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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	
Mauricio VALDIVIEZO-GALDAMEZ	)	**File No.: A097-447-286**
In Removal Proceedings	)	

BRIEF OF *AMICUS CURIAE* THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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INTRODUCTION

The American Immigration Lawyers Association ("AILA") respectfully urges the Board to restore *Matter of Acosta*'s "immutable characteristic" test as the sole measure of particular social groups. The Board should ask only whether a particular social group is united by an "immutable characteristic such as sex, color, or kinship ties, or … a shared past experience … that the members … either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of Acosta,* 19 I&N Dec. 211, 233 (BIA 1985), overruled on other grounds, *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). This straight-forward test captures the foundational principle of our nation's asylum laws: we protect those who face persecution on account of characteristics fundamental to their human rights.

Unfortunately, the Board has abandoned this basic principle in its most recent precedents, and it has adopted a confusing standard of "social visibility" that serves no identifiable statutory purpose. *E.g. Matter of S-E-G-*, 24 I&N Dec. 579, 586 – 87 (2008). *Why* does the United States refuse to recognize social groups that lack "visibility" if it is otherwise clear group members share an immutable characteristic fundamental to their human rights? *Why* would the United States return members of such groups to their home countries knowing they face persecution on account of shared characteristics that plainly deserve protection? The Board has never answered these questions, but it must now.

Amicus offers this brief to highlight how socially or culturally imposed invisibility enables the persecution of many minority groups that Congress surely intended to protect. Sexual minorities, women who oppose female genital mutilation, and persons of conscience who have served as informants or witnesses against powerful criminal organizations are just a few

examples. Because these and similar groups deserving protection often lack social visibility, the departure from *Acosta* makes no sense at all. The Board must explain the purpose of a "social visibility" requirement in an intelligible way now, or else discard it.

AILA also urges the Board to reject the DHS's proposed "social distinction" test, which in reality is nothing but "social visibility" relabeled. DHS Supplemental Brf. at 7 – 12. The "social distinction" test overlooks the problem of social invisibility in the same way the Board's current standard does. *Acosta* needs no elaboration, and the Board should not attempt to repair what even DHS now concedes is a flawed legal standard.

STATEMENT OF INTEREST

The American Immigration Lawyers Association ("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, as well as before the federal courts. This Board has solicited amicus briefs from AILA in many cases that raise vital issues of immigration law, including important asylum cases concerning the "particular social group" ground of protection.[1]

[1] For example, in the past year the Board has solicited amicus briefs from AILA in seven separate cases concerning gender and domestic violence as bases for asylum eligibility. *Matters of K-C-, N-S-, A-R-C-G-, E-M-C-, L-G-P-C-, M-J-V-*, and *R-D-C-P-*.

ARGUMENT

AILA agrees with the Third Circuit that "social visibility" and "particularity" are analytically indistinct, with "particularity" offering "little more than a reworked definition of 'social visibility'". *Valdiviezo-Galdamez v Att'y Gen.*, 663 F.3d 582, 608 (3rd Cir. 2011).[2] *Amicus* also agrees that the Board has never cogently explained what it means by "social visibility." *Id.* at 606 – 07. At times the Board says group membership must be literally visible to the naked-eye of a persecutor, *e.g., Matter of C-A-*, 23 I&N Dec. 951, 952 – 53 (BIA 2006), while at others it describes a broader but ill-defined sociological test that asks whether a proposed social group is "discrete" and "recognizable by others in the community." *S-E-G-*, 24 I&N Dec. at 586 – 87. Regardless of the intended approach, the Board's departure from *Acosta* makes no sense.

The Supreme Court has admonished the Board that its decisions must "be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system." *Judulang v. Holder,* 132 S.Ct. 476, 485 (2011). But the Board has yet to identify *any* statutory purpose that could plausibly link "social visibility" to the enumerated grounds of protection. As detailed below, Congress surely intended to recognize many groups whose persecution is furthered by their social and cultural invisibility. In these cases a strict requirement of "social visibility" stands in direct conflict with the singular, protective purpose of the enumerated grounds, and it cannot be squared with the logic *of Acosta*. The only sensible solution is to abandon "social visibility" now.

