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Why Guidance from the Supreme Court is Required in Redefining the Particular Social Group Definition in Refugee Law

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WHY GUIDANCE FROM THE SUPREME COURT IS REQUIRED IN REDEFINING THE PARTICULAR SOCIAL GROUP DEFINITION IN REFUGEE LAW

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Abstract

One of the most debated topics in refugee law has been the meaning of particular social group (PSG)—one of the five categories used to claim refugee status. In 2006, the Board of Immigration Appeals (BIA) adopted a narrower PSG definition. Since that adoption, a circuit split has persisted over the meaning of PSG. Two circuits in particular have continually refused to adopt this definition—even when the BIA attempted to revise the definition in response to their criticism. This Note proposes a reform that would include a compromise between the two current definitions of PSG by rejecting the BIA's particularity requirement and transforming the social distinction requirement into a flexible standard. Further, this Note advises that the Supreme Court provide guidance to the BIA to ensure that all jurisdictions adhere to the new definition.

Introduction

The particular social group (PSG) definition has been the subject of more litigation and academic debate than the other portions of the legal definition of a refugee. Since the term is not used in ordinary language and is not defined in the international Refugee Convention, it has understandably led to contention. The definition of PSG is important because how narrowly or broadly PSG is defined can result in vast differences in who is granted asylum. It is essential, therefore, for the United States to provide consistency across jurisdictions by establishing a single definition of PSG. Ensuring consistency means that all applicants will be treated fairly regardless of where they apply for asylum. However, ever since the

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Board of Immigration Appeals (BIA) adopted a narrowed PSG definition, consistency across jurisdictions has not been feasible. This is because two federal circuits have continually refused to adopt the BIA's narrowed definition. Therefore, what amounts to a PSG—and therefore who receives asylum—depends on the circuit. This Note proposes a reform that would include a compromise between the two current definitions and also call for the Supreme Court to provide guidance to the BIA to ensure that the new definition would be adhered to, thereby eliminating any inconsistencies amongst the circuits.

Part I discusses the definition of a refugee and provides a general overview of refugee law's history and how it fits into the broader immigration law system, as well as the practical implementations of refugee law. Part II provides a detailed analysis of how the BIA has attempted to revise the PSG definition in the last ten years and the federal appellate courts' responses to those attempts. Finally, Part III calls for the Supreme Court to provide detailed guidance for the BIA to revise the PSG definition to one that removes the particularity requirement and changes the social distinction requirement into a flexible standard.

I. BACKGROUND

A. *History of Immigration Law in the United States*

Immigration law, as we know it today, did not exist at the formation of the United States. Individual states had their own naturalization requirements until the federal government passed the 1790 Naturalization Act.[1] While immigrants always had to meet certain requirements to become citizens, entrance into and presence in the United States was relatively uninhibited.[2] People from any country could move to the United States whenever they wanted to, so long as they could afford it, without obtaining permission from the federal or state governments.[3] The first significant federal

1. *See* Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (repealed 1795) (establishing "a uniform Rule of Naturalization"). For a discussion of naturalization law in the American colonies, see generally Edward E. Hoyt, *Naturalization Under the American Colonies: Signs of a New Community*, 67 POL. SCI. Q. 248 (1952).

2. *See, e.g.*, Robbie Totten, *National Security and U.S. Immigration Policy, 1776–1790,* 39 J. INTERDISC. HIST 37, 38 (2008) ("During the 'Open Door Era' from the early republic to approximately the twentieth century, the borders of the United States were legally unregulated by the federal government, except for a few minor restrictions . . . ."); *see also* Henry B. Hazard, *The Immigration and Nationality Systems of the United States of America*, 14 F.R.D. 105, 107 (1954).

3. *See* Hazard, *supra* note 2 at 106.

legislation dealing with immigration matters other than naturalization was passed in 1819.[4] Then, in 1864, Congress established a Commissioner of Immigration and the United States Emigrant Office.[5] The Emigrant Office was responsible for helping immigrants travel within the United States and protecting them from fraud.[6] The Commissioner oversaw immigrant employment contracts because the Act required immigrants to pledge a portion of their wages to the United States to repay "the expenses of their emigration."[7]

Two Acts in 1875 and 1882 added regulations regarding who could be admitted and who would be excluded.[8] Subsequent acts mainly expanded exclusion categories.[9] The Emergency Quota Act of 1921 established yearly quotas on immigration.[10] Much of the later legislation was enacted as a response to the public's resistance to immigration and as a solution to limit the flow of immigration, both quantitatively and qualitatively.[11] The Emergency Quota Act of 1921 also created a number of classes that were exempt from the maximum quota, allowing any number of immigrants from those classes into the United States.[12]

B. *Refugee Law as a Response to Immigration Law*

The development of immigration law also resulted in the demand for and creation of more specific categories of immigrant

4. *See* An Act Regulating Passenger Ships and Vessels, ch. 46, 3 Stat. 488 (1819) (requiring the captain or master of a ship to deliver a list or manifest of the passengers to a federal collector). *See also* FEDERATION FOR AMERICAN IMMIGRATION REFORM, *History of U.S. Immigration Laws* (2018), https://fairus.org/legislation/reports-and-analysis/history-of-us-immigration-laws.

5. An Act to Encourage Immigration, ch. 246, § 1, 13 Stat. 385, 386 (1864).

6. *Id.*

7. *Id.*

8. Immigration Act of 1882, ch. 376, § 1, 22 Stat. 214, 214 (imposing a fifty-cent duty on every immigrant entering the country and prohibited convicts, lunatics and idiots from landing); Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974) (prohibiting importation of women for prostitution and forced servitude contracts of Chinese or Japanese nationals).

9. *See generally* Hazard, *supra* note 2, at 109–10.

10. *See* Emergency Quota Act of 1921, Pub. L. No. 67-5, § 2(a), 42 Stat. 5 (1921) (yearly admissions were limited by nationality to three percent of foreign born people of the same nationality that had resided in the United States at the time of the 1910 census).

11. *See, e.g.*, *The Rush of Immigrants*, USHISTORY.ORG, http://www.ushistory.org/us/38c.asp (last visited June 11, 2017) ("Not all Americans welcomed the new immigrants with open arms. While factory owners greeted the rush of cheap labor with zeal, laborers often treated their new competition with hostility. Many religious leaders were awestruck at the increase of non-Protestant believers. [Racial purists] feared the genetic outcome of the eventual pooling of these new bloods.").

12. Emergency Quota Act of 1921.

status, including categories for employment status, family-based status, and refugee status, with different requirements and procedures for each. Refugee law, in part a response to immigration law itself, was created as a form of relief for people that needed to flee their countries. It was presented as a solution to people in dire situations that did not have the luxury of time and planning—it was not originally meant to be a part of the traditional immigration law regime.[13] Refugees were not subject to the same numerical limitations as other types of immigrants,[14] and many of the qualitative requirements could be waived for refugees.[15]

The need for creating a process for allowing the immigration of refugees was also felt internationally. As a response, the Refugee Convention of 1951 (Convention), a revision of previous international agreements, was created.[16] The Convention was inspired by humanitarian concerns for the large number of refugees after the two World Wars,[17] but it was only necessary because of the immigration law requirements that existed. States agreed to be bound by the Convention,[18] and later, the Refugee Protocol of 1967 (Protocol),[19] because they recognized that they needed a solution separate from immigration for people fleeing from persecution.[20]

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13. *See* James C. Hathaway, *Why Refugee Law Still Matters*, 8 MELBOURNE J. INT'L L. 89, 96 (2007) ("Refugee law is therefore fundamentally a mechanism of human rights protection, not a mode of immigration.").

14. For example, The Refugee Act of 1980 set the maximum refugee quotas to 50,000 per year for the first three years, allowed the President to change that number based on humanitarian concerns, and set it for subsequent years. Pub L. No. 96-212, § 207(a)(1) 94 Stat. 102 (codified as amended at 8 U.S.C. § 1157(a)(1) (2012)). Asylees (people who are already present in the United States) are not subject to this quota. *See* Refugee Act of 1980 § 208(a) (codified as amended at 8 U.S.C. § 1158 (2012)) (containing no provision for setting a maximum quota for an asylee).

15. Most importantly, people that seek asylum are not required to have legal status to apply for asylum; physical presence is sufficient. 8 U.S.C. § 1158(a)(1) (2012).

16. Convention Relating to the Status of Refugees pmbl., *opened for Signature* July 28, 1951, 189 U.N.T.S. 150, 150 (hereinafter Convention) ("Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement.").

17. *See* UNITED NATIONS HIGH COMM'R FOR REFUGEES (UNHCR), THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL 1 (2011), http://www.unhcr.org/en-us/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html. *See also The 1951 Refugee Convention – Q&A*, UNHCR (2017), http://unhcr.org.ua/en/component/content/article/8-stati-na-anglijskom/63-the-1951-refugee-convention-q-a-a ("[the Convention] was limited to protecting mainly European refugees in the aftermath of World War II").

