁴²

ROUND TWO AT THE BIA: VALDIVIEZO-GALDAMEZ (A.K.A. M-E-V-G-)

Valdiviezo-Galdamez Litigation on Remand from the Third Circuit

With the Third Circuit’s remand of *Valdiviezo-Galdamez* and its instructions to the Board to abandon or explain the social visibility and particularity requirements, immigration advocates launched a coordinated litigation strategy, including extensive amicus briefing, in an effort to get the Board to eliminate or at least alter its additions to the social group standard. This section discusses the arguments raised, the Board’s response in *M-E-V-G-* and *W-G-R-*, and the mounting criticisms of these decisions.

On remand, the Board accepted supplemental briefs from Valdiviezo-Galdamez and the government along with several amicus briefs.²⁴³ In its amicus brief, the

UNHCR discussed its approach to social perception as described in its *Guidelines on International Protection*²⁴⁴ and urged the Board to abandon social visibility and particularity as requirements.²⁴⁵ UNHCR argued that the Board’s transformation of its disjunctive approach into a conjunctive one put the U.S. at odds with the 1951 Convention and 1967 Protocol by inappropriately limiting the availability of international protection.²⁴⁶ The group also criticized the Board’s particularity requirement as unnecessary and confusing because the “protected characteristics” or “social perception” standards employed by the UNHCR already require a group to have well-defined boundaries. To the extent the Board uses particularity to exclude groups based on size or impose additional limitations, UNHCR maintained, the requirement is inconsistent with the international refugee agreements.²⁴⁷

The law school at University of Nevada, Las Vegas (UNLV) filed an amicus brief focused on the legal standards for particular social groups as developed by other countries party to the 1951 Convention and 1967 Protocol.²⁴⁸ It argued that because the Refugee Act of 1980 incorporates the international refugee treaties into United States law, the Board should take into account the interpretations of other parties to those agreements in order to promote its uniform application.²⁴⁹ UNLV reviewed the interpretation of the term “particular social group” in the common law countries of Canada, the United Kingdom, Australia, and New Zealand as well as the standards applied in many civil law countries.²⁵⁰ It urged the Board to follow the practice in the vast majority of these countries that applies social perception as an alternative to the Board’s standard in *Acosta*, rather than as an additional requirement.²⁵¹

The National Immigration Justice Center (NIJC) also submitted an amicus brief describing the Board’s new approach as unfaithful to *Acosta* and unfair to applicants, particularly those who proceed pro se.²⁵² NIJC challenged the new requirements as inconsistent with the principle of ejusdem generis, as a conflation of the term “particular social group” with the nexus requirement, as unnecessary given the filtering structure of the asylum statute, and as inconsistent with the INA in

restricting the size of social groups.²⁵³ The organization also highlighted the difficulties created by the need to articulate narrow and highly specified groups to meet particularity while also demonstrating that the group is recognized by society as a whole: “[i]f the applicant defines a group broadly, she risks the Board rejecting her proposed group as too vague. But if she creates a group that is too narrow, it may not be considered socially visible.”²⁵⁴ This dynamic is particularly complicated by the fact that the asylum application does not require a social group articulation and applicants often complete it without legal representation or English proficiency.²⁵⁵

DHS, in its supplemental brief, advocated for a new test it labeled “social distinction.”²⁵⁶ Homeland Security argued that additional clarification of *Acosta* was necessary and requested by the Courts of Appeals.²⁵⁷ It then proposed that the Board adopt a single addition to *Acosta*’s standard to require that: “(1) the group is composed of members who share a common, immutable characteristic; (2) the group must be perceived by the society in question as distinct; and (3) the social group must exist independently of the fact of persecution.”²⁵⁸ DHS explained that literal visibility or easy identification by the public should not be required but rather “the focus should be on whether the society meaningfully distinguishes persons with the shared characteristic from persons who do not possess the trait.”²⁵⁹ DHS further noted that in its view particularity was best understood as part of the test for social distinction and not as a separate, independent requirement.²⁶⁰

DHS also emphasized the administrative law principles that allowed the Board to reaffirm its position or adopt DHS’ while obtaining deference from the federal courts. It noted the Third Circuit’s statement in *Valdiviezo-Galdamez II* that the Board could add new requirements to or change its interpretation of “particular social group.”²⁶¹ Then, in a lengthy footnote, DHS described its view of the expansive interpretive space within which the Board could operate and how the Board’s new standard for particular social groups could readily satisfy the basic constraints of federal court review.²⁶² DHS noted that the groups that were

recognized in *Kasinga*, *Toboso-Alfonso*, and *Fuentes* would be cognizable under the Board’s requirements or DHS’ new test, and therefore the new approach did not represent a departure from precedent. (Notably, DHS did not contend that the Board had actually applied its social visibility and particularity tests in those cases.)²⁶³ It then stated that in any event, under *FCC v. Fox Television Stations, Inc.*,²⁶⁴ the Board need not conform to its own precedent, and that it had satisfied the minimum requirement of “demonstrating awareness” of its addition to the prior standard.²⁶⁵ Quoting *Fox Television*, DHS explained that the Board “need not demonstrate to a [reviewing] court’s satisfaction that the reasons for its refinement are better than its reasons for the foundational *Acosta* standard. Rather, it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.”²⁶⁶

The Board took the unusual step of holding oral argument in the case and permitted UNHCR to participate.²⁶⁷ The Board asked the representatives at oral argument to recommend refinements to the *Acosta* framework, address the role of social visibility and particularity in analysis of particular social groups, and discuss how DHS’ social distinction test would facilitate the Board’s analysis of this asylum ground.²⁶⁸

The BIA Doubles Down and Rebrands: M-E-V-G- AND W-G-R-

On February 7, 2014, the Board issued its precedential decision on remand along with one in a companion case involving a former gang member from El Salvador.²⁶⁹ In *Matter of M-E-V-G-*, the Board ultimately did not decide whether Valdiviezo-Galdamez’s proposed social group of “Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs” was cognizable.²⁷⁰ Instead, it stated it was providing additional explanation and clarification of its interpretation of “particular social group” to be applied on remand.²⁷¹

As suggested by DHS, the Board began by invoking *Chevron*’s deference principles for its interpretation of

this term and noting its authority under *Fox Television* to change its view so long as it provides a reasoned explanation for the shift.²⁷² The Board maintained, however, that its decision in *M-E-V-G-* did not represent a shift.²⁷³ It positioned the decision as a response to the need for clarification and increased uniformity since *Acosta* and the call from circuit courts for further explanation of its standard.²⁷⁴ (The Board did not acknowledge though that the majority of those calls were for clarification of its additional requirements, not of *Acosta*.²⁷⁵) The Board described the limits of refugee protection that do not encompass harm from natural disasters, civil strife, or war.²⁷⁶ Again employing the canon of *ejusdem generis*,²⁷⁷ it posited that the other protected grounds involve more than an immutable characteristic but also contain a component of “external perception” and a characteristic that “separates various factions” of a particular society.²⁷⁸

Proceeding to its analysis of “particular social group,” the Board disavowed any requirement of “ocular” or “on-sight” visibility, claiming that this was never its intent.²⁷⁹ It therefore renamed the requirement of “social visibility” as “social distinction.”²⁸⁰ The Board then reviewed its three requirements that a particular social group be “(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.”²⁸¹

The Board left *Acosta*’s conception of common immutable characteristics unaltered. It described particularity as concerned with the “boundaries” of the group and consistent with the specificity present in the other grounds of protection.²⁸² Particularity, according to the Board, requires “characteristics that provide a clear benchmark for determining who falls within the group” and thus “commonly accepted definitions.”²⁸³ A group also must be “discrete” and must not be “amorphous, overbroad, diffuse, or subjective.”²⁸⁴

Social distinction, as described by the Board, requires the group to be “perceived as a group by society” but does not require the individual members to be identified on sight.²⁸⁵ In response to the question posed by *Henriquez-Rivas* as to whose perception matters, the Board stated definitively that social distinction “is

determined by the perception of the society in question, rather than by the perception of the persecutor.”²⁸⁶ It justified this departure from the views of several circuit courts on the ground that a focus on the perspective of the persecutor would conflate “social distinction” with the requirement of nexus and conflict with its case law that rejects, as circular, groups defined by the common characteristic of experiencing persecution.²⁸⁷ The Board acknowledged that persecution occurring only in a remote region of a country could limit the inquiry of social distinction to “a more limited subset of the country’s society.”²⁸⁸ But the Board concluded that “[o]nly when the inquiry involves the perception of the society in question will the ‘membership in a particular social group’ ground of persecution be equivalent to the other enumerated grounds of persecution.”²⁸⁹

Turning to the evidentiary burdens on applicants, the Board asserted that applicants with claims on other protected grounds bear the burden to establish the existence of a political or religious group, for example, and that the group “is recognized as such in the relevant society.”²⁹⁰ The Board posited that its requirement for social groups was no different and could be met with “country condition reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like.”²⁹¹ The Board then asserted that each of its key social group precedents before the advent of social visibility and particularity was consistent with these requirements.²⁹²

The Board’s consideration of international standards was terse. It stated, as it had in past decisions, that the international interpretations of “particular social group” from the 1951 Convention and 1967 Protocol were not controlling and that its interpretation “more accurately captures the concepts underlying the United States’ obligations under the Protocol,” invoking *Chevron* deference again.²⁹³ It cited the directive of the European Union which refers particular social groups as defined by an immutable characteristic and perceived by society as distinct.²⁹⁴ UNHCR and UNLV had addressed the force and function of this directive that had not been adopted by all members and did not

prevent a disjunctive approach to the two criteria.²⁹⁵ The Board, however, did not address these points, or mention prominent EU nation decisions taking exactly the opposite reading of the EU document.

Finally, the Board discussed its application of social visibility and particularity in the context of other proposed social groups involving gang resistance. It characterized gangs as generating endemic civil strife and criminal violence that is both widespread and indiscriminate.²⁹⁶ The Board noted that problems caused by gangs may be better addressed by temporary protected status rather than refugee protection.²⁹⁷ But the Board made clear that its decisions in *S-E-G-* and *E-A-G-* were not categorical rejections of all gang-based claims and did not reject the social group in *M-E-V-G-*.²⁹⁸ Instead, it remanded the case for the immigration judge “to engage in any fact-finding that may be necessary to resolve the issues in this case.”²⁹⁹

In *W-G-R-*, issued the same day, the Board rejected the claim based on membership in the particular group of “former members of the Mara 18 gang in El Salvador who have renounced their gang membership.”³⁰⁰ The first two-thirds of the decision discusses the Board’s social group standard, often in nearly identical terms as in *M-E-V-G-*.³⁰¹

Applying those tests to respondent’s proposed social group, the Board concluded that the group lacked particularity because it is too “diffuse, . . . broad[,] and subjective.”³⁰² This was because the group could include persons of “any age, sex, or background” and was not limited to those with “meaningful involvement” in the gang. The Board determined that people who joined the gang at a young age and left years ago, shortly after initiation and without performing any criminal acts, would not be perceived by society as part of the same group as a long-term, hardened gang member with an extensive criminal record.³⁰³ The Board concluded that members of society should generally agree on who is included in a group and that evidence the group is recognized by society was lacking.³⁰⁴ It continued to explain that the group would need further specificity to be particular and that any group characterized by a former association may well require additional definition with respect to “the dura-

tion or strength of the members’ active participation . . . and the recency of their participation.”³⁰⁵ Nor, according to the Board, did respondent demonstrate that his group had the requisite social distinction—again because the record contained “scant evidence that Salvadoran society considers former gang members who have renounced their membership as a distinct social group.”³⁰⁶

Key Criticisms of *M-E-V-G-* AND *W-G-R-*

Not surprisingly, the Board’s choice to reaffirm social visibility—now renamed social distinction—and particularity in *M-E-V-G-* and *W-G-R-* was denounced by advocates.³⁰⁷ Criticism of the decisions centers around three main themes. First, the Board’s tests restrict the availability of refugee protection for applicants with claims based on membership in a particular social group in a way that is inconsistent with the other protected grounds and the statute itself. Second, the Board’s new social group doctrine contradicts its earlier decisions under *Acosta*, and continues to obscure the analysis of these claims. Third, the additional requirements present equitable challenges for applicants and administrability challenges for the immigration courts.

