

# Considering the Refugee Act’s “Particular Social Group” Under *Chevron* Step One: Why Reviewing Courts Should Employ *Cardoza-Fonseca*’s “Traditional Tools of Statutory Construction” in Asylum Cases

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## Introduction

On December 25, 2005, Ms. A-R-C-G- and her three minor children entered the United States without inspection.<sup>1</sup> They fled from “repugnant abuse” at the hands of Ms. A-R-C-G-’s husband, who beat her every week, raped her, burned her breast, and broke her nose.<sup>2</sup> Though Ms. A-R-C-G- contacted the Guatemalan police on several occasions, the police refused to “interfere in a marital relationship.”<sup>3</sup> She stopped calling the police when her husband threatened to kill her if she called again.<sup>4</sup>

Ms. A-R-C-G- “repeatedly tried to leave” her husband by moving to her father’s house and to another part of Guatemala, but her husband found her each time and threatened to kill her if she did not stay with him.<sup>5</sup> Believing that her husband would continue to beat her, Ms. A-R-C-G- fled Guatemala with her children in December 2005.<sup>6</sup>

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<sup>1</sup> A-R-C-G-, 26 I. & N. Dec. 388, 389 (B.I.A. 2014).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *See id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

After arriving in the United States, Ms. A-R-C-G- applied for asylum.<sup>7</sup> The Immigration Judge denied her asylum application, finding that Ms. A-R-C-G- failed to prove that she experienced or feared persecution on account of her membership in a “particular social group.”<sup>8</sup> On appeal, the Board of Immigration Appeals (“Board”) reversed, holding that Ms. A-R-C-G-’s “particular social group”—“married women in Guatemala who are unable to leave their relationship”—was legally cognizable in some cases.<sup>9</sup> After the Board’s decision in *Matter of A-R-C-G-*,<sup>10</sup> many domestic violence survivors were granted asylum due to persecution on account of their membership in similar “particular social groups.”<sup>11</sup>

On June 11, 2018, former Attorney General Jeff Sessions overturned the Board’s decision in *Matter of A-R-C-G-*.<sup>12</sup> He sought to prevent asylum claims based on domestic violence, private crime, and “general hardship.”<sup>13</sup> In *Matter of A-B-*,<sup>14</sup> the Attorney General reiterated that an asylum “applicant seeking to establish persecution on account of membership in a ‘particular social group’ must demonstrate” that her “particular social group” meets the immutability, particularity, and social distinction requirements explained by the Board in *Matter of Acosta*,<sup>15</sup> *Matter of W-G-R-*,<sup>16</sup> and *Matter of M-E-V-G-*.<sup>17</sup> According to the Attorney General, the Board misapplied its legal standard from those cases, and *Matter of A-R-C-G-* was therefore wrongly decided.<sup>18</sup> Despite the atrocities that Ms. A-R-C-G- had faced, the Attorney General decided that she did not deserve asylum.

To best protect asylum applicants like Ms. A-R-C-G-, many advocates have argued that the “particularity” and “social distinction” requirements should be removed from the Board’s “particular social group”

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<sup>7</sup> See *A-R-C-G-*, 26 I. & N. Dec. at 390.

<sup>8</sup> See *id.* at 389.

<sup>9</sup> *Id.* at 388–89.

<sup>10</sup> 26 I. & N. Dec. 388 (B.I.A. 2014).

<sup>11</sup> See Kristen Shively Johnson, *Paving the Way to Better Protection: Matter of A-R-C-G-*, 24 TEX. J. WOMEN, GENDER, & L. 151, 162 (2015).

<sup>12</sup> On March 7, 2018, the Attorney General directed the Board of Immigration Appeals to refer the case to him pursuant to 8 C.F.R. § 1003.1(h)(1)(i) (2020). See *Matter of A-B-*, 27 I. & N. Dec. 316, 317 (Att’y Gen. 2018). The Board had decided the case on December 6, 2016, following an appeal from the Immigration Judge’s decision. See *id.*

<sup>13</sup> See *id.* at 346 (quoting *Velasquez v. Sessions*, 866 F.3d 188, 199 (4th Cir. 2017)).

<sup>14</sup> 27 I. & N. Dec. 316 (Att’y Gen. 2018).

<sup>15</sup> 19 I. & N. Dec. 211 (B.I.A. 1985).

<sup>16</sup> 26 I. & N. Dec. 208 (B.I.A. 2014).

<sup>17</sup> 26 I. & N. Dec. 227 (B.I.A. 2014); see *A-B-*, 27 I. & N. Dec. at 316–19.

<sup>18</sup> *A-B-*, 27 I. & N. at 317.

interpretations.<sup>19</sup> After all, even experienced attorneys fail to successfully define a "particular social group" under these requirements.<sup>20</sup> Some scholars argue that the Board's "particularity" and "social distinction" requirements do not deserve *Chevron* deference because they are "arbitrary and capricious," or because they diverged from the United States's international obligations under the 1967 *Protocol Relating to the Status of Refugees*.<sup>21</sup>

This Comment takes a different approach: it argues that reviewing courts should not accord *Chevron* deference to the Board's "particular social group" interpretations because "particular social group" has an unambiguous meaning within the Immigration and Nationality Act ("INA"). Part I provides an overview of US asylum law, including the Board's evolving "particular social group" interpretations. Part II explores how the Supreme Court applied the *Chevron* two-step framework while interpreting related Refugee Act provisions in *INS v. Cardoza-Fonseca*.<sup>22</sup> Part III considers how the courts of appeals have applied *Chevron* while reviewing the Board's "particular social group" interpretations. It argues that the courts of appeals have misapplied or failed to apply *Cardoza-Fonseca's Chevron Step One* guidance when interpreting "particular social group." Part IV conducts a *Chevron Step One* analysis of "particular social group" in accordance with *Cardoza-Fonseca*. It employs *Cardoza-Fonseca's*

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<sup>19</sup> See, e.g., Nicholas R. Bednar, Note, *Social Group Semantics: The Evidentiary Requirements of "Particularity" and "Social Distinction" in Pro Se Asylum Adjudications*, 100 MINN. L. REV. 355, 368 (2015) (explaining that "particularity" and "social distinction" create "evidentiary barriers that cannot be overcome"); see also S.E.R.L. v. Att'y Gen., 894 F.3d 535, 550 (3d Cir. 2018) ("[T]he arguable inconsistencies in [the Board's] precedent highlight the risk that [the "particularity" and "social distinction"] requirements could be applied arbitrarily and interpreted to impose an unreasonably high evidentiary burden, especially for pro se petitioners, at the threshold.").

<sup>20</sup> See Rachel Gonzalez Settlage, *Rejecting the Children of Violence: Why U.S. Asylum Law Should Return to the Acosta Definition of "A Particular Social Group,"* 30 GEO. IMMIGR. L.J. 287, 338 (2016); Bednar, *supra* note 19, at 385.

<sup>21</sup> See Claudia B. Quintero, *Ganging Up on Immigration Law: Asylum Law and the Particular Social Group Standard - Former Gang Members and Their Need for Asylum Protections*, 13 U. MASS. L. REV. 192, 216 (2018); see also 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, 68 (2008); Kristin A. Bresnahan, Note, *The Board of Immigration Appeal'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, 663-69 (2011); Christopher J. Preston, Note, *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), 92 NEB. L. REV. 431, 443 (2013). But see Frank Paz, Note, *Children Seek Refuge from Gang-Forced Recruitment: How Asylum Law Can Protect the Defenseless*, 42 FORDHAM URB. L.J. 1063, 1098 (2015) (arguing that courts should accord *Chevron* deference to the Board's "particular social group" interpretations to reduce confusion).

<sup>22</sup> 480 U.S. 421 (1987).

“traditional tools of statutory construction” and evaluates the text, Refugee Act legislative history, and INA structure. It also proposes the unambiguous meaning of “particular social group.”

## I. Asylum Law in the United States

Part I offers an overview of asylum law in the United States. First, it briefly explains the origin of the INA’s “refugee” definition, describing the relevant treaty and legislative history. Next, it provides an overview of the “refugee” definition, including the Board’s evolving “particular social group” interpretations. It uses *Matter of A-B-* to demonstrate how the US Department of Justice (“DOJ”) has applied the “particular social group” legal standard in context. Finally, it gives an overview of asylum procedure and explains how a noncitizen may apply for asylum in the United States.

### A. Statutory Background: From the Refugee Convention to the Refugee Act

In 1951, the United Nations’s *Convention Relating to the Status of Refugees* (“Refugee Convention”) was adopted.<sup>23</sup> One-hundred and forty-five states ratified the Refugee Convention.<sup>24</sup> According to the Office of the United Nations High Commissioner for Refugees (“UNHCR”), the Refugee Convention consolidated earlier international refugee documents and provided a “comprehensive codification of the rights of refugees at the international level.”<sup>25</sup> The Refugee Convention also explained the ratifying states’ responsibilities, including the “basic minimum standards for the treatment of refugees.”<sup>26</sup>

While it did not accede to the Refugee Convention, the United States acceded to the 1967 *Protocol Relating to the Status of Refugees* (“Refugee Protocol”) in 1968.<sup>27</sup> The Refugee Protocol expanded the “refugee” definition and required states to conform to the Refugee Convention’s substantive provisions.<sup>28</sup>

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<sup>23</sup> UNHCR, CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES 2 (2010).

<sup>24</sup> *The 1951 Refugee Convention*, UNHCR (2019), <https://perma.cc/HV8N-6T6P>.

<sup>25</sup> UNHCR, *supra* note 23, at 3.

<sup>26</sup> *Id.*

<sup>27</sup> Liliya Paraketsova, Note, *Why Guidance from the Supreme Court Is Required in Redefining the Particular Social Group Definition in Refugee Law*, 51 U. MICH. J.L. REFORM 437, 443 (2018).

<sup>28</sup> UNHCR, *supra* note 23, at 4; Nicholas R. Bednar & Margaret Penland, *Asylum’s Interpretive Impasse: Interpreting “Persecution” and “Particular Social Group” Using International Human Rights Law*, 26 MINN. J. INT’L L. 145, 150 (2017) (The Refugee Protocol expanded the Refugee Convention’s “refugee” definition, so that individuals could qualify as a “refugee” even if (1) they were not displaced before January 1, 1951 as a result of events occurring before that date (i.e., World War II) and (2) they did not reside in a geographical area affected by World War II).

Because the Refugee Protocol was not a self-executing treaty, Congress passed the Refugee Act of 1980 ("Refugee Act").<sup>29</sup> The Refugee Act amended the Immigration and Nationality Act of 1965 and revised the refugee admission procedures to conform to the Refugee Protocol.<sup>30</sup> The Refugee Act essentially adopted its "refugee" definition from the Refugee Protocol.<sup>31</sup> The US Department of Homeland Security ("DHS") and the DOJ apply this definition every day while carrying out and enforcing the INA, just as the Immigration and Naturalization Service<sup>32</sup> ("INS") did previously.

The Secretary of Homeland Security and the Attorney General are charged with administering the INA.<sup>33</sup> Among other duties, the Attorney General is responsible for establishing regulations to carry out the INA and for reviewing the Board's "administrative determinations in immigration proceedings."<sup>34</sup> The Attorney General's determinations about questions of law are "controlling."<sup>35</sup> The Board also has substantial

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<sup>29</sup> Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. § 1101). *But see* Judge Rosemary Barkett, *Immigrants, Refugees and Women: International Obligations and the United States*, 33 EMORY INT'L L. REV. 493, 496-97 (2019) (suggesting that US judges would be required to uphold the Refugee Protocol under Article VI of the United States Constitution even if Congress had not passed the Refugee Act and given effect to the treaty).

<sup>30</sup> The Refugee Act additionally amended the Migration and Refugee Assistance Act of 1962. Refugee Act of 1980, 94 Stat. at 102; Acosta, 19 I. & N. Dec. 211, 219 (B.I.A. 1985); *see* T. David Parish, Note, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 924 n.8 (1992) (The Refugee Protocol was not self-executing; Congress passed the Refugee Act so the Refugee Protocol would become binding domestic law). The original Immigration and Nationality Act ("INA") was passed in 1952. Immigration and Nationality Act, Pub. L. No. 414-477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1537). It has been amended many times. *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 10, 2019), <https://perma.cc/ZW2H-GB4Q>.

<sup>31</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437 (1987); Bednar, *supra* note 19, at 359-60.

<sup>32</sup> STEPHEN H. LEGOMSKY & DAVID B. THRONSON, IMMIGRATION AND REFUGEE LAW AND POLICY 2-3 (7th ed. 2019). ("From 1940 until 2003, the lion's share of the responsibility [for administering the INA] rested with the Attorney General, whose functions in turn were delegated to various Justice Department agencies and officials. The best known of the Department's immigration agencies was the Immigration and Naturalization Service (INS) . . . Its functions included law enforcement, inspection of arriving passengers, prosecution at administrative hearings, detention of noncitizens in connection with immigration proceedings, and processing applications for various immigration benefits . . . [Following September 11, 2001, t]he Homeland Security Act of 2002 . . . brought almost all of those agencies under a single new umbrella, the Department of Homeland Security (DHS) . . . [The Homeland Security Act of 2002] dissolved the INS . . . [T]he Department of Justice . . . retains authority over adjudication, in an agency called the Executive Office of Immigration Review.").

<sup>33</sup> 8 U.S.C. § 1103(a)(1); *Negusie v. Holder*, 555 U.S. 511, 516-17 (2009).

<sup>34</sup> 8 U.S.C. § 1103(g)(2).

<sup>35</sup> *Id.* § 1103(a)(1).

authority because the Attorney General delegated his “discretion and authority” to the Board.<sup>36</sup>

### B. *The “Refugee” Definition*

As explained in Section A, the Refugee Act amended the INA.<sup>37</sup> As amended, the INA provides the basic legal framework governing asylum. Under section 208 of the INA, any noncitizen who is present in the United States may apply for asylum.<sup>38</sup> In turn, the Attorney General may grant asylum to any eligible applicant who proves she is a “refugee.”<sup>39</sup> A refugee is

[1] any person who is outside any country of such person’s nationality . . . and [2] 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 [3] persecution or [4] a well-founded fear of persecution [5] on account of [6] race, religion, nationality, membership in a particular social group, or political opinion.<sup>40</sup>

An asylum applicant bears the burden of proving she is a “refugee” under this definition and the case law applying this definition.<sup>41</sup> For example, the

<sup>36</sup> *Negusie*, 555 U.S. at 517 (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)).

<sup>37</sup> 8 U.S.C. § 1101.

<sup>38</sup> *See id.* § 1158(a)(1).

<sup>39</sup> Asylum—unlike withholding of removal and protection under the Convention Against Torture (“CAT”)—is discretionary. *See id.* §§ 1101(a)(42)(A), 1158(b)(1)(A); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 n.5 (1987) (explaining that asylum is a discretionary form of relief).

<sup>40</sup> 8 U.S.C. § 1101(a)(42)(A). When an applicant has no nationality, she must demonstrate that she is unable or unwilling to return to, and is unable or unwilling to avail herself of, the protection of the country in which she “last habitually resided” due to persecution on account of a protected ground. *Id.*; *see* 8 C.F.R. § 1208.13(b) (2020).

“Persecution” has been construed to mean past persecution. A “well-founded fear of persecution” means fear of future persecution. Past persecution creates a rebuttable presumption of future persecution. 8 C.F.R. § 1208.13(b)(1). The Government may rebut that presumption by proving that (1) the asylum applicant could relocate within her country of origin to avoid persecution or (2) circumstances changed so that the “applicant no longer has a well-founded fear of persecution in the applicant’s country of nationality” based on a protected ground. *Id.* § 1208.13(b)(1)(i)(A); *see Acosta*, 19 I. & N. Dec. 211, 215 (B.I.A. 1985) (“Case law and the regulations have always made clear that it is the alien who bears the burden of proving [by a preponderance of the evidence] that he would be subject to, or fears, persecution.” (citing *INS v. Stevic*, 467 U.S. 407, 422 n.16 (1984))). Even if the government rebuts the presumption of future persecution, the applicant could still receive a discretionary grant of humanitarian asylum based not only on “‘compelling reasons,’ arising out of the severity of the past persecution,” but also on a “‘reasonable possibility’ that he may suffer ‘other serious harm’ upon removal.” *See L-S-*, 25 I. & N. Dec. 705, 710 (B.I.A. 2012) (quoting 8 C.F.R. § 1208.13(b)(1)(iii)(A)–(B)).

<sup>41</sup> *See* 8 U.S.C. § 1158(b)(1)(B)(i). The persecutor bar excludes certain noncitizens from the “refugee” definition. Under the persecutor bar, an applicant who “participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion” is not a “refugee.” *Id.* § 1101(a)(42)(B). If “the evidence indicates that” the persecutor

asylum applicant must prove that she was persecuted or fears she will be persecuted by either the government or someone the government is unable or unwilling to control in her country of origin.<sup>42</sup> Additionally, the applicant must prove that she is not barred from applying for asylum or receiving asylum.<sup>43</sup> Most relevant to this Comment, the applicant must prove that one of the enumerated protected grounds—"race, religion, nationality, membership in a *particular social group*, or political opinion"—is "at least one central reason" for the persecution she experienced or fears.<sup>44</sup> If an applicant claims persecution on account of membership in a "particular social group," she must prove (among other things) that her "particular social group" is legally cognizable.<sup>45</sup>

### 1. Proving Membership in a "Particular Social Group"

In 1985, the *Matter of Acosta* Board decided that membership in a "particular social group" was ambiguous.<sup>46</sup> Since then, the Board's "particular social group" interpretations have evolved over time.<sup>47</sup> Most recently, the Board interpreted "particular social group" in *Matter of M-E-V-G* and its companion, *Matter of W-G-R*. Today's asylum applicant claiming persecution on account of her "membership in a 'particular social group'" must prove "membership in a group, which [a.] is composed of members who share a common immutable characteristic, [b.] is defined with particularity, and [c.] is socially distinct within the society in question."<sup>48</sup>

#### a. Common Immutable Characteristic

The Board first interpreted "particular social group" in *Matter of Acosta*.<sup>49</sup> Under *Acosta*, asylum applicants must prove that their "particular

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bar applies, the asylum applicant bears "the burden of proving by a preponderance of the evidence" that the persecutor bar does not apply. 8 C.F.R. § 1240.8(d).

<sup>42</sup> See *A-B-*, 27 I. & N. Dec. 316, 319 (Att'y Gen. 2018).

<sup>43</sup> See 8 U.S.C. § 1158(a)(2), (b)(2).

<sup>44</sup> *Id.* § 1158(b)(1)(B)(i) (emphasis added); see 8 C.F.R. § 1208.13(b)(1)(i)(A), (b)(3).

<sup>45</sup> See *infra* Part 1 B.1; see also Bednar, *supra* note 19, at 364 (explaining that an applicant must define her "particular social group" in her asylum application and submit corroborating evidence proving her "particular social group" exists, even though the application does not request this information).

<sup>46</sup> *Acosta*, 19 I. & N. Dec. 211, 232 (B.I.A. 1985); see *A-B-*, 27 I. & N. Dec. at 318.

<sup>47</sup> See *A-B-*, 27 I. & N. Dec. at 318–19.

<sup>48</sup> *Id.* at 317.

<sup>49</sup> *Id.* at 318.

social group” is immutable.<sup>50</sup> In reaching this interpretation, the *Acosta* Board first examined the Refugee Act’s legislative history, the Refugee Convention and Refugee Protocol’s negotiating histories and international interpretations, and the definition of “particular social group” under the UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (“UNHCR Refugee Handbook”).<sup>51</sup> Ultimately, the *Acosta* Board determined that the statutory interpretation canon *ejusdem generis* was “most helpful” in interpreting “particular social group.”<sup>52</sup>

Under *ejusdem generis*, a general term within a list may only include things of the same nature as the specific terms within that list.<sup>53</sup> The *Acosta* Board applied *ejusdem generis* and determined that “membership in a particular social group” was a general, ambiguous term following a list of specific terms.<sup>54</sup> Accordingly, “particular social group” could only be comprised of things similar to the other specific protected grounds (race, religion, nationality, and political opinion).<sup>55</sup> Each of the specific protected grounds “describe[d] persecution aimed at an immutable characteristic.”<sup>56</sup> Thus, the Board interpreted “membership in a particular social group” to mean “persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic.”<sup>57</sup>

A characteristic is immutable if the proposed group members cannot or should not “be required to change it because it is fundamental to their individual identities or consciences.”<sup>58</sup> Pursuant to *Acosta*, a common, immutable characteristic might be “a shared past experience” or “sex,

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<sup>50</sup> *Acosta*, 19 I. & N. Dec. at 233.

<sup>51</sup> *Id.* at 232–33.

<sup>52</sup> *Id.* at 233.

<sup>53</sup> See, e.g., 82 C.J.S. STATUTES § 438 (2020); 80 AM. JUR. 2D WILLS § 985 (2020); 39 A.L.R. 1404 (2020); see also *Acosta*, 19 I. & N. Dec. at 233 (citing *Cleveland v. United States*, 329 U.S. 14 (1946)).

<sup>54</sup> See *Acosta*, 19 I. & N. Dec. at 232–33.

<sup>55</sup> *Id.* at 233.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* The *Matter of Acosta* asylum applicant was a taxi driver and cooperative leader in San Salvador, El Salvador. *Id.* at 216. He claimed membership in a “particular social group” of “[taxi cooperative] drivers and persons engaged in the transportation industry of El Salvador.” *Id.* at 232. The Board held that the proposed “particular social group” was not immutable because members of the asylum applicant’s purported “particular social group” could avoid harm “by changing jobs or by cooperating in work stoppages.” *Id.* at 234. The asylum applicant therefore could not seek protection based on that group under the INA. See *id.* at 235.

<sup>58</sup> M-E-V-G-, 26 I. & N. Dec. 227, 231 (B.I.A. 2014) (quoting *Acosta*, 19 I. & N. Dec. at 233).



color, or kinship ties."<sup>59</sup> Immutability determinations must be made on a case-by-case basis.<sup>60</sup>

b. *Social Distinction*

The Board relied upon the *Matter of Acosta* interpretation of "particular social group" for more than twenty years.<sup>61</sup> In 2006, the *Matter of C-A*<sup>62</sup> Board "reviewed the range of approaches to defining particular social group" and again chose to follow the *Acosta* interpretation, which did not require group members' "voluntary associational relationship," "cohesiveness," or "homogeneity."<sup>63</sup> The Board also added "social visibility" as a "relevant factor" in assessing whether a "particular social group" was cognizable.<sup>64</sup>

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<sup>59</sup> *Acosta*, 19 I. & N. Dec. at 233.

<sup>60</sup> *Id.* The Board has noted that some shared past experiences are insufficient to form the basis of a "particular social group." For example, "a person who agrees to work as a government informant in return for compensation takes a calculated risk and is not in a position to claim refugee status should such risks materialize." C-A-, 23 I. & N. Dec. 951, 958 (B.I.A. 2006).