18. *Id.*

19. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (hereinafter Protocol).

20. Convention, *supra* note 16, at pmbl., 189 U.N.T.S. at 152 (discussing "the social and humanitarian nature of the problem of refugees").

The Convention and the Protocol prompted states to remove immigration formalities for a certain subset of migrants that were being denied protection in their own countries—a subset that was limited enough to not overwhelm the world's resources. As defined by the Convention, a refugee is a person who:

> [O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[21]

Initially, the Convention only applied to refugees that were defined as refugees under previous arrangements,[22] or became refugees due to events occurring prior to January 1, 1951,[23] with "events" meaning "events occurring in Europe."[24]

In the years following the creation of the Convention, people fled from persecution that stemmed from events that happened after 1951, or from countries outside of Europe.[25] In 1967, the Protocol removed the geographical and temporal requirements from the definition, expanding it to include refugees that were fleeing persecution from outside of Europe and after the events of January 1, 1951.[26] The refugee definition cannot be changed by any of the parties that sign the Convention or Protocol.[27]

C. *History of Refugee Law in the United States*

The United States was an active member during the drafting of the Convention. Mr. George Lewis Warren represented the United

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21. *Id.* art. 1A(2), 189 U.N.T.S. at 152.
22. *Id.* art. 1A(1), 189 U.N.T.S. at 152.
23. *Id.* art. 1A(2), 189 U.N.T.S. at 152.
24. *Id.* art. 1B(1)(a), 189 U.N.T.S. at 154. The Refugee Convention also allowed states to expand the geographical requirement beyond Europe by declaration at the time of signing the convention. *Id.* art. 1B(1)(b), 189 U.N.T.S. at 154.
25. *See* Protocol, *supra* note 19, at pmbl., 19 U.S.T. at 6225, 606 U.N.T.S. at 268. ("Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention . . . .").
26. *Id.* art. 1(2)–(3), 19 U.S.T. at 6225, 606 U.N.T.S. at 268–70.
27. *Id.* art. 42(1), 189 U.N.T.S. at 182 ("At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to Articles 1, 3, 4, 16(1), 33, 36-46 inclusive.").

States at the Conference of Plenipotentiaries and made significant contributions.[28] However, the United States never ratified the Convention.[29] Perhaps part of the reason the United States did not sign the Convention was because it wanted to retain control over granting refugee status to the most deserving and sympathetic candidates—women and children, as well as those who had already suffered from persecution. Another reason is that ratifying treaties is difficult in the United States, as the Constitution requires the President to obtain advice and consent of two-thirds of the Senate before he can ratify a treaty.[30]

However, the United States adopted a number of national measures that provided some relief for refugees.[31] One such measure, the Refugee and Migration Act of 1962, enabled the United States to provide assistance to "certain migrants and refugees."[32] It authorized the President to continue the United States' membership in the Intergovernmental Committee for European Migration and allowed appropriations for contributions to activities of the United Nations High Commissioner for Refugees (UNHCR) and for services to and resettlement of refugees.[33] It also defined the term refugee as:

> [An] alien[ ] who (A) because of persecution or fear of persecution on account of race, religion, political opinion, fled from a nation or area of the Western Hemisphere; (B) cannot return thereto because of fear of persecution on account of race, religion or political opinion; and (C) [is] in urgent need of assistance for the essentials of life[.][34]

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28. U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Twenty-Fourth Meeting*, U.N. Doc. A/CONF.2/SR.24 (Nov. 27, 1951).

29. UNHCR, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL 1 (2015), http://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html (hereinafter STATES PARTIES).

30. U.S. CONST. art. II, § 2.

31. These included the Presidential Directive on Displaced Persons signed on December 22, 1945 by President Truman, the Displaced Persons Act of 1948, and the Refugee Relief Act of 1953. *See* USCIS, *Refugee Timeline* (last updated June 27, 2017), https://www.uscis.gov/history-and-genealogy/our-history/refugee-timeline.

32. Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121 (codified as amended at 8 U.S.C. §§ 1104, 1182 note (Resettlement of Refugee-Escapee); 22 U.S.C. §§ 2601 to 2606 (2012)).

33. *Id.* at 121–22.

34. *Id.* at 122.

This definition was somewhat similar to the definition provided by the Convention. For example, it included the same geographical requirement. But it also included several differences: (1) it allowed past persecution in addition to fear of future persecution; (2) it changed "being persecuted" to "persecution"; (3) it changed "for reasons of" to "on account of"; (4) it omitted "nationality" and "particular social group"; and (5) it added the requirement that the alien be "in urgent need of assistance." The fifth requirement allowed the United States to prioritize refugee status to those most in need and to retain control. As the United States was not a party to the Convention at the time of enactment of the Migration and Refugee Assistance Act of 1962, it was free to create its own definition and was not internationally obligated to provide assistance to refugees in the same way that the Convention parties were.

In 1965, the Immigration and Nationality Act of 1965 was created. The 1965 Act differentiated from the 1962 Act by revising the previous numerical limits on nationalities,[35] creating numerical limits for the Western and Eastern hemispheres of 120,000 and 170,000 respectively.[36] It also placed a numerical limit of 20,000 per country, prioritized people with special employment skills or familial relationships, and exempted immediate relatives of citizens from the numerical limitations.[37]

On November 1, 1968, the United States ratified the Refugee Protocol.[38] Congress then codified the treaty obligations of the Protocol in the Refugee Act of 1980, which amended the Immigration and Nationality Act of 1965 and Migration and Refugee Assistance Act of 1962.[39] Following this, the Refugee Act of 1980 changed the definition of a refugee to:

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is

35. The limits for nationalities were set at two percent of the foreign-born nationals in the United States of the same nationality, but no less than 100 people. Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153, 159 (codified as amended in scattered sections of 8 U.S.C.). The total annual limit for immigrants was 150,000, but there were a number of classes that were exempt from the numerical limitation, like immediate family members of citizens and people in particular career fields. *Id.* at 155, 159.

36. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911, 911, 916, 921 (codified as amended in scattered sections of 8 U.S.C.).

37. *Id.* at §§ 201–202, 79 Stat. 911–13.

38. STATES PARTIES, *supra* note 29, at 4.

39. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified and amended in scattered sections of 8 U.S.C.).

> 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[40]

This definition is much closer to the Protocol definition, as it removed the geographical restriction as well as the requirement that the person be in urgent need of assistance, and it added "nationality" and "particular social group" to the grounds for persecution that had been previously omitted. People who met the refugee definition would be granted refugee status at the discretion of the Attorney General.[41] In addition to refugee status, the United States grants asylum status to people who meet the refugee definition but are inside the United States.[42]

D. *Current Practices of Granting Refugee and Asylum Status*

The majority of the world's countries have signed both the Protocol and the Convention,[43] so the refugee definitions in those countries apply to people that become refugees at any period in time, and in any country in the world. Such people are thus recognized as refugees in states that are parties to the Protocol.[44] The United States is one of the few countries that signed the Protocol but not the Convention.[45] However, as the Protocol incorporates the vast majority of the Convention by reference,[46] the United

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40. 8 U.S.C. §1101(a)(42) (2012).

41. 8 U.S.C. § 1157(c)(1) (2012); 8 U.S.C. § 1158(b)(1)(A) (2012).

42. *Refugees and Asylum*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-asylum (last updated Nov. 12, 2015).

43. *See* STATES PARTIES, *supra* note 29, at 1. 145 states have signed the Convention, and 146 have signed the Protocol. *Id.* Only Madagascar, St. Kits and Nevis have signed the Convention and not the Protocol. *Id.*

44. The UNHCR describes when recognition of refugee status occurs:

> A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, ¶ 28, UN Doc. HCR/IP/4/Eng/REV.3 (1979, reedited 2011) (hereinafter *Handbook*).

45. STATES PARTIES, *supra* note 29, at 1 (United States is joined by Cabo Verde and Venezuela as signatories only to the Refugee Convention).

46. Protocol, *supra* note 19, art. 1(1), 19 U.S.T. at 6225, 606 U.N.T.S. at 268 ("The States Parties to the present Protocol undertake to apply Articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined."). The Protocol defines Refugees the same way as the

States recognizes people who meet the refugee definition of the Convention, but calls them asylees if they are within the United States when they apply for asylum. In contrast, the United States calls migrants who meet the international refugee definition but are outside of the United States, refugees.

