No. 12-2424

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JULIO ERNESTO MARTINEZ,
Petitioner

v.

ERIC H. HOLDER, JR.,
Attorney General of the United States,
Respondent

PETITION FOR REVIEW
FROM THE BOARD OF IMMIGRATION APPEALS
AGENCY CASE NUMBER: A095 042 745

BRIEF OF *AMICUS CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTRODUCTION

Amicus curiae, the American Immigration Lawyers Association (AILA) respectfully submits this brief in support of the Petitioner, Julio Ernesto Martinez.

In this unpublished decision, a single member of the Board of Immigration Appeals ("BIA" or "Board") has declared that "former members of a gang in El Salvador" cannot constitute a valid "particular social group." The Board member cites two inapposite cases, one of which he mischaracterizes, and fails to acknowledge well-reasoned precedents of the Sixth and Seventh Circuits holding that former gang members can indeed form a cognizable social group. The Board has never staked the sweeping position its member does here in any precedential decision, and in the absence of meaningful agency analysis, this Court should not give the force of law to a controversial rule that the agency itself has never endorsed and may well disagree with. Caution is also appropriate given deep uncertainties currently surrounding the Board's particular social group jurisprudence.

AILA also submits this brief to call the Court's attention to the harsh impact the Board's broad rule could have on many deserving asylum seekers, especially children who are former members of dangerous gangs like MS-13. The Board's categorical exclusion of all former gang members from asylum protection reflects a

disturbing indifference to the plight of these children, many of whom follow their consciences and must risk their lives to escape MS-13. Indifference towards former child gang members in this context stands in stark contrast with the protective concern Congress demands for children throughout the rest of our immigration system, and it defies our nation's understanding that children generally should not be held to the same legal standards as adults. The Board's broad rule is even harder to square with the Trafficking Victims Protection Act (TVPRA), in which Congress explicitly declares that children recruited into violent organizations by adults must be recognized as victims of human rights abuses.

STATEMENT OF INTEREST

AILA is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security ("DHS") and before the Executive Office for Immigration Review

(immigration courts and the BIA), as well as before the United States District Courts, and Courts of Appeals,[1] and the Supreme Court of the United States. AILA has a strong ongoing interest in the proper application and development of U.S. asylum law, including the legal standards defining membership in a particular social group.

ARGUMENT

I. THIS COURT SHOULD NOT DEFER TO A BIA DECISION THAT IGNORES THE STATUTORY SCHEME FOR ASYLUM AND WITHHOLDING ELIGIBILITYAND IS NOT A CLEAR STATEMENT OF THE AGENCY'S POSITION

This Court is asked to affirm an unpublished decision by a single member of the BIA that would exclude all former gang members—no matter their age or level of participation—from asylum and withholding protection. But Congress has already crafted a separate statutory scheme that limits the number of persons who can obtain relief, and effectively screens out former gang members who have serious criminal histories or may be regarded as threats to national security. The Board member here provided no relevant authority or explanation to support his categorical rule that "former members of gangs in El Salvador" are not a particular

[1] This Court most recently accepted and considered AILA's amicus brief in *Hosh v. Lucero*, 680 F. 3d 375 (4th Cir. 2012).

social group, and he failed to acknowledge the contrary precedents of the Sixth and Seventh Circuits. *Urbina-Mejia v. Holder*, 597 F.3d 360, 366 (6th Cir. 2010); *Benitez Ramos v. Holder*, 589 F.3d 426, 429 (7th Cir. 2009) Finally, this Court should approach the unpublished BIA opinion with added caution as the Board's jurisprudence on "particular social group" is under review by the Board itself. Affirming the BIA would give a problematic rule legal force that the agency itself has never conferred, binding asylum officers, immigration judges, and the Board within the Fourth Circuit.

A. The BIA's Categorical Rule on Membership in a Particular Social Group Runs Counter to Congress's Framework for Asylum and Withholding Eligibility

Noncitizens seeking protection under the asylum or withholding of removal statutes must meet numerous eligibility requirements including a lack of serious criminal conduct in the past. The Board's decision however disregards these additional screening criteria and creates an over-exclusive, bright line rule to membership in a particular social group.

