Note

Moving Beyond Reflexive *Chevron* Deference: A Way Forward for Asylum Seekers Basing Claims on Membership in a Particular Social Group

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INTRODUCTION

Many vulnerable groups fall through the cracks of the United States' asylum system, unable to find relief within the labyrinthine yet insufficient protections it offers.[1] One particular category of endangered individuals consists of women and girls who are being persecuted based on their gender.[2] Gender-based persecution includes domestic violence, rape by criminal gangs, and honor killings, among other gender-related violence.[3] Applicants for asylum in the United States must show they have a "well-founded"[4] fear of persecution, as well as show that this persecution is based on one of five specific reasons—their race, religion, nationality, political opinion, or membership in what is called a "particular social group" (PSG).[5] Gender on its own is not among these textually enumerated grounds of protection,

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1. Since the enactment of the Migrant Protection Protocols ("Remain in Mexico" policy) by President Trump, 0.1% of applicants at the southern U.S. border have been granted asylum. Gustavo Solis, *Remain in Mexico Has a 0.1 Percent Asylum Grant Rate*, SAN DIEGO UNION-TRIB. (Dec. 15, 2019), https://www.sandiegouniontribune.com/news/border-baja-california/story/2019-12-15/remain-in-mexico-has-a-0-01-percent-asylum-grant-rate [https://perma.cc/22FT-YEZB].

2. Stephen Legomsky, *Gender-Related Violence Should Be Grounds for Asylum. Congress Must Fix This for Women.*, USA TODAY (Jan. 2, 2019, 4:00 AM), https://www.usatoday.com/story/opinion/2019/01/02/gender-related-violence-grounds-asylum-refugee-women-congress-column/2415093002 [https://perma.cc/QR9G-NTZ9].

3. *Id.*

4. 8 U.S.C. § 1101(a)(42)(A).

5. *Id.*

and so women and girls fleeing from situations of gender-based persecution generally have sought to prove they are members of a PSG.[6] Yet, individuals attempting to submit this kind of asylum claim have faced ever-mounting roadblocks erected by the Department of Justice's Board of Immigration Appeals (BIA), the highest administrative forum that determines asylum claims, and decisions and regulations published by the Attorney General.[7] One of the most challenging requirements that women and girls fleeing gender-based persecution now face in the U.S. asylum process is proving "social distinction" of their claimed PSGs.[8] This requirement means that, in order to even be *considered* for eligibility in the asylum process, she must prove that the society in her home country perceives the class of individuals she is a part of as a sufficiently distinct "group."[9]

The construction of barriers to asylum eligibility have been made possible because of the great degree of deference that administrative agencies like the BIA enjoy.[10] Over the past thirty-six years, courts have developed a doctrine of judicial deference in administrative law that often gives administrative agencies vast leeway when changing their policies. The Supreme Court's landmark 1984 administrative law ruling, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[11] and its progeny, generally require courts to defer to any reasonable agency interpretations of statutes within their regulatory purview that are ambiguous to the extent that Congress has left a particular interpretive question open as a gap for the agency to fill.[12]

6. *See, e.g.*, A-R-C-G-, 26 I. & N. Dec. 388, 389 (B.I.A. 2014), *overruled by* A-B-, 27 I. & N. Dec. 316 (Att'y Gen. 2018) (recognizing "married women in Guatemala who are unable to leave their relationship" as a particular social group).

7. *See infra* Part I.F.

8. W-G-R-, 26 I. & N. Dec. 208, 208 (B.I.A. 2014); M-E-V-G-, 26 I. & N. Dec. 227, 227 (B.I.A. 2014).

9. *See, e.g.*, S.E.R.L. v. Att'y Gen. U.S., 894 F.3d 535, 556–57 (3d Cir. 2018) (holding the proposed PSG of "immediate family members of [Honduran] women who cannot leave domestic relationships" lacked social distinction); Alvizuriz-Lorenzo v. U.S. Att'y Gen., 791 F. App'x 70, 76 (11th Cir. 2019) (holding the proposed PSGs of "girls or young women in Guatemala who cannot leave their family as a result of their age or economic conditions" and "girls or young women in Guatemala who cannot leave their family" are not socially distinct); Rivera-Geronimo v. U.S. Att'y Gen., 783 F. App'x 941, 946 (11th Cir. 2019) (holding the proposed PSG of "Guatemalan women in domestic relationships" is not socially distinct); Osorto-Romero v. Sessions, 732 F. App'x 62, 63–64 (2d Cir. 2018) (holding the proposed PSG of "Honduran women who are viewed as gang property by virtue of their gender" failed to satisfy the social distinction requirement).

10. *See infra* Part I.B.

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

12. *Id.* at 842–44.

The *Chevron* deference doctrine has had a profound impact on immigration law. One of the most significant areas of this impact has been the application of the *Chevron* test to determine what constitutes a PSG under the federal statute that grants asylum to persecuted refugees.[13] In order to be eligible for asylum, an applicant "must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant."[14] Of these various grounds for asylum, the question of what constitutes a PSG within the meaning of the statute has been a hotbed of litigation since the law was enacted.[15] For more than two decades, PSGs were defined using the standalone immutable characteristic standard set forth in *Matter of Acosta*.[16] The BIA added two additional requirements of "particularity" and "social visibility" in the mid-2000s and then sought to clarify the new standard in 2014.[17] Under this new three-part standard, an applicant "must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct[18] within the society in question."[19]

Courts have struggled with the application of the changing definitions the BIA has used but have found it especially challenging in recent years to apply the elements of particularity and what is now called "social distinction."[20] This has led to a split among the United States Circuit Courts of Appeals, as different circuits have decided to apply varying levels of *Chevron* deference to the BIA's decisions.[21] In practice, this has had the result of sowing confusion about the standard and making it incredibly difficult for asylum applicants—particularly those who are pro se—who have credible claims but do not fall

13. 8 U.S.C. § 1158(b)(1)(B)(i).