One of the principal concerns with the standards as described in the new decisions is that they function to screen out large groups based on size or breadth—a restriction the Board does not place on the other protected grounds, that it rejected in *Toboso-Alfonso*,³⁰⁸ and which has no basis in the INA. The Board imposes this limitation through its expansive definition of particularity, which describes the need for clear boundaries for the group and rejects “overbroad” or “diffuse” characteristics.³⁰⁹ But the concept of “delineation”³¹⁰ has little to do with the narrowness or homogeneity of the group.³¹¹ In discussing the example of landowners, the Board states that this group “would likely be far too amorphous to meet the particularity requirement in Canada.”³¹² Yet, that is simply untrue. Such a group has clear boundaries based on a common definition; it just may be large and diverse. Further, narrowness (as opposed to a group that encompasses a “major segment[] of the population”),³¹³ and internal homogeneity are not required for the other protected grounds. It

is enough that an individual possess the religious belief, even if it is shared by many, and it is irrelevant whether the individuals who share that religious belief vary in age, sex, background, length and fervency of belief so long as they meet the nexus requirement.³¹⁴ The Ninth and Seventh Circuits have rejected limits based on the size or heterogeneity of the group.³¹⁵ And nothing in the statute supports such limits.³¹⁶

As NIJC's amicus brief described, the Board further limits social group asylum claims by creating standards for particularity and social visibility that work in opposition to one another. Social distinction requires a group to be characterized in a way that "meaningfully distinguish[es]" those with the characteristic "from those who do not."³¹⁷ For societal recognition to attach a group must be defined in terms that "have socio-cultural resonance in the country at issue."³¹⁸ On the other hand, to be particular, the group must be defined in narrow and specific terms, and with terms that limit internal heterogeneity of the group.³¹⁹ These requirements work together to eliminate social group claims, as *W-G-R* demonstrates. The Board there required the group to be defined with more specificity so as to eliminate the variation in age, sex, background, nature of association with the gang, and recency of membership.³²⁰ The result would be a group defined something like "men between the ages of 15 and 20 who were members of the Mara 18 for two years or less and renounced their membership within 5 years." While such a group may have well-defined boundaries, it would not likely have social salience under the Board's definition. The Tenth Circuit's decision in *Rivera-Barrientos* finding that "women in El Salvador between the ages of 12 and 25 who resisted gang recruitment" was particular but not socially visible illustrates just that.³²¹ Taken together, these requirements make claims based on social group membership far more difficult than claims on other grounds in violation of ejusdem generis principles and threaten to read "particular social group" out of the statute with no congressional authorization to do so.³²²

As described by UNHCR and UNLV, the decisions are also out of step with international standards on social group protection, principles of treaty interpreta-

tion, and the law of other countries party to the international refugee agreements. These inconsistencies raises doubts about whether U.S. law complies with the country's international obligations, as Congress intended it to do when enacting the Refugee Act. *M-E-V-G-* essentially concedes that its prior claims of support in the UNHCR social group guidelines were unjustified given their disjunctive approach to immutability and social perception, but the Board then pivots to isolated language in a European Union Directive that, while it *might* be read to require both immutability and social distinction, has in fact been interpreted by key EU nations to provide the two tests as alternatives not dual requirements, consistent with the UNHCR guidelines.³²³ That the directive does not compel member countries to require both tests, and that prominent EU states follow the UNHCR's disjunctive test in the application of their own laws, are crucial facts that the Board's treatment of international law simply ignores.³²⁴

Advocates have also raised doctrinal concerns regarding the Board's continued lack of consistency and clarity. The Seventh, Third, and Ninth Circuits highlighted the Board's cases in *Kasinga*, *Toboso-Alfonso*, and *Fuentes* as decisions that must be reconciled with the new standard or at least be addressed in the Board's explanation of its additional requirements.³²⁵ In response, the Board quoted *Fox Television* as permitting an agency to change its position but then said it was not.³²⁶ It discussed the three decisions, not to show that the groups would meet the new tests, but instead as if social distinction and particularity had been part of its analysis all along, when in fact those decisions reflect none of those concerns.³²⁷ In *M-E-V-G-*, the Board simultaneously enumerated a three-part test that was not the law when *Acosta*, *Kasinga*, *Toboso-Alfonso*, and *Fuentes* were decided and maintained that it is not changing its interpretation of "particular social group."³²⁸ Whether federal courts find this denial plausible and, if not, whether they find that the Board has put forth a "reasoned explanation" or "displayed awareness that it is changing its position" as *Fox Television* requires, remains to be seen.

The decisions do little to dispel confusion over the

interaction between the separate requirements of particularity and social distinction. The Board prefaced its analysis of the social group standard by discussing its duty to guide the courts to “provid[e] a consistent, authoritative, nationwide interpretation of ambiguous provisions of the immigration laws.”³²⁹ The courts in *Valdiviezo-Galdamez II*, *Henriquez-Rivas*, *Gatimi*, and *Rojas-Perez* described the Board’s failure to provide that guidance with respect to its social visibility and particularity requirements. The Board acknowledged in *M-E-V-G-* that “there is considerable overlap between the ‘social distinction’ and ‘particularity’ requirements, which has resulted in confusion.”³³⁰ But its explanation remains confounding. For example, in describing the two separate tests, it states,

Societal considerations have a significant impact on whether a proposed group describes a collection of people with appropriately defined boundaries and is sufficiently “particular.” Similarly, societal considerations influence whether the people of a given society would perceive a proposed group as sufficiently separate or distinct to meet the “social distinction” test.³³¹

It is difficult to see how the tests vary and what “societal considerations” entail.

As applied in *WGR*, the evidentiary failing for each test appeared to be the same. The respondent’s group was not particular for lack of evidence that it “is recognized within the society”³³² and was not socially distinct for lack of evidence that former gang members are “considered to be a distinct group by Salvadorans.”³³³ The different showing required to establish each requirement remains unclear. The Board’s failure to recognize any social group since the advent of the new requirements perpetuates the confusion because it has provided no affirmative examples of how the record in a given case satisfies each of the tests in a way that would illustrate their “distinct” inquiries.³³⁴

The doctrinal distinction between nexus and the protected ground of particular social group membership also remains muddy. The Board rejected the position of the Second, Seventh, and Ninth Circuits that the persecutor’s perception of a shared immutable or fundamental characteristic could be sufficient to establish a particular social group.³³⁵ It reasoned that social

distinction could not be based solely on the perception of the persecutor because if it did, the requirement would collapse with nexus. This logic is backwards. Instead of the Board recognizing that its social visibility standard was redundant with nexus and thus contraindicated by the statutory structure itself, the Board held fast to its requirement but “refined” it in an attempt to avoid conflation. With the definition of the social distinction driven by what it cannot mean, social distinction seems to be a requirement in search of a purpose.

Here, the purpose appears to be not based in the statute but rather restricting social group claims. By requiring perception of the group by society generally, and not just the persecutor, the Board is imposing a “nexus-plus” test that is not required for the other protected grounds and is far more difficult to meet. For someone with a claim based on political belief, it is enough to show that she possesses that belief and that her persecutors are targeting her as a result. Contrary to the Board’s *ejusdem generis* analysis, there is no “external perception component” that extends beyond that of the persecutor for protection on the other grounds and its requirement of this broader perception for social groups is unfounded as a result.³³⁶

Turning to the practical challenges imposed by the tests, the Board requires applicants, many of whom are pro se, to articulate a group that conforms to the competing social distinction and particularity standards and to meet the substantial evidentiary burden imposed. An applicant must ensure that her particular social group is well-defined by characteristics that are precise, have a common definition, and are not amorphous, overbroad, diffuse, vague, or subjective.³³⁷ Additionally, the group must be perceived as one by society, and not just by the applicant’s persecutors.³³⁸ To do this, the Board suggests providing expert testimony, country condition reports, and press accounts.³³⁹

The decision in *W-G-R-* demonstrates just how difficult it is for an applicant to meet these standards. First, an applicant must run the gauntlet of social group formulation on the I-589 that does not provide a place for the formulation and does not inform an applicant of the complicated and interwoven standard the im-

migration court will apply. Then an applicant must support the group formulation with sociological evidence. The Board found in *W-G-R-* that the applicant's evidence discussing stigma and discrimination associated with former gang membership was insufficient to show distinction because it did not identify the precise reason for the stigma and discussed discrimination against other people within Salvadoran society as well.³⁴⁰ Although the immigration judge found the respondent credible,³⁴¹ his claim failed for lack of documentary and expert evidence.

Additionally, because both tests require an applicant to show her group is "recognized within the society"³⁴² and "considered to be a distinct group,"³⁴³ immigration judges must evaluate whether the testimony, country conditions, and any other evidence is sufficient to meet this sociological standard. Not only is the requirement onerous on applicants, but it forces judges to evaluate issues outside their expertise.³⁴⁴ *M-E-V-G-* and *W-G-R-* again illustrate the administrative challenges that ensue. In *M-E-V-G-*, the Board posits that the group of landowners might be cognizable in one society but not in another depending on the degree of development and "oligarchical" structure.³⁴⁵ How an immigration judge would evaluate evidence of this is not addressed. The Board rejects the group of former gang members because "[i]t is doubtful" that society would consider someone who had joined the gang at a young age, left years ago, and had little involvement while a member to be in the same group as a long-time, active member who had recently defected.³⁴⁶ The Board, however, cites no evidence for this supposition. It also second-guesses the report on gangs in the record and suggests an alternative reason for the stigma and discrimination the report ascribes to former gang members.³⁴⁷

The Board frames both opinions with citations to *Chevron* and *Brand X*, pointing to principles of deference to administrative interpretations. The decisions go to great lengths to address the specific failings raised by those circuit courts that have not accorded deference, but, notably, the Board never states that it declines to follow the contrary decisions in those circuits.³⁴⁸ At any rate, the critiques lodged against *M-E-V-G-* and *W-G-R-* provide compelling reasons for

federal courts to withhold this deference, and several circuit courts are now poised to decide whether to do so. The next part of this *Briefing* identifies litigation that will advance these criticisms, and the Appendix identifies additional resources for lawyers handling social group claims in the wake of the Board's new decisions.

PARTICULAR SOCIAL GROUPS AFTER *M-E-V-G-* AND *W-G-R-*

Cases challenging the Board's newest explanation of the social visibility (now distinction) and particularity tests in *M-E-V-G-* and *W-G-R-* are already pending in circuit courts, and the existing circuit split regarding deference to the Board's social group precedents makes eventual Supreme Court review a distinct possibility. Other options for advocacy could include asking the Attorney General to certify an appropriate case in order to roll back the Board's flawed social group precedents, seeking a social group regulation consistent with *Acosta*, or pursuing a legislative fix. Whether any of these options can succeed is unknown, so the legal standard for particular social group claims is likely to remain uncertain for a significant period of time.

The remainder of this *Briefing* takes note of decisions and administrative actions since *M-E-V-G-* and *W-G-R-*, points out potentially significant social group litigation now in the pipeline, and directs practitioners to additional resources they can access for assistance formulating social groups and documenting their social group claims.

Notable Litigation, Decisions, and Administrative Actions

The BIA remanded *M-E-V-G-* to an immigration judge and the case is not pending before the Third Circuit. However, the petitioner in another case presenting a very similarly formulated social group of young Honduran males who have resisted recruitment by MS-13 because they oppose the gang filed his opening brief in late May with amicus support from AILA and NIJC.³⁴⁹ This case could be the Third Circuit's first opportunity to respond to the Board and decide whether it will continue to deny deference to the new

tests after *M-E-V-G-*. The respondent in *W-G-R-* did file a timely petition for review with the Ninth Circuit on March 10, 2014, and has received a stay of removal from the court. His opening brief is due in September and the case is sure to attract significant amicus support.³⁵⁰ Another former gang member claim now before the Second Circuit is *Ordonez-Azmen v. Holder*. The petitioner has amicus support from UNLV and he filed a supplemental brief in April addressing *M-E-V-G-* and *W-G-R-*.³⁵¹ This case is noteworthy because the Board's new decisions hold for the first time that the social distinction/visibility test must be "determined by the perception of the society in question, rather than by the perception of the persecutor[.]"³⁵² but this is contrary to the Second Circuit's prior decisions indicating that members of a valid social group share "some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general."³⁵³ Because of this unacknowledged conflict, *Ordonez-Azmen* has asked the Second Circuit to reconsider and withdraw the deference it previously extended to the Board's social visibility and particularity criteria in *Ucelo-Gomez v. Mukasey*.³⁵⁴

To date only the Ninth Circuit has addressed *M-E-V-G-* or *W-G-R-* in a published decision. In *Pirir-Boc v. Holder*, the Ninth Circuit remanded the Board's decision rejecting an asserted social group of Guatemalan "individuals taking concrete steps to oppose gang membership and gang authority."³⁵⁵ While the Ninth Circuit accepted that *M-E-V-G-* declined its suggestion in *Henriquez-Rivas* that a persecutor's perceptions should be sufficient to establish the social visibility/distinction element,³⁵⁶ the court explicitly reserved judgment "whether the BIA's requirements of 'social distinction' and 'particularity' constitute a reasonable interpretation of 'particular social group.'" ³⁵⁷ The court found the Board's dismissal of *Pirir-Boc*'s claim by reference to *S-E-G-*'s rejection of a similarly phrased social group was not "consistent with [*M-E-V-G-* and *Acosta* because] the BIA may not reject a group solely because it had previously found a similar group in a different society to lack social distinction or particularity."³⁵⁸ The Ninth Circuit warned the Board it must honor its own precedents by making a case-by-

case, fact-based determination of whether the respondent, brother to a former gang member from Guatemala—and himself a Guatemalan man who had refused to join the gang—had established particularity and social visibility. The court advised the Board to consider on remand whether *Pirir-Boc*'s social group was cognizable in light of *Henriquez-Rivas*, which the court deemed a similar social group.