The United States has a numerical limitation for refugees, as defined by the Refugee Act of 1980, which is determined each year by the President.[47] The code section prescribing procedures for asylees does not provide a numerical limitation on the asylum applications that can be granted per year.[48] However, not all asylees who apply and meet the definition will be granted asylum in the same year they apply.[49]

There are two different types of asylum applications depending on the current status of the immigration seeker.[50] A person who is not in removal proceedings files an affirmative asylum application.[51] A person who is in removal proceedings files a defensive asylum application.[52] Different agencies process the two types of claims.[53]

The Refugee, Asylum, and International Operations (RAIO) of the United States Citizenship and Immigration Board (USCIS), which is part of the Department of Homeland Security (DHS),[54] processes the affirmative applications.[55] In October 2017, RAIO adjudicated affirmative applications from people who filed their applications between June 2013 and February 2016, depending on which region of the U.S. they lived in.[56] This means people were waiting anywhere from two to five years after filing their asylum claim before they were granted asylum if they met the definition.[57]

Convention, only removing the words "As a result of events occurring before 1 January 1951" and "as a result of such events" from the Convention definition. *Id.* art. 1(2), 19 U.S.T. at 6225, 606 U.N.T.S. at 268.

47. 8 U.S.C. § 1157(a)(1)–(2) (2012).

48. 8 U.S.C. § 1158 (2012).

49. *See Affirmative Asylum Scheduling Bulletin*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-scheduling-bulletin (last updated Nov. 6, 2017).

50. *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states (last updated Oct. 19, 2015) (hereinafter *Obtaining Asylum*).

51. *Id.*

52. *Id.*

53. *Id.*

54. DHS, ORGANIZATIONAL CHART 23 (2017), https://www.dhs.gov/sites/default/files/publications/Public%20Org%20Charts%202017.08.15.pdf.

55. *Obtaining Asylum*, *supra* note 50.

56. *Affirmative Asylum Scheduling Bulletin*, *supra* note 49.

57. *Id.* These processing times do not include children or people whose interviews have been rescheduled because their applications are prioritized. *Id.*

Arguably, these processing times create an unofficial numerical limitation, though it changes yearly.

Those claiming asylum after they are already in removal proceedings file defensive applications.[58] Immigration Judges preside over these proceedings, and the Immigration Judges are part of the Executive Office for Immigration Review (EOIR).[59] The EOIR is housed under the Department of Justice (DOJ), in a completely separate agency from the DHS.[60] Processing times for defensive claims of asylum are supposed to be less than 180 days.[61] However, only an average of thirty-five percent of defensive asylum claims received per year were processed between 2012 and 2016.[62] The number of claims received did not change significantly from 2011 to 2015, though there was a larger increase in 2016.[63] Further, according to the American Immigration Council, the Immigration Courts and RAIO had a combined backlog of more than 620,000 cases in 2016.[64] That backlog means that both defensive and offensive asylum claims are taking significantly longer to process, and, according to the American Immigration Council, the actual average wait time for defensive claims in Immigration Court for asylum seekers is more than three years.[65]

Overall, the EOIR and the USCIS together have granted asylum to an average of 22,573 people per year from 1990 to 2014.[66] The smallest number of asylum grants was 5,035 in 1991 and the largest number was 39,148 in 2001.[67] In general, there was an upward trend of asylum claims granted from 1990 through 2001, and a

58. Defensive claims are processed by the Executive Office of Immigration Review (EOIR), which is a part of the Department of Justice, while offensive claims are processed by the USCIS, which is a part of the Department of Homeland Security. *Obtaining Asylum*, *supra* note 50.

59. *See* DOJ, *Executive Office for Immigration Review*, https://www.justice.gov/eoir (last visited Nov. 19, 2017).

60. *See id.*

61. DOJ, UNIFORM DOCKETING SYSTEMS MANUAL Intro-8 (rev. 2013), https://www.justice.gov/sites/default/files/eoir/legacy/2014/04/07/DocketManual_12_2013.pdf.

62. To determine the average claims processed, this Note included claims that were denied or granted as processed in; claims that were abandoned, withdrawn, or other were not included. DOJ, ASYLUM STATISTICS: FY2012-FY2016 (2017), https://www.justice.gov/eoir/file/asylum-statistics/download.

63. *Id.* (the average number of asylum claims received between 2012 and 2016 was 53,375, with the largest number of claims being 65,218 in 2016 and smallest number being 47,534 in 2011).

64. AM. IMMIGRATION COUNCIL, ASYLUM IN THE UNITED STATES 4 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_in_the_united_states.pdf.

65. *Id.* Affirmative applications currently take at least two years. *Id.*

66. DHS, 2014 YEARBOOK OF IMMIGRATION STATISTICS 43, tbl.16 (2016), https://www.dhs.gov/sites/default/files/publications/DHS%202014%20Yearbook.pdf.

67. *Id.*

downward trend from 2001 through 2014, with no years reaching 30,000 granted asylum claims since 2002.[68] Between 1990 and 2014, the affirmative applications have accounted for an average of sixty-four percent of claims granted, although in 2006 and 2007 defensive applications accounted for the majority of claims: granted at fifty-one percent.[69] There may be many reasons for this trend in asylum applications granted, which peaked in 2001, including tightened security screening after 9/11 or possibly smaller appropriations in subsequent years.[70]

E. *What Particular Social Group Means in the Refugee Definition*

Both people who receive asylum status and those who receive refugee status must, at a minimum, meet the refugee definition, as codified by Congress in 1980.[71] One area of the definition that has resulted in significant litigation at both the Board of Immigration Appeals (BIA) and federal appellate level is the definition of "particular social group." To be a refugee or asylee, a person must have been persecuted or have a fear of being persecuted "on account of race, religion, nationality, membership in a particular social group, or political opinion."[72] The Convention itself does not provide a definition for those five grounds.[73] However, defining the first three grounds—race, religion, and nationality—has been a fairly straightforward process for courts overall.[74] Defining what political opinion

68. *Id.*

69. *Id.*

70. However, in the 2008 fiscal year, appropriations to USCIS amounted for only $81 million or 3.38% of total revenue, while fee revenue amounted for $2.5 billion or 96.15% of total revenue, so it seems unlikely that USCIS is very dependent on appropriations for staffing. *See* U.S. CITIZENSHIP AND IMMIGRATION SERVS., ANNUAL REPORT FOR FISCAL YEAR 2008 27 (2008) https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports/uscis-annual-report-2008.pdf.

71. The definition of a refugee is codified at 8 U.S.C. section 1101(a)(42) (2012). The determination of an asylee is outlined in 8 U.S.C. section 1158(b)(1)(a) (2012), which refers back to the refugee definition at section 1101(a)(42) (2012). Asylum seekers just need to meet the definition and apply for status within one year of entering the U.S., 8 U.S.C. § 1158(a)(2)(B) (2012), while refugee seekers must meet the definition and also comply with additional requirements, including security clearance and vulnerability assessments, imposed by the U.S. Refugee Admissions Programs. *U.S. Refugee Admissions Program FAQs*, U.S. DEP'T ST. (Jan. 20, 2017) https://www.state.gov/j/prm/releases/factsheets/2017/266447.htm.

72. 8 U.S.C. §1101(a)(42) (2012).

73. Convention, *supra* note 16.

74. JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 395–96 (Cambridge Univ. Press 2d ed. 2014) (1991) (advocating for a broad interpretation approach that "has been accepted without controversy in a wide range of state parties to the Convention:"). Nationality, which at times overlaps with race, has also been given a broad meaning. *Id.* at 398

consists of has resulted in a greater variance of definitions across jurisdictions.[75] However, most of the definitions of political opinion seem to define it broadly as having any opinion relating to the government or society.[76]

Defining particular social group (PSG) has been much more difficult. In common language, particular social group has no plain meaning, as people typically do not use those three words together. There is almost no drafting history in the Convention that signifies what the term meant to the drafters.[77] To interpret it too broadly would make the other grounds superfluous and go against the intention of the framers which was to have a definition that would create concrete obligations for the States that are parties to the Convention.[78] To interpret it too narrowly could also be contrary to the intention of the framers, because the narrower definition could result in a rejection of claims of people that are deserving of protection by the refugee definition.

("their claims to refugee protection may reasonably be determined on the basis of nationality as well as race"); *see also Calado v Minister for Immigration and Multicultural Affairs* [1998] 89 FCR 59, 67 (Federal Court) (Austl.). The United Nations Human Rights Committee's broad interpretation of religion in the International Covenant for Civil and Political Rights' right to freedom of religion has also been adopted by many state parties for the purpose of the Refugee Convention. *Compare* U.N. Human Rights Comm., General Comments Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, cmt. 22(48), ¶ 2, UN Doc. CCPR/C/21/Rev.1/Add.4 (Sept. 27, 1993) (interpreting freedom of religion to include "theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief") *with* Council Directive 2011/95, art. 10(1)(b), 2011 OJ (L 337/16) (hereinafter EU Directive) ("[T]he concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs.").

