No. 13-174

In the Supreme Court of the United States

ERASMO ROJAS-PEREZ AND ANGELICA GARCIA-ANGELES, PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Assistant Attorney General
DONALD E. KEENER
CAROL FEDERIGHI
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether persons who may be perceived as wealthy in Mexico because of their lengthy residence in the United States constitute a "particular social group" under the withholding of removal provisions of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 699 F.3d 74. The decisions of the Board of Immigration Appeals (Pet. App. 22a-26a) and the immigration judge (Pet. App. 30a-33a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 2012. A petition for rehearing was denied on March 8, 2013 (Pet. App. 34a). On May 24, 2013, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including August 5, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA or Act), 8 U.S.C. 1101 *et seq.*, provides that an alien may not be removed from the United States to a particular country "if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). This form of protection from removal is commonly called "withholding of removal." See *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1682 n.1 (2013).

The alien bears the burden of establishing eligibility for withholding of removal. 8 C.F.R. 1208.16(b). In particular, an alien seeking withholding of removal to a certain country must demonstrate "that there is a clear probability of persecution, or stated differently, that it is more likely than not that he or she would be subject to persecution" if returned to that country. *In re C-T-L-*, 25 I. & N. Dec. 341, 343 (B.I.A. 2010). The alien also must show that the feared persecution is "on account of" one of the five enumerated grounds—"race, religion, nationality, membership in a particular social group, or political opinion." *Id.* at 348 (enumerated ground must be a "central reason" for the persecution); see 8 U.S.C. 1231(b)(3)(A).[1]

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[1] An alien who fears persecution in his home country also may seek asylum, which is a discretionary form of relief available if the alien demonstrates that he "is unable or unwilling to return to" his country of origin "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." 8 U.S.C. 1101(a)(42)(A), 1158(b)(1)(A). The source and meaning of the five protected grounds are the same under the asylum and withholding

This case concerns one of the five enumerated grounds for withholding of removal: persecution on account of "membership in a particular social group." The INA does not define "particular social group." The Board of Immigration Appeals (Board or BIA) has given meaning to that phrase through case-by-case adjudication. In 1985, the Board described a "particular social group" as a "group of persons all of whom share a common, immutable characteristic" 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." *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), overruled in part on other grounds, *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). The Board suggested that the shared characteristic "might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership." *Ibid.* The Board reached that conclusion by applying the "well-established doctrine of ejusdem generis," interpreting the phrase "particular social group" in a manner consistent with the other enumerated grounds for persecution, each of which "describes persecution aimed at an immutable characteristic." *Ibid.* The Board emphasized, however, that whether a proposed group qualifies "remains to be determined on a case-by-case basis." *Ibid.*

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of removal provisions. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 440-441 (1987).

Asylum is not at issue in this case, because petitioners did not apply for asylum and the immigration judge determined that they are ineligible for asylum because they failed to timely file an asylum application. See Pet. App. 23a n.1, 31a; see also Pet. 4 n.1.

Between 1985 and 1997, the Board's precedential decisions identified four "particular social groups": persons identified as homosexuals by the Cuban government;[2] members of the Marehan subclan of the Darood clan in Somalia;[3] "young women of the Tchamba-Kunsuntu Tribe [of northern Togo] who have not had [female genital mutilation], as practiced by that tribe, and who oppose the practice";[4] and Filipinos of mixed Filipino and Chinese ancestry.[5] The Board also suggested that, "in appropriate circumstances," an alien could establish asylum eligibility based on persecution as a "former member of the national police" of El Salvador.[6] Some of those decisions relied not only on an immutable/fundamental group characteristic, but also on whether the group is generally recognizable in the pertinent society. See *In re V-T-S-*, 21 I. & N. Dec. 792, 798 (B.I.A. 1997) (relying on evidence that a percentage of the Philippine population had "an identifiable Chinese background") (citation omitted); *In re H-*, 21 I. & N. Dec. 337, 342-343 (B.I.A. 1996) (reasoning that "clan membership is a highly recognizable, immutable characteristic" and that clan members were "identifiable as a group based upon linguistic commonalities").

Between 2006 and 2008, in response to the evolving nature of claims presented by aliens seeking asylum and developing case law in the courts of appeals, the Board issued four precedential decisions that were

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[2] *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 821-823 (B.I.A. 1990).

[3] *In re H-*, 21 I. & N. Dec. 337, 341-343 (B.I.A. 1996).

[4] *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

[5] *In re V-T-S-*, 21 I. & N. Dec. 792, 798 (B.I.A. 1997).

[6] *In re Fuentes*, 19 I. & N. Dec. 658, 662-663 (B.I.A. 1988).

designed to provide "greater specificity" in defining the phrase "particular social group." *In re S-E-G-*, 24 I. & N. Dec. 579, 582 (B.I.A. 2008). Those decisions restated the immutable/fundamental characteristic requirement. See *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 73-74 (B.I.A.), aff'd *sub nom. Ucelo-Gomez* v. *Mukasey*, 509 F.3d 70 (2d Cir. 2007) (per curiam); *In re C-A-*, 23 I. & N. Dec. 951, 956 (B.I.A.), aff'd *sub nom. Castillo-Arias* v. *United States Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006), cert. denied, 549 U.S. 1115 (2007). They also "reaffirmed" (*A-M-E- & J-G-U-*, 24 I. & N. Dec. at 74) that an important factor in determining whether a proposed group qualifies as a "particular social group" is whether it possesses a recognized level of "social visibility," meaning that "members of a society perceive those with the characteristic in question as members of a social group." *In re E-A-G-*, 24 I. & N. Dec. 591, 594 (B.I.A. 2008). The Board explained that this approach was consistent with its prior decisions, which had considered the "recognizab[ility]" of a proposed group. See *ibid.* (citing *C-A-*, 23 I. & N. Dec. at 960); *S-E-G-*, 24 I. & N. Dec. at 586-587 (same).

