No. 17-241

In the Supreme Court of the United States

WILFREDO GARAY REYES, PETITIONER

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Board of Immigration Appeals reasonably concluded that petitioner failed to establish that former members of the Mara 18 gang in El Salvador who have renounced their gang membership 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-32a) is reported at 842 F.3d 1125. The decision of the Board of Immigration Appeals (Pet. App. 33a-63a) is reported at 26 I. & N. Dec. 208. The oral decision of the immigration judge (Pet. App. 64a-80a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 2016. A petition for rehearing was denied on March 29, 2017 (Pet. App. 81a-82a). On June 26, 2017, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including August 11, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA or Act), 8 U.S.C. 1101 *et seq.*, provides that, with limited exceptions, 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." *Moncrieffe* v. *Holder*, 569 U.S. 184, 187 n.1 (2013).

The alien bears the burden of establishing eligibility for withholding of removal. 8 U.S.C. 1231(b)(3)(C); 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 five grounds enumerated in the statute—"race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A).[1]

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[1] An alien who fears persecution in his country of nationality also may seek asylum, a discretionary form of relief available if the alien demonstrates, *inter alia*, 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). The source and meaning of the five protected grounds are the same under the asylum and withholding of removal provisions. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 419-420 (1999) (distinguishing asylum and withholding of removal); *INS* v.

This case concerns one of the five enumerated grounds for withholding of removal: persecution on account of "membership in a particular social group." 8 U.S.C. 1231(b)(3)(A). The INA does not define "particular social group." *Ibid.* The Board of Immigration Appeals (Board or BIA) has given meaning to that term through case-by-case adjudication in a series of decisions. In 1985, the Board relied on the "well-established doctrine of *ejusdem generis*" to interpret 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." *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). The Board described a "particular social group" as requiring 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." *Ibid.* 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 emphasized, however, that whether a proposed group qualifies depends on the evidence presented in each case. *Ibid.*

Between 1985 and 1997, the Board's precedential decisions recognized four "particular social groups":

Cardoza-Fonseca, 480 U.S. 421, 440-441 (1987). Asylum is not at issue in this case because the immigration judge determined that petitioner failed to timely file an asylum application, and petitioner did not challenge that determination on appeal. See Pet. App. 34a n.1.

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 the Board's decisions relied not only on an immutable 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 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 reiterated the

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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).

immutable 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. *U.S. Attorney 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. *Ibid.* (citing *C-A-*, 23 I. & N. Dec. at 960); see *S-E-G-*, 24 I. & N. Dec. at 586-587 (same).

Those Board 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 determining 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").

In two of its precedential decisions during that period, the Board applied the above considerations in addressing, and rejecting, claims of asylum based on resistance to gang recruitment. In *S-E-G-*, the Board rejected a proposed social group of "Salvadoran youth who have been subjected to recruitment efforts by MS-13 [(the Mara Salvatrucha gang)] and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities." 24 I. & N. Dec. at 581. And in *E-A-G-*, the Board rejected a proposed social group of young "persons resistant to gang membership" in Honduras. 24 I. & N. Dec. at 593.

2. Petitioner is a citizen of El Salvador who was an active member of the Mara 18 criminal gang in that country. Pet. App. 3a. After participating in a number of robberies of wealthy ranchers and serving as the driver for two or three armed bank robberies, petitioner left the gang and had his gang tattoo removed. *Ibid.* He entered the United States without authorization in 2001. *Ibid.*

The Department of Homeland Security initiated removal proceedings against petitioner in 2009. Pet. App. 4a. Petitioner admitted the factual allegations in the Notice to Appear and conceded that he was removable under 8 U.S.C. 1182(a)(6)(A)(i) as an alien present in the United States without being admitted or paroled. Pet. App. 4a, 65a. As relevant here, petitioner applied for withholding of removal and protection under the federal

regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. Unlike withholding of removal, CAT protection does not require the alien to show that he would be tortured because of one of the five enumerated grounds. Instead, he must establish that "it is more likely than not that he * * * would be tortured if removed to the proposed country of removal." 8 C.F.R. 208.16(c)(2); see, *e.g.*, *Kamalthas* v. *INS*, 251 F.3d 1279, 1283 (9th Cir. 2001). As the basis for each form of protection, petitioner claimed that he feared harm in El Salvador by police for his prior gang activities, or by members of his former gang for leaving the gang. Pet. App. 74a-75a.