<sup>61</sup> See Paraketsova, *supra* note 27, at 449–50. *But see* R-A-, 22 I. & N. Dec. 906, 919 (Att'y Gen. 2001) ("The starting point for 'social group' analysis remains the existence of an immutable or fundamental individual characteristic in accordance with *Matter of Acosta* . . . We never declared, however, that the starting point for assessing social group claims articulated in *Acosta* was also the ending point.").

<sup>62</sup> 23 I. & N. Dec. 951 (B.I.A. 2006).

<sup>63</sup> *Id.* at 956–57.

<sup>64</sup> *Id.* at 959–61. The C-A- Board considered whether the asylum applicant's "particular social group"—"noncriminal drug informants working against the Cali drug cartel"—was legally cognizable. *Id.* The Board held that the applicant's purported "particular social group" lacked the requisite social visibility. *See id.* at 961. The Board explained that, because informants tend to act confidentially, they generally "remain unknown and undiscovered." *Id.* at 960. Additionally, drug cartels would harm anyone in the general population who attempted to interfere with their activities. *See id.* at 960–61. The Board held that the applicant failed to establish a legally cognizable "particular social group." *See id.* at 961. "Noncriminal drug informants working against the Cali drug cartel" lacked the requisite social visibility to be perceived or singled out as a group. *Id.* at 961. The C-A- Board also recognized the "particularity" requirement. *Id.* at 957 ("We find that this group is too loosely defined to meet the requirement of particularity.").

The Board explored the new “social visibility” requirement in *Matter of A-M-E & J-G-U*,<sup>65</sup> *Matter of S-E-G*,<sup>66</sup> and *Matter of E-A-G*.<sup>67</sup> A group met the “social visibility” requirement if it was “recognizable” enough to be “perceived as a group by society.”<sup>68</sup> Despite the new “particular social group” requirement, the Board claimed that it did not “depart from or abrogate” the *Acosta* “particular social group” interpretation, and it did not “adopt a new approach to defining particular social groups” under the INA.<sup>69</sup>

Subsequently, in *Matter of W-G-R* and *Matter of M-E-V-G*, the Board addressed the Third and Seventh Circuits’ concerns about the new “social visibility” requirement.<sup>70</sup> In contrast to the other courts of appeals, the

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<sup>65</sup> 24 I. & N. Dec. 69 (B.I.A. 2007). In *A-M-E & J-G-U*, the Second Circuit had remanded the case for the Board to determine whether the applicants’ “particular social group”—“affluent Guatemalans”—was legally cognizable. *Id.* at 73. The Board explained that, while the applicants were “victims of threats of criminal extortion,” the record suggested that private crime was prevalent and affected all socioeconomic classes in Guatemala. *Id.* at 74. Accordingly, the applicants failed to prove that their “particular social group” had the requisite social visibility. *Id.* at 75.

<sup>66</sup> 24 I. & N. Dec. 579 (B.I.A. 2008). In *S-E-G*, the Board considered two “particular social groups”: “Salvadoran youths who have resisted gang recruitment” and “family members of [Salvadoran youths who have resisted gang recruitment].” *Id.* at 582. The applicant claimed that the Mara Salvatrucha (“MS-13”) gang “stole money from [her] brothers, [threatened,] harassed and beat them for refusing to join their gang, and threatened to rape or harm [her].” *Id.* at 580. The applicant failed to prove the requisite “social visibility” because the gangs indiscriminately harmed people, and there was nothing to suggest that “Salvadoran youth who are recruited by gangs but refuse to join (or their family members) would be ‘perceived as a group’ by society.” *Id.* at 586–87.

<sup>67</sup> 24 I. & N. Dec. 591 (B.I.A. 2007). In *E-A-G*, the Board considered two “particular social groups”: “persons resistant to gang membership” and “young persons who are perceived to be affiliated with gangs.” *Id.* at 593. Two of the applicant’s brothers were murdered by gangs in El Salvador, the applicant’s mother received several threats telling her to leave, and the applicant was approached by an MS-13 gang member who attempted to recruit him on multiple occasions. *Id.* at 591–92. The Board conceded that gang membership entailed some visibility, and society might suspect that the applicant, “a young, urban male in Honduras,” had been approached by gangs or resisted gang membership. *Id.* at 595. However, a mere statistical showing was insufficient. *Id.* The Board did not fully resolve this issue but instead rejected the “particular social groups” because a “shared past experience” could not include “violent criminal activity” like former gang membership, even though the applicant in this case had never been a member of a criminal gang. *See id.* at 595–96 (quoting *Artega v. Mukasey*, 511 F.3d 940, 945–46 (9th Cir. 2007)).

<sup>68</sup> *A-M-E & J-G-U*, 24 I. & N. Dec. at 74 (quoting *C-A-*, 23 I. & N. Dec. at 956).

<sup>69</sup> *M-E-V-G*, 26 I. & N. Dec. 227, 237 (B.I.A. 2014).

<sup>70</sup> *Id.* at 228–29; *W-G-R*, 26 I. & N. Dec. 208, 211–12 (B.I.A. 2014); *see also* *Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582, 604 (3d Cir. 2011) (declining to adopt the Board’s “social visibility” requirement); *Gatimi v. Holder*, 578 F.3d 611, 616 (7th Cir. 2009).

Third<sup>71</sup> and Seventh<sup>72</sup> Circuits declined to accord *Chevron* deference to the Board's "social visibility" requirement, in part due to confusion over whether "social visibility" meant ocular visibility. To address the resulting circuit split, the Board renamed "social visibility" as "social distinction" in *W-G-R-* and *M-E-V-G-*.<sup>73</sup>

The Board explained that "social distinction [referred] to recognition by society, taking as its basis the plain language of the [INA]—in this case, the word 'social.'"<sup>74</sup> To be socially distinct, a "particular social group" does not need to be "ocularly visible."<sup>75</sup> Rather, its common immutable characteristics must be "set apart, or distinct, from other persons within the society in some significant way."<sup>76</sup>

### c. Particularity

"Particularity" is a separate requirement from "social distinction," but there is some overlap between the two requirements.<sup>77</sup> "Particularity" describes the "outer limits" of a group.<sup>78</sup> According to the Board, "'particularity' [was] included in the plain language of the [INA]."<sup>79</sup>

The Board explored the parameters of "particularity" in *S-E-G-* and *A-M-E & J-G-U-*. The *S-E-G-* Board explained that a "particular social group" must have "well-defined boundaries" and be "sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons."<sup>80</sup> A "particular social group" must be described with "commonly accepted definitions in the society of which the group is

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<sup>71</sup> See *Valdiviezo-Galdamez*, 663 F.3d at 603, 608.

<sup>72</sup> See *Gatimi*, 578 F.3d at 616 (explaining that the Board's "social visibility" requirement would mean that the only way people could "qualify as members of a particular social group is by pinning a target to their backs" with a social group label on it).

<sup>73</sup> *M-E-V-G-*, 26 I. & N. Dec. at 236; *W-G-R-*, 26 I. & N. Dec. at 216.

<sup>74</sup> *W-G-R-*, 26 I. & N. Dec. at 216.

<sup>75</sup> *M-E-V-G-*, 26 I. & N. Dec. at 238.

<sup>76</sup> *A-B-*, 27 I. & N. Dec. 316, 330 (Att'y Gen. 2018); *M-E-V-G-*, 26 I. & N. Dec. at 238. Social distinction depends on whether the "particular social group" is perceived by society, even if members of that group strive to hide their group membership. *M-E-V-G-*, 26 I. & N. Dec. at 238; *W-G-R-*, 26 I. & N. Dec. at 216 (citing *C-A-*, 23 I. & N. Dec. 951, 956–57 (B.I.A. 2006)). Social visibility may not be solely based on the persecutor's perception. *M-E-V-G-*, 26 I. & N. Dec. at 241–43; *W-G-R-*, 26 I. & N. Dec. at 218. A society may perceive a "particular social group" due to "sociopolitical or cultural conditions." *M-E-V-G-*, 26 I. & N. Dec. at 240.

<sup>77</sup> *M-E-V-G-*, 26 I. & N. Dec. at 241.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 239; *W-G-R-*, 26 I. & N. Dec. at 213.

<sup>80</sup> *S-E-G-*, 24 I. & N. Dec. 579, 582, 584 (B.I.A. 2008).

a part.”<sup>81</sup> The Board in *A-M-E & J-G-U-* found that “affluent” was “too amorphous to provide an adequate benchmark for determining group membership.”<sup>82</sup> Since wealth could be perceived differently by different members of Guatemalan society, “affluent,” by itself, was “too subjective, inchoate, and variable” to form the basis for a “particular social group.”<sup>83</sup> In *Matter of W-G-R-*, the Board affirmed that a “particular social group” must have “definable boundaries.”<sup>84</sup>

Additionally, a “particular social group” cannot be defined by the risk of persecution.<sup>85</sup>

## 2. “Particular Social Group” in Context: *Matter of A-B-*

This Comment does not analyze case-by-case adjudications or argue that specific “particular social groups” are legally cognizable. It examines only the “particular social group” legal standard—not its application. Nevertheless, the Board’s legal standard makes more sense in context. For that reason, this Subsection provides an overview of a recent DOJ “particular social group” analysis. It considers the Attorney General’s *A-B-* application of the Board’s *M-E-V-G-* and *W-G-R-* “particular social group” interpretation specifically because *Matter of A-B-* has been and will continue to be widely challenged and litigated.<sup>86</sup>

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<sup>81</sup> *M-E-V-G-*, 26 I. & N. Dec. at 239.

<sup>82</sup> *A-M-E & J-G-U-*, 24 I. & N. Dec. 69, 76 (B.I.A. 2007).

<sup>83</sup> *Id.*

<sup>84</sup> *W-G-R-*, 26 I. & N. Dec. 208, 214 (B.I.A. 2014).

<sup>85</sup> *See id.* at 215.

<sup>86</sup> *See Grace v. Whitaker*, 344 F. Supp. 3d 96, 125–27 (D.D.C. 2018) (holding that *Matter of A-B-* and a related policy memorandum created a “general rule against positive credible fear determinations in cases in which aliens claim a fear of persecution based on domestic or gang-related violence,” an arbitrary and capricious policy change); *see also*, *De Pena-Paniagua v. Barr*, 957 F.3d 88, 89, 93–94 (1st Cir. 2020) (*Matter of A-B-* did not categorically preclude women who are “unable to leave” a domestic relationship” from establishing membership in a “particular social group” and qualifying for asylum or withholding of removal; a categorical preclusion would have been “arbitrary and unexamined”); *but see* *Gonzales-Veliz v. Barr*, 938 F.3d 219, 233–35 (5th Cir. 2019) (holding that *Matter of A-B-* was not an arbitrary and capricious policy change and, even if it was, the Attorney General adequately explained his reasoning); *Amezcuca-Preciado v. U.S. Att’y Gen.*, 943 F.3d 1337, 1344 (11th Cir. 2019) (according *Chevron* deference to the Attorney General’s interpretation of “particular social group” in *A-B-* “because it is reasonable and consistent with both the [Board’s] and [the Eleventh Circuit’s] prior precedent”); *Godinez v. Barr*, 929 F.3d 598, 602 (8th Cir. 2019) (declining to address “the difficult questions raised by *Matter of A-R-C-G-* and *Matter of A-B-*”); *see generally* 2 IMMIGR. L. SERV. 2d ¶ 10:150 (2020); Kate Jastram & Sayoni Maitra, *Matter of A-B- One Year Later: Winning Back Gender-Based Asylum Through Litigation and Legislation*, 18 SANTA CLARA J. INT’L L. 48 (2020) (summarizing federal litigation related to *Matter of A-B-*).

As this Comment later explains in Part III.C., the courts of appeals are unlikely to overturn their own precedent to conduct a *Chevron* Step One analysis of "particular social group" under *Cardoza-Fonseca*. Accordingly, only the Supreme Court would conduct a *Chevron* Step One analysis to determine Congress's intended meaning of "particular social group," setting the legal standard that the Board should subsequently apply. The Supreme Court may have the opportunity to consider Congress's intended meaning of "particular social group" under *Chevron* Step One if it grants certiorari to review a challenge to *A-B*.<sup>87</sup>

In 2014, the Board decided *Matter of A-R-C-G*-, indicating that survivors of domestic violence may qualify for asylum in some circumstances.<sup>88</sup> Former Attorney General Jeff Sessions certified *A-B*- to himself, so that he could overturn the Board's decision in *A-R-C-G*-.<sup>89</sup> In *A-B*-, the Attorney General considered whether the Board correctly applied its *M-E-V-G*- and *W-G-R*- "particular social group" interpretation when it determined that the *A-R-C-G*- "particular social group" was legally cognizable.

The Attorney General held that the Board failed to correctly apply its "particular social group" legal standard since the DHS had stipulated that the *A-R-C-G*- "particular social group" was legally cognizable. In *A-R-C-G*-, the DHS "conceded that the [applicant] established harm rising to the level of past persecution on account of a particular social group comprised of 'married women in Guatemala who are unable to leave their relationship.'"<sup>90</sup> However, even though the DHS conceded that the applicant's "particular social group" was legally cognizable, the Board in *A-R-C-G*- still applied its current legal standard to the facts of the case; it determined that the *A-R-C-G*- "particular social group" was legally cognizable under the immutability, particularity, and social distinction requirements articulated in *Acosta*, *M-E-V-G*-, and *W-G-R*-.<sup>91</sup>

First, the *A-R-C-G*- Board considered immutability. A "particular social group" is "immutable" if group members share a common characteristic that they cannot or should not be required to change because it is

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<sup>87</sup> The Board's "particular social group" interpretations could also be revisited in challenges to other Attorney General decisions. *See, e.g.*, *Matter of E-R-A-L*-, 27 I. & N. Dec. 767, 769-74 (B.I.A. 2020) ("[A]n alien's status as a landowner does not automatically render that alien a member of a particular social group for purposes of asylum and withholding of removal."); *Matter of L-E-A*-, 27 I. & N. Dec. 581, 595 (Att'y Gen. 2019) (holding that immediate family is unlikely to be socially distinct).

<sup>88</sup> *See generally* *A-R-C-G*-, 26 I. & N. Dec. 388 (B.I.A. 2014).

<sup>89</sup> *See* *A-B*-, 27 I. & N. Dec. 316, 317 (Att'y Gen. 2018).

<sup>90</sup> *A-R-C-G*-, 26 I. & N. Dec. at 392.

<sup>91</sup> *See id.* at 392-95; *but see* *A-B*-, 27 I. & N. Dec. at 334 (finding that the Board did not "properly" analyze the particularity and social distinction requirements).

“fundamental to their individual identities or consciences.”<sup>92</sup> The Board found that the “particular social group”—“married women in Guatemala who are unable to leave their relationship”—was immutable in some circumstances.<sup>93</sup> The Board cited *Acosta* and found that gender, like sex, was immutable.<sup>94</sup> Depending on the circumstances and evidence presented in a particular case, marital status could also be immutable “where the individual is unable to leave the relationship.”<sup>95</sup> In *A-B-*, the Attorney General did not contest the *A-R-C-G-* immutability determination.<sup>96</sup>

Second, the *A-R-C-G-* Board considered particularity. A “particular social group” is “particular” if it has “well-defined boundaries” and is “sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.”<sup>97</sup> The Board found that “married women in Guatemala who are unable to leave their relationship” was defined with particularity in some circumstances. The Board found that “‘married,’ ‘women,’ and ‘unable to leave the relationship’ . . . have commonly accepted definitions within Guatemalan society.”<sup>98</sup> Based on the circumstances in the case—including societal gender norms in Guatemala, “legal constraints regarding divorce and separation,” and the police’s refusal to “interfere in a marital relationship”—the “particular social group” had “discrete and definable boundaries” and was therefore sufficiently particular.<sup>99</sup>

The Attorney General disagreed. In *A-B-*, he determined that the *A-R-C-G-* “particular social group” was not defined with particularity. It was not enough that “‘married,’ ‘women,’ and ‘unable to leave the relationship’ . . . have commonly accepted definitions within Guatemalan society.”<sup>100</sup> Rather, the Attorney General said the *A-R-C-G-* Board should have considered whether the “particular social group” was “defined by characteristics that provide a clear benchmark for determining who falls within the group.”<sup>101</sup> Because the *A-R-C-G-* “particular social group” was

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

<sup>93</sup> *A-R-C-G-*, 26 I. & N. Dec. at 393.

<sup>94</sup> *Id.* at 392–93.

<sup>95</sup> *Id.* (“A range of factors could be relevant, including whether dissolution of a marriage could be contrary to religious or other deeply held moral beliefs or if dissolution is possible when reviewed in light of religious, cultural, or legal constraints.”).

<sup>96</sup> That the Attorney General failed to contest the *A-R-C-G-* immutability determination suggests that Ms. *A-R-C-G-*’s “particular social group” would have been legally cognizable under *Acosta*.

<sup>97</sup> *S-E-G-*, 24 I. & N. Dec. 579, 582, 584 (B.I.A. 2008).

<sup>98</sup> *A-R-C-G-*, 26 I. & N. Dec. at 393.

<sup>99</sup> *Id.*

<sup>100</sup> *A-B-*, 27 I. & N. Dec. 316, 335 (Att’y Gen. 2018).

<sup>101</sup> *Id.* (quoting *M-E-V-G-*, 26 I. & N. Dec. 227, 239 (B.I.A. 2014)).

"too amorphous, overbroad, diffuse, or subjective," according to the Attorney General, it was not defined with particularity.<sup>102</sup>

Third, the Board in *A-R-C-G-* considered social distinction. A "particular social group" is socially distinct if it is "recognizable" enough to be "perceived as a group by society."<sup>103</sup> The Board determined that Ms. *A-R-C-G-*'s "particular social group"—"married women in Guatemala who are unable to leave their relationship"—was "socially distinct within the society in question."<sup>104</sup> According to the *A-R-C-G-* Board, the evidence demonstrated that "society in general perceive[d], consider[ed], or recognize[d] persons sharing the particular characteristic[s] to be a group."<sup>105</sup> The Board considered factors like the lack of adequate legal protections for domestic violence survivors and the "culture of 'machismo and family violence'" in Guatemala.<sup>106</sup> The Board in *A-R-C-G-* explained that whether a "particular social group" is socially distinct "will depend on the facts and evidence in each individual case, including documented country conditions; law enforcement statistics and expert witnesses, if proffered; the [applicant's] past experiences; and other reliable and credible sources of information."<sup>107</sup> Based on the facts and evidence in this case, the *A-R-C-G-* Board determined that Ms. *A-R-C-G-*'s "particular social group" was socially distinct.

In *A-B-*, the Attorney General claimed that the *A-R-C-G-* Board did not explain whether, according to the evidence presented, Guatemalan society recognized "married women in Guatemala who are unable to leave their relationship" as a "particular social group."<sup>108</sup> The Attorney General said "there is significant room for doubt that Guatemalan society views these women, as horrible as their personal circumstances may be, as members of a distinct group in society, rather than each as a victim of a particular abuser in highly individualized circumstances."<sup>109</sup>

The Attorney General further claimed that "particular social groups" that are "defined by their vulnerability to private criminal activity" likely fail the particularity requirement, "given that broad swaths of society may be susceptible to victimization."<sup>110</sup> More specifically, the Attorney General explained that "claims by aliens pertaining to domestic violence or gang

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<sup>102</sup> *Id.* (quoting *M-E-V-G-*, 26 I. & N. Dec. at 239).

<sup>103</sup> *A-M-E & J-G-U-*, 24 I. & N. Dec. 69, 74 (B.I.A. 2007) (quoting *In re C-A-*, 23 I. & N. Dec. 951, 956 (B.I.A. 2006)).

<sup>104</sup> *A-R-C-G-*, 26 I. & N. Dec. at 393 (citing *M-E-V-G-*, 26 I. & N. Dec. at 240).

<sup>105</sup> *Id.* at 393–94 (quoting *W-G-R-*, 26 I. & N. Dec. 208, 217 (B.I.A. 2014)).

<sup>106</sup> *Id.* at 394.

<sup>107</sup> *Id.* at 394–95.

<sup>108</sup> *A-B-*, 27 I. & N. Dec. 316, 336 (Att'y Gen. 2018).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 335.

violence perpetrated by non-governmental actors will [generally] not qualify for asylum.”<sup>111</sup>

The Attorney General’s broad claim that domestic violence and gang violence survivors will generally not qualify for asylum is problematic for a couple of reasons. First, the Attorney General made this claim in dicta as an attempt to implement the Trump Administration’s political agenda. Indeed, gang violence was not even at issue in *A-R-C-G-* or *A-B-*. Second, adjudicators must determine whether a “particular social group” is legally cognizable based on the facts and evidence presented in each case.<sup>112</sup> The Attorney General’s claim directly conflicts with this requirement. *Matter of A-B-* has resulted in increased litigation because “[i]mmigration courts around the country are already issuing orders requiring respondents to submit briefs explaining why their cases should not be summarily denied under the new decision[.]”<sup>113</sup>

*Matter of A-B-*’s core holding merely reiterated and applied the “particular social group” legal standard that the Board previously established in *M-E-V-G-* and *W-G-R-*. Today’s asylum applicant must prove that her “particular social group” meets three substantive requirements. Her “particular social group” must be:

- (1) composed of members who share a common immutable characteristic;
- (2) defined with particularity; and
- (3) socially distinct.<sup>114</sup>

Additionally, her “particular social group” cannot be defined by the persecution she experienced or fears.<sup>115</sup> Rather, the “particular social group” must exist prior to the act of persecution in order for the applicant

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<sup>111</sup> *Id.* at 320.

<sup>112</sup> See, e.g., *M-E-V-G-*, 26 I. & N. Dec. 227, 251 (B.I.A. 2014); *W-G-R-*, 26 I. & N. Dec. 208, 212 (B.I.A. 2014).

<sup>113</sup> Maureen A. Sweeney, *Enforcing/Protection: The Danger of Chevron in Refugee Act Cases*, 71 ADMIN. L. REV. 127, 142 (2019).

<sup>114</sup> *A-B-*, 27 I. & N. Dec. at 320; *M-E-V-G-*, 26 I. & N. Dec. at 237; *W-G-R-*, 26 I. & N. Dec. at 208.

<sup>115</sup> See *A-B-*, 27 I. & N. Dec. at 330–31; *M-E-V-G-*, 26 I. & N. Dec. at 237 n.11 (“[The] social group must exist independently of the fact of persecution.”); *W-G-R-*, 26 I. & N. Dec. at 215.



to satisfy the "nexus" requirement—that she was persecuted *on account of* her "particular social group."<sup>116</sup>

### C. Applying for Asylum in the United States

Under the INA, an "alien" who is present in the United States may apply for asylum.<sup>117</sup> Depending on her circumstances, the applicant must apply for asylum either affirmatively or defensively.