The Board's recent decisions also stated that the analysis of "particular social group" claims involves consideration of whether the group in question is defined with sufficient "particularity." *A-M-E- & J-G-U-*, 24 I. & N. Dec. at 74, 76; *C-A-*, 23 I. & N. Dec. at 957. That is, the proposed group must be sufficiently defined to "provide an adequate benchmark for determining group membership." *A-M-E- & J-G-U-*, 24 I. & N. Dec. at 76; see *ibid.* (stating that "[t]he terms 'wealthy' and 'affluent' standing alone are too amorphous to provide an adequate benchmark for deter-

mining group membership"). The Board further stated that it will consider whether the proposed group "share[s] a common characteristic other than their risk of being persecuted," or instead is "defined *exclusively* by the fact that [the group] is targeted for persecution." *C-A-*, 23 I. & N. Dec. at 956, 960 (citations omitted); see *id.* at 957 (finding group of "noncriminal informants" "too loosely defined to meet the requirement of particularity").

The Board has repeatedly rejected the proposition that an individual's wealth or perceived wealth can, without more, constitute a basis for asylum or withholding of removal. See *In re S-V-*, 22 I. & N. Dec. 1306, 1310 (B.I.A. 2000) (en banc) ("[E]vidence that the perpetrators [of a kidnapping] were motivated by a victim's wealth will not support a finding of persecution within the meaning of the Act."), disagreed with on other grounds, *Zheng* v. *Ashcroft*, 332 F.3d 1186, 1188-1189 (9th Cir. 2003); see also *V-T-S-*, 21 I. & N. at 798-799; *In re T-M-B-*, 21 I. & N. Dec. 775, 778-779 (B.I.A. 1997), rev'd on other grounds, *Borja* v. *INS*, 175 F.3d 732 (9th Cir. 1999). More recently, the Board has applied social visibility and particularity considerations to explain that "affluent Guatemalans" are not a "particular social group," because such a group is not "recognized as a group that is at greater risk of crime in general or of extortion or robbery in particular," and because "[t]he characteristic of wealth or affluence is simply too subjective, inchoate, and variable to provide the sole basis for membership in a particular social group." *A-M-E- & J-G-U-*, 24 I. & N. Dec. at 74-77.

2. Petitioners, a married couple who are natives and citizens of Mexico, entered the United States

without authorization in 2001 (petitioner Rojas-Perez) and 2003 (petitioner Garcia-Angeles). Pet. App. 2a, 30a. The Department of Homeland Security charged them with being removable as aliens present in the United States without being admitted or paroled (both petitioners) and as an alien not in possession of a valid entry document at the time he sought admission (petitioner Rojas-Perez). *Ibid.*; see 8 U.S.C. 1182(a)(6)(A)(i) and (7)(A)(i)(I). Petitioners conceded that they are removable as charged but sought withholding of removal. Pet. App. 2a, 31a. Petitioners asserted that if they returned to Mexico, they would be perceived as wealthy based on their lengthy residence in the United States, and, as a result, their U.S. citizen son could be kidnapped and held for ransom by criminal gangs. *Id.* at 3a, 32a.

The immigration judge (IJ) denied petitioners' applications for withholding of removal. Pet. App. 30a-33a. The IJ noted that both petitioners "concede that they were never harmed or threatened in any way when they were in Mexico." *Id.* at 31a. The IJ then concluded that petitioners had not established that they more likely than not would be persecuted on account of a protected ground if they returned to Mexico. *Id.* at 32a. The IJ explained that, "to the extent that [petitioners] fear any harm from criminal gangs who are or may be active in Mexico," "the gangs would not be seeking to harm or punish [petitioners] in order to overcome a belief or characteristic which they have," but instead because petitioners "could be looked upon as having money" and the gangs would like that money "to accomplish their own nefarious ends." *Ibid.* The IJ also explained that crime perpetrated by criminal gangs "is a condition which is en-

demic to the public as a whole in Mexico and not particularly towards" petitioners. *Ibid.* Finally, the IJ noted the Board's view that aliens "who are returning from the United States and who may be looked upon as having money" do not constitute a "particular social group" under the INA. *Ibid.*

The Board dismissed petitioners' appeal. Pet. App. 22a-26a. The Board explained that "[t]he Immigration Judge found that [petitioners] fear that their son will be kidnapped in Mexico because [they] may be perceived as being wealthy," but that "the fear of persecution based on perceived wealth does not constitute a particular social group under the Act." *Id.* at 23a-24a (citing *A-M-E- & J-G-U-*, 24 I. & N. Dec. at 75; *S-V-*, 22 I. & N. Dec. at 1310; *V-T-S-*, 21 I. & N. Dec. at 799; *Topalli* v. *Gonzales*, 417 F.3d 128, 133 (1st Cir. 2005)).