14. *Id.*

15. *See infra* Part I.C.

16. Acosta, 19 I. & N. Dec. 211 (B.I.A. 1985).

17. *See* Kenneth Ludlum, Note, *Defining Membership in a Particular Social Group: The Search for a Uniform Approach to Adjudicating Asylum Applications in the United States*, 77 U. PITT. L. REV. 115, 119–22 (2015).

18. *Id.* (explaining that the 2014 attempt to clarify the new PSG standard included articulating what it had previously referred to as social "visibility" as social "distinction" instead).

19. W-G-R-, 26 I. & N. Dec. 208, 208 (B.I.A. 2014); M-E-V-G-, 26 I. & N. Dec. 227, 227 (B.I.A. 2014).

20. Ariel Lieberman, *What Is a "Particular Social Group"?:* Henriquez-Rivas *Provides a Possible Solution to Circuit Courts' Confusion*, 28 GEO. IMMIGR. L.J. 455, 461 (2014).

21. *See infra* Part II.B.

into one of the other protected grounds from successfully fighting for their claims.[22]

As the circuit courts of appeals continue to struggle with defining PSGs, the Supreme Court has thus far declined to weigh in on the issue.[23] At the same time, however, Justices on the Court have increasingly shown a willingness to question *Chevron* and other types of judicial deference to agency decision-making as a general matter.[24] This shift by the Supreme Court—particularly in light of Justice Kennedy's concurrence in *Pereira v. Sessions*[25] and the interrelated analysis of judicial deference to agency interpretations of regulations in *Kisor v. Wilkie*[26]—suggests that the time is ripe for the Supreme Court to resolve the circuit split on this issue. These developments also suggest that the lower circuit courts may now have cause to revisit whether their past decisions, to the extent they extended deference to the BIA's current PSG standard, did so too reflexively and assess the standard with greater judicial rigor. A reexamination of circuit court decisions on the BIA's post-*Acosta* additions, in light of the Supreme Court's recent jurisprudence, arguably reveals that most of the courts of appeals were too quick to conclude *Chevron* deference applied to the updated PSG standard. Overturning circuit court precedents applying this reflexive deference to the new PSG standard is a critical step to aligning U.S. asylum adjudication with the original purpose of asylum law as intended by Congress.

Part I of this Note will examine the history of U.S. asylum law, the role of *Chevron* deference within the immigration realm, and the current state of asylum law in the United States. Part II of this Note will discuss in-depth the evolution of the PSG definition and the ensuing circuit split and critically examine the role of *Chevron* deference in those decisions. It will also conclude that the Seventh Circuit (which did not defer to the BIA under *Chevron*) was correct in its analysis, attributable to the more rigorous and independent judicial analysis of congressional intent it applied in its calibration of *Chevron* review. Part III of this Note analyzes the applicability of the reasoning in *Kisor*

22. *See generally* 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, 367–79 (2015) (reviewing the judicial treatment of the standard set in *Acosta* in the years following the decision).

23. *See, e.g.*, Reyes v. Lynch, 842 F.3d 1125 (9th Cir. 2016), *cert. denied*, Reyes v. Sessions, 138 S. Ct. 736 (2018) (illustrating a case where the Supreme Court declined to address how lower courts should define PSGs).

24. *See infra* Part I.E.

25. Pereira v. Sessions, 138 S. Ct. 2105, 2120 (2018).

26. Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

v. Wilkie and Justice Kennedy's concurrence in *Pereira v. Sessions* to argue that the Supreme Court is moving away from what it has called "reflexive deference" to agency interpretations, and that this indicates that the circuit courts that deferred to the BIA's addition of requirements to the *Acosta* definition did so too reflexively. This Note concludes that the Supreme Court should intervene to clarify that most of the circuit courts have not engaged in proper *Chevron* analysis of the PSG standard and undertake an appropriately rigorous application of all the traditional tools of statutory interpretation itself to answer the interpretive question. This Note argues that were the Supreme Court to do so, it should favor the Seventh Circuit's current case law. Finally, this Note concludes that in the absence of direct Supreme Court intervention, circuit courts that previously deferred to the BIA's current PSG standard now have cause to revisit those prior rulings and should assess whether they deferred too reflexively. Resolution of the PSG standard is vital, as continuing uncertainty of its parameters is a matter of life or death for the thousands of individuals fleeing persecution and seeking asylum in the United States based on their membership in a particular social group.

I. THE EVOLUTION OF "PARTICULAR SOCIAL GROUP" IN UNITED STATES ASYLUM LAW

In order to understand the problems with the current manifestation of the particular social group standard, it is helpful to explore the broader context of the history of U.S. asylum law and the current procedure of asylum adjudication. This Part begins with this context before examining the development of the protected ground of membership in a PSG as a basis for asylum applications.[27] This Part then explores *Chevron* deference, an administrative law doctrine that has been extremely influential in shaping immigration law and the PSG standard, paying particular attention to concerns about the doctrine expressed by Supreme Court Justices.[28] Finally, this Part concludes by examining *Kisor v. Wilkie* and its potential for bringing a transformation to the PSG standard through a more rigorous analysis of *Chevron* deference—a transformation made all the more urgent by recent changes to asylum policy.[29]

27. *See infra* Part I.C.
28. *See infra* Part I.D.
29. *See infra* Parts I.E–F.