#### 1. Affirmative Asylum: Presenting a Claim Before an Asylum Officer

In general, applicants who are not already in detention or removal proceedings may apply for asylum affirmatively through the DHS's US Citizenship and Immigration Services ("USCIS").<sup>118</sup> The applicant must file a form I-589, Application for Asylum and for Withholding of Removal<sup>119</sup>

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<sup>116</sup> See *A-B-*, 27 I. & N. Dec. at 335 ("If a group is defined by the persecution of its members, then the definition of the group moots the need to establish actual persecution. For this reason, '[t]he individuals in the group must share a narrowing characteristic other than their risk of being persecuted.'" (quoting *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005)); see also, e.g., *Sarkisian v. Att'y Gen.*, 322 F. App'x 136, 141 (3d Cir. 2009) ("This is a matter of logic: motivation must precede action; and the social group must exist prior to the persecution if membership in the group is to motivate the persecution."); *Rreshpja*, 420 F.3d at 556 ("[A] social group may not be circularly defined by the fact that it suffers persecution."); *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003) ("[A] 'particular social group' must exist independently of the persecution suffered by the applicant for asylum."). In *A-B-*, the Attorney General suggested that the *A-R-C-G-* "particular social group,"—"married women in Guatemala who are unable to leave their relationship"—was "effectively defined to consist of women in Guatemala who are victims of domestic abuse because the inability 'to leave' was created by harm or threatened harm." *A-B-*, 27 I. & N. Dec. at 335. Though not the subject of this Comment, the Attorney General failed to address the legal and social factors that prevented Ms. *A-R-C-G-* from leaving her relationship. "Unable to leave" likely could, in some circumstances, still form the basis of a legally cognizable "particular social group."

<sup>117</sup> 8 U.S.C. § 1158(a)(1).

<sup>118</sup> But see *Minor Children Applying for Asylum by Themselves*, USCIS (Aug. 6, 2020), <https://perma.cc/HY5J-HRVD>.

<sup>119</sup> Withholding of removal (previously "withholding of deportation") is similar to asylum. However, the burden of proof for withholding of removal is higher than the burden of proof for asylum. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987). Whereas an asylum applicant only has to show a well-founded fear of persecution on account of a protected ground, an applicant for withholding of removal must establish that her "life or freedom would be threatened in [her native] country because of [her] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A); see 8 C.F.R. § 1208.16(b) (2020). In other words, the withholding of removal applicant must demonstrate that it is more likely than not that her life or freedom would be threatened on account of one of the five protected grounds. *INS v. Stevic*, 467 U.S. 407, 424, 429–30 (1984).

(“asylum application”) and all supplementary materials before the one-year filing deadline.<sup>120</sup> After the asylum application is filed, the applicant will receive a receipt notice and a written notice of her biometrics appointment, during which she will be fingerprinted and photographed.<sup>121</sup> Finally, a local asylum office, asylum sub-office, or USCIS field office will schedule the asylum interview.<sup>122</sup>

During the asylum interview, an asylum officer will ask the applicant about her application materials and experiences for at least an hour.<sup>123</sup> The asylum officer places the applicant under oath and then “[conducts] the interview in a nonadversarial manner.”<sup>124</sup> The applicant must bring her own interpreter if she does not speak English proficiently.<sup>125</sup> Following the asylum interview, the asylum officer will make a determination about the asylum application, and a supervisory asylum officer will review that determination.<sup>126</sup> The applicant will either return to the asylum office to pick up the decision or the decision will be mailed to her.<sup>127</sup>

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The Refugee Act brought the withholding of removal provision in line with the Refugee Protocol. See Acosta, 19 I. & N. Dec. 211, 219 (B.I.A. 1985); Parish, *supra* note 30, at 924 n.8 (The Refugee Protocol was not self-executing; Congress passed the Refugee Act so the Refugee Protocol would become binding domestic law). Unlike asylum, withholding of removal is mandatory. Under article 33 of the Refugee Protocol, unless a refugee was convicted of a “particularly serious crime” or otherwise threatened a country’s national security: “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” See generally UNHCR, *supra* note 23, at 30. Thus, if a withholding of removal applicant proves that her “life or freedom would be threatened” in another country on account of her “race, religion, nationality, membership in a particular social group, or political opinion,” the United States must not remove her to that country. *Id.* Because withholding of removal is mandatory, an applicant who is ineligible to apply for asylum may still qualify for withholding of removal if she can meet the higher burden of proof. See *Asylum Bars*, USCIS (Apr. 1, 2011), <https://perma.cc/XL22-AUVS>. Applicants may apply for protection under the Convention Against Torture (“CAT”) on the same form. See generally LEGOMSKY & THRONSON, *supra* note 32, at 1371–89.

<sup>120</sup> U.S. CITIZENSHIP & IMMGR. SERVS., OMB NO. 1615-0067, 1-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL (2019), <https://perma.cc/4FTU-LXHX>. Supplementary materials include a passport-style photograph, copies of travel and identification documents with English translations, affidavits with English translations, and country reports. *Id.*

<sup>121</sup> U.S. CITIZENSHIP & IMMGR. SERVS., OMB NO. 1615-0067, 1-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL INSTRUCTIONS (2019), <https://perma.cc/F4U2-AP49>.

<sup>122</sup> *The Affirmative Asylum Process*, USCIS (Apr. 19, 2019), <https://perma.cc/8QLF-S2SJ>.

<sup>123</sup> I have been the interpreter for a few affirmative asylum interviews. The longest interview lasted about three hours. See *Preparing for Your Asylum Interview*, USCIS (June 14, 2019), <https://perma.cc/75TN-MNXU>.

<sup>124</sup> 8 C.F.R. § 208.9(b) (2020).

<sup>125</sup> *Preparing for Your Asylum Interview*, *supra* note 123.

<sup>126</sup> *The Affirmative Asylum Process*, *supra* note 122.

<sup>127</sup> *Id.*

If the asylum application is approved, the asylee is eligible for additional immigration benefits.<sup>128</sup> If the application is denied, the application is generally referred to an Immigration Judge, and the applicant is placed into removal proceedings.<sup>129</sup>

## 2. Defensive Asylum: Presenting a Claim Before an Immigration Judge

In general, applicants who are already in detention or removal proceedings apply for asylum defensively through the DOJ's Executive Office for Immigration Review ("EOIR").<sup>130</sup> While in removal proceedings, an applicant may have one or more master calendar hearings before her individual merits hearing.<sup>131</sup> The individual merits hearing<sup>132</sup> is an adversarial hearing.<sup>133</sup> With or without counsel,<sup>134</sup> the applicant will present her claim, as well as any evidence or witnesses.<sup>135</sup> The applicant will be cross-examined by the DHS's Immigration and Customs Enforcement ("ICE") attorney.<sup>136</sup> Following the individual merits hearing, the Immigration Judge will either grant the asylum application or deny the asylum application and order removal.<sup>137</sup> The Immigration Judge may enter an oral or written decision.<sup>138</sup> If the Immigration Judge denies the asylum application, the applicant may appeal to the DOJ's Board of

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<sup>128</sup> See generally *Benefits and Responsibilities of Asylees*, USCIS (Mar. 8, 2018), <https://perma.cc/WN4J-FPL8>.

<sup>129</sup> See *Types of Asylum Decisions*, USCIS (June 16, 2015), <https://perma.cc/4NW4-M7KH>.

<sup>130</sup> See Rachel D. Settlege, *Affirmatively Denied: The Detrimental Effects of a Reduced Grant Rate for Affirmative Asylum Seekers*, 27 B.U. INT'L L.J. 61, 71 (2009).

<sup>131</sup> See U.S. DEP'T OF JUST., EXEC. OFFICE FOR IMMIGR. REV., IMMIGRATION JUDGE MASTER CALENDAR CHECKLIST FOR PRO SE RESPONDENTS (2020), <https://perma.cc/6V9Q-T4Q3>; U.S. DEP'T OF JUST., EXEC. OFFICE FOR IMMIGR. REV., INTRODUCTION TO THE MASTER CALENDAR (2020), <https://perma.cc/23W3-N45C>; see generally Dagmar R. Myslinska, *What Will Happen at Your Master Calendar Hearing?*, NOLO (2020), <https://perma.cc/HV3Q-QCFN>.

<sup>132</sup> See generally Kristina Gasson, *What Will Happen at Your Individual Immigration Court Hearing on an Asylum Case*, NOLO (2020), <https://perma.cc/DC4C-TX37>.

<sup>133</sup> See Settlege, *supra* note 130, at 75.

<sup>134</sup> Bednar, *supra* note 19, at 361–62 ("While the asylum application instructions provide information for obtaining pro bono counsel, one study suggests only 7% of individuals in removal proceedings are actually represented by pro bono counsel or a nonprofit legal service organization. . . . Applicants represented by an attorney before the [Immigration Judge] have a 45.6% grant rate, compared to the 16.3% grant rate for pro se individuals." (footnote omitted)).

<sup>135</sup> U.S. DEP'T OF JUST., EXEC. OFFICE FOR IMMIGR. REV., IMMIGRATION COURT PRACTICE MANUAL 79–81 (2016), <https://perma.cc/RHT9-TR76>.

<sup>136</sup> See *id.* at 80.

<sup>137</sup> Settlege, *supra* note 130, at 75.

<sup>138</sup> See 8 C.F.R. § 1240.12(a) (2020).

Immigration Appeals.<sup>139</sup> If the Immigration Judge grants the asylum application, the DHS may appeal to the Board.

### 3. Appeal to the Board of Immigration Appeals

On appeal to the Board, both the applicant and the ICE attorney will have the opportunity to submit briefs. The Board occasionally grants a request for oral argument.<sup>140</sup> The Board reviews the Immigration Judge's factual and credibility findings for clear error.<sup>141</sup> The Board "review[s] questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo*."<sup>142</sup> The Board's decision is generally final, although the Attorney General may review it.<sup>143</sup> If the Board affirms the Immigration Judge's decision denying the application for asylum, the applicant may appeal to the appropriate US Court of Appeals within thirty days of the Board's final order.<sup>144</sup>

### 4. Appeal to a United States Court of Appeals

The "court of appeals for the judicial circuit in which the immigration judge completed the proceedings" has jurisdiction over the applicant's appeal from the Board's final order.<sup>145</sup> The court of appeals may only consider the administrative record and grounds upon which the Board relied in reaching its decision.<sup>146</sup> The Board's decision to deny the asylum application "must be upheld if 'supported by reasonable, substantial, and probative evidence on the record considered as a whole.'"<sup>147</sup> An attorney within the DOJ's Office of Immigration Litigation ("OIL") will defend the Board's decision on appeal.<sup>148</sup> If the court of appeals upholds the Board's denial of the asylum application, the applicant may appeal to the Supreme Court.

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<sup>139</sup> *Id.* § 1240.15; U.S. DEP'T OF JUST., EXEC. OFFICE FOR IMMIGR. REV., BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 49–52 (2018), <https://perma.cc/BNJ5-KKHK>.

<sup>140</sup> U.S. DEP'T OF JUST., *supra* note 139, at 52.

<sup>141</sup> 8 C.F.R. § 1003.1(d)(3)(i).

<sup>142</sup> *Id.* § 1003.1(d)(3)(ii).

<sup>143</sup> *Id.* § 1003.1(d)(7).

<sup>144</sup> 8 U.S.C. § 1252(a)(1), (b)(1) (2018).

<sup>145</sup> *Id.* § 1252(b)(2).

<sup>146</sup> *Id.* § 1252(b)(4)(A).

<sup>147</sup> *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992) (quoting 8 U.S.C. § 1105a(a)(4)).

<sup>148</sup> See generally *Office of Immigration Litigation*, U.S. DEP'T OF JUST. (Mar. 5, 2020), <https://perma.cc/DY4W-8ULX>.

## II. The Supreme Court's Review of the Board's Refugee Act Interpretations

An applicant may appeal the Board's final order to the appropriate court of appeals.<sup>149</sup> When reviewing the Board's Refugee Act interpretations, the courts of appeals are bound by the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (*Chevron*).<sup>150</sup> Section A explains the *Chevron* two-step framework generally. Section B describes how the Court applied the *Chevron* two-step framework to Refugee Act provisions in *Cardoza-Fonseca*. It also explains why two subsequent Supreme Court decisions, *INS v. Aguirre-Aguirre*<sup>151</sup> and *Negusie v. Holder*,<sup>152</sup> did not alter *Cardoza-Fonseca*'s *Chevron* Step One guidance.

### A. The *Chevron* Two-Step Framework

In *Chevron*, the Supreme Court set forth the following two-step framework for courts to apply when reviewing an agency's interpretation of a statute that it administers:

[Step One:] First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . [Step Two:] If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>153</sup>

Under *Chevron* Step One, the court must first determine whether the statutory term has an *unambiguous* meaning.<sup>154</sup> In determining whether a statutory term is unambiguous, courts employ "traditional tools of statutory construction."<sup>155</sup> When using these "traditional tools of statutory construction," courts normally begin by analyzing the text of the statute, referring to dictionaries to determine the ordinary meaning of a particular

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<sup>149</sup> 8 U.S.C. § 1252(a), (b)(1)–(2).

<sup>150</sup> 467 U.S. 837 (1984). See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) ("It is clear that principles of *Chevron* deference are applicable to this statutory scheme.").

<sup>151</sup> 526 U.S. 415 (1999).

<sup>152</sup> 555 U.S. 511 (2009).

<sup>153</sup> *Chevron*, 467 U.S. at 842–43 (footnotes omitted).

<sup>154</sup> See *id.*

<sup>155</sup> *Id.* at 843 n.9.

statutory term.<sup>156</sup> Courts may then look to the structure and context of the statute, as well as the textual canons of statutory interpretation.<sup>157</sup> Finally, some courts consider the purpose of the statute, examining its legislative history or using the substantive canons of statutory interpretation.<sup>158</sup>

If, after employing the “traditional tools of statutory construction,” the court determines the statutory term is unambiguous, “that is the end of the matter.”<sup>159</sup> A court must “give effect to the unambiguously expressed intent of Congress.”<sup>160</sup> If the court determines the statutory term is ambiguous, however, the court should proceed to *Chevron* Step Two.<sup>161</sup> Under *Chevron* Step Two, the court must determine whether the agency’s interpretation of the ambiguous statutory term was reasonable.<sup>162</sup>

When reviewing the Board’s interpretations of Refugee Act terms, courts apply the *Chevron* two-step framework.<sup>163</sup>

### B. *The Supreme Court’s Application of the Chevron Two-Step Framework to Refugee Act Provisions in Cardoza-Fonseca*

In *Cardoza-Fonseca*, the Supreme Court explained how courts should apply the *Chevron* framework when reviewing the Board’s interpretations

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<sup>156</sup> See VALERIE C. BRANNON & JARED P. COLE, CONG. RSCH. SERV., R44954, *CHEVRON* DEFERENCE: A PRIMER 14 (2017).

<sup>157</sup> See *id.*

<sup>158</sup> *Id.* at 14–15.

<sup>159</sup> *Chevron*, 467 U.S. at 842.

<sup>160</sup> *Id.* at 842–43; see, e.g., *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018) (declining to “resort to *Chevron* deference, as some lower courts [had] done, for Congress [had] supplied a clear and unambiguous answer to the interpretive question at hand” within the statutory text).

<sup>161</sup> See *Chevron*, 467 U.S. at 843.

<sup>162</sup> *Id.* Although not the subject of this Comment, some scholars and courts have subsequently added steps to the *Chevron* two-step framework. See, e.g., Sweeney, *supra* note 113, at 164, 166–81 (explaining that the “Supreme Court does not necessarily assume congressional intent to delegate deference-worthy authority to every executive agency on every issue on which the agency has general administrative authority” and conducting a *Chevron* Step Zero analysis to consider whether *Chevron* deference is appropriate in cases arising under the Refugee Act); see generally Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757 (2017). Other scholars have argued that *Chevron* should be overturned entirely, “releas[ing] all interpretative power back to the courts.” See, e.g., Amy L. Moore, *Slouching Towards Oblivion: Divergent Implementation and Potential Exodus of Chevron Analysis in the Supreme Court’s Interpretation of Immigration Law*, 87 UMKC L. REV. 549, 605 (2019).

<sup>163</sup> E.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (“It is clear that principles of *Chevron* deference are applicable to [the INA].”); see Gabriel J. Chin, Nicholas Starkman & Steven Vong, *Chevron and Citizenship*, 52 U.C. DAVIS L. REV. 145, 147 (2018) (“The Supreme Court and other courts have held that administrative interpretations of the Immigration and Nationality Act (“INA”) are subject to the general framework of *Chevron*.” (footnotes omitted)).

of Refugee Act terms. According to the *Chevron* two-step framework, the *Cardoza-Fonseca* Court began its analysis at *Chevron* Step One. In discerning Congress's intended meaning of two legal standards in two Refugee Act provisions, the *Cardoza-Fonseca* Court employed three "traditional tools of statutory construction" under *Chevron* Step One: it considered the text, Refugee Act legislative history, and INA structure and concluded that the two legal standards differed.<sup>164</sup> Echoing *Chevron*, the Supreme Court explained that courts are better suited to determine a legal standard when that is a "pure question of statutory construction."<sup>165</sup> Even "in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations,'" the courts must interpret Refugee Act terms in line with Congress's intent.<sup>166</sup>

Under the Court's guidance in *Cardoza-Fonseca*, the Board deserves *Chevron* deference when it determines how a Refugee Act legal standard applies in particular cases.<sup>167</sup> However, when the Board proposes the legal standard supplied by a Refugee Act term, it does *not* deserve *Chevron* deference.<sup>168</sup> Rather, determining a Refugee Act legal standard is a job for the courts.<sup>169</sup>

Subsection 1 summarizes the Court's opinion and holding in *INS v. Cardoza-Fonseca*. Subsection 2 explains how the *Cardoza-Fonseca* Court applied the *Chevron* two-step framework. Finally, Subsection 3 explains why the Court's decisions in *Aguirre-Aguirre* and *Negusie* can be reconciled with *Cardoza-Fonseca*. Reviewing courts should adhere to *Cardoza-Fonseca* when determining Congress's intended meaning of a Refugee Act term under *Chevron* Step One.

### 1. *INS v. Cardoza-Fonseca*

In *Cardoza-Fonseca*, an applicant applied for asylum and withholding of deportation under the INA.<sup>170</sup> At issue were the legal standards of proof

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<sup>164</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430–46 (1987).

<sup>165</sup> *See id.* at 446; *see also Chevron*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction . . . .")

<sup>166</sup> *See Aguirre-Aguirre*, 526 U.S. at 425 (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)); *Cardoza-Fonseca*, 480 U.S. at 446.

<sup>167</sup> *See Cardoza-Fonseca*, 480 U.S. at 446–48.

<sup>168</sup> *See Aguirre-Aguirre*, 526 U.S. at 425 (citing *Cardoza-Fonseca*, 480 U.S. at 448). *But see* James H. Martin, Note, *The Ninth Circuit's Review of Administrative Questions of Law in the Immigration Context: How the Court in Hernandez-Montiel v. INS Ignored Chevron and Failed to Bring Harmony to "Particular Social Group" Analysis*, 10 GEO. MASON L. REV. 159, 171 (2001).

<sup>169</sup> *Cardoza-Fonseca*, 480 U.S. at 446.

<sup>170</sup> *Id.* at 424. "Withholding of deportation" is now called "withholding of removal." *See* 8 U.S.C. § 1231(b)(3) (2018). In 1996, Congress passed the Illegal Immigration Reform and Immigrant

governing asylum and withholding of deportation.<sup>171</sup> The Court had previously held in *INS v. Stevic*<sup>172</sup> that the “well-founded fear” asylum standard did not govern applications for withholding of deportation.<sup>173</sup> Instead, a withholding of deportation applicant had to demonstrate a “clear probability”—that it was “more likely than not”—that she would face persecution if deported.<sup>174</sup> Here, the Court was presented with the converse issue: whether the withholding of deportation “clear probability” standard was equivalent to the asylum “well-founded fear” standard and therefore governed applications for asylum.<sup>175</sup>

The Immigration Judge applied the “clear probability” standard to both the applicant’s asylum claim and withholding of deportation claim.<sup>176</sup> The Board affirmed.<sup>177</sup> On appeal to the Ninth Circuit, the applicant argued that the Immigration Judge and the Board erred by applying the “clear probability” standard to her asylum claim.<sup>178</sup> Instead, she argued, they should have applied the “more generous” “well-founded fear” standard.<sup>179</sup> The Ninth Circuit agreed with the applicant, relying on the plain language and structure of the statute to determine that the asylum and withholding of deportation standards were different.<sup>180</sup> The Ninth Circuit remanded the applicant’s asylum claim, so the Board could

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Responsibility Act (“IRIRA”), which “changed the wording of the withholding provision . . . and moved it to [8 U.S.C. § 1231(b)(3)].” LEGOMSKY & THRONSON, *supra* note 32, at 1162; see *Aguirre-Aguirre*, 526 U.S. at 420.

<sup>171</sup> See Brief for the Petitioner, *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (No. 85-782), 1986 WL 727528, at \*1 (“Whether an alien’s burden of proving eligibility for asylum pursuant to Section 208(a) of the Immigration and Nationality Act of 1952 . . . is equivalent to his burden of proving eligibility for withholding of deportation . . . .”); Brief of Respondent, *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (No. 85-782), 1986 WL 727540, at \*i (“Is there a difference between the ‘well-founded fear of persecution’ standard applied to requests for asylum under section 208(a) of the Immigration and Nationality Act . . . and the ‘clear probability’ standard applicable to requests for withholding of deportation under section 243(h) of the Act . . . ?”).

<sup>172</sup> 467 U.S. 407 (1984).

<sup>173</sup> *Id.* at 423–24.

<sup>174</sup> *Cardoza-Fonseca*, 480 U.S. at 430–31.

<sup>175</sup> See *id.* at 430.

<sup>176</sup> See *id.* at 425.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Cardoza-Fonseca*, 480 U.S. at 425; see generally *Cardoza-Fonseca v. INS*, 767 F.2d 1448 (9th Cir. 1985). The Ninth Circuit also noted that the Board had repeatedly held the asylum “well-founded fear” standard and withholding of deportation “clear probability” standard to be identical, despite contrary circuit court precedent. *Id.* at 1453–54 (“In this respect the Board appears to feel that it is exempt from the holding of *Marbury v. Madison* . . . and not constrained by circuit court opinions.” (citation omitted)).



consider it in the first instance under the appropriate standard.<sup>181</sup> The Supreme Court granted certiorari to resolve a circuit split.<sup>182</sup>

The Supreme Court first considered the withholding of deportation standard. Under the INA, the Attorney General was required to "withhold deportation of an [applicant] who demonstrate[d] that h[er] 'life or freedom would be threatened'" on account of a protected ground.<sup>183</sup> Pursuant to the Court's decision in *INS v. Stevic*, a withholding of deportation applicant had to demonstrate a "clear probability"—that it was "more likely than not"—that she would face persecution if deported.<sup>184</sup>

The Court then considered the asylum standard. Pursuant to the INA, the Attorney General had the discretion to "grant asylum to an [applicant] who [was] unable or unwilling to return to h[er] country 'because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.'"<sup>185</sup>

The Court held that Congress intended for the legal standards governing withholding of deportation and asylum to differ.<sup>186</sup> Unlike in her application for withholding of deportation, the applicant did not have to prove a "clear probability" of persecution in order to qualify for asylum.<sup>187</sup> Whereas a withholding of deportation applicant had to prove more than a fifty percent likelihood of persecution to establish a "clear probability," an asylum applicant merely had to prove a ten percent likelihood of persecution to establish a "well-founded fear."<sup>188</sup>

## 2. Applying the *Chevron* Framework in *Cardoza-Fonseca*

In reaching its conclusion, the *Cardoza-Fonseca* Court considered whether it should give *Chevron* deference to the Board's interpretation of the Refugee Act provisions. Under *Chevron* Step One, the Court explained that

The question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide. Employing traditional tools of

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181 See *Cardoza-Fonseca*, 480 U.S. at 426.