3. The court of appeals denied petitioners' petition for review. Pet. App. 1a-21a. The court noted that "the INA does not define the phrase 'particular social group,'" and so the court has deferred to the Board's interpretation of that term. *Id.* at 5a. In particular, the court has recognized that a "particular social group" is a group "whose members share 'a common, immutable characteristic that makes the group socially visible and sufficiently particular.'" *Ibid.* (quoting *Carvalho-Frois* v. *Holder*, 667 F.3d 69, 73 (1st Cir. 2012)).

The court of appeals held that "substantial evidence supports the agency's conclusion that [petitioners] failed to show" that they would be "persecuted [in Mexico] because they belong to a particular social group." Pet. App. 5a. It explained that the basis for petitioners' claim of membership in a particular social group is their perceived wealth: "the reasoning be-

hind [their] argument appears to be that individuals returning from the United States would possibly be looked upon by criminals as being more financially well-off than others and thus would be targeted for harm." *Id.* at 5a-6a. The court noted that both it and the Board had rejected the view that persons perceived as wealthy make up a "particular social group" for purposes of the INA. *Id.* at 6a (citing *Sicaju-Diaz* v. *Holder*, 663 F.3d 1, 3-4 (1st Cir. 2011); *Lopez-Castro* v. *Holder*, 577 F.3d 49, 54 (1st Cir. 2009); *Diaz* v. *Holder*, 459 Fed. Appx. 4, 6 (1st Cir. 2012) (unpublished); *A-M-E-* & *J-G-U-*, 24 I. & N. Dec. at 75-76; *S-V-*, 22 I. & N. Dec. at 1310). The court explained that "[a] country-wide risk of victimization through economic terrorism is not the functional equivalent of a statutorily protected ground." *Id.* at 6a-7a (brackets in original) (quoting *Lopez-Castro*, 577 F.3d at 54). Accordingly, the court concluded, "the agency's judgment here" was "both reasonable and consonant with its precedent." *Id.* at 7a.

The court of appeals then noted that petitioners "take[] issue with the [Board's] reliance on 'social visibility' as one of the requisite factors that would define a particular and legally cognizable social group." Pet. App. 7a-8a. The court observed that the lack of social visibility was one reason the Board has rejected claims of particular social group membership based on wealth: "[b]ecause crime affects *all* who reside in those countries," "wealth (or the perception of wealth) would not necessarily single out a person for victimization." *Id.* at 8a. The court then observed that two courts of appeals have criticized the Board's social visibility factor, *id.* at 8a-13a, and suggested

that the factor "merits additional examination by and clarification from" the Board, *id.* at 13a.

Judge Howard concurred, expressing the view that there was no "reason to entertain" criticisms of the Board's social visibility factor in this case because such criticisms "have no impact on the outcome." Pet. App. 16a. Judge Howard explained that the social visibility factor "does not demand that the relevant trait be externally visible or otherwise immediately identifiable," but rather that the proposed group is one that the relevant society would recognize based on the trait they have in common. *Id.* at 19a (Howard, J., concurring). Judge Howard then noted that even the two circuits that have criticized the Board's explanation of the social visibility factor have rejected the view that perceived wealth alone can be a basis for persecution under the INA. *Id.* at 20a-21a (Howard, J., concurring).

4. The court of appeals denied petitioners' petition for rehearing en banc. Pet. App. 34a.

ARGUMENT

Petitioners seek further review (Pet. 21-31) of the court of appeals' conclusion that they failed to demonstrate membership in a "particular social group" for purposes of withholding of removal. The court of appeals' decision is correct and does not conflict with any decision of another court of appeals. In addition, to the extent that there is disagreement among the circuits about the validity of the Board's approach to assessing "particular social group" claims, that disagreement leans heavily in favor of the government's position, it is limited to the clarity of the Board's reasoning rather than error in the standard, and any review by this Court would be premature until the

Board has responded to the courts' requests for greater clarity and those courts then have the opportunity to consider the matter further. In any event, this case would be a poor vehicle for further review of the question presented, because petitioners' claims for withholding of removal fail even without consideration of the social visibility factor. This Court recently has denied review in other cases seeking review of the Board's reliance on social visibility to define a "particular social group,"[7] and the same result is appropriate here.

1. The court of appeals' decision is correct. As explained above, in exercising its authority to interpret the INA, the Board has, through a series of decisions, developed and refined its interpretation of the term "particular social group." Based upon its experience and the types of social-group claims it has reviewed, the Board has determined that a "particular social group" generally is a group of persons: (1) sharing a common, immutable characteristic that members of

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[7] See *Gaitan* v. *Holder*, 133 S. Ct. 526 (2012) (No. 11-1525) (claimed particular social group of persons who resist recruitment by gangs in El Salvador); *Velasquez-Otero* v. *Holder*, 133 S. Ct. 524 (2012) (No. 11-1321) (claimed particular social group of Hondurans who have been recruited by, and have refused to join, gangs based on opposition to gang membership); *Pierre* v. *Holder*, 132 S. Ct. 2771 (2012) (No. 11-8335) (claimed particular social group of security guards employed by the United States Embassy in Haiti); *Hernandez-Navarrete* v. *Holder*, 132 S. Ct. 1910 (2012) (No. 11-8255) (claimed particular social group of young Salvadoran men who refuse to join gangs); *Contreras-Martinez* v. *Holder*, 560 U.S. 903 (2010) (No. 09-830) (claimed particular social group of adolescents in El Salvador who refuse to join the gangs of that country because of their opposition to the gangs' violent and criminal activities).

