No. 10-1724

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Oscar Alexander Granados Gaitan,

Petitioner,

vs.

Eric H. Holder, Jr.,
Attorney General of the United States,

Respondent.

BRIEF BY *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S REQUEST FOR PANEL REHEARING OR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae submits the following corporate disclosure statement:

The National Immigrant Justice Center states that it is a program of The Heartland Alliance for Human Needs and Human Rights, an Illinois nonprofit corporation, which has no corporate parents. It is not publicly traded.

/s Claudia Valenzuela Rivas

Claudia Valenzuela Rivas

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STATEMENT OF INTEREST OF *AMICUS CURIAE*:

The National Immigrant Justice Center (NIJC), a program of the Heartland Alliance for Human Needs and Human Rights, is a Chicago-based non-profit organization that provides legal representation and consultation to immigrants, refugees and asylum-seekers of low-income backgrounds. Each year, the NIJC represents hundreds of asylum-seekers before the immigration courts, Board of Immigration Appeals (Board), the Courts of Appeals and the Supreme Court of the United States through its staff attorneys and its network of over 1000 pro bono attorneys. NIJC has subject matter expertise in this area that it believes can assist this Court in its consideration of the present appeal.

Summary of Argument of *Amicus Curiae*

Amicus writes in support of Petitioner's request for rehearing to suggest three points. First, the Board has always interpreted the "particular social group" phrase in concert with the other protected asylum grounds under the doctrine of *ejusdem generis*. In significantly reinterpreting the phrase, the Board disregarded its earlier reasoning. The Board's new case law applies unique rules and unique reasoning to social group claims, without any explanation for why the *ejusdem* canon does not apply. Most specifically, claims for asylum based on race, religion, nationality, and political opinion grounds often include large groups; it is unclear why social groups cannot.

Second, the Board's new approach to social group definitions requires asylum applicants to thread a definitional needle in order to be eligible for protection from persecution. This hyper-technical approach is particularly problematic for *pro se* asylum claimants; the rule is inscrutable to even the most sophisticated asylum practitioner (indeed, it seems quite unclear to even the Board's own lawyers). The Board's approach is problematic not only for its lack of clarity, but because it is unmoored from the purpose of the asylum statute, i.e., to protect people fleeing harm.

Finally, the Board's opaque and evolving rules for the definition of particular social groups were reached without any substantive explanation by the agency for the changes, not least its apparent turn away from the *ejusdem* canon.

The Court of Appeals should grant rehearing, and remand this case to the agency for enunciation of a rule that is in keeping with the asylum statute, and which offers adequate explanation for the agency rule.

ARGUMENT

I. The BIA's New Test for Particular Social Groups Ignores the Principle of *Ejusdem Generis*

In *Matter of Acosta,* decided over twenty-five years ago, the Board of Immigration Appeals (Board) established a rule for membership in a particular social group. *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985). That rule expressly relied on the doctrine of *ejusdem generis*:

> The other grounds of persecution … listed in association with 'membership in a particular social group' are persecution on account of 'race,' 'religion,' 'nationality,' and 'political opinion.' Each of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed….
>
> Applying the doctrine of ejusdem generis, we interpret the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. 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. [W]hatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

Matter of Acosta, 19 I&N Dec. 211 at 233 (citations omitted). The Board's *Acosta* rule was endorsed by the various Courts of Appeals, including this one. *See Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994); *see also Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005); *Castellano-Chacon v. INS*, 341 F.3d 533, 546-48 (6th Cir. 2003); *Lwin v. INS*, 144 F.3d 505, 511 (7th Cir. 1998); *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993) (Alito, J.); *Alvarez-Flores v. INS*, 909 F.2d 1, 7 (1st Cir. 1990).

It is therefore striking that when, two decades after *Acosta*, the Board revisited and amended the social group test – imposing various requirements, most notably those of "social visibility" and "particularity" – it did not so much as mention *ejusdem generis*. *Cf. Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008);

Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008).[1] Amicus believes that a comparison with the other protected grounds helps illustrate the Board's error.