182 *Id.*

183 *Id.* at 423.

184 See *id.*

185 *Id.* (quoting 8 U.S.C. § 1101(a)(42)).

186 See *id.* at 446.

187 *Cardoza-Fonseca*, 480 U.S. at 423–24.

188 See *id.* at 431, 440.

statutory construction, we have concluded that Congress did not intend the two standards to be identical.<sup>189</sup>

The Court employed three “traditional tools of statutory construction.” It considered the text, legislative history of the Refugee Act, and structure of the INA.<sup>190</sup>

The Court first considered the text of the INA provisions, noting that Congress’s intended meaning of INA terms was found within the “ordinary meaning of the words used.”<sup>191</sup> Under the plain language of the INA, a “well-founded fear” of persecution was not identical to a “clear probability” of persecution; the language in the two standards of proof “convey[ed] very different meanings.”<sup>192</sup> If Congress wanted the same standard to apply to both asylum and withholding of deportation, it would have used the same language in both statutory provisions. Because the language in each provision was different, the standards of proof for asylum and withholding of deportation were different.<sup>193</sup>

The Court then considered the legislative history of the Refugee Act. The Court found it significant that Congress drafted both the asylum provision and amended the withholding of deportation provision at the same time, yet it chose to use different language for the standards of proof in each provision.<sup>194</sup> The Court considered additional evidence as well: a prior asylum-related statute with a similar “fear of persecution” standard; the “abundant evidence” that Congress intended to bring US asylum law, including the “refugee” definition, in line with the Refugee Protocol; the UNHCR Refugee Handbook, which supported the Court’s conclusion that an applicant need only demonstrate a ten percent likelihood of persecution to prove asylum eligibility; and Congress’s decision not to “enact the Senate version of the [Refugee Act] bill that would have made a refugee ineligible for asylum” unless she also proved withholding of deportation eligibility.<sup>195</sup> Each aspect of the Refugee Act’s legislative history supported the Court’s finding that the standard of proof for

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<sup>189</sup> *Id.* at 446.

<sup>190</sup> *See id.* at 431–46.

<sup>191</sup> *Id.* at 431 (quoting *INS v. Phinpathya*, 464 U.S. 183, 189 (1984)).

<sup>192</sup> *Id.* at 430–31. In addition to the obvious linguistic differences, the Court also noted that the “clear probability” standard required the “alien to establish by *objective* evidence that it is more likely than not that he or she will be subject to persecution upon deportation.” *Id.* at 430 (emphasis added). In contrast, the “well-founded fear” standard made the “eligibility determination turn to some extent on the *subjective* mental state of the alien.” *Id.* at 430–31 (emphasis added).

<sup>193</sup> *Cardoza-Fonseca*, 480 U.S. at 424, 432.

<sup>194</sup> *Id.* at 432.

<sup>195</sup> *Id.* at 432–43.

asylum was different (and "more generous") than the standard of proof for withholding of deportation.<sup>196</sup>

The Court considered the structure of the INA while addressing an INS argument. According to the INS, the structure of the INA indicated that the asylum "well-founded fear" and withholding of deportation "clear probability" standards were the same.<sup>197</sup> Moreover, the INS argued, it would be absurd for asylum-seekers to have to meet a lower standard of proof when the asylum provision offered greater benefits than the withholding of deportation provision.<sup>198</sup> The Court disagreed. As the Court explained, asylum was discretionary, and it therefore made sense for asylum-seekers to meet a lower standard of proof; the Attorney General could decline to grant asylum to an applicant, even if she was otherwise eligible for asylum.<sup>199</sup> In contrast, withholding of deportation was mandatory; if an applicant proved withholding of deportation eligibility, she had a right to remain in the United States.<sup>200</sup> The structure of the INA indicated that the asylum and withholding of deportation standards were different.

Because the text, Refugee Act legislative history, and INA structure all supported the Court's conclusion that the asylum and withholding of deportation standards differed, the Court resolved the issue under *Chevron* Step One and declined to accord *Chevron* deference to the Board's interpretation and contrary conclusion.<sup>201</sup> The Court was in the best position to decide "a pure question of statutory construction," not the Board.<sup>202</sup> The Court further explained:

The narrow legal question whether the two standards are the same is, of course, quite different from the question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts. There is obviously some ambiguity in a term like 'well-founded fear' which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling "any gap left, implicitly or explicitly, by Congress," the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program. But our task today is much narrower, and is well within the province of the Judiciary. We do not attempt to set forth a detailed description of how the "well-founded fear" test should be applied. Instead, we merely hold that the Immigration Judge and the [Board] were incorrect in holding that the two standards are identical.<sup>203</sup>

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<sup>196</sup> *See id.*

<sup>197</sup> *Id.* at 443.

<sup>198</sup> *See id.*

<sup>199</sup> *See Cardoza-Fonseca*, 480 U.S. at 443.

<sup>200</sup> *See id.*

<sup>201</sup> *Id.* at 445-46.

<sup>202</sup> *Id.* at 446.

<sup>203</sup> *Id.* at 448 (footnote omitted) (citation omitted).

The Court separated the statutory interpretation inquiry from a different inquiry “which ‘arises in each case in which the agency is required to apply [the asylum or withholding of deportation] standards to a particular set of facts.’”<sup>204</sup> The Court determined the asylum “well-founded fear” legal standard under *Chevron* Step One: an asylum applicant may prove a “well-founded fear” of persecution by demonstrating a ten percent likelihood of persecution if returned to her country of origin.<sup>205</sup> Following the Court’s decision in *Cardoza-Fonseca*, the Board must apply that legal standard when adjudicating individual asylum claims.<sup>206</sup>

### 3. The Supreme Court’s Decisions in *Aguirre-Aguirre* and *Negusie* Did Not Alter *Cardoza-Fonseca*’s *Chevron* Step One Guidance

Following its decision in *Cardoza-Fonseca*, the Supreme Court considered other Refugee Act provisions under the *Chevron* two-step framework in *Aguirre-Aguirre* and *Negusie*.<sup>207</sup> Some scholars have claimed that those decisions lessened the importance of *Cardoza-Fonseca*’s *Chevron* Step One guidance.<sup>208</sup> However, *Aguirre-Aguirre* and *Negusie* may be reconciled with *Cardoza-Fonseca*, and reviewing courts should adhere to *Cardoza-Fonseca* when discerning the legal standard supplied by a Refugee Act term under *Chevron* Step One.

#### a. *The Aguirre-Aguirre Court Applied an Existing Standard to Particular Facts*

As previously noted, under *Cardoza-Fonseca*, the Board does not deserve *Chevron* deference in all circumstances. When the Board *interprets* a statutory term and proposes a legal standard supplied by that term, it does not deserve *Chevron* deference. Instead, courts resolve matters of statutory interpretation under *Chevron* Step One.<sup>209</sup> In contrast, when the Board *applies* a statutory legal standard to the facts of a particular case, there may be some ambiguity as to how the statutory legal standard

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<sup>204</sup> Moore, *supra* note 162, at 556 (quoting *Cardoza-Fonseca*, 480 U.S. at 448).

<sup>205</sup> See *Cardoza-Fonseca*, 480 U.S. at 431, 440.

<sup>206</sup> See Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059, 1086–87 (2011) (“[*Cardoza-Fonseca*] distinguished these types of statutory construction questions from the ‘process of case-by-case adjudication’ through which an agency applies a standard to particular facts, filling ‘any gap left, implicitly or explicitly, by Congress.’” (quoting *Cardoza-Fonseca*, 480 U.S. at 448)).

<sup>207</sup> See *id.* at 1085.

<sup>208</sup> *E.g., id.* at 1085–96.

<sup>209</sup> *Cardoza-Fonseca*, 480 U.S. at 446–48.

applies. As a result, courts review the Board's application of the legal standard for reasonableness under *Chevron* Step Two, according deference if the Board's interpretation was reasonable.<sup>210</sup> *Aguirre-Aguirre* involved the Board's application of an existing standard to particular facts, triggering a *Chevron* Step Two analysis on appeal.

The *Aguirre-Aguirre* Court considered withholding of deportation's "serious nonpolitical crime" exception.<sup>211</sup> The issue was whether the applicant was "ineligible for withholding" because he "committed a serious nonpolitical crime" before entering the United States.<sup>212</sup> Previously, in *Matter of McMullen*,<sup>213</sup> the Board proposed a standard to apply in "serious nonpolitical crime" exception cases. The *McMullen* Board held that, in "evaluating the political nature of a crime, we consider it important that the political aspect of the offense outweigh its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature."<sup>214</sup> In *Aguirre-Aguirre*, the Board applied its *McMullen* standard to the facts of the case and held that the applicant had committed a "serious nonpolitical crime" when he "burned buses, assaulted passengers, and vandalized and destroyed property in private shops" to protest government policies in Guatemala.<sup>215</sup>

The Ninth Circuit reversed. Importantly, the Ninth Circuit "expressed no disagreement with" the "serious nonpolitical crime" standard that the Board established in *Matter of McMullen*.<sup>216</sup> The Ninth Circuit could have considered Congress's intended meaning of "serious nonpolitical crime," employing *Cardoza-Fonseca's* "traditional tools of statutory construction" under *Chevron* Step One.<sup>217</sup> Instead, the Ninth Circuit only addressed the

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<sup>210</sup> See *id.* at 447–48.

<sup>211</sup> See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 418 (1999). Under the INA, "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). However, there are several exceptions to that general rule. The Attorney General may remove an "alien" to a country where his life or freedom would be threatened on account of a protected ground if "there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States." *Id.* § 1231(b)(3)(B)(iii). That is the "serious nonpolitical crime" exception.

<sup>212</sup> *Aguirre-Aguirre*, 526 U.S. at 418.

<sup>213</sup> 19 I. & N. Dec. 90 (B.I.A. 1984).

<sup>214</sup> *Id.* at 97–98.

<sup>215</sup> *Aguirre-Aguirre*, 526 U.S. at 418.

<sup>216</sup> See *id.* at 423–24.

<sup>217</sup> See *id.* at 424 ("[T]he [Ninth Circuit] should have asked whether 'the statute is silent or ambiguous with respect to the specific issue' before it; if so, 'the question for the court [was] whether the agency's answer is based on a permissible construction of the statute.'" (quoting *Chevron U.S.A.*

Board's application of its *McMullen* standard.<sup>218</sup> At that point in the analysis, the Ninth Circuit should have considered whether the Board's application was reasonable under *Chevron* Step Two.<sup>219</sup>

While the Board does not deserve *Chevron* deference when it proposes a Refugee Act legal standard, it does deserve *Chevron* deference when it applies that legal standard to the facts of a particular case.<sup>220</sup> Because *Aguirre-Aguirre* involved the Board's application of an existing standard to particular facts, the Ninth Circuit should have determined whether the Board's decision was reasonable under *Chevron* Step Two. As the Supreme

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Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)). The Ninth Circuit had previously reviewed the *McMullen* Board's interpretation of "serious nonpolitical crime" prior to the Supreme Court's decision in *Cardoza-Fonseca*. See *McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986). Without reference to the *Chevron* two-step framework, the Ninth Circuit reviewed the Refugee Act's legislative history and the Refugee Convention and Refugee Protocol's negotiating histories to determine Congress's intended meaning of "serious nonpolitical crime." *Id.* at 594–95. The Ninth Circuit found that, under the Refugee Convention, a "serious nonpolitical crime" is "a crime that was not committed out of 'genuine political motives,' was not directed toward the 'modification of the political organization or . . . structure of the state,' and in which there is no direct, 'causal link between the crime committed and its alleged political purpose and object.'" *Id.* at 595. Further, "even if the preceding standards are met, a crime should be considered a serious nonpolitical crime if the act is disproportionate to the objective, or if it is 'of an atrocious or barbarous nature.'" *Id.* The Ninth Circuit's "serious nonpolitical crime" exception standard was very similar to the Board's *McMullen* standard. Thus, the Ninth Circuit found the Board's balancing test—"weighing of the nature of [the applicant's] alleged offenses against the political ends he sought to obtain"—to be "consistent with the Convention, and thus consistent with congressional intent." *Id.* at 596. The Ninth Circuit held that "[a] balancing approach including consideration of the offense's 'proportionality' to its objective and its degree of atrocity makes good sense." *Id.*

<sup>218</sup> See *Aguirre-Aguirre*, 526 U.S. at 424 ("The Court of Appeals did conclude, however, that the [Board] must supplement this weighing test by examining additional factors.").

<sup>219</sup> *Id.* at 429 ("The [Board's] formulation does not purport to provide a comprehensive definition of the ["serious nonpolitical crime"] exception, and the full elaboration of that standard should await further cases, consistent with the instruction our legal system always takes from considering discrete factual circumstances over time."). But see *Farbenblum*, *supra* note 206, at 1089 ("In the wake of *Cardoza-Fonseca*, it seemed that the nexus between domestic asylum provisions and an established body of international law would render interpretation of those statutory provisions a question of pure statutory construction not entitled to *Chevron* deference. The Court's opinion in *Aguirre-Aguirre*, however, revealed that the gap-filling statutory construction distinction was highly malleable and capable of redefinition. The Court deferred to the [Board] because the agency was 'giv[ing] ambiguous statutory terms "concrete meaning through a process of case-by-case adjudication.'" (quoting *Aguirre-Aguirre*, 526 U.S. at 425)).

<sup>220</sup> See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987); see also *Negusie v. Holder*, 555 U.S. 511, 534 (2009) (Stevens, J., concurring in part and dissenting in part) ("The [Board's] formulation of a test to apply the statutory standard in individual cases and its application of that test in respondent's case were precisely the sort of agency actions that merited judicial deference.").

Court held, the Ninth Circuit erred "by failing to follow *Chevron* principles in its review" of the Board's decision.<sup>221</sup>

In sum, the *Aguirre-Aguirre* Court considered the Board's application of a Refugee Act standard—not the Board's interpretation of the standard itself—making its analysis distinguishable from the *Cardoza-Fonseca* Court's analysis. The *Aguirre-Aguirre* Court did not employ *Cardoza-Fonseca*'s "traditional tools of statutory construction" to determine Congress's intended meaning of a Refugee Act term under *Chevron* Step One. Even so, it still adhered to *Cardoza-Fonseca*'s guidance when it explained that courts should review the Board's applications of an existing standard under *Chevron* Step Two.

b. *The Negusie Court's Opinion Should Be Reconciled with Cardoza-Fonseca*

*Negusie* should be reconciled with *Cardoza-Fonseca*. In *Negusie*, the Court considered whether there is a "coercion or duress" exception within the persecutor bar.<sup>222</sup> Without conducting a *Chevron* Step One analysis, the Court found an ambiguity in the statute regarding whether "persecution" presumes culpable intent.<sup>223</sup> Because the Board made a legal error when considering this issue in the first instance, the Court remanded the case for further proceedings.<sup>224</sup>

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<sup>221</sup> *Aguirre-Aguirre*, 526 U.S. at 425.

<sup>222</sup> Under the persecutor bar, "[t]he term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(B) (2018); *Negusie*, 555 U.S. at 514 ("[The] 'persecutor bar' applies to those seeking asylum or withholding of removal. It does not disqualify an alien from receiving a temporary deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)." (citations omitted)).

<sup>223</sup> *Negusie*, 555 U.S. at 517–18 ("The parties disagree over whether coercion or duress is relevant in determining if an alien assisted or otherwise participated in persecution. As there is substance to both contentions, we conclude that the statute has an ambiguity that the agency should address in the first instance."). *But see* Farbenblum, *supra* note 206, at 1094 ("Linking *Orlando Ventura* and *Chevron*, the majority in *Negusie* determined that the statutory construction issue was placed 'in agency hands' because congressional intent was not clear under *Chevron* step one. The majority opaquely reasoned that the statute was ambiguous simply because '[t]he parties disagree over whether coercion or duress is relevant . . . [and] there is substance to both contentions.'" (quoting *Negusie*, 555 U.S. at 517 (footnote omitted))).

<sup>224</sup> *Negusie*, 555 U.S. at 517 ("When the [Board] has not spoken on 'a matter that statutes place primarily in agency hands,' our ordinary rule is to remand to 'giv[e] the [Board] the opportunity to address the matter in the first instance in light of its own expertise.'" (quoting *INS v. Orlando Ventura*, 537 U.S. 12, 16–17 (2002) (per curiam))).

At first glance, it may appear that the *Negusie* Court diverged from its *Cardoza-Fonseca* guidance.<sup>225</sup> Rather than determine the “persecution” legal standard that the Board should subsequently apply, the *Negusie* Court said the Board should determine both the “persecution” legal standard *and* its application in the first instance on remand:

[W]e find it appropriate to remand to the agency for its initial determination of the *statutory interpretation question and its application* to this case. The agency’s interpretation of the statutory meaning of “persecution” may be explained by a more comprehensive definition, one designed to elaborate on the term in anticipation of a wide range of potential conduct; and that expanded definition in turn may be influenced by how practical, or impractical, the standard would be in terms of its application to specific cases. These matters may have relevance in determining whether its statutory interpretation is a permissible one.<sup>226</sup>

The Supreme Court also implied that courts should subsequently review both the Board’s interpretation of the “persecution” legal standard and its application under *Chevron* Step Two. However, even if the Board set the “persecution” legal standard in the first instance—which it did not do<sup>227</sup>—a reviewing court could still consider Congress’s intended meaning of “persecution” under *Chevron* Step One, overruling the Board’s proposed interpretation and setting the correct legal standard for the Board to subsequently apply. If *Negusie* reaches the Supreme Court again, it will likely conduct a *Chevron* Step One analysis, as well. After all, that is exactly what the Court did in *Cardoza-Fonseca* when it overruled the Board’s interpretation of the asylum “well-founded fear” legal standard and conducted its own statutory analysis.<sup>228</sup>

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<sup>225</sup> See Moore, *supra* note 162, at 606.

<sup>226</sup> *Negusie*, 555 U.S. at 524 (emphasis added).

<sup>227</sup> In June 2018, the Board briefly considered the meaning of “persecution”: “As an initial point, we interpret the term ‘persecution’ in the persecutor bar as carrying the same meaning as it does in the context of determining an alien’s eligibility for asylum or withholding of removal.” *Negusie*, 27 I. & N. Dec. 347, 366 (B.I.A. 2018). While it did not establish a “persecution” legal standard, the Board set a fact-intensive test for a limited duress defense to the persecutor bar:

[A]t a minimum the applicant must establish by a preponderance of the evidence that he (1) acted under an imminent threat of death or serious bodily injury to himself or others; (2) reasonably believed that the threatened harm would be carried out unless he acted or refrained from acting; (3) had no reasonable opportunity to escape or otherwise frustrate the threat; (4) did not place himself in a situation in which he knew or reasonably should have known that he would likely be forced to act or refrain from acting; and (5) knew or reasonably should have known that the harm he inflicted was not greater than the threatened harm to himself or others.

*Id.* at 363. In October 2018, the Attorney General certified that case to himself, staying the Board’s decision. *Negusie*, 27 I. & N. Dec. 481 (Att’y Gen. 2018).

<sup>228</sup> See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430–31, 448 (1987).



Alternatively, an attorney could reasonably argue that, like in *Aguirre-Aguirre*, the case was not really remanded for the Board to determine a general "persecution" legal standard that should be applied in persecutor bar cases. Rather, the case was only remanded for the Board to determine how the persecutor bar applied to the facts of a particular case involving coerced persecution.<sup>229</sup> Pursuant to *Cardoza-Fonseca*, the Board's application of the persecutor bar to the facts of particular cases would subsequently be reviewed under *Chevron* Step Two.<sup>230</sup>

Perhaps the *Negusie* Court should have conducted a *Chevron* Step One analysis and considered whether Congress's intended meaning of "persecution" included a duress exception.<sup>231</sup> Justice Stevens took that approach in his opinion, concurring in part and dissenting in part. He explained that "a complete interpretation of a statutory provision might demand both judicial construction and administrative explication" because, while "[c]ourts are expert at statutory construction," agencies administering a statute are "expert at statutory implementation."<sup>232</sup> Thus, the Court should decide the "narrow question of statutory construction" under *Chevron* Step One: whether the persecutor bar "disqualifies from asylum or withholding of removal an alien whose conduct was coerced or otherwise the product of duress."<sup>233</sup> If the Court found a duress exception, it would then remand the case to the Board, so that the Board could "determine how the persecutor bar applies in individual cases."<sup>234</sup>

In conclusion, even though the *Negusie* Court allowed the Board to consider the "persecution" legal standard in the first instance, a reviewing court should still conduct a *Chevron* Step One analysis of "persecution" if it considers a challenge to the Board's proposed legal standard. The Court's decision in *Negusie* should be reconciled with its guidance in *Cardoza-Fonseca*.

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<sup>229</sup> See *Negusie*, 555 U.S. at 523. But see Moore, *supra* note 162, at 561 (suggesting that the Court declined to interpret the statutory text because it wanted to "avoid forcing a conflict between itself and the agency" under *Brand X* or because it wanted to respect the "allocation of workload between agencies and courts that classifies statutory interpretation regarding a policy choice as better suited to agencies and as different from a legal interpretation of texts that is better suited to the purview of the courts").

<sup>230</sup> See *Negusie*, 555 U.S. at 524.

<sup>231</sup> *Id.* at 528–29 (Stevens, J., concurring in part and dissenting in part) ("[T]he threshold question" is a "pure question of statutory construction for the courts to decide." (quoting *Cardoza-Fonseca*, 480 U.S. at 446)); see Farbenblum, *supra* note 206, at 1094–95 ("[The Court] did not explain why the sources relied upon in *Cardoza-Fonseca* did not give rise to the same conclusion of clear congressional intent in *Negusie*." (footnote omitted)).

<sup>232</sup> *Negusie*, 555 U.S. at 529–530 (Stevens, J., concurring in part and dissenting in part).

<sup>233</sup> *Id.* at 528–29.

