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Give Me Your Tired, Your Poor, Your Particular and Socially Visible Masses: The Eighth Circuit's New Standard Governing Particular Social Group Asylum Applications After *Gaitan v. Holder*, 671 F.3d 678 (8th Cir. 2012)

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Give Me Your Tired, Your Poor, Your Particular and Socially Visible Masses: The Eighth Circuit’s New Standard Governing Particular Social Group Asylum Applications After *Gaitan v. Holder*, 671 F.3d 678 (8th Cir. 2012)

TABLE OF CONTENTS

I. Introduction	432
II. Background	434
A. Seeking and Attaining Asylum in the United States	434
B. The Evolution of Particular Social Group	435
1. International Asylum Standards	435
2. Federal Agency Interpretation and Judicial Deference	436
a. <i>In re Acosta</i>	437
b. The Rise of Social Visibility and Particularity	437
c. One Summer Day in 2008: <i>In re S-E-G-</i> and <i>In re E-A-G-</i>	438
C. <i>Gaitan v. Holder</i>	439
1. Facts and Procedural History	439
2. Majority Opinion	440

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3. Concurring Opinion	440
III. Analysis	441
A. Grounds for Overturning <i>Gaitan</i>	441
1. Neither <i>Constanza</i> nor <i>Ortiz-Puentes</i> Was Controlling Precedent	441
2. The New Particular Social Group Formulation Adopted from the BIA Is Arbitrary and Capricious, and Thus Should Not Be Given <i>Chevron</i> Deference	443
a. The BIA's New PSG Formulation Is Inconsistent with Past Interpretation	443
b. The BIA Departed from <i>Acosta</i> Without Properly Explaining Its Reasons	445
b. The New BIA Formulation Will Lead to Arbitrary and Capricious Results	449
B. A Return to <i>Acosta</i> and the Immutable Characteristics Test	451
IV. Conclusion	452

I. INTRODUCTION

For many noncitizens today, the law of asylum exists as the sole route to lawful residence in the United States. The safety and relief that the mere borderlines of our nation secure for some of the most desperate and oppressed are accessed only through this one body of law. Though it may not say so on the pedestal of the Statue of Liberty, passage through Emma Lazarus's "golden door"¹ (or, in other cases, permission to stay on this side of the door) for "the homeless, tempest-tost"² requires, for many, navigation through the modern obstacles of asylum law. Needless to say, there is not merely one door to this country. Nor is there a single key that opens them all. Whether a claim of asylum is successful and, therefore, whether a noncitizen is able to enjoy the refuge that this country provides, depends very much on what part of the country the noncitizen inhabits.

Those seeking asylum in the vast expanse of the American Midwest may notice that the door has recently gotten smaller. In *Gaitan v. Holder*,³ the Eighth Circuit Court of Appeals fundamentally changed the requirements of attaining asylee status by formally requiring that a particular social group (PSG), one of the protected asylum classes in the Immigration and Nationality Act⁴ (INA), possess

1. EMMA LAZARUS, *THE NEW COLOSSUS* (1883).

2. *Id.*

3. *Gaitan v. Holder*, 671 F.3d 678 (8th Cir.), *cert. denied*, No. 11-1525, 2012 WL 2367600 (U.S. Oct. 29, 2012).

4. 8 U.S.C. § 1101-1537 (2006).

the limiting characteristics of “social visibility” and “particularity.”⁵ At first glance, *Gaitan* does not appear to be the culprit in altering the asylum scheme in the Eighth Circuit, as the court merely purported to “follow” two of its own recent cases,⁶ *Constanza v. Holder*⁷ and *Ortiz-Puentes v. Holder*,⁸ which adopted the particularity and social visibility requirements established by the Board of Immigration Appeals⁹ (BIA). However, neither *Constanza* nor *Ortiz-Puentes* addressed the issue of whether the BIA acted “arbitrarily and capriciously in adding the requirements of ‘social visibility’ and ‘particularity’ to its definition of ‘particular social group.’”¹⁰ By answering no, the *Gaitan* majority unequivocally changed particularity and social visibility from being “some of the many factors in the holistic analysis of the issue to absolute prerequisites to establishing membership in a particular social group”¹¹ and thus took sides in the split among the federal circuits.

The Eighth Circuit’s decision in *Gaitan* was a momentous development in federal immigration jurisprudence and will have dire effects on asylum seekers in the American Midwest. The decision illuminates a unique aspect of immigration law¹²: one who seeks asylum on the basis of a PSG in Illinois (the Seventh Circuit) may be admitted,¹³ while the same noncitizen may be excluded in Nebraska (the Eighth Circuit) for not meeting the particularity and social visibility criteria now solidified by *Gaitan*. This characteristic is especially important as to asylum, where decisions can potentially mean the difference between life and death of the petitioner.¹⁴ In Part II, this Note traces

5. *Gaitan*, 671 F.3d at 681–82.

6. *Id.* at 681.

7. *Constanza v. Holder*, 647 F.3d 749 (8th Cir. 2011).

8. *Ortiz-Puentes v. Holder*, 662 F.3d 481 (8th Cir. 2011).

9. “The highest administrative tribunal for interpreting and applying the United States immigration law, esp. reviewing appeals from adverse decisions of immigration judges and district directors of the Department of Homeland Security.” BLACK’S LAW DICTIONARY 197 (9th ed. 2009).

10. *Gaitan*, 671 F.3d at 682 (Bye, J., concurring).

11. *Id.* at 685.

12. See Matthew Shelton Nestrud, *Misguided Interpretation Is Not “Immutable”: A Critique of the Board of Immigration Appeals’ Interpretation of “Membership in a Particular Social Group” Under United States Asylum Law—A Proposed Standard*, 5 J. MARSHALL L. J., 597, 607–08 (2012) (“Decisions by federal Courts of Appeal are binding on the BIA only in cases arising from the circuit in which the applicant applied for asylum.”).

13. See, e.g., *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009); *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

14. See *Ardestani v. I.N.S.*, 502 U.S. 129, 140 (1991) (Blackmun, J., dissenting) (“The alien’s stake in [a deportation] proceeding is enormous (sometimes life or death in the asylum context)”); *Albathani v. I.N.S.*, 318 F.3d 365, 378 (1st Cir. 2003) (“Immigration decisions, especially in asylum cases, may have life or death consequences, and so the costs of error are very high.”); *Rodriguez-Roman v. I.N.S.*, 98

the relatively recent history of asylum law, with a specific focus on the particularity and social visibility requirements, to understand the basis on which the Eighth Circuit took sides in this federal circuit split. Part III of this Note criticizes the prudence of *Gaitan*'s holding in casually accepting the BIA's new PSG formulation and proposes the Eighth Circuit rely on the original PSG standard set out in *In re Acosta*¹⁵ in future cases.

Gaitan unjustifiably moved the Eighth Circuit to a stricter, more exclusive vision of asylum law and gave legal credence to an arbitrary and capricious PSG formulation created by the BIA. This Note proposes the Eighth Circuit overturn *Gaitan* insofar as it adopted the BIA's new PSG formulation¹⁶ and revert back to the *Acosta* standard that most fairly governs federal asylum law.