[2] The Service concedes this point, and now argues that the Board, "should clarify that 'social visibility' and 'particularity' should be read as a single 'social distinction' requirement." DHS Supp. Brf. at 7.

I. Congress intended to protect all social groups whose members are united by an immutable characteristic fundamental to their human rights

Acosta construed the refugee definition of 8 U.S.C. § 1101(a)(42)(A) and the enumerated grounds of protection at its center: "race, religion, nationality, membership in a particular social group or political opinion." Congress adopted the refugee definition with the express purpose of conforming U.S. asylum law to the United Nations Convention and Protocol Relating to the Status of Refugees ("Convention").[3] The enumerated grounds of protection come directly from the Convention's own refugee definition at Article 1.2, and they also anchor Article 33.1, which imposes the rule of *non-refoulement* ("non-return") upon all parties to the treaty.[4] Article 33.1 prohibits the return of any person to a country where they would face persecution on account of one of the five enumerated grounds of protection, and for this reason it serves as "the cornerstone of asylum and international refugee law … reflect[ing] the commitment of the international community to ensure to all persons the enjoyment of human rights[.]"[5] Congress intended the U.S. refugee definition to incorporate the *non-refoulment* rule and give "statutory meaning to our national commitment to human rights and humanitarian concerns." S. Rep. No. 256, 96th Cong., 2d Sess. 1, 4, reprinted in 1980 U.S.C.C.A.N. 141, 144; *Cardoza-Fonseca*, 480 U.S. at 428 – 29; *Matter of S-P-*, 21 I &N Dec. 486, 492 (BIA 1996).

Acosta is consistent with Congress's unmistakable commitment to the human rights principles of *non-refoulment*. Furthermore, *Acosta* avoided a formalistic, "purely linguistic

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[3] United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 1968 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268; United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 – 29 (1987).

[4] Article 33.1 provides: "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."

[5] UNHCR, *Note on the Principle of Non-Refoulement*, November 1997. *Available at* http://www.unhcr.org/refworld/docid/438c6d972.html [last accessed, August 10, 2012]

analysis" of the isolated words "particular social group", and instead applied the doctrine of *ejusdem generis* ("of the same kind") in order to identify the deeper statutory purpose that unites all five grounds of protection. 19 I&N Dec. 232-33. The Board compared the term "particular social group" with the other grounds of race, religion, nationality, and political opinion, and by this purpose-driven methodology it identified immutable characteristics as the unifying test. *Id.* The Board understood "particular social group" to operate as one among five symmetrical statutory grounds that together express our nation's commitment to protect persons from persecution inflicted on account of characteristics "fundamental to human identity or conscience." *Id.* at 233. It is this singular concern for human rights related to identity and conscience that joins all five enumerated grounds in common meaning and carries forward Congress's unambiguous intent to align the U.S. refugee definition with the protective mandate of the Convention.

Acosta's clear standard was adopted by other countries, is embodied in the UNHCR's important guidelines on the law of refugees,[6] and it has been applied by the circuit courts of appeals.[7] For over two decades the Board remained faithful to *Acosta* in precedents recognizing important social groups, including some that obviously lack visibility, such as homosexuals and women who oppose female genital mutilation.[8]

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[6] 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, U.N. Doc. HCR/GIP/02/02 ¶¶ 11-12 (May 7, 2002) ("UNHCR Guidelines)

[7] *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1988); *Bah v. Mukasey*, 529 F.3d 99, 112 (2d Cir. 2008); *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir. 2002); *Castellano-Chacon v. INS*, 341 F.3d 533, 546 (6th Cir. 2003); *Sepulveda v Gonzales*, 464 F.3d 770, 771 (7th Cir. 2006); *Ngengwe v. Mukasey*, 543 F.3d 1029 (8th Cir. 2008); *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005); *Niang v. Gonzales*, 422 F.3d 1187, 1198-99 (10th Cir. 2005); *Castillo-Arias v. Att'y Gen.*, 446 F.3d 1190, 1196 (11th Cir. 2006).