75. *Compare* GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 31 (1st ed. 1983) (defining "political opinion" as "any opinion on any matter in which the machinery of state, government and policy may be engaged") *and* Canada v. Ward, [1993] 2 S.C.R. 689, 746 (Can.) (adopting Goodwin-Gill and McAdam's definition) *with EU Directive*, *supra* note 74, art. 10(1)(e) (defining political opinion to "include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution . . . and to their policies or methods") *and* UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Article 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status for Refugees*, ¶ 45, UN Doc. HCR/GIP/09/08 (Dec. 22, 2009) (defining political opinion as one "not tolerated by the authorities or society and that are critical of generally accepted policies, traditions or methods").

76. *See generally* HATHAWAY & FOSTER, *supra* note 74, at 405–06.

77. The term was added by Sweden's delegate to the Conference of Plenipotentiaries as a last-minute amendment to the definition during the Conference and was adopted without discussion. HATHAWAY & FOSTER, *supra* note 74, at 423–24.

78. *See* U.N. ESCOR, Ad Hoc Comm. on Statelessness and Related Problems, 1st Sess., 3d mtg., UN Doc. E/AC.32/SR.3 at 13 (Jan. 26, 1950) (statement of Mr. Henkin of the United States) ("The obligations of signatory States must be accurately defined and that could not be done unless the categories to benefit were fixed . . . .").

In the United States, the body that is in charge of making standards for immigration law, including refugee law, is the BIA.[79] All immigration cases first go to an Immigration Judge, and then can be appealed to the BIA.[80] The BIA is housed under EOIR of DOJ.[81] Appeals from the BIA go up to the relevant circuit court that the Immigration Judge sits in.

In 1985, the BIA used the *ejusdem generis* principle[82] to create a definition for membership in a PSG in *Matter of Acosta*:

> [A] member of a group of persons all of whom share a common, immutable characteristic. . . . However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution under the Act, namely, something that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed. By construing 'persecution on account of membership in a particular social group' in this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.[83]

This "immutable characteristic test," or the "*Acosta* standard," as it later became known, was applauded by scholars and adopted widely across foreign jurisdictions. Lord Hope of the United Kingdom commented that the *ejusdem generis* test complemented the non-discrimination purpose of the Convention.[84] Canada adopted the immutable characteristic definition and also stated that PSG included membership in a group when the association to that group

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79. *Board of Immigration Appeals*, DOJ, https://www.justice.gov/eoir/board-of-immigration-appeals (last updated Oct. 2, 2017).

80. *Id.*

81. *See id.*

82. *Ejusdem generis* is a rule of interpretation that when general wording follows a class of items, that general wording is usually restricted to things of the same type as the listed items. *See ejusdem generis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

83. *In re* Acosta, 19 I.&N. Dec. 211 (B.I.A. 1985) *overruled in part on other grounds by* Mogharrabi, 19 I. & N. Dec. 439, 441 (B.I.A. 1987).

84. Shah and Islam v. Home Department, (1999) 2 AC 629, 656 (U.K.H.L., Mar. 25, 1999).

was fundamental to one's human dignity, as well as former membership in a group.[85] The circuit courts adopted it as well. This definition continued to be used in the United States for over twenty years, with case law sorting out what was and was not an immutable characteristic. Eventually, based on the case law that had developed, the BIA decided to refine the definition and create a more exacting standard.

II. CURRENT STATE OF THE PSG DEFINITION

When the BIA started revising the PSG definition, uniformity of acceptance of the PSG definition ended. The BIA first added two additional requirements, particularity and social visibility, to the *Acosta* standard in several decisions between 2006 and 2008 (the "2007 definition").[86] Some circuit courts accepted the definition citing *Chevron* deference,[87] while others rejected it, creating today's circuit split.[88]

Then, in 2014, the BIA, partially in response to criticism from certain circuits, clarified the definition and changed the social visibility requirement to social perception (the "2014 definition").[89] However, this new definition did not resolve the circuit split. The circuits that rejected the social visibility and particularity requirements in the 2007 definition have not adopted the new 2014 definition.[90] Further, the circuits that had accepted the social visibility and particularity definition now disagree whether the 2014 definition changes the 2007 definition.[91] To understand the basis for the current circuit split, an analysis of the two BIA definitions and the circuits' reactions to them is required.

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85. Canada v. Ward, (1993) 2 S.C.R. 689, 739 (Can.) (describing three possible categories of particular social groups: "(1) groups defined by an innate or unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.").

86. *See infra* Part II.A. To avoid confusion, this definition will be referred to as "the 2007 definition" in subsequent parts of the Note.

87. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

88. *See infra* Part II.B.

89. *See infra* Part II.C.

90. *See infra* Part II.D(2).

91. *See infra* Part II.D(3).

A. *The BIA Adds to the Particular Social Group Definition*

In several of its decisions between 2006 and 2008, the BIA modified the *Acosta* definition of PSG and added two requirements. First, in 2006, in *Matter of C-A-*, the BIA stated that a group's social visibility is an important consideration in identifying the existence of a PSG.[92] Second, the BIA added the particularity requirement to the PSG definition on top of the *Acosta* immutability test.[93] The particularity requirement meant that a group could not be defined "too loosely."[94] For example, the court in *Matter of A-M-E- & J-G-U-* held that the terms "wealthy" and "affluent" did not meet the PSG particularity requirement because they were too "amorphous."[95]

Subsequently, in *Matter of S-E-G-*, the BIA reaffirmed that PSG's require particularity and social visibility, and better defined those requirements.[96] The BIA stated that a group meets the particularity requirement if it is sufficiently distinct so that the society in question recognizes it as a discrete class of persons.[97] A group meets the social visibility requirement if its characteristics are "generally recognizable by others in the community."[98]

In *Matter of S-E-G-*, the BIA held that Salvadoran youths who were recruited by gangs met neither the social visibility nor the particularity requirements of a PSG.[99] The male applicant in the case tried to define his PSG as "male children who lack stable families and meaningful adult protection, who are from middle and low income classes, who live in the territories controlled by the MS-13 gang, and who refuse recruitment." The BIA held that this description was too amorphous because "people's ideas of what those terms mean can vary."[100] The female applicant's proposed PSG of family members who refuse MS-13 was likewise deemed too amorphous to meet the particularity requirement.[101] The applicants failed the social visibility requirement because they did not demonstrate that, in the gang's eyes, their proposed PSG was narrower than the general El Salvador population.[102]

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92. *In re* C-A-, 23 I. & N. Dec. 951, 951 (B.I.A. 2006).
93. *Id.* at 956–57; *see also In re* A-M-E-& J-G-U-, 24 I. & N. Dec. 69, 74 (B.I.A. 2007).
94. *In re* C-A-, 23 I. & N. Dec. at 957, 961 (rejecting the group of "noncriminal informants" as a PSG).
95. *In re* A-M-E-& J-G-U-, 24 I. & N. Dec. at 76.
96. *In re* S-E-G-, 24 I. & N. Dec. 579, 582 (B.I.A. 2008).
97. *Id.* at 584.
98. *Id.* at 586.
99. *Id.*
100. *Id.* at 585 (quoting Davila-Mejia v. Mukasey, 531 F.3d 624, 629 (8th Cir. 2008)).
101. *Id.*
102. *Id.* at 587.

The court in *Matter of E-A-G-*, a companion case published together with *Matter of S-E-G-*, held that a Honduran youth who resisted gang membership did not satisfy a PSG's social visibility requirement because they did not possess an identifying characteristic that would allow others in Honduras to recognize them as such.[103] Thus, both cases indicated that gang membership and resistance to gang membership would not satisfy the additional requirements of particularity and social visibility of a PSG.

B. *Circuit Courts React to the BIA's Addition of Particularity and Social Visibility Requirements to the PSG Definition*

After the BIA decided *Matter of S-E-G-* and *E-A-G-* and after asylum claim cases dealing with the PSG definition worked their way up to the circuit court level, a difference of treatment of the new BIA definition of PSG emerged among the circuit courts. Most circuits accepted the social visibility requirement. Others expressly applied *Chevron* deference and accepted both new requirements in the new definition.[104] And two circuits expressly rejected the social visibility requirement.[105]

1. Circuits Accepting New Definition of PSG Under *Chevron* Deference

The Fourth Circuit ruled that the new BIA definition was reasonable when it upheld the BIA's decision that ''young, Americanized, well-off Salvadoran male deportees with criminal histories who oppose gangs'' do not satisfy the requirements of a PSG.[106] The court held that the group failed all three PSG requirements: it lacked an immutable characteristic, was "too broad and amorphous" to satisfy the particularity requirement, and failed the social visibility requirement because it was not readily identifiable.[107] Because the Fourth Circuit found that the BIA's definition of PSG was reasonable, and

103. *In re* E-A-G-, 24 I. & N. Dec. 591, 595 (B.I.A. 2008).

104. *See, e.g.*, Orellana-Monson v. Holder, 685 F.3d 511, 521 (5th Cir. 2012); Rivera-Barrientos v. Holder, 666 F.3d 641, 649, 653 (10th Cir. 2012); Lizama v. Holder, 629 F.3d 440, 446–47 (4th Cir. 2011); Scatambuli v. Holder, 558 F.3d 53, 58 (1st Cir. 2009).