Pirir-Boc is the only published decision to discuss *M-E-V-G* and *W-G-R-*, but since the Board issued these decisions there have been a small number of published circuit opinions addressing social group claims without mentioning the Board's precedents.³⁵⁹ Otherwise there have been eleven decisions that cited *M-E-V-G-* or *W-G-R-*, all unpublished, and all in the Ninth Circuit. In each of the cases, the Ninth Circuit remanded for a determination of the impact, if any, of the BIA decisions.³⁶⁰ Three of the decisions specifically identified the issue as one of cognizability of the proposed particular social group.³⁶¹

In the area of gender related social groups, DHS and DOJ still have not promulgated any final social group regulations. In the wake of *L-R-* and *R-A-*, DHS and immigration judges can and should continue to recognize domestic violence as a basis for asylum and withholding, though treatment of these claims is subject to inconsistency given the absence of binding regulatory or Board authority on point.³⁶² Practitioners should know that between 2011 and 2012 the Board solicited amicus briefs from the American Immigration Lawyers Association (AILA) in seven separate Central American domestic violence asylum cases, and in each case asked the parties and amici curiae to provide briefs that "specifically and comprehensively address the issue of whether domestic violence can, in some instances, form the basis of an asylum or withholding of removal claim."³⁶³ Of the seven appeals, DHS was able to remove six from the Board's docket by motions withdrawing its own appeal, agreeing to a grant of relief, or by seeking remand for further proceedings and development of the factual record with respect to social group, nexus, or other issues.³⁶⁴ The only case still pending is *Matter of K-C-*. AILA's amicus brief in *K-C-* urged the Board to recognize the social group of

“Guatemalan women,” without more, or, alternatively, a version of definition proposed by DHS in *R-A-* and *L-R-*, “Guatemalan women in domestic relationship who cannot leave.”³⁶⁵ CGRS also filed an amicus brief calling on the Board to grant asylum without remand after recognizing one of the social groups supported in the AILA brief since the undisputed record established K-C-’s eligibility in all respects.³⁶⁶

The Board also has before it in *Matter of R-P-* the long-pending appeal of one respondent who seeks recognition of the gender per se social group “Guatemalan women.”³⁶⁷ R-P- was gang raped and gave birth as a result, and she provided extensive evidence that the government of Guatemala was unable and unwilling to protect her, but the BIA rejected her social group as “overbroad” in an unpublished decision.³⁶⁸ The case was previously on appeal to the Eighth Circuit but was remanded pursuant to a joint stipulation of the parties following the Ninth Circuit’s decision in *Perdomo v. Holder*, which remanded another unpublished Board decision denying a nearly identically defined social group.³⁶⁹ Both CGRS and NIJC filed amicus briefs with the Board in support of R-P-’s asylum claim.³⁷⁰

One disturbing development not directly concerning the social group standard but that implicates the *M-E-V-G-* and *W-G-R-* decisions is the February 2014 amendment of the U.S. Citizenship and Immigration Services’ credible fear instruction manual used to train asylum officers.³⁷¹ The statutory definition of “credible fear of persecution” is “a significant possibility . . . that the alien could establish eligibility for asylum[.]”³⁷² The revised USCIS RAIO Manual cites *M-E-V-G-* and states “[f]or a credible fear of persecution, there must be a significant possibility that the applicant can establish that the persecutor was motivated to harm him or her on account of his or her . . . membership in a particular social group.”³⁷³ Regrettably, the new manual appears to raise the threshold for “significant possibility” by requiring that the applicant “demonstrate a *substantial and realistic possibility of succeeding*.”³⁷⁴ These revisions are an illegitimate attempt to limit credible fear claims by Central Americans and Mexicans, and they have been harshly criticized by advocates because they risk

exacerbating already disturbing trends in DHS treatment of asylum seekers in the credible fear process.³⁷⁵ This includes prejudgment and rejection by asylum officers of potentially meritorious claims for protection, especially gang-related claims, which officers may mistakenly feel licensed to reject as lacking a substantial and realistic possibility of success on social group grounds³⁷⁶—a problem similar to the Board’s improper and categorical treatment of the gang-related claim in *Pirir-Boc*.³⁷⁷

General Considerations and Resources

Because the future of the legal standard governing particular social groups is uncertain and the social distinction and particularity tests present additional obstacles not applied to other grounds of protection, lawyers should always consider whether a client’s claim could be based on an alternative ground—political opinion, religion, race, or nationality. For example, in the context of gang-resistance, applicants asserting political opinion and religion based claims have often faced difficulties proving nexus, but these can still be viable alternatives in addition to or instead of even harder social group claims, depending on the facts and the quality of the record you can build.³⁷⁸ There are two notable cases pending in the Ninth Circuit now that provide examples of this strategy. In *Colocho v. Holder*, Harvard’s Immigration and Refugee Clinical Program, along with other amici, are supporting the political opinion claim of an asylum seeker who as a teenager was brutally assaulted and threatened by Salvadoran gang members because of his participation in a youth group widely known to oppose the gang and its activities.³⁷⁹ Colocho built a strong record of his activities in El Salvador, the gang’s knowledge of and specific reactions to his activities, and extensive country conditions evidence demonstrating that the gang has come to effectively operate as an alternative government in El Salvador today.³⁸⁰ In *G-M- v. Holder*, CGRS is co-counsel to a family of Salvadoran asylum applicants who established a strong record documenting gang persecution directed at them because as Evangelical Christians they were proselytizing with a focus on recruiting youth into the Church and discouraging them from joining the gang.³⁸¹

As described in part three, the Third and Seventh Circuits have refused to defer to the Board's social visibility and particularity tests and apply neither, the Ninth Circuit has withheld judgment on whether they are reasonable tests, the Fourth Circuit has pointedly avoided addressing social visibility but defers to particularity, and with some caveats other circuits have with varying degrees of enthusiasm deferred to and applied both tests. It remains unknown how these courts will react to *M-E-V-G-* and *W-G-R-* and whether circuit courts may change their positions with respect to social distinction and particularity as the Board has most recently explained these tests, so the current state of the law in your circuit could improve or get worse going forward. In general, therefore, advocates in all circuits who are presenting claims before DHS or EOIR should formulate social groups to meet the new tests, and, crucially, build records including detailed country conditions evidence and expert testimony that can satisfy immutability, social distinction, and particularity. Within the Seventh and Third Circuits, where the courts have refused to give deference to social visibility and particularity, it is advisable to articulate alternative social groups—one geared to *Acosta* alone, and another designed to satisfy social visibility/distinction and particularity. In other circuits, considering circuit case law and the type of social group claim presented, it will often make sense to follow the same pattern and to formulate alternative social groups. In all circuits, whenever it is in your client's interests, you should then raise and preserve objections to the Board's social distinction and particularity requirements, as discussed in Part three, in case it is later necessary to take an appeal.

Practitioners should take advantage of available resources in planning case strategy and formulating their social groups. For example, at the website of the Center for Gender and Refugee Studies (CGRS), lawyers and other asylum advocates can request technical assistance in formulating a social groups tailored to the circumstances of individual cases, and obtain practice advisories, expert declarations, country conditions reports, briefs and decisions, as well as referrals to potential experts.³⁸² Also, the National Immigrant Justice Center (NIJC) has issued an excellent practice

advisory on social group claims following *M-E-V-G-* and *W-G-R-*,³⁸³ with helpful guidance on formulating social groups in a companion webinar slideshow.³⁸⁴

Finally, the Appendix contains resources which provide important legal authority and guidance as a starting point for practitioners developing social groups claims in a variety of specific contexts.

ENDNOTES:

¹Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42)(A) (emphasis added). The statute setting forth procedures and eligibility criteria for asylum is INA § 208, 8 U.S.C.A. § 1158. The withholding of removal statute is at INA § 241(b)(3), 8 U.S.C.A. § 1231(b)(3). Regulations governing asylum and withholding applicants are found at 8 C.F.R. § 1208. See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436–41, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987) (explaining standards for asylum and withholding).

²See Deborah Anker, *The Law of Asylum in the United States* §§ 5:45–5:64 (2014 edition).

³Pub.L. No. 96-212, § 201(a), 94 Stat. 102, 102–03 (1980).

⁴The United States acceded to the Protocol in 1968. The Protocol, in turn, incorporates the Convention. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268; United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (referred to herein interchangeably as “Protocol” or “Convention”; *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 428–29, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987).

⁵Convention Article 1A(2) defines a refugee as someone who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country”.

⁶Convention Article 33A(1) provides: “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Non-refoulement is “the cornerstone of asylum and

international refugee law . . . reflect[ing] the commitment of the international community to ensure to all persons the enjoyment of human rights[.]” United Nations High Comm’r for Refugees, UNHCR Note on the Principle of Non-Refoulement (November 1997), available at <http://www.unhcr.org/refworld/docid/438c6d972.html>.

⁷Id.

⁸S. Rep. No. 96-256, at 1 (1979), reprinted in 1980 U.S.C.C.A.N. 141; see *Cardoza-Fonseca*, 480 U.S. at 429; *Matter of S-P-*, 21 I. & N. Dec. 486, 492, 1996 WL 422990 (B.I.A. 1996). The Convention duty of non-refoulement is codified in U.S. law by the withholding statute INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A): “[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”

⁹U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Nov. 19, 1951, Summary Record of the Third Meeting, at 14, U.N. Doc. A/CONF.2/SR.3 (Nov. 19, 1951); see *Fatin v. I.N.S.*, 12 F.3d 1233, 1239 (3d Cir. 1993) (discussing history of Convention and Refugee Act).

¹⁰United Nations High Comm’r for Refugees, 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, ¶ 2, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereafter “UNHCR Social Group Guidelines”].

¹¹See e.g., *Fatin*, 12 F.3d at 1239.

¹²See, e.g., *In re Kasinga*, 21 I. & N. Dec. 357, 1996 WL 379826 (B.I.A. 1996) (ground-breaking BIA social group precedent recognizing gender-based social group of “young women of the Tchambakunsuntu tribe who have not had female genital mutilation (FGM), as practiced by that tribe, and who oppose the practice”).

¹³See, e.g., Blaine Booke, Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012, 24 Hastings Women’s L.J. 107 (2013) (describing inconsistent adjudication of social group claims based on domestic violence).

¹⁴See Anker *supra* note 2, at § 5:41; see, e.g., *Matter of H-*, 21 I. & N. Dec. 337, 333-34, 1996 WL 291910 (B.I.A. 1996) (reversing immigration judge and ex-

plaining that the large size of social groups based on Somali clan membership should not be of concern because each applicant must establish persecution “on account of that membership.”); see also Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 Va. J. Soc. Pol’y & L. 119 (2007) (debunking claims that recognition of large social groups leads to large influxes of asylum seekers, and documenting that recognition of social groups based on female genital cutting did not result in meaningful increases of asylum seekers in the United States or Canada).

¹⁵*Safaie v. I.N.S.*, 25 F.3d 636, 640 (8th Cir. 1994) is a classic example of how concerns over size and breadth of a social group can cause a court to conflate analysis of the *cognizability* of a social group with the distinct elements of well-founded fear and nexus:

Safaie asserts that Iranian women, by virtue of their innate characteristic (their sex) and the harsh restrictions placed upon them, are a particular social group. We believe this category is overbroad, because no factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender.