<sup>234</sup> *Id.* at 534.

c. *Reviewing Courts Should Adhere to Cardoza-Fonseca's Guidance and Determine Congress's Intended Meaning of a Refugee Act Term Under Chevron Step One*

*Cardoza-Fonseca* provides important guidance on how to apply the *Chevron* two-step framework to Refugee Act terms. When a court reviews the Board's interpretation of a Refugee Act term, including a legal standard supplied by that term, it must first attempt to discern Congress's intended meaning under *Chevron* Step One. The reviewing court must employ *Cardoza-Fonseca's* "traditional tools of statutory construction" and consider the text, Refugee Act legislative history, and INA structure.<sup>235</sup> Courts should only move to *Chevron* Step Two to determine if the Board's interpretation was reasonable if the legal standard supplied by the Refugee Act term is still ambiguous after the court's *Chevron* Step One analysis.<sup>236</sup> Thus, the Board generally will not receive *Chevron* deference when it proposes a Refugee Act legal standard.<sup>237</sup> Courts are in a better position to determine Congress's intended meaning of a Refugee Act term, and they must do so under *Chevron* Step One.<sup>238</sup>

Once a court determines Congress's intended meaning of a Refugee Act term—including the legal standard supplied by that term—the Board must then apply that legal standard to the particular facts of each case. When courts later review the Board's applications of the legal standard, the Board may receive *Chevron* deference for its reasonable determinations of how the Refugee Act legal standard applies.<sup>239</sup> When discerning Congress's intended meaning of a Refugee Act term, reviewing

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<sup>235</sup> *Cardoza-Fonseca*, 480 U.S. at 448 (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)).

<sup>236</sup> See *Chevron*, 467 U.S. at 843.

<sup>237</sup> See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (citing *Cardoza-Fonseca*, 480 U.S. at 448–49). *But see* *Martin*, *supra* note 168, at 171.

<sup>238</sup> See *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1569, 1572 (2017) (employing "normal tools of statutory interpretation" to discern the meaning of an INA term and finding that *Chevron* [Step Two] did not apply because the term, in context, was unambiguous); *cf.* *INS v. Orlando Ventura*, 537 U.S. 12, 14 (2002) (*per curiam*); *Aguirre-Aguirre*, 526 U.S. at 424 (finding that the Ninth Circuit "failed to accord the required level of deference" to the Board's *application* of a statutory interpretation).

<sup>239</sup> See *Cardoza-Fonseca*, 480 U.S. at 448 ("There is obviously some ambiguity in a term like 'well-founded fear' which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling 'any gap left, implicitly or explicitly, by Congress,' the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program." (quoting *Chevron*, 467 U.S. at 843)); *see also, e.g.*, *W.G.A. v. Sessions*, 900 F.3d 957, 964 (7th Cir. 2018) ("Whether a group qualifies as a 'particular social group' is a question of law that we review *de novo*, though we give *Chevron* deference to the Board's 'reasonable interpretation set forth in precedential opinions.'" (quoting *Cece v. Holder*, 733 F.3d 662, 668–69 (7th Cir. 2013) (*en banc*))).

courts should follow the Court's *Chevron* Step One guidance in *Cardoza-Fonseca*.

### III. The Courts of Appeals' Review of the Board's "Particular Social Group" Interpretations

When reviewing the Board's interpretations of "particular social group," a court should first conduct its own *Chevron* Step One analysis to discern Congress's intended meaning within section 101 of the INA.<sup>240</sup> The court should employ *Cardoza-Fonseca*'s "traditional tools of statutory construction" and consider the text, Refugee Act legislative history, and INA structure.<sup>241</sup> The court may only proceed to *Chevron* Step Two and consider whether the Board's proposed legal standard was reasonable if, after conducting its own statutory analysis under *Chevron* Step One, the court determines that "particular social group" is still ambiguous.<sup>242</sup>

Despite the Supreme Court's guidance in *Cardoza-Fonseca*, the courts of appeals have misapplied or failed to apply the *Chevron* two-step framework when reviewing the Board's proposed interpretations of "particular social group." With one exception, the courts of appeals have failed to consider Congress's intended meaning of "particular social group" under *Chevron* Step One.<sup>243</sup> Instead, they generally only assessed the reasonableness of the Board's interpretations under *Chevron* Step Two.

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<sup>240</sup> "The term 'refugee' means . . . any 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 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." 8 U.S.C. § 1101(a)(42)(A) (emphasis added).

<sup>241</sup> See *Chevron*, 467 U.S. at 843 n.9.

<sup>242</sup> See *id.* at 842–43.

<sup>243</sup> A-B-, 27 I. & N. Dec. 316, 326 (Att'y Gen. 2018) ("As the Board and the federal courts have repeatedly recognized, the phrase 'membership in a particular social group' is ambiguous.").

The First,<sup>244</sup> Second,<sup>245</sup> Third,<sup>246</sup> Fourth,<sup>247</sup> Fifth,<sup>248</sup> Sixth,<sup>249</sup> Seventh,<sup>250</sup> Eighth,<sup>251</sup> Ninth,<sup>252</sup> Tenth,<sup>253</sup> and Eleventh<sup>254</sup> Circuits upheld the Board's *Acosta* interpretation of "particular social group" as reasonable and accorded *Chevron* deference. Except for the Seventh Circuit,<sup>255</sup> the courts of appeals have subsequently accorded *Chevron* deference to the Board's *M-E-V-G-* and *W-G-R-* interpretation of the "particular social group" legal standard as well.<sup>256</sup>

Part III first offers an overview of the courts of appeals' decisions. As Section A explains, most of the courts of appeals have failed to consider Congress's intended meaning of "particular social group" under *Chevron* Step One. In contrast, the Third Circuit considered Congress's intended meaning of "particular social group" under *Chevron* Step One, although it failed to employ all of *Cardoza-Fonseca's* "traditional tools of statutory construction." Section B summarizes the Third Circuit's opinion. Finally, Section C concludes by explaining that the courts of appeals are unlikely to overturn their past precedent to employ *Cardoza-Fonseca's* "traditional tools of statutory construction" under *Chevron* Step One.

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<sup>244</sup> *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985).

<sup>245</sup> *See Koudriachova v. Gonzales*, 490 F.3d 255, 262 (2d Cir. 2007).

<sup>246</sup> *Lukwago v. Ashcroft*, 329 F.3d 157, 171 (3d Cir. 2003).

<sup>247</sup> *Lizama v. Holder*, 629 F.3d 440, 446–47 (4th Cir. 2011).

<sup>248</sup> *See Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir. 2002).

<sup>249</sup> *See Castellano-Chacon v. INS*, 341 F.3d 533, 548–49 (6th Cir. 2003).

<sup>250</sup> *See Lwin v. INS*, 144 F.3d 505, 510–11 (7th Cir. 1998).

<sup>251</sup> *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994).

<sup>252</sup> *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1091–93 (9th Cir. 2000).

<sup>253</sup> *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005) ("We agree that the term *social group* is ambiguous and find the [Board's *ejusdem generis*] analysis to be reasonable.").

<sup>254</sup> *Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190, 1196 (11th Cir. 2006).

<sup>255</sup> *See infra* note 262.

<sup>256</sup> *See S.E.R.L. v. Att'y Gen.*, 894 F.3d 535, 539–50 (3d Cir. 2018); *Reyes v. Lynch*, 842 F.3d 1125, 1129, 1133–35 (9th Cir. 2016); *Ngugi v. Lynch*, 826 F.3d 1132, 1138 (8th Cir. 2016); *Hernandez-De La Cruz v. Lynch*, 819 F.3d 784, 786–87, 787 n.1 (5th Cir. 2016) (implicitly giving deference to the Board's *M-E-V-G-* and *W-G-R-* interpretation); *Gonzalez v. U.S. Atty. Gen.*, 820 F.3d 399, 405 (11th Cir. 2016) (per curiam); *Menijar v. Lynch*, 812 F.3d 491, 498 (6th Cir. 2015); *Oliva v. Lynch*, 807 F.3d 53, 61 (4th Cir. 2015) (applying the *M-E-V-G-* and *W-G-R-* interpretations of "particular social group"); *Paiz-Morales v. Lynch*, 795 F.3d 238, 243 (1st Cir. 2015); *Rodas-Orellana v. Holder*, 780 F.3d 982, 992 (10th Cir. 2015); *Paloka v. Holder*, 762 F.3d 191, 195 (2d Cir. 2014).

A. *Most of the Courts of Appeals Have Failed to Consider Congress's Intended Meaning of "Particular Social Group" Under Chevron Step One*

Except for the Third Circuit, all of the courts of appeals have failed to correctly consider the meaning of "particular social group" under *Chevron* Step One. As of May 2020, the First,<sup>257</sup> Second,<sup>258</sup>

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<sup>257</sup> The First Circuit first considered the meaning of "particular social group" before the Supreme Court had decided *Cardoza-Fonseca*. At that time, it found the UNHCR Refugee Handbook and the Board's opinion in *Acosta* instructive. *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985). Nearly two decades later, the First Circuit noted that the INA did not explicitly define "particular social group" and that the term is not "free from ambiguity." *Elien v. Ashcroft*, 364 F.3d 392, 396 (1st Cir. 2004). The First Circuit explained that the Board's interpretations of INA terms "are accorded substantial deference," and the Board's reasonable interpretations will be upheld if the statute is silent or ambiguous. *Id.* at 396–97. In *Scatambuli*, the First Circuit similarly only considered whether the Board's C-A- interpretation of "particular social group" was reasonable under *Chevron* Step Two. *Scatambuli v. Holder*, 558 F.3d 53, 59–60 (1st Cir. 2009) ("A number of our sister circuits have adopted the [Board]'s use of social visibility as a relevant criterion . . . We agree that it is relevant to the particular social group analysis.").

<sup>258</sup> Without mentioning the *Chevron* two-step framework, the Second Circuit determined in 1991 that members of a "particular social group" must share common characteristics that are "recognizable and discrete." *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991). It did not employ *Cardoza-Fonseca*'s "traditional tools of statutory construction" and instead only cited to persuasive authority in the First and Ninth Circuits to reach its conclusion. *See id.*

Following the Board's 2006 decision in *Matter of C-A-*, the Second Circuit reconsidered the Board's "particular social group" interpretation. In *Koudriachova v. Gonzales*, the Second Circuit first noted that, "of the five grounds protected under the INA, membership in a 'particular social group' is the least well-defined on its face." *Koudriachova v. Gonzales*, 490 F.3d 255, 260 (2d Cir. 2007). It also noted that the INA's legislative history "does not shed much, if any, light" on the meaning of "particular social group," resulting in inconsistent applications and court decisions. *Id.* While the Second Circuit at least mentioned the text and legislative history, it failed to conduct a full *Chevron* Step One analysis under the Supreme Court's guidance in *Cardoza-Fonseca*. Instead, it moved to *Chevron* Step Two and found the Board's interpretation of "particular social group" in C-A-, including the *Acosta* immutability test, reasonable. *See id.* at 261–62.

After the Board's decisions in *M-E-V-G-* and *W-G-R-*, the Second Circuit again considered the meaning of "particular social group." Without employing *Cardoza-Fonseca*'s "traditional tools of statutory construction" under *Chevron* Step One, the Second Circuit called "particular social group" a "vague" statutory term that Congress did not explicitly define in the INA. *Paloka*, 762 F.3d at 195–96. It thus only considered whether the Board's evolving "particular social group" interpretations were reasonable under *Chevron* Step Two. *Id.*

Fourth,<sup>259</sup> Fifth,<sup>260</sup> Sixth,<sup>261</sup> Seventh,<sup>262</sup>

<sup>259</sup> The Fourth Circuit has noted that the INA did not define “particular social group,” and “there is little legislative history on the matter.” *Martinez v. Holder*, 740 F.3d 902, 910 (4th Cir. 2014). Thus, in 2011, the Fourth Circuit accorded *Chevron* deference to the Board’s reasonable interpretations of “particular social group,” as explained in *Acosta, E-A-G-*, and *A-M-E- & J-G-U-*. *Lizama v. Holder*, 629 F.3d 440, 446–47 (4th Cir. 2011). The Fourth Circuit similarly deferred to the Board’s subsequent interpretations of “particular social group” in *M-E-V-G-* and *W-G-R-*. See, e.g., *Oliva*, 807 F.3d at 61 (applying the *M-E-V-G-* and *W-G-R-* interpretations of “particular social group”).

<sup>260</sup> The Fifth Circuit noted the *Chevron* two-step framework, but it glossed over *Chevron* Step One. See *Orellana-Monson v. Holder*, 685 F.3d 511, 517, 519–20 (5th Cir. 2012). Without employing *Cardoza-Fonseca*’s “traditional tools of statutory construction,” the Fifth Circuit determined that “particular social group” was ambiguous merely because it was not explicitly defined in the INA. See *id.* at 520–21. The Fifth Circuit made no attempt to discern Congress’s intended meaning of “particular social group,” instead moving straight to *Chevron* Step Two to consider whether the Board’s interpretation of “particular social group” was reasonable. *Id.* at 521.

<sup>261</sup> In *Sanchez-Robles*, the Sixth Circuit stated that because Congress did not explicitly define “particular social group” in the INA, the Board and Sixth Circuit would both “necessarily” be required to interpret it. *Sanchez-Robles v. Lynch*, 808 F.3d 688, 691 (6th Cir. 2015); *Urbina-Mejia v. Holder*, 597 F.3d 360, 365–66 (6th Cir. 2010). In practice, however, the Sixth Circuit has not conducted a full *Chevron* Step One analysis and has instead accepted the Board’s interpretations of “particular social group” under *Chevron* Step Two.

In *Castellano-Chacon*, the Sixth Circuit described the definition of “particular social group” as “elusive” and accorded *Chevron* deference to the Board’s *Acosta* interpretation without conducting a *Chevron* Step One analysis. See *Castellano-Chacon v. INS*, 341 F.3d 533, 546–49 (6th Cir. 2003). While the Sixth Circuit considered the approaches taken by the First, Second, Third, Seventh, Eighth, and Ninth Circuits, it did not employ *Cardoza-Fonseca*’s “traditional tools of statutory construction” to discern Congress’s intended meaning of “particular social group.” See *id.* at 546. Instead, the Sixth Circuit moved to *Chevron* Step Two and said the Board deserved *Chevron* deference for its interpretation of the INA “insofar as it [reflected] a judgment that [was] peculiarly within the [Board’s] expertise.” *Id.*

The Sixth Circuit similarly upheld the Board’s “social visibility” and “particularity” requirements, as articulated in *C-A-*, *S-E-G-*, and *A-M-E- & J-G-U-*. *Umana-Ramos v. Holder*, 724 F.3d 667, 671, 673 (6th Cir. 2013). It also upheld the Board’s clarified “social distinction” requirement in *M-E-V-G-* and *W-G-R-*. See *Menijar*, 812 F.3d at 498.

<sup>262</sup> Without noting the *Chevron* two-step framework, the Seventh Circuit briefly described the meaning of “social group” as “elusive.” *Lwin v. INS*, 144 F.3d 505, 510 (7th Cir. 1998). Although the Seventh Circuit called the Refugee Act’s legislative history “uninformative”—without any further explanation—under *Chevron* Step One, it declined to use the “traditional tools of statutory construction” according to the Court’s guidance in *Cardoza-Fonseca*. *Id.* at 510–11. While the Seventh Circuit implied that it could set forth its own “particular social group” criteria under *Chevron* Step One, it declined to do so. See *id.* at 511. Instead, it moved directly to *Chevron* Step Two, noting that the Board’s *Acosta* interpretation of the Refugee Act’s “particular social group” provisions were “entitled to deference.” *Id.*

As of May 2020, the Seventh Circuit has not yet considered whether the Board’s *M-E-V-G-* and *W-G-R-* “social distinction” and “particularity” requirements are reasonable and entitled to *Chevron* deference. *Melnik v. Sessions*, 891 F.3d 278, 286 n.22 (7th Cir. 2018) (declining to consider the Board’s “social distinction” and “particularity” requirements in *Matter of M-E-V-G-* and *Matter of*

Eighth,<sup>263</sup> Ninth,<sup>264</sup>

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*W-G-R*); see also *W.G.A. v. Sessions*, 900 F.3d 957, 964–65 (7th Cir. 2018). However, like the Third Circuit, the Seventh Circuit declined to extend *Chevron* deference to the Board's initial "particularity" and "social visibility" requirements. *Melnik*, 891 F.3d at 286 n.22; *Gatimi v. Holder*, 578 F.3d 611, 615–16 (7th Cir. 2009). In *Gatimi*, the Seventh Circuit explained that the Board's "social visibility" requirement "[made] no sense; nor [had] the Board attempted . . . to explain the reasoning behind" it. *Gatimi*, 578 F.3d at 615; see *Melnik*, 891 F.3d at 286 n.22. Like some of its sister circuits, the Seventh Circuit occasionally refers to "particular social group" as "social group," implying that it does not find the Board's "particularity" requirement in the plain language of the INA. See, e.g., *Melnik*, 891 F.3d at 287; *Pavlyk v. Gonzales*, 469 F.3d 1082, 1085–86 (7th Cir. 2006); *Sepulveda v. Gonzales*, 464 F.3d 770, 771–72 (7th Cir. 2006); *Yadegar-Sargis v. INS*, 297 F.3d 596, 603 (7th Cir. 2002); *Lwin*, 144 F.3d at 510. Even so, the Seventh Circuit failed to consider the plain meaning of "particular social group" under *Chevron* Step One, instead only considering whether the Board's interpretation was reasonable under *Chevron* Step Two.

<sup>263</sup> Because "particular social group" was not explicitly defined in the INA, the Eighth Circuit considered it ambiguous without conducting a *Chevron* Step One analysis. See, e.g., *Ngengwe v. Mukasey*, 543 F.3d 1029, 1033 (8th Cir. 2008). It instead only considered whether the Board's interpretations were reasonable under *Chevron* Step Two. See *id.* The Eighth Circuit initially adopted the Ninth Circuit's *Sanchez-Trujillo* "voluntary associational relationship" interpretation of "particular social group" and the alternative *Acosta* immutability interpretation. *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994). In general, however, the Eighth Circuit has given substantial deference to the Board's "particular social group" interpretations.

The Eighth Circuit accords *Chevron* deference "to the [Board's] reasonable interpretation of [particular social group]", and will not overturn the [Board's] conclusion unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Matul-Hernandez v. Holder*, 685 F.3d 707, 712 (8th Cir. 2012) (quoting *Gaitan v. Holder*, 671 F.3d 678, 680 (8th Cir. 2012)). The Eighth Circuit has upheld the Board's interpretations of "particular social group" in *Acosta*, *C-A-*, *A-M-E-* & *J-G-U-*, *S-E-G-*, *M-E-V-G-*, and *W-G-R-*, without fully explaining why those interpretations were reasonable. See, e.g., *Ngugi v. Lynch*, 826 F.3d 1132, 1138 (8th Cir. 2016); *Gaitan*, 671 F.3d at 680; *Ngengwe*, 543 F.3d at 1033; *Davila-Mejia v. Mukasey*, 531 F.3d 624, 628 (8th Cir. 2008).

<sup>264</sup> Following *Matter of Acosta*, the Ninth Circuit proposed a "voluntary associational relationship" standard, whereby people who voluntarily chose to associate in a group with one another, including past associations, formed a "particular social group." *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986). It also upheld the *Acosta* immutability standard as an alternative test. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1091–92 (9th Cir. 2000).

The Ninth Circuit did not understand the Board's *C-A-* "social visibility" interpretation to require ocular visibility. *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1089 (9th Cir. 2013). In *Henriquez-Rivas*, the Ninth Circuit explained that the Board's "social visibility" and "particularity" requirements were reasonable to the extent that they did not conflict with the Board's prior precedent. *Id.* Regarding "social visibility," the Ninth Circuit reviewed the text of the INA and found that the persecutor's perception of whether a person belongs to a "particular social group" may be more important than society's perception, given the nexus requirement. *Id.* The Ninth Circuit did not, however, decide whether the "social visibility" and "particularity" requirements were valid. *Id.* at 1091. In *Pirir-Boc*, the Ninth Circuit initially declined to decide whether the Board's *M-E-V-G-* and *W-G-R-* "social distinction" and "particularity" requirements were reasonable. *Pirir-Boc v. Holder*, 750 F.3d 1077, 1085 (9th Cir. 2014).

Tenth,<sup>265</sup> and Eleventh<sup>266</sup> Circuits have failed to correctly employ *Cardoza-Fonseca*'s "traditional tools of statutory construction" under *Chevron* Step One. However, to varying degrees, some of the courts of appeals have employed *Cardoza-Fonseca*'s "traditional tools of statutory construction" under *Chevron* Step Two. For example, the Tenth Circuit considered the text of "particular social group" using dictionaries to

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Two years later, however, the Ninth Circuit decided *Reyes* and determined that the *W-G-R* "social distinction" and "particularity" requirements were reasonable and entitled to *Chevron* deference. The Board considered Wilfredo Garay Reyes's asylum application in *Matter of W-G-R*. The Ninth Circuit then considered his asylum application on appeal. *Reyes v. Lynch*, 842 F.3d 1125, 1129, 1133–35 (9th Cir. 2016). The Ninth Circuit explained that the "particularity" requirement was reasonable and consistent with the Board's prior precedent. *Id.* at 1135–36 ("Recognizing that, in order to be 'particular,' a group must have some definable boundary is not unreasonable."). The Ninth Circuit explained that the "social distinction" requirement was also consistent with the Board's prior precedent and that the Board was free to emphasize society's perception of a "particular social group" in considering "social distinction." *Id.* at 1136. The Board could also emphasize the persecutor's motive in considering the "nexus" requirement—even though the Ninth Circuit had interpreted the "social visibility" requirement differently in *Henriquez-Rivas*—because the Board's interpretation was reasonable. *Id.* at 1135–37.

<sup>265</sup> When it first considered the meaning of "particular social group," the Tenth Circuit did not conduct its own *Chevron* Step One analysis but instead moved directly to *Chevron* Step Two to consider whether the Board's *Acosta* interpretation was reasonable. *Niang v. Gonzales*, 422 F.3d 1187, 1198–99 (10th Cir. 2005) ("We agree [with the Board] that the term *social group* is ambiguous and find the [Board]'s . . . analysis to be reasonable.").

In considering the Board's *C-A* interpretation seven years later, the Tenth Circuit again assumed that "particular social group" was ambiguous because Congress did not explicitly define it in the INA. *Rivera-Barrientos v. Holder*, 666 F.3d 641, 648 (10th Cir. 2012). The Tenth Circuit made no attempt to employ the "traditional tools of statutory interpretation" used in *Cardoza-Fonseca* before reaching this conclusion. *See id.* Instead, it only considered whether the Board's interpretation was reasonable under *Chevron* Step Two. *Id.* at 648–50.