[8] *Matter of Fuentes,* 19 I&N Dec. 658 (BIA 1988)(former members of the national police of El Salvador); *Matter of Toboso-Alfonso,* 20 I&N Dec. 819 (BIA 1990)(homosexual Cubans); *Matter of Kasinga,* 21 I&N Dec. 357 (BIA 1996)(young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been

II. The "social visibility" standard fails to protect key social groups whose members share an immutable characteristic fundamental to their human rights.

Against this background, why graft an asymmetric requirement of visibility only to the "particular social group" ground of protection? The Board did this without mentioning the *ejusdem generis* canon yet claims both that it continues to embrace *Acosta* and that the new requirement adds "greater specificity" to the *Acosta* standard. *Matter of S-E-G-*, 24 I&N Dec. at 582. This is illogical. The "social visibility" requirement cannot be squared with *Acosta's* uniform treatment of all five enumerated grounds, and it defies any common sense understanding of the human rights policy Congress advanced when it adopted our refugee definition. It makes no sense to think Congress would thwart the very principle that defines the enumerated grounds by categorically withdrawing protection from social groups whose members do in fact share an immutable characteristic. The Board has lost touch with the deeper human rights purpose that unites the enumerated grounds of protection, and it has lapsed into just the kind of superficial formalism it avoided in *Acosta*. The unexplained departure from *Acosta*'s purpose-driven methodology results in a standard, "unmoored from the purposes and concerns of the immigration laws [and] hing[es] eligibility for discretionary relief on [...] a matter irrelevant to the alien's fitness to reside in this country." *Judulang,* 132 S.Ct. at 484. If the Board believes the enumerated grounds of protection are animated by a second statutory purpose that competes with the one it identified in *Acosta*, it must identify that purpose and explain how it supports the "social visibility" test.

Amicus respectfully submits the "social visibility" requirement lacks any purpose credibly related to the enumerated grounds of protection. Many social groups that Congress

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subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice); *Matter of H-*, 21 I&N Dec. 337 (BIA 1996)(members of the Marehan subclan of Somalia) *Matter of V-T-S-*, 21 I&N Dec. 792 (BIA 1997) (Filipinos of mixed Filipino-Chinese ancestry).

surely intended to protect are socially or and culturally invisible.

A. Sexual minorities such as homosexuals deserve protection regardless of their "social visibility"

The Third and Seventh Circuits are correct that the Board's new social group precedents are incoherent because they provide no rational explanation as to how certain social groups previously recognized under *Acosta*, including homosexuals, could satisfy the "social visibility" test. *Valdiviezo-Galdamez v. Holder*, 663 F.3d 582, 605 (3rd Cir. 2011) (citing *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (citing *Toboso-Alfonso*, 20 I&N Dec. at 822 – 23))). A requirement of social visibility—be it literal, naked-eye visibility or some broader sociological concept of perception—would categorically bar recognition of homosexuals living in countries where homosexuality is culturally suppressed to the point of invisibility.

For example, in a 2007 speech at Colombia University, Iranian President Mahmoud Ahmedinejad publicly maintained that Iranian homosexuals do not exist, despite international reports of over 4000 executions of gay men and lesbians within Iran since 1979. *See,* Fatma E. Marouf, *The Emerging Importance of "Social Visibility" in Defining a Particular Social Group and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 Yale L. & Pol'y Rev. 47, 79-81 (2008)("Marouf"). Ahmedinejad's point of view demonstrates how a society or culture may deny the very possibility of sexual minorities, thereby rendering them socially invisible, while at the same time enabling their persecution. *Id.* Government officials or non-state actors within a given society may persecute members of an objectively identifiable social group, while the larger society or community in question does not subjectively perceive those individuals as sharing a special social identity at all. Or consider the related problem of a repressive society or culture that only perceives *some* homosexuals as possessing this

characteristic—say, for example, outwardly effeminate men. The Board's new test would appear to exclude from recognition (and protection) all other men who may be persecuted for being homosexual, but who do not neatly fit the larger society's subjective and discriminatory stereotype of what homosexuality is. *Id.*

