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## An Insurmountable Obstacle: Denying Deference to the Bia's Social Visibility Requirement

Kathleen Kersh  
*University of Michigan Law School*

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AN INSURMOUNTABLE OBSTACLE:  
DENYING DEFERENCE TO THE BIA’S SOCIAL  
VISIBILITY REQUIREMENT

*Kathleen Kersh\**

*In the last fifteen years, the Board of Immigration Appeals has imposed a requirement that persons seeking asylum based on membership in a particular social group must establish that the social group is “socially visible” throughout society. This Comment argues that the social visibility requirement should be denied administrative deference on several grounds. The requirement should be denied Chevron deference because Congress’s intent behind the Refugee Act of 1980 is clear and unambiguous and, alternatively, the requirement is an impermissible interpretation of the statute. The requirement is also arbitrary and capricious under the Administrative Procedures Act. This Comment argues that courts should instead follow the United Nations High Commissioner for Refugees’ definition of a particular social group, in which social visibility is one of two methods to establish a particular social group. An adoption of this framework would serve Congress’s intent to adhere to the United States’ international obligations.*

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## INTRODUCTION

In 1995, a young woman arrived in Brownsville, Texas after fleeing her abusive husband in Guatemala. She had married him in Guatemala at age sixteen. Immediately after the wedding, her husband began sexually and physically abusing her.<sup>1</sup> He never left her alone; he followed her to work every day and made her accompany him to the local cantina at night, where he would become inebriated and violent.<sup>2</sup> When her period was once late, he beat her so violently that he dislocated her jawbone. When she did not want to abort the pregnancy, he kicked her in her spine.<sup>3</sup> He not only raped her repeatedly, but also passed sexually transmitted diseases on to her from his other sexual encounters, and he repeatedly kicked her in the genitalia.<sup>4</sup>

The woman tried to run away to relatives in other parts of Guatemala, but her husband always followed her. One night, she attempted to commit suicide. Her husband told her she could die, but she would never be able to leave him.<sup>5</sup> She asked the police for help, and they issued a summons for her husband. When he failed to appear, the police took no further action. Twice, she called the Guatemalan police for help, but they never responded.<sup>6</sup> Once, she appeared before a Guatemalan judge, but he told her he would not interfere in her domestic disputes.<sup>7</sup> There were no domestic violence shelters or similar organizations in Guatemala that could help her. Eventually, she was able to get help fleeing from her husband and come to the United States, where she sought asylum. However, the Board of Immigration Appeals denied her asylum request because victims of spousal abuse were not a recognized “faction” of Guatemalan society.<sup>8</sup> The woman was ordered to be removed to Guatemala and to the life-threatening abuse she suffered there.<sup>9</sup>

One year earlier, in 1994, a young Togolese woman arrived at the Newark International Airport.<sup>10</sup> After her father’s death, the woman’s aunt forced her into a polygamous marriage with a man thirty years her

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1. These are the facts of *R-A-*, 22 I. & N. Dec. 906, 908 (B.I.A. 1999).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 908–09.

6. *Id.*

7. *Id.*

8. *Id.* at 918.

9. The applicant in *R-A-* was granted asylum in 2009, after the Department of Homeland Security conceded the applicant’s eligibility for asylum. See Brief *ex rel* Rodi Alvarado Pena to the Attorney General of the United States at 13–14, *R-A-*, 22 I. & N. Dec. 906 (B.I.A. 1999). The Immigration Judge issued a summary decision that did not address social visibility and sufficient particularity concerns.

10. These are the facts of *Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996).

senior.<sup>11</sup> Under tribal custom, the woman's husband and aunt planned for her to submit to Female Genital Mutilation ("FGM") before the marriage was consummated. If she were forced to submit to FGM, parts of her genitalia would be cut away with a knife. She knew she would bleed extensively, her vagina might be sewn together, and she might have permanent and life-threatening complications.<sup>12</sup> Unfortunately, she could not relocate anywhere in Togo. She knew the police would refuse to help her because, even though the Togolese government knew FGM existed, it did nothing to prevent young girls from being submitted to it. In fact, she believed the police would actually *help* her aunt find her, and there were few places she could hide from the government or anyone else in such a small country.<sup>13</sup> With the help of her sister, the young woman fled to Germany and then to the United States, where she claimed and was ultimately granted, asylum.<sup>14</sup>

The women in these cases share similar circumstances. Both were harmed in their country for reasons ultimately linked to their gender. Both women lived in countries where the police would not help them. Both women were unable to hide anywhere in their home country. Both feared persecution for reasons known only privately, rather than by society as a whole. The difference between these two cases ultimately rests on each woman's ability to fulfill the Board of Immigration Appeals' "social visibility" requirement, which demands that a person's protected class must be perceived by the society in which she lives.<sup>15</sup> This Comment discusses the inconsistent application of this requirement, and the way it shirks the U.S. government's international obligations by forcing deserving asylum applicants to return home to their persecutors.

★ ★

Asylum law is one of the most complex legal systems in immigration law today. It blends immigration legal issues with international obligations and human rights interests. The Refugee Act of 1980,<sup>16</sup> now § 101(a)(42) of the Immigration and Nationality Act,<sup>17</sup> was the codification of the United States' international obligations as parties to the 1967 Protocol re-

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11. *Id.* at 358.

12. *Id.* at 361.

13. *Id.* at 359.

14. *Id.*

15. *See R-A*, 22 I. & N. Dec. 906, 924–25 (B.I.A. 1999) (noting that while the two applicants' situations are similar, the applicant in *Kasinga* had established that the practice of FGM in Togo was widespread and acknowledged throughout Togolese society, while the applicant in *R-A* had failed to establish the same for spousal abuse in Guatemala).

16. Refugee Act, Pub. L. 96-212, 94 Stat. 107 (codified at 8 U.S.C. § 1521, et seq.).

17. Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(42)(A)(2000).

lating to the Status of Refugees.<sup>18</sup> As a signatory to the 1967 Protocol, the United States agreed to accept into American law the virtually identical text of the 1951 Convention Relating to the Status of Refugees,<sup>19</sup> and the U.S. has since become a key player in the international refugee community.<sup>20</sup>

Section 101(a)(42) of the Immigration and Nationality Act permits the U.S. government discretion to grant asylum to an applicant present in the United States who qualifies as a “refugee.”<sup>21</sup> A “refugee” is defined in the Act as “any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>22</sup> This definition essentially creates three main requirements for an asylum applicant: first, he or she must prove a well-founded fear of persecution; second, he or she must be a member of a protected class (race, religion, nationality, political opinion, or a member of a particular social group); and third, he or she must prove the persecution feared is on account of membership in a protected class, also known as the nexus requirement.<sup>23</sup>

This Comment focuses on the way the Board of Immigration Appeals (“BIA” or “the Board”), the administrative agency authorized by Congress to interpret the Immigration and Nationality Act through formal adjudications,<sup>24</sup> has defined membership of a particular social group. The Supreme Court has held that appellate circuits should grant deference to the BIA’s interpretations of asylum provisions under the Immigration and

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18. Protocol Relating to the Status of Refugees art. 2, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]. The 1967 Protocol and its parent treaty, the United Nations Convention Relating to the Status of Refugees, created an international definition for a refugee and outlined elements of eligibility for refugee status.