The immigration judge (IJ) denied petitioner's applications. Pet. App. 64a-80a. Despite some inconsistencies in petitioner's testimony, *id.* at 73a-75a, the IJ considered him credible and found that he had experienced violent incidents at the hands of his former gang in El Salvador, *id.* at 75a. With respect to withholding of removal, however, the IJ concluded that petitioner had not demonstrated a likelihood of future harm on account of his membership in a cognizable particular social group defined as "former members of Mara 18 in El Salvador who have renounced their gang membership." *Id.* at 76a. The IJ also rejected petitioner's claim to CAT protection, concluding that petitioner "ha[d] failed to demonstrate by any standard that he would be subjected to torture" if returned to El Salvador. *Id.* at 79a.

3. Petitioner appealed to the Board, which rejected his appeal in a precedential decision. Pet. App. 33a-63a.

a. The Board used its decision in this case, as well in a companion case, *In re M-E-V-G-*, 26 I. & N. Dec. 227 (2014), to clarify its precedent on the requirements for demonstrating a "particular social group." Pet. App. 35a-54a. With respect to the particularity requirement, the Board explained that the term "is included in the plain language of the Act and is consistent with the specificity by which" the other enumerated grounds—race, religion, nationality and political opinion—"are commonly defined." *Id.* at 41a. Particularity, the Board explained, requires that a group "be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective." *Id.* at 42a; see *id.* at 43a-44a.

With regard to social visibility, the Board explained that the term "clarified the importance of 'perception' or 'recognition'" by the relevant society "in the concept of the particular social group." Pet. App. 46a. The Board stated that "[t]he term [social visibility] was never meant to be read literally, but our use of the word 'visibility' unintentionally promoted confusion." *Ibid.* In particular, while the majority of circuits had deferred to the Board's methodology,[7] the Third and Seventh

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[7] 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, 164-167 (4th Cir. 2012); *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); *Henriquez-Rivas* v. *Holder*, 707 F.3d 1081, 1091-1093 (9th Cir. 2013) (en banc); *Rivera-Barrientos* v. *Holder*, 666 F.3d 641, 650-652 (10th Cir. 2012); *Castillo-Arias* v. *U.S. Attorney Gen.*, 446 F.3d 1190, 1196-1197 (11th Cir. 2006), cert. denied, 549 U.S. 1115 (2007). The Fourth Circuit repeatedly deferred to the Board's social group analysis, see *Zelaya*, 668 F.3d at 164-167 (citing cases), but did not specifically address the "social visibility" criterion, see *Martinez* v. *Holder*, 740 F.3d 902, 910, 913 n.4 (2014); *Lizama* v. *Holder*,

Circuits had criticized the Board's explanation of the "social visibility" factor, which those courts interpreted as requiring literal or "on-sight" visibility of the putative group's shared characteristic. 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). Those courts did not find the Board's approach invalid, but rather concluded that the Board's explanation of the social visibility criterion was insufficient and remanded each case to the Board for further proceedings. See *Valdiviezo-Galdamez*, 663 F.3d at 606 (having a "hard time understanding" the explanation offered for "social visibility" in light of Board precedent); *Benitez Ramos*, 589 F.3d at 430 (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"); cf. *Henriquez-Rivas* v. *Holder*, 707 F.3d 1081, 1089 (9th Cir. 2013) (en banc) (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").

In the decision in petitioner's case, the Board addressed those criticisms, explaining that it would rename "social visibility" as "social distinction" in order

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629 F.3d 440, 447 n.4 (2011). While the Eighth Circuit in some decisions recognized and applied the "social visibility" requirement, *Gaitan* v. *Holder*, 671 F.3d 678, 681, cert. denied, 568 U.S. 978 (2012), it also suggested that the validity of that criterion might be "an open question" in the circuit, *Gathungu* v. *Holder*, 725 F.3d 900, 908 n.4 (2013). In addition, the Ninth Circuit accepted the social visibility requirement, see *Arteaga* v. *Mukasey*, 511 F.3d 940, 945 (2007), but later requested clarification from the Board on its application, *Henriquez-Rivas*, 707 F.3d at 1089-1091.