As Petitioner describes, to qualify for withholding or asylum the statute requires a noncitizen to establish (1) possession of a protected characteristic, (2) harm rising to the level of persecution, (3) which is sufficiently likely, (4) that the

persecution is on account of the protected characteristic, and (5) that their government is unable or unwilling to protect the applicant. 8 U.S.C. §§ 1101(a)(42), 1231(b)(3)(A); *see also Qiao Hua Li v. Gonzales*, 405 F.3d 171,177–78 (4th Cir. 2005); *Saldarriaga v. Gonzales*, 402 F.3d 461, 466 (4th Cir. 2005); *M.A. A26851062 v. U.S. I.N.S.*, 858 F.2d 210, 218 (4th Cir. 1988). Pet. Opening Br. 18-20 35-40. The statute already bars undesirable or dangerous noncitizens from receiving asylum or withholding of removal, including those with serious criminal histories in the United States or abroad, and those who U.S. immigration officials regard as a risk to national security. 8 U.S.C. §§ 1158(b)(2)(A), 1231(b)(3)(B). Additionally, asylum always requires an additional, favorable exercise of agency discretion. 8 U.S.C. § 1158(b)(1)(A).[2]

Establishing a protected characteristic such as membership in a particular social group is therefore only one of many requirements for asylum or withholding of removal, and proving one's membership in a cognizable group does not entitle an applicant to either form of relief. Conversely, the Board's decision uses the "particular social group" ground of protection to deny asylum and withholding to an entire class rather than systematically analyzing each separate statutory

[2] The Board's holding would apply to asylum and withholding of removal applicants alike as the grounds of protection are the same. *Zelaya v. Holder*, 668 F.3d 159, 161 (4th Cir. 2012).

requirement. By doing so, the Board here creates a dubious rule that short circuits consideration of the statutory elements Congress designed to limit eligibility for relief and sweeps far too broadly.

B. The BIA Declined to Give Its New Position the Force of Law and Provided Insufficient Reasoning to Support a Precedential Ruling by This Court in Its Place

The BIA advances an expansive, policy-based restriction on eligibility for asylum or withholding of removal, but does so in an unpublished decision. As such, the BIA's rule applies only to Martinez. 8 C.F.R. § 1003.1(e)(6)(ii). The proposition that former gang members cannot form a cognizable particular social group is controversial, and it is a proposition the Board has never adopted in any precedential decision. Considering this unpublished decision's lack of reasoning and reliability, the Court should refrain from giving the Board's rule the legal force that the agency chose not to.

The Department of Justice can issue formal decisions on questions of policy in numerous ways. It can issue formal regulations. 8 U.S.C. § 1103(a)(3). The BIA can promulgate rules that carry the force of law through case-by-case adjudication in precedential opinions. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); 8 C.F.R. § 1003.1(d)(1), (e)(6). The Attorney General can also certify a case to

himself and issue a binding precedential opinion. 8 C.F.R. § 1003.1(g), (h)(1)(i). In the past, the Attorney General has exercised this authority to ensure that discretionary grants of asylum would not be given to applicants with certain types of criminal convictions, even if they were technically eligible for asylum under the statute, *Matter of Jean*, 23 I. & N. Dec. 373 (B.I.A. 2002), a rule that was subsequently codified at 8 C.F.R. § 1212.7(d). The executive could conceivably adopt authoritative rules with respect to former gang members in any of these ways.

But the agency has never promulgated an authoritative policy on former gang members. Instead, the single BIA member here cited only two highly distinguishable cases: *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007), and *Matter of McMullen*, 19 I. & N. Dec. 90, 95 (B.I.A. 1984). The BIA opinion provided no insight into how these cases apply to all former gang members or to the facts of this case, and, in fact, it mischaracterizes *Arteaga* as applying to former gang members, which it did not. *Benitez Ramos*, 589 F.3d at 429 (discussing *Arteaga*).

Without a clear and reasoned basis for the unpublished decision, this Court is left to "guess at the theory underlying the agency's action." *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947). A federal court cannot uphold such a

decision. "If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable." *Id.* ("We must know what a decision means before the duty becomes ours to say whether it is right or wrong." (citation and quotation omitted)); *see also Crespin-Valladares v. Holder*, 632 F.3d 117, 123 (4th Cir. 2011) (discussing the Court's constraints under *Chenery*).

