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Ganging Up on Immigration Law: Asylum Law and the Particular Social Group Standard - Former Gang Members and Their Need for Asylum Protections

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Ganging Up on Immigration Law: Asylum Law and the Particular Social Group Standard – Former Gang Members and Their Need for Asylum Protections

Claudia B. Quintero

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ABSTRACT

The Refugee Act of 1980 was a significant piece of legislation for the development of asylum law, and the United States' commitment to human rights and humanitarian concern for the struggles of refugees worldwide. The Act recognized the urgent needs of persons fleeing persecution in their homelands, asylees, and their need for protection and resettlement. The protections afforded in the Act extended to asylum seekers that were persecuted on the basis of (1) race, (2) religion, (3) nationality, (4) membership in a particular social group, or (5) political opinion. However, Congress did not define "membership in a particular social group" in the Refugee Act of 1980 or otherwise, and have left it to the Board of Immigration Appeals to interpret the term "membership in particular social group." As such, the Board of Immigration Appeals has developed, through case law, an arbitrary and loose definition for "membership in a particular social group." With such arbitrariness, as discussed in this Article, any group, including former gang members fleeing their country and seeking asylum could make a cognizable claim that they are a "member of a particular social group," and therefore ought to be afforded protections under the Refugee Act of 1980.

This Article examines the history of asylum law that developed after the passing of the Refugee Act of 1980, specifically the "particular social group" standard as it was developed through Board of Immigration Appeals decisions, and a brief history of the development of the MS-13 and 18th Street gangs in the Northern Triangle of Central America. Ultimately, this Article examines a circuit court split on whether former gang members constitute a "particular social group." This Article takes the position that former gang members do constitute a "particular social group," and thus should be afforded asylum protections.

AUTHOR NOTE

B.A., California State University, Los Angeles; M.S., University of Utah; J.D., Western New England University School of Law. Thanks are extended to Professor Harris Freeman who helped with the very initial drafts of this Article, Barbie Curatolo who meticulously tech cited this piece, to the students of the Western New

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Moreover, this Article is dedicated to all the immigrants who have taken the arduous journey into the United States in search of a better life. This Article is especially dedicated to my mother who herself was an immigrant from Mexico and sought a better life for herself and her family, and worked as a single-mother to provide for her children. This article is also dedicated to my immigration attorney, Andrea Ramos, who in 2006 helped me achieve legal permanent residency through Special Immigrant Juvenile Status, and is the sole reason why I was able to attend law school and pursue a legal career in public interest.

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I. INTRODUCTION

Imagine this: you are born in El Salvador, fatherless, and in extreme poverty. You fall into a neighborhood gang, the Mara Salvatrucha 13,¹ where gang leaders order you to extort your neighbors. You are beaten when you resist and threatened with death when you try to quit the gang. You no longer feel safe and flee to the United States seeking protection.

A gang member renouncing his gang membership and fleeing to the United States is essentially a death wish. Former gang members who flee to the United States in search of asylum protection are fleeing violent persecution from the gangs to which they used to be loyal. This is the factual circumstance of five federal courts of appeals cases, where repentant former gang members have fled to the United States in search of asylum protections; three petitioners have been successful in their argument that they are members of a “particular social group,”² and two petitioners have not been successful.³

This Article will demonstrate that the United States Court of Appeals for the First and Ninth Circuits, which ruled against the asylum seekers, erred in their decisions when they ruled that former gang members do not constitute a “particular social group.”⁴ Part II of this Article will provide background on the gang culture that exists in Central America. Part III of this Article will provide a brief overview of asylum law, and the development of the “particular social group” standard.⁵ Part IV will provide relevant case law and discuss the five circuit court cases that have created the current circuit court split.⁶ Part

¹ See Sonja Wolf, *Mara Salvatrucha: The Most Dangerous Street Gang in the Americas?*, 54 *LATIN AM. POL. & SOC'Y* 65, 65 (2012).

² See *Martinez v. Holder*, 740 F.3d 902, 905-06 (4th Cir. 2014); *Urbina-Mejia v. Holder*, 597 F.3d 360, 362 (6th Cir. 2010); *Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009).

³ See *Garay Reyes v. Lynch* 842 F.3d 1125, 1129 (9th Cir. 2016); *Cantarero v. Holder*, 734 F.3d 82, 85-87 (1st Cir. 2013).

⁴ *Garay Reyes*, 842 F.3d at 1129; *Cantarero*, 734 F.3d at 85-87.

⁵ Hereinafter the terms “member of a particular social group” and “particular social group” are meant as terms of art and will be referenced without quotation marks. The term is an element of the asylum standard carved out through case law by the Board of Immigration Appeals.

⁶ See generally *Garay Reyes*, 842 F.3d 1125; *Cantarero*, 734 F.3d 82; *Martinez*, 740 F.3d 902; *Urbina-Mejia*, 597 F.3d 360; *Ramos*, 589 F.3d 426.

V of this Article will discuss the procedural aspect of the Board of Immigration Appeals decisions.⁷ Part VI will offer an analysis of how the inconsistency of the Board of Immigration Appeals, in its application of the particular social group standard, has set the stage for the current circuit split.⁸ The best resolution to this split is by having circuit courts consider former gang members as a particular social group because they meet the requirements of the standard.⁹

II. BACKGROUND

A. Northern Triangle: The Culture and Origins of the MS-13 and Mara 18

Gangs have terrorized Honduras, Guatemala, and El Salvador (“the Northern Triangle”)¹⁰ since the 1990s.¹¹ The Northern Triangle is now home to two of the largest and most violent gangs, the Barrios 18 (“M-18” or “18th Street”) and the Mara Salvatrucha (“MS-13”).¹² Both gangs began in the inner-city of Los Angeles, California in response to exclusion from already existing gangs comprised of other ethnicities.¹³

⁷ See Kathleen Kersh, *An Insurmountable Obstacle: Denying Deference to the BIA’s Social Visibility Requirement* 19 MICH. J. OF RACE & L. 153, 166 (2013).

⁸ Christopher J. Preston, *Give Me Your Tired, Your Poor, Your Particular and Socially Visible Masses: The Eighth Circuit’s New Standard Governing Particular Social Group Asylum Applications After Gaitan v. Holder*, 671 F.3d 678 (8th Cir. 2012), 92 NEB. L. REV. 431, 443 (2013).

⁹ See, e.g., *Martinez*, 740 F.3d 902.

¹⁰ Cynthia J. Arnson & Eric L. Olson, *Introduction*, in ORGANIZED CRIME IN CENTRAL AMERICA: THE NORTHERN TRIANGLE, 1, 1 (Cynthia J. Arnson & Eric L. Olson ed., 2011) (El Salvador, Honduras, and Guatemala are part of the Northern Triangle area of Central America, also known as just “the Northern Triangle.”).

¹¹ See Steven S. Dudley, *Drug Trafficking Organizations in Central America: Transportistas, Mexican Cartels, and Maras*, in ORGANIZED CRIME IN CENTRAL AMERICA: THE NORTHERN TRIANGLE 18, 41 (Cynthia J. Arnson & Eric L. Olson ed., 2011); Jillian N. Blake, *Gang and Cartel Violence: A Reason to Grant Political Asylum from Mexico and Central America*, 38 YALE J. OF INT’L L. ONLINE 31, 32-34 (2012) [hereinafter Blake, *Gang and Cartel Violence*]; Juan J. Fogelbach, *Gangs, Violence, and Victims in El Salvador, Guatemala, and Honduras*, 12 SAN DIEGO INT’L L.J. 417, 418 (2011).

¹² Blake, *Gang and Cartel Violence*, *supra* note 11, at 32; Dudley, *supra* note 11, at 41; Fogelbach, *supra* note 11, at 420.

¹³ Blake, *Gang and Cartel Violence*, *supra* note 11, at 32; Fogelbach, *supra* note 11, at 420-21.

The 18th Street gang was created in the 1960s by Mexican-American youth in the Rampart neighborhood of Los Angeles; the gang grew to incorporate members of various ethnicities, including “Central Americans as they arrived in large numbers in the 1980s.”¹⁴ Many Los Angeles based MS-13 and M-18 gang members were refugees who fled civil war violence in El Salvador and Guatemala during the 1980s, and were living illegally in the United States.¹⁵ Some Central American refugees joined the already established gangs; however, most Salvadoran youth complained of being victimized by the established gangs and formed their own gang, MS-13, exclusively for Salvadoran youth.¹⁶

In the late 1990s, many Central American refugees, especially those that were involved in gangs, were deported back to their countries of origin after the implementation of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.¹⁷ The United States facilitated the removal of young men, who had entered the United States illegally, and were involved in criminal and gang-related activity.¹⁸ Most of the deportees were young men who had joined gangs, and served time in U.S. prisons.¹⁹ Ultimately, many of these young men were deported back to their country of origin, “despite often having no family there, and having limited or non-existent

¹⁴ Fogelbach, *supra* note 11, at 420.

¹⁵ Blake, *Gang and Cartel Violence*, *supra* note 11, at 32; Fogelbach, *supra* note 11, at 420-21.

¹⁶ Fogelbach, *supra* note 11, at 420-21.

¹⁷ Fogelbach, *supra* note 11, at 421; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, tit. 3 §§ 303-05, 110 Stat. 3009-546 (1996) (codified as amended 8 U.S.C. § 1101(a) (1996)); see generally Dara Lind, *The Disastrous, Forgotten 1996 Law That Created Today's Immigration Problem*, VOX (Apr. 28, 2016, 8:40 AM), <https://www.vox.com/2016/4/28/11515132/iirira-clinton-immigration> [https://perma.cc/8CKL-YMNR].

¹⁸ Blake, *Gang and Cartel Violence*, *supra* note 11, at 32; Fogelbach, *supra* note 11, at 421.

¹⁹ See Joshua Keating, *The Unintended Consequences of Deporting Criminals*, SLATE (Feb. 23, 2017, 12:41 PM), http://www.slate.com/blogs/the_slatest/2017/02/23/deporting_criminals_to_central_america_helped_cause_the_same_violence_that.html [https://perma.cc/RMU2-MNAD]; see also Clare Ribando Seelke, *Gangs in Central America*, CONGRESSIONAL RESEARCH SERVICE 1, 3 (Aug. 29, 2016), <https://fas.org/sgp/crs/row/RL34112.pdf> [https://perma.cc/B43K-MF4A].

Spanish language skills.”²⁰ The newly deported gang members depended on each other and replicated the gang culture they had learned in the United States.²¹ “Gang cliques”²² were established in Central America and have since grown to a total of approximately “36,000 [gang members] in Honduras, 10,500 in El Salvador, and 14,000 in Guatemala.”²³

There are approximately nine hundred gang cliques currently operating within the Northern Triangle.²⁴ Operationally, the cliques have a sophisticated power structure, but do not have a centralized leader making the decisions.²⁵ Instead, the gangs are “composed of numerous vertically-organized, cooperative cliques” with local bosses and leaders at a municipal level.²⁶ Leadership within the gang usually begins with a neighborhood clique leader, followed by “municipal leaders, department leaders, leaders for gang members outside of prison, prison gang leaders, country leaders, and ultimately international leaders.”²⁷ Most gang recruits are associated with certain risk factors that make them vulnerable to gangs.²⁸ These factors include: “conditions of poverty, family disintegration or separation, neglect, violent domestic environments, unemployment, scarcity of educational and developmental opportunities, and family membership in gangs.”²⁹ The gangs in the Northern Triangle offer social

²⁰ Douglas Farah, *Organized Crime in El Salvador: Its Homegrown and Transnational Dimensions*, in ORGANIZED CRIME IN CENTRAL AMERICA: THE NORTHERN TRIANGLE 104, 112 (Cynthia J. Arnson & Eric L. Olson ed., 2011).