A. A BRIEF OVERVIEW OF UNITED STATES ASYLUM LAW

In order to be granted asylum in the United States, an applicant must meet the statutory definition of a "refugee":

> [A]ny person who is outside any country of such person's nationality . . . 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.[30]

Congress adopted this definition as part of the Refugee Act of 1980,[31] which enacted the 1951 United Nations Convention Relating to the Status of Refugees and 1967 Protocol.[32] The 1951 Convention outlined the definition of refugees in modern international law and set forth "the kind of legal protection, other assistance, and social rights" that governments ought to provide to refugees.[33] The 1967 Protocol expanded the scope of the 1951 Convention by eliminating its original "geographical and time limits."[34] The U.S. definition of "refugee" is the same as the Convention's definition basing protection on the five protected grounds of race, religion, nationality, membership in a PSG, and political opinion.[35] Notably, in codifying its obligation to the international treaty, Congress declared that the Refugee Act of 1980 reflected "the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands" and promised to "encourage all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible."[36] While the

30. 8 U.S.C. § 1101(a)(42)(A) (outlining the eligibility criteria and procedures for asylum).

31. Refugee Act of 1980, Pub. L. No. 96-212, § 201(a), 94 Stat. 102, 102–03 (1980).

32. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 428–29 (1987).

33. Convention Relating to the Status of Refugees, *supra* note 32, art. 1(A)(2); UNHCR, THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL 1 (2011). The Convention defined a "refugee" as an individual who:

> As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Convention Relating to the Status of Refugees, *supra* note 32, art. 1(A)(2).

34. UNHCR, *supra* note 33, at 4.

35. Refugee Act of 1980, Pub. L. No. 96-212, § 201(a), 94 Stat. 102, 102–03 (1980).

36. *Id.* § 101(a), 94 Stat. at 102. The INA has been subsequently modified numerous times. Significant changes were brought about by the Illegal Immigration Reform

protective purpose of the different grounds is clear, the drafting histories of the Convention provide little insight into the intended scope of "particular social group."[37] This has led to confusion and inconsistency in the adjudication of asylum cases.[38]

Membership in a PSG is not enough to get asylum.[39] An applicant must also satisfy multiple other elements, including that (1) they were harmed in the past or have a "well-founded fear" of future harm, (2) the harm is severe enough to rise to "persecution," (3) the harm was or will be inflicted by the government or an entity the government is unwilling or unable to control, and (4) the harm is "on account of" (5) one or more of the five protected grounds.[40] Even when an individual meets all the elements of the refugee definition, he or she is not guaranteed to be granted that relief. There are numerous other regulatory and statutory grounds that may disqualify a refugee,[41] and otherwise qualifying individuals may be denied asylum based on the government's broad discretion.[42] The overarching structure of U.S. asylum law, therefore, serves to work as a set of legal "filters" that limit access to relief.[43] All five of the grounds for asylum protection—including membership in a PSG—can potentially include large numbers of diverse individuals.[44] However, an applicant that proves their

and Immigrant Responsibility Act (IIRIRA) of 1996, including the addition of a requirement that asylum seekers demonstrate "by clear and convincing evidence" that they filed their asylum application within one year of arriving in the United States. Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 604(a), 110 Stat. 3009-689, 3009-690–91 (1996) (codified at 8 U.S.C. § 1158(a)(2)(B) (1998)).

37. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Third Meeting*, at 14, U.N. Doc. A/CONF.2/SR.3 (Nov. 19, 1951); *see* Ivan A. Tereschenko, *The Board of Immigration Appeals' Continuous Search for the Definition of "Membership in a Particular Social Group" in* Matter of M-E-V-G- *and* Matter of W-G-R-*: In the Context of Youth Resistant to Gang Recruitment in Central America*, 30 CONN. J. INT'L L. 93, 99–100 (2014) ("Neither the *1951 Convention* nor the *1967 Protocol* have defined 'membership in a particular social group,' and the drafting history fails to specify its exact meaning.").

38. *See, e.g.*, Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN'S L.J. 107, 119–47 (2013) (discussing varying outcomes in the adjudication of particular social group claims based on domestic violence).

39. *See* 8 U.S.C. § 1101(a)(42)(A).

40. *Id.* (identifying both objective and subjective elements).

41. *Id.* §§ 1158(b)(2)(A), 1231(b)(3)(B).

42. *Id.* § 1158(b)(1)(A), (b)(2)(C).

43. DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 41 (2014).

44. Benjamin Casper, Katherine Evans, Julia DiBartolomeo Decker & Hayley Steptoe, Matter of M-E-V-G- *and the BIA's Confounding Legal Standard for "Membership in a Particular Social Group*," 14-06 IMMIGR. BRIEFINGS 1, 3 (2014).

membership in a PSG only becomes a *candidate* for relief, and the other requirements of the refugee definition limit this larger group to a much smaller number of individuals who are ultimately able to gain protection in the United States.[45]

B. IMMIGRATION AND ASYLUM LAW ADJUDICATION IN THE UNITED STATES

Immigration adjudication in the United States primarily occurs through the thousands of decisions made each year by asylum officers and immigration judges (IJs), both of whom are located in the executive branch.[46] Immigration judges, while located within the federal government, are not Article III judges.[47] Rather, the immigration courts and the appellate body that reviews IJ decisions, the Board of Immigration Appeals (BIA or Board), are part of the Executive Office of Immigration Review (EOIR) which is an agency within the Department of Justice.[48] Immigration judges and Board members are also not administrative law judges and therefore do not have the same safeguards to their independence provided by the Administrative Procedures Act.[49] Both IJs and Board members are appointed by the Attorney General and may only be removed for cause.[50] However, as a matter of discretion, the Attorney General may reassign them to a different position.[51] Importantly, the immigration courts are situated in a position of supervision underneath the nation's chief prosecutor—the EOIR Director reports directly to the Deputy Attorney General.[52] While IJs are not directly part of the entity responsible for immigration enforcement, the Department of Homeland Security (DHS), "they have long complained that their position under the Attorney General undermines their independence."[53] A primary concern with the

45. *Id.*

46. 8 C.F.R. § 100.1 (2018).

47. Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1640 (2010).

48. 8 C.F.R. § 1003.0 (2018).

49. *See* Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1648 (2016); Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1145 (2006).

50. Barnett, *supra* note 49; Resnik, *supra* note 49.

51. *See* Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 373–74 (2006) (explaining how Attorney General Ashcroft reduced the BIA's size and "promised the future reassignments" of its members).

52. 8 C.F.R. § 1003.0(b).

53. Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 709 (2019) (citing *Strengthening and Reforming America's Immigration Court System: Hearing Before the Subcomm. on Border Sec. & Immigr. of the S. Comm. on the Judiciary*, 115th Cong. 3–5 (2018)). Other factors give rise to concern about the

current system is the "inherent conflict of interest" IJs face as adjudicators that makes them "particularly vulnerable to political pressure and interference," a major issue when they are making life or death decisions in asylum cases.[54]

1. Typical Procedure for Applying for Asylum

Asylum seekers have two primary methods for claiming asylum[55] in this vast, confusing, and altogether not impartial immigration system. If DHS has initiated removal proceedings, a noncitizen may file what is often referred to as a "defensive" application for asylum with the immigration court.[56] If DHS has not initiated removal proceedings, an individual may file an "affirmative" application with the U.S. Citizenship and Immigration Service (USCIS).[57] In either context, the application form itself and the relevant legal standards are generally the same.[58] As a procedural matter, affirmative applications are first reviewed by asylum officers charged to conduct non-adversarial interviews and decide to either grant the application or refer the application to an IJ for further defensive consideration in the context of removal proceedings.[59] Sixty-five percent of affirmative applications are referred to immigration courts.[60] Either the government or the

independence of IJs and Board members. By regulation, IJs and Board members have a duty to "exercise their independent judgment and discretion" when adjudicating the individual cases before them. 8 C.F.R. § 1003.1(d)(1)(ii) (2018). Yet, they must also "act as the Attorney General's delegates in the cases that come before them." *Id.* § 1003.1(a) (2018); *see also* Michael Kagan, Chevron*'s Liberty Exception*, 104 IOWA L. REV. 491, 493 (2019) ("In a deportation case, the Department of Homeland Security operates as police, jailer, prosecutor, and deporter, while the Department of Justice plays the role of judge through its Immigration Courts. Both departments answer to the same Chief Executive, and can easily work together in pursuit of a more aggressive immigration policy.").

54. *ABA Again Calls for an Independent Immigration Court*, A.B.A. (July 23, 2019), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/july_2019_washington_letter/immigration_article_0719 [https://perma.cc/3VBS-6E8X].

55. *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states [https://perma.cc/4RVP-H3LH] (Sept. 22, 2020).

56. *Id.*

57. *Id.*

58. *Id.*

59. 8 C.F.R. § 208.9 (2018). The IJ may rely on the asylum officer's findings of fact. *Id.* § 1240.7(a). However, the IJ ultimately exercises de novo review of the application. *Id.* § 1003.42(d).

60. JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 33 (2009).

noncitizen may appeal an IJ's decision to the BIA.[61] Final removal orders issued by the Board may be appealed by submitting a petition for review to the United States Court of Appeals.[62] The current backlog of cases in the immigration courts[63] means that most asylum applicants do not get the merits of their cases adjudicated for years.[64]

C. *MATTER OF ACOSTA*: THE BIA'S FIRST MAJOR GUIDANCE ON WHAT CONSTITUTES A PARTICULAR SOCIAL GROUP

In addition to the broader uncertainty asylum seekers face because of the infirmities and inefficiencies of the structure of asylum adjudication, they also face uncertainty in how the merits of their cases are evaluated if they base their claim on membership in a PSG. The definition of "particular social group" did not come from the Refugee Act but rather from the BIA's interpretation of the term in a precedent-setting case in 1985, *Matter of Acosta.*[65] Using the *ejusdem generis* canon[66] in relation to the four other protected grounds, the BIA reasoned that membership in a PSG was also defined by an "immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed."[67] In the subsequent two decades, multiple BIA cases applied the *Acosta* standard for PSGs to approve important social groups that were based only on

61. 8 C.F.R. § 1003.1(b) (2018).

62. 8 U.S.C. § 1252(b)(2).

63. As of August 2020, there were more than 1.2 million immigration cases pending in immigration courts nationwide. *Immigration Court Backlog Tool*, SYRACUSE U. TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog [https://perma.cc/F98N-YA4M].

64. *See* Lindsay M. Harris, *The One-Year Bar to Asylum in the Age of the Immigration Court Backlog*, 2016 WIS. L. REV. 1185, 1204–05 (describing how the current backlog is affecting the timing for an applicant's merit hearing).

65. Acosta, 19 I. & N. Dec. 211 (B.I.A. 1985), *overruled on other grounds by* Mogharrabi, 19 I. & N. Dec. 439, 441 (B.I.A. 1987) ("[T]he 'clear probability' standard and the 'well-founded fear' standard are not meaningfully different and, in practical application, converge. That portion of . . . *Matter of Acosta* has therefore been effectively overruled.").