None of this makes any sense. Regardless of their visibility or perceptibility within a society, homosexuals share an objectively immutable characteristic that is worthy of recognition because it is closely related to basic human rights. Intimate expression of innate sexual orientation is a liberty right fundamental to our "dignity as free persons." *Lawrence v. Texas*, 539 U.S. 558, 567 (2003). For this reason alone homosexuals deserve recognition as candidates for protection in the same way that persons possessing a race, religion, nationality or political opinion also do. No statutory purpose plausibly connected to the enumerated grounds could justify excluding homosexuals from protection *because* they are from a society so repressive it denies their very existence. If the Board discerns such a purpose it must explain it to the public in an intelligible way now.

B. Women who oppose female genital mutilation deserve protection regardless of their "social visibility"

Just as sexual minorities deserve recognition without regards to their "social visibility", so too do women who are from countries where female genital mutilation is prevalent, and who oppose the practice. Female genital mutilation is known by other names such as female genital cutting and female circumcision. It is a brutal procedure that involves partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons. *Kasinga*, 21 I&N Dec. at 361 – 62; *Hassan v. Gonzales*, 484 F.3d 513, 517 n. 1 (8th Cir. 2007). It may be performed a few days after birth or many years later after a young girl

enters puberty. *Id.* Generally, it is performed without anesthesia and with a knife, scissors, or a razor. *Id.* Female genital mutilation causes severe pain, loss of sexual function, and serious health problems. *Id.* In all of these respects it is a grave human rights violation.

This Board has acknowledged that women who oppose being subjected to female genital mutilation share an immutable characteristic because having intact genitalia is fundamental to one's identity and basic human rights. *Kasinga,* 21 I&N Dec. at 366. Yet by any understanding of the Board's new "social visibility" test, it would appear such women can now be denied recognition as a social group. A woman who opposes female genital mutilation will not be discernible to the naked eye. *Gatimi v. Holder*, 578 F.3d at 615 ("women who have not yet undergone female genital mutilation in tribes that practice it do not look any different from anyone else."). And assuming "social visibility" instead refers to some more abstract concept of subjective societal perception, women who oppose female genital mutilation will predictably fall short of the required level of recognizablity within their society by taking measures to avoid persecution. *Valdiviezo-Galdamez*, 663 F.3d at 635. Because women who oppose female genital mutilation are neither visible to the naked eye nor likely to be "perceived" by others in their society as a distinct segment of the population, the "social visibility" requirement would perversely exclude them from any possibility of protection.

Surely Congress would not intend to withdraw protection from all members of this otherwise cognizable group only because brutal sexual persecution forces them to remain socially and culturally invisible. No legitmate purpose tied to the enumerated grounds of protection could deny recognition to women who oppose being sexually butchered but hide this fact. If the Board now detects in the enumerated grounds a countervailing statutory purpose that it did not notice there before, it must explain what that purpose is, and why it trumps *Acosta's*

human rights imperative.

It is true the Board has tried to explain "social visibility" by pointing to influential guidelines of the United Nations High Commissioner for Refugees (UNHCR), which do acknowledge "social perception" as an alternative method to establish the validity of social groups apart from immutable characteristics.[9] These guidelines are explicitly over inclusive, rather than under inclusive, so to the extent women opposing female genital mutilation are cognizable under *Acosta*, yet unable to meet a heightened requirement of "social visibility", the Board's approach stands in direct conflict with UNHCR's.[10] Importantly, UNHCR's "social perception" criterion—unlike the Board's "social visibility" requirement—*does* account for social groups that deserve protection but are socially or culturally invisible due the hostile environment in which they exist. Marouf.