Fatma E. Marouf, in *The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 Yale L. & Pol’y Rev. 47, 71–78 (Fall 2008), describes how inherent difficulties in providing evidence sufficient to meet the BIA’s new social visibility test causes adjudicators to assess cognizability by the relative risk of harms that an asserted group’s members face compared to other members of society, thereby promoting “conflat[ation of] the “persecution” (i.e., seriousness of harm), “well-founded fear” (i.e., level of risk), “on account of” (i.e., causal nexus) and protected ground elements of the refugee definition.”

¹⁶See *id.*; UNHCR Social Group Guidelines, *supra* note 10, at ¶¶ 18–19

¹⁷INA § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42)(A).

¹⁸8 C.F.R. § 208.13(b)(3)(i), (ii).

¹⁹8 U.S.C.A. § 1158(b)(2)(A); 8 U.S.C.A. § 1231(b)(3)(B).

²⁰8 U.S.C.A. § 1158(a)(2)(B). There are limited exceptions to the one-year time limit for asylum applications at 8 U.S.C.A. § 1158(a)(2)(D).

²¹8 U.S.C.A. § 1158(b)(1)(A), (b)(2)(C).

²²Anker, *supra* note 2, at § 5:41.

²³Id.

²⁴As discussed below, prompted by desire to provide standards for gender-based social group claims, the Justice Department previously issued proposed regulations that would have defined “particular social group.” Asylum and Withholding Definitions, 65 Fed. Reg. 76588, 76589 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208). These regulations were never finalized. See Karen Musalo, A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women’s Claims, 29 Refugee Surv. Q. 58–60 (2010).

²⁵8 C.F.R. § 1003.1(d)(1).

²⁶8 C.F.R. § 1003.1(g), (h); see *In re E-L-H-*, 23 I. & N. Dec. 814, 2005 WL 1995655 (B.I.A. 2005).

²⁷Compare, e.g., *Valdiviezo-Galdamez v. Attorney General of U.S.*, 663 F.3d 582, 603–09 (3d Cir. 2011), and *Gatimi v. Holder*, 578 F.3d 611, 615–16 (7th Cir. 2009) (criticizing BIA’s additional requirements as being inconsistent with prior precedent), with *Lizama v. Holder*, 629 F.3d 440, 447 (4th Cir. 2011), and *Ramos-Lopez v. Holder*, 563 F.3d 855, 862 (9th Cir. 2009) (upholding one or both of the requirements). See *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 233, 2014 WL 524499 (B.I.A. 2014) (describing circuit split).

²⁸See, e.g., *Gaitan v. Holder*, 671 F.3d 678 (8th Cir. 2012), cert. denied, 133 S. Ct. 526, 184 L. Ed. 2d 339 (2012).

²⁹8 U.S.C.A. § 1252(b)(2).

³⁰USCIS Asylum Officer Basic Training, Asylum Eligibility Part III: Nexus and the Five Protected Characteristics 36 (Mar. 12, 2009) (hereinafter, available at <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBT%20Lesson%20Plans/Nexus-the-Five-Protected-Characteristics-31aug10.pdf>).

³¹The Center for Gender and Refugee Studies provides technical assistance to asylum seekers, and is an excellent source for unpublished Board and immigration judge decisions. Assistance can be requested at <http://cgrs.uchastings.edu/assistance/request>.

³²*I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436–41, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987).

³³UNHCR Social Group Guidelines, *supra* note 10.

³⁴See *Abbott v. Abbott*, 560 U.S. 1, 130 S. Ct. 1983, 1993, 176 L. Ed. 2d 789, 7 A.L.R. Int’l 749 (2010); see also Fatma E. Marouf, The Role of Foreign Authorities in U.S. Asylum Adjudication, 45 N.Y.U. J. Int’l L.

& Pol. 391 (2013) [hereinafter “Marouf, Foreign Authorities”].

³⁵Anker, *supra* note 2, at §§ 5:45–5:64.

³⁶Center for Gender & Refugee Studies, <http://cgrs.uchastings.edu/> (last visited June 14, 2014).

³⁷National Immigrant Justice Center, <http://www.immigrantjustice.org/> (last visited June 14, 2014).

³⁸19 I. & N. Dec. 211, 233 (1985), overruled on other grounds, *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 1987 WL 108943 (B.I.A. 1987).

³⁹Id.

⁴⁰Id.

⁴¹Id.

⁴²Id.

⁴³Id.

⁴⁴Id. at 234.

⁴⁵19 I. & N. Dec. 658 (B.I.A. 1988).

⁴⁶20 I. & N. Dec. 819 (B.I.A. 1990).

⁴⁷21 I. & N. Dec. 357 (B.I.A. 1996).

⁴⁸See *infra* notes 132 through 306 and accompanying text. In addition to *Fuentes*, *Toboso-Alfonso*, and *Kasinga*, the Board applied *Acosta* to when recognizing social groups in *In re H-*, 21 I. & N. Dec. 337, 1996 WL 291910 (B.I.A. 1996) (members of the Marehan subclan in Somalia), and *In re V-T-S-*, 21 I. & N. Dec. 792, 1997 WL 107592 (B.I.A. 1997) (Filipinos of mixed Filipino-Chinese ancestry), while it denied recognition under *Acosta* to one social group in *Matter of Vigil*, 19 I. & N. Dec. 572, 1988 WL 235477 (B.I.A. 1988) (“young, male, unenlisted urban Salvadorans”).

⁴⁹*Fuentes*, 19 I. & N. Dec. at 662.

⁵⁰Id. at 659.

⁵¹Id. at 662.

⁵²Id.

⁵³*Toboso-Alfonso*, 20 I. & N. Dec. at 822–23.

⁵⁴Id. at 820–21.

⁵⁵Id. at 821.

⁵⁶Id. at 822.

⁵⁷Id.

⁵⁸Id. at 822–23.

⁵⁹Id. at 822.

⁶⁰*Kasinga*, 21 I. & N. Dec. at 365.

⁶¹Id. at 358.

⁶²Id. at 365.

⁶³Id. at 366.

⁶⁴Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694, 21 Env't. Rep. Cas. (BNA) 1049, 14 Env'tl. L. Rep. 20507 (1984), federal courts reviewing agency interpretation of a statute falling within the agency's area of expertise must undertake a two-step analysis: first, if the statute is unambiguous with respect to the precise question raised the court does not defer to the agency and it applies the statute's plain terms, but second, if the statute is ambiguous, the court must defer to the agency interpretation so long as it is a reasonable one. Id. at 842–43.

⁶⁵See *Gebremichael v. I.N.S.*, 10 F.3d 28, 35–36 (1st Cir. 1993); *Koudriachova v. Gonzales*, 490 F.3d 255, 262 (2d Cir. 2007); *Fatin v. I.N.S.*, 12 F.3d 1233, 1240 (3d Cir. 1993); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir. 2002); *Castellano-Chacon v. I.N.S.*, 341 F.3d 533, 546, 2003 FED App. 0293P (6th Cir. 2003); *Lwin v. I.N.S.*, 144 F.3d 505, 512 (7th Cir. 1998); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1033 (8th Cir. 2008); *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005); *Niang v. Gonzales*, 422 F.3d 1187, 1198–99 (10th Cir. 2005); *Castillo-Arias v. U.S. Atty. Gen.*, 446 F.3d 1190, 1196 (11th Cir. 2006).

⁶⁶*Fatin v. I.N.S.*, 12 F.3d 1233, 1239 (3d Cir. 1993).

⁶⁷Id. at 1235, 1241.

⁶⁸Id. at 1240.

⁶⁹Id.

⁷⁰The REAL ID Act of 2005 clarifies that to establish nexus an applicant must “establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant.” See § 208(b)(1)(B)(i); 8 U.S.C.A. § 1158(b)(1)(B)(ii) (emphasis added). This standard is considered to turn on objective “reasons” rather than subjective “motives.” See Anker, *supra* note 2, §§ 5:11, 5:12. The applicant only has to show his or her membership in a protected group was one of the “central reasons” for the persecution—he or she does not have to show that it was the dominant or most important reason. *Ndayshimiye v. Attorney General of U.S.*, 557 F.3d 124, 129 (3d Cir. 2009).

⁷¹The Third Circuit went on to deny the petition because it believed the record did not show Fatin would be harmed “on account of” her gender, and also

that Fatin had not shown she was actually a member of the more narrowly defined social group of “Iranian women who refuse to conform to the government’s gender-specific laws and norms[.]” though the court stated this group “may well satisfy the BIA’s [*Acosta*] definition.” *Fatin*, 12 F.3d at 1241. See *Niang v. Gonzales*, 422 F.3d 1187, 1198–1200 (10th Cir. 2005) (explaining that gender “plus” another characteristic like tribal ties are sufficient under *Acosta* and *Kasinga* to establish immutability, and any additional narrowing characteristics are not necessary, but may be added in order to satisfy separate element of nexus).

⁷²*Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1572–73 (9th Cir. 1986).

⁷³Id. at 1576.

⁷⁴Id.

⁷⁵Id. at 1577.

⁷⁶947 F.2d 660 (2d Cir. 1991).

⁷⁷Id. at 663.

⁷⁸Id. (quoting *De Valle v. I.N.S.*, 901 F.2d 787, 793 (9th Cir. 1990); *Ananeh-Firempong v. I.N.S.*, 766 F.2d 621, 626 (1st Cir. 1985)).

⁷⁹Id.

⁸⁰The Eighth Circuit in *Safaie v. I.N.S.*, 25 F.3d 636, 640 (8th Cir. 1994) also sought to limit large and broad social groups but in doing so conflated social group cognizability with well-founded fear and nexus, stating “We believe [the social group of Iranian women] is overbroad, because no factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender.”

⁸¹225 F.3d 1084, 1087 (9th Cir. 2000).

⁸²Id. at 1092 (citing *Lwin v. I.N.S.*, 144 F.3d 505, 511–12 (7th Cir. 1998)).

⁸³Id. at 1092–93 (emphasis in original).

⁸⁴*Ochoa v. Gonzales*, 406 F.3d 1166, 1171 (9th Cir. 2005) (citing *Sanchez-Trujillo*, 801 F.2d at 1577) (rejecting as overbroad the particular social group of “business owners in Colombia who have rejected demands by narco-traffickers to participate in illegal activity”).

⁸⁵*Perdomo v. Holder*, 611 F.3d 662, 667 n.5, 667–69, (9th Cir. 2010). The Ninth Circuit en banc returned to this concept again in *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1093–94 (9th Cir. 2013) (en banc) and rejected the requirement that social groups be homogeneous across all traits. See Circuit Courts

Split on Social Visibility and Particularity, *infra*.

⁸⁶*Id.*

⁸⁷*Gao v. Gonzales*, 440 F.3d 62 (2d Cir. 2006), cert. granted, judgment vacated on other grounds, 552 U.S. 801, 128 S. Ct. 345, 169 L. Ed. 2d 2 (2007). *Gao* states that although *Gomez* “used broad language that could (and has) been read as conflicting with *Matter of Acosta*, [. . .] this Court rejected *Gomez*’s claim not because the social group she defined was too ‘broadly based’ but rather because ‘there is no indication that *Gomez* will be singled out for further brutalization on [the basis of her past victimization].’ In other words, *Gomez* can reasonably be read as limited to situations in which an applicant fails to show a risk of future persecution on the basis of the ‘particular social group’ claimed, rather than as setting an *a priori* rule for which social groups are cognizable.” *Gao*, 440 F.3d at 69 (quoting *Gomez*, 947 F.2d at 664).

⁸⁸For a comprehensive, comparative analysis of international interpretations of “particular social group,” see Marouf, *Foreign Authorities*, *supra* note 34, at 421–45.

⁸⁹*Canada (Attorney-General) v. Ward*, [1993] 2 S.C.R. 689, 739 (Can.).

⁹⁰*Islam v. Sec’y of State for the Home Dep’t and Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah*, [1999] 2 A.C. 629 (H.L.) 640–41 (U.K.).

⁹¹*Refugee Appeal No. 1312/93, Re GJ 27–28* (N.Z. Refugee Status Appeals Authority, Aug. 30, 1995).

⁹²*Applicant A v. Minister of Immigration & Ethnic Affairs*, [1997] H.C.A. 4, 190 CLR 225, 264 (McHugh J).

⁹³*Id.*

⁹⁴*Id.*

⁹⁵*Minister for Immigration & Multicultural Affairs v. Zamora*, (1998) FCR 458, 454 (Austl.).

⁹⁶UNHCR Social Group Guidelines, *supra* note 10.

⁹⁷*Id.* at ¶¶ 6–7.

⁹⁸*Id.* at ¶ 6.

⁹⁹*Id.* at ¶ 7.