"to clarify that social visibility does not mean 'ocular' visibility—either of the group as a whole or of individuals within the group." Pet. App. 46a (citation omitted). Instead, the Board stated, "[s]ocial distinction refers to recognition by society." "To be socially distinct, a group need not be *seen* by society; it must instead be *perceived* as a group by society." *Id.* at 47a. The Board further clarified the relative roles of the particularity and social distinction criteria, and it explained that its current articulation of these requirements was consistent with its prior decisions. *Id.* at 50a-52a.

b. Turning to the facts of petitioner's case, the Board concluded that petitioner failed to establish that the group of former Mara 18 gang members in El Salvador met the particularity and social distinction requirements necessary to show the existence of a "particular social group." Pet. App. 54a-58a. With respect to particularity, the Board concluded that petitioner's proposed group was "too diffuse" and "too broad and subjective" because "[i]t is not limited to those who have had * * * meaningful," long-term, or recent "involvement with the gang." *Id.* at 54a-55a. Although the Board noted the Ninth Circuit's view that, "as a general" matter, present or past participation in criminal activity cannot be the defining characteristic of a particular social group, *id.* at 44a n.5, the Board did not resolve this case on that basis, *ibid.*; see *id.* at 22a n.10.

Regarding social distinction, the Board held that "[t]he record contains scant evidence that Salvadoran society considers former gang members who have renounced their gang membership as a distinct social group." Pet. App. 56a. While there was evidence regarding "gangs, gang violence, and the treatment of gang members," it was of little probative value because

it did not concern societal treatment of *former* gang members specifically. *Ibid.* Finally, the Board concluded, "[e]ven if [petitioner's] purported social group[] w[as] cognizable under the Act, he has not demonstrated the required nexus between the harm he fears and his status as a former gang member." *Id.* at 58a.

c. The Board also rejected petitioner's CAT claim. Although petitioner had previously suffered harm at the hands of his former gang, petitioner had not "established that it is more likely than not that gang members would torture him if they encountered him now, more than 13 years after he left the gang, or even that they still remain involved in the gang." Pet. App. 60a-61a. The Board therefore upheld the IJ's "predictive findings with respect to [petitioner's] torture claim" as not clearly erroneous. *Id.* at 62a.

4. The court of appeals denied the petition for review with respect to withholding of removal, but granted it with respect to petitioner's CAT claim. Pet. App. 1a-32a.

a. The court began by explaining that the INA does not define the term "particular social group," that the term is ambiguous, and that "[t]he BIA's construction of ambiguous statutory terms in precedential decisions is entitled to deference" under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 844 (1984). Pet. App. 11a. After tracing the Board's prior decisions, the court held that the Board's interpretation in this case (as well as in the companion case of *M-E-V-G-*) "is reasonable and entitled to *Chevron* deference." *Id.* at 15a.

The court of appeals concluded that the particularity requirement "is reasonable and is consistent with [the Board's] precedent, which has long required that a particular social group have clear boundaries and that its

characteristics have commonly accepted definitions." Pet. App. 15a. The court observed that the Board's interpretation did not "disqualify groups that exceed specific breadth or size limitations"; nor did it eliminate groups solely because they are diverse. *Id.* at 16a.

The court also held that the Board's articulation of its social distinction requirement is reasonable. Pet. App. 17a. The court observed that the Board's articulation did not require "on-sight" visibility, *ibid.*, and it stated that although the Board had not given "the persecutor's perspective the same role in the analysis as [the court of appeals] had recommended [in *Henriquez-Rivas*], it did give that perspective an important place," *id.* at 18a (citation omitted; second set of brackets in original). And the court rejected petitioner's argument that the social distinction criterion was redundant of the nexus requirement. *Id.* at 18a-19a.

b. The court then held that the Board's application of its particularity and social distinction requirements to petitioner's proposed social group was reasonable. Pet. App. 19a-21a. The court agreed with the Board that the group of former Mara 18 members who had renounced their membership, "regardless of the length and recency of that membership," did not meet the particularity requirement. *Id.* at 21a. The court similarly determined that substantial evidence supported the Board's application of social distinction. *Id.* at 21a-22a. Although the court acknowledged some record evidence suggesting recognition of former gang members as a group in El Salvador—such as rehabilitation programs and threats against former gang members—"[t]he record evidence does not * * * compel the conclusion that Salvadoran society considers former gang members as a * * * social group * * * distinct from current gang

members who may also avail themselves of government programs or from suspected gang members who face discriminatory treatment and other challenges in Salvadoran society." *Id.* at 21a. Because the court held that the Board reasonably rejected petitioner's proposed social group on the basis of particularity and social distinction, it did not address the Board's holding that petitioner also had not demonstrated the requisite nexus between his proposed group and the persecution he feared. *Id.* at 9a n.4.[8]

c. The court granted the petition for review with respect to the denial of CAT protection. The court reasoned that the denial was "premised on legal error" because the court believed that the IJ's decision was based on "an erroneous view that [the] killings [petitioner feared] are not torture." Pet. App. 26a, 30a. The court therefore vacated and remanded the CAT claim to the Board. *Id.* at 32a.