²¹ *Id.*

²² Jennifer J. Adams & Jesenia M. Pizarro, *MS-13: A Gang Profile*, 16 J. GANG RES. 1, 4 (2009) (“The MS-13 [and 18th Street gang are] divided into subgroups called cliques; each clique has its own name and is in charge of defending a certain amount of territory. For example, in Los Angeles, a clique of sixty-five members was in charge of patrolling thirty-three street blocks. Each clique is independent of one another, but they will band together in response to a perceived threat. Cliques may also work together in some criminal activities, such as dealing drugs and selling weapons.”).

²³ Dudley, *supra* note 11, at 42; Fogelbach, *supra* note 11, at 420.

²⁴ Fogelbach, *supra* note 11, at 422.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 424.

²⁹ *Id.*

acceptance and an alternative way to acquire certain goods to which individuals might not otherwise have access.³⁰ Due to the risk factors many youth face, they turn to gangs in search of “protection, a social and substitute family network, and a source of livelihood.”³¹

Much of the ongoing social violence in the Northern Triangle is attributable to gang-based criminal activity.³² Extremely high levels of homicide have resulted from gang violence perpetuated against citizens of the Northern Triangle.³³ This area is the most violent region in the world.³⁴ In 2015, the Northern Triangle recorded over 17,422 homicides, an 11 percent increase over the previous year.³⁵ Gang culture in the Northern Triangle is so ingrained within the culture that in El Salvador there is a saying: “if you’re not in a gang, then you’re against gangs.”³⁶ Recruitment for the gangs is focused on integrating street children that are vulnerable to the gangs, taking them off the streets and providing them with a better standard of living.³⁷ In addition to recruiting street children, gangs also recruit in and around schools, going as far as demanding payment from schools and harassing students.³⁸ Most often, gangs “coerce, intimidate, or force [vulnerable] children to deliver messages; stand as lookouts; and

³⁰ *Id.*

³¹ *Id.* at 426-27.

³² *Id.* at 437; see also Michael Shifter, *Countering Criminal Violence in Central America*, COUNCIL ON FOREIGN RELATIONS: CENTER FOR PREVENTATIVE ACTION 1, 7 (Apr. 2012), https://cfrd8-files.cfr.org/sites/default/files/pdf/2012/03/Criminal_Violence_CSR64.pdf [<https://perma.cc/D89A-QXKQ>].

³³ Fogelbach, *supra* note 11, at 439-41; see Rocio Cara Labrador & Danielle Renwick, *Central America’s Violent Northern Triangle*, COUNCIL ON FOREIGN REL. 1, 4 (last updated Jan. 18, 2018), <https://www.cfr.org/backgrounder/central-americas-violent-northern-triangle> [<https://perma.cc/D2WW-ZNLX>].

³⁴ Arnsen & Olson, *supra* note 10, at 1-2, 28-30; Fogelbach, *supra* note 11, at 440; see generally Labrador & Renwick, *supra* note 33.

³⁵ AFP, *El Salvador Becomes World’s Most Deadly Country Outside a War Zone*, TELEGRAPH (Jan. 5, 2016, 11:15 PM), <http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/elsalvador/12083903/El-Salvador-becomes-worlds-most-deadly-country-outside-a-war-zone.html> [perma.cc/7QL8-EJUV].

³⁶ Fogelbach, *supra* note 11, at 429.

³⁷ *Id.* at 432.

³⁸ *Id.*

distribute drugs, weapons, and liquor,” and sometimes even “rob or kill.”³⁹ Sometimes, gang members decide they do not want to be a part of such violence and choose to disassociate themselves from the gang.⁴⁰ Members must seek permission to leave the gang, and those that are not given permission or do not ask for permission are “considered traitors, and according to gang norms, all cliques are notified and have the ‘green light’ to kill them.”⁴¹ Fearing retaliation, defecting gang members flee their countries, leaving everything behind, including their families, in search of asylum protection in the United States.⁴²

III. THE BASICS OF ASYLUM LAW

The Immigration and Nationality Act (INA), which was amended by the Refugee Act of 1980 to include “explicit asylum provisions . . . for the first time,” confers upon the Attorney General of the United States the authority to grant asylum to any eligible refugee.⁴³ The INA defines a refugee as:

*[A]ny person who is outside any country of such person’s nationality . . . 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.*⁴⁴

³⁹ *Id.*

⁴⁰ *Id.* at 435-36.

⁴¹ *Id.* at 436.

⁴² *See id.* at 462.

⁴³ Immigration and Nationality Act, 8 U.S.C. § 1101(a) (2014) (codified as amended in scattered sections of 8 U.S.C. § 1103 *et seq.*); *see also* 8 U.S.C. § 1103(a)(1) (2009); *see also* Edward M. Kennedy, *Refugee Act of 1980*, 15 INT’L MIGRATION REV., 141, 143 (1981); *see also* Ivan A. Tereschenko, *The Board of Immigration Appeals’ Continuous Search for the Definition of “Membership in A Particular Social Group” in Matter of M-E-V-G- and Matter of W-G-R-: In the Context of Youth Resistant to Gang Recruitment in Central America*, 30 CONN. J. INT’L L. 93, 99 (2014).

⁴⁴ Immigration and Nationality Act, § 1101(a)(42).

The INA's definition of refugee is derived from the 1951 Convention and the 1967 Protocol, two key international provisions governing the protection of refugees.⁴⁵ In 1980, President Jimmy Carter signed into law the Refugee Act of 1980, which adopted the United Nations' 1951 Refugee Convention (the "1951 Convention"), relating to the status of refugees.⁴⁶ This Act allows individuals fleeing from their home countries to petition for asylum in the United States.⁴⁷ The Act requires individuals to demonstrate "a well-founded fear of persecution on account of race, religion, nationality, *membership in a particular social group*, or political opinion."⁴⁸ There is no statutory definition for the particular social group categorization, nor does legislative history provide an exact definition, this Article's focus is to further analyze and define the particular social group category.⁴⁹

A. Development of the Particular Social Group Standard

The Board of Immigration Appeals (BIA) defined particular social group in the seminal case *Matter of Acosta*, as "persons of similar background, habits, or social status."⁵⁰ The BIA applied the doctrine of *ejusdem generis* to develop guidelines for construing the particular social group standard.⁵¹ The Board held that each of the four categories (race, religion, nationality and political opinion):

⁴⁵ Protocol Relating to the Status of Refugees, at art. 1 § 2, 19 U.S.T. 6225, 606 U.N.T.S. 267 (Jan. 31, 1967); United Nations Convention Relating to the Status of Refugees, at art. 1, 2545 U.N.T.S. 38 (July 28, 1951); *see also* Tereschenko, *supra* note 43, at 99.

⁴⁶ Refugee Act of 1980, Pub. L. No. 96-212, § 201, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C. § 1521 *et seq.* (1952)); *see generally* Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981); *see also* Kennedy, *supra* note 43, at 141.

⁴⁷ *See generally* Kennedy, *supra* note 43, at 141; *see also* Anker & Posner, *supra* note 46, at 9.

⁴⁸ Refugee Act, § 201 (emphasis added).

⁴⁹ Tereschenko, *supra* note 43, at 99.

⁵⁰ *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). *Matter of Acosta* was overruled in part by *Matter of Mogharrabi* where the court held "that the 'clear probability' standard and the 'well-founded fear' standard are not meaningfully different and, in practical application, converge. That portion of [the decision] in *Matter of Acosta* has therefore been effectively overruled." *Matter of Mogharrabi* 19 I. & N. Dec. 439, 441 (BIA 1987).

⁵¹ *Matter of Acosta*, 19 I. & N. at 233 (explaining that the *ejusdem generis* doctrine literally translates to "of the same kind" and "holds that general words used in

*describes persecution aimed at 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 [And the phrase] “persecution on account of membership in a particular social group” to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic.*⁵²

Following *Matter of Acosta*, the BIA applied the particular social group test in two important cases that have helped shape asylum law,⁵³ *Matter of Toboso-Alfonso*,⁵⁴ and *In re Fauziya Kasinga*.⁵⁵ Each case,

an enumeration with specific words should be construed in a manner consistent with the specific words.”).

⁵² *Id.*

⁵³ See *Particular Social Group Practice Advisory: Applying for Asylum After Matter of M-E-V-G- and Matter of W-G-R-*, NAT’L IMMIGRANT JUST. CTR. 1, 1 (2014), <https://www.immigrantjustice.org/sites/default/files/PSG%2520Practice%2520Advisory%2520and%2520Appendices-Final-1.22.16.pdf> [https://perma.cc/2SE9-65F2] [hereinafter *Applying for Asylum*]; see also Jillian Blake, *Getting to Group Under U.S. Asylum Law*, 90 NOTRE DAME L. REV. ONLINE 167, 168 (2015) [hereinafter Blake, *Getting to Group*].

⁵⁴ See generally *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990) (holding that homosexuals in Cuba were a particular social group for purposes of asylum). The Cuban government persecuted applicant because of his sexual orientation as a homosexual man. *Id.* at 820. Applicant testified that being homosexual was a criminal offense in Cuba, and that the government had allowed the Union of Community Youth to demonstrate against homosexuals at his workplace. *Id.* at 821. Because of his homosexuality, applicant was forced to work in a labor camp for 60 days. *Id.*

⁵⁵ See *In re Fauziya Kasinga*, 21 I. & N. Dec. 357, 357 (BIA 1996) (holding that “young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who opposed the practice,” were a protected particular social group). Applicant was a 19-year-old female of Togo and a member of the Tchamba-Kunsuntu Tribe. *Id.* at 358. Custom among the tribe was for young women, around the age of fifteen, to undergo female genital mutilation (“FGM”). *Id.* Refugee had been spared FGM at the age of fifteen because she was protected by her father, who was very influential within the tribe. *Id.* When applicant’s father died her aunt forced her into a polygamous marriage, and before she was to consummate her marriage she was required to undergo FGM.

Matter of Toboso-Alfonso and *In re Fauziya Kasinga*, established that particular social groups could be comprised of individuals of a particular sexual orientation or a particular gender targeted for mutilation, respectively.⁵⁶

In *Matter of Toboso-Alfonso*, the Cuban government persecuted applicant because of his sexual orientation as a homosexual man.⁵⁷ The Cuban government gave applicant the choice to be jailed for four years in a penitentiary or to leave Cuba for the United States.⁵⁸ Applicant opted to leave Cuba during the Mariel boatlift of 1980.⁵⁹ The court withheld deportation in *Matter of Toboso-Alfonso*, and the applicant was recognized as a member of a particular social group.⁶⁰ The Immigration and Naturalization Service (INS) appealed, arguing that homosexuals were not a particular social group.⁶¹ The BIA rejected INS' argument stating that "among other showings [applicants] must establish facts demonstrating that members of the group are persecuted, have a well-founded fear of persecution, or that their life or freedom would be threatened because of that status."⁶² Applicant, here, established these criteria.