¹⁰⁰*Id.* at ¶ 9.

¹⁰¹*Id.* at ¶ 11 (emphasis added).

¹⁰²*Id.*

¹⁰³*Id.* at ¶¶ 15–16, 17–18.

¹⁰⁴*Id.* As a companion to the general social group

guidelines, UNHCR simultaneously issued its groundbreaking gender guidelines, which emphatically endorsed gender-related claims across a number of contexts, and reaffirmed recognition of gender-related “particular social groups” under the UNHCR definition. The recognized social groups included those composed of women, without regard to group size, and homosexuals, transsexuals, or transvestites. *Id.* at ¶¶ 28–31.

¹⁰⁵*Applicant S v. Minister for Immigration & Multicultural Affairs*, (2004) 217 CLR 387, 397–98. (Austl.).

¹⁰⁶*Id.*; see also Brief of Thomas & Mack Legal Clinic, University of Nevada, Las Vegas William S. Boyd School of Law Supporting Respondent at 7, *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 2014 WL 524499 (B.I.A. 2014).

¹⁰⁷*Applicant S*, 217 CLR at ¶ 34.

¹⁰⁸Immigration and Refugee Board, Preferred Position Paper, Membership in a Particular Social Group as a Basis for a Well-Founded Fear of Persecution (Mar. 1992) (allowing two-step test nearly identical to UNHCR approach where proposed group is analyzed first for immutability, and only afterwards for social perception if immutability is lacking); Marouf, *Foreign Authorities*, *supra* note 34 at 427.

¹⁰⁹*Refugee Appeal No. 1312/93, Re GJ 27–28* (N.Z. Refugee Status Appeals Authority, Aug. 30, 1995), at 60; Marouf, *Foreign Authorities*, *supra* note 34 at 433–34.

¹¹⁰See *K v. Sec’y of State for the Home Dep’t*, [2006] W.L.R. 733 (H.L.), [2006] UKHL 46 (U.K.); Marouf, *Foreign Authorities*, *supra* note 34 at 427, 428–29.

¹¹¹For discussion of the social group standards of other nations, including civil law nations, see Marouf, *Foreign Authorities*, *supra* note 34 at 434–51.

¹¹²22 I. & N. Dec. 906 (B.I.A. 1999).

¹¹³*Id.* at 909.

¹¹⁴*Matter of R-A-*, 22 I. & N. Dec. 906, 2001 WL 1744475 (B.I.A. 2001) (vacating the BIA’s 1999 decision); see *In re E-L-H-*, 23 I. & N. Dec. 814, 2005 WL 1995655 (B.I.A. 2005) (explaining that Board precedents vacated by Attorney General have no precedential value under 8 C.F.R. § 1003.1(g), (h)). Because *R-A-* is vacated entirely and on its merits, practitioners should object if an immigration judge ever attempts to cite or otherwise rely on the Board’s decision, and pursue the issue on appeal if necessary.

¹¹⁵The Center for Gender and Refugee Studies (CGRS) represented Rody Alvarado and provides a complete timeline of the case with links to all relevant documents on its website at <http://cgrs.uchastings.edu/our-work/matter-r>.

¹¹⁶Id.

¹¹⁷Asylum and Withholding Definitions, 65 Fed. Reg. 76588, 76589 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

¹¹⁸Id. at 76593.

¹¹⁹Id. at 76594.

¹²⁰Id.

¹²¹801 F.2d 1571 (9th Cir. 1986).

¹²²Id.

¹²³Id.

¹²⁴*In re R-A-*, 22 I. & N. Dec. 906, 2001 WL 1744475 (B.I.A. 2001).

¹²⁵Brief of DHS at 26, *In re R-A-*, 22 I. & N. Dec. 906, 2001 WL 1744475 (B.I.A. 2001), available at <http://cgrs.uchastings.edu/sites/default/files/Matter%20of%20R-A-%20DHS%20brief.pdf>.

¹²⁶Id. at 4–5.

¹²⁷Id. at 19–25.

¹²⁸Id. at 20–25.

¹²⁹Id.

¹³⁰Id.; DHS also cited and criticized the Eighth Circuit’s *Safaie* decision for merging social group analysis with separate elements of the refugee definition. Id.

¹³¹Id. at 19–42.

¹³²23 I. & N. Dec. 951 (B.I.A. 2006).

¹³³Id. at 952.

¹³⁴Id. at 952–53.

¹³⁵Id. at 954.

¹³⁶Id. at 959.

¹³⁷Id. at 960.

¹³⁸24 I. & N. Dec. 69 (B.I.A. 2007) (holding that “affluent Guatemalans” lack sufficient social visibility to be perceived as a group by society and that the proposed group was defined without adequate particularity to constitute a particular social group).

¹³⁹*Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. at 74 (citing *C-A-* for proposition that social visibility is a “factor” to consider in determining whether a social

group exists, but later in same page discussing whether respondents had established “requisite” social visibility for their proposed group).

¹⁴⁰*Matter of S-E-G-*, 24 I. & N. Dec. 579, 2008 WL 2927590 (B.I.A. 2008); *Matter of E-A-G-*, 24 I. & N. Dec. 591, 2007 WL 5367673 (B.I.A. 2008) (applying *S-E-G-* visibility and particularity requirements to reject PSGs of “persons resistant to gang membership” and “young persons who are perceived to be affiliated with gangs”).

¹⁴¹*S-E-G-*, 24 I. & N. Dec. at 582.

¹⁴²See Marouf, *Social Visibility*, supra note 15, at 47.

¹⁴³*S-E-G-*, 24 I. & N. Dec. at 579–80.

¹⁴⁴Id. at 582–87.

¹⁴⁵Id. at 586–88.

¹⁴⁶Id. at 587.

¹⁴⁷Id. at 585 (discussing *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007)).

¹⁴⁸Id. at 584.

¹⁴⁹Id. at 584–85.

¹⁵⁰Id. at 585 (quoting *Davila-Mejia v. Mukasey*, 531 F.3d 624, 628–29 (8th Cir. 2008)).

¹⁵¹Id. at 585–86.

¹⁵²Id.

¹⁵³*Matter of R-A-*, 24 I. & N. Dec. 629, 2008 WL 4419696 (B.I.A. 2008).

¹⁵⁴Id.

¹⁵⁵Brief of DHS, *In re L-R-*. Available at http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf.

¹⁵⁶Id. at 6.

¹⁵⁷Id. at 14.

¹⁵⁸Id. at 17–20.

¹⁵⁹Brief of DHS, *In re; L-R-*. at 16. Id. at 16–17

¹⁶⁰Id. at 17–18

¹⁶¹Id. at 20–21.

¹⁶²Id. at 29.

¹⁶³The history of the *R-A-* case is detailed at the CGRS website: <http://cgrs.uchastings.edu/our-work/matter-r>.

¹⁶⁴Preston, Julia, “Asylum Granted to Mexican Woman in Case Setting Standard on Domestic Abuse,”

New York Times, August 12, 2010, available at <http://www.nytimes.com/2010/08/13/us/politics/13asylum.html> (last accessed May 12, 2014).

¹⁶⁵See Blaine Bookey, Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States From 1994 to 2012, 24 Hastings Women's L. J. 107 (2013), available at <http://cgrs.uchastings.edu/sites/default/files/DVAsylum.pdf>.

¹⁶⁶The *S-E-G-* respondents appealed their case to the Eighth Circuit but eventually the case was reopened on a joint motion filed by the respondents and DHS that does not disturb the precedential value of the Board's decision. See http://www.ilcm.org/litigation/SEG_Joint_Reopening_Documents.pdf.

¹⁶⁷*Castillo-Arias v. U.S. Atty. Gen.*, 446 F.3d 1190 (11th Cir. 2006).

¹⁶⁸*Id.* at 1198.

¹⁶⁹*Id.*

¹⁷⁰*Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007).

¹⁷¹*Id.* at 73 (citing *Gomez v. I.N.S.*, 947 F.2d 660, 664 (2d Cir. 1991)).

¹⁷²*Id.*

¹⁷³*Id.*

¹⁷⁴*Gashi v. Holder*, 702 F.3d 130, 136 (2d Cir. 2012).

¹⁷⁵*Mendez-Barrera v. Holder*, 602 F.3d 21, 26 (1st Cir. 2010).

¹⁷⁶The First Circuit has continued to defer to the requirements in published decisions. See, e.g., *Beltrand-Alas v. Holder*, 689 F.3d 90 (1st Cir. 2012); *Tay-Chan v. Holder*, 699 F.3d 107 (1st Cir. 2012). But two judges on the court have criticized the Board's additional requirements and noted their rejection by the Seventh and Third Circuits. These judges called for additional clarity and explanation by the Board, stating that it is "particularly unclear how courts are to square the BIA's more recent statements regarding the social visibility requirement with its former decisions, which allow as cognizable those characteristics in particular social groups that are only visible when made known by individual members," citing *Kasinga* and *Toboso-Alfonso*. *Rojas-Perez v. Holder*, 699 F.3d 74, 81 (1st Cir. 2012), cert. denied, 134 S. Ct. 1274, 188 L. Ed. 2d 297 (2014) (majority opinion). The *Rojas-Perez* majority continued that if under *Acosta* an immutable characteristic is one that an individual "cannot change or should not be required to change, it is

not clear why an individual with a hidden characteristic need make that characteristic known for it to be deemed immutable." *Id.*

¹⁷⁷*Orellana-Monson v. Holder*, 685 F.3d 511, 521 (5th Cir. 2012).

¹⁷⁸*Id.* at 521–22.

¹⁷⁹*Id.* at 521.

¹⁸⁰*Id.*

¹⁸¹*Id.* at 521–22.

¹⁸²*Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011).

¹⁸³*Umana-Ramos v. Holder*, 724 F.3d 667, 670 (6th Cir. 2013).

¹⁸⁴*Id.* at 672.

¹⁸⁵*Id.* at 672–73.

¹⁸⁶*Id.* at 674 (citation and quotation omitted).

¹⁸⁷*Rivera-Barrientos v. Holder*, 666 F.3d 641 (10th Cir. 2012).

¹⁸⁸*Id.* at 650.

¹⁸⁹*Id.* at 652.

¹⁹⁰*Id.*

¹⁹¹See, e.g., *Garcia v. Holder*, 746 F.3d 869, 872 (8th Cir. 2014); *Constanza v. Holder*, 647 F.3d 749 (8th Cir. 2011); *Davila-Mejia v. Mukasey*, 531 F.3d 624, 628–29 (8th Cir. 2008).

¹⁹²*Gathungu v. Holder*, 725 F.3d 900, 908 n.4 (8th Cir. 2013); *Gaitan v. Holder*, 683 F.3d 951 (8th Cir. 2012) (Colloton, J., concurring in the denial of rehearing en banc).

¹⁹³*Garcia*, 746 F.3d at 872.

¹⁹⁴*Constanza*, 647 F.3d at 752.

¹⁹⁵*Gaitan v. Holder*, 671 F.3d 678, 682 (8th Cir. 2012), cert. denied, 133 S. Ct. 526, 184 L. Ed. 2d 339 (2012).

¹⁹⁶*Gathungu*, 725 F.3d at 908.

¹⁹⁷*Martinez v. Holder*, 740 F.3d 902, 910 (4th Cir. 2014), as revised, (Jan. 27, 2014); *Zelaya v. Holder*, 668 F.3d 159, 165 n.4 (4th Cir. 2012).

¹⁹⁸*Zelaya*, 668 F.3d at 166; *Lizama v. Holder*, 629 F.3d 440, 447 (4th Cir. 2011).

¹⁹⁹*Zelaya*, 668 F.3d at 162, 166.

²⁰⁰*Lizama*, 629 F.3d at 446, 447–48.

²⁰¹*Crespin-Valladares v. Holder*, 632 F.3d 117, 121, 125 (4th Cir. 2011); *Zelaya*, 668 F.3d at 166.

²⁰²*Zelaya*, 668 F.3d at 166.

²⁰³578 F.3d 611 (7th Cir. 2009).

²⁰⁴*Id.* at 616.

²⁰⁵464 F.3d 770 (7th Cir. 2006).

²⁰⁶*Gatimi*, 578 F.3d at 618.

²⁰⁷*Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009).

²⁰⁸*Id.* at 431.