5. The court of appeals denied petitioner's request for rehearing and rehearing en banc, with no judge requesting a vote on whether to grant en banc review. Pet. App. 81a-82a.

ARGUMENT

Petitioner seeks further review (Pet. 12-33) of the court of appeals' conclusion that he failed to demonstrate membership in a "particular social group" for purposes of seeking withholding of removal. The court

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[8] In a footnote, the court of appeals rejected petitioner's argument that the Board denied him due process by imposing a new evidentiary standard (*i.e.*, the revised "particularity" and "social distinction" requirements) without allowing him to supplement the record. The court did not determine whether the BIA imposed a new standard, explaining that even if it had done so, petitioner could not show prejudice. Pet. App. 22a n.10.

of appeals' decision is correct and does not conflict with any decision of another court of appeals. Although a few courts of appeals had questioned the Board's reasoning prior to its decision in this case and *In re M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014), every court that has addressed the question since those decisions has determined, as the Ninth Circuit did here, that the Board's interpretation of "particular social group" is reasonable and has deferred to it. And even if review were otherwise warranted, this case would present a poor vehicle for considering the question presented. This Court has repeatedly denied review of petitions questioning the Board's interpretation of "particular social group,"[9] and the same result is appropriate here.

1. The Board reasonably interpreted the term "particular social group" to require particularity and social distinction, and the court of appeals correctly deferred to that interpretation.

a. 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." Relying on the canon of *ejusdem generis* and its experience reviewing social group claims, the Board has determined that a "particular social group" is a group of persons: (1) sharing a

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[9] See *Sanchez-Ochoa* v. *Sessions*, No. 17-289, 2017 WL 3641220 (Oct. 30, 2017); *De Souza* v. *Lynch*, 137 S. Ct. 638 (2016) (No. 16-532); *Rojas-Perez* v. *Holder*, 134 S. Ct. 1274 (2014) (No. 13-174); *Gaitan* v. *Holder*, 568 U.S. 978 (2012) (No. 11-1525); *Velasquez-Otero* v. *Holder*, 568 U.S. 977 (2012) (No. 11-1321); *Pierre* v. *Holder*, 567 U.S. 918 (2012) (No. 11-8335); *Hernandez-Navarrete* v. *Holder*, 566 U.S. 941 (2012) (No. 11-8255); *Contreras-Martinez* v. *Holder*, 560 U.S. 903 (2010) (No. 09-830).

common, immutable characteristic that members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences; (2) that is sufficiently defined to provide an adequate benchmark for delineating the group; and (3) the members of which are perceived as a group by the relevant society due to the shared characteristic. 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. *U.S. Attorney Gen.*, 446 F.3d 1190 (11th Cir. 2006), cert. denied, 549 U.S. 1115 (2007); see also Pet. App. 40a (adhering to and clarifying prior holding); *M-E-V-G-*, 26 I. & N. Dec. at 237 (same). Those criteria are referred to as (1) immutability, (2) particularity, and (3) social distinction, respectively. See Pet. App. 40a.

The Board's interpretation comports with the statutory scheme and the other enumerated grounds in the INA. Moreover, because the INA does not define the term "particular social group," see Pet. App. 12a, the Board's interpretation 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*, 566 U.S. 553, 591 (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").

In the decision below and the companion case of *M-E-V-G-* (the Board's decision on remand from the

Third Circuit's decision in *Valdiviezo-Galdamez* v. *Attorney Gen. of U.S.*, 663 F.3d 582 (2011)), the Board thoroughly explained the need for the particularity and social distinction criteria. See *M-E-V-G-*, 26 I. & N. Dec. at 230-232; see also Pet. App. 36a. Applying *ejusdem generis*, the Board reiterated that the phrase "particular social group" should be construed consistently with the other four protected grounds—race, religion, nationality, and political opinion—which "have more in common than simply describing persecution aimed at an immutable characteristic." *M-E-V-G-*, 26 I. & N. Dec. at 236. Each has well-defined boundaries and is "set apart, or distinct from other persons within the society in some significant way"—attributes captured by the particularity and social distinction requirements. *Id.* at 238; see Pet. App. 37a; *In re S-E-G-*, 24 I. & N. Dec. 579, 586-587 (B.I.A. 2008); *C-A-*, 23 I. & N. Dec. at 959-960; *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985). The Board further explained that while the "immutable characteristic" criterion had been sufficient to resolve the first cases it confronted, Pet. App. 42a, over time, the single test "led to confusion and a lack of consistency [addressing] various possible social groups, some of which appeared to be created exclusively for asylum purposes," *M-E-V-G-*, 26 I. & N. Dec. at 231.