In *In re Fauziya Kasinga*, applicant was a 19-year-old female citizen of Togo and a member of the Tchamba-Kunsuntu Tribe located in northern Togo.⁶³ Custom among the tribe was for young women, around the age of fifteen, to undergo female genital mutilation

Id. Fearing that she would be mutilated, she fled Togo for Ghana and Germany by airplane, eventually ending up in the United States. *Id.* at 358-59.

⁵⁶ See *Matter of Toboso-Alfonso*, 20 I. & N. at 822; see also *In re Fauziya Kasinga*, 21 I. & N. at 357.

⁵⁷ *Matter of Toboso-Alfonso*, 20 I. & N. at 820.

⁵⁸ *Id.* at 821.

⁵⁹ *Id.* at 821; see also Susana Peña, "Obvious Gays" and the State Gaze: Cuban Gay Visibility and U.S. Immigration Policy During the 1980 Mariel Boatlift, 16 J. OF THE HIST. OF SEXUALITY 482, 484 (2007). ("[T]he Mariel boatlift began on 28 March 1980 when a Cuban bus driver took a busload of passengers into the Peruvian embassy in Havana to seek asylum. A week later, as tensions escalated, [Fidel] Castro announced that anyone seeking asylum would be allowed to leave Cuba and pulled back the troops guarding the embassy.").

⁶⁰ *Matter of Toboso-Alfonso*, 20 I. & N. at 819, 822.

⁶¹ *Id.* at 822.

⁶² *Id.*

⁶³ *In re Fauziya Kasinga*, 21 I. & N. Dec. 357, 358 (BIA 1996).

(FGM).⁶⁴ Fearing that she would be mutilated, applicant fled Togo for Ghana and then Germany by airplane, eventually ending up in the United States.⁶⁵ *In re Fauziya Kasinga* established that “the particular social group is defined by common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities.”⁶⁶

The particular social group standard was further developed and clarified by the BIA in *In re C-A-* and *Matter of S-E-G-*.⁶⁷ These cases provide that, in addition to the immutable characteristic requirement, particular social groups had to “be socially visible, and particularly defined.”⁶⁸ *In re C-A-* expanded the particular social group category by stating that the “social visibility” of members in a claimed group is an important element for identifying the existence of a particular social group for asylum purposes.⁶⁹ Most recently, two cases, *Matter of M-E-V-G-* and *Matter of W-G-R-*,⁷⁰ have clarified the “social visibility”

⁶⁴ *Id.*

⁶⁵ *Id.* at 358-59.

⁶⁶ *Id.* at 366.

⁶⁷ *See generally In re C-A-*, 23 I. & N. Dec. 951 (BIA 2006). Colombian applicant befriended a member of the Cali drug cartel and became an informant to the General Counsel of the city, who prosecuted the drug cartels. *Id.* at 951. Applicant argued he was persecuted because of his relationship to both individuals. *Id.* at 953. The court incorporated immutability of past experience and social visibility into their determination of whether applicant was part of a particular social group. *Id.* at 958-61. The court found applicant did not demonstrate that he was persecuted based on his membership in a particular social group. *Id.* at 961. *See also Matter of S-E-G-*, 24 I. & N. Dec. 579, 582-86 (BIA 2008) (establishing the “particularly” element for the particular social group standard). Respondents were youth in El Salvador who were persecuted by the gangs and harassed for refusing to join the gang. *Id.* at 579-80.

⁶⁸ *Applying for Asylum, supra* note 53, at 2.

⁶⁹ *In re C-A-*, 23 I. & N. at 959-61.

⁷⁰ *See generally Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (BIA 2014). Respondent was persecuted by “members of the Mara Salvatrucha gang [who] beat him, kidnaped [sic] and assaulted him and his family while they were traveling in Guatemala, and threatened to kill him if he did not join the gang.” *Id.* at 228.; *see also Matter of W-G-R-*, 26 I. & N. Dec. 208, 215-18 (BIA 2014). Respondent, who was a former member of the 18th Street gang, claimed he was a member of a particular social group after “members of his former gang confronted him after he left the gang, and he was shot in the leg during one of two attacks he suffered. He fled to the United States after he was targeted for

element of the particular social group test, which was criticized by courts for being confusing and too literal.⁷¹ These cases broadened the meaning of “social visibility,” and clarified that the meaning was not “literal or ‘ocular’ visibility,” but instead was meant to “emphasize ‘perception’ and ‘recognition.’”⁷² In both *Matter of M-E-V-G-* and *Matter of W-G-R-*, the BIA stated, “we now rename the ‘social visibility’ requirement as ‘social distinction.’”⁷³ The BIA further clarified that “to be socially distinct, a group need not be *seen* by society; it must instead be *perceived* as a group by society.”⁷⁴

Asylum seekers often select “membership in a particular social group” as the basis for their asylum application.⁷⁵ Each case that the BIA takes on for review regarding the particular social group standard and a claim for a new particular social group adds on to the already complex field of asylum law.⁷⁶ For an individual to satisfy the particular social group standard, an applicant must show: (1) he or she is a member of a group; (2) the constituent members of the group share immutable characteristics, and the group is both; (3) socially distinct; and (4) particularly defined.⁷⁷

retribution for leaving the gang.” *Id.* at 209. In both cases the Board clarified that the “social visibility” element of a particular social group does not mean “literal or ocular visibility” and renamed the element as “social distinction.” *Id.* at 216; *Matter of M-E-V-G-*, 26 I. & N. at 236.

⁷¹ Linda Kelly, *The New Particulars of Asylum’s “Particular Social Group,”* 36 WHITTIER L. REV. 219, 224 (2015).

⁷² *Id.* The argument here is that the perception ought to be from the perspective of the individual doing the persecuting and not just any random observer. *Id.*

⁷³ *Matter of M-E-V-G-*, 26 I. & N. at 236; *Matter of W-G-R-*, 26 I. & N. at 212.

⁷⁴ *Matter of W-G-R-*, 26 I. & N. at 216. The court found that “it is critical that the terms used to describe the group have commonly accepted definitions in the society of which the group is a part.” *Id.* at 214.

⁷⁵ *Applying for Asylum*, *supra* note 53, at 1.

⁷⁶ See generally *Resources for Asylum Claims Based on Membership in a Particular Social Group*, NAT’L IMMIGRANT JUST. CTR., <https://www.immigrantjustice.org/resources/resources-asylum-claims-based-membership-particular-social-group> (last visited Apr. 16, 2018) [<https://perma.cc/CCN5-RGGX>]; see also Reena Arya, *BIA Requires Asylum Seekers to Identify Particular Social Group*, CATH. LEGAL IMMIGR. NETWORK INC., <https://cliniclegal.org/resources/bia-requires-asylum-seekers-identify-particular-social-group> (last visited May 8, 2018) [<https://perma.cc/SE2N-BJEZ>].

⁷⁷ *Applying for Asylum*, *supra* note 53, at app. B at 9. Readers should take notice that this Article only addresses the particular social group standard of the asylum

IV. THE GANG'S ALL HERE: AN EXAMINATION OF CIRCUIT COURT CASES

Five cases, factually similar, and posing the same argument, have made their way to various circuit courts across the country.⁷⁸ In three of the cases, *Martinez v. Holder*, *Urbina-Mejia v Holder*, and *Ramos v. Holder*, the Fourth, Sixth, and Seventh Circuits, respectively, held that, for asylum purposes, former gang membership constituted membership in a particular social group.⁷⁹ By way of contrast in *Cantarero v. Holder*, and *Garay Reyes v. Lynch*, the First and Ninth Circuits, respectively, upheld the BIA's decision to deny the petitioner's argument that former gang members constituted a particular social group.⁸⁰ In *Cantarero v. Holder*, and *Garay Reyes v. Lynch*, the BIA ruled that former gang members were not a particular social group, and thus not eligible for protection under the Refugee Act.⁸¹ This circuit split is worthy of consideration, and warrants a deeper look.

In 2009, the Seventh Circuit heard *Ramos v. Holder* and held that former gang members constituted a particular social group because they meet the "social visibility" factor of the standard; the court did not consider the other prongs of the standard.⁸² Petitioner was born and

process. It is critical to note that asylum law is a vastly complex form of immigration relief. The process for applying for asylum, which is not the topic of this Article, is long and considers many aspects of an asylum seeker's life. Merely satisfying the elements of the particular social group standard does not qualify an individual for asylum protections, it is but one aspect of many requirements for asylum eligibility. See NAT'L IMMIGRANT JUSTICE CTR., BASIC PROCEDURAL MANUAL FOR ASYLUM REPRESENTATION AFFIRMATIVELY AND IN REMOVAL PROCEEDINGS (Jan. 2017), http://immigrantjustice.org/sites/default/files/content-type/resource/documents/2017-01/NIJC%20Asylum%20Manual_01%202017_final.pdf [https://perma.cc/3LVZ-44XK].

⁷⁸ See *Garay Reyes v. Lynch*, 842 F.3d 1125, 1129-30 (9th Cir. 2016); *Martinez v. Holder*, 740 F.3d 902, 905-06 (4th Cir. 2014); *Cantarero v. Holder*, 734 F.3d 82, 83-84 (1st Cir. 2013); *Urbina-Mejia v. Holder*, 597 F.3d 360, 362-63 (6th Cir. 2010); *Ramos v. Holder*, 589 F.3d 426, 428 (7th Cir. 2009).

⁷⁹ See *Martinez*, 740 F.3d at 913; *Urbina-Mejia*, 597 F.3d at 367; *Ramos*, 589 F.3d at 431.

⁸⁰ See *Cantarero*, 734 F.3d at 86-87; see *Garay Reyes*, 842 F.3d at 1138.

⁸¹ See *Cantarero*, 734 F.3d at 87; *Garay Reyes*, 842 F.3d at 1132.

⁸² *Ramos*, 589 F.3d at 430-31.

raised in El Salvador.⁸³ At the age of fourteen he joined the Mara Salvatrucha, and was a member for almost ten years.⁸⁴ In 2003, petitioner immigrated to the United States and reconnected with his Christian values.⁸⁵ He feared that if he returned to El Salvador he would not be able to rejoin the gang without violating his “Christian scruples and that the gang would kill him for his refusal to rejoin.”⁸⁶ Petitioner also had MS-13 tattoos on his face and body, and the court found that if he had them removed the gang would still recognize him.⁸⁷ The court ruled in the favor of petitioner, supporting its decision by reasoning that petitioner met the social visibility element of the particular social group standard.⁸⁸ The court reasoned that “[i]f society recognizes a set of people having certain common characteristics as a group, this is an indication that being in the set might expose one to special treatment, whether friendly or unfriendly.”⁸⁹ In this case, petitioner was a member of an easily identifiable “specific, well-recognized, indeed notorious gang.”⁹⁰

In 2010, following *Ramos*, the Sixth Circuit heard *Urbina-Mejia v. Holder*.⁹¹ Urbina-Mejia was a citizen of Honduras who arrived in the United States when he was seventeen years old.⁹² He had lived in Memphis, Tennessee with his mother, and had no criminal record in the United States.⁹³ Urbina-Mejia fled his homeland to escape from gang life.⁹⁴ At the age of fourteen, he joined the 18th Street gang, and remained a member for three years.⁹⁵ Urbina-Mejia claimed he received death threats if he did not do what he was told by upper-level gang members.⁹⁶ He recalled that other members of the gang taught

⁸³ *Id.* 428.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 430-31.