II. BACKGROUND

A. Seeking and Attaining Asylum in the United States

Because immigration is a highly administrative body of law in the United States, inquiry into the status of noncitizens relies heavily upon federal statutes and regulations. The premier source of this law is the expansive INA. In order to qualify for asylum under this legislation, an applicant must meet one of the five protected grounds under the statutory definition of "refugee"¹⁷:

[A]ny person who is outside any country of such person's nationality . . . 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.¹⁸

This Note will focus only upon the protected ground of membership in a particular social group.

Petitions for asylum are categorized as either "affirmative" or "defensive," depending on the status of the applicant at the time of her application: noncitizens who are in legal nonimmigrant status file "affirmative" asylum applications, whereas "defensive" asylum applications are filed in response to removal proceedings already instituted against the noncitizen.¹⁹ Defensive asylum applications are exclu-

F.3d 416, 432 (9th Cir. 1996) (Kozinski, J., concurring) (noting the "life or death" importance of judicial review in asylum cases).

15. *Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985), *overruled on other grounds* by Mogharabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

16. The Eighth Circuit can overturn its own precedent if sitting en banc. See U.S. v. Billue, 576 F.3d 898, 904 (8th Cir. 2009) (quoting U.S. v. Mickleson, 433 F.3d 1050, 1052 (8th Cir. 2006)).

17. Immigration and Nationality Act § 208, 8 U.S.C. § 1158(b)(1)(A) (2006).

18. *Id.* § 1101(a)(42)(A) (emphasis added).

19. Nitzan Sternberg, *Do I Need to Pin a Target to My Back?: The Definition of "Particular Social Group" in U.S. Asylum Law*, 39 FORDHAM URB. L.J. 245, 256 (2011)

sively adjudicated by an Immigration Judge (IJ) who makes the initial determination of whether the applicant meets the statutory definition of “refugee.”²⁰ If the applicant receives an adverse determination, the IJ’s decision can be appealed to the BIA.²¹ While severely limited in reviewing the IJ’s findings of fact,²² the BIA is allowed to “review questions of law, discretion, and judgment” of IJ decisions *de novo*.²³ BIA decisions are then appealed to the federal circuit in which the IJ made the initial determination.²⁴

B. The Evolution of Particular Social Group

1. *International Asylum Standards*

Modern asylum law can be traced back to international standards promulgated in the immediate post-World War II era Convention Relating to the Status of Refugees²⁵ (1951 Convention).²⁶ Adopted by the United Nations General Assembly, the 1951 Convention was written to establish a worldwide standard of refugee and asylee status.²⁷ To that end, it defined “refugee” as a person who,

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in 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.²⁸

Though not a signatory of the 1951 Convention,²⁹ the United States would honor this standard by ratifying the 1967 Protocol Relating to the Status of Refugees³⁰ (1967 Protocol), which incorporated the original 1951 Convention definition.³¹ Though the Protocol was unenforce-

(citing 3-33 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 34.02 (2010)).

20. See 8 C.F.R. § 208.2(b); § 208.14(a) (2012). The applicant has the burden of proof in establishing he or she meets that definition. 8 C.F.R. § 208.13(a).

21. See 8 C.F.R. § 1003.1(b)(9).

22. See *id.* § 1003.1(d)(3)(i).

23. *Id.* § 1003.1(d)(3)(ii).

24. See Immigration and Nationality Act § 242, 8 U.S.C. § 1252(b)(2).

25. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Convention].

26. Nestrud, *supra* note 12, at 602.

27. *Id.*

28. 1951 Convention, *supra* note 25, at 152.

29. Nestrud, *supra* note 12, at 602.

30. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 [hereinafter 1967 Protocol].

31. See *id.* at 6225.

able in U.S. courts,³² the definition of refugee therein would become federal law when Congress passed the Refugee Act of 1980.³³ The Refugee Act implemented, with very minor changes, the original definition of the 1951 Convention.³⁴ “Therefore, the definition of refugee in U.S. statutory law comes directly from international law.”³⁵

2. *Federal Agency Interpretation and Judicial Deference*

Though the INA’s provisions were drawn substantially from international standards, the United States created its own PSG formulations through federal agencies that are tasked with enforcing the statute. However, the INA does not expressly specify what a particular social group is or what it means to be a member thereof. This task of administering unclear legislative provisions is nothing new—the United States Supreme Court has given federal agencies great discretion in interpreting congressional legislation to make up for legislative ambiguities like those found in the INA.

*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*³⁶ is the landmark administrative law case that gave the BIA this power. In *Chevron*, the United States Supreme Court held that federal administrative bodies, like the BIA, have wide authority to interpret federal legislation they are charged with administering: “If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.”³⁷ This so-called “*Chevron* deference” keeps courts from interfering with an agency’s statutory construction, “unless [it is] arbitrary, capricious, or manifestly contrary to the statute.”³⁸ Even though the BIA acts as a “quasi-judicial body,”³⁹ the Supreme Court has held that *Chevron* applies to the Board’s statutory interpretations.⁴⁰ Because the INA leaves a large “gap” in the definition of PSG, and because *Chevron* only establishes remote outer limits on administrative interpretation, the BIA’s decisions regarding PSG membership have been and will continue to be given great weight by federal courts.

32. See *Abdelwahed v. I.N.S.*, 22 F. App’x 811, 815 (9th Cir. 2001) (holding that “the Protocol does not give [an asylum petitioner] any rights beyond what he already enjoys under the immigration statutes”).

33. Refugee Act of 1980, Pub. L. No. 96-212, § 201, 94 Stat. 102.

34. See *id.*

35. Sternberg, *supra* note 19, at 259.

36. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

37. *Id.* at 843–44.

38. *Id.* at 844.

39. *Lee v. I.N.S.*, 685 F.2d 343, 344 (9th Cir. 1982).

40. See *Negusie v. Holder*, 555 U.S. 511, 516–17 (2009).

a. In re Acosta

The BIA's first administrative interpretation of PSG came in *Acosta*.⁴¹ In that case, a citizen of El Salvador sought asylum on the basis of membership in a PSG consisting of taxi drivers who refused to give in to demands by guerilla groups to participate in work stoppages.⁴² Although the BIA construed the meaning of membership in a PSG in a relatively liberal manner, the respondent failed to meet asylee status under the statute "because [his] membership in the group . . . was something he had the power to change."⁴³ Because the class was not defined by an "immutable characteristic,"⁴⁴ the BIA would not recognize it as a PSG under the INA.

The BIA formulated its definition of PSG by looking to the other protected classes in the statute.⁴⁵ Using the doctrine of *ejusdem generis*, the BIA extrapolated from the nature of race, religion, nationality, and political opinion that a PSG consists of members who "share a common, immutable characteristic . . . that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or conscience."⁴⁶ Thus, under *Acosta*, the question for tribunals considering an asserted PSG became whether the noncitizen "was able by his own actions to avoid the persecution."⁴⁷

The BIA consistently adhered to the *Acosta* formulation for the next two decades in a myriad of asylum cases.⁴⁸ Federal circuit courts including the Eighth Circuit gave the same adherence.⁴⁹ However, this deference would not last forever, as the *Acosta* standard gave way to stricter, more limiting tests.

b. *The Rise of Social Visibility and Particularity*

The *Acosta* standard would control issues of membership in a PSG until, in 2006, the BIA began adding to the formula. That year, the BIA considered whether a group of "noncriminal drug informants

41. *Acosta*, 19 I. & N. Dec. 211, 234 (B.I.A. 1985), *overruled on other grounds by* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

42. *Id.*

43. *Id.*

44. *Id.* at 233.