²⁰⁹The Sixth and Fourth Circuits have agreed with the Seventh Circuit that former gang membership is a shared past experience impossible to change. *Urbina-Mejia v. Holder*, 597 F.3d 360, 366 (6th Cir. 2010); *Martinez v. Holder*, 740 F.3d 902, 911–12 (4th Cir. 2014), as revised, (Jan. 27, 2014). The Sixth Circuit expanded on the distinction between current and former gang members, noting that *repudiation* of gang membership, not gang membership itself, is the characteristic former gang members should not be required to change. *Martinez*, 740 F.3d at 912; see also *Urbina-Mejia*, 597 F.3d at 366 (“[O]nce one has left the gang, one is forever a former member of that gang.”). *Urbina-Mejia*’s claim was ultimately denied due to commission of nonserious political crimes outside the U.S. *Urbina-Mejia*, 597 F.3d at 369. In *Martinez*, the Fourth Circuit reached only the immutability question, finding the group of “former members of a gang in El Salvador” is immutable, and remanded for further proceedings. *Martinez*, 740 F.3d at 913. In contrast, the First Circuit deferred to the BIA in rejecting the contention that former gang membership is distinct from current membership. *Cantarero v. Holder*, 734 F.3d 82, 87 (1st Cir. 2013). The court in *Cantarero* stated that renunciation of gang membership did not change the shared past experiences of former gang members, which included violence and crime. *Id.* at 86. The First Circuit also rejected the rationales of the Sixth and Seventh Circuits, focusing in particular on the Seventh Circuit’s discussion of the statutory bars to asylum. *Id.* (“[W]e disagree that Congress’s decision not to expressly exclude former gang members is probative of its intent as to whether they are eligible for refugee status as a protected group.”). The Fourth Circuit, which ruled last in time, considered and forcefully rejected *Cantarero*. *Martinez*, 740 F.3d at 911 n.3.

²¹⁰*Valdiviezo-Galdamez v. Attorney General of U.S.*, 502 F.3d 285, 290 (3d Cir. 2007) (“*Valdiviezo-Galdamez I*”); *Valdiviezo-Galdamez v. Attorney General of U.S.*, 663 F.3d 582, 588 (3d Cir. 2011) (“*Valdiviezo-Galdamez II*”).

²¹¹*Valdiviezo-Galdamez II*, 663 F.3d 582 at 603–08.

²¹²*Id.* at 604.

²¹³*Id.*

²¹⁴*Id.* at 605.

²¹⁵*Id.* at 605–06.

²¹⁶*Id.* at 606–07.

²¹⁷*Id.* at 608.

²¹⁸*Id.*

²¹⁹*Id.* (internal quotation marks omitted).

²²⁰See, e.g., *Barrios v. Holder*, 581 F.3d 849 (9th Cir. 2009); *Ramos-Lopez v. Holder*, 563 F.3d 855 (9th Cir. 2009).

²²¹707 F.3d 1082 (9th Cir. 2013) (en banc).

²²²*Id.* at 1091.

²²³The social group recognized by the Ninth Circuit en banc as satisfying the Board’s new standards is substantially the same as the one the Fourth Circuit said it rejected in *Crespin-Valladares*. See *Zelaya*, 668 F.3d at 166; *Crespin-Valladares*, 632 F.3d at 125.

²²⁴*Henriquez-Rivas*, 707 F.3d at 1088–89 (internal citations omitted).

²²⁵*Id.* at 1087–89.

²²⁶*Id.* at 1090.

²²⁷*Id.*

²²⁸*Id.* at 1090.

²²⁹*Cece v. Holder*, 733 F.3d 662, 673 (7th Cir. 2013) (en banc).

²³⁰*Id.* at 668–70 & n.1.

²³¹*Id.* at 667.

²³²*Id.* at 671.

²³³*Id.*

²³⁴*Id.* at 672–73.

²³⁵*Id.* at 673.

²³⁶*Id.*

²³⁷*Id.*

²³⁸*Id.* (citing *In re H-*, 21 I. & N. Dec. 337, 343, 1996 WL 291910 (B.I.A. 1996)).

²³⁹*Id.* at 675.

²⁴⁰*Id.*

²⁴¹*Id.* at 676.

²⁴²*Id.*

²⁴³Brief for UNHCR as Amicus Curiae Supporting Respondent, *Matter of Valdiviezo-Galdamez*, 26 I. & N. Dec. 227 (B.I.A. 2014) available at <http://www.refworld.org/docid/503653562.html>; Brief for Thomas & Mack Legal Clinic, University of Nevada, Las Vegas William S. Boyd School of Law as Amicus Curiae Supporting Respondent, *Matter of Valdiviezo-Galdamez*, 26 I. & N. Dec. 227 (B.I.A. 2014), available at http://immigrantjustice.org/sites/immigrantjustice.org/files/VALDIVIEZO%20UNLV_Valdiviezo%20Amicus.pdf (last accessed June 7, 2014); Brief for The National Immigration Justice Center as Amicus Curiae Supporting Respondent, *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 2014 WL 524499 (B.I.A. 2014), available at <http://immigrantjustice.org/sites/immigrantjustice.org/files/Valdiviezo%20NIJC%20Amicus%20FINAL.pdf>; Brief for American Immigration Lawyers Association (AILA) Supporting Respondent, *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 2014 WL 524499 (B.I.A. 2014), available at <http://www.aila.org/content/default.aspx?docid=41045> (last accessed June 15, 2014); Brief of DHS on Remand from the U.S. Court of Appeals of the Third Circuit, *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 2014 WL 524499 (B.I.A. 2014), available at http://www.ilcm.org/documents/litigation/Valdiviezo-Galdamez_DHS_Supp_Brief_BIA.pdf.

²⁴⁴UNHCR Social Group Guidelines, *supra* note 10.

²⁴⁵Brief for UNHCR as Amicus Curiae Supporting Respondent, *Matter of Valdiviezo-Galdamez*, 26 I. & N. Dec. 227 (B.I.A. 2014) available at <http://www.refworld.org/docid/503653562.html>.

²⁴⁶*Id.* at 12.

²⁴⁷*Id.* at 20–21.

²⁴⁸Brief for Thomas & Mack Legal Clinic, University of Nevada, Las Vegas William S. Boyd School of Law as Amicus Curiae Supporting Respondent, *Matter of Valdiviezo-Galdamez*, 26 I. & N. Dec. 227 (B.I.A. 2014), available at http://immigrantjustice.org/sites/immigrantjustice.org/files/VALDIVIEZO%20UNLV_Valdiviezo%20Amicus.pdf (last accessed June 7, 2014); Marouf, *Foreign Authorities*, *supra* note 34, at 425.

²⁴⁹UNLV Amicus Brief in *M-E-V-G-*, *supra* note 243, at 3–6.

²⁵⁰*Id.* at 9–20.

²⁵¹*Id.* at 8–9, 20.

²⁵²Brief for The National Immigration Justice

Center as Amicus Curiae Supporting Respondent at 7–8, *Matter of Valdiviezo-Galdamez*, 26 I. & N. Dec. 227 (B.I.A. 2014), available at <http://immigrantjustice.org/sites/immigrantjustice.org/files/Valdiviezo%20NIJC%20Amicus%20FINAL.pdf>.

²⁵³*Id.* at 9–19.

²⁵⁴*Id.* at 19–20.

²⁵⁵*Id.* at 22–24.

²⁵⁶Brief of DHS on Remand from the U.S. Court of Appeals of the Third Circuit, *Matter of Valdiviezo-Galdamez*, 26 I. & N. Dec. 227 (B.I.A. 2014), available at http://www.ilcm.org/documents/litigation/Valdiviezo-Galdamez_DHS_Supp_Brief_BIA.pdf.

²⁵⁷*Id.* at 5–7.

²⁵⁸*Id.* at 8 (footnotes omitted).

²⁵⁹*Id.*

²⁶⁰*Id.* at 10.

²⁶¹*Id.* at 5 (quoting *Valdiviezo-Galdamez II*, 664 F.3d at 608).

²⁶²*Id.* at 12 n.14.

²⁶³*Id.*

²⁶⁴556 U.S. 502 (2009).

²⁶⁵Brief of DHS in *Valdiviezo-Galdamez*, *supra* note 243, at 12, n.14.

²⁶⁶*Id.* (internal quotation marks omitted).

²⁶⁷Letter to Counsel from DHS/ICE Office of Chief Counsel, (Nov. 6, 2012) available at http://www.ilcm.org/documents/litigation/Valdiviezo-Galdamez_BIA_questions_for_oral_argument.pdf.

²⁶⁸*Id.*

²⁶⁹*Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 2014 WL 524499 (B.I.A. 2014); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 2014 WL 524498 (B.I.A. 2014) (Grant, Malphrus, Mullane).

²⁷⁰*M-E-V-G-*, 26 I. & N. Dec. at 228, 252–53.

²⁷¹*Id.* at 234, 252.

²⁷²*Id.* at 230, 234 & n.9.

²⁷³*Id.* at 234 n.9. However, the Board did not discuss whether its interpretations in the decisions leading up to and including *S-E-G-* and *E-A-G-* were new. *Id.*

²⁷⁴*Id.* at 231–32.

²⁷⁵*Id.* at 232.

²⁷⁶*Id.* at 235.

²⁷⁷Id. at 234.

²⁷⁸Id. at 236.

²⁷⁹Id. at 236, 238.

²⁸⁰Id. The Board noted that its conception of “social distinction” was not the same as the one advanced by DHS in its brief. Id. at 236 n.11.

²⁸¹Id. at 237.

²⁸²Id. at 238, 239.

²⁸³Id. at 239 (citing *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 76, 2007 WL 274141 (B.I.A. 2007)).

²⁸⁴Id. (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170–71 (9th Cir. 2005)).

²⁸⁵Id. at 240. The Board did not provide any other affirmative definition of the term but rather contrasted the requirement with ocular visibility.

²⁸⁶Id. at 242.

²⁸⁷Id. at 242–43.

²⁸⁸Id. at 243 (citing *In re Kasinga*, 21 I. & N. Dec. 357, 366, 1996 WL 379826 (B.I.A. 1996)).

²⁸⁹Id.

²⁹⁰Id. at 244.

²⁹¹Id.

²⁹²Id. at 244–47.

²⁹³Id. at 247–49.

²⁹⁴Id. at 248 & n.15.

²⁹⁵Brief for UNHCR, *supra* note 243, at 15–16. Brief for UNLV, *supra* note 243, at 20–24.

²⁹⁶Id. at 250.

²⁹⁷Id. at 251.

²⁹⁸Id.

²⁹⁹Id. at 252. In the context of consistency with precedent, the Board stated that its opinion clarifying the prior requirements would not be a basis to reopen denials based on social visibility unless the denial was for lack of literal visibility. Id. at 247 & n.14.

³⁰⁰*Matter of W-G-R-*, 26 I. & N. Dec. 208, 209, 2014 WL 524498 (B.I.A. 2014).

³⁰¹For example, the BIA used identical language to articulate particularity, id. at 213; *M-E-V-G-*, 26 I. & N. Dec. at 239, and social distinction, *W-G-R-*, 26 I. & N. Dec. at 216; *M-E-V-G-*, 26 I. & N. Dec. at 240. The BIA also used identical language in discussing why using perception of the persecutor was problematic. *W-G-R-*, 26 I. & N. Dec. at 218; *M-E-V-G-*, 26 I. & N.

Dec. at 242.

³⁰²*W-G-R-*, 26 I. & N. at 221 (citing *Mayorga-Vidal v. Holder*, 675 F.3d 9, 15 (1st Cir. 2012)). It also rejected respondent’s alternative social group of deportees from the United States as “too broad and diverse” because it could include “men, women, and children of all ages” and that “[t]he length of time they were in the United States, the recency of removal, and societal views on how long a person is considered a deportee after repatriation could vary immensely.” Id. at 223.

³⁰³Id. at 221.

³⁰⁴Id.

³⁰⁵Id. at 221–22.

³⁰⁶Id. at 222. The Board dismissed Harvard Law School’s report, “No Place to Hide,” as ambiguous as to whether discrimination of tattooed former gang members occurs because of their status or because their tattoos raise suspicions that they remain members of the gang. Id. It also noted that the Department of State Country Report on El Salvador does not discuss former gang members as a distinct group. Id.

³⁰⁷See, e.g., Anker, at § 5.44; National Immigration Justice Center (NIJC), Particular Social Group Practice Advisory: Applying for Asylum After *Matter of M-E-V-G-* and *Matter of W-G-R-*, available at http://www.immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20PSG%20Practice%20Advisory_Final_3.4.14.pdf; Supplemental Brief for Petitioner, *Ordonez-Azmen v. Holder*, No. 13-2769 (2d. Cir. Apr. 16, 2014).