⁸⁹ *Id.*

⁹⁰ *Id.* at 431.

⁹¹ *See generally* *Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010).

⁹² *Id.* at 362.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 363.

him how to use a nine-millimeter handgun, and that sometimes he would use a baseball bat to intimidate, and at times harm victims.⁹⁷ Urbina-Mejia testified, “he [had] never seriously injured any rival gang member” and “he regretted his criminal activities but worried that he would be killed if he did not participate.”⁹⁸ In considering Urbina-Mejia’s claim, the court reasoned that “being a former member of a group ‘is an immutable characteristic and that mistreatment because of such status could be found to be persecution on account of . . . membership in a particular social group.’”⁹⁹ Additionally, the court noted that, similar to *Martinez*, “once one has left the gang, one is forever a former member of that gang,” and as such could possibly be “recognized by the 18th Street gang and the MS-13 gang as an ex-gang member if he returned to Honduras.”¹⁰⁰ The court held that Urbina-Mejia was a member of a particular social group.¹⁰¹

Martinez v. Holder, heard by the Fourth Circuit in 2014, involved a Salvadoran refugee who was a former member of the MS-13 gang.¹⁰² Julio Martinez fled violence in his homeland at the age of twenty and moved to Baltimore, Maryland with his family.¹⁰³ Martinez’s stepfather died when he was twelve years old, and like many young kids, Martinez found solace and a family in MS-13.¹⁰⁴ After joining MS-13 in El Salvador, Martinez refused orders from the gang’s leaders to commit crimes against his neighbors and left the gang.¹⁰⁵ Gang members who did not accept Martinez’s departure made multiple attempts on his life.¹⁰⁶ Martinez fled El Salvador and stayed with his

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 366 (citation omitted).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 367.

¹⁰² *Martinez v. Holder*, 740 F.3d 902, 905-06 (4th Cir. 2014).

¹⁰³ Lauren Gold, *Caught in the Crossfire*, 2014 Art. 14 MD. CAREY L. MAG. 1, 1 (2014), <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1090&context=mcl> [<https://perma.cc/452J-VE44>].

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*; see also Pamela Constable, *Former Salvadoran Gang Member Says He’s Living Right and Deserves U.S. Protection*, WASH. POST (May 18, 2014), <https://www.washingtonpost.com/local/former-salvadoran-gang-member-says-hes-living-right-and-deserves-us-protection/2014/05/18/1aa2e7e6-dacd-11e3->

sister in Maryland.¹⁰⁷ In *Martinez*, the court concluded “that the BIA erred as a matter of law in its interpretation of the phrase ‘particular social group’ by holding that former gang membership is not an immutable characteristic.”¹⁰⁸ The court found that Martinez’s proposed particular social group, “former MS-13 members from El Salvador,” was immutable, because “the only way that Martinez could change his membership in the group would be to rejoin MS-13.”¹⁰⁹ The court remanded the case back down to the BIA for further proceedings consistent with the court’s opinion.¹¹⁰

Contrary to these decisions, the First Circuit, in 2013, created the now-existing circuit split in deciding *Cantarero v. Holder*.¹¹¹ In *Cantarero*, the court rejected the argument that petitioner was part of a particular social group, holding that being a former gang member is not an immutable characteristic.¹¹² The petitioner, Kevin Fabricio Claros Cantarero, was born and raised in El Salvador and at the age of twelve left El Salvador for the United States to join his parents.¹¹³ Upon arriving in the United States, he became the beneficiary of the Temporary Protected Status Program (TPS) and has remained in the United States ever since.¹¹⁴ When Cantarero was sixteen years old he joined the 18th Street gang.¹¹⁵ Petitioner testified that “he joined the East Boston arm of the 18th Street gang,” and tattooed himself with various tattoos that identified him as a member, some of which were difficult to hide.¹¹⁶ A couple of years after joining the gang, petitioner

8009-71de85b9c527_story.html?utm_term=.63cc1807d3f8
[<https://perma.cc/J3YH-93G3>].

¹⁰⁷ Gold, *supra* note 103, at 1.

¹⁰⁸ *Martinez v. Holder*, 740 F.3d 902, 913 (4th Cir. 2014).

¹⁰⁹ *Id.* at 906.

¹¹⁰ *Id.* at 913.

¹¹¹ *Cantarero v. Holder*, 734 F.3d 82, 86-87 (1st Cir. 2013).

¹¹² *Id.*

¹¹³ *Id.* at 83.

¹¹⁴ *Id.* The text of the Temporary Protected Status (8 U.S.C.A. § 1254(a) (1952)) reads, “Temporary Protected Status (TPS): (a) Granting of Status (1) In general. - In the case of an alien who is a national of a foreign state (c), the Attorney General, in accordance with this section - (A) may grant the alien temporary protected status in the United States and shall not remove the alien from the United States during the period in which such status is in effect[.]”

¹¹⁵ *Cantarero*, 734 F.3d at 83.

¹¹⁶ *Id.*

became afraid of the violent nature of the gang after a gang-related shooting occurred when he was out partying one night.¹¹⁷ Shortly afterwards, petitioner experienced a religious conversion and left the gang, resulting in him being beaten by active members.¹¹⁸ Leaders of the gang threatened petitioner, stating that being a gang member was a “lifelong commitment and that if he tried to leave, the gang would kill him or members of his family.”¹¹⁹ Petitioner argued that, if deported to El Salvador, he feared persecution from the Salvadoran branch of the 18th Street gang because of his decision to leave the gang.¹²⁰ He felt he would be an easy target to rival gangs and police authorities in El Salvador because of his gang tattoos.¹²¹

The court in *Cantarero* recognized that the INA does not define particular social group nor does it provide “guidance in the legislative history as to its meaning,” but refused to go further than acknowledge the lack of legislative guidance.¹²² The First Circuit notes that its “role in the process of interpreting th[e] phrase is quite limited,” reasoning that they “must uphold the BIA’s interpretation.”¹²³ Despite recognition by the First Circuit that “both courts and commentators have struggled to define it . . . and read in its broadest literal sense, the phrase is almost completely open ended.”¹²⁴ Furthermore, the First Circuit held that: (1) in offering refugee protections for individuals facing persecution, Congress did not intend for asylum protections to include violent street gangs;¹²⁵ and (2) the arguments posed by the Sixth and Seventh Circuits are not strong enough to overcome *Chevron* deference.¹²⁶ The First Circuit disagrees that former gang

¹¹⁷ *Id.* at 84.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 85.

¹²³ *Id.*

¹²⁴ *Id.* (quoting *Fatin v. I.N.S.*, 12 F.3d 1233, 1238 (3d Cir.1993)).

¹²⁵ *Id.*

¹²⁶ *Id.* at 87; see also *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984). The notion of *Chevron* deference refers to the deference the judiciary grants an administrative agency in their statutory interpretation, or in other words, their interpretation of statutes and words within the statutes that have delegated regulatory authority. See also Valerie C. Brannon & Jared P. Cole, *Chevron Deference: A Primer*, CONGRESSIONAL RESEARCH SERVICE 1, 1

members are a particular social group, asserting that the Seventh Circuit's finding is "largely superfluous . . . since, by its reasoning, anyone persecuted for any reason (other than perhaps a personal grudge) might be said to be in such a [social] group."¹²⁷

In 2016, the Ninth Circuit issued its opinion in *Garay Reyes v. Lynch* and became the latest case to join the circuit split.¹²⁸ In *Garay Reyes* the court upheld the BIA's decision that petitioner was not a member of a particular social group.¹²⁹ Petitioner joined the Mara 18 gang in El Salvador at seventeen years old.¹³⁰ During his tenure with the gang, Garay served as a driver for a few robberies, but soon became disenchanted with the violence and lifestyle of the gang and decided to leave.¹³¹ Fearing for his life, and retribution from the gang leader, who had previously announced that anyone trying to leave the gang could be punished by beatings or death, Garay went into hiding.¹³² Garay moved to another town, but was eventually found by the gang's leader and shot in the leg.¹³³ A few months later, he was attacked a second time by machete wielding assailants.¹³⁴ At the age of eighteen, Garay had his gang tattoo removed and subsequently left for

(Sept. 19, 2017), <https://fas.org/sgp/crs/misc/R44954.pdf> [<https://perma.cc/TB8Y-4XLC>]. "Congress has created numerous administrative agencies to implement and enforce delegated regulatory authority. Federal statutes define the scope and reach of agencies' power, granting them discretion to, for example, promulgate regulations, conduct adjudications, issue licenses, and impose sanctions for violations of the law. The Administrative Procedure Act (APA) confers upon the judiciary an important role in policing these statutory boundaries, directing federal courts to 'set aside agency action' that is 'not in accordance with law' or 'in excess of statutory jurisdiction, authority, or limitations.' Courts will thus invalidate an action that exceeds an agency's statutory authorization or otherwise violates the law. Of course, in exercising its statutory authorities, an agency necessarily must determine what the various statutes that govern its actions mean. This includes statutes the agency specifically is charged with administering as well as laws that apply broadly to all or most agencies." *Id.*

¹²⁷ *Cantarero*, 734 F.3d at 87.

¹²⁸ *See generally* *Garay Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016).

¹²⁹ *Id.* at 1129.

¹³⁰ *Id.*

¹³² *Id.*

¹³² *Id.* at 1130.

¹³³ *Id.*

¹³⁴ *Id.*

the United States.¹³⁵ The Ninth Circuit reasoned that substantial evidence supported the BIA's conclusion that Garay's proposed group lacked social distinction and as such was not a cognizable particular social group.¹³⁶

V. PROCEDURAL: CHEVRON DEFERENCE

The Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council* recognized the importance of deferring to an administrative agency in determining certain issues of law.¹³⁷ To decide whether an administrative agency's interpretation of a statute ought to be granted *Chevron* deference, courts must determine whether Congress has spoken on the issue in question.¹³⁸ If Congress has spoken on the issue, and its intent is clear, the administrative agency must give effect to Congress' expressed intent.¹³⁹ If Congress has not spoken on the issue, and a statute is found to be "silent or ambiguous . . . a court may grant deference to an agency's interpretation where it is a permissible construction of the statute."¹⁴⁰ The Supreme Court has long "recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations."¹⁴¹ As one New York Time's article reported:

In today's regulatory world, agencies often step in to fill the gap, putting forth their own interpretation of a statute. The principle of the Chevron case says that a federal court will defer to a federal agency's views. One rationale for this doctrine is that an agency, with

¹³⁵ *Id.*

¹³⁶ *Id.* at 1138.

¹³⁷ *See* *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

¹³⁸ *See* *Kersh, supra* note 7, at 166.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Chevron*, 467 U.S. at 844.