Ultimately, the Board's decision is unpersuasive and unreasonable, and due no deference as a result. As Petitioner argues, the unpublished decision is not entitled to *Chevron* deference and is inherently unpersuasive under the standard described in *Skidmore*. Pet. Opening Br. 14-18. Even if the Court were to apply *Chevron*, the Board's interpretation is not a reasonable one. The decision misrepresents Ninth Circuit case law, and then creates a bar to asylum and withholding that is not grounded in the statute or the Board's prior opinions on the meaning of "particular social group." The Board "has never given a reasoned explanation for why the statutory bars . . . should be extended by administrative interpretation to former members of gangs." *Benitez Ramos*, 589 F.3d at 430. As the Seventh Circuit noted, "[i]t's not even clear that the Board thinks that *all* former members of *every* gang should be barred from obtaining asylum or withholding of removal." *Id.* (emphasis in original). Further, this position conflicts with the

Board's standard of immutability in *Acosta*, which it fails to acknowledge or explain. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); Pet. Opening Br. 28-35.

Because this Court is faced with an unreasoned BIA decision that adopts a controversial policy position with sweeping implications but no authority, AILA respectfully urges this Court to refrain from ratifying the decision in a precedential opinion, and recommends the issue be remanded to the agency for further consideration in the first instance.

C. The Court Should Avoid the BIA's New Rule Given the Uncertainty Surrounding Its Current Standard for Particular Social Groups

The current uncertainty and confusion surrounding the Board's interpretation of "particular social group," which is under review by the Board itself, is an additional reason this Court should not defer to rule announced here. In *Matter of S-E-G-* and *Matter of E-A-G-*, the Board added the controversial requirements of "social visibility" and "particularity" to its definition of "particular social group," and described the new requirements as clarifications of the "immutable characteristics" standard set forth in *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985). *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582, 585-87 (B.I.A. 2008); *Matter of E-A-G-*, 24 I. & N. Dec. 591 (B.I.A. 2008). The BIA's

new interpretation has been rejected by the Third Circuit, overruled in part by the Seventh Circuit, and redefined and called into question by the Ninth Circuit. *Henriquez-Rivas v. Holder*, No. 09-71571, --- F.3d ----, 2013 WL 518048 (9th Cir. Feb. 13, 2013) (en banc); *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582 (3d Cir. 2011); *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009). The Fourth Circuit has thus far accepted only the particularity requirement. *Zelaya*, 668 F.3d at 165 n.4; *Lizama v. Holder*, 629 F.3d 440, 447 & n.4 (4th Cir. 2011).

On remand from the Third Circuit in *Valdiviezo-Galdamez*, the Board invited oral argument last December and distributed questions to the parties that indicate that it is reconsidering the validity of its more recent social group precedents. Specifically, it asked participants to discuss the role "social visibility" and "particularity" should play in the Board's analysis of particular social group, "i.e. should it be one of several factors, an additional and alternate inquiry separate from the *Acosta* framework, or something else?"[3] In its brief to the BIA, the Department of Homeland Security (DHS) has advocated for a separate "social distinction" test in which an applicant must "establish that (1) the group is composed of members who share a common, immutable characteristic; (2) the

[3] *Available at* http://www.aila.org/content/default.aspx?bc=8748|43650.

group [is] perceived by the society in question as distinct, and (3) the social group . . . exist[s] independently of the fact of persecution."[4]

While the validity of the Board's requirements of "social visibility" and "particularity" are not themselves presently before this Court, a single BIA member is here asserting yet another significant qualification of the "particular social group" ground of protection, despite uncertainty among the Board, DHS, and the U.S. Courts of Appeals concerning its earlier interpretation of the term.[5] A published circuit opinion might further complicate the Board's current reevaluation of its social group jurisprudence, which is likely to respond to the relevant decisions of the Sixth and Seventh Circuits discussed above, and exacerbate the law's disarray. Remand is all the more justified under these circumstances. [6]

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[4] *Available at* http://www.ilcm.org/documents/litigation/Valdiviezo-Galdamez_DHS_Supp_Brief_BIA.pdf.