The Board also specifically addressed criticisms from the courts of appeals. It clarified that social visibility did not mean literal visibility, and it renamed the criterion "social distinction" to avoid further confusion. Pet. App. 38a (citing *Valdiviezo-Galdamez*, 663 F.3d at 606), 40a. The Board also explained that the refined criteria were consistent with its prior decisions. See *id.* at 38a, 50a-54a; *M-E-V-G-*, 26 I. & N. Dec. at 244-247. And

it clarified the role of particularity, independent of the social distinction criterion, specifically addressing the Third Circuit's concerns. See *M-E-V-G-*, 26 I. & N. Dec. at 238-240 (discussing *Valdiviezo-Galdamez*); Pet. App. 41a-43a (same). In addition, in response to the Ninth Circuit's decision in *Henriquez-Rivas* v. *Holder*, 707 F.3d 1081, 1089-1091 (2013) (en banc), the Board explained that social distinction must be viewed from the point of view of the society generally, not from the perspective of the persecutor alone. *M-E-V-G-*, 26 I. & N. Dec. at 242. Recognizing a particular social group based only on the persecutor's perception, the Board noted, would conflict with the well-established rule that "persecutory conduct alone cannot define the group." *Ibid.* As the court of appeals recognized (Pet. App. 15a-19a), the Board's explication of the particularity and social distinction requirements therefore was reasonable and consistent with its prior precedent, "which has long required that a particular social group have clear boundaries and that its characteristics have commonly accepted definitions." *Id.* at 15a.

b. Petitioner does not challenge the applicability of deference under *Aguirre-Aguirre* and *Chevron* to decisions of the Board generally, or contend that the Board's definition of "particular social group" could never warrant deference. Instead, he contends (Pet. 20-29) that the Board's interpretation of "particular social group" in the present precedential decision is not entitled to *Chevron* deference because it is "arbitrary," "unreasonable," and "lacks a reasoned explanation." Petitioner's arguments fail.

Petitioner first asserts (Pet. 20-22) that the particularity and social distinction requirements are arbitrary and unreasonable because, in his view, they constitute

an unexplained departure from the Board's prior approach, which was "grounded in the concept of immutability." Pet. 22. But petitioner ignores the Board's extensive explanation in its decision in this case and its companion (as well as in prior cases) that the Board adopted the immutability requirement "only 5 years" after passage of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, when "relatively few particular social group claims had been presented to the Board"; that that requirement was sufficient to resolve early cases; but that subsequent social groups proposed by applicants for asylum or withholding of removal required delineation of additional criteria derived from the same principles from which the Board had derived the immutability requirement. Pet. App. 36a; see *id.* at 41a; *M-E-V-G-*, 26 I. & N. Dec. at 230-232. Thus, to the extent the Board refined its methodology, it provided ample explanation. Cf. *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Petitioner next contends (Pet. 23-25) that, even accepting the particularity and social distinction requirements, the Board's decision in this case reflects "a shift" in how it applies those concepts. Petitioner fails to acknowledge that, as both the Board and the court of appeals explained, the Board's decision in this case is consistent with its prior precedent. See Pet. App. 15a, 17a, 50a-52a. In fact, while petitioner faults (Pet. 24) the Board for supposedly requiring greater definition of the proposed group in this case than in others, the differences between decisions simply reflect that a particular social group must be established on a case-by-case basis. For example, petitioner relies on *In re A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014) (cited at Pet. 24-25), but the Board there did not hold that "married women

unable to leave relationships" are *always and everywhere* a particular social group, just as petitioner concedes (Pet. 22) that the Board did not hold here that "former gang members" are *never* a particular social group. See *M-E-V-G-*, 26 I. & N. Dec. at 251 ("we emphasize that our holdings * * * should not be read as a blanket rejection of all factual scenarios involving gangs"). Instead, the Board ruled that the evidence in *A-R-C-G-* established the particularity and social distinction of that applicant's social group in the society in question, 26 I. & N. Dec. at 393-394, while the evidence in this case did not, Pet. App. 54a-58a. Similarly, petitioner contends (Pet. 23) that the Board "has given inconsistent weight to the views of the perpetrators in assessing social distinction." But the Board thoroughly explained its approach (Pet. App. 48a-49a), and the court of appeals correctly noted (*id.* at 18a) that the BIA "d[id] not preclude consideration of the persecutor's perspective." See also *id.* at 49a ("Social distinction may therefore not be determined *solely* by the perception of an applicant's persecutors.") (emphasis added).