UNHCR adopted the "social perception" criterion even though almost all common law countries already applied some version of the *Acosta* immutable characteristic test. One of those countries, Australia, also asked whether a proposed social group is objectively set apart from the larger society, and has referred to societal "perception" in this context. *E.g., Applicant S v. Minister for Immigration & Multicultural Affairs* (2004) 217 C.L.R. 387. But Australia has clarified that "the general principle is not that the group must be recognised or perceived within the society, but rather that the group must be distinguished from the rest of the society." *Id.* at 397 – 98 . In other words, Australia never requires proof of societal perception if group members share an immutable characteristic, and in those cases where it does consider social

[9] *C-A-*, 23 I&N Dec. at 960 (citing UNCHR, Guidelines on International Protection: Membership of a particular social group within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/02 (May 7, 2002)("UNHCR Guidelines"); *S-E-G-*, 24 I&N Dec. at 586.

[10] UNHCR has emphatically rejected the Board's reliance upon the Guidelines in amicus briefs to several courts of appeals, including the Third Circuit in the instant case. *See Valdiviezo-Galdamez,* 663 F.3d at 615 n. 4 (Hardiman, J., concurring).

perception, the test is always an objective one. Australia understands that,"[c]ommunities may deny the existence of particular social groups because the common attribute shared by members of the group offends religious or cultural beliefs held by a majority of the community." *Id.* at 400. In such situations, *"[t]hose communities do not recognize or perceive the existence of the particular social group, but it cannot be said that the particular social group does not exist."* *Id* (emphasis added).

In sum, the Board claims support for "social visibility" in UNHCR's reference to "social perception", but UNHCR accommodates Australian law, and Australia has rejected the sort of subjective societal perception requirment that the Board now applies in the United States. Australia understands that a subjective test could improperly bar protection for deserving minority groups (like women opposed to sexual mutilation or homosexuals) that may be invisible within certain societies and cultures yet objectively cognizable and perceptible to the outside world. The Board does not account for this fundamental problem posed by social invisibility, so the "social visibility" requirement is disconnected from the purpose of the enumerated grounds of protection, and it has no basis in the UNHCR guidelines either.

C. Persons of conscience who have testified or informed against powerful criminal gangs deserve protection regardless of their "social visibility"

Persons of conscience who have testified or informed against criminal gangs are also worthy of recognition under the enumerated grounds of protection because they are members of a particular social group united by a common, immutable past experience, as well as a shared commitment to the rule of law. *See Acosta*, 19 I&N Dec. at 233. Take Diego Castillo-Arias, an average Colombian citizen who ran a small family bakery in a city threatened by an infamous drug cartel. Diego became acquainted with a former police officer who frequented the bakery.

This man had been dismissed by the police for corruption but then became a security chief for the cartel, and during his many visits to the bakery he would brag to Diego about his involvement with the cartel's leadership and its international drug operations. Diego learned many details about the cartel, including its intentions to wage war against the government and to assassinate politicians it considered opponents. Out of a strong sense of civic duty, Diego contacted a friend who was a prosecutor responsible for investigating drug traffickers, and over the next four years he served as an unpaid secret informant, passing on detailed information about the cartel's operations. When cartel members learned of this they confronted Diego and his son in a public street, attempted unsuccessfully to kidnap Diego, then beat him and shattered the son's jaw with the butt of a pistol. Diego, his family, and the prosecutor with whom he had worked all fled the country to avoid death.

These, of course, are the facts of *Matter of C-A-*, 23 I&N Dec. at 952 – 53, the first of the Board's more recent cases establishing the "social visibility" standard. In *C-A-* the Board purported to reaffirm *Acosta*,[11] but refused to recognize "former noncriminal drug informants working against the Cali drug cartel" because it determined the group lacks sufficient visibility. In so holding, the Board concluded that a social group composed of former confidential informants is by its "very nature" socially invisible:

> In the normal course of events, an informant against the Cali cartel intends to remain unknown and undiscovered. Recognizability or visibility is limited to those informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members.

[11] The Board stated "we continue to adhere to *Acosta*", and clarified it would not to require any "voluntary associational relationship" or "cohesiveness" among social group members. 23 I&N Dec. at 956 – 57 (discussing *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000).