66. *Acosta*, 19 I. & N. Dec. at 233 ("[G]eneral words used in an enumeration with specific words should be construed in a manner consistent with the specific words.").

67. *Id.*

immutable characteristics such as sexual orientation (*Matter of Toboso-Alfonso*)[68] and gender-related mutilation (*Matter of Kasinga*).[69]

After the BIA's decision in *Acosta*, the circuit courts of appeals applied *Chevron* deference[70] and followed the immutable characteristics standard as a permissible interpretation of the ambiguity of "particular social group."[71] The Third Circuit's decision in *Fatin v. I.N.S.*[72] became a particularly frequently-cited decision, ruling that under *Acosta* an applicant must "(1) identify a group that constitutes a 'particular social group' . . . (2) establish that he or she is a member of that group, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that membership."[73] Critically, this analysis takes into account that "large and internally diverse social groups—such as women in a given country—should be cognizable under *Acosta* without further qualification" because the other definitional requirements of the statute, such as nexus,[74] limit the number of individuals within this broader group who actually qualify for asylum.[75]

The *Acosta* definition quickly gained international acceptance, with other countries such as Canada, the United Kingdom, and New

68. Toboso-Alfonso, 20 I. & N. Dec. 819, 820 (B.I.A. 1990) (holding that homosexuals in Cuba consisted of a particular social group for purposes of asylum).

69. Kasinga, 21 I. & N. Dec. 357, 357 (B.I.A. 1996) (holding that "[y]oung women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice" were a PSG).

70. *See infra* Part II.B.

71. Gebremichael v. I.N.S., 10 F.3d 28, 35–36 (1st Cir. 1993); Koudriachova v. Gonzales, 490 F.3d 255, 262 (2d Cir. 2007); Fatin v. I.N.S., 12 F.3d 1233, 1240 (3d Cir. 1993); Lopez-Soto v. Ashcroft, 383 F.3d 228, 235 (4th Cir. 2004); Ontunez-Tursios v. Ashcroft, 303 F.3d 341, 352–53 (5th Cir. 2002); Castellano-Chacon v. I.N.S., 341 F.3d 533, 546 (6th Cir. 2003); Lwin v. I.N.S., 144 F.3d 505, 512 (7th Cir. 1998); Ngengwe v. Mukasey, 543 F.3d 1029, 1033 (8th Cir. 2008); Mohammed v. Gonzales, 400 F.3d 785, 797 (9th Cir. 2005); Niang v. Gonzales, 422 F.3d 1187, 1198–99 (10th Cir. 2005); Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190, 1196 (11th Cir. 2006).

72. *Fatin*, 12 F.3d at 1240.

73. Casper et al., *supra* note 44, at 5.

74. For asylum claims based on membership in a particular social group, the statutory nexus requirement limits asylum to those who can demonstrate that this membership in a PSG was "at least one central reason" for their feared persecution. 8 U.S.C. § 1158(b)(1)(B)(i). In other words, the nexus requirement means these asylum seekers must prove their persecution occurs "on account of" their membership in a particular social group. *See id.* § 1101(a)(42)(A) (defining "refugee" as a person who has a "well-founded fear of persecution on account of" membership in a PSG).

75. Casper et al., *supra* note 44, at 5.

Zealand following the standard set in the United States.[76] In 2002, summarizing the practices of these and other countries, the United Nations High Commissioner for Refugees (UNHCR) issued Guidelines interpreting "particular social group" to include the *Acosta* definition.[77] The Guidelines observed that the first step of analyzing PSGs should be to assess for immutability, and only if immutability does not exist should the potential group be analyzed as to whether the society in question perceives it as a group.[78] The proposed definition for a PSG was as follows:

> [A] group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.[79]

Since the UNHCR Guidelines were published, Canada, New Zealand, and the United Kingdom have declined to apply any kind of requirement of social perception to the identification of PSGs.[80] The BIA however, has significantly changed the definition of PSGs from the *Acosta* standard over the past couple of decades.[81]

D. ASYLUM LAW AND ADMINISTRATIVE LAW: *CHEVRON* DEFERENCE IN THE IMMIGRATION LAW CONTEXT

Chevron has become a mainstay of administrative law, and as immigration law is largely administrative, an in-depth understanding of this doctrine is important.[82] The basic rule of *Chevron* requires a two-step analysis.[83] First, it asks whether the intent of Congress is clear on

76. Canada (Att'y Gen.) v. Ward, [1993] 2 S.C.R. 689, 736–39 (Can.); *Ex parte* Shah [1999] 2 AC 629 (HL) 640–41 (appeal taken from Immigration Appeal Tribunal) (Eng.); GJ, Refugee Appeal No. 1312/93, at 27–28 (Refugee Status Appeals Auth. 1995) (N.Z.), https://www.refworld.org/cases,NZL_RSAA,3ae6b6938.html [https://perma.cc/Z5BY-JQE5].

77. United Nations High Commissioner for Refugees, Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, ¶ 2, U.N. Doc. HCR/GIP/02/02 (May 7, 2002).

78. *Id.* ¶ 6–7.

79. *Id.* ¶ 11.

80. Fatma E. Marouf, *The Role of Foreign Authorities in U.S. Asylum Adjudication*, 45 N.Y.U. J. INT'L L. & POL. 391, 434–51 (2013) (discussing the particular social group standards of other countries).

81. *See infra* Part II; *see also* Bednar, *supra* note 22; Ludlum, *supra* note 17, at 119–24 (discussing the history of PSG interpretations since *Acosta*).

82. Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 GEO. IMMIGR. L.J. 99, 100–04 (2017).

83. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

the specific question at hand.[84] Second, "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."[85] The Supreme Court's reasoning was based on two primary principles.[86] First, administrative agencies provide necessary expert knowledge that Congress lacks: "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[87] Second, Congress has expressly authorized agencies' ability to create these policies:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.[88]

In *United States v. Mead Corp.*,[89] the Supreme Court introduced "*Chevron* Step Zero," holding that deference under *Chevron* is only appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority," but did not precisely explain how to identify when this occurs.[90] Several years later, the Supreme Court decided another important addition to the *Chevron* doctrine, holding in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*[91] that *Chevron* trumps stare decisis when statutory meaning is ambiguous.[92] In *King v. Burwell*, the Court applied an additional "extraordinary questions" or "major questions" limitation to the scope of *Chevron* deference, whereby an agency's interpretation of statutory provisions

84. *Id.*

85. *Id.* at 843.

86. Jessica Senat, *The Asylum Makeover:* Chevron *Deference, the Self-Referral and Review Authority*, 35 TOURO L. REV. 867, 877 (2019).

87. *Chevron*, 467 U.S. at 842–43 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

88. *Id.* at 843–44.

89. United States v. Mead Corp., 533 U.S. 218 (2001).

90. *Id.* at 226–27.

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

92. *Id.* at 981–83.

that have significant economic or political impact do not receive deference.[93]

While the rule as stated in the *Chevron* opinion seems fairly straightforward, it has evolved into a doctrine through subsequent interpretations by lower courts that have expanded its use in review of administrative law.[94] This "process by which *Chevron* became law—a series of lower court decisions and then default acceptance in the Supreme Court—prevented . . . ambiguities from being vented and resolved in an authoritative forum; instead, they remain to this day largely submerged and unaddressed."[95] Some circuit courts have complicated matters even further by requiring agencies to take additional steps in their interpretations before the court will defer to them[96] or espousing the possibility that an agency may waive *Chevron* deference.[97] With all of the exceptions that have been built in, the *Chevron* doctrine no longer provides straightforward guidance to regulated parties (if it ever really did).[98] While the original ruling appeared to be brightline on its face, in application it has not been as clear.[99] However, because *Chevron* deference has a seemingly clear formulaic character, it makes it more noticeable when a court does not follow it. The Supreme Court itself "applies *Chevron* inconsistently at best."[100] What

93. *See* King v. Burwell, 576 U.S. 473, 485–86 (2015) (holding that matters of "economic and political significance" are extraordinary cases that give the Court reason to hesitate applying *Chevron* deference).

94. *See* Gary Lawson & Stephen Kam, *Making Law out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 62–63 (2013) (discussing the uncertainty of lower courts dealing with and interpreting *Chevron*'s unanswered questions).

95. *Id.* at 6.

96. *See* Kristin E. Hickman & Mark R. Thomson, *The* Chevron*ization of* Auer, 103 MINN. L. REV. HEADNOTES 103, 109 (2019), https://www.minnesotalawreview.org/wp-content/uploads/2019/03/Hickman_FINAL.pdf [https://perma.cc/9GJZ-UDLS] (discussing the varied approaches to *Chevron* used by courts including the D.C. Circuit, the Fourth Circuit, and others).

97. *See* James Durling & E. Garrett West, *May* Chevron *Be Waived?*, 71 STAN. L. REV. ONLINE 183, 183 (2019), https://review.law.stanford.edu/wp-content/uploads/sites/3/2019/01/71-Stan.-L.-Rev.-Durling-West_Final.pdf [https://perma.cc/XJF7-L2QQ]; Jeremy D. Rozansky, *Waiving* Chevron, 85 U. CHI. L. REV. 1927, 1956 (2018).

98. *See* Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2602 (2006) ("[*Mead*] has produced a great deal of confusion and complexity, disappointing those who hoped that *Chevron* would simplify the law.").

99. *See* Ian Bartrum, *The Constitutional Canon as Argumentative Metonymy*, 18 WM. & MARY BILL RTS. J. 327, 329 (2009) ("[A] canonical text takes on its own metonymic meanings—sometimes quite apart from its literal textual meaning—within the practice of constitutional law.").

100. Kagan, *supra* note 53, at 498; *see also* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory*

has emerged from this inconsistency is a reframing of *Chevron* by legal scholars as a more fluid set of guiding principles for jurisprudence instead of a rigid test.[101]

1. *Chevron* Deference Within Immigration Law

Within the asylum context, the Supreme Court has been largely silent on the application of *Chevron*, with a few notable exceptions.[102] In *I.N.S. v. Cardoza-Fonseca*, the majority opinion by Justice Stevens gave two reasons for its holding overruling a BIA interpretation of the INA.[103] First, that the language of the statute was sufficiently clear to decide the issue before the Court[104] so "there is simply no need and thus no justification for a discussion of whether the interpretation is entitled to deference[.]"[105] This reasoning seems like a straightforward application of *Chevron* Step One, but the opinion went on to say that *Chevron* did not apply at all "to a pure question of statutory construction"[106] and suggested that the doctrine was more appropriate to use when an agency applies laws to particular facts.[107] Some scholars have noted that this decision "was an early expression of doubt, from no less than the author of *Chevron* itself."[108]

While *Cardoza-Fonseca* did not apply *Chevron* deference, the Court did cite and discuss the doctrine indicating that it would apply *Chevron* to immigration cases.[109] However, in a 1992 case regarding

Interpretations from Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1124–25 (2008) (describing statistical findings highlighting the inconsistent application of the *Chevron* standard); Michael Herz, Chevron *Is Dead: Long Live* Chevron, 115 COLUM. L. REV. 1867, 1870 (2015) (noting that judges, especially Supreme Court Justices, "have narrowed the circumstances in which *Chevron*, by its own terms, applies and invoke *Chevron* only intermittently in those circumstances").