45. *Id.*

46. *Id.*

47. *Id.* at 234.

48. See *Gaitan v. Holder*, 671 F.3d 678, 683 (8th Cir.) (Bye, J., concurring) (listing numerous BIA cases that relied on *Acosta* in granting asylum for those claiming membership in a particular social group), *cert. denied*, No. 11-1525, 2012 WL 2367600 (U.S. Oct. 29, 2012).

49. *Id.* See also C-A-, 23 I. & N. Dec. 951, 955-56 (B.I.A.) (discussing cases from multiple federal circuits that relied on the *Acosta* formulation), *aff'd*, *Castillo-Arias v. Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006).

working against [a] Cali drug cartel” should be granted asylum.⁵⁰ The BIA rejected the claim on two bases.⁵¹ First, the purported group failed to meet the *Acosta* standard, in that the immutable characteristic of the respondent’s “past experiences” did not warrant protection since he was “aware of the risks involved” and was thus “not in a position to claim refugee status [merely because] such risks materialize[d].”⁵² Second, and more remarkable, was the BIA’s holding that the purported group did not deserve protected status because it lacked “visibility,” concluding “the very nature of the conduct at issue is such that it is generally out of the public view.”⁵³ This case planted the seed of the BIA’s new PSG formulation, and the rule would germinate over a series of ensuing cases.

The BIA solidified the social visibility requirement in subsequent decisions. In 2007, the Board rejected the claim that membership in a group consisting of “affluent Guatemalans” warranted protected status.⁵⁴ While reaffirming the social visibility test set out in *In re C-A-*, the BIA also established “particularity” as a second prong of the PSG determination: “The characteristic of wealth or affluence is simply too subjective, inchoate, and variable to provide the sole basis for membership in a particular social group.”⁵⁵ Thus, the possession of an immutable characteristic⁵⁶ would not be enough for asylum applicants. Under the formulation created by cases like *In re C-A-* and *In re A-M-E & J-G-U-*, the BIA would also consider whether the applicant’s purported social group was socially visible and distinguishable on an objectively observable basis (i.e. *particular*). However, one year later the BIA would change these characteristics from being simply matters of consideration to determinative requirements.

c. One Summer Day in 2008: In re S-E-G- and In re E-A-G-

On July 30, 2008, the BIA decided two very similar cases that revised the formulation governing PSG status under the INA. One was *In re E-A-G-*,⁵⁷ a case in which the BIA denied asylum to an applicant who claimed membership in the PSGs of “young persons who are perceived to be affiliated with gangs” and “persons resistant to gang membership.”⁵⁸ The “companion”⁵⁹ to this case was *In re S-E-G-*,⁶⁰ in

50. *C-A-*, 23 I. & N. Dec. at 957.

51. *Id.* at 958–60.

52. *Id.* at 958.

53. *Id.* at 959–60.

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

55. *Id.* at 76.

56. *See supra* subsection II.B.2.a.

57. *E-A-G-*, 24 I. & N. Dec. 591 (B.I.A. 2008).

58. *Id.* at 593.

59. *Id.*

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

which the BIA also denied asylum to a purported member of two groups: “Salvadoran youths who have resisted gang recruitment, or family members of such Salvadoran youth.”⁶¹ In each case, the BIA rejected the asylum claim on the ground that neither possessed social visibility,⁶² establishing for the first time that such a characteristic, along with particularity, is *required* for protected status under the INA’s PSG classification.

In *In re S-E-G-*, the BIA claimed the “concepts of ‘particularity’ and ‘social visibility’ give greater specificity to the definition of a social group” and thus deferred to the judgment of the past decisions of *In re C-A-* and *In re A-M-E- & J-G-U-* regarding those concepts.⁶³ However, the Board subtly altered those prior decisions by defining the two group characteristics as “requirements” under the PSG formulation.⁶⁴ This alteration, in conjunction with the doctrine of *Chevron*, makes these two cases landmarks in federal asylum law, and they would play a crucial role in the Eighth Circuit’s decision in *Gaitan*.

C. *Gaitan v. Holder*

1. *Facts and Procedural History*

In 2000, a twelve-year-old Salvadoran boy named Oscar Alexander Granados Gaitan was approached by members of one of the most infamous gangs in the world, *Mara Salvatrucha*, or “MS-13.”⁶⁵ After two years of refusing invitations to join MS-13 and being subjected to violent threats against himself and his family, Gaitan entered the United States without inspection in April 2002.⁶⁶ The United States Department of Homeland Security (DHS) initiated removal proceedings against Gaitan in August 2007, and he was ordered to appear before an IJ for an individual merits hearing.⁶⁷

After admitting the factual allegations and conceding the charge of removability, Gaitan sought relief from removal by way of asylum, withholding of removal, and the Convention Against Torture on the grounds that he was a protected member of a PSG consisting of “young

61. *Id.* at 582.

62. *See id.* at 579; *E-A-G-*, 24 I. & N. Dec. at 591.

63. *S-E-G-*, 24 I. & N. Dec. at 582.

64. *See id.* at 584 (emphasis added) (“The essence of the ‘particularity’ requirement . . . is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.”); *see also id.* at 586–87 (emphasis added) (“The question whether a proposed group has a shared characteristic with the *requisite* ‘social visibility’ must be considered in the context of the country of concern and the persecution feared.”).

65. *Gaitan v. Holder*, 671 F.3d 678, 679 (8th Cir.), *cert. denied*, No. 11-1525, 2012 WL 2367600 (U.S. Oct. 29, 2012).

66. *Id.*

67. *Id.*

males that have been previously recruited by MS-13 and are opposed to the nature of gangs.”⁶⁸ The IJ rejected Gaitan’s claims on two bases: first, Gaitan’s testimony did not meet the required standard of credibility; and second, even if the credibility standard had been met, Gaitan’s purported PSG did not meet the standard set out in *In re S-E-G-*, which the IJ found to be controlling.⁶⁹

On appeal, the BIA issued a single-member decision overturning the IJ’s credibility ruling, yet affirming the decision on the merits.⁷⁰ The BIA concluded that the IJ correctly applied controlling weight to *In re S-E-G-*.⁷¹

2. *Majority Opinion*

The majority in *Gaitan* based its denial of the asylum petition on two prior cases: *Constanza*⁷² and *Ortiz-Puentes*.⁷³ These cases formally brought to the Eighth Circuit the concrete requirements of particularity and social visibility.⁷⁴ Both prior cases involved petitioners similar to Gaitan—individuals who had fled gang violence in Central America and sought asylum in the United States as members of PSGs consisting of persons resistant to gang activity.⁷⁵ And in both cases, the court adopted the BIA’s asylum standards of *In re S-E-G-*, denying the petitions on the basis that their purported social groups lacked particularity and social visibility.⁷⁶ Thus, the majority in *Gaitan* had the apparently simple task of following its previous decisions,⁷⁷ as those decisions so closely resembled the fact pattern of the petitioner at bar.