Id. at 957 – 59.[12]

Again, one of the most prominent criticisms of *C-A-* and its progeny is the constant vacillation between this literal, naked-eye definition of "social visibility" and some broader, more abstract concept of subjective societal perception. This inconsistency caused the Seventh and Third Circuits to agree, "it is unclear whether the Board … understands the difference" between the two approaches. *Valdiviezo-Galdamez*, 663 F.3d at 606 (*quoting Ramos v. Holder* 589 F.3d 426, 430 (7th Cir. 2009). Judges of the Ninth Circuit also confronted the government about this confusion during *en banc* argument in *Henriquez-Rivas*, forcing the government to concede that *C-A-*'s discussion of social visibility is "muddled" and "very hard to understand."[13] *Amicus* agrees that the explanation of "social visibility" is incoherent, and it is intolerable that worthy asylum applicants like Diego Castillo-Arias can be denied protection under a shifting test that even the Board's best lawyers do not understand. But *Amicus* is just as troubled by *C-A-*'s application of *Acosta*, which is no less incoherent, because it proves that the Board adopted the "social visibility" test without considering how it relates to the purpose of the enumerated grounds of protection.

In *Matter of C-A-*, the Board acknowledges that past service as an informant is an immutable characteristic, "as it has already occurred and cannot be undone", but then cautions, "that does not mean that any past experience shared by others suffices to define a particular social group for asylum purposes." 23 I&N Dec. at 958. If the Board were following *Acosta*, it would next ask whether past service as an informant is the kind of characteristic, "so

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[12] Despite the suggested distinction regarding witnesses who appear in court, the Board has since used *C-A-* to deny recognition to proposed social groups composed of persons who have served as trial witnesses against criminal gangs. *See, e.g., Henriquez-Rivas v. Holder*, 449 Fed. Appx. 626, 2011 (9th Cir. 2011), *vacated, reh'g en banc granted, Henriquez-Rivas v. Holder*, 670 F.3d 1033 (9th Cir. January 31, 2012).

[13] *See* Oral Argument at 38:46-41:10, *Henriquez-Rivas v. Holder*, No. 09-71571 (9th Cir. Mar. 20, 2012), *available at* http://www.ca9.uscourts.gov/media/view_ subpage.php?pk_id=0000008957

fundamental to [...] identity or conscience that it ought not be required to be changed." 19 I&N Dec. at 233. This never happens. Instead, *C-A-* poses an evasive analogy that compares paid informants to police and military personnel, and invokes *Matter of Fuentes* for the proposition, "we do not afford protection to persons exposed to risks normally associated with employment in occupations such as the police or military...[i]n part...because persons accepting such employment are aware of the risks and undertake the risks in return for compensation." *C-A-*, 23 I&N Dec. at 958 – 59 (*citing Fuentes*, 19 I&N 658). Aside from being irrelevant to *Acosta*, the analogy mischaracterizes *Fuentes*, which said nothing whatsoever about compensation when it held, unequivocally, that former Salvadoran policemen are a cognizable particular social group. *Fuentes*, 19 I&N Dec. at 660 – 63. *C-A-* continues its evasion of *Acosta* by asserting, "[t]he question in this case becomes whether the respondent's civic motives for working as a government informant distinguish his situation from that of informants employed by the government." *C-A-*, 23 I&N Dec. at 959. The Board then reasons that unpaid informants who act out of a sense of civic duty and moral responsibility are not wholly different from paid informants or paid police and military personnel, all of whom may share noble motivations to some extent. *Id.* At the end of its tortured analogy, the Board concludes that a social group of unpaid informants who oppose the Cali cartel is not cognizable because, "the distinction between informants who are compensated and those who act out of civic motives is not particularly helpful in addressing the question of who is deserving of protection under the asylum law." *Id.*

C-A- never asks or answers the legally relevant question: do "former noncriminal drug informants working against the Cali drug cartel" share a common characteristic fundamental to their consciences and the exercise of their basic human rights? To say that informants' civic motives are "not particularly helpful in addressing the question of who is deserving of

protection" is nonsensical. A civic-minded commitment to defend the rule of law and one's own country against criminal terrorists is precisely the kind of characteristic *Acosta* deems worthy of recognition. Such a commitment is without question a matter of conscience and it is closely related to important human rights. The Third Circuit has said as much, and UNHCR agrees too. *Garcia v. AG of the United States*, 665 F.3d 496, 504 (3d Cir. 2011) (former witnesses against Guatemalan gang share immutable past experience that they cannot change and could not be asked to change); UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, 31 March 2010, ¶ 38 (resistance to criminal gangs may be considered an immutable characteristic fundamental to conscience and the exercise of human rights because it is founded on respect for the rule of law and the right to freedom of association.).