the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences; (2) the members of which are perceived as a group by the relevant society due to the shared characteristic; (3) that is sufficiently defined to provide an adequate benchmark for delineating the group; and (4) that is not defined exclusively by the fact that its members have been targeted for persecution. See *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 73, 74, 76 (B.I.A.), aff'd *sub nom. Ucelo-Gomez* v. *Mukasey,* 509 F.3d 70 (2d Cir. 2007) (per curiam); *In re C-A-*, 23 I. & N. Dec. 951, 957, 960 (B.I.A.), aff'd *sub nom. Castillo-Arias* v. *United States Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006), cert. denied, 549 U.S. 1115 (2007); see also pp. 3-6, *supra.*

Because the INA does not define the term "particular social group," see Pet. App. 5a, the Board's interpretation of it is entitled to deference so long as it is a "fair and permissible" reading of the statute. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 428 (1999); see *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-845 (1984); see also *Holder* v. *Martinez Gutierrez*, 132 S. Ct. 2011, 2017 (2012) (explaining that under *Chevron*, the Board's "position prevails if it is a reasonable construction of the statute, whether or not it is the only possible interpretation or even the one a court might think best"). As relevant here, the Board has reasonably concluded that social visibility is a relevant criterion in deciding whether to recognize a proposed social group. The Board explained that the social visibility and particularity factors are designed to "give greater specificity to the definition of a social group," which was initially defined as "a group whose members 'share a common, immutable characteristic

. . . 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.'" *In re S-E-G-*, 24 I. & N. Dec. 579, 582-583 (B.I.A. 2008) (quoting *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), overruled in part on other grounds, *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987)). The Board further explained that the phrase "particular social group" should be construed consistently with the other four protected grounds—race, religion, nationality, and political opinion—so that group members have a "shared characteristic" that makes the group "generally * * * recognizable by others in the community." *Id.* at 586-587; see *C-A-*, 23 I. & N. Dec. at 959-960; *Acosta*, 19 I. & N. Dec. at 233. The Board also relied on guidelines adopted by the Office of the United Nations High Commissioner for Refugees (UNHCR), which "confirm that 'visibility' is an important element in identifying the existence of a particular social group." *C-A-*, 23 I. & N. Dec. at 960.[8] The Board's consideration of

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[8] Petitioner contends (Pet. 24-27) that the Board's approach is unreasonable because the UNHCR's guidelines adopted a disjunctive test in which groups that either have an immutable characteristic or are socially visible constitute a "particular social group." There is no requirement that the Board, which has interpretive authority over the INA, must follow the broadest interpretation of the UNHCR guidelines—especially UNHCR guidelines, like those here (Pet. 26), that were adopted long after the enactment of the relevant portions of the INA—for its interpretation of the INA to be reasonable. This Court has recognized that the UNHCR's guidelines may be "useful interpretive aid[s]," but they are "not binding on the Attorney General, the BIA, or United States courts." *Aguirre-Aguirre*, 526 U.S. at 427; see also *Rivera-Barrientos* v. *Holder*, 666 F.3d 641, 650 (10th Cir. 2012) (conclud-

social visibility in assessing an alien's claim of membership in a particular social group is therefore reasonable.

In this case, the court of appeals correctly held that petitioners failed to demonstrate a likelihood of persecution on account of membership in a particular social group. The court noted that petitioners had not been subject to any attacks when they lived in Mexico and that they "denied having received any specific threats" that would support their claimed fear of returning to Mexico. Pet. App. 3a & n.2, 5a. The court then correctly recognized that people who are perceived as wealthy because of a lengthy residence in the United States do not constitute a recognizable and particular social group that is subject to persecution. *Id.* at 3a, 6a-7a. The court noted that "both the IJ and the BIA (respectively) grounded their analyses on this well-settled logic," and it found that logic to be "reasonable" and "consonant with [the agency's] precedent." *Id.* at 7a. As the IJ explained, one reason perceived wealth is not itself a protected ground is that under petitioners' theory of persecution, gangs in Mexico "would not be seeking to harm or punish [petitioners] in order to overcome a belief or characteristic which they have," but instead to obtain money "in order to accomplish their own nefarious ends," and crime in Mexico, including crime perpetrated by criminal gangs, "is a condition which is endemic to the public as a whole in Mexico." *Id.* at 32a. It was entirely reasonable for the Board to conclude that perceived wealth is not like the other enumerated grounds (race, religion, nationality, and political opin-

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ing that "variation from the [UNHCR] Guidelines" does not make the Board's interpretation unreasonable).

ion) and does not define a particular social group under the INA. And as explained below, every court that has considered the issue has deferred to the Board's conclusion that persons perceived as wealthy based on residence in the United States do not comprise a particular social group under the INA. See pp. 15-16, 23-24, *infra.*

2. The Board has long been of the view that whether a proposed group qualifies as a "particular social group" must "be determined on a case-by-case basis." *C-A-*, 23 I. & N. Dec. at 955 (quoting *Acosta*, 19 I. & N. Dec. at 233); cf. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) (recognizing that the term "well-founded fear," which is used in the INA provisions governing asylum, "can only be given concrete meaning through a process of case-by-case adjudication"). Accordingly, whether there is any disagreement in the circuits warranting this Court's review depends on whether the circuits have reached different conclusions about whether materially indistinguishable groups constitute "particular social groups."