101. *See* Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1766 (2010) ("*Chevron* and the other formal deference regimes have the following characteristics in practice: They are flexible rules of thumb or presumptions deployed by the Justices episodically and not entirely predictably, rather than binding rules that the Justices apply more systematically.").

102. *See* Kagan, *supra* note 53, at 517–21.

103. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 423–50 (1987).

104. *Id.* at 432.

105. *Id.* at 453 (Scalia, J., concurring).

106. *Id.* at 446.

107. *Id.* at 448.

108. *E.g.*, Kagan, *supra* note 53, at 518 ("By the end of the next Term, however, the Court was again applying the *Chevron* doctrine (irregularly, as ever) to questions of law, and *Cardoza-Fonseca* quietly dropped from sight." (citing Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 986 (1992))).

109. *Cardoza-Fonseca*, 480 U.S. at 445–48; *id.* at 453–55 (Scalia, J., concurring).

asylum eligibility, the government asked the Court to apply *Chevron* deference, but no reference to the doctrine was made in the decision.[110] It was not until 1999 in *I.N.S. v. Aguirre-Aguirre*, another case about asylum eligibility, that the Court affirmed that the "principles of *Chevron* deference are applicable to this statutory scheme."[111] At least since 1999, the Court seems to have affirmed the application of *Chevron* deference to immigration cases and deferred more regularly in cases involving asylum eligibility.[112] The Court does, however, appear to apply *Chevron* deference very differently in immigration cases concerning deportation.[113]

2. The State of *Chevron* Deference Today

Legal scholars now generally agree that the Supreme Court and the courts of appeals are inconsistent in their application of the *Chevron* doctrine.[114] Notably, Supreme Court Justices themselves have also begun to openly criticize *Chevron* and the evolution of its application to cases decided by the Court.[115] For example, in *Michigan v. EPA*, Justice Thomas directly questioned *Chevron*'s constitutionality.[116] Much of the criticism of Neil Gorsuch's nomination to the Supreme Court in 2017 centered around his views[117] of *Chevron* deference.[118] During his

110. *See generally* I.N.S. v. Elias-Zacarias, 502 U.S. 478 (1992) (providing no reference to *Chevron* or to deference under the doctrine).

111. I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999) (explaining that Congress explicitly delegated authority to the Attorney General to decide questions of law under the INA).

112. Kagan, *supra* note 53, at 518–19 (first citing Negusie v. Holder, 555 U.S. 511, 517 (2009); then citing Gonzales v. Thomas, 547 U.S. 183, 187 (2006); and then citing I.N.S. v. Orlando Ventura, 537 U.S. 12, 16–17 (2002)).

113. Discussing the nuanced distinctions that some scholars have noted about the application of *Chevron* in cases involving discretionary relief from deportation is beyond the scope of this Note. *See* Kagan, *supra* note 53, at 498 (discussing the implicit ways that the Supreme Court limits *Chevron* deference when reviewing the legality of government intrusion upon physical liberty).

114. *See, e.g.*, Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 12 (2017); Eskridge & Baer, *supra* note 100; Herz, *supra* note 100, at 1879.

115. *E.g.*, Michigan v. EPA, 576 U.S. 743, 760 (2015) (Thomas, J., concurring).

116. *Id.*

117. *See, e.g.*, Gutierrez-Briquela v. Lynch, 834 F.3d 1142, 1152 (Gorsuch, J., concurring) ("*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty.").

118. *See, e.g.*, Peter J. Henning, *Gorsuch Nomination Puts Spotlight on Agency Powers*, N.Y. TIMES (Feb. 6, 2017), https://www.nytimes.com/2017/02/06/business/dealbook/gorsuch-nomination-puts-spotlight-on-agency-powers.html [https://perma.cc/KCZ7-UM4A]; Steven Davidoff Solomon, *Should Agencies Decide Law? Doctrine May Be Tested at Gorsuch Hearing*, N.Y. TIMES (Mar. 14, 2017), https://www

time as a judge on the U.S. Court of Appeals for the Tenth Circuit, "Justice Gorsuch challenged the *Chevron* doctrine's premises, contended that *Chevron* deference conflicts with separation of powers principles, and at least strongly hinted that the Supreme Court should repudiate *Chevron*."[119]

Though they have not been as explicitly critical of the *Chevron* doctrine, Chief Justice Roberts and Justice Alito also appear to have doctrinal concerns with judicial deference to agencies. Christopher Walker has noted that Chief Justice Roberts disagreed with Justice Scalia in 2013 about how much deference an administrative agency should get when interpreting the outer boundaries of its own authority.[120] In language sounding critical of *Chevron*, Chief Justice Roberts expressed concern about the "vast power" of the administrative state over day-to-day life.[121] Justice Kennedy and Justice Alito joined him in this critique.[122]

The concerns about *Chevron* that the Justices have expressed in questions outside of immigration law indicate that the time may be approaching for a reckoning about the continued applicability of the doctrine overall. At the very least, a reckoning in the immigration context seems likely and appropriate considering two recent developments. *Pereira v. Sessions* was a 2018 Supreme Court case that centered around the BIA's interpretation of Section 1229(a) of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[123] Justice Kennedy joined the Court's opinion in full but wrote a concurrence specifically to discuss his concern with the way *Chevron* "has come to be understood and applied."[124] He observed that when courts of appeals initially began to encounter the question at issue, there was an "emerging consensus" that "abruptly dissolved" after the BIA adopted a different reading of the statute.[125] After this

.nytimes.com/2017/03/14/business/dealbook/neil-gorsuch-chevron-deference.html [https://perma.cc/JG5M-GGF3].