Nothing in *C-A-* or any of the subsequent precedents explains why a highly visible group is more deserving of protection than a group with lesser visibility—or a group like secret informants that may be completely unknown to the larger society. "Social visibility" has no logical connection to the qualities of conscience that make Diego Castillo-Arias's commitment to the rule of law worthy of recognition under the enumerated grounds. It makes no sense to think Congress would deny protection to a group of courageous citizen-informants who risk life and limb to stop the criminal destruction of their democracy—and *only* because secrecy is essential to their shared mission. If the Board plans to keep the "social visibility" requirement, it must identify a purpose related to the enumerated grounds of protection that can justify this absurdity.

III. The proposed "social distinction" test is indistinguishable from the "social visibility" requirement

The most the DHS can say in support of the Board's current social group jurisprudence is that it "may" represent a reasonable interpretation of the Act. DHS Supp. Brf. at 7. But rather

than offer an actual defense, the DHS asks this Board to "clarify that 'social visibility' and 'particularity' should be read as a single 'social distinction' requirement." *Id.* With this, the DHS admits that "social visibility" and "particularity" are indeed indistinguishable, and it all but concedes that both concepts are too flawed to retain. *Amicus* respectfully implores the Board to reject "social distinction" for the many sound reasons Respondent advances in his reply brief. *See* Respondent's Reply Br. (Jun. 19, 2012). We emphasize here that "social distinction" is just a hasty repackaging of "social visibility" that carries forward the same problematic condition that all social groups "must be perceived by the society in question as distinct." DHS Supp. Brf. at 8. The strict requirement of subjective societal perception ensures that this "new" standard would also deny recognition to worthy social groups that are socially or culturally invisible.

The DHS asserts that the Board's "social visibility" test does not contradict the underpinnings of "the foundational *Acosta* standard", and it also asserts that, "subject to case-by-case analysis in the context of the society in question", the social groups recognized in *Kasinga* and *Toboso-Alfonso* could pass the "social visibility", "particularity" or "social distinction" tests. DHS Supp. Brf. at 12. However, the DHS does not offer any meaningful analysis to support these assertions, and it plants them within a troubling footnote that assures the Board it will face only a very low bar in federal court should it choose to double down on "social visibility" or approve the "social distinction" test. *Id.* The DHS suggests that any reason this Board may give for departing from *Acosta* need not in fact be "better" than the reasons that led it to adopt *Acosta* in the first place. *Id.* The Board can survive judicial review, the DHS counsels, so long as it is more careful this time to display a conscious intent to limit *Acosta*, while also professing it "'*believes* [this] to be better, which the conscious change of course adequately indicates.'" *Id.* (*quoting FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). The

Board should rebuke the invitation to plaster over the cracks in the foundation of a crumbling policy. The only proper goal here is to achieve the *best* policy and to explain it to the public in the clearest terms possible.[14]

The DHS now argues the *Acosta* framework is "insufficient", DHS Supp. Brf. at 6 -7, but its discussion of circuit case law is wrong, *See* Resp. Reply Brf. at 6-9, and the claim of insufficiency directly contradicts the position DHS took before the Attorney General in *Matter of R-A-*, 23 I&N Dec. 694 (AG 2005):

> [S]ocial perceptions may provide evidence of the immutability or fundamentality of a characteristic asserted to define a social group. Thus, they may be indicators that a social group exists. The Board's decision, however, while naming them as "factors," finds that a particular social group does not exist because the Board has concluded that this kind of social perceptions evidence is not present in the case. Thus, the Board applies these "factors" as requirements, without relating them in any way to the *Acosta* immutable characteristics standard. This departs from the sound doctrine the Board established nearly 20 years ago in *Acosta,* and there is no reason for such a departure.