3. *Concurring Opinion*

But for being held by prior controlling decisions, the concurrence in *Gaitan* would have strongly dissented against the majority.⁷⁸ The problem for the concurrence was not so much that Gaitan’s case dif-

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Constanza v. Holder*, 647 F.3d 749 (8th Cir. 2011).

73. *Ortiz-Puentes v. Holder*, 662 F.3d 481 (8th Cir. 2011).

74. *Gaitan*, 671 F.3d at 681.

75. *See Constanza*, 647 F.3d at 752; *Ortiz-Puentes*, 662 F.3d at 483.

76. *See Constanza*, 647 F.3d at 753–54; *Ortiz-Puentes*, 662 F.3d at 483.

77. The court was bound pursuant to *Owsley v. Luebbers*, 281 F.3d 687, 690 (8th Cir. 2002) (“It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel.”).

78. *Gaitan*, 671 F.3d at 682 (Bye, J., concurring) (“I [concur] reluctantly . . . and write separately to express my disagreement with our circuit’s as-a-matter-of-course adoption of ‘social visibility’ and ‘particularity’ as requirements for establishing ‘membership in a particular social group.’”).

ferred from that of *Constanza* or *Ortiz-Puentes*, but the way in which the Eighth Circuit so effortlessly adopted the standards of the BIA:

While both decisions cited with approval the BIA's new approach to defining "particular social group," neither had before it the issue raised in this appeal: did the BIA act arbitrarily and capriciously in adding the requirements of "social visibility" and "particularity" to its definition of "particular social group." While I am convinced it did, I am nonetheless bound by circuit precedent and therefore concur in the result.⁷⁹

The concurrence concluded that because the BIA did not explain its reasons for diverting from the *Acosta* formulation, the additional PSG requirements should have been disregarded by the Eighth Circuit in *Constanza* and *Ortiz-Puentes*.⁸⁰ Nonetheless, the concurrence held true to controlling precedent.⁸¹

III. ANALYSIS

The Eighth Circuit should overturn *Gaitan* on two grounds. First, the court erred in holding that its decision was mandated by *Constanza* and *Ortiz-Puentes*, since *Gaitan* raised an issue that neither of the court's precedents answered—whether the BIA's new PSG standard is arbitrary and capricious. Second, the BIA's new PSG formulation is arbitrary and capricious under *Chevron*, and insofar as the Eighth Circuit gave deference to the BIA's unreasonable interpretation of the INA, *Gaitan* should be overturned. In its stead, the court should demand in future cases that the BIA return to its original *Acosta* formulation, a well-grounded and reasonable standard by which to adjudicate PSG claims.

A. Grounds for Overturning *Gaitan*

1. *Neither Constanza nor Ortiz-Puentes Was Controlling Precedent*

The court in *Gaitan* denied the applicant's claim of asylum on the grounds that two precedent Eighth Circuit cases, *Constanza* and *Ortiz-Puentes*, rejected petitioners with PSG claims indistinguishable from *Gaitan*'s.⁸² Citing *Owsley v. Luebbers*⁸³ for the proposition that "[i]t is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel,"⁸⁴ the court based its holding strictly on the outcome of those two prior cases.⁸⁵ While appearing to be doctrinally

79. *Id.*

80. *Id.* at 686.

81. *Id.*

82. *Gaitan*, 671 F.3d at 681.

83. 281 F.3d 687 (8th Cir. 2002).

84. *Id.* at 690.

85. *Gaitan*, 671 F.3d at 681.

correct, the court misapplied *stare decisis* by giving controlling weight to two cases that were decided on wholly different issues.

As Justice Bye in his concurrence argued, neither *Constanza* nor *Ortiz-Puentes* was decided against the contention that the BIA's requirements of particularity and social visibility are arbitrary and capricious.⁸⁶ Instead, in each case the court adopted the BIA's two requirements "as-a-matter-of-course"⁸⁷ and applied them to the petitioners at bar.⁸⁸ Because the petitioners in each prior case merely argued that their purported PSGs met the BIA's two requirements, the Eighth Circuit was not forced to weigh on the prudence of the new BIA formulation. *Gaitan* would not make the same mistake but would put the court to this test.

The court in *Gaitan* readily acknowledged the petitioner's claim: "Gaitan asserts that these requirements are not entitled to deference by this Court because they are 'conflicting, confusing, and illogical.'"⁸⁹ The court even appeared to treat the case as one of first impression: "At the time that he filed his appeal, Gaitan was correct that no panel of this Court had gone so far as to refer to social visibility and particularity as requirements."⁹⁰ Regardless of these acknowledgments, however, the court quickly and erroneously concluded that the BIA met the deference test merely because of its two prior decisions, *Constanza* and *Ortiz-Puentes*: "We are bound by the decision of earlier panels. As a result, this Court cannot find that the social visibility and particularity requirements articulated in *In re S-E-G* are arbitrary or capricious."⁹¹ The court made this conclusion even though the "decisions of earlier panels" never considered whether the requirements were arbitrary or capricious. This overly formulistic reasoning is a perversion of *stare decisis*, and it is not worthy of continued adherence. *Gaitan* and the rest of the Eighth Circuit deserved a hearing on the legal prudence of the BIA's new asylum formulation. Because both were robbed of this necessary juridical development, *Gaitan* should be overturned by future Eighth Circuit courts.

86. *Id.* at 682 (Bye, J., concurring).

87. *Id.*

88. See *Constanza v. Holder*, 647 F.3d 749 (8th Cir. 2011); *Ortiz-Puentes v. Holder*, 662 F.3d 481 (8th Cir. 2011); see also *Davila-Mejia v. Mukasey*, 531 F.3d 624 (8th Cir. 2008) (This was the first Eighth Circuit case to address the particularity and social visibility requirements, deferring to *In re A-M-E & J-G-U*. The court in *Davila-Mejia*, like *Constanza* and *Ortiz-Puentes*, also was not faced with the contention that the two requirements are arbitrary and capricious.).

89. *Gaitan*, 671 F.3d at 681.

90. *Id.*

91. *Id.* (citation omitted).

2. *The New Particular Social Group Formulation Adopted from the BIA Is Arbitrary and Capricious, and Thus Should Not Be Given Chevron Deference*

Chevron mandates that courts give deference only to agency statutory interpretations that are not “arbitrary, capricious, or manifestly contrary to the statute.”⁹² This standard was expounded upon in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*,⁹³ which held that *Chevron* deference is not owed to agency interpretations that are inconsistent with past interpretations and that are not adequately explained by the agency.⁹⁴ The fact that the Eighth Circuit gave deference to the BIA’s new PSG formulation without applying the *Brand X* standard is grounds for overturning *Gaitan*. The BIA’s current PSG standard fails *Brand X* because (1) the addition of particularity and social visibility as requirements to the PSG ground of asylum is inconsistent with the BIA’s past interpretation of PSG under the *Acosta* standard, (2) the BIA’s departure from *Acosta* was not adequately explained, and (3) the new PSG formulation will create arbitrary and capricious results when applied by future Boards and federal courts.

a. *The BIA’s New PSG Formulation Is Inconsistent with Past Interpretation*

In order for an agency’s statutory interpretation to be denied *Chevron* deference by the court, *Brand X* first requires that the interpretation be inconsistent with past practice.⁹⁵ This element is easily met by the BIA’s new interpretation of the PSG standard. The addition of the particularity and social visibility requirements to the PSG determination is not only inconsistent on its face with the *Acosta* standard, but also in effect: the newly heightened standard has left PSGs vulnerable that would have and already have met the *Acosta* standard.