19. United Nations Convention relating to the Status of Refugees art. 1, July 28, 1951, 19 U.S.T. 6259, 189 [hereinafter “Refugee Convention”]; 1967 Protocol, *supra* note 18, at art. 1, para. 1.

20. 2013 UNHCR Regional Operations Profile – North America and the Caribbean, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (2013), <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e492086&submit=GO> (noting that “in 2012 the United States accepted more people for [refugee] resettlement than any other country in the world”).

21. INA § 1101(a)(42)(A).

22. *Id.*

23. 8 U.S.C. § 1158(b)(1)(B) (2012).

24. 8 C.F.R. § 1003.1(a) (2009); *see also* INS v. Aguirre-Aguirre, 526 U.S. 415, 424–25 (1999) (“The Attorney General, while retaining ultimate authority, has vested the BIA with power to exercise the discretion and authority conferred upon the Attorney General by law’ in the course of ‘considering and determining cases before it.’”) (internal citations omitted).

Nationality Act.<sup>25</sup> The Comment discusses the way the Board of Immigration Appeals has deviated from the purpose and objective of the Refugee Act and the 1967 Protocol by imposing a social visibility requirement to establish a particular social group. The Comment builds on Kristin A. Bresnahan's note in the *Berkeley Journal of International Law*, which argues the social visibility requirement should not be granted administrative deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* and is an unlawful result of arbitrary and capricious reasoning.<sup>26</sup> Bresnahan calls for the U.S. government's adoption of the United Nation's High Commissioner for Refugee's<sup>27</sup> definition of a particular social group, which provides a particular social group may be defined either by a common, immutable characteristic its members share, or because the group is perceived as a unit in society.

This Comment accepts Bresnahan's main argument that the social visibility requirement is not a permissible interpretation of the statute and thus does not deserve *Chevron* deference. However, this Comment argues that the BIA should not be granted *Chevron* deference not only because the social visibility requirement is an impermissible interpretation of the statute (a *Chevron* Step Two argument), but because Congress's intent behind the language of the Refugee Act is clear and unambiguous and does not leave room for the BIA's imputation of the requirement (a *Chevron* Step One argument). Where Bresnahan and the BIA have invoked the interpretive canon of *eiusdem generis* to interpret the language of the Refugee Act, this Comment analyzes the social visibility requirement under the canon of *noscitur a sociis*, which is more consistent with Congressional intent.

Part I of this Comment discusses the development of the social visibility doctrine and analyzes how the Seventh and Third Circuits have refused to grant administrative deference to the BIA and have found social visibility arbitrary and capricious under the Administrative Procedure Act. Part II argues against granting *Chevron* deference to the BIA's interpretation of a particular social group because Congress has already unambiguously expressed its intent behind the definition of a particular social group. Alternatively, Part II reiterates Bresnahan's argument that the social visibility requirement is an impermissible interpretation of the statute. Part III then demonstrates how the BIA's reasoning behind the creation of the

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25. *Aguirre-Aguirre*, 526 U.S. at 424–25; *see also* *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984) (holding that a court should grant deference to an administrative agency charged with interpreting a particular statute where Congress has not directly spoken to the precise question at issue and where the agency's interpretation is based on a "permissible construction" of the statute).

26. *See* Kristin A. Bresnahan, *The Board of Immigration Appeals's New Social Visibility Test for Determining Membership of a Particular Social Group in Asylum Claims and its Legal Policy Implications*, 29 *BERKELEY J. INT'L L.* 649 (2011).

27. Hereinafter "UNHCR."

social visibility requirement is arbitrary and capricious because it is inconsistent with prior agency interpretation and because the BIA failed to consider relevant factors, such as the particular social group's visibility to the persecutor, in creating the requirement. Finally, Part IV briefly explores why social visibility is an ineffective tool to allay "floodgates" concerns, the fear that an overbroad definition of refugee will cause an inundation of applicants, clogging the court system.

This Comment argues that the social visibility requirement forces adjudicators to consider factors irrelevant both to Congress's purpose in creating the Refugee Act and the purpose of the authors of the 1967 Protocol. Consequently, its revocation would not only prevent the denial of asylum status to certain qualifying refugees, but would, as Bresnahan also argues, promote a consistent and fair application of the law.

## I. HISTORY AND DEVELOPMENT OF "PARTICULAR SOCIAL GROUP"

The term "particular social group" is not defined in the Refugee Act, the 1951 Refugee Convention, or the 1967 Protocol, from which the definition of refugee is derived. This Part explores how the BIA's definition of a particular social group has developed and transformed from the "immutable characteristic" test described in *Matter of Acosta*<sup>28</sup> to an imputation of a social visibility requirement in recent BIA decisions. Part I.A briefly discusses the *Acosta* test and its use of the *ejusdem generis* interpretive canon. Part I.B discusses UNHCR's incorporation of the *Acosta* immutable characteristic test and the social perception test popular in other international jurisdictions. Part I.C analyzes the BIA's gradual deviation from the immutable characteristic test to an incorporation of a social visibility requirement. Part I.D explores the express rejection of the social visibility requirement by the Third and Seventh Circuits, including the important administrative law and practical arguments set forth in these decisions.

### A. The BIA's *Acosta* Standard

In *Matter of Acosta*, the BIA established a requirement that a particular social group consist of members who share a common, immutable characteristic.<sup>29</sup> The BIA held members of a taxi cooperative did not share a common, immutable characteristic because they could avoid persecution by changing their career and discontinuing membership in the cooperative.<sup>30</sup> In its analysis, the BIA invoked the interpretive canon of *ejusdem generis* and examined the common characteristics of the other four grounds protected by the statute: political opinion, nationality, race and religion. The doctrine of *ejusdem generis*, which means literally "of the same kind,"

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28. *Acosta*, 19 I. & N. Dec. 211, 233–34 (B.I.A. 1985), *overruled on other grounds by* *Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

29. *Id.* at 233.

30. *Id.* at 234.

holds that words used in a group should be interpreted in a manner consistent with other words in the same group.<sup>31</sup> The BIA concluded that all grounds “described persecution aimed at an immutable characteristic” which is “either beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not to be required to be changed.”<sup>32</sup> The “common, immutable characteristic” test thus formed the foundational standard for the definition of a particular social group in American asylum law.<sup>33</sup>

### B. *The UNHCR Guidelines*

The 1967 Protocol charges the UNHCR with supervising the application of treaty provisions.<sup>34</sup> As a result, UNHCR interpretations of the Refugee Convention and the 1967 Protocol have been given considerable weight in American courts. In 2002, the UNHCR published the *Guidelines on International Protection: Membership of a Particular Social Group* to provide legal interpretive guidance on the definition of membership of a particular social group.<sup>35</sup> The definition in the UNHCR Guidelines merges the immutable characteristic definition established in *Acosta* with the Australian “social perception” approach.<sup>36</sup> Where the immutable characteristic test focuses on characteristics that are unchangeable, but may or may not be visible to society, the social perception approach focuses on the “external perceptions” of the group and the group’s ability to be identified as a “social unit” by society.<sup>37</sup>

The UNHCR Guidelines define a particular social group as “a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The common characteristic must be innate, unchangeable, or otherwise fundamental to one’s identity, conscience or the exercise of one’s human rights.”<sup>38</sup> By incorporating the *Acosta* immutable characteristic standard into its defi-

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31. *Id.* at 233.