Petitioner further argues that particularity and social distinction are "different articulations of the same concept." Pet. 26 (quoting *Valdiviezo-Galdamez*, 663 F.3d at 608). But the Board specifically explained the distinct roles played by the two criteria: "'[p]articularity chiefly addresses the question of delineation," whereas social distinction reflects "the importance of 'perception' or 'recognition'" in the relevant society. Pet. App. 43a, 46a; see *id.* at 15a-17a; see also *M-E-V-G-*, 26 I. & N. Dec. at 238-240.

Finally, petitioner contends (Pet. 27-29) that the Board's decision in this case is inconsistent with *In re Fuentes*, 19 I. & N. Dec. 658, 662-663 (B.I.A. 1988). As

the Board explained, however, in that case it "held that the respondent did not show that the harm he feared bore a nexus to his status as a former member of the national police," and it therefore "did not fully assess the factors that underlie particularity and social distinction." Pet. App. 52a; see 19 I. & N. Dec. at 662-663. Because those inquiries could have supported a finding of a "particular social group," *Fuentes*'s recognition that a group of former long-time and recent members of the national police could have constituted a "particular social group" does not conflict with the decision below.

c. Nor are the courts of appeals divided on whether the Board's interpretation of the phrase "particular social group" is entitled to deference. See Pet. 12-20. Since the Board clarified its criteria for finding a particular social group in the present decision and *M-E-V-G-*, all eight courts of appeals that have addressed the validity of those requirements in precedential decisions have deferred to the Board's reasoning. See Pet. App. 15a; *Paiz-Morales* v. *Lynch*, 795 F.3d 238, 243 (1st Cir. 2015); *Paloka* v. *Holder*, 762 F.3d 191, 195 (2d Cir. 2014);[10] *Hernandez-De La Cruz* v. *Lynch*, 819 F.3d 784, 786-787 & n.1 (5th Cir. 2016); *Zaldana Menijar* v. *Lynch*, 812 F.3d 491, 498 (6th Cir. 2015); *Ngugi* v. *Lynch*, 826 F.3d 1132, 1138-1139 (8th

[10] *Paloka* stated that the court "give[s] the BIA interpretations *Chevron* deference because the statutory phrase is vague" and remanded for application of *W-G-R-* and *M-E-V-G-*. 762 F.3d at 195; see *id.* at 196. Subsequent unpublished Second Circuit decisions have applied *W-G-R-* and *M-E-V-G-*, citing *Paloka* as according deference to those decisions. See *Lemus-de Umana* v. *Sessions*, No. 16-121, 2017 WL 4930944, at *1 (Nov. 1, 2017); *Ramirez-Gonzalez* v. *Sessions*, 698 Fed. Appx. 644, 646 (2017); *Gomez-Ramos* v. *Sessions*, 682 Fed. Appx. 68, 69 (2017); *Orellana-Rodriguez* v. *Sessions*, 677 Fed. Appx. 12, 13 (2017).

Cir. 2016); *Rodas-Orellana* v. *Holder*, 780 F.3d 982, 991-996 (10th Cir. 2015); *Gonzalez* v. *U.S. Attorney Gen.*, 820 F.3d 399, 404-406 (11th Cir. 2016) (per curiam). In unpublished decisions, two other circuits appear to have accepted the Board's criteria. *De Esquivel* v. *Attorney Gen. of United States*, 686 Fed. Appx. 147, 149 & n.17 (3d Cir. 2017) (quoting and applying the Board's criteria); *Pacas-Renderos* v. *Sessions*, 691 Fed. Appx. 796, 804 (4th Cir. 2017) (same).

Petitioner nonetheless contends (Pet. 2, 12, 13) that the Third, Sixth, and Seventh Circuits have rejected the Board's approach. But as petitioner concedes (Pet. 16 n.6), the Sixth Circuit has deferred to the Board's interpretation in this case and *M-E-V-G-*, see *Zaldana Menijar*, *supra*, and it also deferred to the particularity and social visibility requirements prior to the Board's 2014 precedential decisions, see *Umana-Ramos* v. *Holder*, 724 F.3d 667, 671-672 (6th Cir. 2013).