The new PSG standard, promulgated by the BIA in the numerous cases since *In re C-A-*, is facially and logically distinct from the *Acosta* standard. Even though the BIA has not expressly abandoned the *Acosta* ‘immutable characteristics’ test since adding the two requirements of particularity and social visibility,⁹⁶ the layering of the additional requirements to the PSG determination marks a significant departure from the Board’s prior adherence to *Acosta* and thus consti-

92. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

93. *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

94. *Id.* at 981.

95. *Id.*

96. *See, e.g.*, E-A-G-, 24 I. & N. Dec. 591, 593 (B.I.A. 2008) (citing *Acosta*, 19 I. & N. Dec. 211, 233–34 (B.I.A. 1985)); A-M-E & J-G-U-, 24 I. & N. Dec. 69, 73 (B.I.A. 2007) (citing *Ortunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir. 2002)).

tutes the kind of inconsistency *Brand X* contemplated.⁹⁷ This change of course, however, is not just cosmetic; the facial inconsistency will have material effects on asylum adjudications.

The BIA's new PSG standard applied by the Eight Circuit in *Gaitan* will eliminate good asylum precedent created under the *Acosta* standard. This narrowing effect will unjustifiably leave vulnerable asylum-seeking members of certain PSGs that once satisfied the *Acosta* standard but will inevitably fail the particularity and social visibility requirements.⁹⁸ Such PSGs as women threatened with female genital mutilation, homosexuals, and former police officers make up some of these discarded groups.⁹⁹ Each group has already been granted asylum under the *Acosta* standard¹⁰⁰ yet would undoubtedly be rejected by the BIA acting under the current PSG formulation for lacking social visibility.¹⁰¹ By accepting the social visibility and particularity requirements, the Eighth Circuit in *Gaitan* joined the BIA in narrowing the bases on which persecuted individuals can seek ref-

97. See Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae at 10, Thomas, No. A75-597-033/-034/-035/-036 (B.I.A. 2007) [hereinafter UNHCR, *Amicus Curiae*], available at <http://www.unhcr.org/refworld/docid/45e34e244.html> (“The Board in *Acosta* did not require either a ‘social perception’ or ‘social visibility’ test, and UNHCR would caution the Board against adopting such a rigid approach which may disregard groups that the Convention is designed to protect.”); *Valdiviezo-Galdamez v. Att’y Gen. of U.S.*, 663 F.3d 582, 608 (3rd Cir. 2011) (“[T]he BIA’s addition of the requirements of ‘social visibility’ and ‘particularity’ to its definition of ‘particular social group’ is inconsistent with its prior decisions”); *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (“[R]egarding ‘social visibility’ as a criterion for determining ‘particular social group,’ the Board has been inconsistent rather than silent.”).

98. See *Valdiviezo-Galdamez*, 663 F.3d at 604 (“If a member of any of these [previously asserted PSGs] applied for asylum today, the BIA’s ‘social visibility’ requirement would pose an insurmountable obstacle to refugee status, even though the BIA has already held that membership in any of these groups qualifies for refugee status if an alien can establish that s/he was persecuted ‘on account of that group membership.’”).

99. Sternberg, *supra* note 19, at 285.

100. See *Fauziya Kasinga*, 21 I. & N. Dec. 357, 365–66 (B.I.A. 1996) (“The defined social group [of young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice] meets the test we set forth in *Matter of Acosta*”); *Toboso-Alfonso*, 20 I. & N. Dec. 819, 820–23 (B.I.A. 1990) (holding that Cuban homosexuals are a valid particular social group). Cf. *Fuentes*, 19 I. & N. Dec. 658, 662 (B.I.A. 1988) (recognizing “status as a former member of the national police” to be an “immutable characteristic,” the court acknowledged the possibility “that mistreatment occurring because of such a status in appropriate circumstances could be found to be persecution on account of political opinion or membership in a particular social group”).

101. See *Valdiviezo-Galdamez*, 663 F.3d at 604 (“The members of each of these groups have characteristics which are completely internal to the individual and cannot be observed or known by other members of the society in question (or even other members of the group) unless and until the individual member chooses to make that characteristic known.”).

uge in this country by eliminating valid BIA precedent, a change that has been implemented without the required proper agency explanation.

b. The BIA Departed from Acosta Without Properly Explaining Its Reasons

The Eighth Circuit in *Gaitan* should not have given deference to the BIA's new PSG formulation because the BIA did not properly explain why it departed from the *Acosta* standard. This was the objection of the reluctant concurrence in *Gaitan*, which relied on the rule in *Brand X*¹⁰²: In applying the *Chevron* standard, “[u]nexplained inconsistency is . . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.”¹⁰³ Agencies are allowed to shift their interpretation, the Supreme Court stated, if they “adequately” explain their reasons because *Chevron* intended to leave discretion to those agencies to deal with ambiguities in legislation.¹⁰⁴ Since the BIA exercised this discretion in its range of cases that shifted the PSG formulation¹⁰⁵ but gave untenable reasons for doing so, the Eighth Circuit should have deemed the formulation arbitrary and capricious and refused to pay it deference in *Gaitan*.

The BIA made its initial departure from *Acosta* in *In re C-A-* when it added “visibility”—or “the extent to which members of the purported group would be *recognizable* to others”¹⁰⁶—to the PSG formulation. The reasoning the Board used to explain its shift was tenuous at best. First, the BIA purported to rely on its own precedent but did so in a questionable manner. The Board stated that it was guided by “[o]ur other decisions recognizing particular social groups [that] *involved* characteristics that were highly visible and recognizable by others in the country in question,”¹⁰⁷ suggesting that social visibility was less of a formal, precedential consideration, and more of a trend among a handful of previous cases.¹⁰⁸ The Board also took a closer

102. *Gaitan v. Holder*, 671 F.3d 678, 685–86 (8th Cir.) (Bye, J., concurring), *reh'g denied*, 683 F.3d 951 (8th Cir. 2012), *cert. denied*, 133 S. Ct. 526 (U.S. 2012).

103. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

104. *Id.* The agency construction must also be “reasonable” for *Chevron* to apply. *Id.* at 980.

105. *See supra* subsection III.A.2.a.

106. *C-A-*, 23 I. & N. Dec. 951, 959 (B.I.A. 2006) (emphasis added), *aff'd*, *Castillo-Arias v. Att'y Gen. of U.S.*, 446 F.3d 1190 (11th Cir. 2006).

107. *Id.* at 960 (emphasis added).