For instance, there is no requirement that asylum applicants demonstrate that persecution would be directed against groups which are homogenous or limited in size.[2] If there were such a rule, it would bar those persecuted on account of grounds such as race and nationality, which often encompass large and diverse groups; and indeed, it would bar political opinion claims in countries where totalitarian regimes oppresses the majority. The Board has previously explicitly rejected a requirement of "cohesiveness" or "homogeneity" among members of a

[1] In *S-E-G-* itself, the Department of Homeland Security agreed to a joint reopening request at the Board of Immigration Appeals, forestalling the appeal then pending in this Court. *See Amicus Curiae* in Support of Attorney General Certification of *Matter of S-E-G* at 3 (Jan. 27, 2010) (found at http://www.ilcm.org/litigation/AG_certification_amicus_NIJC.pdf). This came after the Supreme Court called for a response from the Solicitor General in regards to the Motion for Stay of Removal filed by S-E-G- with the Supreme Court, sub nom *Gonzalez-Mira v. Holder*, No. 09A61 (July 14, 2009).

[2] Neither the statutory definition, 8 U.S.C. § 1101(a)(42)(A), nor the language of the 1951 Convention relating to the Status of Refugees, July 28, 1951, 10 U.S.T. 6259, 189 U.N.T.S. 150, or the United States High Commissioner for Refugees' ("UNHCR") *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1992), require that a particular social group be narrowly defined. It was Congress' intention that U.S. immigration law correspond with treaty commitments. *See Cardoza-Fonseca*, 480 U.S. 421 at 436 ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the [1967 UN Refugee Protocol]… to which the United States acceded in 1968.")

particular social group. *Matter of C-A-*, 23 I&N Dec. 951, 957 (BIA 2006). And the BIA has recognized a number of broad and internally diverse social groups as particular social groups because group members met the *Acosta* test by sharing an innate characteristic. *See, e.g.*, *Matter of H-*, 21 I&N Dec. 337 (BIA 1996) (Somali clans); *Matter of V-T-S-*, 21 I&N Dec. 792 (BIA 1997) (Filipinos of Chinese ancestry). Yet the Board now requires a heightened definitional standard for social group claims, and precludes broadly defined groups. *See Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007); *Matter of C-A-*, 23 I&N Dec. 951.

It is simply wrong to suggest that recognizing broad social groups "would be tantamount to extending refugee status to every alien displaced by general conditions . . . in his or her home country." *Soriano v. Holder*, 569 F.3d 1162, 1166 (9th Cir. 2009). Even if a particular social group is defined broadly, that says little about the number of people who would qualify for asylum under that ground. The law requires that the applicant show she would be persecuted *on account of* membership in her proposed social group, which can become more difficult when the group is more broadly defined. *Cf. Safaie v. INS*, 25 F.3d 636 (8th Cir.1994) with *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007). Moreover, various

statutory provisions limit asylum eligibility, most notably, the requirement that the harm the applicant suffered or fears would rise to the level of persecution.[3]

The Court should grant rehearing and remand to permit the Board to reconcile its new tests with *ejusdem generis*, or to expressly reject that approach.

II. The BIA's Rule Cannot Stand As a Matter of Administrative Law Because It Is Divorced From the Asylum Statute, In Text and In Principle

The requirements of "particularity" and "social visibility" employed by the Board in analyzing social group claims essentially function as Scylla and Charybdis.[4] If the applicant strays too close to one side, she risks the Board finding her group as too broadly defined and "vague." But neither may the applicant define the group narrowly, lest the Board deny it for being so narrow that the society would not "recognize" the group as such. The applicant must thread a definitional needle, on pain of being deported to face persecution, torture, or death.

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[3] In addition, applicants must generally prove that they cannot reasonably relocate to avoid persecution, unless the persecutor is by the government or is government-sponsored. *See* 8 C.F.R. § 208.13(b)(3)(i). Even where an applicant suffered past persecution, triggering a rebuttable presumption of future persecution, the government may overcome that presumption. *See* 8 C.F.R. § 208.13(b)(3)(ii). Finally, asylum is a discretionary form of relief and the statute bars individuals from asylum based on criminal and national security grounds. *See* 8 U.S.C. § 1158(b)(1)(A), (b)(2)(A); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 441 (1987); *INS v. Stevic*, 467 U.S. 407, 423 (1984).