105. *See, e.g.*, Valdiviezo-Galdamez v. Att'y Gen. (*Valdiviezo-Galdamez II*), 663 F.3d 582, 604 (3d Cir. 2011); Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009).

106. Lizama v. Holder, 629 F.3d 440, 446–47 (4th Cir. 2011).

107. *Id.* at 447–48.

because PSG was not defined in the statute or regulation, the court deferred to the BIA's definition.[108]

The Fifth Circuit also applied *Chevron* deference when it held in *Orellana-Monson v. Holder* that the BIA's addition of social visibility and particularity to the PSG definition was valid because it was not "vague or ambiguous."[109] Further, the Fifth Circuit stated that "the BIA's current particularity and social visibility test is not a radical departure from prior interpretation, but rather a subtle shift that evolved from the BIA's prior decisions on similar cases and is a reasoned interpretation."[110] In that case, the court held that the proposed PSG—men who refused to join the Mara 18 gang—failed the particularity requirement because it was too broad and encompassed a "wide swath of society."[111] The court also held that the proposed PSG definition failed the social visibility requirement because no one in society, including the gang, was likely to view "nonrecruits" as a group, but only to view them as individual people who happen to go "against the gang's interest."[112]

The Tenth Circuit accepted the BIA's 2007 definition in *Rivera-Barrientos v. Holder* when it upheld a decision that "El Salvadoran women between ages twelve and twenty-five" met the particularity requirement but failed the social visibility requirement.[113] The court found that the particularity requirement "flows quite naturally from the language of the statute," and was therefore a reasonable reading of the statute.[114] Additionally, the Tenth Circuit reasoned that if the social visibility requirement was not read too narrowly, the BIA's addition of that requirement to the PSG definition was not "inconsistent" or "illogical" with the definition set out in *Matter of Acosta*, as past PSGs, such as kinship ties, can meet the social visibility requirement.[115]

The Ninth Circuit also found in *Ramos-Lopez v. Holder* that the BIA's new definition was reasonable and required *Chevron* deference because by not defining PSG in the Immigration and

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108. *Id.* at 446 (citing Zheng v. Holder, 562 F.3d 647, 654 (4th Cir. 2009)).

109. 685 F.3d 511, 521 (5th Cir. 2012); *see* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

110. *Id.*

111. *Id.* at 522.

112. *Id.*

113. 666 F.3d 641, 650 (10th Cir. 2012).

114. *Id.*

115. *Id.* at 652; *see* Gatimi v. Holder, 578 F.3d 611, 615–16 (7th Cir. 2009) (holding that the social visibility requirement was inconsistent with past case law that upheld PSG membership where members did not have a physically recognizable trait).

Nationality Act, Congress had implicitly authorized the BIA to resolve any ambiguity in the definition.[116] The court agreed with the BIA that "young Honduran men who have been recruited by MS-13, but who refused to join" were not a PSG.[117] The Ninth Circuit held that the BIA could reasonably determine that the group was not sufficiently particular because gangs target all young men in Honduras.[118] The court reasoned that the group was not socially visible in society because only the gang would recognize who resisted its recruitment, and that was only because it kept tabs on them.[119]

Lastly, the First Circuit held in *Scatambuli v. Holder* that the social visibility requirement is "relevant" to the analysis of whether a group is a PSG.[120] The *Scatambuli* court upheld the BIA's determination that the proposed group, "government informants," failed the social visibility requirement of a PSG.[121] Whether the First Circuit embraces the particularity requirement is unclear: the court did not discuss the particularity requirement, aside from stating that it is part of the BIA definition.[122]

2. Circuits Rejecting Social Visibility Requirement

The Seventh Circuit expressly rejected the social visibility requirement in *Gatimi v. Holder*.[123] It rejected the definition because it was inconsistent with a prior Seventh Circuit case, *Sepulveda v. Gonzales*,[124] and because it believed that the social visibility standard was nonsensical.[125] The *Gatimi* court gave three examples of groups the BIA had previously accepted as a PSG but have no socially visible characteristics: women at risk of female genital mutilation within tribes, homosexuals in homophobic societies, and former members of military police.[126] The court stated that because the BIA never

116. 563 F.3d 855, 859 (9th Cir. 2009).
117. *Id.* at 858, 860.
118. *Id.* at 861–62.
119. *Id.* at 862.
120. 558 F.3d 53, 60 (1st Cir. 2009).
121. *Id.* at 55–56.
122. *Id.* at 60.
123. 578 F.3d 611 (7th Cir. 2009).
124. *Id.* at 615; Sepulveda v. Gonzales, 464 F.3d 770, 771–72 (7th Cir. 2006). In *Sepulveda* the court held that a former employee could be a PSG under the *Acosta* standard and if the BIA wished to depart from that standard it must give reasons for the departure. 464 F.3d at 772.
125. *Gatimi*, 578 F.3d at 615.
126. *Id.* at 615–16 (referencing *In re* Kasinga, 21 I. & N. Dec. 357, 365–66 (B.I.A. 1996); *In re* Toboso-Alfonso, 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990); and *In re* Fuentes, 19 I. & N. Dec. 658, 662 (B.I.A. 1988)).

mentioned social visibility in those cases and then added the social visibility requirement without explaining how it was consistent with those past cases, the new definition was inconsistent with the *Acosta* definition.[127] In addition, the court reasoned that if a person is seeking asylum because he or she will be persecuted based on his or her membership in that group, "[he or she] will take pains to avoid being socially visible."[128]

Similarly, the Third Circuit held in *Valdiviezo-Galdamez v. Attorney General* (*Valdiviezo-Galdamez II*) that the addition of the particularity and social visibility requirements by the BIA was not entitled to *Chevron* deference because that would result in the agency adjudicating PSG asylum claims inconsistently or irrationally.[129] The Third Circuit noted the same BIA cases as the Seventh Circuit as examples of cases that met the PSG definition using the *Acosta* standard but would not satisfy the social visibility requirement.[130] It also favorably cited the Seventh Circuit's *Gatimi* decision.[131]

Turning to the particularly requirement, the Third Circuit refused to afford *Chevron* deference to the BIA, stating that it was "hard-pressed to discern any difference between the requirement of 'particularity' and the discredited requirement of 'social visibility.'"[132] The court held that because the added particularity and social visibility requirements to the PSG definition are a departure from its PSG definition in *Acosta*, the BIA must give a "principled reason" for the new definition, which the BIA has not done.[133] That case was remanded back to the BIA.[134]

C. *The BIA Clarifies Its Particular Social Group Definition in 2014*

In response to *Valdiviezo-Galdamez II*, the BIA clarified its definition of PSG in *Matter of M-E-V-G-*.[135] While the BIA conceded that there is some overlap between the social visibility and particularity

127. *Gatimi*, 578 F.3d at 616.

128. *Id.*

129. Valdiviezo-Galdamez v. Att'y Gen. (*Valdiviezo-Galdamez II*), 663 F.3d 582, 604 (3d Cir. 2011).

130. *Id.* ("[W]omen who are opposed to female genital mutilation [*Kasinga*, 21 I. & N. Dec. at 365–66], homosexuals required to register in Cuba ([*Toboso-Alfonso*, 20 I. & N. Dec. at 822–23], and former members of the El Salvador national police [*Fuentes*, 19 I. & N. Dec. at 662].").

131. *Id.* at 604–05.

132. *Id.* at 608.

133. *Id.* (quoting Johnson v. Ashcroft, 286 F.3d 696, 700 (3d Cir. 2002)).

134. *Id.* at 608–09.

135. 26 I. & N. Dec. 227 (B.I.A. 2014).

requirements, it did not remove either of the requirements.[136] Instead, it reiterated that particularity is meant to delineate outer limits to a PSG, because the immutable characteristic test is not always sufficiently precise in defining a group.[137]

Then the BIA renamed the "social visibility" requirement the "social distinction" requirement.[138] It emphasized that social distinction is not an "ocular" requirement and defined it as a requirement that society perceives, considers, or recognizes people in that PSG.[139] It further stated that the social distinction requirement refers to social recognition and is also derived from the statutory language of the asylee definition.[140] In contrast to the Third and Seventh circuits,[141] the BIA analyzed that the examples in *Matter of Kasinga*, *Matter of Toboso-Alfonso*, and *Matter of Fuentes* could meet its social distinction requirement because young women opposed to female genital mutilation (FGM), homosexuals, and former members of the national police could be perceived by their society as members of a unified group.[142]

The BIA stated that efforts of members of a PSG to hide their membership in that group would not deprive them of protected status under the social distinction requirement, though it did not explain how they could still be perceived by society if they were successful in hiding from society.[143] In the same case, the BIA stated that resistance to gang membership could, given a certain factual scenario, be a PSG, though its previous cases have generally not awarded PSG status to those resisting gang membership or past gang members.[144] For instance, the BIA stated that a case that involved gangs targeting homosexuals might satisfy the PSG definition.[145]

Matter of W-G-R- was published as a companion case to *Matter of M-E-V-G-*.[146] *Matter of W-G-R-* stated that the particularity requirement was added because "not every immutable characteristic is

136. *Id.* at 240–41.