108. *See Fatma E. Marouf, The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 *YALE L. & POL'Y REV.* 47, 64 (2008) (“All of [the decisions cited by the BIA] turned on an *Acosta* analysis based on immutable characteristics, not social perception or visibility.”).

look at its previous decision in *In re H*-¹⁰⁹ to justify its consideration of social visibility.¹¹⁰ That case, however, hardly established an entirely new and distinct consideration of social visibility. *In re H*- and the precedent that it relied upon merely referred to “recognizable” as an extension of “discrete”¹¹¹—i.e., the already-established requirement that social groups be *particular*.¹¹² For instance, in *Gomez v. I.N.S.*,¹¹³ authority relied on by the BIA in *In Re H*-, the Second Circuit stated: “Like the traits which distinguish the other four enumerated categories[—]race, religion, nationality and political opinion[—]the attributes of a particular social group must be recognizable and discrete. Possession of broadly-based characteristics . . . will not by itself endow individuals with membership in a particular group.”¹¹⁴ Surely, the court in *Gomez* was not arguing that inconspicuous characteristics such as religious affiliation or political opinion are *socially visible* characteristics in the sense that “members . . . would be recognizable to others”¹¹⁵ around them.¹¹⁶ This leap in logic indicates that the social visibility determination that the BIA in *In re C-A*- claimed was well-established had no precedential foundation at all and that it existed merely as an elaboration on the particularity requirement, not a totally separate prong of the PSG formulation.

The reason for the BIA’s dubious adherence to precedent has to do with the second ground on which it incorrectly justified the social visibility consideration and departed from *Acosta*—a misinterpretation of international asylum standards concerning what “social visibility”

109. *H*-, 21 I. & N. Dec. 337 (B.I.A. 1996).

110. *C-A*-, 23 I. & N. Dec. at 959–60.

111. *H*-, 21 I. & N. Dec. at 342 (citing *Gomez v. I.N.S.*, 947 F.2d 660, 664 (2d Cir. 1991)).

112. See Sternberg, *supra* note 19, at 292–93 (quoting S-E-G-, 24 I. & N. Dec. 579, 584 (B.I.A. 2008)) (“According to the BIA, [t]he essence of the ‘particularity’ requirement . . . is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.’ As this excerpt highlights, social visibility and particularity are not distinct tests. Emphasizing this blending of the two tests, the Third Circuit concluded that particularity merely articulates the same concept underlying social visibility, and ultimately rejected the particularity requirement. The inability to meaningfully distinguish particularity from social visibility illustrates that particularity is not a coherent legal test.”).

113. *Gomez v. I.N.S.*, 947 F.2d 660 (2d Cir. 1991).

114. *Id.* at 664.

115. *C-A*-, 23 I. & N. Dec. at 959.

116. See Brian Soucek, Comment, *Social Group Asylum Claims: A Second Look at the New Visibility Requirement*, 29 YALE L. & POL’Y REV. 337, 341–42 (2010) (citations omitted) (“In the list ‘race, religion, nationality, membership in a particular social group, or political opinion,’ visibility is hardly the common element; race may be visible to the eye, but religion and political opinion generally require ‘evidence of things not seen.’”); see also Marouf, *supra* note 108, at 68–69 (explaining that, because of the “key differences” between *Gomez* and the “new ‘social visibility’ test,” *Gomez* “fails to justify or explain ‘C-A’s social visibility requirement’”).

was originally intended to mean and how it was to be implemented. In *In re C-A-*, the BIA relied on guidelines issued by the United Nations High Commissioner for Refugees¹¹⁷ (UNHCR) as confirmation “that ‘visibility’ is an important element in identifying the existence of a particular social group.”¹¹⁸ While this statement was facially consistent with the UNHCR’s guidelines, the way in which the BIA has applied those guidelines has been problematic in two ways.

First the BIA, in *In re C-A-* and subsequent cases, misconstrued what the UNHCR meant by “visibility.” The BIA has defined its own view of “social visibility” as requiring a characteristic that is physically visible in the eyes of the surrounding public.¹¹⁹ However, this contradicts the interpretation by the very body that the BIA has consistently cited to in its definition.¹²⁰ In reference to the “social perception” approach previously discussed in its own guidelines,¹²¹ the UNHCR stated that “members of a group need not be easily recognizable to the general public in order for the group as a whole to be perceived by society as a particular social group.”¹²² In essence, the BIA replaced the UNHCR’s objective standard of “social perception”¹²³ with its own *subjective* standard of “social visibility,” which focuses on what members of the community actually perceive about the PSG in question.¹²⁴

117. U.N. High Comm’r on 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 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter UNHCR, *Guidelines*]. The UNHCR describes itself as “mandated by the United Nations to lead and coordinate international action for the worldwide protection of refugees and the resolution of refugee problems. UNHCR’s primary purpose is to safeguard the rights and well-being of refugees. . . . UNHCR shall provide for the protection of refugees by, *inter alia*, ‘promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.’” UNHCR, *Amicus Curiae*, *supra* note 97, at 1.

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

119. *See id.* (rejecting asylum to “confidential informants” on the basis that “the very nature of the conduct at issue is such that it is generally out of the public view”).

120. *See* Marouf, *supra* note 108, at 64 (“[A]lthough the BIA referenced the UNHCR Guidelines, it did not truly apply the ‘social perception’ approach set forth therein.”).

121. *See* UNHCR, *Guidelines*, *supra* note 117, ¶ 7.

122. UNHCR, *Amicus Curiae*, *supra* note 97, at 8 (citations omitted) (“For instance, the general population in Cuba would not automatically recognize homosexuals, nor would average Salvadorans necessarily recognize former members of the national police, nor would a typical Togolese tribal member inevitably be aware of young women who opposed female genital mutilation but had not been subjected to the practice.”).

123. “The question to be established is whether the particular social group is ‘cognisable’ as a group, viewed *objectively* in terms of the relevant society.” *Id.* at 7 (emphasis added) (citation omitted).

124. Marouf, *supra* note 108, at 49.

Second, notwithstanding its misunderstanding of the UNHCR's terminology, the BIA misinterpreted the UNHCR's reference to the "social perception" test¹²⁵ as a second requirement along with the *Acosta* "immutable characteristics" test. The UNHCR did not intend for its PSG formulation to contain two prongs which both had to be met, but instead intended that the two prongs would be alternative avenues to meet the PSG standard.¹²⁶ Recognizing the validity of the two tests, the UNHCR meant to reconcile both into "a single standard that incorporates both dominant approaches: a particular social group is 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."¹²⁷ In other words, social perception was meant to cover what *Acosta* could not: "If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society."¹²⁸ While the BIA in *In re C-A-* basically adhered to this interpretation, the subsequent Board decisions that relied on that case as precedent completely eliminated it by requiring that a PSG meet *both* the *Acosta* standard and the "social visibility" standard.¹²⁹

Since the BIA departed from the *Acosta* "immutable characteristics" standard and failed to give a well-conceived explanation for doing so, the Eighth Circuit should not have given deference to the new BIA standard challenged in *Gaitan*. The Board's reliance on precedent that in no way supported a social visibility requirement in the PSG determination, and its misinterpretation of international standards promulgated by UNHCR, fails to satisfy the rule in *Brand X* that an agency must "adequately explain[] the reasons for a reversal of policy" in order to receive *Chevron* deference.¹³⁰ "[T]he BIA's failure to offer any reasonable explanation for its new interpretation distinguishes the situation at hand from cases where courts have granted substantial deference despite a revised agency interpretation because of a 'well-considered basis for the change.'"¹³¹ The BIA's PSG formula-

125. See UNHCR, *Guidelines*, *supra* note 117, ¶ 7.

126. See UNCHR, *Amicus Curiae*, *supra* note 97, at 9.

127. UNHCR, *Guidelines*, *supra* note 117, ¶ 11 (emphasis added).

128. *Id.* ¶ 13 ("So, for example, if it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognized as a group which sets them apart.")