[4] S.H., BUTCHER AND A. LANG, THE ODYSSEY OF HOMER 199-200 (MacMillan & Co.1922) (1879).

For instance, the Board requires applicants to define their groups "with sufficient particularity" to provide "an adequate benchmark for determining group membership." *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 at 74-76. Under this scheme, the Board has rejected a group composed of "wealthy Guatemalans" because it found wealth an amorphous and subjective criterion. *Id*. at 73, 76; *see Arteaga v. Mukasey*, 511 F.3d 940, 944 (9th Cir. 2007) (citing *A-M-E- & J-G-U-* with approval). Yet, if the applicant were to define the group with greater precision – a particular income level, for instance – then the claim would be denied because society wouldn't recognize such statistical groupings as a discrete "social group." *See Sanchez-Trujillo et al. v. Immigration and Naturalization Service*, 801 F.2d 1571, 1576 (9th Cir. 1986) ("[A] statistical group of males taller than six feet would not constitute a "particular social group" under any reasonable construction of the statutory term, even if individuals with such characteristics could be shown to be at greater risk of persecution than the general population.")

Lost in the mix is the question which ought to be asked: *i.e.*, whether the applicant would actually face persecution for being, e.g., "wealthy," a not-uncommon phenomena. *See, e.g.*, "Foreign News: Days of Wrath," *Time Magazine* (Nov. 26, 1928) (describing alleged resistance to the Soviet Union by "rich peasant" class); *Tapiero de Orejuela v. Gonzales*, 423 F.3d 666, 673 (7th Cir.2005) (cognizable social group of "educated, landowning class"). The Board

has never purported to explain how its test would treat a "rich peasant" class; but persecutors seem willing to kill people without defining with precision how much food the peasant must possess in order to be considered "rich."

Again, this definitional emphasis is apparently applied only to social group claims, notwithstanding the Board's earlier invocation of *ejusdem generis* in interpreting social group membership. *Acosta* at 233-34. Members of political parties or groupings hold various political opinions, *see* John O. McGinnis, *The Condorcet Case for Supermajority Rules*, 16 Sup. Ct. Econ. Rev. 67, 78 (2008), yet the fact that a political party's agenda is "vague" would seem no bar to asylum if its members established that they were persecuted on account of their political party affiliation. *See, e.g.*, *Reyes-Guerrero v. I.N.S.*, 192 F.3d 1241 (9th Cir. 1999). Racial composition is often unclear, particularly at the boundaries. *Cf. People v. Dean*, 14 Mich. 406, 1866 WL 2866, *11 (Mich. 1866) ("persons are white within the meaning of our constitution, in whom white blood so far preponderates that they have less than one-fourth of African blood"). So, too, with religion; the fact that a religious movement like Falun Gong has no "formal requirements for membership; indeed, it has no membership," is no protection against vicious persecution. *Iao v. Gonzales*, 400 F.3d 530, 533 (7th Cir. 2005).

The question which the Board ought to ask is whether the asylum claim proposed by the applicant has real substance, such that the applicant would be

persecuted due to her membership in a particular social group whose members share an immutable characteristic. The extent to which the group is susceptible to precise delimitation is relevant only to the extent that it bears on that question of proof. After all, an applicant who proposes a broad particular social group gains no benefit thereby, unless the applicant can show (a) that she is in fact a member of the proposed group, and (b) that she has been or would be persecuted on account of that membership.