137. *Id.* at 239.

138. *Id.* at 228.

139. *Id.* at 240.

140. *Id.*

141. Valdiviezo-Galdamez v. Att'y Gen. (*Valdiviezo-Galdamez II*), 663 F.3d 582, 604 (3d Cir. 2011); Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009).

142. *M-E-V-G-*, 26 I. & N. Dec. at 240 (referencing *In re* Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996); *In re* Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990); and *In re* Fuentes, 19 I. & N. Dec. 658 (B.I.A. 1988)).

143. *Id.*

144. *Id.* at 251.

145. *Id.*

146. *In re* W-G-R-, 26 I. & N. Dec. 208, 214 (B.I.A. 2014).

sufficiently precise to define a particular social group."[147] As a companion to *Matter of M-E-V-G-*, *Matter of W-G-R-* also held that the social distinction requirement could be satisfied with any perception by society of the group and not just visual perception.[148] The social visibility requirement was partly justified by reference to *Matter of C-A-*, which cited the UNHCR guidelines when it adopted the social visibility requirement.[149]

D. *Circuits React to the BIA's 2014 PSG Definition, Which Renamed the Social Visibility Requirement to Social Distinction*

After the BIA published *Matter of M-E-V-G-* and *Matter of W-G-R-*, revising the PSG definition once more, circuit courts again had the opportunity to either accept or reject the new definition. The circuits that had previously accepted the three-requirement definition have thus far adopted the new definition.[150] The two circuits that rejected the 2007 BIA definition have not indicated their acceptance of the BIA's new revised definition.[151] Further, there is now additional disagreement among the circuits that had accepted the 2007 definition on whether *Matter of M-E-V-G-* and *Matter of W-G-R-* changed the definition and whether cases must be remanded in light of the new decisions.[152]

1. Approval of the New PSG Definition

In November 2016, the Ninth Circuit reviewed an appeal of *Matter of W-G-R-*, the case where the applicant's proposed PSG was "former members of the Mara 18 gang in El Salvador who have renounced their membership."[153] While the court vacated the BIA's finding that the Immigration Judge was not clearly erroneous in denying the applicant's Convention Against Torture claim, it held that the BIA's definition of PSG with the particularity and social distinction requirements in *Matter of W-G-R* was reasonable and therefore entitled to *Chevron* deference.[154] Nonetheless, the court found that the proposed PSG did not meet the social distinction

147. *Id.* at 213.
148. *Id.* at 216.
149. *Id.* (citing *In re* C-A-, 23 I. & N. Dec. 951, 956–57 (B.I.A. 2006)).
150. *See infra* Part II.D(1).
151. *See infra* Part II.D(2).
152. *See infra* part II.D(3).
153. Reyes v. Lynch, 842 F.3d 1125, 1137 (9th Cir. 2016).
154. *Id.* at 1135, 1140–41.

requirement because gang members who renounce their membership are not distinct from current gang members or suspected gang members.[155]

The Sixth Circuit accepted the BIA's 2014 definition of PSG with the clarified particularity requirement and renamed social distinction requirement in *Reyna v Lynch*.[156] In that case, the Sixth Circuit refused to remand the applicant's claim back to the agency to determine whether "Americanized Mexican deportees" would qualify as a PSG.[157] It also upheld a BIA finding that an applicant's PSG lacked social distinction in *Zaldana Menijar v. Lynch*.[158] It noted that there was no evidence that the El Salvadoran society "perceives, considers, or recognizes" either of the applicant's two proposed PSGs: "El Salvadoran male youth, who were forced to actively participate in violent gang activities for the majority of their youth and who refused to comply with demands to show their loyalty through increasing violence [or] active and long-term former gang members."[159] The court's rejection of the claim was supported by the fact that the proposed PSG in this case was similar to the proposed PSG that was rejected in *Matter of W-G-R-*: "former members of the Mara 18 gang in El Salvador who have renounced their gang membership."[160]

The Fourth Circuit in *Oliva v. Lynch* cited the analysis in *Matter of M-E-V-G-* and *Matter of W-G-R-*,[161] and has not indicated that the new PSG definition, with the particularity and social distinction requirements, is unreasonable.[162] The court remanded *Oliva* back to the BIA because it found that the agency did not consider all the evidence the applicant provided to show that he was socially distinct. The applicant claimed he was part of a proposed PSG of people who left the MS-13 gang without its permission.[163] The BIA only rejected his example of employment discrimination as evidence of social distinction, but did not consider the existing rehabilitation programs for former gang members and statements by a community organizer that former gang members have a visible presence in church.[164]

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155. *Id.* at 1138.
156. 631 F. App'x. 366, 370–71 (6th Cir. 2015).
157. *Id.* at 370.
158. 812 F.3d 491, 499 (6th Cir. 2015).
159. *Id.* at 498–99 (citation omitted).
160. *Id.* at 499 (citation omitted).
161. 807 F.3d 53, 61 (4th Cir. 2015) (citing *In re* M-E-V-G, 26 I. & N. Dec. 227, 237 B.I.A.2014)).
162. *Id.*
163. *Id.*
164. *Id.*

The Eleventh Circuit in *Gonzalez v. Attorney General* upheld the 2014 definition's particularity requirement.[165] The court noted with approval that the BIA had reasoned that the applicant's proposed PSG of former gang members in *Gonzalez* was not "defined with any greater specificity" than the former gang members in *Matter of W-G-R-*.[166]

2. Rejection of the New PSG Definition

The two circuits that previously rejected the old 2007 PSG definition adopted by the BIA have not indicated that they will accept the new definition. In *Gutierrez v. Lynch* and *R.R.D. v. Holder*, the Seventh Circuit continued to perform the *Acosta* analysis and did not adopt the new clarified definition set out in *Matter of M-E-V-G-* and *Matter of W-G-R-*.[167] In *Guiterrez*, the Seventh Circuit implied it would not reject proposed PSGs that fail the particularity requirement.[168] The Third Circuit has so far declined to decide whether the new clarified definition in *Matter of M-E-V-G-* and *Matter of W-G-R-* rectifies the problems of the old definition that the Third Circuit held were present in *Valdiviezo-Galdamez II*.[169]

3. Disagreement Over Whether the New PSG Definition Changes the Previous Analysis of PSG

In addition to disagreement over whether the BIA definition is a reasonable interpretation of PSG, there is now new disagreement among the circuits that accepted the 2007 BIA definition: does the clarification in *Matter of M-E-V-G-* and *Matter of W-G-R-* change the definition of PSG substantially?

Many circuits have accepted the BIA's assertion that *Matter of M-E-V-G-* and *Matter of W-G-R-* merely clarified the previous PSG definition. The Sixth Circuit has held that the new definition has not

165. 820 F.3d 399, 404 (11th Cir. 2016).

166. *Id.* at 405.

167. *See, e.g.*, Gutierrez v. Lynch, 834 F.3d 800, 805 (7th Cir. 2016); R.R.D. v. Holder, 746 F.3d 807, 810 (7th Cir. 2014).

168. *Gutierrez*, 834 F.3d at 805.

169. *E.g.*, Edeki v. Att'y Gen., 658 F. App'x 643 (3d Cir. 2016) (finding it did not need to reach the issue of whether social distinction is the same as social visibility because the applicant also failed to meet the nexus requirement); Vaitkus v. Att'y Gen., 655 F. App'x 118, 123 (3d Cir. 2016) ("Regardless of *whether* the BIA's standard for 'particular social group' governs . . . .") (emphasis added); Sazo-Godinez v. Att'y Gen., 629 F. App'x 271, 275 (3d Cir. 2015).

"meaningfully chang[ed] the requirements for proving a particular social group."[170] The First Circuit has declined to remand cases because of the new definition, indicating, however, that if a case were to be decided on the basis of ocular social visibility, it would be a reason to remand the case back to the BIA.[171] The Tenth Circuit has also refused to remand cases based on the clarified definition of PSG in *Matter of M-E-V-G-* and *Matter of W-G-R-*.[172]

On the other hand, the Second Circuit remanded a case back to the BIA in light of the newly clarified definition of PSG in *Matter of M-E-V-G-* and *Matter of W-G-R-*.[173] It held that "remand is appropriate in this case following the agency's clarification of its approach."[174] The Ninth Circuit also remanded a case back to the BIA after *Matter of M-E-V-G-* and *Matter of W-G-R-*.[175]

III. PROPOSED REFORM

The BIA's revised definition of PSG in *Matter of M-E-V-G-* and *Matter of W-G-R-* has so far failed to garner unified approval from the circuits, and may have actually created more confusion. Both the 2007 and 2014 definitions that the BIA adopted lacked detailed reasoning, stated the standard in conclusory terms, and placed too much emphasis on a textual argument that misunderstood the purpose of the term "particular social group." However, instead of rejecting the BIA's definition and going back to the *Acosta* definition, this Note maintains that the essence of its definition can be salvaged.