[5] AILA notes that the single BIA member who decided this case, Roger Pauley, recognized the uncertainty surrounding the Board's current standard in his dissent in the Seventh Circuit's remand of *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009), which rejected the Board's new "social visibility" requirement. Board member Pauley disagreed with his colleagues' decision not to clarify the agency's "particular social group" jurisprudence in a precedential response to the Seventh Circuit. Pauley stated that this area of law is "in disarray" and complained that the Board had shirked its "obligation to provide uniform guidance throughout the country as to the meaning of the ambiguous term 'particular social group.'" *Available at* http://www.ilcm.org/litigation/BIA_Gatimi_Remand_Order.pdf

[6] The problems that can result when a circuit court affirms a questionable, non-precedential BIA decision are illustrated by *Matter of Gonzalez-Zoquiapan*, 24 I. &

II. THIS COURT SHOULD NOT ENDORSE A CATEGORICAL RULE THAT WOULD EXCLUDE DESERVING ASYLUM APPLICANTS, SUCH AS FORMER CHILD GANG MEMBERS

This Court should not ratify the BIA's categorical determination that "former members of a gang in El Salvador" do not comprise a cognizable particular social group. *Amicus* agrees with Petitioner that this Court should instead follow the well-reasoned decisions of the Sixth and Seventh Circuits. The rule the BIA applied here has far-reaching implications and excludes many worthy asylum applicants who Congress surely would want to protect. For example, given the facts of this case, it is evident the BIA's rule would exclude vulnerable children whose past gang membership was significantly coerced or otherwise lacking in culpability, and treat them no differently than hardened adult criminals who control the gang and recruit children into its ranks. Former gang members are often children who have risked their lives to break away in courageous acts of personal conscience. *Amicus* contends that these children offer the clearest example why

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N. Dec. 549 (B.I.A. 2008). There, the BIA confronted the Eighth Circuit's precedent *Amador-Palomares v. Ashcroft*, 382 F.3d 864 (8th Cir. 2004), and explained that the Eighth Circuit had "accorded deference to an unpublished order of this Board" that the agency then rejected as a flawed interpretation of the immigration statute. *Gonzalez-Zoquiapan*, 24 I. & N. Dec. at 550. Similarly, if this Court makes precedential an unpublished decision that does not actually reflect the agency's view, the Board will be bound until it is able to correct its own interpretation in a later case.

"former gang members in El Salvador" satisfies *Acosta*'s "immutable characteristic" standard, since all former gang members are united by a shared past experience they cannot undo, or at least one that Congress would never want them to undo by rejoining a criminal organization like MS-13. *See Benitez Ramos v. Holder*, 589 F.3d at 430.

In arriving at its categorical rule, the BIA also overlooks basic principles announced by Congress and the Supreme Court regarding the treatment of children and as compared to adults. The Board's unwillingness to factor the harsh realities that cause many Salvadoran children to associate with gangs is at odds with the protective treatment Congress generally requires for children under our immigration laws, including laws requiring special treatment of unaccompanied children who apply for asylum. Additionally, a categorical rule excluding all former gang members from asylum stands in profound tension with the Trafficking Victims Protection Act (TVPRA), a law that explicitly categorizes children as human rights victims when adults initiate them into violent organizations similar to Central American gangs.

A. The BIA's Categorical Rule Is at Odds With the Protective Treatment Congress Generally Requires for Children Under Our Immigration Laws.

The BIA's treatment of former child gang members like Martinez does not square with the special treatment children receive throughout the rest of our immigration system. *See, e.g.*, 8 C.F.R. § 208.4(a)(5)(ii) (classifying unaccompanied children as legally disabled for purposes of excusing the normal one-year time limit for asylum applications at 8 U.S.C. § 1158(a)(2)(D)); 8 C.F.R. § 1248(b) (deeming unaccompanied children under 18 legally incompetent to make admissions to deportation charges in immigration court proceedings); 8 U.S.C. § 1182(a)(9)(B)(iii)(I) (noncitizens under 18 do not accrue unlawful presence in the United States); 8 U.S.C. § 1445(b) (restricting the right to apply for naturalization to individuals over 18); 8 U.S.C. § 1183a(f)(1)(B) (an affidavit of support on behalf of an immigrating noncitizen must be filed by legally competent sponsors who are at least 18 years of age); *see also Sandoval v. Holder*, 641 F.3d 982, 989 (8th Cir. 2011) (stating that the BIA has the authority to refine the scope of certain deportation or inadmissibility grounds based on the age and capacity of the non-citizen whose conduct is in question).