32. This Comment argues that *eiusdem generis* is not the appropriate interpretive canon to analyze the definition of a particular social group. The more appropriate doctrine is *noscitur a sociis* (a word is known by its associates); see *infra*, note 91 and accompanying text.

33. *Acosta*, 19 I. & N. Dec. at 233.

34. 1967 Protocol, *supra* note 18, at art. 2, para. 1.

35. U.N. High Commissioner for Refugees, *Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or Its Protocol Relating to the Status of Refugees*, U.N. Doc. HRC/GIP/02/02 (May 7, 2002) [hereinafter UNHCR Guidelines].

36. UNHCR Guidelines, *supra* note 35, at para. 7 (The social perception approach requires a group share a common characteristic which makes them a “cognizable group or sets them apart from society at large.”).

37. See Applicant A v. Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 (Austl.) (discussing a Chinese couple’s qualification as members of a particular social group as a result of their fear of persecution from China’s one child policy).

38. UNHCR Guidelines, *supra* note 35, at para. 11 (emphasis added).



inition of a particular social group, the UNHCR advised that a common, immutable characteristic was sufficient to establish a particular social group. The use of the word “or” in the definition indicates that the UNHCR intended to add the social perception approach as an *alternative*, but not a co-requisite, to the immutable characteristic approach. The Guidelines state that while the two approaches often converge, the social perception approach can cover certain characteristics, such as occupation, that are neither immutable nor fundamental to human dignity, but that the Refugee Convention is still designed to protect.<sup>39</sup>

Finally, the UNHCR Guidelines also emphasize that cohesiveness, internal association or recognition by members of a group, is not a requirement to establish a particular social group.<sup>40</sup> In other words, members of a particular social group are required to share a common characteristic or be a visible faction of society, but they do not have to know of other group members or associate with each other as a group.<sup>41</sup> The UNHCR noted that women, for example, share a common characteristic and are seen as a social group in society, but do not necessarily associate with one another based on that characteristic.<sup>42</sup>

### C. *The Emergence of the BIA’s Social Visibility Requirement*

The BIA has used the social perception approach in the UNHCR definition of a particular social group to impute a requirement that a group be socially visible: that a shared characteristic of a particular social group is “generally recognizable by others in the community.”<sup>43</sup> The following cases illustrate how the imposition of the social visibility requirement by the BIA diverges from the definition of particular social group in the UNHCR Guidelines and how the BIA has subsequently confused establishing a particular social group with other elements necessary to prove asylum eligibility.

#### 1. *Matter of R-A-* (1999)

*Matter of R-A-* is the first case in which the BIA imputed a social visibility requirement to the definition of a particular social group.<sup>44</sup> The BIA held “Guatemalan women who have been intimately involved with

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39. See UNHCR Guidelines, *supra* note 35, at para. 13 (noting that even if participating in a particular occupation is “neither unchangeable nor a fundamental aspect of human identity,” it may still constitute “a particular social group” if in “society they are recognized as a group which sets them apart”). *But cf. Acosta*, 19 I. & N. Dec. at 234 (finding members of a taxi cooperative did not share an immutable characteristic because they could change occupations).

40. UNHCR Guidelines, *supra* note 35, at para. 15.

41. *Id.*

42. *Id.*

43. S-E-G-, 24 I. & N. Dec. 579, 586 (B.I.A. 2008).

44. It should be noted that the BIA decided *R-A-*, before the UNHCR Guidelines were published, and therefore, the Guidelines are not mentioned in this section of the argument.

Guatemalan male companions, who believe that women are to live under male domination” was not a particular social group because spousal abuse victims were not perceived by Guatemalans as a distinct faction of Guatemalan society.<sup>45</sup> In its analysis, the BIA acknowledged that it was deviating from its own precedent,<sup>46</sup> but held the imputation of a new social visibility standard was consistent with the other four protected grounds: race, religion, nationality and political opinion. The BIA held that because the other four protected grounds were “typically” and “frequently” separate and distinct groups in society, such distinction must now be an absolute requirement for a particular social group.<sup>47</sup> However, at no point in its opinion did the BIA specifically address *how* the other four protected grounds are recognized by members of society as visibly distinct, nor did it provide an explanation as to why a factor (social visibility) that “generally” applies to the other four protected grounds should be a *requirement* to establish a particular social group. Therefore, in *Matter of R-A-*, the Board not only set aside its own *Acosta* immutable characteristic standard and imported a social perception requirement to the definition of a particular social group,<sup>48</sup> but it provided no real analytical basis for doing so.

## 2. Matter of C-A- (2006)

In *Matter of C-A-*,<sup>49</sup> the BIA upheld the social visibility requirement, holding that “noncriminal informants working against the Cali cartel” did not constitute a particular social group because they were not “visible” to the Cali cartel or “other members of society.”<sup>50</sup> In its decision, the BIA referenced the UNHCR Guidelines and acknowledged the UNHCR’s incorporation of the *Acosta* immutable characteristic test and the social perception test.<sup>51</sup> The BIA found that the applicant failed the *Acosta* test because he voluntarily chose to be an informant, and was aware of the risk of danger in doing so.<sup>52</sup> Therefore, the BIA turned to the social visibility prong of the UNCHR definition, confirming “visibility” as “an important element in identifying the existence of a particular social group.”<sup>53</sup> The BIA’s rejection of the applicant’s particular social group on social visibility grounds misconstrued the UNHCR Guidelines to *require* that voluntary

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45. R-A-, 22 I. & N. Dec. 906, 918 (B.I.A. 1999).

46. *Id.*

47. See C-A-, 23 I. & N. Dec. 951, 961 (B.I.A. 2006).

48. R-A-, 22 I. & N. Dec. at 917–19.

49. 23 I. & N. Dec. 951 (B.I.A. 2006).

50. *Id.* at 960.

51. *Id.* at 956.

52. *Id.* at 958–59.

53. *Id.* at 960.

informants be visible and recognizable in society in order to constitute a particular social group.<sup>54</sup>

While the BIA seemed to rely on the “social perception” prong of the UNHCR’s definition of particular social group in its Guidelines, its analysis was inconsistent with the UNHCR’s definition of social perception. The BIA held that Cali informants were not socially visible because they “intended to remain unknown and undiscovered,” and that only members who were known to the public were socially visible.<sup>55</sup> By contrast, the UNHCR Guidelines’ definition of social perception requires only that the “group” be cognizable, rather than the individual members. Further, the BIA’s analysis placed too much power on the subjective perceptions of Columbian society.<sup>56</sup> The BIA held that the Cali informants were not visible because, as secret informants, their identities were not actually known in the community, rather than determining whether the group is objectively cognizable as a separate faction in Columbian society.<sup>57</sup> Thus, while the BIA’s decision in *Matter of C-A-* appeared to draw on the UNHCR Guidelines definition of a particular social group, the BIA actually created its own social visibility requirement that deviates from its own precedent and the UNHCR interpretation.