³⁰⁸*Toboso-Alfonso*, 20 I. & N. Dec. at 822.

³⁰⁹*M-E-V-G-*, 26 I. & N. Dec. at 239–40.

³¹⁰*W-G-R-*, 26 I. & N. Dec. at 214.

³¹¹Id. (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170–71 (9th Cir. 2005) for requirement that the group must be narrowly defined).

³¹²Id. at 241.

³¹³*M-E-V-G-*, 26 I. & N. Dec. at 239.

³¹⁴Cf. *W-G-R-*, 26 I. & N. Dec. at 221–22 (rejecting group of former gang members on equivalent grounds).

³¹⁵See, e.g., *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1093–94 (9th Cir. 2013) (en banc) (rejecting requirement for homogeneity and overruling its cases to the contrary); *Cece v. Holder*, 733 F.3d 662, 674 (7th Cir. 2013) (en banc) (“[B]readth of category has never been a per se bar to protected status.”); *Perdomo*

v. Holder, 611 F.3d 662, 669 (9th Cir. 2010) (rejecting size as a consideration).

³¹⁶See 8 U.S.C.A. §§ 1158(a)(1) & (b)(1)(A), 1101(a)(42)(A), 1231(b)(3)(A).

³¹⁷*M-E-V-G-*, 26 I. & N. Dec. at 238.

³¹⁸Brief for National Immigrant Justice Center as Amicus Curiae Supporting Petitioner at 14, *Santos v. Holder*, No. 14-1050, (3d Cir. May 29, 2014).

³¹⁹*W-G-R-*, 26 I. & N. Dec. at 221–22.

³²⁰*Id.*

³²¹*Rivera-Barrientos v. Holder*, 666 F.3d 641, 650 (10th Cir. 2012).

³²²*Cf. Leocal v. Ashcroft*, 543 U.S. 1, 12, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004) (interpretations “must give effect to every word of a statute wherever possible”).

³²³*M-E-V-G-*, 26 I. & N. Dec. at 248; see, e.g., *Secretary of State for the Home Department v. K and Fornah v. Secretary of State for the Home Department*, [2006] UKHL 46 (U.K.) (House of Lords) (interpreting the EU Directive as consistent with the UNHCR’s disjunctive approach); Amicus Brief for UNLV, *supra* note 243, at 20–24; Amicus Brief for UNHCR, *supra* note 243, at 14–17.

³²⁴*Id.*

³²⁵*Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1087–88 (9th Cir. 2013) (stating that inconsistency with the decisions would be a problem but suggesting reconciliation); *Valdiviezo-Galdamez v. Attorney General of U.S.*, 663 F.3d 582, 604 (3d Cir. 2011) (finding the decisions to be inconsistent with social visibility); *Gatimi v. Holder*, 578 F.3d 611, 615–16 (7th Cir. 2009) (same); *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009) (same).

³²⁶*M-E-V-G-*, 26 I. & N. Dec. at 234 & n.9; *W-G-R*, 26 I. & N. Dec. at 212 & n.2.

³²⁷Compare *M-E-V-G-*, 26 I. & N. Dec. at 245, with *Toboso-Alfonso*, 20 I. & N. Dec. at 822. Compare *M-E-V-G-*, 26 I. & N. Dec. at 246, with *Kasinga*, 21 I&N Dec at 365–66. Compare *M-E-V-G*, 26 I. & N. Dec. at 246, with *Fuentes*, 19 I. & N. Dec. at 661–63.

³²⁸*M-E-V-G-*, 26 I. & N. Dec. at 234 & n.9; *W-G-R*, 26 I. & N. Dec. at 212 & n.2.

³²⁹*M-E-V-G-*, 26 I. & N. Dec. at 234 (quoting *Matter of R-A-*, 24 I. & N. Dec. 629, 631, 2008 WL 4419696 (B.I.A. 2008)).

³³⁰*Id.* at 240.

³³¹*Id.* at 241.

³³²*W-G-R-*, 26 I. & N. Dec. at 221.

³³³*Id.* at 222.

³³⁴See NIJC Amicus Brief in *Santos*, *supra* note 318, at 13.

³³⁵*Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1089 (9th Cir. 2013); *Gashi v. Holder*, 702 F.3d 130, 136 (2d Cir. 2012); *Gatimi v. Holder*, 578 F.3d 611, 615–16 (7th Cir. 2009); *Benitez Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009); *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007).

³³⁶*M-E-V-G-*, 26 I. & N. Dec. at 236, 243.

³³⁷*Id.* at 239.

³³⁸*Id.* at 240–42.

³³⁹*Id.* at 244.

³⁴⁰*Id.* at 222. The evidentiary burden as applied by the Board here appears to require the type of sociological analysis the Second Circuit rejected in *Ucelo-Gomez*. 509 F.3d at 73.

³⁴¹*Id.* at 209.

³⁴²*Id.* at 221 (discussing particularity).

³⁴³*Id.* at 222 (discussing social distinction).

³⁴⁴See Marouf, *Social Visibility*, *supra* note 15, at 47, 79, 81.

³⁴⁵*M-E-V-G-*, 26 I. & N. Dec. at 241.

³⁴⁶*W-G-R-*, 26 I. & N. Dec. at 221.

³⁴⁷*Id.* at 222.

³⁴⁸*M-E-V-G-*, 26 I. & N. Dec. at 241–43 (addressing problems with defining groups by the persecutor’s perception); *id.* at 240–41 (addressing the Third and Ninth Circuits’ doubts about the distinction between visibility and particularity); *id.* at 238 (addressing disagreement about whether visibility requires on-sight visibility or not); see *id.* at 244–47 (dedicating an entire section of the opinion to explaining *M-E-V-G-*’s purported consistency with prior precedent). When the Board chooses not to follow binding circuit precedent it says so explicitly in its published decisions. See, e.g., *Matter of Douglas*, 26 I. & N. Dec. 197, 2013 WL 5719434 (B.I.A. 2013) (“we respectfully decline to follow the Third Circuit’s case law to the contrary and will apply our holding in *Matter of Baires* to cases arising in that circuit”).

³⁴⁹*Santos v. Holder*, Third Circuit file No. 14-1050. The NIJC amicus brief in support of the petitioner is available at <http://immigrantjustice.org/sites/immigran>

tjustice.org/files/Santos%20Amicus%20Brief.pdf.

³⁵⁰*Reyes v. Holder*, Ninth Circuit file No. 14-70686. Pacer docket viewed June 16, 2014.

³⁵¹Supplemental Brief for Petitioner, *Ordonez-Azmen v. Holder*, No. 13-2769 (2d. Cir. Apr. 16, 2014). The authors have represented the Petitioner as co-counsel with NIJC and David Sperling.

³⁵²*M-E-V-G-*, 26 I. & N. Dec. at 242.

³⁵³*Gomez v. I.N.S.*, 947 F.2d 660 (2d Cir. 1991) (quoting *De Valle v. I.N.S.*, 901 F.2d 787, 793 (9th Cir. 1990); *Ananeh-Firemong v. I.N.S.*, 766 F.2d 621, 626 (1st Cir. 1985)).

³⁵⁴509 F.3d 70 (2d Cir. 2007).

³⁵⁵*Pirir-Boc v. Holder*, 2014 WL 1797657, *1, *4 (9th Cir. 2014).

³⁵⁶*Id.* at *4 n. 6.

³⁵⁷*Pirir-Boc* at *5.

³⁵⁸*Pirir-Boc* at *4.

³⁵⁹*N.L.A. v. Holder*, 744 F.3d 425 (7th Cir. 2014) (reaffirming *Cece* and *Acosta* in approving “Colombian land owners who refuse to cooperate with the FARC” and stating “there can be no rational reason . . . to reject a category of ‘land owners’ when . . . *Acosta* specifically used land owning as an example of a social group and this Circuit has made clear that the category of educated land owning cattle farmers targeted by the FARC qualifies[.]”); *R.R.D. v. Holder*, 746 F.3d 807 (7th Cir. 2014) (reaffirming former membership in Mexican police as an immutable shared past experience and recognizing “honest Mexican police officers.”); *Garcia v. Holder*, 746 F.3d 869 (8th Cir. 2014) (rejecting gang resistance-related social group based on prior circuit precedent and *Matter of S-E-G-*).

³⁶⁰*Hernandez-Garcia v. Holder*, 2014 WL 2211687 (9th Cir. 2014); *Aguilar-Rodriguez v. Holder*, 2014 WL 2211716 (9th Cir. 2014); *Midence-Martinez v. Holder*, 2014 WL 2199276 (9th Cir. 2014); *Amaya-Palacios v. Holder*, 2014 WL 2200280 (9th Cir. 2014); *Molina-Linares v. Holder*, 2014 WL 2142163 (9th Cir. 2014); *de Franco v. Holder*, 2014 WL 2142182 (9th Cir. 2014); *Palencia v. Holder*, 2014 WL 2142199 (9th Cir. 2014); *Gonzalez-Flores v. Holder*, 2014 WL 2142203 (9th Cir. 2014); *Barragan-Zepeda v. Holder*, 2014 WL 1409569 (9th Cir. 2014); *Montanico v. Holder*, 2014 WL 983874 (9th Cir. 2014); *Quele-Navarro v. Holder*, 2014 WL 820752 (9th Cir. 2014).

³⁶¹*Barragan-Zepeda v. Holder*, 2014 WL 1409569,

*1(9th Cir. 2014); *Midence-Martinez v. Holder*, 2014 WL 2199276, *1(9th Cir. 2014); *Quele-Navarro v. Holder*, 2014 WL 820752, *1(9th Cir. 2014).

³⁶²See Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012, 24 *Hastings Women’s L.J.* 107 (2013).

³⁶³BIA amicus requests to AILA and case records in *Matter of K-C-*; *Matter of N-M-*; *Matter of ARC-G*; *Matter of EMC*; *Matter of LGP-C*; *Matter of MJV*; *Matter of RDCP-G*, on file with author, Benjamin Casper, who was co-counsel for AILA as amicus curiae.

³⁶⁴*Id.*

³⁶⁵Brief of amicus curiae the American Immigration Lawyers Association, in support of respondent, *Matter of K-C-* (October 18, 2011), available at: <http://www.aila.org/content/default.aspx?docid=37495>.

³⁶⁶Brief of amicus curiae the Center for Gender and Refugee Studies, in support of respondent, *Matter of K-C-* (Oct. 17, 2011), available at http://cgrs.uchastings.edu/sites/default/files/Matter_of_KC_CGRS_Amicus_10_2011_Redacted_Combined_0.pdf.

³⁶⁷*Matter of R-P-*. The history of the *R-P-* is documented on the CGRS website which also includes CGRS’s amicus brief in support of *R-P-*’s appeal. <http://cgrs.uchastings.edu/our-work/matter-r-p>. The authors, Benjamin Casper and Kate Evans, represent *R-P-* before the Board.

³⁶⁸*Id.*

³⁶⁹*Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010) (remanding for the Board to provide a reasoned explanation why the social group “all Guatemalan women” does not satisfy *Acosta* and holding the large size of the group is not a proper basis to deny recognition.). The history of the *Perdomo* case is also documented on the CGRS website at <http://cgrs.uchastings.edu/our-work/matter-perdomo>; *Matter of R-P-* (<http://cgrs.uchastings.edu/our-work/matter-r-p>).

³⁷⁰Brief of amicus curiae the Center for Gender and Refugee Studies, in support of respondent, *Matter of R-P-* (Apr. 20, 2012), available at http://cgrs.uchastings.edu/sites/default/files/R-P_-_amicus_CGRS_4_20_2012.pdf; Brief of amicus curiae the National Immigrant Justice Center, in support of respondent, *Matter of R-P-* (Nov. 4, 2011), available at http://immigrantjustice.org/sites/immigrantjustice.org/files/CRP_AMICUS_FINAL_Redacted_0.pdf.

³⁷¹United States Immigration & Citizenship Ser-

vices RAIO, Asylum Division Office Training Course: Credible Fear (revised Feb. 28, 2014) [hereinafter USCIS ADOTC] available at: https://docs.google.com/a/umn.edu/file/d/0B__6gbFPjVDoxQWdCNjBLNVpCZXQ3aDJUekVtYkJLd0ZVV1pR/edit; Memorandum from John Lafferty, Chief, Asylum Division, on Release of Updated Asylum Division Officer Training Course Lesson Plan, Credible Fear of Persecution and Torture Determinations to Asylum Office Directors and Officers (Feb. 28, 2014);

³⁷²INA § 235(b)(1)(B)(iii)(v); 8 U.S.C.A. § 1225(b)(1)(B)(iii)(v).