The tension between the Board's new rule and the treatment of children under the immigration statutes is even more apparent in light of the additional

protections Congress requires for unaccompanied children under the Trafficking Victims Protection Act (TVPRA). Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044. These children are never subject to the one-year filing deadline that applies to adult applicants, and they cannot be returned to a safe third country in place of receiving asylum in the United States. 8 U.S.C. § 1158(a)(2)(E). Unaccompanied children also receive the benefit of special non adversarial asylum proceedings outside the immigration courts. 8 U.S.C. § 1158(b)(3)(C). Furthermore, if an unaccompanied child must be subject to removal proceedings, the TVPRA mandates that she be given the more protective removal proceedings under 8 U.S.C. § 1229(a) rather than expedited removal proceedings under 8 U.S.C. §1225. The Act even obligates the government to ensure that unaccompanied children have access to free counsel in their hearings. *See* TVPRA, Pub. L. No. 110-457, § 235(a)(5)(E)(iii), 122 Stat. 5044.

These provisions honor the established principle that children have a different legal status than adults and that this difference has significance when determining the legal consequences of their actions. *See, e.g., Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Roper v. Simmons*, 125 S. Ct. 1183 (2005); *Graham v. Florida*, 130 S. Ct. 2011 (2005). The Supreme Court has repeatedly taken into

account that children and adults differ in key ways. First, children "lack . . . maturity and [have] an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking." *Miller*, 132 S. Ct. at 2464 (citation and quotations omitted). Second, "children are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." *Id.* (citation and quotations omitted). Finally, a child's actions are less likely to show a pattern of "irretrievable depravity" because a child's character and traits are much less fixed than those of an adult. *Id.* The reasoning in *Miller*, *Roper*, and *Graham* relates to criminal sentencing, but the principles have broader significance, including in the immigration context, and most especially with respect to vulnerable children seeking protection from persecution. *See Sandoval*, 641 F.3d at 989.

The need to acknowledge the limited capacity and victimization of child gang members is apparent when considering the situation of gang members who join, or are coercively recruited, at a young age as a result of social pressures and then risk their lives to renounce the gang as they mature and want no part in its activities. Edgar Chocoy presents a poignant example.

Edgar's mother abandoned him when he was only six months old, leaving him to be raised by his grandfather, his drug-dealing uncle, and his aunt. Greg Campbell, *Death by Deportation: A Denver Judge Denied a 16-year-old's Political Asylum Application–and Sentenced Him to Death*, Boulder Weekly (last visited Feb. 21, 2013).[7] As a lonely twelve-year old boy, he saw the members of MS-13 as the family that he never had. *Id.* However, as he grew up and met kids from other neighborhoods who were not in gangs, he began to dissociate from MS-13, opting to play video games and lead a normal life over the crime sprees his other "family" offered. *Id.* Edgar was forced to flee to the United States after receiving multiple death threats from MS-13. *Id.* His asylum claim was denied, and he was sent back to Guatemala. *Id.* In doing so, the judge stated that there were millions of people in Guatemala, and it was unlikely that the gang would find him. *Id.* Seventeen days after arriving in Guatemala, Edgar was murdered by MS-13 after he ventured out of hiding to buy some juice and watch a parade. *Id.*

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[7] *Available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CDIQFjAA&url=http%3A%2F%2Fpards.org%2Fij%2FEdgarChocoy(Guatemala%2CMinor%2CDeportee%2CIJVandello)DeathbyDeportation(Article)GregCampbell%2CJoelDyer.doc&ei=RsM0UfzxDPHUyQHZ0oDIAQ&usg=AFQjCNHD1oCsQTCGltva9pngeNx26vSRcg&sig2=x90-orGpBFQiMC-cQEsiCA.

Similarly, Petitioner Martinez was only fourteen years old at the time he joined the neighborhood gang that was later enveloped by MS-13. (AR 8.) He had lost his step-father and his mother was barely able to provide food. (AR 336, 350.) He joined the group for a sense of family and to be reassured that someone was taking care of him. (AR 165.) When MS-13 took over, Martinez wanted out and refused to participate in the gang's criminal activities despite the beatings he received. He was beaten, stabbed, and shot in his attempts to escape their reach. (AR 165-68.)