To determine whether the Board's interpretation of "particular social group" was reasonable, the Tenth Circuit considered the ordinary meaning of "particular" and "group" using 2002 dictionary definitions. *Id.* at 648 ("As a starting point in assessing the reasonableness of the [Board's] interpretation, we begin with the common meaning of 'particular' and 'group.' Webster's defines 'particular' as 'an individual specific separate thing, instance, or case as distinguished from a whole class.' WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1647 (2002). It describes 'group,' in turn, as 'a number of individuals bound together by a community of interest, purpose, or function.'"). The Tenth Circuit did not explain why it chose to use a dictionary from 2002 for its analysis. It determined that the Board's "particularity" requirement naturally flowed from "*particular social group*." *Id.* at 649.

<sup>266</sup> Like the Fifth Circuit, the Eleventh Circuit at least noted the *Chevron* two-step framework, but it glossed over *Chevron* Step One. *See Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190, 1196 (11th Cir. 2006). Similarly, the Eleventh Circuit did not employ *Cardoza-Fonseca*'s "traditional tools of statutory construction" under *Chevron* Step One. Instead, it stated only that "Congress did not directly speak on the issue of what constitutes a 'particular social group'" and moved to *Chevron* Step Two. *Id.*



discern whether the Board's interpretation was reasonable under *Chevron* Step Two.<sup>267</sup>

Additionally, the Ninth and Eleventh Circuits employed some of *Cardoza-Fonseca's* "traditional tools of statutory construction" outside of the *Chevron* two-step framework. Without reference to *Chevron*, in *Sanchez-Trujillo v. INS*,<sup>268</sup> the Ninth Circuit employed two of *Cardoza-Fonseca's* "traditional tools of statutory construction" (legislative history and text) to discern the meaning of "particular social group." First, the Ninth Circuit considered the legislative history and noted the origins of "particular social group" in the Refugee Protocol.<sup>269</sup> The Ninth Circuit also reviewed related international guidance on the meaning of "particular social group," including the UNHCR Refugee Handbook, which said that "a particular social group normally comprises persons of similar background, habits or social status."<sup>270</sup>

Because the Ninth Circuit considered the legislative history "generally uninformative," it then considered the text of the statute. The Ninth Circuit explained that "[t]he statutory words 'particular' and 'social' which modify 'group,' indicate that the term does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance."<sup>271</sup> In other words, because the adjectives "particular" and "social" modified "group," the Ninth Circuit determined that "particular social group" was not completely open-ended, even if it should be construed broadly.<sup>272</sup> The Ninth Circuit failed to consider *Cardoza-Fonseca's* third "traditional tool of statutory construction": the structure of the INA.

The Eleventh Circuit employed one of *Cardoza-Fonseca's* "traditional tools of statutory construction" when it considered the text of "particular social group."<sup>273</sup> Like the Tenth Circuit, the Eleventh Circuit considered the text of "particular social group" using dictionary definitions. While the Tenth Circuit in *Rivera-Barrientos v. Holder*<sup>274</sup> only used dictionary definitions to determine whether the Board's interpretation was reasonable under *Chevron* Step Two,<sup>275</sup> the Eleventh Circuit declined to determine whether the *Chevron* two-step framework would apply at all.<sup>276</sup>

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<sup>267</sup> *Rivera-Barrientos*, 666 F.3d at 648.

<sup>268</sup> 801 F.2d 1571 (9th Cir. 1986).

<sup>269</sup> *Id.* at 1575.

<sup>270</sup> *Id.* at 1575–76.

<sup>271</sup> *Id.* (citation omitted).

<sup>272</sup> *See id.*; *see also* *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092 (9th Cir. 2000).

<sup>273</sup> *Perez-Zenteno v. U.S. Att'y Gen.*, 913 F.3d 1301, 1310 (11th Cir. 2019).

<sup>274</sup> 666 F.3d 641 (10th Cir. 2012).

<sup>275</sup> *Id.* at 648.

<sup>276</sup> *Perez-Zenteno*, 913 F.3d at 1307–08.

The Eleventh Circuit does not accord *Chevron* deference to “single-member, non-precedential” Board decisions, unless the Board’s decision was “compelled” by its earlier precedent.<sup>277</sup> The Eleventh Circuit thus considered the meaning of “particular social group” without deciding whether the single-member, non-precedential Board decision in that case deserved *Chevron* deference.<sup>278</sup>

Because the United States acceded to the 1967 Refugee Protocol, the Eleventh Circuit reviewed dictionary definitions from 1966.<sup>279</sup> The Eleventh Circuit first considered the meaning of “group.” A “group” was “a number of individuals bound together by a community of interest, purpose or function as a class.”<sup>280</sup> A “class” was “a society-wide grouping of people according to social status, political or economic similarities, or interests or ways of life in common.”<sup>281</sup> Based on these definitions, the Eleventh Circuit found that the phrase “social group” implied “a subset of the population bound together by some discrete and palpable characteristics.”<sup>282</sup> It then found that the “addition of the modifier ‘particular’ suggest[ed] some narrowing from the breadth otherwise found in the term ‘social group.’”<sup>283</sup> The Court determined that “particular” meant “of, relating to, or being a single definite person or thing as distinguished from some or all others.”<sup>284</sup> From there, the Court held that “a particular social group denot[ed] some characteristic setting the group off in a definite way from the vast majority of society; indeed, ‘particular’ must meaningfully narrow the possibilities or it would be mere surplusage and redundant of the word ‘group.’”<sup>285</sup>

In sum, most of the courts of appeals failed to correctly consider the meaning of “particular social group” under *Chevron* Step One. Some of the courts of appeals considered the meaning of “particular social group” under *Chevron* Step Two or outside of the *Chevron* framework. Even though the Ninth and Eleventh Circuits partially employed the “traditional tools of statutory construction” described in *Cardoza-Fonseca*,

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<sup>277</sup> *Id.*; see *Sweeney*, *supra* note 113, at 148 (“In 2001, in *United States v. Mead Corp.*, the Court held that an agency must have been authorized to and must have in fact spoken ‘with [the] force of law’ in order to trigger *Chevron* deference. This was dubbed a preliminary [*Chevron*] Step Zero.” (footnote omitted)).

<sup>278</sup> *Perez-Zenteno*, 913 F.3d at 1310.

<sup>279</sup> *See id.*

<sup>280</sup> *Id.* (quoting *Group*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1966)).

<sup>281</sup> *Id.* (quoting *Class*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1966)).

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Perez-Zenteno*, 913 F.3d at 1310 (quoting *Particular*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1966)).

<sup>285</sup> *Id.*

the Ninth Circuit did not follow the *Chevron* two-step framework, and the Eleventh Circuit avoided the *Chevron* question altogether.

### B. *The Third Circuit*<sup>286</sup> Considered Congress's Intended Meaning of

<sup>286</sup> In *Valdiviezo-Galdamez*, the Third Circuit confirmed that it would "review the [Board's] statutory interpretation of the [INA] under the deferential standard set forth in *Chevron*." *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 590 (3d Cir. 2011). It again noted that Congress's intended meaning of "particular social group" was unclear. *Id.* at 603. However, the Third Circuit declined to extend *Chevron* deference to the Board's new "social visibility" and "particularity" requirements for "particular social group," as explained in *C-A-*, *A-M-E-* & *J-G-U-*, and *S-E-G-*. *See id.* at 608. The Third Circuit noted that "social visibility" and "particularity" seemed to be "different articulations of the same concept" and explained that "social visibility" conflicted with prior Board precedent. *Id.* It also said that a "social visibility" requirement was illogical because "members of some persecuted groups that have been recognized as a 'particular social group' would certainly take pains to avoid being identified in a society where they would face persecution if government agents knew they belonged to the group." *Id.* at 607. The Board's "particularity" requirement similarly conflicted with prior precedent and therefore did not merit *Chevron* deference. *Id.* at 608. The Third Circuit ultimately remanded the case to the Board for further proceedings and suggested that the Board's change in policy without a "principled reason" could be "arbitrary, capricious, [or] an abuse of discretion." *Id.* at 608-09. The Third Circuit did not conduct its own statutory interpretation of "particular social group" in deciding the case.

The Board addressed the Third Circuit's concerns about its "social visibility" and "particularity" requirements in *Matter of M-E-V-G-*. *S.E.R.L. v. Att'y Gen.*, 894 F.3d 535, 540, 547 (3d Cir. 2018). *M-E-V-G-* required an applicant to establish that her "particular social group" was "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." *Id.* at 540, 547 (quoting *M-E-V-G-*, 26 I. & N. Dec. 227, 237 (B.I.A. 2014)).

Following the Board's decisions in *M-E-V-G-* and *W-G-R-*, the Third Circuit again considered whether the Board's "revised interpretation" of "particular social group" was reasonable. *Id.* at 549. This time, the Third Circuit found that the Board's interpretation of "particular social group" was reasonable and deserved *Chevron* deference. *Id.* at 540, 549-50. In reaching its decision, the Third Circuit cited, among other things, the Board's explanation in *M-E-V-G-* and *W-G-R-* that "particularity" and "social distinction" came from the plain language of the INA. *Id.* at 547-48. The Board also explained that "social distinction" did not require "ocular visibility," but rather that society could perceive the "particular social group." *Id.* at 548, 551 ("It is well within the bounds of reasonableness for the [Board] to interpret the term 'particular social group' in the INA as requiring evidence that the society in question recognizes a proposed group as distinct."). The Board noted that "particularity" and "social distinction" overlap, but they are "both different and necessary" requirements. *Id.* at 548.

In *S.E.R.L.*, the Third Circuit noted that "[t]he familiar *Chevron* two-step analysis . . . applies with full force in the immigration context." *Id.* at 549. However, the Third Circuit glossed over *Chevron* Step One, accepting the Board's determination that "particular social group" was ambiguous. *Id.* ("Our case law has already established that the term 'particular social group' is undefined in the statute, and its meaning is unclear."). The Third Circuit's reasonableness analysis emphasized how the Board applied "particular social group" in its precedent. *Id.* at 553-54 ("The additional requirements of social distinction and particularity arose from the [Board's] experience adjudicating prior cases and its desire to give further guidance."). The Third Circuit also noted that "particular" was found in the text of the INA, but it again failed to consider the plain meaning of "particular" and moved directly to *Chevron*

*“Particular Social Group” Under Chevron Step One, Employing Two of Cardoza-Fonseca’s “Traditional Tools of Statutory Construction”: Legislative History and Text*

In contrast to the other courts of appeals, the Third Circuit considered the meaning of “particular social group” under *Chevron* Step One. The Third Circuit’s analysis in *Fatin v. INS*<sup>287</sup> mostly adhered to the Supreme Court’s guidance in *Cardoza-Fonseca*. The Third Circuit employed two of *Cardoza-Fonseca*’s “traditional tools of statutory construction” under *Chevron* Step One: text and legislative history.

First, then–Judge Alito considered the text of “particular social group”:

Read in its broadest literal sense, [“particular social group”] is almost completely open-ended. Virtually any set including more than one person could be described as a “particular social group.” Thus, the statutory language standing alone is not very instructive.<sup>288</sup>

Because the plain language of “particular social group” is broad, Judge Alito considered it “not very instructive.”<sup>289</sup> However, he did not claim that “particular social group” was necessarily ambiguous, and he declined to explain why a broad, literal reading of “particular social group” conflicted with Congress’s intent.

Judge Alito then considered the legislative history. He first noted that “particular social group” was added to the INA when Congress passed the Refugee Act.<sup>290</sup> By passing the Refugee Act, “Congress intended ‘to bring United States refugee law into conformance with’” the Refugee Convention and Refugee Protocol.<sup>291</sup> Thus, Judge Alito considered the meaning of “particular social group” at the time the Refugee Convention was adopted:

When the Conference of Plenipotentiaries was considering the Convention in 1951, the phrase “membership of a particular social group” was added to this definition as an “afterthought.” The Swedish representative proposed this language, explaining only that it was needed because “experience had shown that certain refugees had been persecuted because they belonged to particular social groups,” and the proposal was adopted.<sup>292</sup>

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Step Two, stating that the Board’s *M-E-V-G-* interpretation of “particular” was reasonable, and it therefore prevailed. *Id.* at 552.

<sup>287</sup> 12 F.3d 1233 (3d. Cir. 1993).

<sup>288</sup> *Id.* at 1238.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 1239.

<sup>291</sup> *Id.* (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987)).

<sup>292</sup> *Id.* (footnote omitted) (first quoting 1 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 219–20 (1996); then quoting U.N. Conference of Plenipotentiaries on the Status

Judge Alito determined that the legislative history of the Refugee Act and the negotiating histories of the Refugee Convention and Refugee Protocol did not "shed[] much light on the meaning of the phrase 'particular social group.'"<sup>293</sup>

Thus, Judge Alito determined that "particular social group" was ambiguous and moved to *Chevron* Step Two. Under *Chevron* Step Two, Judge Alito briefly considered the structure of the statute, noting that the *Acosta* Board's use of *ejusdem generis* to interpret "particular social group" was a reasonable statutory construction entitled to *Chevron* deference.<sup>294</sup>

While the Third Circuit began to discern Congress's intended meaning of "particular social group" under *Chevron* Step One, the other courts of appeals declined to do so. The Third Circuit's analysis was incomplete, however. First, the Third Circuit failed to consider the INA's structure under *Chevron* Step One. Second, it failed to explain why a broad, literal meaning of "particular social group" conflicted with Congress's intent.<sup>295</sup> Scholars conducting comparable statutory analyses have argued that Congress intended just that: a broad "particular social group" meaning.<sup>296</sup>

C. *Most of the Courts of Appeals Are Unlikely to Employ Cardoza-Fonseca's "Traditional Tools of Statutory Construction" and Correctly Consider Congress's Intended Meaning of "Particular Social Group" Under Chevron Step One*

In *Matter of A-B-*, the Attorney General reaffirmed the Board's *M-E-V-G-* and *W-G-R-* interpretation of the "particular social group" legal standard. Because of the way the Attorney General applied the *M-E-V-G-* and *W-G-R-* interpretation to preclude most domestic and gang violence survivors from qualifying for asylum or withholding of removal, *A-B-* has been widely challenged.<sup>297</sup> The courts of appeals should use this opportunity to revisit the meaning of "particular social group," conducting a *Chevron* Step One analysis under *Cardoza-Fonseca's*

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of Refugees and Stateless Persons, *Summary Rec. of the 3d Mtg.*, 14, U.N. Doc. A/CONF.2/SR.3 (Nov. 19, 1951)).

<sup>293</sup> *Fatin*, 12 F.3d at 1239.

<sup>294</sup> *Id.*

<sup>295</sup> *See id.* at 1238–40.

<sup>296</sup> *See, e.g., Acosta*, 19 I. & N. Dec. 211, 232 (B.I.A. 1985) (explaining that Professor Atle Grahl-Madsen concluded that "social group" was a broad catch-all designed "to stop a possible gap in" the Refugee Convention's coverage); Parish, *supra* note 30, at 927–28.

<sup>297</sup> *See supra* text accompanying note 86.

guidance. Unfortunately, at least outside of the Seventh Circuit,<sup>298</sup> that is unlikely to happen.

Assuming the courts of appeals will follow their own precedents, they will continue to uphold the Board's interpretations of "particular social group" without conducting a *Chevron* Step One analysis. Accordingly, the Supreme Court should grant certiorari and conduct its own *Chevron* Step One analysis of "particular social group."

#### IV. The Supreme Court Should Employ *Cardoza-Fonseca's* "Traditional Tools of Statutory Construction" and Consider Congress's Intended Meaning of "Particular Social Group" Under *Chevron* Step One

The Supreme Court should grant certiorari to review the Board's *M-E-V-G-* and *W-G-R-* interpretation of "particular social group"—such as in a challenge to the Attorney General's decision in *A-B-*. There are several reasons why the Supreme Court would grant certiorari. First, as of May 2020, the Seventh Circuit has declined to extend *Chevron* deference to the Board's *M-E-V-G-* and *W-G-R-* interpretation of "particular social group."<sup>299</sup> The Court should grant certiorari to resolve the circuit split if that issue is raised on appeal.<sup>300</sup> Second, the courts of appeals have failed to correctly consider Congress's intended meaning of "particular social group" by employing *Cardoza-Fonseca's* "traditional tools of statutory construction" under *Chevron* Step One. The Supreme Court has become less deferential to agency interpretations over time, and it may want to correct the courts of appeals' pattern of disregarding *Chevron* Step One.<sup>301</sup> Finally, asylum is

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<sup>298</sup> See *supra* text accompanying note 262 (noting that the Seventh Circuit could consider the meaning of "particular social group" under *Chevron* Step One).

<sup>299</sup> *Id.*

<sup>300</sup> *Cf., e.g.,* *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018) ("The Court granted certiorari in this case to resolve division among the Courts of Appeals on a simple, but important, question of statutory interpretation . . . ." (citation omitted)); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 426 & n.2 (1987) (explaining that the Supreme Court granted certiorari to resolve a circuit split, though every circuit except the Third Circuit agreed on the legal standard that the Board should apply); Nitzan Sternberg, Note, *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, 289 (2011) ("To help create uniformity in asylum law, the Supreme Court should resolve the conflict about the definition of ['particular social group'].").

<sup>301</sup> See, e.g., *Sweeney, supra* note 113, at 149 ("[A]s administrative agencies have grown in influence and power, the concern [about the reach of the *Chevron* doctrine] has shifted from worry about a judiciary overstepping its bounds to fear of runaway executive agencies in danger of trampling the other two branches of government."); Thomas A. Lorenzen & Sharmistha Das, *The Decline of Deference: Is the Supreme Court Pruning Back the Chevron Doctrine?*, ABA (Sept. 1, 2015), <https://perma.cc/VHT2-MDV6>; cf. *Sweeney, supra* note 113, at 162 ("[M]any courts have historically resisted deferring to the Board and the Attorney General on immigration decisions, for reasons that appear to range from a

an important sociopolitical issue in the United States right now, so the Supreme Court will face political pressure to review a challenge to decisions like *Matter of A-B*.<sup>302</sup>

After the Supreme Court grants certiorari, it should consider Congress's intended meaning of "particular social group" under *Chevron* Step One. In doing so, it should adhere to its decision in *Cardoza-Fonseca* by employing its "traditional tools of statutory construction."<sup>303</sup> Section A describes how the Supreme Court should consider the text, Refugee Act legislative history, and INA structure to discern Congress's intended meaning of "particular social group" under *Chevron* Step One. It proposes the likely outcome of the Court's statutory analysis: a "particular social group" is "any specified collection of people within human society." Section B briefly explores the benefits and limitations of the Supreme Court's potential *Chevron* Step One analysis.

#### A. *Employing Cardoza-Fonseca's "Traditional Tools of Statutory Construction" Under Chevron Step One*

In *Cardoza-Fonseca*, the Supreme Court considered the text, Refugee Act legislative history, and INA structure under *Chevron* Step One.<sup>304</sup> Similarly, Section A employs *Cardoza-Fonseca's* "traditional tools of statutory construction" to determine Congress's intended meaning of "particular social group" under *Chevron* Step One. First, Subsection 1

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lack of confidence in the competence of the Board to concerns about its objectivity as an adjudicator. Studies going back to 1990 have found that courts have been less deferential to [Board] decisions than to the decisions of most other agencies."). *But see* Farbenblum, *supra* note 206, at 1096 (noting the Court's "trend toward increasing deference to the [Board]").

<sup>302</sup> See generally Amy Rublin, Note, *The Role of Social Science in Judicial Decision Making: How Gay Rights Advocates Can Learn from Integration and Capital Punishment Case Law*, 19 DUKE J. GENDER L. & POL'Y 179, 182 (2011) ("[The Supreme] Court values the public's pulse before deciding whether to grant certiorari . . .").

<sup>303</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987); see Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 543–45, 552–53 (2003); see also *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984); GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 10–11 (7th ed. 2015); Frederick Liu, *Chevron as a Doctrine of Hard Cases*, 66 ADMIN. L. REV. 285, 309 (2014) ("This account of the 'tools of statutory construction' finds support in *Chevron's* use of the label 'traditional,' which indicates that the tools themselves are no different from those used to apply statutes generally." (quoting *Chevron*, 467 U.S. at 843 n.9)). *But see* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 76 (2008) ("Inquiries into the statute's text, structure, and purpose, as well as traditional textual construction canons, fit well within [Step One's] positive inquiry, and their continued application to regulatory statutes is uncontroversial."); Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733, 762 (1998).

<sup>304</sup> See *supra* Part II.B.2.

considers the text, reviewing dictionary definitions of “particular,” “social,” and “group” from 1980 (the year that Congress passed the Refugee Act, amending the INA), 1967 (the year the Refugee Protocol was adopted), and 1951 (the year “particular social group” originated in the Refugee Convention). These definitions are helpful in discerning Congress’s intended meaning of “particular social group.”<sup>305</sup> Subsection 2 considers the meaning of “particular social group” in light of the Refugee Act’s legislative and negotiating histories. Finally, Subsection 3 considers “particular social group” within the structure of the INA.

### 1. Considering the Text of “Particular Social Group” Under *Chevron* Step One

Following its guidance in *Cardoza-Fonseca*, the Supreme Court should begin its *Chevron* Step One analysis by considering the text of “particular social group.” Because Congress did not explicitly define “particular social group” in the INA, this Comment considers the textual meaning of “particular social group” using dictionaries.<sup>306</sup> This Comment relies on dictionaries from 1980 (the year the Refugee Act was enacted) because such dictionaries best reflect Congress’s intended meaning.<sup>307</sup> Because the Refugee Act’s “particular social group” originated in the 1951 Refugee Convention, this Comment also reviews dictionaries from 1951. Additionally, this Comment reviews dictionaries from 1967 because the United States acceded to the 1967 Refugee Protocol—which included the Refugee Convention’s “particular social group.”<sup>308</sup>

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<sup>305</sup> See *Sarhan v. Holder*, 658 F.3d 649, 654 (7th Cir. 2011) (noting that “particular social group” is “not necessarily self-defining,” implying either that it *could* be self-defining or that the definition would have to be discerned through the “traditional tools of statutory construction”).

<sup>306</sup> See 33 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 8434 (2d ed. 1987) (“Where a statutory phrase lacks an express definition in the statute itself, a court should ‘typically give the phrase its ordinary meaning.’ In determining such meaning, courts sometimes consult dictionaries.” (quoting *FCC v. AT&T Inc.*, 562 U.S. 397 (2011))).

<sup>307</sup> See, e.g., *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1569 (2017); *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 609–12 (1987) (relying on dictionary definitions from when a statute became law to discern the meaning of the statutory term “race” during that time period); see also *Parish*, *supra* note 30, at 925 (“Congress did not draft the language of the new refugee definition and did not choose to alter it substantially. Congress was not engaged in threshing out and explaining a new idea, but in the importation into U.S. law of an established idea—the refugee definition of the Convention and Protocol.”).

<sup>308</sup> The Eleventh Circuit similarly considered dictionary definitions from 1966, claiming that “particular social group” originated in the 1967 Refugee Protocol. However, while the Refugee Protocol expanded the Refugee Convention’s “refugee” definition, “particular social group” remained unchanged. Thus, “particular social group” actually originated in the 1951 Refugee Convention, not the 1967 Refugee Protocol. See *supra* Part III.A.