129. See S-E-G-, 24 I. & N. 579 (B.I.A. 2008); E-A-G-, 24 I. & N. Dec. 591 (B.I.A. 2008); A-M-E & J-G-U-, 24 I. & N. Dec. 69 (B.I.A. 2007).

130. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (emphasis added).

131. Marouf, *supra* note 108, at 68 (citing *Robertson v. Methow Valley Citizens' Council*, 490 U.S. 332, 356 (1989)).

tion, requiring social visibility and particularity, is thus arbitrary and capricious under *Chevron*, and the Eighth Circuit's ruling in *Gaitan* giving it deference should be overturned.

c. *The New BIA Formulation Will Lead to Arbitrary and Capricious Results*

Notwithstanding the BIA's improperly explained departure from *Acosta*, the BIA's new PSG formulation approved by *Gaitan* does not meet the *Chevron* standard because the formulation will lead to arbitrary and capricious results when applied by future tribunals. The BIA's new PSG standard cannot be relied upon to produce consistent, predictable results in future BIA and federal court decisions because there has been no judicial consensus regarding the exact definition of "social visibility" and any attempt to satisfy the formulation creates severe evidentiary problems. The inevitable arbitrary and capricious outcomes are grounds for rejecting *Chevron* deference to that BIA interpretation—insofar as the Eighth Circuit gave that deference in *Gaitan*, its decision should be overturned.

First, the BIA's new PSG formulation will cause arbitrary and capricious asylum determinations because the BIA and courts applying the formulation have not agreed on what the social visibility standard is. Regardless of the merits of either the "social visibility" approach or the "social perception" (or "external criterion"¹³²) approach,¹³³ the fact that both have been recognized in applying the BIA's new PSG interpretation makes inconsistent and arbitrary results inevitable.¹³⁴ Judge Posner made his view on this issue perfectly clear: "Often it is unclear whether the Board is using the term 'social visibility' in the literal sense or in the 'external criterion' sense, or even . . . whether it understands the difference."¹³⁵ One thing is clear—the lack of a stan-

132. See *Benitez-Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009) (term used by Judge Posner synonymous with the UNHCR's "social perception" approach and in contradistinction to literal visibility).

133. For a discussion on these two approaches and their meanings, see *supra* subsection III.A.2.b.

134. See Kristin A. Bresnahan, Note, *The Board of Immigration Appeals's New "Social Visibility" Test for Determining "Membership of a Particular Social Group" in Asylum Claims and Its Legal and Policy Implications*, 29 BERKELEY J. INT'L L. 649, 670–71 (2011). Compare *Rodriguez v. Att'y Gen. of U.S.*, No. 09-2593, slip op. at 217 (3d Cir. 2010) (affirming a BIA decision that upheld an immigration judge's asylum determination, which rejected a petitioner's PSG claim on the basis that "it is unlikely that anyone would be able to tell from looking at him that he is HIV positive"), with *Koudriachova v. Gonzales*, 490 F.3d 255, 261 (2d Cir. 2007) (citation omitted) (recognizing the "social perception" approach, claiming that "a group's 'visibility' [means] the extent to which members of society perceive those with the relevant characteristic as members of a social group").

135. *Benitez-Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009); see also Soucek, *supra* note 116, at 340 (citation omitted) ("[Quick] was the Board's shift within

dard definition has endowed the BIA with overwhelming discretion in choosing which test to apply.¹³⁶

An example of how this judicial discrepancy in the meaning of social visibility creates arbitrary and capricious outcomes is the common PSG claim based on a characteristic intentionally *concealed from view* by the petitioner. The Seventh Circuit emphasized that “[i]f you are a member of a group that has been targeted for . . . persecution, you will take pains to avoid being socially visible,”¹³⁷ and such individuals should not be forced to resort to “pinning a target to their backs.”¹³⁸ However, this is what the “social visibility” test would require of noncitizens with such characteristics as homosexuality claiming PSG status because such a trait is not physically apparent to others. On the other hand, as one commentator has claimed, homosexuals are “recognized as [a] particular social group[] in the United States,”¹³⁹ and, therefore, a tribunal applying the “social perceptions” test would surely agree that such a characteristic would warrant PSG status. Thus, those who belong to a PSG that includes individuals with a characteristic that must be hidden in order to avoid persecution are at the whim of whichever social visibility standard the reviewing Board or court subscribes to. Until one social visibility definition is agreed upon by the Board and the federal judiciary for purposes of PSG determination, the new BIA formulation should be deemed arbitrary and capricious and not worthy of deference.

Second, there are serious evidentiary problems in proving social visibility that will lead future tribunals to arbitrary and capricious asylum outcomes. This is particularly dangerous given the wide deference conferred by appellate courts to IJs’ initial factual findings.¹⁴⁰ Since the “social visibility” test is “subjective and sociological in nature, not based on legal norms and principles” as the *Acosta* “immutable characteristics” test is, “it poses unique evidentiary challenges and likely will result in inconsistent and incoherent decisions.”¹⁴¹

Matter of C-A- from groups that are ‘easily recognizable and understood by others to constitute social groups’ to the claim that previous decisions ‘recognizing particular social groups involved characteristics that were highly visible and recognizable by others in the country in question.’ This shift from figurative to literal sight occurred in the space of a single paragraph . . .”).

136. Marouf, *supra* note 108, at 106.

137. *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009).

138. *Id.* at 616.

139. Marouf, *supra* note 108, at 79.

140. See *Hassan v. Gonzales*, 484 F.3d 513, 516 (8th Cir. 2007) (citations omitted) (“An IJ’s factual determinations must be upheld if supported by reasonable, substantial, and probative evidence on the record considered as a whole. This standard is a deferential one, requiring a reviewing court to uphold a denial of asylum unless an alien demonstrates that the evidence he presented was so compelling that no reasonable fact finder could fail to find the requisite fear of persecution.”).

141. Marouf, *supra* note 108, at 71.

Namely, courts cannot get into the minds of the persecutor when trying to link the petitioner's persecution to her social visibility, not even through circumstantial evidence.¹⁴² The result is that adjudicators will rely too heavily on the factor of past persecution in identifying the particular social group, confusing the overall asylum analysis.¹⁴³ Because this evidentiary confusion will lead to arbitrary and capricious asylum outcomes, the new PSG formulation that creates it should be denied deference.