No court of appeals has held that people who may be perceived as wealthy in their home countries because of their prior residence in the United States constitute a "particular social group" under the INA. Three circuits have addressed this question in published opinions and have rejected the view that such persons constitute a "particular social group." See *Sicaju-Diaz* v. *Holder*, 663 F.3d 1, 3-4 (1st Cir. 2011) ("wealthy individuals returning to Guatemala from a lengthy stay in the United States"); *Matul-Hernandez* v. *Holder*, 685 F.3d 707, 710 (8th Cir. 2012) ("Guatemalans returning from the United States who are perceived as wealthy"); *Delgado-Ortiz* v. *Holder*, 600

F.3d 1148, 1150 (9th Cir. 2010) (per curiam) ("Mexicans returning home from the United States who are targeted as victims of violent crime as a result").[9] Two other circuits have also rejected this type of proposed group in unpublished decisions. See *Garcia-Camacho* v. *Holder*, 443 Fed. Appx. 633, 634 (2d Cir. 2011) (unpublished) ("persons who have long residence in the United States and who[] are returning to Mexico" and fear kidnapping and extortion at the hands of criminal gangs); *Vindel* v. *Holder*, 504 Fed. Appx. 396, 398-399 (6th Cir. 2012) (per curiam; unpublished) (alien "perceived as wealthy as a result of her lengthy residency in the United States").[10]

There is thus no conflict in the circuits with respect to the question whether individuals who may be perceived as wealthy based on their lengthy residence in the United States constitute a "particular social group" for purposes of asylum or withholding of removal.

3. Petitioners contend (Pet. 1-2, 13-20) that there is disagreement in the circuits regarding whether the

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[9] See also *Escobar* v. *Holder*, 698 F.3d 36, 39 (1st Cir. 2012) ("Guatemalan nationals repatriated from the United States"); *Garcia-Callejas* v. *Holder*, 666 F.3d 828, 829 (1st Cir. 2012) (per curiam) ("returnee[s] [to El Salvador who are] perceived as wealthy"); *Escalante-Jimenez* v. *Holder*, 511 Fed. Appx. 634, 635 (9th Cir. 2013) (unpublished) ("Salvadorian nationals who are returning from the United States after a very long period . . . and who are thus perceived as vulnerable, wealthy and holding a conflicting political opinion by the gangs"); *Ventura* v. *Holder*, 459 Fed. Appx. 633, 634-635 (9th Cir. 2011) (unpublished) ("immigrants returning to their home country after living in the United States").

[10] See also *Cristobal-Leon* v. *Holder*, 510 Fed. Appx. 397, 399 (6th Cir. 2013) (per curiam; unpublished) (Guatemalans who had lived in the United States and were perceived to have accumulated wealth).

Board may consider social visibility in evaluating "particular social group" claims. To the extent there is any disagreement among the circuits regarding "particular social group" claims, that disagreement may resolve itself as the Board refines and shapes the "particular social group" definition.

The Board outlined its social visibility and particularity criteria in *C-A-* and further refined those criteria up through its decision in *S-E-G-*. See pp. 3-6, *supra*; *S-E-G-*, 24 I. & N. Dec. at 582 (stating by way of summary of prior case law that "membership in a purported social group requires that the group have particular and well-defined boundaries, and that it possess a recognized level of social visibility"). Altogether, nine circuits have deferred to the Board's methodology in these cases, or accepted parts of the methodology employed by the Board in those cases without addressing other parts. See *Scatambuli* v. *Holder*, 558 F.3d 53, 59-60 (1st Cir. 2009); *Ucelo-Gomez*, 509 F.3d at 73; *Zelaya* v. *Holder*, 668 F.3d 159, 165-167 (4th Cir. 2012);[11] *Orellana-Monson* v. *Holder*, 685 F.3d 511, 519-522 (5th Cir. 2012); *Umana-Ramos* v. *Holder*, 724 F.3d 667, 671-672 (6th Cir. 2013); *Davila-Mejia* v. *Mukasey*, 531 F.3d 624, 629 (8th Cir. 2008);[12] *Henriquez-Rivas* v. *Holder*, 707 F.3d 1081,

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[11] Although the Fourth Circuit has repeatedly deferred to the Board's social group reasoning, see, *e.g.*, *Zelaya*, 668 F.3d at 164-167 (citing cases), it is not clear that the court has addressed the "social visibility" criterion, see *Lizama* v. *Holder*, 629 F.3d 440, 447 n.4 (2011).

[12] In a recent decision, the Eighth Circuit stated that although the court has applied the social visibility criterion, the validity of that criterion may be "an open question" in the circuit. *Gathungu* v. *Holder*, 725 F.3d 900, 908 n.4 (8th Cir. 2013).

1091-1093 (9th Cir. 2013) (en banc);[13] *Rivera-Barrientos* v. *Holder*, 666 F.3d 641, 650-652 (10th Cir. 2012); *Castillo-Arias*, 446 F.3d at 1197.