*its expertise, is better positioned than a judge to know a statute's meaning.*¹⁴²

Thus, *Chevron* deference is an important doctrinal element to consider when analyzing legal issues regarding administrative agencies, specifically in regard to quasi-judicial entities like the BIA.¹⁴³ It is not disputed that *Chevron* deference applies to the Board of Immigration Appeals' decisions, or interpretations of the Immigration and Naturalization Act.¹⁴⁴ In fact, the Supreme Court has recognized that the "principles of *Chevron* deference are applicable to this statutory scheme."¹⁴⁵ The Court noted that the Attorney General has "delegated to the BIA the 'discretion and authority conferred upon by the Attorney General by law' in the course of 'considering and determining cases before it.'"¹⁴⁶ Therefore, the BIA "should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'"¹⁴⁷ Thus, the refusal of circuit courts to give deference to the BIA in the aforementioned cases is significant because when a circuit court reverses an administrative agency it has good reason.¹⁴⁸ The fact that three circuit courts have held contrary to the BIA on the issue of whether former gang members constitute a particular social group should be a compelling basis for both the First and Ninth Circuits to reverse the BIA.¹⁴⁹

In holding contrary to the BIA on whether former gang members constitute a particular social group, the circuit courts took into consideration the *Chevron* deference doctrine.¹⁵⁰ In *Martinez* the court

¹⁴² Steven Davidoff Solomon, *Should Agencies Decide Law? Doctrine May Be Tested at Gorsuch Hearing*, N. Y. TIMES (Mar. 14, 2017), https://www.nytimes.com/2017/03/14/business/dealbook/neil-gorsuch-chevron-deference.html?_r=0 [<https://perma.cc/SD54-5U4G>].

¹⁴³ *See id.*

¹⁴⁴ *See* *Negusie v. Holder*, 555 U.S. 511, 516 (2009).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 517 (citation omitted).

¹⁴⁷ *Id.* (citations omitted).

¹⁴⁸ *See generally* Brannon & Cole, *supra* note 126, at 1.

¹⁴⁹ *Martinez v. Holder*, 740 F.3d 902, 906 & 909 (4th Cir. 2014); *Urbina-Mejia v. Holder*, 597 F.3d 360, 365-66 (6th Cir. 2010); *Ramos v. Holder*, 589 F.3d 426, 429 & 431 (7th Cir. 2009). *But see* *Cantarero v. Holder*, 734 F.3d 82, 86-87 (1st Cir. 2013); *Garay Reyes v. Lynch*, 842 F.3d 1125, 1129 (9th Cir. 2016).

¹⁵⁰ *See Martinez*, 740 F.3d at 909.

stated, “in conducting our review, we generally give *Chevron* deference to the BIA’s statutory interpretations, recognizing that Congress conferred on the BIA decision-making power to decide such questions of law.”¹⁵¹ However, procedurally, the court found that:

*[b]ecause the decision . . . was issued by a single BIA member, it does not constitute a precedential opinion, as a precedential opinion may only be issued by a three-member panel When issuing a single-member, nonprecedential opinion, the BIA is not exercising its authority to make a rule carrying the force of law, and thus the opinion is not entitled to Chevron deference.*¹⁵²

Thus, in *Martinez*, the court did not grant the BIA *Chevron* deference, though the court did give the BIA’s opinion some weight.¹⁵³ In *Urbina-Mejia*, the court, stated that “substantial deference is given to the Board’s interpretation of the INA . . . unless the interpretation is ‘arbitrary, capricious, or manifestly contrary to the statute.’”¹⁵⁴ The Sixth Circuit held that as a matter of law, the Board erred in finding that petitioner was not part of a particular social group.¹⁵⁵ Although the Sixth Circuit denied petitioner’s request, it held contrary to the BIA that former gang members do constitute a particular social group, but could not reverse the BIA’s decision because petitioner failed to provide corroborating evidence to support his asylum claim.¹⁵⁶ In *Ramos*, the court did not discuss *Chevron* deference in its opinion; however, the court did note that the opinion was “characteristically terse, [and delivered by] one-member” of the panel.¹⁵⁷ Similar to *Martinez*, the court did not give deference to the BIA decision because it was written by one-member.¹⁵⁸

Much deference, however, was given to the BIA in *Cantarero*, the court stating, “[b]ecause we are confronted with a question implicating

¹⁵¹ *Id.*

¹⁵² *Id.* at 909-10.

¹⁵³ *Id.* at 910.

¹⁵⁴ *Urbina-Mejia*, 597 F.3d at 364.

¹⁵⁵ *Id.* at 367.

¹⁵⁶ *Id.* at 367-68.

¹⁵⁷ *See generally* *Ramos v. Holder*, 589 F.3d 426, 429 (7th Cir. 2009).

¹⁵⁸ *See generally id.*; *see also* *Martinez*, 740 F.3d at 909-10.

‘an agency’s construction of the statute which it administers,’ we follow *Chevron* principles in our review of the BIA’s decision.”¹⁵⁹ In *Garay Reyes* the Ninth Circuit also afforded the BIA *Chevron* deference, stating that “[c]onsistency with the agency’s past practice or precedent is not required for an agency interpretation to be due *Chevron* deference; a new or varying agency interpretation is permitted, if it is adequately explained.”¹⁶⁰ However, the BIA rarely adequately explains its variance in decision making, yet it is often afforded *Chevron* deference.¹⁶¹ In this instance, the BIA is not providing a reasoned explanation, nor is it adequately explaining its decision, rather it is “rewriting prior decisions so they appear to conform to the new requirements.”¹⁶² The court held that the BIA’s articulation of the particular social group requirements are consistent with the statute, and reflects the agency’s ongoing efforts to construe the ambiguous statutory phrase particular social group is reasonable and “is entitled to *Chevron* deference.”¹⁶³ However, such deference to the BIA by the Ninth Circuit is erroneous, as the “social distinction” and “particularity” requirements the BIA refers to are “plainly arbitrary, incoherent, and internally contradictory.”¹⁶⁴

Chevron deference is important to consider when arguing that the First and Ninth Circuits should have reversed the BIA’s decision in deciding whether former gang members constituted a particular social group. The First Circuit recognized that “both courts and commentators have struggled to define [the particular social group standard] and read in its broadest literal sense, the phrase is almost completely open-ended.”¹⁶⁵ The BIA could interpret and apply such a broad and open-ended phrase in an arbitrary or capricious way, such

¹⁵⁹ *Cantarero v. Holder*, 734 F.3d 82, 84-85 (1st Cir. 2013) (quoting *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984)).

¹⁶⁰ *Garay Reyes v. Lynch*, 842 F.3d 1125, 1133 (9th Cir. 2016).

¹⁶¹ See generally *Kersh*, *supra* note 7; see also Kristin A. Bresnahan, *The Board of Immigration Appeals’s New Social Visibility Test for Determining Membership of a Particular Social Group in Asylum Claims and Its Legal Policy Implications*, 29 BERKELEY J. INT’L L. 649, 669 (2011).

¹⁶² *Petition for Writ of Certiorari, Garay Reyes v. Sessions* 842 F.3d 1125 (9th Cir. 2016), *petition for cert filed*, (U.S. Aug. 11, 2017) (No. 17-241) at 28.

¹⁶³ *Id.* at 10-11.

¹⁶⁴ *Id.* at 20.

¹⁶⁵ *Cantarero v. Holder*, 734 F.3d 82, 85 (1st Cir. 2013) (quoting *Fatin v. I.N.S.*, 12 F.3d 1233, 1238 (3d Cir. 1993)).

that the First Circuit should not have given the BIA deference.¹⁶⁶ Finally, *Chevron* deference was at issue in *National Cable and Telecommunications v. Brand X*, where the Supreme Court held that “*Chevron* deference is not owed to agency interpretations that are inconsistent with past interpretations and that are not adequately explained by the agency.”¹⁶⁷

A. Arbitrary and Capricious

Additionally, another reason why the First and Ninth Circuits should not have given the BIA deference is that the BIA has defined particular social group in an arbitrary or capricious manner.¹⁶⁸ It is no secret that immigration laws are complex to decipher; application should be consistent to assist with the complexities that are immigration laws and statutes.¹⁶⁹ Scholars have recognized that “immigration statutes of the United States are among the worst, longest, most ambiguous, complicated, illogical, undemocratic and arbitrary laws in the world.”¹⁷⁰ This characterization is further complicated by the BIA’s arbitrary application and interpretation.

The Administrative Procedures Act (APA) authorizes courts to set aside agency interpretations of statutes if the interpretations are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁷¹ As such, an argument can be made that the BIA’s interpretation of particular social group has been “arbitrary or capricious.”¹⁷² This would not be the first time courts have found BIA’s interpretation of immigration statutes arbitrary or capricious.¹⁷³

¹⁶⁶ *See id.*

¹⁶⁷ *See generally* Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 969-72 (2005); Preston, *supra* note 8, at 443.

¹⁶⁸ *Judulang v. Holder*, 565 U.S. 42, 43 (2011); Jack Wasserman, *The Undemocratic, Illogical and Arbitrary Immigration Laws of the United States*, 3 INT’L LAW. 254, 254 (1969).

¹⁶⁹ *See generally* Cristina M. Rodríguez, *Uniformity and Integrity in Immigration Law: Lessons from the Decisions of Justice (and Judge) Sotomayor*, YALE L.J. F. (Mar. 2014).

¹⁷⁰ Wasserman, *supra* note 168, at 254.

¹⁷¹ Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1966).

¹⁷² *See generally id.*

¹⁷³ *See generally Judulang*, 565 U.S. at 43 (holding that the BIA’s policy was arbitrary and capricious).

In 2011, the Supreme Court, in *Judulang v. Holder*, held that the BIA's "policy for deciding when resident aliens may apply to the Attorney General for relief from deportation under a now-repealed provision of immigration law[]" was arbitrary and capricious.¹⁷⁴ In a succinct opinion, the Court held that "when an administrative agency sets policy, it must provide a reasonable explanation for its action. That is not a high bar, but is an unwavering one. Here, the BIA has failed to meet it."¹⁷⁵ By striking down the BIA's policy regarding relief from deportation, the Supreme Court did two things: 1) created the most rigorous review of an immigration agency's action under the APA to date; and 2) affirmed the viability of the "arbitrary and capricious" standard as a meaningful avenue of challenging the merits of an immigration agency action under either the APA or *Chevron*.¹⁷⁶

Legal scholars have also recognized that the BIA fails to meet or provide reasonable explanation for why it makes the decisions it does, and that it often crosses into making decisions that are arbitrary and/or capricious.¹⁷⁷ Additionally, the BIA has made interpretations of the particular social group standard that are inconsistent.¹⁷⁸ The BIA's interpretations cannot be relied upon to deliver consistent results to assist in future decisions because there is no consensus regarding the exact meaning of particular social group.¹⁷⁹

The First Circuit in *Cantarero* accepted the BIA's reasoning by rejecting the petitioner's argument that he was a member of a particular social group.¹⁸⁰ The First Circuit acknowledged that the BIA first interpreted the phrase particular social group in *Matter of Acosta* as referring to "a group of persons all of whom share a common, immutable characteristic."¹⁸¹ The court then noted that "in subsequent

¹⁷⁴ *Id.* at 45.

¹⁷⁵ *Id.*

¹⁷⁶ Jeffrey D. Stein, *Delineating Discretion: How Judulang Limits Executive Immigration Policy-Making Authority and Opens Channels for Future Challenges*, 27 GEO. IMMIGR. L.J. 35, 48 (2012).

¹⁷⁷ Preston, *supra* note 8, at 443.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*; see also *Cantarero v. Holder*, 734 F.3d 82, 85 (1st Cir. 2013) (explaining that the INA does not define particular social group and that there is "no guidance in the legislative history as to its meaning," but refused to go further than acknowledge the lack of legislative guidance).

¹⁸⁰ *Cantarero*, 734 F.3d at 87.