Petitioner asserts (Pet. 16) that a conflict is "implicit[]" in the Sixth Circuit's 2010 decision in *Urbina-Mejia* v. *Holder*, 597 F.3d 360, which held that "former 18th Street gang members" were a cognizable particular social group based solely on immutability. See *id.* at 360, 366-367. Petitioner then suggests (Pet. 16 n.6) that under the "rule of orderliness," the decision in *Urbina-Mejia* takes precedence over the court of appeals' subsequent decisions. But any intra-conflict among the Sixth Circuit's pre-2014 decisions would have been best resolved by that court in the first instance, and it is now irrelevant. Since the Board's decisions in *M-E-V-G-* and this case, the Sixth Circuit, in a published opinion, has specifically deferred to the Board's interpretation of the particularity and social distinction criteria. See *Zaldana Menijar*, 812 F.3d at 498.

Decisions of the Third and Seventh Circuits also do not support petitioner's claimed split of authority. To be sure, before the precedential decisions below and in *M-E-V-G-*, both of those courts had declined to defer to the Board's initial explanations for its social visibility requirement. In *Valdiviezo-Galdamez*, 663 F.3d at 606-607, and *Gatimi* v. *Holder*, 578 F.3d 611, 615-616 (7th Cir. 2009), the courts criticized that criterion as requiring literal or ocular visibility, *i.e.*, that the characteristic be viewable to the eye. See also *Benitez Ramos* v. *Holder*, 589 F.3d 426, 429-431 (7th Cir. 2009). And in *Valdiviezo-Galdamez*, 663 F.3d at 608-609, the Third Circuit also questioned whether the particularity requirement served a purpose distinct from the social visibility requirement of which it disapproved.

As discussed above, however, in the decision below and *M-E-V-G-*, the Board specifically addressed those critiques. The Board explained that it did not consider "social visibility," which it renamed "social distinction," to require that a particular social group's shared trait must be literally (or "ocular[ly]") visible. *M-E-V-G-*, 26 I. & N. Dec. at 238; see Pet. App. 46a. The Board also explained how particularity plays a role separate from social distinction. Pet. App. 41a-44a; *M-E-V-G-*, 26 I. & N. Dec. at 238-240 (discussing *Valdiviezo-Galdamez*).

Since this case and *M-E-V-G-* were decided, neither the Third Circuit nor the Seventh Circuit has addressed the particularity and social distinction criteria in a published opinion. The Third Circuit has, however, quoted and applied the Board's criteria in an unpublished decision. See *De Esquivel*, 686 Fed. Appx. at 149 & nn.15, 17. As for the Seventh Circuit, petitioner suggests (Pet. 19) that in *Orellana-Arias* v. *Sessions*, 865 F.3d 476, 484

n.2 (2017), the court "reaffirmed that it still refuses to defer to the BIA's particularity requirement." But the court expressly declined to address "the cognizability of the proposed social groups" in that case, resting its decision instead on the petitioner's failure to establish a nexus. *Id.* at 484. The footnote petitioner cites states only—and "parenthetically"—that "in this circuit we reject the notion that the breadth of a social category per se makes it non-cognizable under the Act." *Id.* at 484 n.2. The footnote's dictum does not discuss the Board's decision here or in *M-E-V-G-*, which do not suggest or apply the "per se" rule "rejected" by the Seventh Circuit. See Pet. App. 16a ("The BIA's statement of the purpose and function of the 'particularity' requirement does not, on its face, impose a numerical limit on a proposed social group or disqualify groups that exceed specific breadth or size limitations."). Thus, there is currently no division among the courts of appeals on the question presented.

2. Petitioner does not clearly challenge the application of the "particularity" and "social distinction" requirements to his claimed social group of former Mara 18 gang members in El Salvador. To the extent petitioner makes such a challenge, however, further review of that factbound question is unwarranted.

a. Applying the relevant criteria to the evidence in the record, the Board and the court of appeals correctly determined that petitioner had not demonstrated that the proposed group of "former members of Mara 18 in El Salvador who have renounced their gang membership" possessed particularity or social distinction. Pet. App. 19a-22a, 54a-57a. Petitioner's proposed social group lacks particularity because it is "too diffuse, as well as being too broad and subjective." *Id.* at 54a. "It

is not limited to those who have had a meaningful involvement with the gang and would thus consider themselves—and be considered by others—as 'former gang members.'" *Id.* at 55a; see *id.* at 21a. While petitioner asserts (Pet. 25) that his proposed group is "discrete and ha[s] definable boundaries," he makes no attempt to address the Board's specific findings that there was no evidence that all persons who had ever joined and left the gang, no matter how fleetingly and how long ago, constitute a single group. See Pet. App. 55a-56a. In fact, gang membership and former membership in El Salvador are nebulous concepts, with different stages of membership,[11] different degrees of involvement,[12] and different manners of severing one's ties to the gang.[13]