Salvadoran gangs recruit children as young as eight or nine years old and over half of the gang members of Central America join before the age of fifteen. Marlon Carranza, *Detention or Death: Where the "Pandillero" Kids of El Salvador are Heading*, Universidad Centroamericana José Simeón Cañas 215 (July 2003).[8] The prevalence of child recruits is a direct effect of El Salvador's massive and devastating civil war. (AR 431.) The decade-long war claimed over 40,000 lives in the first three years alone. *Id.* As the war raged on, approximately 20% of the population of El Salvador fled the country, largely to the United States. *Id.* The country was left in a state of widespread poverty, with flawed social infrastructure,

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[8] *Available at* http://www.coav.org.br/publique/media/elsalvadoring.pdf.

high unemployment, and pervasive violence. Kelly Padgett Lineberger, *The United States–El Salvador Extradition Treaty: A Dated Obstacle in the Transnational War Against Mara Salvatrucha (MS-13)*, 44 Vand. J. Transnat'l L. 187, 192 (2011). As a result, an estimated three million of El Salvador's 8.5 million citizens —over one third—now live abroad and support their families on remittances. Jucinta Escudos, *El Salvador depending on remittances for its economic survival*, BertelsmannStiftung (July 1, 2011).[9]

Psychological and sociological research on gangs indicates that children are much more susceptible to gang recruitment pressure in the absence of parental guidance. Kathryn Kizer, *Behind the Guise of Gang Membership: Ending the Unjust Criminalization*, 5 DePaul J. for Soc. Just. 333, 344-45 (2012). In El Salvador, where many must cope with housing shortages, a lack of potable water, and starvation, families are often simply unable to create an environment that empowers children to resist gang recruitment efforts. Juan J. Fogelbach, *Gangs, Violence, and Victims in El Salvador, Guatemala, and Honduras*, 12 San Diego Int'l L.J. 417, 426-29 (2011). And with so many parents away from home,

[9] *Available at* http://futurechallenges.org/local/el-salvador-depending-on-remittances-for-its-economic-survival/.

Salvadoran children are left with few resources, little support, and become highly susceptible to coercive gang recruitment tactics. (AR 238.)

J.D. joined MS-13 at age 13. Fogelbach, *Gangs, Violence, and Victims in El Salvador, Guatemala, and Honduras*, 12 San Diego Int'l L.J. at 428. His father was killed in the Salvadoran civil war when he was just seven years old. *Id.* His mother left for the United States the next year, leaving him under the custody and care of his grandparents along with eight other grandchildren. *Id.* He felt abandoned and neglected. *Id.* Since many of his friends had already joined a gang, he decided to associate with a gang himself. *Id.* Taking advantage of the vulnerability of children like J.D. and their lack of systemic protection, the gangs, until recently, recruited members by bribing teachers and coming directly into schools. *See generally* UNHCR, *El Salvador: The presence and activities of Mara Salvatrucha (MS or MS-13) and of Mara 18 (M18) in El Salvador, recruitment, measures taken by the government to fight the maras, and protection offered to victims of the maras (2008-2010)*, UNHCR.ORG, (last visited February 19, 2013 7:34 PM);[10]

[10] *Available at* http://www.unhcr.org/refworld/country,,,,SLV,,4dd223432,0.html

Central America's Gang Wars: A Truce Leads to an Unusual Peace, Time.com (last visited Feb. 19, 2013 6:49 PM).[11]

In *Miller*, the Supreme Court considered the scientific evidence that a child's brain does not have the same capacity to assess consequences and control behavior as an adult's, and that as children grow and their brains develop, they can shed the "transient rashness, proclivity for risk, and inability to assess consequences" they once displayed. 132 S. Ct. at 2464. The BIA's rule treats children and adults alike—regardless of the differences in their maturity, capacity, or culpability.

The children of El Salvador have had to cope with sociological disintegration and the profound poverty that ensues. They lack caregivers, guidance, and support in meeting their basic needs. The gangs have leveraged this vulnerability to recruit the country's children in vast numbers. The BIA's rule ignores this reality. Instead, it is inconsistent with the protections Congress and the Supreme Court provide for children and the consideration of their circumstances that these protections reflect.