### 3. *Matter of A-M-E-* (2007)

In *Matter of A-M-E-*, the BIA held that “wealthy Guatemalans” could not constitute a particular social group because they were not “perceived as a group by society.”<sup>58</sup> The respondents in the case were wealthy Guatemalans who feared criminal extortion by unidentified assailants because of their wealthy status and ability to pay ransom. Here, the BIA looked to the “context” of the country in which persecution was feared in order to determine the social visibility of the respondents’ proposed social group. Specifically, the BIA looked to incidents of violence and kidnapping and found that because violence was widespread across many socio-economic levels in Guatemala, wealthy Guatemalans did not constitute a recognizable group in society. As a result, the BIA found that the respondents failed to establish that their group was socially visible.<sup>59</sup>

This decision illustrates the BIA’s repeated use of the social visibility requirement in lieu of the nexus requirement. The BIA claimed the fact that violence was widespread meant that wealthy Guatemalans did not constitute a recognizable group in society. However, whether violence is

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54. See Fatma E. Marouf, *The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group”*, 27 YALE L. & POL’Y REV. 47, 64 (2008).

55. *C-A-*, 23 I. & N. Dec. at 960.

56. Marouf, *supra* note 54, at 64.

57. *C-A-*, 23 I. & N. Dec. at 960.

58. See *A-M-E & J-G-U-*, 24 I. & N. Dec. 69, 74 (B.I.A. 2007).

59. *A-M-E- & J-G-U-*, 24 I. & N. Dec. at 75.

widespread has no bearing on whether wealthy Guatemalans are socially visible. Rather, widespread violence might indicate that wealthy Guatemalans are not attacked *on account of* their wealthy status, but rather as a result of general violence. Moreover, the fact that people suffer from violent attacks or robberies across different socioeconomic groups does not necessarily mean the wealthy would not be persecuted because of their wealth. In making this presumption, the BIA used violence to other groups as the litmus for the social visibility test and consequently conflated the nexus requirement with a respondent's burden to establish she belongs to a particular social group.

#### 4. Matter of S-E-G- (2008)

The BIA's biggest deviation from the UNHCR Guidelines definition of a "particular social group" occurred in the *Matter of S-E-G-* decision.<sup>60</sup> The BIA held "Salvadoran youth who have been subjected to recruitment efforts by MS13 and who have rejected or resisted membership in the gang"<sup>61</sup> and "family members of such Salvadoran youth" did not constitute a particular social group because they were not socially visible.<sup>62</sup> Unlike in *Matter of C-A-* and *Matter of A-M-E-*, where the BIA used the social visibility approach because it found the respondents' particular social groups did not share a common immutable characteristic, the BIA in *Matter of S-E-G-* held that members of this group did share a common, immutable characteristic: their past recruitment by gangs.<sup>63</sup> Nevertheless, the BIA found the particular social group failed because it did not possess *requisite* "well-defined boundaries" and "a recognized level of social visibility."<sup>64</sup> In so holding, the BIA morphed the "either immutable characteristic approach or social perception approach" definition of particular social group in the UNHCR Guidelines and created a new, higher standard requiring a social group to share a characteristic that is both immutable *and* socially visible.

Similar to its approach in *Matter of A-M-E-*, the Board looked to country conditions and incidences of crime and violence on the entire population to determine whether the respondents' social group was socially visible. Here, the BIA found Salvadoran youth who were recruited by gangs and refused to join were not socially visible because they did not experience a "higher incidence of crime than the rest of the popula-

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60. *S-E-G-*, 24 I. & N. Dec. 579, 579 (B.I.A. 2008).

61. *Id.* at 585 (the full name of the respondents' first particular social group was "Salvadoran youth who have been subjected to recruitment efforts by MS-13 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").

62. *Id.* at 584-87.

63. *Id.* at 585.

64. *Id.* at 582.

tion.”<sup>65</sup> The Board held that Salvadorans who resisted gang recruitment could not constitute a particular social group because they were “not in a substantially different situation from anyone who has crossed the gang, or who is perceived to be a threat to the gang’s interests.”<sup>66</sup> Here, the BIA again conflated establishing a particular social group with the nexus requirement by mistakenly looking to the presence of persecution outside of respondents’ particular social group to evidence the persecutor’s intent (or lack thereof) to harm respondents *on account of* their refusal to join the gang.

The fact that gang members threatened other members of El Salvadoran society—that Salvadorans who resist gang recruitment were not the *exclusive* recipients of gang violence—is not relevant to whether or not they are a particular social group in Salvadoran society. If anything, the BIA should have understood gang members’ generalized violence to undermine the applicant’s asylum claim on nexus grounds: that the applicant could not prove the gang members targeted him because he refused gang recruitment and not as an act of random violence. Instead, the BIA applied an unmerited social visibility requirement to reject a particular social group that would otherwise succeed under the *Acosta* and UNHCR standards.

#### D. *Rejection of Social Visibility by the Third and Seventh Circuits*

Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, a court should grant deference to an administrative agency charged with interpreting a particular statute where Congress has not directly spoken to the precise question at issue and where the agency’s interpretation is based on a “permissible construction” of the statute. Five appellate circuits have granted deference to the BIA and adopted the social visibility requirement;<sup>67</sup> however the Third and Seventh Circuits have expressly rejected it,<sup>68</sup> and the remaining circuits have neither rejected nor adopted it.

In *Gatimi v. Holder*, the Seventh Circuit reversed the BIA’s holding that defectors of the Kenyan Mungiki gang could not constitute a particular social group because the respondent did not possess “any characteristics

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65. *Id.* at 587.

66. *Id.*

67. *Scatambuli v. Holder*, 558 F.3d 53, 54, 58 (1st Cir. 2009) (“BIA’s determination that applicants, who had been informants to United States government regarding drug smuggling ring, lacked social visibility, and thus were not members of particular social group [‘PSG’], was supported by substantial evidence.”); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 738 (9th Cir. 2008) (“[Y]oung men in El Salvador resisting gang violence” were not a PSG); *Davila-Mejia v. Mukasey*, 531 F.3d 624, 628–29 (8th Cir. 2008) (rejecting the PSG “competing [Guatemalan] family business owners”); *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 72–73 (2d Cir. 2007) (rejecting “affluent Guatemalans” as a PSG); *Castillo-Arias v. U.S. Att’y. Gen.*, 446 F.3d 1190, 1194–95, 1197 (11th Cir. 2006) (determining informants on a Columbian drug cartel were not a PSG).