Petitioner is correct (Pet. 14-16) that the Third and Seventh Circuits have criticized the Board's explanation of its "social visibility" factor. See *Valdiviezo-Galdamez* v. *Attorney Gen. of the U.S.*, 663 F.3d 582, 606-607 (3d Cir. 2011); *Benitez Ramos* v. *Holder*, 589 F.3d 426, 429-431 (7th Cir. 2009); *Gatimi* v. *Holder*, 578 F.3d 611, 615-616 (7th Cir. 2009). The Ninth Circuit also requested that the Board clarify how to apply the social visibility factor. See *Henriquez-Rivas*, 707 F.3d at 1089-1091. However, in each of those cases, the court did not find the Board's approach invalid, but rather concluded that the Board's explanation of the social visibility criterion was insufficiently clear and remanded the case to the Board for further proceedings. See *Valdiviezo-Galdamez*, 663 F.3d at 606, 612 (having a "hard time understanding" the explanation offered for "social visibility" in light of Board precedent); *Benitez Ramos*, 589 F.3d at 430, 432 (describing the agency's application of the "social visibility" factor as "unclear"); *Gatimi*, 578 F.3d at 616, 618 (seeking clarification on "what work 'social visibility' does"); *Henriquez-Rivas*, 707 F.3d at 1089 (questioning how to determine whether the proposed group is recognizable in society but "leav[ing] it to the BIA to decide this issue in the first instance"). Accordingly, the Board will have the opportunity to provide further

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[13] The Ninth Circuit has accepted the social visibility factor, see *Arteaga* v. *Mukasey*, 511 F.3d 940, 945 (9th Cir. 2007), but in a recent decision, that court sought clarification by the Board on the application of that factor, see *Henriquez-Rivas*, 707 F.3d at 1089-1091; see also p. 18, *infra*.

explanation in response to those decisions.[14] In light of those remands, it would be premature for this Court to consider the application of the term "particular social group" before the Board has done so and before the courts of appeals have had an opportunity to consider the Board's further elaboration.

Contrary to petitioners' contentions, the Board's use of "social visibility" does not represent an "unexplained departure" from prior Board decisions, and the Board has not inconsistently applied this criterion. See Pet. 8-13, 10, 14, 22-25. The Board's cases explain the development of the social visibility criterion and provide examples of its consistent application. See, *e.g.*, *Orellana-Monson*, 685 F.3d at 521 ("[T]he BIA's current particularity and social visibility test is not a radical departure from prior interpretation, but rather a subtle shift that evolved out of the BIA's prior decisions on similar cases and is a reasoned interpretation, which is therefore entitled to deference."); see also pp. 3-6, *supra*.

Petitioners focus (Pet. 14-15) on criticisms raised in *Gatimi* and *Benitez Ramos*, but those decisions rest on the incorrect premise that the Board's "social visibility" criterion requires that members of a particular social group must literally be visible to the naked eye. See *Benitez Ramos*, 589 F.3d at 430; *Gatimi*, 578 F.3d at 616. As an initial matter, this case provides little reason to consider those criticisms, because petitioners do not assert that the notion of literal visibility played any role in the agency's decision in their case. In any event, although it appears that the government's briefs and oral argument in those cases may

[14] On December 11, 2012, the Board heard oral argument on remand in *Valdiviezo-Galdamez*. The case remains pending.

have contributed to the confusion, see *Benitez Ramos*, 589 F.3d at 430; *Gatimi*, 578 F.3d at 616, that very narrow interpretation is not required by the Board's precedential decisions. Indeed, both the en banc Ninth Circuit and the Sixth Circuit recently have reviewed the Board's precedential decisions and recognized that they do not "impos[e] an 'on-sight' visibility requirement" for social visibility. *Henriquez-Rivas*, 707 F.3d at 1088; see *Umana-Ramos*, 724 F.3d at 672-673; see also Pet. App 19a-20a (Howard, J., concurring) (summarizing First Circuit precedent as recognizing that "social visibility does not demand that the relevant trait be externally visible or otherwise immediately identifiable").

In its precedential decision in *E-A-G-*, the BIA defined "social visibility" as "the extent to which members of a society perceive those with the characteristic in question as members of a social group." 24 I. & N. Dec. 591, 594 (B.I.A. 2008). Consistent with that statement, the Board's precedential decisions have equated "social visibility" with the extent to which the relevant society perceives there to be a group in the first place, rather than the ease with which one may necessarily be able to identify particular individuals as members of such a group. See *S-E-G-*, 24 I. & N. Dec. at 586-588 (discussing "general societal perception" and finding little evidence that Salvadoran youth who resist gang recruitment "would be 'perceived as a group' by society"); *A-M-E- & J-G-U-*, 24 I. & N. Dec. at 74 (finding little evidence that "wealthy Guatemalans" "would be recognized as a group that is at a greater risk of crime in general or of extortion or robbery in particular").