This Note proposes that the Supreme Court review the circuit split regarding the PSG definition, reject *Chevron* deference awarded to the BIA by the majority of the circuits, and require the BIA to provide "principled reasons" for their definition. The Court should give guidance to the BIA on the amount of reasoning it must provide for the standards to be effective and it should review the agency's action after remand for consistency in its decision. This Note further suggests that the BIA adopt the reasoning proposed in the reform below.

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170. Alvarez-Mejia v. Lynch, 628 F. App'x 388, 390 (6th Cir. 2015).

171. Paiz-Morales v. Lynch, 795 F.3d 238, 243–44 (1st Cir. 2015) (holding that the proposed PSG "members opposed to gang membership" failed the particularity requirement).

172. Rodas-Orellana v. Holder, 780 F.3d 982, 994 (10th Cir. 2015).

173. Paloka v. Holder, 762 F.3d 191, 193, 197–99 (2d Cir. 2014).

174. *Id.* at 197.

175. Pirir-Boc v. Holder, 750 F.3d 1077, 1079 (9th Cir. 2014).

This Note also suggests that the BIA adopt the following reform: keep the *Acosta* immutable characteristic requirement, remove the particularity requirement, and keep the social distinction component. Additionally, the BIA should change the social distinction component from a requirement to a standard that can be met if there is a possibility that society can perceive the group. This reformed definition aligns more closely with the purpose of the Convention, which Congress meant to adhere to when it adopted the refugee definition in 1980.

A. *The BIA's 2007 and 2014 Definitions of PSG Are Not Entitled to* Chevron *Deference*

Chevron deference should not be applied to the 2007 and 2014 BIA definitions of PSG because they are inconsistent with the BIA's *Acosta* PSG definition and the BIA has not given "principled reasons" for the transformation of the *Acosta* definition. "Principled reasons" should be given when an agency departs from a previous standard,[176] like the BIA did here. Otherwise, the agency acts arbitrarily.[177] *Chevron* deference is given to agency regulations so long as they are not "arbitrary, capricious, or manifestly contrary to the statute."[178]

The BIA's revision of the PSG definition by adding the particularity requirement and the social visibility requirement (later renamed social distinction) was not a mere clarification of the PSG definition set out in *Acosta*; it was a transformation of that definition. Further, that revision is inconsistent with the *Acosta* definition. The inconsistency is most evident when viewed in light of the groups that were awarded PSG status prior to 2007 but would fail social visibility/social perception requirements after the creation of the 2014 definition.[179]

Although the Third and Seventh Circuits evaluated these cases as failing the social visibility requirement,[180] it is likely they would also fail the social perception requirement, despite the BIA's conclusory

176. Johnson v. Ashcroft, 286 F.3d 696, 700 (3d Cir. 2002).

177. *Id.*

178. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

179. *See, e.g.*, *In re* Kasinga, 21 I. & N. Dec. 357, 365–66 (B.I.A. 1996) (holding that women at risk of female genital mutilation are a PSG); *In re* Toboso-Alfonso, 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990) (holding that homosexuals in homophobic societies are a PSG); *In re* Fuentes, 19 I. & N. Dec. 658, 662 (B.I.A. 1988) (holding that former members of military police are a PSG).

180. Valdiviezo-Galdamez v. Att'y Gen. (*Valdiviezo-Galdamez II*), 663 F.3d 582, 604 (3d Cir. 2011); Gatimi v. Holder, 578 F.3d 611, 615–16 (7th Cir. 2009).

assertion that the groups meet the social distinction requirement.[181] The BIA did not explain *how* a society can "perceive" a PSG other than visibly, but merely stated that any perception, consideration, or recognition would suffice.[182] It is unlikely that the society in *Matter of Kasinga* would perceive,[183] including in a non-ocular way, women who are at risk of Female Genital Mutilation as a separate group. Likewise, it is unlikely that homosexuals in *Matter of Toboso-Alfonso* or former members of military police in *Matter of Fuentes* would have met the social distinction requirement,[184] because it is hard to imagine how they would have been perceived by their society in a non-ocular way when they were not perceived visually.

Since the BIA has not provided a consistent definition for PSG, and has not given "principled reasons" for its definition, it is acting arbitrarily.[185] The BIA has failed to provide a reasonable explanation for the new definition or justify the change.[186]

B. *Reforming the Definition*

The BIA should reform the PSG definition and include clear guidance for Immigration Judges to follow when they are applying the definition to a fact pattern. First, the BIA should keep the *Acosta* immutable characteristic requirement because that standard was supported by clear reasoning for its adoption and was accepted worldwide. Second, the BIA should remove the particularity requirement, because when the first part of the definition is applied properly—the immutable characteristic—it encompasses the particularity requirement. When used in the PSG definition, immutable does not only mean a characteristic that one cannot change or should not be forced to change, but also a characteristic that allows one to be categorized; having a nose is not something you can change, but it is not something that would be an immutable characteristic for purposes of a PSG.

Finally, the BIA should keep the social distinction requirement—but change it from a rigid requirement to a more flexible standard

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181. *In re* M-E-V-G-, 26 I. & N. Dec. 227, 240 (B.I.A. 2014).

182. *See id.* at 234–36.

183. 21 I. & N. Dec. 357 (B.I.A. 1996).

184. *In re* Toboso-Alfonso, 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990); *In re* Fuentes, 19 I. & N. Dec. 658, 662 (B.I.A. 1988).

185. Johnson v. Ashcroft, 286 F.3d 696, 700 (3d Cir. 2002).

186. *See* Salameda v. INS, 70 F.3d 447, 450 (7th Cir. 1995) (holding that the BIA "may not abandon an interpretation without an explanation" when it issued a decision that there was no "extreme hardship" to a deportee without considering his community assistance though it considered in prior cases when determining "extreme hardship").

that can be met if there is a possibility that society can perceive the group. The social perception requirement should be kept because it can offer guidance to Immigration Judges that can help them analyze whether a fact pattern contains a PSG. It should be changed to a more fluid standard because it is difficult to determine with certainty if a group is perceived in a society foreign to the Immigration Judge.

1. The *Acosta* Immutable Characteristic Should Remain Part of the PSG Definition

The *Acosta* immutable characteristic standard should remain part of the PSG definition. Not only has it been adopted by all of the circuit courts, but it has also been widely accepted by scholars and courts worldwide.[187] By requiring a PSG to be defined by an immutable characteristic that the PSG member "cannot change, or should not be required to change because it is fundamental to their individual identities," courts will keep out frivolous claims while remaining flexible enough to accommodate new types of refugees as the world's understanding of protected grounds evolves.[188]

2. The Particularity Requirement Should Be Removed From the PSG Definition

The particularity requirement should be removed from the PSG definition because it does not add anything to the immutable characteristic requirement. Examples of proposed PSG terms like "wealthy" or "affluent" that failed the particularity requirement as being too "amorphous"[189] would have also failed the immutable characteristic requirement: being wealthy is not unchangeable and it is widely agreed that being wealthy is not so fundamental to one's identity that one should not be required to change it—unlike sexual orientation. Further, the particularity requirement often blends in with the social distinction requirement.[190]

One further reason that the particularity requirement should be removed is that the other four grounds—race, nationality, religion, and political opinion—do not contain such a requirement. Having

187. *See supra* note 77 and accompanying text.

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

189. *In re* A-M-E-& J-G-U-, 24 I. & N. Dec. 69, 76 (B.I.A. 2007).

190. Valdiviezo-Galdamez v. Att'y Gen. (*Valdiviezo-Galdamez II*), 663 F.3d 582, 608 (3d Cir. 2011).

an additional requirement for the PSG definition does not make sense and is contrary to the reasons for adopting the immutable characteristic requirement in *Acosta*. The *ejusdem generis* principle requires the interpreter to find what is common among the other terms when determining the meaning of the term, not set that term completely apart.

3. The Social Distinction Requirement Should Be Revised to a Standard That Requires the Fact-Finder to Determine if a Society *Could* Perceive the Group as a PSG

The social distinction requirement involves a detailed fact-based inquiry into whether a foreign society recognizes an asylum seeker's PSG membership.[191] Such a detailed inquiry is very difficult for Immigration Judges to accurately perform because they often lack the time and resources to fully investigate a case. Additionally, such judges may not have all the evidence at their disposal. Changing the social distinction element from a requirement to a more lenient standard that requires the Immigration Judge to determine if there is a possibility that the group is socially distinct,[192] would counter the inadequacy of evidence and resources available for making that determination.