68. *Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582, 582 (3d Cir. 2011); *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009).

that would cause others in Kenyan society to recognize him as a former member of Mungiki.”<sup>69</sup> The Seventh Circuit declined to grant *Chevron* deference to the Board, holding the social visibility requirement was inconsistent with previous opinions and the requirement “makes no sense.”<sup>70</sup> In his opinion, Judge Richard Posner noted the Board had frequently found non-socially visible characteristics constituted particular social groups, such as “young women of a tribe that practices female genital mutilation but who have not been subjected to it,”<sup>71</sup> homosexuals,<sup>72</sup> former members of the national police,<sup>73</sup> and former military leaders or land owners.<sup>74</sup> Posner found the BIA’s inconsistent application of the social visibility requirement led to arbitrary decision making and thus did not merit a grant of deference.<sup>75</sup> Further, the court held the Board’s social visibility requirement had the absurd effect of expecting a member of a group targeted for persecution to flaunt their identity in society so that they would be socially visible, which would increase the likelihood of persecution, rather than avoid it.<sup>76</sup>

In November 2011, the Third Circuit also rejected the BIA’s social visibility requirement in *Valdiviezo-Galdamez v. Att’y Gen. of the U.S.* when it overruled the BIA’s finding that “Honduran youth who have been actively recruited by gangs but have refused to join because they oppose gangs” did not constitute a particular social group.<sup>77</sup> Citing *Gatimi v. Holder*, the Third Circuit found the social visibility requirement was inconsistent with the BIA’s immutable characteristic requirement in *Matter of Acosta*.<sup>78</sup> The Court held this inconsistency rendered the social visibility requirement an arbitrary and impermissible construction of the Refugee Act and undeserving of a grant of deference.<sup>79</sup> The court also reiterated the Seventh Circuit’s finding that the social visibility requirement produced the absurd effect of denying asylum to someone who purposefully shields his protected characteristic to avoid persecution.<sup>80</sup> The Court noted that someone who truly feared persecution would take steps to hide themselves from their persecutor, yet “by attempting to avoid persecution by blending in to the society at large, the [BIA]’s rationale would cause

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69. *Gatimi*, 578 F.3d at 615.

70. *Id.*

71. *Kasinga*, 21 I. & N. Dec. 357, 365–66 (B.I.A. 1996).

72. *Toboso-Alfonso*, 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990).

73. *Fuentes*, 19 I. & N. Dec. 658, 662 (B.I.A. 1988).

74. *Acosta*, 19 I. & N. Dec. 211, 233, 233–34 (B.I.A. 1985).

75. *Gatimi v. Holder*, 578 F.3d 611, 616 (7th Cir. 2009).

76. *Id.*

77. 663 F.3d 582, 607 (3d Cir. 2011).

78. *Id.* at 604.

79. *Id.*

80. *Id.* at 607.

them to forfeit eligibility for asylum” because they were no longer socially visible as a member of a protected group.<sup>81</sup>

## II. CHEVRON DEFERENCE

In her 2011 note, Kristin A. Bresnahan argues the BIA’s creation of the social visibility requirement deviates from the U.S.’s international obligations as signatories to the 1967 Protocol, and thus merits a denial of *Chevron* deference.<sup>82</sup> To decide whether an administrative agency’s interpretation of a statute merits *Chevron* deference, a court must first consider whether Congress has directly spoken to the precise question at issue.<sup>83</sup> If Congress’s intent is clear in the construction of the statute, then the agency must “give effect to the unambiguously” expressed intent of Congress.<sup>84</sup> Where a statute is found to be silent or ambiguous to a certain issue, a court may grant deference to an agency’s interpretation where it is a permissible construction of the statute.<sup>85</sup>

Bresnahan argues the BIA’s social visibility requirement does not deserve *Chevron* deference because it is contrary to Congress’s intent to incorporate international obligations as signatories to the 1967 Protocol. Bresnahan argues that the Refugee Act is ambiguous with regard to the definition of a particular social group and therefore open to administrative interpretation. However, Bresnahan argues, the social visibility requirement is an impermissible interpretation and thus should not be granted deference by courts. Part II.A argues that Congress was *not* ambiguous as to the definition of a particular social group and uses the canon of *noscitur a sociis* to argue that the language of the statute indicates Congress’s intent to uniformly interpret all five protected classes in the Refugee Act—a *Chevron* “step one” issue. Part II.B builds on Bresnahan’s argument that, even if the statute is ambiguous, the social visibility requirement is an impermissible construction and thus undeserving of *Chevron* deference. However, where Bresnahan focused on international legal principles, this Comment will focus on statutory interpretation and the legislative history of the statute in the United States. This Comment explores why the social visibility doctrine fails arbitrary and capricious review in the following section.

### A. *Chevron Step One: The Social Visibility Requirement is Inconsistent with Congressional Intent*

The Supreme Court has held that a court must reject administrative interpretations statutory provisions that contradict Congress’s clear intent

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81. *Id.*

82. Bresnahan, *supra* note 26, at 665.

83. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 837–38 (1984).

84. *Id.* at 842–43.

85. *Id.* at 843.

behind the statute.<sup>86</sup> A court may look to traditional tools of statutory construction to determine Congressional intent.<sup>87</sup> The BIA has invoked the doctrine of *ejusdem generis* to interpret the definition of a particular social group.<sup>88</sup> *Ejusdem generis*, translated to mean “of the same kind,” “applies when a drafter has tacked on a catchall phrase at the end of an enumeration of specifics.”<sup>89</sup> However, the BIA and UNHCR have both expressly stated that a “particular social group” was not intended to be a “catch-all” category that grants refugee status to everyone who does not belong to another protected ground.<sup>90</sup> Therefore, *ejusdem generis* is not the correct cannon to interpret this provision of the Refugee Act.

Instead, the canon of *noscitur a sociis*, or “a word is known by its associates,” is a more appropriate tool to define a particular social group as one of a group of five protected grounds for establishing refugee status. *Noscitur a sociis* does not frame a particular social group as a catch-all, but rather an independent category that should be defined by the characteristics of other categories in the statute. Under *noscitur a sociis*, each word in a group is limited to a “general subset of the things or actions” that the group covers.<sup>91</sup> In this case, race, religion, nationality, political opinion and membership in a particular social group are associated because they are protected classes. Each subset represents a different type of characteristic that a persecutor would try to “overcome” through persecution.<sup>92</sup>

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86. *Id.* at 843 n.9.

87. *Id.*

88. *See* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (applying *ejusdem generis* to interpret a particular social group to mean a group of persons “all of whom share a common, immutable characteristic” that is either innate, such as sex, color, or kinship ties, or a “shared past experience such as former military leadership or land ownership” to be determined on a case-by-case basis).

89. ANTONIN SCALIA AND BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 199 (2012).

90. UNHCR Guidelines, *supra* note 35, at para. 2 (“Consistent with the language of the [Refugee] Convention, this category cannot be interpreted as a ‘catch all’ that applies to all persons fearing persecution.”); *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190, 1194 (11th Cir. 2006); *C-A-*, 23 I. & N. Dec. 951, 960 (B.I.A. 2006) (quoting the UNHCR Guidelines’ provision).