Matter of R-A-, Department of Homeland Security's Position on Respondent's Eligibility for Relief at 25 (Feb. 19, 2004). *Available at* http://cgrs.uchastings.edu/pdfs/dhs_brief_ra.pdf (last accessed, Aug. 10, 2012). Now the DHS has joined the Board in imposing "social perception" as a requirement, for no identifiable purpose, and without relating it in any intelligible way to *Acosta's* explanation of the enumerated grounds.

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[14] See 8 C.F.R. § 1003.1(d)(1) ("the Board, through precedent decisions, shall provide *clear* and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act.")(emphasis added). In contrast with the Third and Seventh Circuits, other sometimes divided courts of appeals have found that a "social visibility" criterion can meet the low standard of reasonableness required to pass *Chevron* review. *Mendez-Barrera v. Holder*, 602 F.3d 21, 25 (1st Cir. 2010); *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007); *Oreallana-Monson v. Holder*, 685 F.3d 515, 516 (5th Cir. 2012); *Kante v. Holder*, 634 F.3d 321, 326 (6th Cir. 2011); *Gaitan v. Holder*, 671 F.3d 678 (8th Cir. 2012); *Castillo-Arias v. United States AG*, 446 F.3d 1190 (11th Cir. 2006). The Ninth Circuit has extended *Chevron* deference in panel decisions including *Ramos-Lopez v. Holder*, 563 F.3d 855, 861-62 (9th Cir. 2009), but may be poised to reverse course *en banc* in *Henriquez-Rivas*. At any rate, in a case like this one, where the legal question presented goes to the very heart of our nation's commitment to human rights, the Board's duty is to produce a lucid policy that best honors that commitment, not to patch a flawed one in hopes it will be judged minimally reasonable.

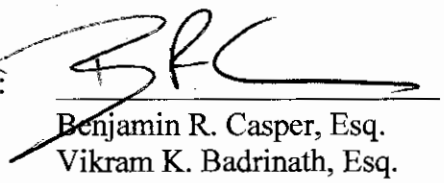
To be clear, *Amicus* does not contend that the visibility of a social group is irrelevant to asylum eligibility. Indeed, adjudicators must consider the visibility of a group when assessing important second-order issues, such as whether persecution is "on account of" group membership, or whether an individual group member has a well-founded fear of persecution. *E.g., Mogharrabi*, 19 I&N Dec. at 446 ("well founded fear" is established with proof that persecutor "is aware or could become aware of an applicant's protected characteristic."). But "social visibility" and "social distinction" requirements have no logical connection to the first-order issue of whether a valid social group exists. In this first step of asylum analysis the Board should return to *Acosta*'s sound rule and ask only whether group members share an immutable characteristic that is closely related to their basic human rights and therefore worthy of protection in the same way that race, religion, nationality and political opinion also are.

CONCLUSION

For the reasons stated herein, this Board should abandon the "social visibility" and "particularity" requirements, reject the DHS's "social distinction" test, and reaffirm its well-reasoned approach in *Acosta* as the proper standard for evaluating particular social groups.

August 17, 2012

Respectfully submitted,

By: 

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In the Matter of:	)	
Mauricio VALDIVIEZO-GALDAMEZ	)	**File No.: A097 447 286**
In Removal Proceedings	)	

PROOF OF SERVICE

The undersigned hereby declares as follows: I am a citizen of the United States and am over the age of 18 years and not a party to the captioned action. I served a true and correct copy of the foregoing document by placing said copy in the U.S. mail on this date, postage prepaid, addressed as follows:

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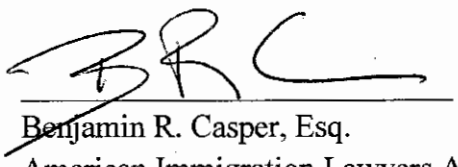

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