The Board's fixation on technical definitions is particularly egregious when it comes to *pro se* applicants. The asylum application, form I-589, available at http://www.uscis.gov/files/form/i-589.pdf (last accessed April 24, 2012), invites the applicant to select membership in a particular social group as the basis for her fear, but never asks the applicant to define that group. The closest the form gets to that question is to ask the applicant to explain "why you believe you could or would be persecuted," *id.* at 5, in a space which suggests a narrative. The form does not prompt the applicant to name a social group, nor to offer potential other social group definitions in the alternative. Neither do the form instructions explain to the applicant the delicate needle which she must thread in order to qualify for asylum. See Instructions, available at http://www.uscis.gov/files/form/i-589instr.pdf (last accessed April 24, 2012).

Asylum applicants are often unsophisticated and at risk of falling prey to shoddy or fraudulent operations that purport to provide legal representation. *Avagyan v. Holder*, 646 F.3d 672, 682 (9th Cir. 2011). Many obtain assistance from community organizations, churches, unlicensed notaries, or well-intentioned but ill-informed community members. *See Morales Apolinar v. Mukasey*, 514 F.3d 893, 897 n.6 (9th Cir. 2008). Asylum "[f]orms are frequently filled out by poor, illiterate people who do not speak English and are unable to retain counsel." *Aguilera-Cota v. U.S. INS*, 914 F.2d 1375, 1382 (9th Cir. 1990).

It is crucial that the Board's test be one which can be understood. But the Board's current test is confusing to experts and lawyers, let alone lay individuals and asylum applicants. It is a national obligation, both in statute and in treaty, not to return individuals to a country where they face persecution. *See* 8 U.S.C. 1231(b)(3); 19 U.S.T. 6223, 6259–6276, T.I.A.S. No. 6577 (1968); *see generally Stevic*, 467 U.S. at 416-17. If the Board cannot explicate a social group theory with some semblance of logical consistency, it is unfair to expect asylum applicants – both *pro se* applicants and those represented by counsel – to identify a social group that can meet the agency's shifting criteria. *See Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 617 (3rd Cir. 2011) (Board's inconsistent interpretation "unfairly forces asylum applicants to shoot at a moving target") (Hardiman, J., concurring).

By focusing on definitional technicalities rather than substance, the Board has lapsed into just the sort of formalistic, "purely linguistic analysis" it chose to avoid in *Acosta*, 19 I&N Dec. at 232, and has lost sight of the core purpose of the asylum statute that *Acosta*'s "immutable characteristic" rule so perfectly expresses: to protect those who face persecution on account of characteristics "fundamental to identity and conscience." The Board's social visibility and particularity test is, in Amicus' view, "unmoored from the purposes and concerns of the immigration laws," by "hinging [an] alien's eligibility for … relief on … a matter irrelevant to the alien's fitness to reside in this country." *Judulang v. Holder*, __ U.S. __, 132 S.Ct. 476, 490, 484 (2011) (requiring the BIA's approach to "be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system."). This Court should decline to defer to such a rule.

III. The BIA's Social Visibility Test is an Unexplained Departure From An Existing Rule and Does Not Merit *Chevron* Deference

Where an agency announces an interpretation that is a departure from a long-established rule, the agency must provide an explanation for its change in position. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ('[a]n agency may not…depart from a prior policy *sub silentio* or simply disregard rules that are still on the books…the agency must show that there are good reasons for the new policy"); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-43 (1983)("[a]gencies must follow, distinguish, or overrule

their own precedent…an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.").

As argued above, the Board appears to have diverged from interpreting the social group ground through the lens of *ejusdem generis*, which informed its views for decades. The Board does not appear to appreciate the effects of its new test on the traditional *Acosta* formulation.[5] Indeed, the Board and its counsel seem unaware of whether it "is using the term 'social visibility' in the literal sense or in the 'external criterion' sense, or even whether it understands the difference." *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 1999). The Board has never addressed or reconciled the apparent contradictions in its reasoning, beyond stating in conclusory fashion that past successful social group claims under the *Acosta* formulation could likewise meet its social visibility requirements. *See Matter of C-A-* at 960; *Valdiviezo-Galdamez*, 663 F.3d 582 at 607 ("The government's position appears to be little more than an attempt to avoid the tension arising from the Board's various interpretations of that phrase, and the fact that the Board's present interpretation would have excluded the asylum claims that were granted in *In re Kasinga, In re Toboso–Alfonso,* and *In re Fuentes.* ") (*citing Matter of Kasinga*, 21

[5] In *Matter of C-A-*, for instance, the BIA concluded, "[ha]ving reviewed the range of approaches to defining particular social group, we continue to adhere to the *Acosta* formulation," *Matter of C-A-* at 956.