91. For example, *ejusdem generis* is applied to a list of words with a generalized catchall word at the end, such as “dogs, cats, horses, cattle and other animals” (where “other animals” is a general term that can encompass all the previous-listed terms and anything else in the animal category), whereas *noscitur a sociis* is applied to a list of independent yet related words, such as “dogs, cats, horses, cattle and sheep.” Unlike “other animals,” in the first list, “sheep” in the second list is not a generalized catchall term, but is merely another type of animal in a list of animals. Under *noscitur a sociis*, all of the words in the list share a common characteristic, that they are a type of animal. Applying the doctrine of *noscitur a sociis* would allow an interpreter who did not know what a sheep was to infer that it is a type of animal, because it is one word in a long list of other animals. The Refugee Act’s list of five protected grounds—race, religion, nationality, political opinion, and membership in a particular social group—is much more like the second list in the above example than the first. SCALIA & GARNER, *supra* note 89, at 196.

92. *Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).



As the final court of appeal for asylum decisions,<sup>93</sup> the Supreme Court's application of the interpretive canon of *noscitur sociis* should have influence on the definition of a "particular social group." For example, in *Babbitt v. Sweet Home Chapter of Communities for A Great Oregon*,<sup>94</sup> the Supreme Court used *noscitur sociis* to analyze the Secretary of the Interior's interpretation of the word "take" in the Endangered Species Act.<sup>95</sup> The Court examined the other words listed in the statute's definition of "take," and found that the wide range of words (such as "harass" and "pursue") included in the definition indicated Congress's intent to impart a broad meaning to the word "take," beyond its "established meaning."<sup>96</sup> Unlike the statute in *Babbitt*, the language of the Refugee Act does not indicate an intent to create broad and variable interpretations of protected statuses, but rather should be interpreted uniformly as classes that represent characteristics 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."<sup>97</sup> The social visibility requirement is a deviation from this uniform interpretation, as many groups recognized under the other protected grounds would arguably not satisfy the social visibility requirement since they would not be deemed visible to general society.<sup>98</sup> Imputing a social visibility requirement to only the definition of a particular social group and not to the other four protected grounds disrupts the uniform establishment of the protected grounds that Congress intended. As such, the social visibility requirement should not be granted deference under *Chevron* step one.

B. *Chevron Step Two: The Social Visibility Requirement is an Impermissible Construction of the Refugee Act of 1980*

If the Supreme Court were to hold that Congress has been silent or ambiguous to the definition of a particular social group, the BIA's social visibility requirement should not be entitled to *Chevron* deference under the "step two" analysis because it is an impermissible interpretation of the statute. The Supreme Court has historically looked to legislative history

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93. See 8 U.S.C. § 1252(a)(2)(B) (vesting courts with the power to review denials of discretionary relief). *But cf.* 8 USC § 1158(a) (regarding eligibility for asylum).

94. 515 U.S. 687 (1995).

95. Endangered Species Act, 16 U.S.C. § 1532 (1973).

96. *Babbitt*, 515 U.S. at 697–98 n.10.

97. *Acosta*, 19 I. & N. Dec. at 233.

98. For example, the Ninth Circuit granted asylum to a Ukrainian businessman who reported police and lower-level government corruption to higher government officials, though his identity as a whistleblower was unknown throughout society. *See Fedunyak v. Gonzales*, 477 F.3d 1126, 1129–30 (9th Cir. 2007). Courts have also held that refusing to practice one's religion in an effort to not be recognizable to the rest of society did not negate a well-founded fear of future persecution. *See, e.g., Kazemzadeh v. U.S. Att'y Gen.*, 577 F.3d 1341, 1353–55 (11th Cir. 2009); *see generally Edu v. Holder*, 624 F.3d 1137 (9th Cir. 2010).

and overall purpose behind a statute to determine whether an agency's interpretation is a permissible one.<sup>99</sup> As Bresnahan discusses in her note, the overall purpose of the Refugee Act was to codify the U.S.'s obligations as signatories to the 1967 Protocol. The social visibility requirement is inconsistent with the UNHCR interpretation of the Protocol, and as such, deviates from the purpose of the Refugee Act, and thus is an impermissible construction of the statute.

The Court in *INS v. Cardoza-Fonseca* found that the legislative history of the Refugee Act was an important tool in interpreting the overall purpose of the statute.<sup>100</sup> The Court held that one of the key aspects to understanding the history and therefore the broad purpose of the Refugee Act is the "abundant evidence of an intent to conform the definition of 'refugee' and our asylum law to the United Nations Protocol . . ."<sup>101</sup> Conference Committee Reports from the drafting process for the 1980 Refugee Act confirm the Court's finding that the Refugee Act was intended as a codification of the U.S.'s international obligations as signatory to the 1967 Protocol. The original Senate bill incorporated the "internationally-accepted" definition of refugee contained in the Refugee Convention and the 1967 Protocol.<sup>102</sup> The House of Representatives amendment also "incorporated the U.N. definition."<sup>103</sup> Congress codified the Refugee Act's definition of refugee "with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision will be construed consistent with the Protocol."<sup>104</sup>

Drawing on the legislative history of the statute, the Supreme Court made it clear that an interpretation of the Refugee Act requires allegiance to the text of the 1967 Protocol.<sup>105</sup> The Protocol declares the UNHCR to

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99. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

100. 480 U.S. 421 (1987).

101. *Id.* at 432. Antonin Scalia and Bryan Garner criticize the use of legislative history to interpret a statute, stating, "From the beginnings of the republic, American law followed what is known as the 'no-recourse doctrine'—that in the interpretation of a text, no recourse may be had to legislative history." SCALIA & GARNER, *supra* note 89, at 369. They also criticize the "false notion that the purpose of interpretation is to discover intent" where a statute has been written by multiple authors, "especially multiple authors who may not have had the same objects in mind." *Id.* at 391.

102. S. Rep. No. 96-590, at 20 (1980).

103. H. R. No. 96-781, at 19 (1980).

104. *Id.* at 20.

105. See *INS*, 480 U.S. at 432 (holding the standard for determining a well-founded fear of future persecution must conform with the definition in the 1967 Protocol). *But see INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (holding the U.N. Handbook "may be a useful interpretive aid, but it is not binding on the Attorney General, the BIA, or United States courts" when interpreting the text of the 1967 Protocol); *Acosta*, 19 I. & N. Dec. 211, 221 (B.I.A. 1985) (determining that the BIA must follow the terms of the 1967 Protocol, but finding, "[w]hile we do not consider the UNHCR's position in the *Handbook* to be controlling, the

be the official interpreting body and supervisor of its implementation.<sup>106</sup> As previously stated, the UNHCR Guidelines on membership of a “particular social group” do not pose a social visibility requirement, but rather require a group *either* share a common, immutable characteristic *or* be perceived as a unit by society. Therefore, to heed the plain purpose of the Refugee Act would require deference to our international obligations under the 1967 Protocol and thus a rejection of the social visibility requirement, as it is inconsistent with the UNHCR’s definition of a particular social group. The BIA and other American courts should specifically adopt the UNHCR’s definition of a particular social group, which includes the immutable characteristic approach outlined in *Acosta*.