The historical development of the Board's interpretation of "particular social group" reflects this distinction. For example, the Board recognized a group of women who had not yet been subjected to female genital mutilation and who opposed the practice as constituting a particular social group, *In re Kasinga*, 21 I. & N. Dec. 357, 365-366 (B.I.A. 1996), even though those two characteristics are not necessarily outwardly visible. Similarly, the Board recognized homosexuals in Cuba and former members of the Salvadoran national police as particular social groups, see *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (B.I.A. 1990); *In re Fuentes*, 19 I. & N. Dec. 658, 662 (B.I.A. 1988), although members of those groups generally would not be recognized based on visible characteristics. In *C-A-*, the Board referred to the "easily recognizable" traits it had identified in prior decisions, yet these traits were not literally visible. 23 I. & N. Dec. at 959. As the en banc Ninth Circuit correctly explained, the Board's precedential decisions have equated "social visibility" with the extent to which the group "would be 'perceived as a group' by society," rather than the ease with which one may necessarily be able to identify by sight individuals as having the particular characteristic shared by members of that group. *Henriquez-Rivas*, 707 F.3d at 1088-1089 (citations omitted).

Moreover, the Third and Seventh Circuits' criticism of the "social visibility" criterion is based on an incomplete study of the Board's precedents. For example, the Seventh Circuit stated in *Gatimi* that the Board has not "attempted, in this or any other case, to explain the reasoning behind the criterion of social visibility" and that the Board "has been inconsistent rather than silent" because it has not "repudi-

at[ed]" earlier decisions that recognized particular social groups without referring to social visibility. 578 F.3d at 615-616; see also *Valdiviezo-Galdamez*, 663 F.3d at 606-607. But the Seventh Circuit in *Gatimi* did not discuss the Board's 2006 precedential decision in *C-A-*, which explained that the Board's previous "decisions involving social groups have considered the recognizability, i.e., the social visibility, of the group in question," 23 I. & N. Dec. at 959-960; or the Board's 2007 precedential decision in *A-M-E- & J-G-U-*, which described *C-A-* as having "reaffirm[ed] the requirement that the shared characteristic of the group should generally be recognizable by others in the community," 24 I. & N. Dec. at 74; or the Board's 2008 precedential decision in *S-E-G-*, which contained a detailed discussion of the Board's views regarding social visibility and particularity, 24 I. & N. Dec. at 582-588.[15] By contrast, those courts that have sought to harmonize the Board's decisions have correctly recognized that the "social visibility" criterion does not require on-sight visibility. See, *e.g.*, *Umana-Ramos*, 724 F.3d at 672-673; *Henriquez-Rivas*, 707 F.3d at 1088; *Rivera-Barrientos*, 666 F.3d at 652. And to the extent any confusion remains, the Board should have the first opportunity to resolve it by clarifying its interpretation.

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[15] The Seventh Circuit mentioned those Board decisions in *Benitez Ramos*, but did not discuss them, relying instead on its prior decision in *Gatimi*. 589 F.3d at 430. The Third Circuit noted the Board's decisions in *C-A-* and *A-M-E- & J-G-U-*, but rather than try to harmonize the Board's decisions, the court dismissed the more recent decisions as attempts to "spackle over the cracks" in prior decisions, *Valdiviezo-Galdamez*, 663 F.3d at 607.

Accordingly, not only is there no circuit conflict on the question whether persons perceived as wealthy based on residence in the United States are a particular social group under the INA, but it would be premature for this Court to address the Board's particular social group criteria more generally.

4. In any event, this case would be a poor vehicle for further review of the social visibility factor because petitioners' proposed social group would fail for other reasons.

First, petitioners' proposed social group—Mexican nationals who would be perceived as wealthy based on their lengthy residence in the United States, see Pet. App. 3a, 7a n.3, 32a—would not qualify as a "particular social group" even without the social visibility requirement. As the concurring judge below pointed out, "removing the social visibility test from the equation would not salvage [petitioners'] case" because the Board and numerous courts of appeals "rejected" perceived wealth, standing alone, as a basis for persecution "long before the social visibility test was ever formulated." *Id.* at 20a-21a (Howard, J., concurring). The Board has consistently held that wealth or perceived wealth is not itself a basis for persecution under the INA and that a "particular social group" cannot be defined only by reference to wealth or perceived wealth. See *In re S-V-*, 22 I. & N. Dec. 1306, 1310 (B.I.A. 2000) ("[E]vidence that the perpetrators were motivated by a victim's wealth will not support a finding of persecution within the meaning of the Act."), disagreed with on other grounds, *Zheng* v. *Ashcroft*, 332 F.3d 1186 (9th Cir. 2003); see also, *e.g.*, *A-M-E- & J-G-U-*, 24 I. & N. Dec. at 74-77; *In re V-T-S-*, 21 I. & N. Dec. 792, 798-799 (B.I.A. 1997); *In*

re T-M-B-, 21 I. & N. Dec. 775, 778-779 (B.I.A. 1997), rev'd on other grounds, *Borja* v. *INS*, 175 F.3d 732 (9th Cir. 1999).[16] The courts of appeals likewise have not found wealth or perceived wealth, standing alone, to qualify as a basis for persecution. See, *e.g.*, *Perlera-Sola* v. *Holder*, 699 F.3d 572, 577 (1st Cir. 2012); *Castillo-Enriquez* v. *Holder*, 690 F.3d 667, 668 (5th Cir. 2012); *Matul-Hernandez*, 685 F.3d at 712-713; *Garcia-Callejas* v. *Holder*, 666 F.3d 828, 830 (1st Cir. 2012) (per curiam); *Ucelo-Gomez*, 509 F.3d at 73-74. Even those circuits that have criticized the Board's social visibility criterion have recognized that a group defined solely based on wealth or perceived wealth does not provide a basis for asylum or withholding of removal. See Pet. App. 20a-21a (Howard, J., concurring) (citing *Tapiero de Orejuela* v. *Gonzales*, 423 F.3d 666, 672 (7th Cir. 2005), and *Jimenez-Mora* v. *Ashcroft*, 86 Fed. Appx. 527, 531 (3d Cir. 2004) (per curiam; unpublished)).[17]