I&N Dec. 357 (BIA 1996) (young women who have not been subjected to female genital mutilation and oppose the practice); *Matter of Toboso–Alfonso*, 20 I&N Dec. 819 (BIA 1994) (homosexual men); *Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988) (former policemen)).[6]

"When an administrative agency's decisions are inconsistent, a court cannot pick one of the inconsistent lines and defer to that one…[s]uch picking and choosing would condone arbitrariness and usurp the agency's responsibilities." *Gatimi v. Holder*, 578 F.3d 611, 616 (7th Cir. 2009); *see also FCC v. Fox Television Stations, Inc*., 556 U.S. 502 at 515("[I]t is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."); *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 670-675 (1973) (remanding where the agency decision was contrary to its earlier decisions, legislative history and "subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals….").

[6] Counsel for *S-E-G-* filed a request for certification with the Attorney General to ask the agency to revisit its decision *See* Request for Certification to the Attorney General in *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008) (filed February 23, 2009), found at http://www.immigrantlawcentermn.org/documents/SEG-AG_Certification_request_final.pdf; that request has not been granted.

Because the BIA has never reconciled the definitional tension between its decades-old "immutability" test with its recently announced "social visibility" and "particularity" test, contrary to the panel's assertion, the agency is not entitled to *Chevron* deference in this instance. *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

The Board not infrequently announces precedential decisions in response to appellate court remands, particularly where courts of appeals note some unclear aspects of the agency's thinking. *See, e.g.*, *Matter of A-M-E- & J-G-U-* at 69 (considering case after remand from the Court of Appeals in *Ucelo-Gomez v. Gonzales*, 448 F.3d 180 (2d Cir. 2006)). However, the Board has yet to respond to the trenchant criticism of its rule in *S-E-G-*. *Cf. Henriquez-Rivas v. Holder*, No. 09-71571, docket nos. 89-91 (requesting information regarding remand in *Valdiviezo*); *In re Gatimi* (BIA Nov. 22, 2010) (unpublished) (Pauley, dissenting) (remanding without addressing questions raised by Court of Appeals). The gaping hole in the Board's reasoning must be addressed. If this Court joins the Third and Seventh Circuits in remanding to the agency for clarification of its social group rules, there is every reason to believe that the Board would explain, clarify, or amend the new test being challenged in this matter.

CONCLUSION

The Board's "social visibility" and "particularity" rule is an unexplained change from prior agency policy, which is not only unintelligible to pro se and represented litigants alike, but elevates form over the core purpose of our nation's asylum laws. The Court should grant Petitioner's request for rehearing and remand Petitioner's case to the agency to permit the Board to formulate and apply a rule that is consistent with the text and purpose of the asylum statute.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

Pursuant to Fed.R.App.P. 32(a)(7)(C), undersigned counsel for Amicus Curiae certifies that the foregoing brief complies with the type-volume limitations of Fed.R.App. 32(a)(7)(B)(i), in that it is prepared in 14 point Times New Roman font, and is no more than 15 pages in length, exclusive of table of contents, table of authorities, and certificates of counsel.

/s/ Claudia Valenzuela Rivas

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 29(c)(5)

Pursuant to Fed.R.App.P. 29(c)(5), undersigned counsel for *Amicus Curiae* in support of Petitioner's Request for Panel Rehearing and Rehearing *En Banc* certifies that no party's counsel authored *Amicus Curiae*'s brief in whole or in part; no party or a party's counsel contributed money that was intended to fund preparing or submitting *Amicus Curiae*'s brief; and no person, other than *Amicus Curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief for *Amicus Curiae*.

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