### III. ARBITRARY AND CAPRICIOUS REVIEW

Even if the social visibility requirement were granted administrative deference under *Chevron*, the interpretation is unlawful because it is the result of arbitrary and capricious reasoning under the Administrative Procedure Act.<sup>107</sup> In *National Cable and Telecommunications Association v. Brand X Internet Services*, the Supreme Court held an administrative interpretation of a statute is procedurally arbitrary and capricious if it is inconsistent with past agency interpretations and the agency does not provide a “reasoned explanation” that “adequately justifies” the inconsistency.<sup>108</sup> This Comment agrees with Bresnahan’s argument that the BIA’s social visibility requirement is a sudden and unjustified departure from prior administrative interpretations, and as such, is arbitrary and capricious under *Brand X*.<sup>109</sup> Additionally, this Comment argues that the BIA’s failure to consider relevant factors, including limitation of the requirement to the group’s visibility to the persecutor, rather than society in general, also merits a finding of arbitrary and capricious reasoning.<sup>110</sup>

As Bresnahan argues, the BIA’s social visibility requirement is inconsistent with both international law and its own case law. By imposing the

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*Handbook* nevertheless is a useful tool to the extent that it provides us with one internationally recognized interpretation of the Protocol.”).

106. 1967 Protocol, *supra* note 18, at art. II, para. 1 (“The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.”).

107. 5 U.S.C. § 706 (2006) (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .”).

108. 545 U.S. 967, 1000–01 (2005).

109. Bresnahan, *supra* note 26, at 666–73.

110. See *Judulang v. Holder*, 132 S. Ct. 476, 477 (2011) (finding the BIA failed to consider relevant factors, such as an immigrant’s ties to his community and his overall fitness to reside in the country, when charging removable aliens under exclusion grounds rather than grounds for removal).

requirement, the BIA effectively overrules many of its own previous decisions finding certain socially invisible characteristics sufficient to establish a particular social group. For example, the BIA granted asylum to the respondent in *Matter of Toboso-Alfonso* on account of his membership in a particular social group, “homosexuals” in Cuba.<sup>111</sup> However, in its analysis, the BIA did not address whether or not gay men were socially visible in Cuban society.<sup>112</sup> The BIA also found “young women who are members of the Tchamba-Kunsutu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice” to be a particular social group in *Matter of Kasinga*, despite the fact that the respondent’s membership in this group was recognized only by her immediate family.<sup>113</sup> Such internal inconsistencies without a basis for justification were the impetus behind the Seventh Circuit’s rejection of the social visibility requirement, finding the BIA was effectively “usurp[ing] the agency’s responsibilities” by “picking and choosing” which particular social groups fulfilled the social visibility requirement, and by not conducting a social visibility analysis at all for some groups.<sup>114</sup>

The BIA has also failed to give an adequate justification for its imposition of the social visibility requirement, nor has it explained the inconsistent results the requirement has created. Bresnahan notes the BIA’s attempted justification of the social visibility requirement in *Matter of S-E-G-* as “giv[ing] greater specification to the definition of a social group”<sup>115</sup> does not sufficiently address the deviation from the innate characteristic framework set forth in *Acosta*.<sup>116</sup> The BIA attempted to classify the social visibility requirement as a specification, where in reality it is a change in interpretation that effectively overrules previous particular social group determinations. Further, the BIA also attempted to justify the social visibility doctrine by stating it is consistent with federal circuits’ definitions of particular social group.<sup>117</sup> However, the BIA cannot use federal circuit compliance as grounds for justification of its social visibility requirement, since the Third and Seventh Circuits have explicitly rejected the requirement. Thus, the BIA’s attempts to justify its inconsistency are clearly insufficient to suspend a finding of arbitrariness and capriciousness in the social visibility requirement.<sup>118</sup>

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111. *Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (B.I.A. 1990).

112. *Id.* at 820–23.

113. *Kasinga*, 21 I. & N. Dec. 357, 358 (B.I.A. 1996).

114. *Gatimi v. Holder*, 578 F.3d 611, 616 (7th Cir. 2009).

115. *S-E-G-*, 24 I. & N. Dec. 579, 582 (B.I.A. 2008).

116. Bresnahan, *supra* note 26, at 667.

117. *S-E-G-*, 24 I. & N. Dec. at 583.

118. The Supreme Court has held inconsistent interpretations not to be arbitrary and capricious where adequate justification is provided. See *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009) (stating that the FCC’s justification that increased expletive censorship

The BIA has also failed to justify its reasoning behind the social visibility requirement in part due to its refusal to consider certain factors that are relevant to the determination of whether a person's circumstances merit a grant of asylum.<sup>119</sup> To avoid a finding of procedural arbitrary and capricious reasoning, "[t]he BIA's approach must be tied . . . to the purposes of the immigration laws or the appropriate operation of the immigration system."<sup>120</sup> The inherent purpose of granting asylum is to protect people from those who seek to persecute them because of a protected status. The BIA's social visibility requirement involves consideration of factors, namely the visibility of the group to society in general, that are not germane to the decision of whether someone will be persecuted based on a protected status. In determining whether someone is a member of a protected group, it is the *persecutor's* awareness of an asylum applicant's membership in a particular social group that should be relevant to their status as a refugee. Instead, the BIA's social visibility requirement inherently imposes a requirement that general society—not the persecutor—recognize this protected status.

A persecutor's motive is the result of his perception of the protected characteristic in another: someone would not kill a young man *because* he refused gang membership if he was not aware that the young man refused gang membership. Because the Supreme Court has held that persecutor's motive is a relevant factor in an asylum adjudication, and because a persecutor's motive is directly linked to his perception of the applicant's protected characteristic, it logically follows that the persecutor's ability—rather than the ability of society at large—to perceive a particular social group is a relevant factor in establishing a particular social group.<sup>121</sup>

The persecutor's awareness of the victim's protected status has been emphasized in cases adjudicating asylum on other protected grounds. In *INS v. Elias-Zacarias*, the persecutor's motive for persecution was held to be a "critical" piece of evidence that the applicant must provide in order to establish feared persecution on account of political opinion.<sup>122</sup> In that case, the applicant, who feared persecution from guerillas on account of his refusal to join them, was denied asylum because he inadequately proved that the persecutors were motivated by the applicant's political opinion against

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serves the government's interest in "providing for the well-being of its youth" is sufficient to account for the agency's policy change that finds the use of the f- and s- words indecent).

119. *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007) (finding the E.P.A. arbitrarily and capriciously refused to regulate certain vehicle emissions because it did not consider or justify its non-consideration as to whether greenhouse gasses cause or contribute to climate change).

120. *Judulang v. Holder*, 132 S. Ct. 476, 478 (2011).

121. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) ("[S]ince the [Refugee Act] makes motive critical, [the applicant] must provide *some* evidence of it, direct or circumstantial.").

122. *Id.* at 483.

guerilla activity.<sup>123</sup> The Court held that the Refugee Act “makes motive critical” and applicants “must provide *some* evidence of it. . . .”<sup>124</sup>

The BIA’s emphasis is thus misplaced when it requires that members of the general public, who are often far removed from the persecutory acts, recognize this protected characteristic in social group members. Many asylum applicants who deserve refugee status fear persecution because they belong to a group that is secretive or unobvious, but that the government, their family, or organized crime members clearly recognize. Society’s recognition of a characteristic that establishes a particular social group, such as homosexuality or land ownership status, is ultimately irrelevant to whether the applicant will face persecution on account of this protected ground unless the applicant fears persecution from society as a whole. The consideration of the visibility of a person’s protected status to the general public is an irrelevant factor that the BIA has not only considered, but requires for the establishment of a particular social group.