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[16] The Board has recognized that "in appropriate circumstances, 'wealth' may be a shared characteristic of a social group" when the group is more defined. See *A-M-E- & J-G-U-*, 24 I. & N. Dec. at 73-76 & n.6. But petitioners' claimed social group is based entirely on perceived wealth, see note 17, *infra*, and as the Board has explained, that factor is "too subjective, inchoate, and variable to provide the sole basis for membership in a particular social group," *A-M-E- & J-G-U-*, 24 I. & N. Dec. at 76.

[17] Petitioners do not identify any court that has defined a "particular social group" based on wealth alone. See pp. 15-16, *supra* (citing cases where courts have rejected such claims). Instead, they contend that their proposed group is "based on more than wealth alone" because it is also based on their lengthy residence on the United States. Pet. 30. But those amount to the same thing, because petitioners contend that their residence in the United States is what would lead to the perception of wealth. Pet. App. 32a. As the court of appeals correctly recognized, petitioners

As the Board explained in rejecting "affluent Guatemalans" as a "particular social group," such a group fails not only because it is not "recognized as a group that is at greater risk of crime in general or of extortion or robbery in particular," but also because "[t]he characteristic of wealth or affluence is simply too subjective, inchoate, and variable to provide the sole basis for membership in a particular social group." *A-M-E- & J-G-U-*, 24 I. & N. Dec. at 74-77. Accordingly, even without the social visibility requirement, petitioners' proposed social group fails because it is insufficiently particular. See, *e.g.*, *Ucelo-Gomez*, 509 F.3d at 73-74.

Relatedly, petitioners failed to establish that any persecution would be "on account of" a protected ground, as the INA requires. As the IJ explained, "to the extent that [petitioners] fear any harm from criminal gangs who are or may be active in Mexico," "the gangs would not be seeking to harm or punish [petitioners] in order to overcome a belief or characteristic which they have" but instead because petitioners "could be looked upon as having money" and the gangs would like that money "to accomplish their own nefarious ends." Pet. App. 32a. The crime petitioners fear in Mexico "is a condition which is endemic to the public as a whole in Mexico and not particularly towards" petitioners. *Ibid.* As the court of appeals explained in this case, "[a] country-wide risk of victimization through economic terrorism" is not persecution on account of a protected ground. *Id.* at 6a-7a (quoting *Lopez-Castro* v. *Holder*, 577 F.3d 49, 54 (1st Cir.

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based their claimed fear of persecution on "their belief that they would be perceived by others as wealthy once [in Mexico]." *Id.* at 7a n.3.

2009)); see also, *e.g.*, *Melgar de Torres* v. *Reno*, 191 F.3d 307, 314 (2d Cir. 1999) (crime in the country of removal is not a basis for asylum); *Shehu* v. *Attorney Gen. of U.S.*, 482 F.3d 652, 657 (3d Cir. 2007) (similar); *Kharkhan* v. *Ashcroft*, 336 F.3d 601, 605 (7th Cir. 2003) (similar). Accordingly, petitioners have not demonstrated the required nexus between their fear of persecution and their claimed membership in a particular social group.

Finally, petitioners' claim fails because they did not establish that it is more likely than not they would be persecuted in Mexico. Petitioners must show a clear probability of persecution, meaning that persecution is "more likely than not." *In re C-T-L-*, 25 I. & N. Dec. 341, 343 (B.I.A. 2010). Petitioners' brief testimony provided little support for their claimed fear of persecution: petitioner Rojas-Perez "denied having received any specific threats" and "explained that neither he nor his wife's family had been subjected to attacks while in Mexico," and petitioner Garcia-Angeles "limited her testimony to brief remarks in which she admitted that she entered the United States without inspection in 2003 and affirmed that she was Rojas's spouse." Pet. App. 3a; see *id.* at 31a (IJ's observation that both petitioners "concede[d] that they were never harmed or threatened in any way when they were in Mexico").[18] Accordingly, petition-

[18] Petitioners' testimony about their fear of persecution comprises only three pages of the administrative record, in addition to a few typed paragraphs on their application for withholding of removal. Administrative Record (A.R.) 78-80, 166-167. Petitioner Rojas-Perez described his fear of persecution in very general terms, stating that "people [in Mexico] know that I was here and coming from the United States I have a son that's a citizen and

ers have not provided evidence to demonstrate a likelihood of persecution in Mexico. For this reason as well, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Assistant Attorney General
DONALD E. KEENER
CAROL FEDERIGHI
Attorneys

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there is always the possibility that they can kidnap or do something." A.R. 79. But he did not identify any specific source that would harm him or his family or explain why that harm might occur, much less show that it was more likely than not to occur. Petitioner Garcia-Angeles's only testimony in support of the claim was answering "[y]es" to the question, "you're also afraid of the gangs in Mexico?" A.R. 82.