¹⁸¹ *Matter of Acosta*, 19 I. & N. Dec. 211, 212 (BIA 1985).

decisions, the BIA elaborated that the proffered characteristic must make the group socially visible and sufficiently particular.¹⁸² Finally, the court highlighted that the BIA denied petitioner's claim of a "proposed group on the grounds that recognizing former members of violent criminal gangs as a particular social group would undermine the legislative purpose of the INA."¹⁸³ The court noted that they did not find this interpretation unreasonable or impermissible; even though it could be argued to be arbitrary and capricious for failing to acknowledge that petitioner met the particular social group standard, and at a minimum ought to be afforded the opportunity to submit an asylum claim.¹⁸⁴

VI. CIRCUIT COURT CASES AND THE PARTICULAR SOCIAL GROUP STANDARD

Of the five grounds for asylum delineated in the Refugee Act,¹⁸⁵ the particular social group is the one that is most heavily scrutinized because its boundaries are ambiguous.¹⁸⁶ This ambiguity allows individuals who fear returning to their country of origin, but do not fit the other four categories, to seek asylum.¹⁸⁷ On the other hand, the ambiguity of the particular social group standard makes it so that deserving groups are arbitrarily denied protections under asylum law.¹⁸⁸

How, then, do courts determine which groups are deserving of a particular social group distinction and which are not? Because the particular social group category does not have a statutory definition, the BIA and appellate courts are free to interpret the statute as they see fit.¹⁸⁹ This Article argues that the First Circuit erred in its decision that

¹⁸² *Cantarero*, 734 F.3d at 85.

¹⁸³ *Id.*

¹⁸⁴ *See id.*

¹⁸⁵ Refugee Act of 1980, Pub. L. No. 96-212, § 201(a)(42)(A), 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C. § 1521 *et seq.* (1952)).

¹⁸⁶ Benjamin Casper et al., *Matter of M-E-V-G- and the BIA's Confounding Legal Standard for "Membership in a Particular Social Group,"* 14-06 IMMIGR. BRIEFINGS 1, 3 (2014).

¹⁸⁷ Blake, *Getting to Group*, *supra* note 53, at 167; *see also* Casper, *supra* note 186, at 3.

¹⁸⁸ Blake, *Getting to Group*, *supra* note 53, at 168.

¹⁸⁹ *Castellano-Chacon v. INS*, 341 F.3d 533, 546 (6th Cir. 2003).

former gang members are not a particular social group.¹⁹⁰ The argument that Congress did not intend “to include violent street gangs” in its offering of refugee protections does not stand because there have been other groups, of similar characteristics, that have been granted asylum under the particular social group category.¹⁹¹

A. Former Gang Members are a Particular Social Group

The First Circuit held that “a former gang member was still a gang member.”¹⁹² Rejecting the argument that former gang members are a particular social group, the First Circuit discredits the arguments made by the Fourth, Sixth, and Seventh Circuits.¹⁹³ However, the First Circuit is wrong; former gang members are a particular social group, as they meet the test set forth in *Matter of Acosta*.¹⁹⁴

1. Former Gang Members: Immutable Characteristic

The court in *Martinez* asserted that “[a]t the outset . . . Martinez’s membership in a group that constitutes former MS-13 members is immutable,” because the only way to change this immutable characteristic is to rejoin the MS-13, which violates a fundamental part of petitioner’s conscience.¹⁹⁵ MS-13 members share common, immutable characteristics; namely, “their past experiences together, their initiation rites, and their status as Spanish-speaking immigrants in the United States.”¹⁹⁶ Past experiences, by their very nature are immutable, because they have already occurred and cannot be undone.¹⁹⁷ This finding could also be applied to a particular social group of former members of the 18th Street gang, as all former gang

¹⁹⁰ *Cantarero v. Holder*, 734 F.3d 82, 86-87 (1st Cir. 2013).

¹⁹¹ *See Martinez v. Holder*, 740 F.3d 902, 905-06 (4th Cir. 2014); *Urbina-Mejia v. Holder*, 597 F.3d 360, 362 (6th Cir. 2010); *Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009). *But see Garay Reyes v. Lynch*, 842 F.3d 1125, 1129 (9th Cir. 2016); *Cantarero v. Holder*, 734 F.3d 82, 86 (1st Cir. 2013).

¹⁹² *Cantarero*, 734 F.3d at 86.

¹⁹³ *Martinez*, 740 F.3d at 905-06; *Urbina-Mejia*, 597 F.3d at 362; *Ramos*, 589 F.3d at 431.

¹⁹⁴ *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

¹⁹⁵ *Martinez*, 740 F.3d at 911.

¹⁹⁶ *Castellano-Chacon v. INS*, 341 F.3d 533, 549 (6th Cir. 2003).

¹⁹⁷ *In re C-A-*, 23 I. & N. Dec. 951, 958 (BIA 2006).

members, regardless of specific gang affiliation, share common immutable characteristics.¹⁹⁸

The petitioner in *Urbina-Mejia* argued that changing such an immutable part of an individual “would be [an] unconscionable [thing] for [asylum seekers] to change” because it is “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.”¹⁹⁹ The BIA held that petitioner had failed to “show that the characteristic which he possesses is so fundamental to his identity that it would be unconscionable for him to change it.”²⁰⁰ However, the BIA was incorrect in its holding, because it is beyond the power of a former gang member to change the status of a “former gang member,” unless they rejoin the gang and become an active gang member.²⁰¹ *Martinez* reasoned that “[Martinez’s] repudiation of gang membership, along with its violence and criminality, is a critical aspect of his conscience that he should not be forced to change.”²⁰²

2. Former Gang Members: Particularity

The criterion of “particularity” within the particular social group standard refers to “whether the group is ‘sufficiently distinct’ that it would constitute a ‘discrete class of persons.’”²⁰³ This term, “particularity,” establishes that it is critical to consider how a group is described, and that it be described in a way that is commonly accepted within the society in which the group is a part.²⁰⁴ The group must be “discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective.”²⁰⁵

Former gang members meet the particularity requirement. Within their society, former gang members are a “discrete class of persons,” specifically, *former* gang members, not active or inactive gang

¹⁹⁸ See *Martinez*, 740 F.3d at 912; see also *Urbina-Mejia*, 597 F.3d at 366.

¹⁹⁹ *Urbina-Mejia*, 597 F.3d at 365; *Matter of Acosta*, 19 I. & N. at 233 (explaining the background reasoning that the petitioner used).

²⁰⁰ *Urbina-Mejia*, 597 F.3d at 365 (explaining that the Board was reaffirming the immigrations judge’s finding).

²⁰¹ *Martinez*, 740 F.3d at 911.

²⁰² *Id.* at 912.

²⁰³ See *Matter of W-G-R-*, 26 I. & N. Dec. 208, 210 (BIA 2014) (citation omitted).

²⁰⁴ *Id.* at 213-14.

²⁰⁵ *Id.* at 214.

members.²⁰⁶ This “definable boundary” and discrete distinction immediately separates these former gang members from any other types of gang members.²⁰⁷ Thus, the argument that the MS-13 and 18th Street gangs constitute a particular social group is plausible.²⁰⁸ Determining whether an individual is a former gang member is straightforward; they either are or are not; however, there is ambiguity as to whether the MS-13 or 18th Street gang are merely gangs because they are known for their notoriously violent ways, whose influence and reach is transcontinental, leading some sociologists to consider them powerful criminal syndicates.²⁰⁹

3. Former Gang Members: Socially Distinct

In *Matter of M-E-V-G-*, the courts renamed the social visibility criterion of the particular social group test as “social distinction.”²¹⁰ The courts never imposed ocular visibility as a prerequisite for a viable particular social group, as not all groups will encompass visible characteristics.²¹¹ Courts recognized that some particular social groups, with social distinction, “involved characteristics that were highly visible,”²¹² and other particular social groups that were not visible.²¹³ The social distinction terminology refers to a particular social group that has recognition within the society of which they are a part.²¹⁴

Most individuals living in Central America, where gangs are prevalent, can easily recognize and identify members of the MS-13 and 18th Street gangs.²¹⁵ The argument remains that they might not be

²⁰⁶ *See id.* at 210, 221-22.

²⁰⁷ *Id.* at 214, 221-22.

²⁰⁸ *See* Lorena S. Rivas-Tiemann, *Asylum to a Particular Social Group: New Developments and Its Future for Gang-Violence*, 47 TULSA L. REV. 477, 498 (2013).

²⁰⁹ *Id.* at 442; *see generally* Arnson & Olson, *supra* note 10, at 1.

²¹⁰ *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 236 (BIA 2014).

²¹¹ *Id.* at 238.

²¹² *In re C-A-*, 23 I. & N. Dec. 951, 960 (BIA 2006).

²¹³ *Matter of M-E-V-G-*, 26 I. & N. at 238.

²¹⁴ *Id.* at 240.

²¹⁵ *See generally* *Maras: Las Pandillas Que Aterrorizan Centroamérica*, SPUTNIK MUNDO (Oct. 08, 2016, 9:38 PM), <https://mundo.sputniknews.com/americalatina/201608101062742221-maras-pandilla/> [<https://perma.cc/PK2D-MXJH>]; *see also* VICTOR M. RODRÍGUEZ &

able to identify *former* gang members as easily.²¹⁶ The Ninth Circuit argued that former gang members should not be considered a particular social group because “the category of non-associated or disaffiliated persons . . . is far too unspecific and amorphous.”²¹⁷ However, the Sixth Circuit in *Ramos* held that petitioner was a member of a “specific, well-recognized, indeed notorious gang, the former members of which do not constitute a ‘category . . . far too unspecific and amorphous to be called a social group.’”²¹⁸

In *Matter of W-G-R-*, the BIA found that former Mara 18 gang members do not meet the “social distinction” requirement for a particular social group.²¹⁹ The BIA held that, although there is some evidence of societal views towards former gang members, it is difficult to discern whether “discrimination occurs because of their status as known former gang members or because their tattoos create doubts or confusion about whether they are, in fact, former, rather than active, gang members.”²²⁰ That logic, however, is faulty as it does not consider how the persecutors of former gang members view this group as socially distinct.²²¹ The BIA further stated that the social distinction ought to be based on the perception of society in general rather than the persecutor because basing social distinction on the perception of the persecutor could lead to groups being defined solely by the

ROBERTO CUELLAR, INSTITUTO DE INVESTIGACIONES JURÍDICAS, EL FENÓMENO DE LAS MARAS EN CENTROAMÉRICA: UN ESTUDIO PENAL CON UN ENFOQUE DE DERECHOS HUMANOS 187, 190, <https://archivos.juridicas.unam.mx/www/bjv/libros/6/2506/11.pdf> (last visited May 10, 2018) [<https://perma.cc/NH2H-B5QV>]; see generally Rebeca García Bravo, *Maras en Centroamérica y México*, COMISIÓN ESPAÑOLA DE AYUDA AL REFUGIADO, 13 (2013), <https://cear.es/wp-content/uploads/2013/10/CENTROAMERICA.-2013.-Maras.pdf> [<https://perma.cc/D4LM-R3QH>] (explaining that what make these gangs easily identifiable are the markings they put upon their bodies, such as tattoos on their faces, and the distinctive hand signals they use to communicate and mark their territory). *Id.*

²¹⁶ See *Arteaga v. Mukasey*, 511 F.3d 940, 946 (9th Cir. 2007).

²¹⁷ *Id.*

²¹⁸ *Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009) (citation omitted).