B. Congress Recognizes Children as Human Rights Victims When Adults Use Them in Violent Organizations

[11] *Available at* http://world.time.com/2012/08/13/central-americas-gang-wars-a-truce-leads-to-an-unusual-peace/.

The BIA's categorical rule concerning former gang members is also in profound tension with a new law Congress has adopted both to prevent children from becoming soldiers, and to assist and protect former child soldiers. The TVPRA Reauthorization of 2008 contains the Child Soldiers Prevention Act, in which Congress announced its intent to "end the abuse of human rights" suffered by children whom adults have drafted or otherwise initiated into violent armed organizations. TVPRA, Pub. L. No. 110-457, § 402, 122 Stat. 5044. Section 402 of the Act defines "child soldier" to include:

> (i) any person under 18 years of age who takes a direct part in hostilities as a member of governmental armed forces;
>
> (ii) any person under 18 years of age who has been compulsorily recruited into governmental armed forces;
>
> (iii) any person under 15 years of age who has been voluntarily recruited into governmental armed forces; or
>
> (iv) any person under 18 years of age who has been recruited or used in hostilities by armed forces distinct from the armed forces of a state.

It is notable that in section (iv), Congress designates any child under 18 who has been "recruited" or otherwise "used" by non-state armed forces. The statute reflects a congressional understanding that children who are former members of groups very similar to MS-13 cannot be held to the same standards as the adult members who recruit or "use" them in organized violence. Furthermore, the Act

does not limit its concern only to children who have been "compulsorily" recruited into armed forces—Congress, through subsection (iii), also seeks to protect children under 15 who have been "voluntarily" recruited into military service.

Taken together, these provisions confirm that young children, even those who "voluntarily" associate with violent adult organizations, are themselves victims of human rights abuses, and they are properly understood as being "used" by the adults who initiate them into the group. *Lukwago v. Ashcroft*, 329 F.3d 157, 178 (3d Cir. 2003) (finding that former child soldiers of the Lord's Resistance Army in Uganda form a cognizable particular social group united by immutable shared past experience). Congress further defines "child soldier" to include those "serving in any capacity, including in a support role such as a cook, porter, messenger, medic, guard, or sex slave." 22 U.S.C. § 2370c(2)(b). This reinforces the general principle that children should not be considered culpable members of violent adult organizations, and it highlights the important fact that children are often exploited in severe ways by adults who control such groups.

Further, in the context of asylum, the Supreme Court has recently required the BIA to consider the relevance of the intent and motive behind an applicant's past involvement in a violent, persecutory organization. *Negusie v. Holder*, 555 U.S. 511 (2009) (concluding the BIA misapplied the strict liability standard of

Fedorenko v. United States, 101 S. Ct. 737 (1981), when interpreting the asylum "persecutor bar" of 8 U.S.C. § 1101(a)(42)). The *Negusie* Court reversed the BIA's attempt to impose a categorical bar to asylum and remanded for the BIA to consider the potential importance of voluntariness in light of the statutory language and purpose of the Refugee Act of 1980, and to "anticipat[e the] wide range of potential conduct" that might merit different treatment under the Act. *Id.* at 522-24.

It is worth noting that the Board has, in fact, considered the voluntariness and culpability of a child's association with a persecutory armed force in past unpublished cases. *Matter of B-O-*, (B.I.A. July 12, 2006).[12] For example, in *Matter of B-O-*, the BIA agreed that a former child soldier's past membership in the infamous Lord's Resistance Army of Uganda constitutes a cognizable "particular social group." The BIA went on to state, "because the [asylum applicant] was a boy between the ages of 11 and 13 during the relevant period, we are not persuaded that he had the requisite personal culpability for ordering, inciting, assisting, or otherwise participating in the persecution of others." *Id.*

In contrast, the BIA decision here fails to account for the coercive, and often brutal, recruiting practices employed by gangs in Central America—the type of

[12] *Available at* http://www.aila.org/content/default.aspx?docid=43648.

activity Congress has condemned as a human rights abuse of the children involved. Rather, it reflexively applied a distorted reading of *Arteaga*, and the inapposite decision in *McMullen*, without considering how Martinez came to be associated with MS-13 as a child or recognizing that many former gang members are victims themselves.