First, in 1980, Congress likely understood "particular" to mean "specific."<sup>309</sup> An applicant claiming persecution on account of her membership in a "particular social group" must describe her *specific* "social group."<sup>310</sup> Similarly, the representatives to the United Nations's Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons<sup>311</sup> ("Conference of Plenipotentiaries") who adopted the 1951 Refugee Convention<sup>312</sup> and the states parties to the 1967 Refugee Protocol<sup>313</sup> likely also understood "particular" to mean "specific."

As explained in Section B, the negotiating history of the Refugee Convention supports this broad, particular-as-specific definition. "Particular social group" was added to the Refugee Convention to protect those who would not otherwise be protected from persecution on account of the previously-enumerated grounds (race, religion, nationality, and political opinion).<sup>314</sup> Because "particular social group" includes persecution on account of any *specified* "social group," "particular" should be construed broadly.

Other definitions also suggest a broad construction of "particular." For example, the definition of "particular" as "an indefinite part of a whole

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<sup>309</sup> *Particular*, BLACK'S LAW DICTIONARY (5th ed. 1979) ("[r]elating to a part or portion of anything; separate; sole; single; individual; *specific*; local; comprising a part only; partial in extent; not universal . . . [o]pposed to general" (emphasis added)); *Particular*, WEBSTER'S NEW WORLD DICTIONARY (2d college ed. 1980) ("of or belonging to a single, definite person, part, group, or thing; not general; distinct . . . *specific*" (emphasis added)).

<sup>310</sup> Both the Board and the courts of appeals have, at times, referred to "particular social group" as "social group," suggesting that "particular" merely requires the specific "social group" to be described or specified; "social group" is the most important part of the statutory term. *See, e.g.*, *Melnik v. Sessions*, 891 F.3d 278, 285–88 (7th Cir. 2018); *Pavlyk v. Gonzales*, 469 F.3d 1082, 1087–90 (7th Cir. 2006); *Sepulveda v. Gonzales*, 464 F.3d 770, 771–72 (7th Cir. 2006); *Yadegar-Sargis v. INS*, 297 F.3d 596, 602–05 (7th Cir. 2002); *Acosta*, 19 I. & N. Dec. 211, 232–35 (B.I.A. 1985).

<sup>311</sup> The Refugee Convention was finalized at the 1951 United Nations's Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons. Steinbock, *supra* note 303, at 812.

<sup>312</sup> *Particular*, BLACK'S LAW DICTIONARY (4th ed. 1951) ("[r]elating to a part or portion of anything . . . *specific*" (emphasis added)); *Particular*, WEBSTER'S NEW COLLEGIATE DICTIONARY (2d ed. 1951) ("relating to a portion of anything; separate; *specific* . . . [h]aving the character of . . . a *specific* subclass, which falls under some general concept" (emphasis added)); *Particular*, WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (encyclopedic ed. 1951) ("of or belonging to a single, definite person, part, group, or thing . . . *specific*" (emphasis added)).

<sup>313</sup> *Particular*, WEBSTER'S NEW WORLD DICTIONARY (compact school & office ed. 1967) ("regarded separately; *specific*" (emphasis added)); *Particular*, WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1967) ("an individual or a *specific* subclass . . . under some general concept or term" (emphasis added)).

<sup>314</sup> *See, e.g.*, *Acosta*, 19 I. & N. Dec. at 232 ("Congress did not indicate what it understood this ground of persecution to mean, nor is its meaning clear in the Protocol. This ground was not included in the definition of a refugee proposed by the committee that drafted the U.N. Convention; rather it was added as an afterthought.").

class”<sup>315</sup> suggests a broad construction of “particular” as an unlimited, unspecified group within a larger body. This definition directly conflicts with the Board’s *M-E-V-G-* and *W-G-R-* interpretation of “particularity,” which claimed that a “*particular social group*” “must . . . be discrete and have definable boundaries.”<sup>316</sup>

Second, in 1951, 1967, and 1980, “social” was defined as “a general word . . . pertaining to human society” or describing “society or its organization.”<sup>317</sup> Because “social” was an adjective describing “group,” it would have merely required the “particular social group” to be a group that exists in *society*.

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<sup>315</sup> *Particular*, THE AMERICAN COLLEGE DICTIONARY (text ed. 1951) (“not referring to the whole extent of a class, but only to an indefinite part of it”); *Particular*, THE RANDOM HOUSE COLLEGE DICTIONARY (rev. ed. 1980) (“not general; referring to an indefinite part of a whole class”); *Particular*, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1967) (“of or pertaining to a single or specific . . . group, class . . . not general; referring to an indefinite part of a whole class”); *see also Particular*, THE AMERICAN EVERYDAY DICTIONARY (1951) (“pertaining to some one . . . group”); *Particular*, THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH (4th ed. 1951) (“relating to one as distinguished from others”); *Particular*, THE LITTLE OXFORD DICTIONARY OF CURRENT ENGLISH (5th ed. 1980) (“relating to one as distinguished from others”); *Particular*, THE WORLD BOOK DICTIONARY (1967) (“belonging to some one . . . group”); *Particular*, WEBSTER’S NEW WORLD DICTIONARY (compact school & office ed. 1967) (“of or belonging to a single group”).

<sup>316</sup> *M-E-V-G-*, 26 I. & N. Dec. 227, 239 (B.I.A. 2014); *W-G-R-*, 26 I. & N. Dec. 208, 214 (B.I.A. 2014).

<sup>317</sup> *Social*, OXFORD AMERICAN DICTIONARY (1980) (“of society or its organization”); *Social*, THE AMERICAN COLLEGE DICTIONARY (text ed. 1951) (“of or pertaining to human society, esp. as a body divided into classes according to worldly status”); *Social*, THE AMERICAN EVERYDAY DICTIONARY (1951) (“of or pertaining to human society”); *Social*, THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH (4th ed. 1951) (“of or in or towards society”); *Social*, THE LITTLE OXFORD DICTIONARY OF CURRENT ENGLISH (5th ed. 1980) (“relating to society”); *Social*, THE RANDOM HOUSE COLLEGE DICTIONARY (rev. ed. 1980) (“[O]f or pertaining to human society, esp. as a body divided into classes according to worldly status . . . Social is a general word and may refer to organized society as a whole . . .”); *Social*, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1967) (“of or pertaining to human society”); *Social*, THE WORLD BOOK DICTIONARY (1967) (“concerned with human beings in their relations to each other”); *Social*, WEBSTER’S NEW COLLEGIATE DICTIONARY (1980) (“of, relating to, or based on rank or status in a particular society”); *Social*, WEBSTER’S NEW COLLEGIATE DICTIONARY (2d ed. 1951) (“[o]f or pertaining to society as an organism or as a group of interrelated, interdependent persons”); *Social*, WEBSTER’S NEW WORLD DICTIONARY (compact school & office ed. 1967) (“of or having to do with society”); *Social*, WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (2d college ed. 1980) (“of or having to do with the ranks or activities of society”); *Social*, WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (encyclopedic ed. 1951) (“of or having to do with human beings living together as a group in a situation requiring that they have dealings with one another . . . living or associating in groups or communities”); *Social*, WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY (1967) (“of or relating to human society . . . of, relating to, or based on rank or status in a particular society”).

Third, "group" was defined as "any . . . assemblage of persons."<sup>318</sup> A "group" is simply a "collection of people." Like "particular" and "social," it should be broadly construed.

Thus, in 1980, 1967, and 1951, members of Congress, states parties to the Refugee Protocol, and representatives to the Conference of Plenipotentiaries would have understood "particular social group" as a broad term meaning "any specified collection of people within human society." Congress intended "particular social group" to be broadly construed. That Congress intended for a Refugee Act term to be broadly construed does not in itself mean the term is ambiguous.<sup>319</sup>

## 2. Considering the Refugee Act's Legislative History Under Chevron Step One

Under *Cardoza-Fonseca*, the Supreme Court should next consider the legislative history of the Refugee Act under *Chevron* Step One. Congress intended for the Refugee Act to conform to the Refugee Protocol.<sup>320</sup> Accordingly, when interpreting Refugee Act provisions, the Board and reviewing courts have also considered (among other things) the

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<sup>318</sup> *Group*, THE AMERICAN COLLEGE DICTIONARY (text ed. 1951) ("[A]ny assemblage of persons . . . a number of persons . . . considered together as being related in some way."); *Group*, THE AMERICAN EVERYDAY DICTIONARY (1951) ("[A]ny assemblage of persons or things . . . a number of persons . . . belonging or classed together."); *Group*, THE RANDOM HOUSE COLLEGE DICTIONARY (rev. ed. 1980) ("any collection or assemblage of persons"); *Group*, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1967) ("any collection or assemblage of persons"); *Group*, WEBSTER'S NEW COLLEGIATE DICTIONARY (2d ed. 1951) ("[a]n assemblage of persons . . . forming a separate unit"); see also *Group*, OXFORD AMERICAN DICTIONARY (1980) ("[A] number of persons or things gathered, placed, or classed together. . . ."); *Group*, THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH (4th ed. 1951) ("number of persons . . . belonging or classed together"); *Group*, THE LITTLE OXFORD DICTIONARY OF CURRENT ENGLISH (5th ed. 1980) ("number of persons . . . near or belonging or classed together"); *Group*, THE WORLD BOOK DICTIONARY (1967) ("[A] number of persons . . . belonging or classed together."); *Group*, WEBSTER'S NEW COLLEGIATE DICTIONARY (1980) ("[A] number of individuals assembled together or having some unifying relationship . . . ."); *Group*, WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (2d college ed. 1980) ("[A] number of persons . . . gathered closely together and forming a recognizable unit . . . ."); *Group*, WEBSTER'S NEW WORLD DICTIONARY (compact school & office ed. 1967) ("[A] number of persons . . . gathered or classified together."); *Group*, WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (encyclopedic ed. 1951) ("[A] number of persons . . . gathered closely together and forming a recognizable unit . . . a number of persons . . . classified together because of common characteristics, [and] community of interests . . . ."); *Group*, WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1967) ("[A] number of individuals assembled together or having common interests . . . an assemblage of related organisms . . . .").

<sup>319</sup> See JAMES T. O'REILLY, ADMINISTRATIVE RULEMAKING § 18:13 (2020) ("Broad statutory terms should be read with their plain meaning, where possible.").

<sup>320</sup> See, e.g., *INS v. Stevic*, 467 U.S. 407, 425–26 (1984); Maurice A. Roberts, *The U.S. and Refugees: The Refugee Act of 1980*, 12 J. OPINION, Spring/Summer 1982, at 4, 5.

negotiating histories of the Refugee Convention and Refugee Protocol.<sup>321</sup> The legislative history of the Refugee Act and the negotiating histories of the Refugee Convention and Refugee Protocol support the broad, textual meaning of “particular social group” as “any specified collection of people within human society.” Further, both the UNHCR Refugee Handbook and the 2002 UNHCR *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* (“UNHCR Guidelines”) support a broad “particular social group” construction.

a. *The Refugee Act*

The Refugee Act’s legislative history suggests that Congress intended “particular social group” to be construed broadly.<sup>322</sup> Even though Congress did not explicitly define “particular social group,” several characteristics of the Refugee Act support a broad “particular social group” interpretation. First, when Congress enacted the Refugee Act, Congress declared the following purpose: “[I]t is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands.”<sup>323</sup> The “refugee” definition should further the Refugee Act’s purpose and seek to protect all people from persecution. “Particular social group” should therefore be construed broadly to protect as many people as possible from persecution. Second, the Refugee Act increased the United States’s current numerical limitations on overseas refugees<sup>324</sup> from 17,400 to 50,000 for the three initial fiscal years.<sup>325</sup> Given Congress’s commitment to welcoming more refugees to the United States, it is likely

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<sup>321</sup> See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–41 (1987); *Stevic*, 467 U.S. at 416–20; *Acosta*, 19 I. & N. Dec. 211, 220 (B.I.A. 1985); see also *INS v. Elias-Zacarias*, 502 U.S. 478, 487 (1992) (Stevens, J., dissenting).

<sup>322</sup> See Parish, *supra* note 30, at 925 n.11. But see Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT’L L.J. 505, 513 (1993) (“Congress did not focus on the social group concept and gave no explicit indication of its understanding of the purpose or meaning of this term.”).

<sup>323</sup> Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; see Deborah Anker, *The Development of U.S. Refugee Legislation*, 6 IN DEFENSE OF THE ALIEN 159, 160 (1983) (“[The United States is] a nation with a strong humanitarian heritage and unique historic role as a haven for persons fleeing persecution.”).

<sup>324</sup> See LEGOMSKY & THRONSON, *supra* note 32, at 9 (“The overseas refugee program, for which the President annually announces numerical limits, admits refugees who apply from outside United States territory.” In contrast, the asylum program, which is the subject of this Comment and “which is not subject to numerical limits . . . admit[s] certain refugees who have already arrived at United States ports of entry or the interior on their own.”).

<sup>325</sup> Roberts, *supra* note 320, at 5.

that Congress also intended to strengthen protections for asylum-seekers and withholding of removal applicants who similarly fled persecution and sought to prove they were "refugees." Third, Congress further expanded the concept of "refugee," so that anyone with an eligible persecution claim could request refuge in the United States, rather than only those of a particular nationality or ideology.<sup>326</sup> Each of these characteristics suggests that Congress wanted to protect as many people as possible—and many more than it had previously—from persecution. "Particular social group" should therefore be construed broadly to protect more "refugees."

Congress adopted the term "particular social group" from the Refugee Convention and Refugee Protocol and intended for the Refugee Act to conform to the Refugee Protocol.<sup>327</sup> It is therefore important to also examine the negotiating histories of the Refugee Convention and Refugee Protocol, as the Court did in *Cardoza-Fonseca*.

#### b. *The Refugee Convention and Refugee Protocol*

When interpreting Refugee Act provisions, courts should consider the Refugee Convention and Refugee Protocol histories.<sup>328</sup> Like the Refugee Act's legislative history, the Refugee Convention's negotiating history supports a broad "particular social group" construction.<sup>329</sup> "Particular social group" was added to the Refugee Convention as an "afterthought" when the Swedish representative to the Conference of Plenipotentiaries explained that "experience had shown that certain refugees had been persecuted because they belonged to particular social groups."<sup>330</sup> The representatives to the Conference of Plenipotentiaries added "particular social group" to ensure the Refugee Convention would broadly protect people from persecution.

More than fifteen years later, the Refugee Protocol retained "particular social group" as part of the "refugee" definition. In fact, the Refugee Protocol made only two changes to the Refugee Convention's "refugee" definition: it removed both the temporal restrictions and the geographic restrictions imposed by the Refugee Convention. By removing

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<sup>326</sup> See Anker, *supra* note 323, at 161–62.

<sup>327</sup> See, e.g., *INS v. Stevic*, 467 U.S. 407, 426 (1984); Roberts, *supra* note 320, at 5; Steinbock, *supra* note 303, at 816; Parish, *supra* note 30, at 925.

<sup>328</sup> See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–41 (1987); *Stevic*, 467 U.S. at 416–20; *Acosta*, 19 I. & N. Dec. 211, 220 (B.I.A. 1985); see also *INS v. Elias-Zacarias*, 502 U.S. 478, 487 (1992) (Stevens, J., dissenting).

<sup>329</sup> See Steinbock, *supra* note 303, at 812–13; Parish, *supra* note 30, at 926–28.

<sup>330</sup> Parish, *supra* note 30, at 926–27 (quoting U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Rec. of the 3d Mtg.*, 14, U.N. Doc. A/CONF.2/SR.3 (Nov. 19, 1951)).

these restrictions, the Refugee Protocol extended its protections, so that individuals could qualify as “refugees” even if they were not present in a geographical area affected by World War II before January 1, 1951.<sup>331</sup>

Although not binding on United States courts, UNHCR resources are further helpful in interpreting “particular social group.”<sup>332</sup> The UNHCR Refugee Handbook defines “particular social group” as “normally compris[ing of] persons of similar background, habits or social status.”<sup>333</sup> As some scholars have explained, the UNHCR Refugee Handbook definition of “particular social group” appears to suggest a broad “catch all.”<sup>334</sup>

The UNHCR Guidelines suggest a slightly more limited approach.<sup>335</sup> “Particular social group” is broad and flexible, remaining “open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”<sup>336</sup> However, while “particular social group” should be construed broadly, it is not so broad that race, religion, nationality, and political opinion are “superfluous.”<sup>337</sup>

In contrast to the Board’s *M-E-V-G-* and *W-G-R-* interpretation of “particular social group,” under the UNHCR Guidelines, “particular social

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<sup>331</sup> See Bednar & Penland, *supra* note 28, at 149–50.

<sup>332</sup> See *Cardoza-Fonseca*, 480 U.S. at 464 (Powell, J., dissenting) (“[S]tatements by the United Nations High Commissioner for Refugees have no binding force, because ‘the determination of refugee status under the . . . Protocol . . . is incumbent upon the Contracting State.’” (quoting *id.* at 439 n.22 (majority opinion))).

<sup>333</sup> UNHCR, HANDBOOK AND GUIDELINES ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 17 (2011). While United Nations supplementary materials are not binding on the United States, the Supreme Court has considered them as helpful guidance for construing Refugee Act provisions. See, e.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (“We agree the U.N. Handbook provides some guidance in construing the provisions added to the INA by the Refugee Act.”).

<sup>334</sup> Parish, *supra* note 30, at 926 (“The primary message to be gleaned from an examination of interpretations of the term ‘social group’ within the context of the Protocol is that this category is a catch all, and should be flexibly interpreted.”).

<sup>335</sup> UNHCR, 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, HCR/GIP/02/02 2 (2002), <https://perma.cc/4G9H-MQJX> [hereinafter UNHCR GUIDELINES] (“Particular social group” is not a “catch all.”).

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* However, an applicant may qualify for asylum under more than one protected ground based on the same instance of persecution. See *id.* Further, “particular social group” may not be “defined *exclusively* by the fact that it is targeted for persecution.” *Id.* at 2, 4 (“Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognizable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.” (quoting *Applicant A v. Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 264 (Austl.)).

group" must only meet one requirement: *either* "immutability" or "social perception."<sup>338</sup> The "immutability" approach mirrors the *Acosta* interpretation of "particular social group" and requires the applicant to prove group members have an "innate" or "fundamental" characteristic that they cannot or should not be required to change.<sup>339</sup> Similar to "social distinction," the "social perception" approach requires an applicant to prove that members of her "particular social group" "[share] a common characteristic which makes them a cognizable group or sets them apart from society at large."<sup>340</sup> The UNHCR interprets "particular social group" more broadly than the *Acosta* "immutability" interpretation, but perhaps more narrowly than its plain, textual meaning—"any specified collection of people within human society."<sup>341</sup> Although not binding on US courts, the UNHCR Refugee Handbook and UNHCR Guidelines support a broad meaning of "particular social group."

### 3. Considering the INA's Structure Under *Chevron* Step One

Finally, the Supreme Court should consider the structure of the INA under *Chevron* Step One. Importantly, "particular social group" falls within a list.<sup>342</sup> An asylum applicant may seek protection from persecution

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<sup>338</sup> *Id.* at 2–3.

<sup>339</sup> *Id.*

<sup>340</sup> *See id.* at 3.

<sup>341</sup> *But cf.* *De Pena-Paniagua v. Barr*, 957 F.3d 88, 94–98 (1st Cir. 2020) (suggesting that a broad "particular social group" like "Dominican women" could be legally cognizable under *Acosta*, given *Acosta's* recognition of "sex" as a characteristic that could define "particular social group").

<sup>342</sup> Another structural aspect of "Title 11—Admission of Refugees" also stands out: "Particular social group" is used twice. *Id.* at 102–03 (codified at 8 U.S.C. § 1101(a)(42)). "Particular social group" is used to describe who is *included* in the "refugee" definition, and then "particular social group" is used to describe who is *excluded from* the "refugee" definition. *Id.* In defining a "refugee," Congress first explained who is included as a "refugee":

The term 'refugee' means (A) any 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 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

....

*Id.* at 102 (emphasis added).

Congress then explained who is excluded from the "refugee" definition under the persecutor bar: "[B] The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a *particular social group*, or political opinion." *Id.* at 102–03 (emphasis added); *see also* *Negusie v. Holder*, 555 U.S. 511, 513–14 (2009).

on account of one or more of the listed protected grounds: “race, religion, nationality, membership in a *particular social group*, or political opinion.”<sup>343</sup>

Two canons of construction are helpful in discerning the meaning of statutory terms within a list: *noscitur a sociis* and *eiusdem generis*.<sup>344</sup> Under *noscitur a sociis*, “a word is known by the company it keeps.”<sup>345</sup> When applying *noscitur a sociis* to the Refugee Act, “particular social group” refers “specifically to the subset” of “particular social groups” involving race, religion, nationality, and political opinion—and not to just any “particular social group.”<sup>346</sup>

Under *eiusdem generis*, “[w]here general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”<sup>347</sup> Thus, “particular social group” refers only to “particular social groups” that are similar to the other enumerated

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Because Congress used “particular social group” twice in the same definition, it is very likely that Congress intended only one meaning for the term “particular social group.” In some circumstances, Congress’s “identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute.” *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015). That is unlikely the case here, where Congress used the identical “particular social group” and surrounding language within the *same* statutory provision. See 94 Stat. at 102–03; see also *Balachova v. Mukasey*, 547 F.3d 374, 384 (2d Cir. 2008) (“We have strongly suggested that the [Board] should apply the same definition to persecution in the persecutor-bar context as it does in defining who is a refugee.”).

Thus, if “particular social group” is defined *narrowly* in determining who is included in the “refugee” definition, it must also be defined narrowly in determining who is excluded from the “refugee” definition. Conversely, if “particular social group” is defined *broadly* in determining who is included in the “refugee” definition, it must also be defined broadly in determining who is excluded from the “refugee” definition.

On the one hand, “particular social group” should not be so broad that nobody could overcome the persecutor bar. On the other hand, it should not be so narrow that “particular social group” becomes meaningless under the persecutor bar. *But see* Zoë Egelman, Note, *Punishment and Protection, Two Sides of the Same Sword: The Problem of International Criminal Law Under the Refugee Convention*, 59 HARV. INT’L L.J. 461, 495 (2018) (“[S]uffering a minor act of persecution will be insufficient to establish a claim to refugee status, while committing a similar minor act of persecution may be enough to render one excludable.”).

<sup>343</sup> 8 U.S.C. § 1101(a)(42)(A) (emphasis added).

<sup>344</sup> See *Yates*, 135 S. Ct. at 1085–86.

<sup>345</sup> *Id.* at 1085.

<sup>346</sup> *Cf. id.* (applying *noscitur a sociis* to interpret that the term “tangible object”—the last term within a list that began with “record” and “document”—specifically referred to not all tangible objects but only “the subset of tangible objects involving records and documents”).