The BIA’s refusal to address the importance of the persecutor’s perception of a particular social group, rather than the perception of society at large, indicates arbitrary and capricious reasoning.

#### IV. THE FLOODGATES CONCERN

Finally, Bresnahan’s note also discusses the BIA’s use of the social visibility requirement as insurance against the historic “floodgates” concern: the constant fear of adjudicators and other government officials that ambiguity in asylum law will cause an inundation of eligible applicants.<sup>125</sup> The BIA has used the social visibility requirement to create a more “discrete” class of persons that prevents the establishment of a particular social group with “a large swath of potential members.”<sup>126</sup> Bresnahan argues that this concern is frivolous since an asylum applicant must not only establish membership in a particular social group, but must also demonstrate she fears persecution *on account of* that membership.<sup>127</sup> It is important to note the constraints the other elements of asylum, such as the nexus requirement, place on the floodgates concern. Even if someone is found to be a member of a particular social group, she still must establish that her fear of future persecution rises to a *well-founded* fear, *and* the government is unable or unwilling to control her potential persecutors. The asylum applicant is

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123. *Id.*

124. *Id.* It is important to note that while respondent’s claim was based on political opinion, the Court in *Elias-Zacarias* did not hold that the persecutor’s motive was critical only in political opinion cases, suggesting the persecutor’s motive for persecuting an asylum applicant is clearly important in every protected ground.

125. Bresnahan, *supra* note 26, at 675.

126. A-M-E- & J-G-U, 24 I. & N. Dec. 69, 74–76 (B.I.A. 2007).

127. Bresnahan, *supra* note 26, at 675.

required to meet her burden of proof for each element,<sup>128</sup> creating a complex and difficult system that prevents courts and the government from an inundation of meritorious asylum applications.

For example, if the social visibility requirement had not been imposed in *Matter of S-E-G-*, the nexus requirement and standard for proving well-founded fear would have controlled potential floodgates concerns. “Salvadorian youth who have been subjected to recruitment by efforts by MS13” should have constituted a particular social group under the immutable characteristic approach, because members in this group share a past experience that they are unable to go back in time to change.<sup>129</sup> The shared past experience is not generally applicable in society and thus clearly creates a discrete and particular social group. Even though this group could be large in number, each potential applicant would still need to prove that the facts of his or her own experience create a well-founded fear of future persecution, and that the persecution is based on their refusal to be recruited by a gang.

It is also important to note that the Refugee Act already provides safeguards against floodgates concerns. As Bresnahan notes, successful asylum applicants must provide corroborating evidence and/or credible testimony to an Immigration Judge. They must not fall outside the one-year bar period<sup>130</sup> or trigger the terrorism or persecutor bars.<sup>131</sup> All of these steps exist to ensure that adjudicators only grant asylum to people who deserve protection under the Refugee Act. By attempting to achieve these goals through the social visibility requirement, the BIA has deviated from Congress’ intended methods to address potential floodgates concerns.

The BIA’s use of social visibility as a preemptive measure to avoid large particular social groups<sup>132</sup> also violates the U.S.’s international obligations as a 1967 Protocol signatory. The UNHCR Guidelines specifically

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128. Each element of asylum is multifaceted and contains multiple requirements. For example, in establishing a well-founded fear of future persecution, an applicant must establish (1) she has a subjective fear of future persecution and (2) the fear is objectively supported by articulable reasons. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 450 (1987).

129. *S-E-G-*, 24 I. & N. Dec. 579, 579 (B.I.A. 2008); see also *Fuentes*, 19 I. & N. Dec. 658, 662 (B.I.A. 1988) (status as a former national policeman is an immutable characteristic); *Sepulveda v. Gonzales*, 464 F.3d 770, 771–72 (7th Cir. 2006) (former subordinates of the attorney general); *Koudriachova v. Gonzales*, 490 F.3d 255, 262–63 (2d Cir. 2007) (former KGB agents); *Cruz-Navarro v. INS*, 232 F.3d 1024, 1029 (9th Cir. 2000) (former members of police or military).

130. See 8 U.S.C. § 1158(a)(2)(B) (2012) (“[The refugee definition] shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien’s arrival in the United States.”).

131. See 8 U.S.C. § 1158(b)(2)(A)(2012) (excerpting from refugee definition aliens who have persecuted others, been convicted of a particularly serious crime or serious nonpolitical crime, pose a danger to national security, have participated in terrorist activities under 8 U.S.C. § 1182(a)(3)(B)(i), or who were firmly resettled in another country).

132. *S-E-G-*, 24 I. & N. Dec. at 584 (noting the size of a particular social group can be an “important factor in determining whether the group would be recognized”).

state that size should not be a relevant factor in establishing a particular social group.<sup>133</sup> Size is not a consideration in the establishment of the other protected grounds: members of a nationality or race may extend to entire countries or regions. For example, a political opinion may be shared by the majority of a population, yet is still grounds for asylum status if the government persecutes people who share it. The express intent of the international community is therefore not to limit the size of protected classes, but rather to rely on the other elements of asylum and other procedural safeguards to ensure refugee status eligibility only to those who truly deserve it. Because the social visibility doctrine abrogates the functions of other elements of the refugee definition, it risks denying refugee status to those who clearly deserve it.

### CONCLUSION

The BIA should not be granted any interpretive deference in its imposition of the social visibility requirement for establishing a particular social group. The requirement is clearly contrary to congressional intent in drafting the Refugee Act and an impermissible interpretation of the statute. Further, the BIA has failed to provide adequate justification for the inconsistent results the social visibility requirement produces, suggesting the agency's reasoning behind the requirement is arbitrary and capricious.

As Bresnahan concludes, the Supreme Court should adopt the UNHCR's *either* immutable characteristic *or* social perception approach. Under this framework, social visibility is sufficient but not necessary to establishing a particular social group. Because the social visibility requirement excludes many possible refugees who deserve protection under the Refugee Act, and because it is inconsistent with the purpose of the statute and the BIA's prior holdings, social visibility should not be required, but should be an alternative to the common, immutable character test in *Acosta*. The social visibility of a group should be evaluated where a group lacks immutable characteristics. For example, a group that is defined by its youth or by its occupation may not fulfill the *Acosta* standards. In many of these cases, a social group could be defined by a common characteristic that is widely perceived in society, but that might eventually change and is therefore not immutable. In these limited circumstances, the social visibility of the group could be weighed in deciding whether the shared characteristic establishes a particular social group.

Concerns that the social visibility requirement is necessary to prevent a flood of asylum grants based on membership in a particular social group are unfounded. The abundance of safeguards, such as the one-year bar and the credibility requirement, as well as an applicant's need to prove the other elements of asylum, ensure that asylum is not granted to people who are not meant to be afforded the statute's protection. Thus, the social visi-

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133. UNHCR Guidelines, *supra* note 35, at para. 18.



bility requirement does not advance the purpose of the Refugee Act in any way and only risks a confusing, inconsistent, and ineffective application of American law.