The Board and court of appeals also correctly found that the proposed group of former Mara 18 gang members in El Salvador lacks social distinction. Indeed, while petitioner contends that the criterion itself is arbitrary, he does not argue that it was misapplied in his case. The Board correctly observed that "[t]he record

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[11] See Administrative Record (A.R.) 619-620 ("initial association * * * occurs informally and does not rise to the level of actual 'membership'"); A.R. 620 (referring to "the initiation rites associated with becoming a full-fledged member"); A.R. 680 (referring to someone who "half-belonged to a gang but never made up his mind").

[12] A.R. 269 (referring to "calm ones" who "no longer participate actively in gang operations," but whose status "may be temporary or of a more permanent nature"); A.R. 588 (referring to "active" and "inactive gang members"); A.R. 622 & n.135 (referring to "active and non-active gang members" and to "the process of withdrawing from active gang membership").

[13] Cf. A.R. 268-269, 668-669 (describing specific instances when gangs permitted members to depart).

contains scant evidence that Salvadoran society considers former gang members who have renounced their gang membership as a distinct social group." Pet. App. 56a. To the extent there was evidence of "any societal view" of former gang members, it showed that society thought of such individuals as possible *active* gang members, and not specifically as *former* gang members. *Ibid.*; see *id.* at 21a.

b. Petitioner suggests in passing that there is some disagreement in the courts of appeals regarding whether "former gang members" may constitute a cognizable particular social group. See Pet. 12, 13 n.5, 16, 18. But the Board has long recognized that whether a proposed group so qualifies 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), and it followed that approach here. See Pet. App. 55a-57a (rejecting group based on the lack of evidence of particularity and social distinction of the group within El Salvador); see also *M-E-V-G-*, 26 I. & N. Dec. at 251 (stating that decisions should not be read as "blanket rejection of all factual scenarios involving gangs"). As petitioner concedes (Pet. 22), although the Ninth Circuit has previously suggested that gang membership may not be the defining characteristic of a particular social group, see *Arteaga* v. *Mukasey*, 511 F.3d 940, 945-946 (2007), neither the Board nor the court of appeals relied on that rationale in this case. See Pet. App. 44a n.5; *id.* at 22a n.10. Moreover, each of the cases that petitioner cites for the alleged disagreement on this point applied the Board's pre-2014 decisions. See *Martinez* v. *Holder*, 740 F.3d 902, 909-910 (4th Cir. 2014); *Urbina-Mejia*, 597 F.3d at 366-367; *Benitez Ramos*, 589 F.3d at 429-431; cf. *Oliva*

v. *Lynch*, 807 F.3d 53, 62 (4th Cir. 2015) (remanding because, as the government agreed, BIA failed to address record evidence). To the extent there remains tension among the courts of appeals regarding whether prior criminal activity may be the defining characteristic of a particular social group, that tension is not implicated in this case.

3. Finally, even if review were otherwise warranted, this case would be a poor vehicle to address the BIA's interpretation and application of the term "particular social group" for at least two reasons. First, the court of appeals did not reach the Board's holding that even if petitioner could demonstrate his membership in a "particular social group," he failed to show a "nexus" between that group and the possibility of persecution in El Salvador. See Pet. App. 9a n.4; *id.* at 58a-60a. Thus, even a decision in petitioner's favor on both "particularity" and "social distinction" would not necessarily entitle him to withholding of removal.

Second, the decision below is interlocutory: while the court of appeals denied the petition for review with respect to withholding of removal, it granted the petition regarding the Board's denial of petitioner's CAT claim, and remanded for reconsideration of that claim. See Pet. App. 26a-32a. It is thus possible that petitioner could obtain relief (in the form of CAT protection) without this Court's intervention. Moreover, while petitioner contends (Pet. 29-32) that CAT protection is more limited than withholding of removal, he fails to acknowledge that to obtain CAT protection, he would not be required to prove either membership in a "particular social group" or a "nexus" between that membership and any potential torture. See Pet. 3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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