³⁷³USCIS ADOTC, *supra* note 371 at 24–25.

³⁷⁴USCIS ADOTC, *supra* note 371 at 14–15 (emphasis added); Memorandum from John Lafferty, *supra* note 371 at 2.

³⁷⁵Sara Campos & Joan Friedland, American Immigration Council, Mexican and Central American Asylum and Credible Fear Claims 4 (May 2014); available at: <http://www.immigrationpolicy.org/special-reports/mexican-and-central-american-asylum-and-credible-fear-claims-background-and-context>.

³⁷⁶*Id.*

³⁷⁷*Pirir-Boc v. Holder*, 2014 WL 1797657, *1, *4 (9th Cir. 2014).

³⁷⁸See e.g. *Marroquin-Ochoma v. Holder*, 574 F.3d 574, 578 (8th Cir. 2009) (acknowledging gangs could persecute others on account of political opinion but finding insufficient evidence of nexus); *Bueso-Avila v. Holder*, 663 F.3d 934, 935–36 (7th Cir. 2011) (stating gang related religious persecution claim was

feasible but upholding BIA on finding of no nexus).

³⁷⁹Brief of Amici Curiae Harvard Immigration and Refugee Clinical Program and Other Immigration Rights Advocates in Support of Petitioner in *Colocho v. Holder*, Ninth Circuit No. 13-70470 (Nov. 19, 2013), available at <http://harvardimmigrationclinic.files.wordpress.com/2014/03/colocho-amicus-brief.pdf>.

³⁸⁰*Id.*

³⁸¹CGRS's website documents the procedural history of *G-M- v. Holder* and has a link to the petitioners' redacted opening brief to the Ninth Circuit: <http://cgrs.uchastings.edu/our-work/g-m-v-holder>.

³⁸²Center for Gender and Refugee Studies website Request Assistance page: <http://cgrs.uchastings.edu/request-assistance/requesting-assistance-cgrs>.

³⁸³National Immigrant Justice Center, Particular Social Group Practice Advisory: Applying for Asylum After Matter of M-E-V-G- and Matter of W-G-R- (February 2014). This advisory is tailored primarily to cases arising in the Seventh Circuit, but also provides an excellent general framework for social group case analysis. Available at https://www.immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20PSG%20Practice%20Advisory_Final_3.4.14.pdf.

³⁸⁴National Immigrant Justice Center, *Seeking Asylum Based on Membership in a Particular Social Group After M-E-V-G- and W-G-R-* (May 16, 2014), available at https://www.immigrantjustice.org/sites/immigrantjustice.org/files/PSG%20Webinar_Vera_5%2016%2014_final.pdf.

Appendix

APPENDIX: RESOURCES FOR SOCIAL GROUP CLAIMS

General

- U.N. High Comm'r for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, HCR/IP/4/ENG/REV. 3 (Dec. 2011), *available at* <http://www.refworld.org/docid/4f33c8d92.html>
- U.N. High Comm'r 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, HCR/GIP/02/02 (May 7, 2002), *available at* <http://www.refworld.org/docid/3d36f23f4.html>
- DEBORAH ANKER, THE LAW OF ASYLUM IN THE UNITED STATES §§ 5:45-:64(14th ed. 2014)
- NAT'L IMMIGRANT JUSTICE CTR., PARTICULAR SOCIAL GROUP PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER *MATTER OF M-E-V-G-* AND *MATTER OF W-G-R-* (Feb. 2014), *available at* https://www.immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20PSG%20Practice%20Advisory_Final_3.4.14.pdf
- NAT'L IMMIGRANT JUSTICE CTR., BASIC PROCEDURAL MANUAL FOR ASYLUM REPRESENTATION AFFIRMATIVELY AND IN REMOVAL PROCEEDINGS (Feb. 2014), *available at* https://www.immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20Asylum%20Manual_02%202014%20final_0.pdf
- *Asylum Brief Bank: "Membership in a Particular Social Group,"* NAT'L IMMIGRANT JUSTICE CTR., <http://immigrantjustice.org/asylum-brief-bank-membership-particular-social-group> (last visited June 7, 2014).

Gangs

- U.N. High Comm'r for Refugees, Guidance Note on Refugee Claims Relating to Victims of Organized Gangs (March 31, 2010), *available at* <http://www.refworld.org/docid/4bb21fa02.html>.
- DEBORAH ANKER, THE LAW OF ASYLUM IN THE UNITED STATES §§ 5:56-:58, :60-:61 (14th ed. 2014)
- National Immigration Justice Center (NIJC), Particular Social Group Practice Advisory: Applying for Asylum After *Matter of M-E-V-G-* and *Matter of W-G-R-*, *available at* https://www.immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20PSG%20Practice%20Advisory_Final_3.4.14.pdf
- LISA FRYDMAN & NEHA DESAI, BEACON OF HOPE OR FAILURE OF PROTECTION? U.S. TREATMENT OF ASYLUM CLAIMS BASED ON PERSECUTION BY ORGANIZED GANGS, 12-20 IMMIGR. BRIEFINGS 1 (Oct. 2012).
- INT'L HUMAN RIGHTS CLINIC, HARVARD LAW SCHOOL, NO PLACE TO HIDE: GANG, STATE AND CLANDESTINE VIOLENCE IN EL SALVADOR (Feb. 2007), *available at* <http://www.ansarilawfirm.com/docs/Gang-State-and-Clandestine-Violence-in-El-Salvador.pdf>
- *Gang Related Asylum Resources*, U.S. COMM. FOR REFUGEES & IMMIGRANTS, <http://www.refugees.org/resources/for-lawyers/asylum-research/gang-related-asylum-resources/> (last visited June 8, 2014).

Gender

- U.N. High Comm'r for Refugees, Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, HCR/GIP/02/01 (May 7, 2002), *available at* <http://www.refworld.org/docid/3d36f1c64.html>
- U.N. High Comm'r for Refugees, Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of

Trafficking and Persons at Risk of Being Trafficked, HCR/GIP/06/07 (Apr. 7, 2006), available at <http://www.unhcr.org/443b626b2.html>

- U.S. Citizenship and Immigration Service, Asylum Officer Basic Training Course, Female Asylum Applications and Gender-Related Claims (Mar. 12, 2009), available at: <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-division-training-programs>
- Fatma E. Marouf, *The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL’Y REV. 47 (Fall 2008)
- DEBORAH ANKER, THE LAW OF ASYLUM IN THE UNITED STATES §§ 5:46, :53 (14th ed. 2014).
- *Gender Asylum Guidelines*, CTR. FOR GENDER & REFUGEE STUDIES, <http://cgrs.uchastings.edu/search-materials/gender-asylum-guidelines> (last visited June 7, 2014)
- *Gender-Based Asylum Claims*, NAT’L IMMIGRANT JUSTICE CTR., <http://immigrantjustice.org/gender-based-asylum-claims#.U5PV7vldVqU> (last visited June 7, 2014).

FGM

- U.N. High Comm’r for Refugees, Guidance Note on Refugee Claims relating to Female Genital Mutilation (May 2009), available at <http://www.refworld.org/docid/4a0c28492.html>
- UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES, ASYLUM OFFICER BASIC TRAINING – FEMALE ASYLUM APPLICANTS AND GENDER-RELATED CLAIMS (Mar. 12, 2009), available at <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOB/TC%20Lesson%20Plans/Female-Asylum-Applicants-Gender-Related-Claims-31aug10.pdf>
- DEBORAH ANKER, THE LAW OF ASYLUM IN THE UNITED STATES §§ 5:47-:48 (14th ed. 2014).
- NATALIE NANASI, LESSONS FROM *MATTER OF A-T-*: GUIDANCE FOR PRACTITIONERS LITIGATING ASYLUM CASES INVOLVING A SPECTRUM OF GENDER-BASED HARMS, FROM FEMALE GENITAL MUTILATION TO FORCED MARRIAGE AND BEYOND, 12-02 IMMIGR. BRIEFINGS 1 (Feb. 2012).

Forced Marriage

- DEBORAH ANKER, THE LAW OF ASYLUM IN THE UNITED STATES § 5:51 (14th ed. 2014)
- NATALIE NANASI, LESSONS FROM *MATTER OF A-T-*: GUIDANCE FOR PRACTITIONERS LITIGATING ASYLUM CASES INVOLVING A SPECTRUM OF GENDER-BASED HARMS, FROM FEMALE GENITAL MUTILATION TO FORCED MARRIAGE AND BEYOND, 12-02 IMMIGR. BRIEFINGS 1 (Feb. 2012)
- DANIELLE L.C. BEACH, BATTLEFIELD OF GENDERCIDE: FORCED MARRIAGES AND GENDER-BASED GROUNDS FOR ASYLUM AND RELATED RELIEF, 09-12 IMMIGR. BRIEFINGS 1 (Dec. 2009).

Children

- U.N. High Comm’r for Refugees, Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, HCR/GIP/09/08 (Dec. 22, 2009), available at <http://www.unhcr.org/50ae46309.html>
- U.N. High Comm’r for Refugees, Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked, HCR/GIP/06/07 (Apr. 7, 2006), available at <http://www.unhcr.org/443b626b2.html>
- UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES, ASYLUM OFFICER BASIC TRAINING COURSE - GUIDELINES FOR CHILDREN’S ASYLUM CLAIMS (Sept. 1, 2009), available at <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOB/TC%20Lesson%20Plans/Guidelines-for-Childrens-Asylum-Claims-31aug10.pdf>

- DEBORAH ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES* § 5:59 (14th ed. 2014)
- LISA FRYDMAN, ELIZABETH DALLAM & BLAINE BOOKEY, *A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM* (2014), available at <http://www.supportkind.org/en/about-us/resources>
- Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.-C.L. L. REV. 247 (2010)
- DEBORAH ANKER ET AL., *MEJILLA-ROMERO: A NEW ERA FOR CHILD ASYLUM*, 12-09 IMMIGR. BRIEFINGS 1 (Sept. 2012)
- VICTORIA NEILSON & CLEMENT LEE, IMMIGRATION EQUALITY, PRACTICE ADVISORY: SEEKING ASYLUM FOR LGBT CHILDREN AND YOUTH (Feb. 2011), available at http://www.immigrationequality.org/wp-content/uploads/2011/09/Microsoft-Word-2412_Practice_Advisory_on_LGBT_Minor_Asymm_Applicants_February_20111.pdf
- *Children's Asylum Guidelines*, CTR. FOR GENDER & REFUGEE STUDIES, <http://cgrs.uchastings.edu/search-materials/childrens-asylum-guidelines> (last visited June 7, 2014)
- *Useful Documents for Attorneys Representing Unaccompanied Immigrant Children*, NAT'L IMMIGRANT JUSTICE CTR., <http://immigrantjustice.org/useful-documents-attorneys-representing-unaccompanied-immigrant-children> (last visited June 7, 2014).

Sexual Orientation

- U.N. High Comm'r for Refugees, Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/12/01 (Oct. 23, 2012), available at <http://www.refworld.org/docid/50348afc2.html>
- UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES, RAIO DIRECTORATE – OFFICER TRAINING, GUIDANCE FOR ADJUDICATING LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) REFUGEE AND ASYLUM CLAIMS (Dec. 28, 2011), available at <http://www.uscis.gov/sites/default/files/USCIS/About%20Us/Directorates%20and%20Program%20Offices/RAIO/lgbtir-guidance-for-adjudicating-lesbian-gay-bisexual-and-intersex-claims.pdf>
- DEBORAH ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES* §§ 5:54-:55 (14th ed. 2014)
- Fatma E. Marouf, *The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL'Y REV. 47 (Fall 2008)
- VICTORIA NEILSON & CLEMENT LEE, IMMIGRATION EQUALITY, PRACTICE ADVISORY: SEEKING ASYLUM FOR LGBT CHILDREN AND YOUTH (Feb. 2011), available at http://www.immigrationequality.org/wp-content/uploads/2011/09/Microsoft-Word-2412_Practice_Advisory_on_LGBT_Minor_Asymm_Applicants_February_20111.pdf
- *Immigration Equality Asylum Manual*, IMMIGRATION EQUALITY, <https://immigrationequality.org/issues/law-library/lgbth-asylum-manual/> (last visited June 7, 2014).

Mental Health

- U.N. HIGH COMM'R FOR REFUGEES & WORLD HEALTH ORG., MENTAL HEALTH OF REFUGEES (1996), available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=4a54bc010&skip=0&query=mental%20health>
- DEBORAH ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES* § 5:63 (14th ed. 2014)