²¹⁹ See *Matter of W-G-R-*, 26 I. & N. Dec. 208, 222 (BIA 2014).

²²⁰ *Id.*

²²¹ See *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 236 (BIA 2014); see also *Matter of W-G-R-*, 26 I. & N. at 222.

persecution they face.²²² However, the BIA fails to consider that asylum seekers are seldom perceived by society in general, but rather are perceived by the perpetrators as socially distinct when the perpetrator decides to persecute an individual.²²³

B. Former Gang Members Are a Particular Social Group

1. Arbitrary and Capricious: BIA's Application of the Particular Social Group Standard

The BIA's application of the particular social group is arbitrary and capricious because it considers separate aspects of the particular social group test when it makes its decisions. The court in *Lukwago v. Ashcroft* reasoned that "what constitutes a 'particular social group' [is] difficult to discern."²²⁴ The BIA's application of such a phrase differs by circuit.²²⁵ The First, Third, Sixth, and Seventh Circuits have all adopted the BIA's approach, which defined the term particular social group as a group composed of individuals who share a "common, immutable characteristic."²²⁶ The Second Circuit has defined "particular social group" as "individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor."²²⁷ The Ninth Circuit recently changed its definition to harmonize with the BIA's definition, and now recognizes 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."²²⁸

The Sixth Circuit in *Castellano-Chacon* recognized that the definition of particular social group is a "flexible one, which encompasses a wide variety of groups who do not otherwise fall within the other categories."²²⁹ The BIA's application of the particular social

²²² *Matter of W-G-R-*, 26 I. & N. at 217-18.

²²³ Blake, *Getting to Group*, *supra* note 53, at 175.

²²⁴ *Lukwago v. Ashcroft*, 329 F.3d 157, 170 (3d Cir. 2003).

²²⁵ *See Castellano-Chacon v. INS*, 341 F.3d 533, 546 (6th Cir. 2003) (citations omitted).

²²⁶ *Id.*

²²⁷ *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991).

²²⁸ *Castellano-Chacon*, 341 F.3d at 546 (citation omitted).

²²⁹ *Id.* at 549.

group standard is quite arbitrary.²³⁰ The same circuit issued two different rulings on cases based on similar facts.²³¹ The Sixth Circuit, in *Urbina-Mejia*, held that the BIA was wrong in finding that petitioner was not part of a particular social group,²³² while in a factually similar case, *Castellano-Chacon*, the Sixth Circuit upheld the BIA's decision that a former gang member was not a particular social group.²³³

In *Castellano-Chacon*, the petitioner was a native of Honduras, who at eighteen joined a New York branch of MS-13, just two years after illegally entering the country.²³⁴ A few years later, petitioner decided to leave the MS-13 gang because of the perpetual violence within the gang, and because so many members were being jailed.²³⁵ Castellano-Chacon applied for asylum, but was time-barred from applying because he had missed the one-year statute of limitations.²³⁶ He then applied for withholding of removal, which does not maintain a one-year deadline, and wherein “the courts consider the same factors to determine eligibility for both asylum and withholding.”²³⁷ Castellano-Chacon alleged he had a fear of persecution based on his membership in a particular social group.²³⁸ The court held that he did not maintain such a membership.²³⁹ The court further held that “external perception of a group is a relevant factor to consider in making a determination as to whether a group” is a particular social group.²⁴⁰ Admittedly, the court did state that “it is possible to conceive of the [former or present] members of MS-13 as a particular social group,” but petitioner here does not argue that as the basis of his membership.²⁴¹

²³⁰ Bresnahan, *supra* note 161, at 669.

²³¹ See *Urbina-Mejia v. Holder*, 597 F.3d 360, 362 (6th Cir. 2010).

²³² *Id.*

²³³ *Castellano-Chacon*, 341 F.3d at 554.

²³⁴ *Id.* at 538.

²³⁵ *Id.* at 539.

²³⁶ *Id.* at 541-42 (explaining that in order for petitioners to be eligible for asylum they have to apply within one year of entering the United States).

²³⁷ *Id.* at 545.

²³⁸ *Id.* at 549.

²³⁹ *Id.*

²⁴⁰ *Id.* at 548.

²⁴¹ *Id.* at 549.

Petitioner in *Castellano-Chacon* was time-barred from requesting asylum, and instead opted to request for a withholding of removal.²⁴² Procedurally, withholding of removal and asylum are different, such that there is no time bar for a petitioner to request withholding of removal as there is in asylum, but the factors for determination remain the same.²⁴³ In a withholding of removal, just as in asylum, the petitioner must show their “life or freedom would be threatened in his or her home country on account of one of the same five grounds necessary for asylum (race, religion, nationality, membership in a particular social group, or political opinion).”²⁴⁴ Because the substantive legal factors remain the same for withholding of removal and asylum, the particular social group discussion in *Castellano-Chacon* is relevant and applicable to the argument of this Article.

The differences between the groups asserted in *Ramos*, where petitioner argued that they were part of a group of former gang members,²⁴⁵ and *Castellano-Chacon*, where petitioner argued they were part of a group of “tattooed youth” who also happen to be former gang members, are nuanced.²⁴⁶ Despite the distinction, the BIA applied the particular social group test arbitrarily and inconsistently because it considered separate aspects of the particular social group test in making its determination.²⁴⁷ It is incomprehensible that a circuit court granted *Chevron* deference to the BIA, when its varied interpretation of the particular social group standard seems quite “arbitrary and capricious.”²⁴⁸ The courts have found that:

[T]he legislative history of the INA fails to “shed much light on the meaning of the phrase ‘particular social group’” [and] given the ambiguity of the language, [the role of the court] is limited to reviewing the BIA’s

²⁴² *Id.* at 541.

²⁴³ *Id.* at 544-45.

²⁴⁴ *Id.* at 545.

²⁴⁵ *Ramos v. Holder*, 589 F.3d 426, 428 (7th Cir. 2009).

²⁴⁶ *Castellano-Chacon*, 341 F.3d at 549.

²⁴⁷ *See generally Ramos*, 589 F.3d at 426; *Castellano-Chacon*, 341 F.3d at 545.

²⁴⁸ Wasserman, *supra* note 168, at 254 (explaining that immigration statutes in the United States are arbitrary).

*interpretation, using Chevron deference to determine if it is a “permissible construction of the statute.”*²⁴⁹

This Article posits that the BIA should not be given deference when its interpretation and application of a statute is arbitrary and capricious.

C. Bad Actors as Protected Particular Social Groups

The First Circuit held, and supported the BIA’s reasoning, that “recognizing former members of violent criminal gangs as a particular social group would undermine the legislative purpose of the INA.”²⁵⁰ It is worthwhile to note that the INA bans certain individuals from obtaining immigration relief.²⁵¹ Merely establishing a characteristic, such as membership in a particular social group, is one of the many requirements for asylum, and proving one’s membership in a cognizable group does not entitle an applicant any form of relief.²⁵² Under the INA, bans from gaining asylum relief would include “persecutors and those who have committed a ‘serious nonpolitical crime.’”²⁵³ However, these bans should not have any bearing on whether the applicant is an actual member of the claimed particular social group.²⁵⁴ These bans should only come into effect after the applicant is deemed to fall within one of the five protected categories.²⁵⁵ The argument that Congress “did not mean to grant asylum to those whose association with a criminal syndicate has caused them to run into danger”²⁵⁶ is unpersuasive. Former gang members should be recognized as a particular social group, just as former members of brutal criminal gangs are.²⁵⁷ At the very least, courts should entertain the argument that former gang members constitute a particular social group, and remand back to the BIA to

²⁴⁹ Lukwago v. Ashcroft, 329 F.3d 157, 171 (3d Cir. 2003) (quoting Fatin v. INS, 12 F.3d 1233, 1239 (3d Cir. 1993)).

²⁵⁰ Cantarero v. Holder, 734 F.3d 82, 85 (1st Cir. 2013).

²⁵¹ *Id.* at 87 (citation omitted).

²⁵² *Id.* at 85.

²⁵³ *Id.* at 87 (citation omitted).

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 86.

²⁵⁷ *See* Gatimi v. Holder, 578 F.3d 611, 614-16 (7th Cir. 2009) (explaining the court’s rationale for overturning the BIA’s decision that defectors from a brutal criminal gang, Mungiki, in Kenya would not receive asylum).

make such a finding or require the BIA to explain its reasoning when it fails to make the finding. This was the case in *Koudriachova v. Gonzales*, when the court found the argument that former KGB agents could be a particular social group persuasive, stating that “it appears that the BIA may have misapplied its own *Acosta* test in reaching this determination.”²⁵⁸ In other words, the court held that former KGB agents were not a particular social group, and remanded the case back to the BIA to either classify the petitioner as a member of the particular social group or explain why it could not.²⁵⁹ These groups, all similar in nature, are groups that are perceived as “groups whose members had formerly participated in antisocial or criminal conduct.”²⁶⁰ These groups have been afforded asylum protections, despite their violent pasts, and their arguments that they are a particular social group have been heard and strongly considered in their favor.²⁶¹

In *Gatimi v. Holder*, the Seventh Circuit held that a former member of a violent Kenyan tribal group, the Mungiki, was a member of a particular social group.²⁶² Francis Gatimi joined the Kikuyo group called the Mungiki in 1995.²⁶³ The group is known as “a thuggish army terrorizing Kenya with extortion rackets and gruesome punishments.”²⁶⁴ The group also requires women, including wives of members and of defectors, “to undergo clitoridectomy and

²⁵⁸ See *Koudriachova v. Gonzales*, 490 F.3d 255, 264 (2d Cir. 2007). The Circuit court reasoned that the BIA had misapplied the *Acosta* test in their finding that former KGB agents who defected were not a particular social group. *Id.* at 262. The court refused to make the ruling, noting that “[i]t is not our task to determine, in the first instance, whether the group of defected KGB agents constitute a particular social group. Rather, in accordance with the Supreme Court’s mandate . . . we remand to the BIA for additional investigation or explanation with respect to the question of whether defected KGB agents form a particular social group under the INA.” *Id.* at 263.

²⁵⁹ *Id.* at 262. (The subsequent BIA case was unpublished and it could not be determined what the final disposition of the case on remand turned out to be).

²⁶⁰ See *Martinez v. Holder*, 740 F.3d 902, 911 (4th Cir. 2014).

²⁶¹ See *Koudriachova*, 490 F.3d at 264; *Gatimi*, 578 F.3d at 614-16; *Martinez*, 740 F.3d at 911.

²⁶² See *Gatimi*, 578 F.3d at 616.

²⁶³ *Id.* at 613.