<sup>347</sup> *Id.* at 1086 (quoting *Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003)).



protected grounds (race, religion, nationality, and political opinion)—and not to just any “particular social group.”<sup>348</sup>

*Ejusdem generis* is best applied here, where the general “particular social group” follows the more specific “race,” “religion,” “nationality,” and “political opinion” in a list. In *Acosta*, the Board relied on *ejusdem generis* to interpret membership in a “particular social group.”<sup>349</sup> The Board found that each of the specific protected grounds described an “immutable characteristic” that was “beyond the power of an individual to change” or was “so fundamental to individual identity or conscience that it ought not to be required to be changed.”<sup>350</sup> That led to the *Acosta* Board’s immutability interpretation of “particular social group”—a “group of persons all of whom share a common, immutable characteristic.”<sup>351</sup>

While the *Acosta* analysis offers one reasonable interpretation of “particular social group” through *ejusdem generis*, the Supreme Court could reach a different interpretation.<sup>352</sup> For example, the Court might find that “race, religion, nationality . . . and political opinion” are similar because they are social constructs; key identifying characteristics; or characteristics that are commonly used to oppress marginalized communities. Importantly, *ejusdem generis* does not conflict with the broad, textual meaning of “particular social group”—“any specified collection of people within human society.” After all, a racial group—like a religious group, national origin group, or political group—is a specified collection of people within human society.

In sum, if the Supreme Court employs *Cardoza-Fonseca*’s “traditional tools of statutory construction” under *Chevron* Step One, it should determine the unambiguous meaning of “particular social group” to be “any specified collection of people within human society.”

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<sup>348</sup> *Cf. id.* at 1086–87 (applying *ejusdem generis* to interpret that the term “tangible object”—the last term within a list that began with “record” and “document”—reflected Congress’s desire to cabin the applicable “tangible objects” to those related to “records” and “documents”).

<sup>349</sup> *Acosta*, 19 I. & N. Dec. 211, 233–34 (B.I.A. 1985).

<sup>350</sup> *Id.* at 233.

<sup>351</sup> *Id.*

<sup>352</sup> The UNHCR Guidelines also adopted the *Acosta* “immutability”—or, alternatively, the “social perception”—approach. UNHCR GUIDELINES, *supra* note 335, at 3. Even so, the Supreme Court does not have to adopt the “immutability” interpretation if it employs *ejusdem generis* to consider the structure of the statute. While the *Acosta* “immutability” interpretation could be considered reasonable under *Chevron* Step Two, the Supreme Court must conduct its own statutory analysis to discern Congress’s intended meaning of “particular social group” under *Chevron* Step One. By considering the text, Refugee Act legislative history, and INA structure, the Supreme Court will likely reach a different interpretation of “particular social group”—“any specified collection of people within human society”—rendering a *Chevron* Step Two analysis unnecessary.

B. *Benefits and Limitations of the Supreme Court's Potential Chevron Step One Analysis of "Particular Social Group"*

As explained in Section A, if the Supreme Court reviews a challenge to the Board's *M-E-V-G-* and *W-G-R-* "particular social group" interpretation, it should begin with a *Chevron* Step One analysis. The Supreme Court should adhere to its precedent in *Cardoza-Fonseca*, employing its "traditional tools of statutory construction" to determine Congress's intended meaning of "particular social group." These "traditional tools of statutory construction" all point to a broad interpretation of "particular social group": "any specified collection of people within human society." Because Congress's intended meaning of "particular social group" is unambiguous, the Supreme Court would resolve the matter there, setting the legal standard for the DOJ to subsequently apply when adjudicating asylum claims. There are several benefits and limitations of this analysis.

1. *Benefits of the Supreme Court's Potential Chevron Step One Analysis of "Particular Social Group"*

Several benefits would result if the Supreme Court considered the meaning of "particular social group" under *Chevron* Step One. First, if the Supreme Court determined the meaning of "particular social group" to be "any specified collection of people within human society," it would further the Refugee Act's express purpose by better "respond[ing] to the urgent needs of persons subject to persecution in their homelands."<sup>353</sup> Over time, as the Board's "particular social group" interpretations have grown increasingly complex and nearly impossible to satisfy,<sup>354</sup> the courts have allowed the Board to overlook the reason why Congress passed the Refugee Act in the first place—to protect people from persecution.<sup>355</sup> A

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<sup>353</sup> Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; see Anker, *supra* note 323, at 160 ("[The United States is] a nation with a strong humanitarian heritage and unique historic role as a haven for persons fleeing persecution.").

<sup>354</sup> See Settlege, *supra* note 20, at 309–10 ("Practically, having to meet this new three-part test greatly increases the evidentiary burden of an asylum applicant."); Bednar & Penland, *supra* note 28, at 154 ("The [Board] and [courts of appeals] use particularity and social distinction to deny asylum to individuals from Central America, whose particular social groups allegedly cannot meet these criteria.").

<sup>355</sup> See Jesse Imbriano, *Opening the Floodgates or Filling the Gap?: Perdomo v. Holder Advances the Ninth Circuit One Step Closer to Recognizing Gender-Based Asylum Claims*, 56 VILL. L. REV. 327, 327–29 (2011) ("Asylum is contemporary society's promise that those seeking safe haven will find it; however, complex implementation has meant that many individuals with legitimate, court-recognized fear of persecution are left without recourse and forcibly returned to the domain of their persecutors.").

broad "particular social group" meaning would ensure that as many people fleeing persecution as possible could be protected.<sup>356</sup> That is especially important for *pro se* applicants who have experienced or fear persecution but do not have the benefit of attorneys to formulate their "particular social groups" according to the Board's evolving interpretations.<sup>357</sup>

Some have argued that a broad "particular social group" interpretation would "result in a flood of new asylum seekers to the United States."<sup>358</sup> However, even if the Court defined "particular social group" broadly—reducing asylum-seekers' evidentiary burden—asylum applicants would still have to prove the other elements of asylum (e.g., persecution<sup>359</sup> and nexus<sup>360</sup>).<sup>361</sup> More importantly, under *Chevron* Step One, a court's proper role is to discern Congress's intended meaning of "particular social group," not to evaluate whether Congress's decision to protect people from persecution is good policy.<sup>362</sup>

Second, as a practical matter, it would be helpful for the Supreme Court to interpret "particular social group," setting the legal standard that the Board should then apply. Having a set legal standard would ensure greater notice, consistency, and predictability for asylum applicants.<sup>363</sup>

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<sup>356</sup> See *id.* at 350–51 ("Emphasis on the size of the social group is misplaced. Appropriate interpretation of the refugee definition does not require that a particular social group be a small category but actually suggests that it is a very large category parallel to race, religion, and nationality." (footnote omitted)).

<sup>357</sup> See Settlage, *supra* note 20, at 310 ("These new requirements are unduly burdensome, particularly for *pro se* applicants . . . Not only might it be difficult to obtain necessary evidence, but a *pro se* applicant without knowledge of asylum law will have difficulty articulating a social group that meets the new requirements.").

<sup>358</sup> See, e.g., *id.* at 312 n.177.

<sup>359</sup> See Bednar & Penland, *supra* note 28, at 156–59.

<sup>360</sup> See, e.g., Linda Kelly, "On Account Of" *Private Violence: The Personal/Political Dichotomy of Asylum's Nexus*, 21 UCLA J. INT'L L. & FOREIGN AFF. 98 (2017); Walter H. Ruehle, *Into the Heart of Darkness: The Nexus Factor in Asylum Cases*, 14-11 IMMIGR. BRIEFINGS 1 (2014).

<sup>361</sup> 8 U.S.C. § 1158; Theresa A. Vogel, *Critiquing Matter of A-B-: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence*, 52 U. MICH. J.L. REFORM 343, 420 (2019) ("The refugee definition incorporates many other elements that must be met in order to qualify for asylum in addition to demonstrating that an asylum seeker falls under one of the five grounds for asylum. These elements include a well-founded fear of persecution and proof that the state is unable or unwilling to provide protection when a non-state actor inflicts persecution.").

<sup>362</sup> See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (explaining that under *Chevron* Step One, courts determine whether Congress has "directly spoken to the precise question at issue"); see also Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 ("[I]t is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands . . .").

<sup>363</sup> See *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006) (*per curiam*); *Melnik v. Sessions*, 891 F.3d 278, 286 n.22 (7th Cir. 2018) (explaining that the Board's "case-by-case determination of the particular kind of group characteristics that would qualify" as a "particular social group" has resulted in

After the Court sets the legal standard, the DOJ could further clarify how “particular social group” applies through case-by-case adjudication,<sup>364</sup> but it could no longer change the “particular social group” legal standard itself.<sup>365</sup>

That the Department of Justice could no longer change the “particular social group” legal standard would provide a third benefit: if the Supreme Court determined the meaning of “particular social group” under *Chevron* Step One, setting the legal standard for the DOJ to apply, the Attorney General and Board could no longer manipulate the meaning of “particular social group” for political purposes. It is no secret that the Trump Administration’s immigration policy priorities have made it more difficult for people fleeing persecution to prove asylum eligibility.<sup>366</sup> As Professor Fatma E. Marouf explained: Like current Attorney General William Barr, “[b]oth President Trump and former Attorney General Jeff Sessions have equated the rule of law with deportation, not fair adjudication . . . [W]hat

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“confusion and a lack of consistency” (quoting *M-E-V-G-*, 261 & N. 227, 331 (B.I.A. 2014)); Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 *GEO. IMMIGR. L.J.* 99, 102 (2018) (explaining that immigration law raises “serious due process concerns, fair notice, and separation of powers concerns” because the Board can overturn circuit court precedent (quoting *Gorsuch Confirmation Hearing Day 2 Part 1*, CSPAN (Mar. 21, 2017), <https://perma.cc/2Z8S-T6EF>)); Quintero, *supra* note 21, at 216–18 (suggesting that the Board’s application of the “particular social group” legal standard could be arbitrary and capricious, resulting in circuit splits); Sternberg, *supra* note 300, at 288–89 (“Uniformity in the law is desirable because it prevents arbitrary outcomes . . . [T]he absence of a clear, uniform definition of [“particular social group”] has led to many failed asylum applications in the United States.”)).

<sup>364</sup> See, e.g., *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (“The particular kind of group characteristic that will qualify under [the *Acosta* “immutability”] construction remains to be determined on a case-by-case basis. 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.” (quoting *Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985))).

<sup>365</sup> The courts of appeals review de novo the Board’s legal conclusions about whether a given “particular social group” is cognizable. In general, the courts of appeals accord *Chevron* deference to precedential, three-member Board decisions that make reasonable determinations about whether a given “particular social group” is legally cognizable. See, e.g., *Perez-Zenteno v. U.S. Att’y Gen.*, 913 F.3d 1301, 1307 (11th Cir. 2019) (“Our law is clear that we defer to reasonable interpretations of the ambiguous statutory phrase ‘particular social group’ set forth in precedential, three-member [Board] decisions, including *Matter of Acosta* and its progeny.” (citation omitted)). However, even if a circuit court overturned the Board’s determination, the “particular social group” legal standard itself would remain intact, ensuring greater consistency and notice for asylum applicants.

<sup>366</sup> See THE WHITE HOUSE, TRUMP ADMINISTRATION IMMIGRATION POLICY PRIORITIES (Oct. 8, 2017), <https://perma.cc/GR66-PZ76> (“End abuse of our asylum system by tightening standards, imposing penalties for fraud, and ensuring detention while claims are verified.”); see also Kari Hong, *Weaponizing Misery: The 20-Year Attack on Asylum*, 22 *LEWIS & CLARK L. REV.* 541, 548–67 (2018) (describing how the Trump Administration has “seized upon” recent administrations’ policies to further undermine protections given to asylum-seekers).

Trump expects from [Immigration Judges] and asylum officers is the rapid denial of asylum applications.<sup>367</sup> Immigration Judges and Board members, who are the Attorney General's delegates and DOJ employees, have little ability to "exercise independent judgment in light of these clear marching orders to issue deportation orders and tighten asylum standards."<sup>368</sup>

Even if the Board exercises its independent judgment and reaches a conclusion the Attorney General does not like, the Attorney General is free to certify the case to himself and overturn the Board's precedent to further partisan goals.<sup>369</sup> While uncommon in past administrations, the Trump Administration has "pushed [this] use of the review mechanism to a new extreme."<sup>370</sup> For example, as explained in Part I.B.2., Sessions certified *Matter of A-B-* to himself, so that he could overturn the Board's precedent in *Matter of A-R-C-G-*.<sup>371</sup> In overturning *A-R-C-G-*, the Attorney General claimed that survivors of domestic or gang violence could generally not qualify for asylum.<sup>372</sup> Gang violence was not even at issue in *A-R-C-G-* or *A-B-*; the Attorney General clearly sought to narrow the types of groups that qualify as "particular social groups" to further the Trump Administration's policy goals.

Similarly, Attorney General William Barr overturned the Board's decision in *Matter of L-E-A-*,<sup>373</sup> which had recognized the respondent's

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<sup>367</sup> See Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 711-12 (2019).

<sup>368</sup> *Id.* at 713; see Family, *supra* note 363, at 100 ("[T]he enforcement of immigration law often involves . . . the use of agency adjudicators with very little decisional independence."); Hong, *supra* note 366, at 559 ("[Board] members—like the misnamed immigration judges—are not 'judges' in the sense that they have independence from political pressures; rather they are employees of the Department of Justice . . . They . . . have been fired for not deporting enough people: 'in 2002, the [B]oard members were purged if they had viewpoints that differed from Attorney General Ashcroft's prosecutorial agenda.'" (quoting Kari E. Hong, *Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship*, 28 GEO. IMMIGR. L.J. 277, 337 (2014))).

<sup>369</sup> See 8 C.F.R. § 1003.1(h)(1) ("The Board shall refer to the Attorney General for review of its decision all cases that . . . [t]he Attorney General directs the Board to refer to him."); see also 8 U.S.C. § 1103(a)(1) ("[D]etermination and ruling by the Attorney General with respect to all questions of law shall be controlling.").

<sup>370</sup> Marouf, *supra* note 367, at 743; see also Hong, *supra* note 366, at 560 ("[Attorney General] Jeff Sessions] has been reconsidering [Board] decisions that had been favorable to asylum seekers . . .").

<sup>371</sup> See *A-B-*, 27 I. & N. Dec. 316, 317 (Att'y Gen. 2018); Sweeney, *supra* note 113, at 142-43 ("*Matter of A-B-*, the domestic violence decision, is particularly concerning, as the case it overturned, *Matter of A-R-C-G-*, had represented the considered result of fifteen years of agency adjudication—at the immigration judge, [Board] and Attorney General levels—that ended in a consensus that domestic violence claims could and should be recognized within the asylum framework.").

<sup>372</sup> *A-B-*, 27 I. & N. Dec. at 320.

<sup>373</sup> 27 I. & N. Dec. 40 (B.I.A. 2017), *overruled by L-E-A-*, 27 I. & N. Dec. 581, 586 (Att'y Gen. 2019) (*L-E-A- II*).

“father’s immediate family” as a “particular social group.”<sup>374</sup> In overturning *L-E-A-*, the Attorney General went beyond the facts of the specific case to claim that an applicant’s immediate family will generally not be socially distinct enough to constitute a legally cognizable “particular social group,” furthering the Trump Administration’s political agenda by making it harder for some applicants to prove asylum eligibility.<sup>375</sup> If the Supreme Court determines the legal standard that the DOJ must apply, the Attorney General and Board will no longer be able to manipulate “particular social group” for political purposes—especially when those political purposes deviate from the Refugee Act’s express purpose.<sup>376</sup>

## 2. Limitations of the Supreme Court’s Potential *Chevron* Step One Analysis of “Particular Social Group”

There are several limitations to the above analysis. First, the Supreme Court may not have the opportunity to review the meaning of “particular social group” under *Chevron* Step One. For example, if litigants fail to exhaust a challenge to the meaning of “particular social group” before the Immigration Judge or Board<sup>377</sup> or waive that issue on appeal to the courts

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<sup>374</sup> *L-E-A- II*, 27 I & N. Dec. at 586.

<sup>375</sup> *See id.* at 582 (“[T]he large and prominent kinship and clan groups that have been recognized by the Board as cognizable particular social groups stand on a very different footing from an alien’s immediate family, which generally will not be distinct on a societal scale, whether or not it attracts the attention of criminals who seek to exploit that family relationship in the service of their crimes.”).

<sup>376</sup> *But see* *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (explaining that immigration law requires the Attorney General and Board to “exercise especially sensitive political functions that implicate questions of foreign relations” (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988))).

<sup>377</sup> *See, e.g.*, Diane Uchimiya, *Falling Through the Cracks: Gang Victims as Casualties in Current Asylum Jurisprudence*, 23 *BERKELEY LA RAZA L.J.* 109, 157 (2013) (“By addressing the erroneous interpretations of the statutory terms ‘membership in a particular social group’ and ‘political opinion’ at the immigration court level, an applicant preserves the argument as a basis for appeal.”).

of appeals,<sup>378</sup> the Court would decline to review the issue in the first instance.<sup>379</sup>

Second, even if the meaning of "particular social group" were properly raised on appeal—such as in a challenge to the Attorney General's *A-B*-application of the Board's *M-E-V-G-* and *W-G-R-* "particular social group" interpretation—the Supreme Court could still deny certiorari.<sup>380</sup>

But even if the Supreme Court grants certiorari, it might not adhere to its opinion in *Cardoza-Fonseca* when interpreting "particular social group." For example, the Court could employ other "traditional tools of statutory construction," even considering the Board's "particular social group" interpretations under *Chevron* Step One.<sup>381</sup> Alternatively, as some scholars have argued, the Supreme Court could determine that *Chevron* "deference to the Board and to the Attorney General is not appropriate in cases arising under the Refugee Act" and decline to reach *Chevron* Step One at all.<sup>382</sup>

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<sup>378</sup> See, e.g., *Nolasco-Morales v. Barr*, 788 Fed.App'x 1022, 1025 (6th Cir. 2019) ("Nolasco-Morales asked the agency to recognize 'Guatemalan women unable to leave a relationship.' The [Board] found that this group failed for the reasons set forth in *Matter of A-B-*. However, Nolasco-Morales does not present any argument on appeal regarding that ruling and has therefore forfeited it."): cf. Uchimiya, *supra* note 377, at 161–62 ("In cases of first impression before circuit courts, asylum advocates should submit scholarly articles and solicit amicus briefs by respected scholars to provide insight and analysis as to why the [Board]'s interpretations of asylum law and withholding of removal do not merit deference and to interpret the Refugee Act consistent with the Refugee Convention and 1967 Protocol. Because of *stare decisis*, cases with the same legal issue and indistinguishable facts are predetermined by prior precedent. The circuit court may *sua sponte* hear an appeal en banc, or the parties may petition for a hearing en banc. Prior circuit court precedent may only be overruled if the case is heard en banc. Thus, asylum advocates should petition for en banc review where necessary to overturn prior circuit court precedent." (footnote omitted)).

<sup>379</sup> See *INS v. Orlando Ventura*, 537 U.S. 12, 16–17 (2002) (per curiam) (explaining that a court must remand an asylum case to the Board if the Board did not consider part of the asylum claim in the first instance); *Aguirre-Aguirre*, 526 U.S. at 432 (declining to address an argument that the respondent failed to raise before the Board and circuit court and raised for the first time before the Supreme Court).

<sup>380</sup> See Imbriano, *supra* note 355, at 332 ("[T]he Supreme Court infrequently grants certiorari for immigration cases."); see also, e.g., *Reyes v. Sessions*, 138 S. Ct. 736 (2018) (denying a petition for a writ of certiorari challenging the Board's "particular social group" interpretations as undeserving of *Chevron* deference).

<sup>381</sup> See *BRANNON & COLE*, *supra* note 156, at 14–15 ("[T]o help determine congressional intent, courts have looked to past agency practice as well as agency interpretations that were advanced prior to the dispute before the court." (footnote omitted)); see also Sweeney, *supra* note 113, at 184–85 (explaining that courts should consider employing the *Charming Betsy* cannon against interpreting statutes in a way that would "violate the law of nations" under *Chevron* Step One).

<sup>382</sup> Sweeney, *supra* note 113, at 135, 166–81 (describing how a court could conduct a *Chevron* Step Zero analysis to determine that *Chevron* deference is inappropriate in cases arising under the Refugee Act); see also Moore, *supra* note 162, at 605 ("The easiest way to resolve the *Chevron* tension and

Finally, the Supreme Court could, after conducting a *Chevron* Step One analysis, determine that “particular social group” is ambiguous and only consider whether the Board’s interpretation was reasonable under *Chevron* Step Two.<sup>383</sup>

## Conclusion

As courts review challenges to the Attorney General’s *A-B-* application of the Board’s *M-E-V-G-* and *W-G-R-* “particular social group” interpretation, they should consider Congress’s intended meaning of “particular social group” under *Chevron* Step One. When analyzing Refugee Act terms like “particular social group,” courts should employ *Cardoza-Fonseca*’s “traditional tools of statutory construction.” Unfortunately, the courts of appeals have failed to follow *Cardoza-Fonseca*’s guidance. Because the courts of appeals are unlikely to overturn their own precedent, this Comment argues that the Supreme Court should grant certiorari to consider Congress’s intended meaning of “particular social group” under *Chevron* Step One. After considering the text, Refugee Act legislative history, and INA structure, the Supreme Court should hold that Congress’s intended meaning of “particular social group” is “any specified collection of people within human society,” setting the legal standard for the DOJ to subsequently apply. A broad “particular social group” interpretation will further the Refugee Act’s express purpose and better “respond to the urgent needs of persons subject to persecution in their homelands,” refocusing asylum law on protecting people from persecution.<sup>384</sup> It will also result in greater notice and consistency for asylum applicants<sup>385</sup> because the Board and Attorney General will no longer be able to manipulate “particular social group” for political purposes.<sup>386</sup>

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ultimately a portion of the power struggle between courts and agencies is to overturn *Chevron* and its progeny and release all interpretive power back to the courts.”)

<sup>383</sup> Although unlikely, Congress could also expressly define “particular social group,” rendering the above analysis moot. See Sternberg, *supra* note 300, at 290–91 (During the 112th Congress, Democrats in both the House and Senate introduced bills adopting the “immutability” interpretation of “particular social group.”).

<sup>384</sup> Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

<sup>385</sup> See Sternberg, *supra* note 300, at 288–89 (“Uniformity in the law is desirable because it prevents arbitrary outcomes . . . [T]he absence of a clear, uniform definition of [“particular social group”] has led to many failed asylum applications in the United States.”).

<sup>386</sup> See Hong, *supra* note 366, at 560 (“[Attorney General Jeff Sessions] has been reconsidering [Board] decisions that had been favorable to asylum seekers . . .”); Marouf, *supra* note 367, at 743 (“The use of Attorney General review to advance partisan goals is undisputed.”).