B. A Return to *Acosta* and the Immutable Characteristics Test

The Eighth Circuit should overturn its decision in *Gaitan* for the aforementioned reasons and demand that the BIA adhere to the *Acosta* standard that governed asylum applications for two decades. By doing so, the Eighth Circuit would follow the lead of the Third and Seventh Circuits in refusing to defer to the arbitrary and capricious interpretation of the BIA and would effectively avoid the multitude of problems that such deference has caused.¹⁴⁴ Such a solution “properly applies *Chevron*, is easiest to apply, has a basis in coherent statutory analysis, comports with international obligations, and rejects the problematic social visibility test and particularity requirement.”¹⁴⁵

The *Acosta* standard was, from its genesis and through twenty years of BIA and appellate court adherence, loyally followed and championed for its effectiveness and reasonability in governing PSG asylum applications. *Acosta* has been lauded for its conformance to the original intent of those who first established international asylum standards.¹⁴⁶ The Eleventh Circuit Court of Appeals also praised *Acosta* for “[striking] an acceptable balance between (1) rendering ‘particular social group’ a catch-all for all groups who might claim persecution, which could render the other four categories meaningless, and (2) rendering ‘particular social group’ a nullity by making its requirements too stringent or too specific.”¹⁴⁷ American courts are not alone in their approval of the “immutable characteristics” approach—

142. *Id.*

143. *Id.* at 76.

144. *See, e.g.*, *Valdiviezo-Galdamez v. Att’y Gen. of U.S.*, 663 F.3d 582 (3d Cir. 2011); *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

145. Sternberg, *supra* note 19, at 291.

146. *Id.* at 293 (quoting JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 158–61 (1991)) (“By basing the definition of ‘membership of a particular social group’ on application of the *ejusdem generis* principle, we respect both the specific situation known to the drafters—concern for the plight of persons whose social origins put them at comparable risk to those in the other enumerated categories—and the more general commitment to grounding refugee claims in civil or political status . . .”).

147. *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190, 1197 (11th Cir. 2006).

the *Acosta* standard controlled asylum cases so effectively and fairly that it found itself in courts of foreign countries, cited for its reasonability.¹⁴⁸

The reason for this domestic and international acclaim is the prudence and utility of the *Acosta* standard, qualities that are missing from the new PSG formulation. The *Acosta* standard does not suffer from the kind of evidentiary problems created by the social visibility requirement—the subjective focus of how the persecuted are viewed by others is too unreliable for consistent and reasonable application.¹⁴⁹ Moreover, the *Acosta* approach solves the problem that concerned Judge Posner about the social visibility requirement—denying asylum to those who claim PSG membership based on an immutable characteristic they intentionally had kept *socially invisible*.¹⁵⁰ Under *Acosta*, an immutable characteristic, like homosexuality, need not be visible to anyone in order to meet PSG status. Because this standard avoids arbitrary and capricious results, fosters consistent and reasonable asylum determinations, and is firmly rooted in prior BIA and international standards, the Eighth Circuit should affirm its loyalty to the *Acosta* PSG formulation after overturning *Gaitan*.

IV. CONCLUSION

Asylum is a body of law crucial to many who seek the kind of refuge the United States has offered since before it even existed. Though fundamentally a legislative and administrative matter, the federal judiciary will be most likely the one responsible for repairing the PSG standard. While the Supreme Court was correct in asserting that courts should have no role in writing immigration policy in place of the responsible federal agencies,¹⁵¹ the individual circuits, as the Eighth Circuit is urged here, possess this duty for two reasons.

First, neither Congress nor the executive branch, nor even the Supreme Court, will agree to restore the PSG formulation to its prudent origins. Congress made an attempt in 2011 with the concurrent introduction of two bills in the House and Senate that intended to codify *Acosta* as the formal PSG standard.¹⁵² The bills' introduction and subsequent failure getting out of committee¹⁵³ suggest two reasonable

148. Marouf, *supra* note 108, at 54–57 (referring to authorities in Canada, New Zealand, and the United Kingdom).

149. *Id.* at 104.

150. See *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009).

151. *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006).

152. See Refugee Protection Act of 2011, H.R. 2185, 112th Cong. § 5(a)(D) (2011); Refugee Protection Act of 2011, S. 1202, 112th Cong. § 5(a)(D) (2011).

153. See *Refugee Protection Act of 2011 (H.R. 2185)*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/hr2185> (last visited Nov. 4, 2012); *Refugee Protection Act of 2011 (S. 1202)*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/s1202> (last visited Nov. 4, 2012).

assumptions: first, that the current PSG standard is in dire need of reform, but second, that Congress will unlikely be the vehicle for that reform in the near future.¹⁵⁴ The executive branch has the ability to repair the PSG formulation, as well. The Attorney General has the discretion to review BIA cases and could exercise it in overturning the Board's new PSG formulation.¹⁵⁵ No such action has occurred. Alternatively, the Department of Homeland Security (DHS) could promulgate new rules regarding membership in a PSG that adhere to the *Acosta* standard. However, it has been nearly three years since DHS has proposed such rulemaking.¹⁵⁶ Finally, the Supreme Court remains extremely reluctant to weigh in on the PSG formulation.¹⁵⁷ Recent to this writing, the Court denied certiorari to review *Gaitan*.¹⁵⁸

Second, the remedial measures urged of the Eighth Circuit here are well within its authority. Restoring the *Acosta* standard as controlling for PSG determinations is simply carrying out the Supreme Court's mandate in *Chevron*—rejecting an administrative interpretation because it is arbitrary and capricious.¹⁵⁹ After doing so, the Eighth Circuit should then remand future cases to the BIA to be determined by the *Acosta* formulation, as the Seventh Circuit has done.¹⁶⁰

This reform will be too late for the likes of Gaitan—he has already been subjected to the unjustifiable and unreasonable PSG standards concocted by the BIA. However, many more are in line behind him seeking refuge in the United States. The Eighth Circuit owes them the chance to state their case under a well-founded and prudent legal standard. The court should do this by overturning *Gaitan* and restoring integrity to future Eighth Circuit asylum determinations.

154. See Sternberg, *supra* note 19, at 290–91 (citing RUTH ELLEN WASEM, CONG. RESEARCH SERV., R41704, OVERVIEW OF IMMIGRATION ISSUES IN THE 112TH CONGRESS 1 (2011)).

155. See 8 C.F.R. § 1003.01(h)(1)(i) (2012).

156. See Statement of Regulatory Priorities, 74 Fed. Reg. 64,213, 64,220 (Dec. 7, 2009).

157. See Sternberg, *supra* note 19, at 253 n.50 (citing Stanley Dale Radtke, *Defining a Core Zone of Protection in Asylum Law: Refocusing the Analysis of Membership in a Particular Social Group to Utilize Both the Social Visibility and Group Immutability Component Approaches*, 10 J.L. & SOC. CHALLENGES 22, 37 (2008)) (“The [Supreme] Court has never expressly decided the meaning of PSG.”).

158. *Gaitan v. Holder*, 671 F.3d 678 (8th Cir.), *reh'g denied*, 683 F.3d 951 (8th Cir.), *cert. denied*, 133 S. Ct. 526 (U.S. 2012).

159. See *supra* subsection III.A.2.

160. See, e.g., *Gatimi v. Holder*, 578 F.3d 611, 618 (7th Cir. 2009).