²⁶⁴ Christopher Goffard, *Court Sheds Light on Scary Kenya Gang*, L.A. TIMES (Nov. 27, 2011), <http://articles.latimes.com/2011/nov/27/world/la-fg-kenya-mungiki-20111127> [<https://perma.cc/3KD4-FKFS>].

excision.”²⁶⁵ Gatimi defected from the group in 1999 and not long after the group broke into his home looking for him.²⁶⁶ Unable to find him, they killed his servant instead.²⁶⁷ In one instance, the group kidnapped and tortured petitioner and released him only after he promised to produce his wife for circumcision.²⁶⁸ Petitioner left Kenya and applied for asylum in the United States.²⁶⁹

The Seventh Circuit reversed the BIA’s decision that the petitioner was not a member of a particular social group, refuting the BIA’s argument that petitioner did not meet the “social visibility” criterion for determining a particular social group.²⁷⁰ The court criticized the BIA for its inconsistent application of the “social visibility” element stating that “when an administrative agency’s decisions are inconsistent, a court cannot pick one of the inconsistent lines and defer to that one.”²⁷¹ Further, “such picking and choosing would condone arbitrariness and usurp the agency’s responsibilities.”²⁷² The court found that the Mungiki constituted a particular social group because Gatimi met the prongs of the particular social group standard.²⁷³ The BIA had refused to recognize Gatimi as a member of a particular social group because he had not met the “socially visible” prong of the standard.²⁷⁴ The Seventh Circuit rejected this argument, claiming it “makes no sense” because the Board has not attempted “in this or [in] any other case, to explain the reasoning behind the criterion of social visibility.”²⁷⁵ The Board has been “inconsistent rather than silent. It has found groups to be ‘particular social groups’ without reference to social visibility.”²⁷⁶

In a similar case, *Koudriachova v. Gonzales*, the Second Circuit held that the BIA misapplied its own test when it held that KGB

²⁶⁵ *Gatimi*, 578 F.3d at 613.

²⁶⁶ *Id.* at 614.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 615-16.

²⁷¹ *Id.* at 616.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* at 615.

²⁷⁵ *Id.*

²⁷⁶ *Id.*; see, e.g., *In re Fauziya Kasinga*, 21 I. & N. Dec. 357, 365-66 (BIA 1996).

intelligence agents that defected to the United States were not members of a particular social group.²⁷⁷ The petitioner in *Koudriachova* was a native of the former United Soviet Socialist Republic (USSR), who was drafted into mandatory service by the Soviet military when he was eighteen years old.²⁷⁸ Not long after joining the military, petitioner was drafted into the Ministry of Internal Affairs (“MVD”), which was comprised of “a special group of troops responsible for guarding secret military objects and locations, controlling riots in prisons and student towns, and fulfilling special assignments relating to terrorism and saboteur groups.”²⁷⁹

After completing his term of military service in 1983, and during his third year at the Institute of Meteorology, petitioner was summoned to report to the KGB Intelligence Service headquarters.²⁸⁰ Petitioner was chosen by the soviet government to work with the Intelligence Service agency as a spy.²⁸¹ He did not wish to be a KGB agent, but felt he had no other choice.²⁸² During his tenure as a KGB agent, and before he attended spy school, petitioner worked undercover as a spy at a factory that employed many foreign specialists.²⁸³ Petitioner would often report to a supervisor within the KGB on information he had obtained from his co-workers.²⁸⁴ As the date neared for petitioner to attend spy school, he decided that he was going to defect to the United States.²⁸⁵ Petitioner distanced himself from his KGB supervisor by relocating homes.²⁸⁶ Not long after moving, two men attacked him on the street; petitioner believed the two men were sent by the KGB.²⁸⁷ Petitioner and his family eventually left the USSR and entered the United States with visitor visas on September 20, 1992.²⁸⁸

²⁷⁷ See *Koudriachova v. Gonzales*, 490 F.3d 255, 262 (2d Cir. 2007).

²⁷⁸ *Id.* at 258.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 258-59.

²⁸¹ *Id.* at 259.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

The court in *Koudriachova* held that the BIA misapplied its test to determine whether a group constitutes a particular social group.²⁸⁹ In the initial underlying BIA case, the BIA concluded that petitioner was not a member of a particular social group.²⁹⁰ The BIA reasoned that “because the evidence did not establish that defected KGB agents maintain ‘any associational relationship’ or share ‘any recognizable and discrete characteristics,’” they were not a particular social group – this is incorrect.²⁹¹ The Second Circuit noted that “[n]o such associational relationship is required” to make a particular social group determination.²⁹² While the court did not explicitly state that KGB agents are not a particular social group, it did not uphold the BIA’s decision and instead remanded the case back down to the BIA.²⁹³

The court did not make issue of the fact that *Koudriachova* had been a part of a criminal syndicate, nor did the court in *Gatimi*.²⁹⁴ Petitioners were involved in organizations that are notorious for perpetuating criminal acts against other individuals.²⁹⁵ Both the Seventh and Second Circuits failed to raise those issues against petitioners when determining whether these asylum seekers might be eligible for asylum as members of a particular social group.²⁹⁶ The INA offers other bars to keep dangerous individuals from receiving asylum protections, after the issue of whether they are members of a particular social group has been resolved.

VII. CONCLUSION

Five circuits have addressed whether former gang members constitute a particular social group under asylum law.²⁹⁷ Three circuits have accepted the argument that former gang members were a

²⁸⁹ *Id.* at 262-63.

²⁹⁰ *Id.* at 262.

²⁹¹ *See id.*

²⁹² *Id.* at 263.

²⁹³ *Id.*

²⁹⁴ *See generally id.*; *see also* *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009).

²⁹⁵ *Gatimi*, 578 F.3d at 613; *Koudriachova*, 490 F.3d at 259.

²⁹⁶ *See generally Gatimi*, 578 F.3d 611; *see also Koudriachova*, 490 F.3d 255.

²⁹⁷ *See* *Garay Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016); *Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014); *Cantarero v. Holder*, 734 F.3d 82 (1st Cir. 2013); *Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010); *Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

particular social group²⁹⁸ and two others have rejected it.²⁹⁹ The two circuits rejecting this position erred in their decisions because former gang members constitute a particular social group, for being a former gang member is an immutable quality that cannot or should not be required to change.³⁰⁰ Additionally, former gang members are a socially distinct group, especially when considering how they are viewed by their persecutors.³⁰¹ Lastly, other groups, similar in nature to former gang members, have been given the particular social group distinction and have been afforded asylum protections.³⁰² Because persuasive case precedent exists, former gang members should, undoubtedly, be deemed, and considered, a particular social group;

²⁹⁸ See *Martinez*, 740 F.3d at 906 (accepting the argument that former gang members are a particular social group, because being a former gang member is an immutable characteristic); see also *Urbina-Mejia*, 597 F.3d at 365-67 (accepting the argument that former gang members are a particular social group because it is a part of their conscience they cannot change); see also *Ramos*, 589 F.3d at 430-31 (accepting the argument that former gang members are a particular social group because they are socially visible).

²⁹⁹ See *Garay Reyes*, 842 F.3d at 1138 (upholding the BIA's decision that former gang members are not a particular social group); see also *Cantarero*, 734 F.3d at 87 (rejecting the argument that former gang members are a particular social group).

³⁰⁰ See *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). In *Matter of Acosta* the BIA interpreted "the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic . . . [and that] whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Id.*

³⁰¹ See *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 236 (BIA 2014); see also *Matter of W-G-R-*, 26 I. & N. Dec. 208, 211 (BIA 2014); see also *Kelly*, *supra* note 71, at 226. The argument here is that the perception ought to be from the perspective of the individual doing the persecuting and not just any random observer. See *id.* at 230.

³⁰² See *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009) (affording asylum to defectors from a brutal Kenyan criminal gang, Mungiki.); see also *Koudriachova*, 490 F.3d 255 (recognizing that KGB agents who defect could be recognized as a particular social group, the court remanded the case back to the BIA to make a determination, strongly suggesting that they should be classified as a particular social group); see also *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003) (finding that former child soldiers who have escaped from the Lord's Resistance Army fit within the definition of a particular social group).

similar to other groups that are unquestionably recognized as particular.

In August 2017, a petition for writ of cert with the Supreme Court was filed on behalf of Garay Reyes, petitioner of the Ninth Circuit case *Garay Reyes v. Holder*.³⁰³ In January 2018, the petition was denied by the Court.³⁰⁴ However, it is worth noting that petitioner, in his petition, asserted the arguments delineated in this Article, unequivocally stating that the BIA should not have been afforded deference by the Ninth Circuit due to its arbitrary and capricious application of the particular social group standard requirements.³⁰⁵ Counsel for petitioner argued that former gang members are a cognizable particular social group and meet the requirements set forth by the BIA through a number of precedent-setting decisions.³⁰⁶ It is unfortunate that the Court denied the writ of cert, because the Court missed an opportunity to articulate with specificity what a particular social group is; or at the very least, provide guidance in the context of former gang members.³⁰⁷ The Supreme Court has tradition of chastising the BIA for being arbitrary or capricious, and this case could have further admonished the BIA's penchant for making arbitrary decisions without providing adequate explanations for them.³⁰⁸ While it was not the proper time for the Court to consider this case, it is an issue that warrants attention sooner rather than later. In this political climate, with the targeting of any and all undocumented immigrants in the United States, it would be proper and timely for the Supreme Court to consider granting a petition of this sort.³⁰⁹ There has never been a better time for the judiciary to address the concerns of

³⁰³ See generally Petition for Writ of Certiorari, Garay Reyes, *supra* note 162; see also Steven Trader, *High Court Asked to Review El Salvador Immigrant's Case*, LAW360 (Aug. 21, 2017), <https://www.law360.com/articles/955819/high-court-asked-to-review-el-salvador-immigrant-s-case> [<https://perma.cc/RAH2-LY4Z>].

³⁰⁴ *Garay Reyes*, 842 F.3d 1125, cert. denied, 2018 U.S. LEXIS 669 (2018).

³⁰⁵ See *id.* at 1131-33; see also *supra* Part VI.

³⁰⁶ See Petition for Writ of Certiorari, Garay Reyes at 12-18.

³⁰⁷ See generally *id.*

³⁰⁸ *Judulang v. Holder*, 565 U.S. 42, 43 (2011).

³⁰⁹ See Petition for Writ of Certiorari, Garay Reyes, *supra* note 162, at 2-3; see also Miriam Jordan, *Immigration Agents Arrest Hundreds in Sweep of Sanctuary Cities*, N.Y. TIMES (Sept. 28, 2017), https://www.nytimes.com/2017/09/28/us/ice-arrests-sanctuary-cities.html?_r=0 [<https://perma.cc/PD35-6MT6>].

immigrants, particularly those seeking asylum, than now.³¹⁰ It is not only former gang members who stand to be victims of violence perpetrated by gangs in Central America, but also innocent people who have no ties to gangs.³¹¹ If gangs in Central America are targeting citizens who have no relationship with gangs, what can be said of what will happen to former gang members who have turned their backs on the gangs; such gangs function with impunity and have no problem killing people to teach a lesson.³¹²

Julio Martinez, petitioner in *Martinez v. Holder*, had his execution ordered by the gang leader when he departed from the gang.³¹³ He was stabbed by a group of attackers and left for dead.³¹⁴ He then tried to flee to another village, but was tracked down and shot at, demonstrating that for the gang, nothing but death will satisfy their desire for retribution.³¹⁵

³¹⁰ See generally Caitlin Dickerson & Miriam Jordan, 'No Asylum Here': Some Say U.S. Border Agents Rejected Them, N.Y. TIMES (May 3, 2017), <https://www.nytimes.com/2017/05/03/us/asylum-border-customs.html> [https://perma.cc/Y9PP-D8WE].

³¹¹ Sibylla Brodzinsky & Ed Pilkington, U.S. Government Deporting Central American Migrants to Their Deaths, GUARDIAN, (Oct. 12, 2015), <https://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america> [https://perma.cc/6TA5-N3MG].

³¹² Constable, *supra* note 106.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*