MS-13 came to El Salvador after the 1996 changes in immigration law resulted in the deportation of tens of thousands of felons. (AR 431-32); Casey Kovacic, *Creating a Monster*: *MS-13 and How United States Immigration Policy Produced "The World's Most Dangerous Criminal Gang"*, 12 Gonz. J. Int'l L. 2 (2008-2009). MS-13 members, hardened from United States' penitentiaries and violent turf wars were sent to El Salvador in large numbers, bringing with them their knowledge of gang operations. *Id.* Today, 60% of the gang members in El Salvador are deportees or gang members who have fled prosecution in the U.S. *Id.*

These leaders took over local groups like Martinez's and expanded through coercion and threats. For many children, the decision is between joining a gang or death. Benito Zaldívar was not even a teenager when the gangs began to recruit

him. Julia Preston, *Losing Asylum, Then His Life*, N.Y. Times (June 28, 2010).[13] His parents had moved to the United States, his grandmother had died, and he had few options. *Id.* The gangs threatened to hurt him and his remaining family if he did not join. *Id.* Instead, he fled to the U.S. to be with his parents. *Id.* His asylum claim was denied, and eight weeks after his removal, Benito was murdered by the gang because of his resistance. *Id.*

As of 2007, at least 39,000 people were members of gangs in El Salvador. (AR 446.) Gangs are now so prevalent and powerful in El Salvador that, as one NGO coordinator put it, "People join gangs because they are forced to. In the past, youth had the luxury of joining voluntarily." *Id*. at 451. The specter of violence towards self or family is often a driving factor in one's decision to join MS-13. Monica Fanesi, *Relief Pursuant to the Convention Against Torture: A Framework For Central American Gang Recruits and Former Gang Members to Fulfill the "Consent or Acquiescence" Requirement*, 13 Roger Williams U. L. Rev. 308, 311 (2008). Eight-year-old Adonai was recruited by adult gang members to be a messenger because he was too young to face criminal prosecution. Fogelbach, *Gangs, Violence, and Victims in El Salvador, Guatemala, and Honduras*, 12 San

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[13] *Available at* http://www.nytimes.com/2010/06/29/us/29asylum.html?pagewanted=all&_r=0.

Diego Int'l L.J. at 431. When Adonai refused, a gang member shot one of his friends. *Id.* In the face of this threat, Adonai acquiesced and began delivering messages for the gang. *Id.*

Even after joining the gang, child recruits are regularly subjected to violence at the hands of other gang members. Initiation rites include being beaten for 13 seconds by a group of gang members, or for girls, gang rape. Samuel Logan, *This is for the Mara Salvatrucha: Inside the MS-13, America's Most Violent Gang* 38 (New York: Hyperion, 2009). Participation is then coerced through a system of yellow-lighting or green-lighting gang transgressors. If a member is yellow lighted, he requires discipline and can be taken by gang members, beaten severely by a group, stabbed, and dumped in front of a hospital. *Id.* at 169. If a member is green-lighted, he has been approved for death by MS-13 leadership. *Id*. at 109. Martinez's own experience reflects the ongoing victimization many child members experience. Pet. Opening Br. 4-9.

Rather than honoring the protective goals Congress has affirmed in our immigration statutes, the BIA decision would categorically exclude children like those described here. It draws no line between culpable adults who organize the gang's criminal operations and innocent children with no option but to "volunteer"

to be their victims, and it provides no explanation for why this distinction does not matter.

AILA respectfully urges this Court to refrain from adopting the BIA's categorical rule excluding all "former members of gangs in El Salvador" from asylum and withholding protection. The BIA's decision treats former childhood members of gangs, who should properly be considered victims, no differently than the hardened adult criminals who still run the gangs—a policy that makes no sense, and that the agency has not explained.

CONCLUSION

AILA agrees with Petitioner that "former members of a gang in El Salvador" constitutes a cognizable "particular social group." AILA respectfully recommends that this Court grant the petition for review, vacate the Board's decision, and remand for further proceedings on petitioner's withholding claim.

Respectfully submitted,

March 14, 2013 **s/Andres Benach**

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,953 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Software 2007, in 14 point font size and Times New Roman type style.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on March 14, 2013, I electronically filed the foregoing BRIEF OF AMICUS CURIAE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system, which will send such filing to the following registered CM/ECF users:

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