Further, such flexibility would allow the judge to account for instances when different parts of the society in question perceive membership in that PSG. After all, the meaning of society is ambiguous and could include meanings as diverse as the entire country, a region, a town, a village, or an industry.

Part of the motivation for the addition of the social distinction requirement, like the particularity requirement, seems to stem from a desire to limit the perceived floodgates problem that could result if only the immutable characteristic requirement is part of the PSG definition.[193] However, the floodgate problem can be better dealt

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191. *See, e.g., In re* M-E-V-G-, 26 I. & N. Dec. 227 (B.I.A. 2014).

192. For example, family members of gang members would likely meet this standard, as it is likely that the community recognizes gang members, and therefore it is possible they are also aware of who the gang members' families are. *See* Oscar Martinez et al., *Killers on a Shoestring: Inside the Gangs of El Salvador*, N.Y. TIMES (Nov. 20, 2016), https://www.nytimes.com/2016/11/21/world/americas/el-salvador-drugs-gang-ms-13.html?mcubz=0 (Gangs in El Salvador "extort about 70 percent of businesses.").

193. *See* Maria S. Hwang, Note, *Blood Relations: Analyzing Kinship Based, Gang-Related Asylum Claims Under the Lens of Understanding "Particular Social Groups"*, 21 SUFFOLK J. TRIAL & APP. ADV. 134, 134–36 (2016) (discussing the tougher immigration policies in response to the surge in immigrants escaping gang violence, including inconsistent approaches to asylum claimants whose status is based on their association with gangs).

with in other parts of the refugee definition, such as the nexus requirement, the criminality bar, and the overall difficulty of the asylum process.[194] In addition, the Convention was enacted to provide relief to millions of displaced people after World War II, so it was meant to accommodate large groups—though it did not include economic migrants or people fleeing from natural disasters. Because the Convention was originally meant to provide relief on a large scale, the fact that the PSG definition could result in a large group of people eligible for refugee status is not a good reason in and of itself to arbitrarily narrow the definition.[195]

Moreover, the floodgates concern is overstated. The combined percentage of asylees and refugees that the United States takes in is miniscule in comparison to the total number of refugees in recent years.[196] The number of people being granted asylum has gone down significantly, not up, since 2001.[197]

Lastly, having the social distinction requirement is problematic because the other four grounds—race, nationality, religion, and political opinion—do not contain such a requirement, and it is possible certain nationalities, religions, and political opinions would fail the social perception requirement in certain societies. If an Immigration Judge were instead required to make a judgment on whether there is a possibility that society recognizes a certain nationality, religion, or political opinion, most would probably pass. This would eliminate the inconsistency of choosing a definition that is contrary to the *ejusdem generis* principle responsible for the adoption of the immutable characteristic standard.

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194. Gabriela Corrales, *Justice Delayed Is Justice Denied: The Real Significance Of* Matter Of A-R-C-G-, 26 BERKELEY LA RAZA L.J. 70, 86 (2016).

195. *See id.* ("[A]sylum law is designed to protect massive groups of people during times of great persecution, so size alone should never constrain good policy.").

196. Total refugees have numbered over eight million per year since 1982, and in some years rose to over fourteen million. Brian Foo, *Distance from Home—Translating Global Refugee Movement to Song*, Vimeo (July 7, 2015, 11:17 AM), https://vimeo.com/132833445. In contrast, the United States has granted asylum to an average of 22,573 people per year, or 0.10% of the worldwide refugee population. *See* DHS, 2014 Yearbook of Immigration Statistics, *supra* note 66, at 43, tbl.16 (listing the number of individuals granted asylum from 1990-2014); UNHCR, *Statistics at a Glance*, http://www.unhcr.org/en-us/figures-at-a-glance.html (last visited Nov. 20, 2017) (showing the worldwide refugee population to be 22.5 million). Even combined with the average 79,329 refugees accepted, the United States accounts for the relocation of only .45% of the worldwide refugee population. *See Cumulative Summary of Refugee Admissions*, Bureau of Population, Refugees, and Migration, U.S. Dep't St. Archive (Dec. 13, 2015), https://2009-2017.state.gov/j/prm/releases/statistics/251288.htm (showing the total number of refugees admitted to the United States from 1975 to 2014, which averages to 79,329.1 refugees admitted per year); *Statistics At a Glance*, *supra* note 196 (showing the worldwide refugee population to be 22.5 million).

197. *See* DHS, 2014 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 66, at 43, tbl.16.

C. *The Proposed Reform Would Honor the Convention's Purpose Better than the BIA's 2007 and 2014 Definitions*

When Congress amended the refugee definition in the Refugee Act of 1980, the main purpose of that amendment was to adopt the Convention definition of refugee.[198] Although the Protocol is not self-executing and therefore does not have the force of law, courts must follow the general rule set out in *Murray v. Schooner Charming Betsy* that "an Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains."[199] Therefore, a definition that honors the Convention's and Protocol's purpose and the legal obligations on the United States of that treaty is better than a definition that is contrary to the Protocol's purpose. Keeping the current BIA definition would be contrary to the purpose of the Protocol because it unnaturally narrows the definition of refugee and makes the PSG element superfluous.

Values that were central to the Protocol and Convention centered on protecting people fleeing persecution because of the five nexus grounds: race, nationality, religion, political opinion and particular social group. Later, the Protocol and Convention "figured in the development of the fundamental principle of non-discrimination in general international law."[200] Arbitrarily narrowing the definition would go against these values.

D. *The Proposed Reform Is a Better Option Than Simply Going Back to the* Acosta *Definition*

Although many have advocated for a return to the *Acosta* standard,[201] after ten years of the BIA adhering to the narrower PSG definition and with the majority of the circuits deferring to that

198. Khan v. Holder, 584 F.3d 773, 783 (9th Cir. 2009) ("[T]he Refugee Act of 1980 . . . sought to bring United States refugee law into conformity with the Protocol.") (citations omitted).

199. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); *see also* Khan v. Holder, 584 F.3d 773, 783 (9th Cir. 2009) (citing the quotation in the refugee context).

200. GOODWIN-GILL, *supra* note 75, at 39.

201. *E.g.*, Kenneth Ludlum, *Defining Membership in a Particular Social Group: The Search for a Uniform Approach to Adjudicating Asylum Applications in the United States*, 77 U. PITT. L. REV. 115, (2015); Jillian Blake, Essay, *Getting to Group Under U.S. Asylum Law,* 90 NOTRE DAME L. REV. ONLINE 167 (2015); Kathleen M. Mallon, Note, *Assessing the Board of Immigration Appeals' Social Visibility Doctrine in the Context of Human Trafficking*, 89 CHI.-KENT L. REV. 1169 (2014); Isaac T.R. Smith, Note, *Searching for Consistency in Asylum's Protected Grounds*, 100 IOWA L. REV. 1891 (2015); Nitzan Sternberg, Note, *Do I Need to Pin a Target to My Back?*, 39 FORDHAM URB. L.J. 245 (2011). The Third and Seventh Circuits currently use the *Acosta* standard instead of the

definition, the time has passed for returning to that standard. Instead, a revision of the standard that removes the particularity requirement and makes the social distinction requirement a flexible standard would be a better solution. The Third Circuit indicated that it would accept the BIA definition if it gave "principled reasons" for its revision of the *Acosta* standard[202] and the Seventh Circuit noted that the BIA did not explain sufficiently how the definition is consistent with the *Acosta* standard.[203] Adopting the revised definition this Note proposes would add a reason for keeping the social distinction requirement—to give additional guidance to Immigration Judges analyzing a potential PSG—while still maintaining consistency with the *Acosta* standard, thereby satisfying the Third and Seventh Circuits.

CONCLUSION

Having the Supreme Court step in and give clear guidance to the BIA on revising the PSG definition is appropriate because there has not been consistency among the circuits since 2007 and because the BIA failed to provide consistency with its revision in 2014. Requiring the BIA to provide "principled reasons" for the definition and reforming the social distinction requirement into a standard is an excellent middle ground between simply deferring to the BIA or continuing with the old *Acosta* definition. This approach allows past cases where a PSG was found to remain consistent with the old definition and the new definition. A decision from the Supreme Court giving clear guidance to the BIA on the revision of the PSG definition would finally end more than ten years of inconsistency and uncertainty.

BIA definition. *See, e.g.,* Gutierrez v. Lynch, 834 F.3d 800, 805 (7th Cir. 2016); Valdiviezo-Galdamez v. Att'y Gen. (*Valdiviezo-Galdamez II*), 663 F.3d 582, 604 (3d Cir. 2011).

202. *Valdiviezo-Galdamez II*, 663 F.3d at 608.

203. Gatimi v. Holder, 578 F.3d 611, 615–16 (7th Cir. 2009).