119. Kristin E. Hickman, *To Repudiate or Merely Curtail? Justice Gorsuch and* Chevron *Deference*, 70 ALA. L. REV. 733, 735 (2019).

120. Christopher J. Walker, *Toward a Context-Specific* Chevron *Deference*, 81 MO. L. REV. 1095, 1103 (2016).

121. City of Arlington v. FCC, 569 U.S. 290, 313 (2013) (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010) (Roberts, C.J., dissenting)).

122. *Id.*

123. Pereira v. Sessions, 138 S. Ct. 2105, 2108 (2018) ("A putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a 'notice to appear under section 1229(a) [of the IIRIRA]' . . . .").

124. *Id.* at 2120 (Kennedy, J., concurring).

125. *Id.*

contrary BIA decision,[126] at least six courts of appeals, citing *Chevron*, concluded that the statute was ambiguous and held the BIA interpretation to be reasonable.[127] Justice Kennedy observed that "[i]n according *Chevron* deference to the BIA's interpretation, some Courts of Appeals engaged in cursory analysis of the questions whether, applying the ordinary tools of statutory construction, Congress's intent could be discerned . . . and whether the BIA's interpretation was reasonable."[128] He called this "reflexive deference"[129] and citing concerns raised by Justice Thomas and Justice Gorsuch noted that "it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision."[130]

The trepidation that Justices have expressed about deference to agency interpretations has not been limited to cases involving *Chevron* deference. *Auer* deference, also known as *Seminole Rock*[131] deference, is an offshoot of *Chevron* under which a court defers to an agency's interpretation of a regulation it itself has promulgated.[132] In 2015, Justices Scalia, Alito, and Thomas showed a desire to reconsider *Auer* deference,[133] and in 2019 the Court finally took up this question.[134] While the Court ultimately upheld *Auer*,[135] it cabined the doctrine in ways that outline a possible approach the Court could take with *Chevron* as well.

126. *See* Camarillo, 25 I. & N. Dec. 644 (B.I.A. 2011).

127. *Pereira*, 138 S. Ct. at 2120 (referencing holdings from the Second, Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits).

128. *Id.* (citations omitted).

129. *Id.*

130. *Id.* at 2121.

131. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

132. *See* Auer v. Robbins, 519 U.S. 452, 461–63 (1997) (deferring to the Secretary of Labor's regulation).

133. *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 107–12 (2015) (Scalia, J., concurring) (arguing that even if *Chevron* remains, deference under *Auer* should be reversed); *id.* at 112–13 (Thomas, J., concurring) (arguing the *Seminole Rock* and *Auer* "line of precedents undermines our obligation to provide a judicial check on the other branches"); *id.* at 107–08 (Alito, J., concurring) ("The opinions of Justice S[calia] and Justice T[homas] offer substantial reasons why the *Seminole Rock* doctrine may be incorrect.").

134. *See infra* Part I.E (discussing *Kisor v. Wilkie*).

135. *See infra* Part I.E.

E. *KISOR V. WILKIE* AND THE SUPREME COURT'S GROWING CONCERN ABOUT REFLEXIVE DEFERENCE TO ADMINISTRATIVE AGENCIES

Not long after Justice Kennedy's concurrence in *Pereira v. Sessions* calling for a reconsideration of *Chevron* deference, the Supreme Court decided *Kisor v. Wilkie*.[136] While the case concerned *Auer* deference in the separate but related context of judicial deference of agency interpretation of regulations, and did not concern asylum law, its deference analysis and cross-reference to Justice Kennedy's *Pereira* concurrence[137] is instructive and may well foreshadow how the Supreme Court could soon sharply recalibrate its related *Chevron* deference doctrine in the context of statutory interpretation.

In *Kisor*, a veteran of the Vietnam War first tried to acquire disability benefits from the Department of Veterans Affairs (VA) in 1982, alleging his military service had caused him to develop post-traumatic stress disorder.[138] The VA denied his application, and in 2006 Kisor sought to reopen his claim.[139] After reopening his case, the VA agreed Kisor was eligible for the benefits but only granted them from the date of his motion to reopen instead of the date of his first application, as he had requested.[140] The Board of Veterans' Appeals, the appellate body above the VA, affirmed the retroactive decision based on its interpretation of an agency regulation governing such claims.[141] The Court of Appeals for Veterans Claims, an independent court that is the first to review decisions by the Board of Veterans' Appeals, also affirmed.[142] The case then made its way to the Federal Circuit which also affirmed, but did so by applying *Auer* and deferring to the Board's interpretation because it found the VA regulation relevant to the case to be ambiguous.[143] The Supreme Court granted certiorari to consider Kisor's position that *Auer* and *Seminole Rock* should be overruled, ending the deference these two decisions give to agencies.[144] Ultimately, the Supreme Court did not overrule *Auer* and *Seminole Rock*.[145] However, the Court conducted an in-depth analysis of *Auer* deference and its justifications and, finding that the Federal Circuit had been too

136. *See* Kisor v. Wilkie, 139 S. Ct. 2400 (2019).
137. *Id.* at 2415, 2446.
138. *Id.* at 2409.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 2405, 2424.

quick in assuming the doctrine applied, vacated the judgment below and remanded the case for further proceedings.[146]

In its in-depth assessment of why *Auer* deference remains viable, the plurality opinion authored by Justice Kagan cross-referenced Justice Kennedy's concurrence in *Pereira v. Sessions*, acknowledging that "in a vacuum, our most classic formulation of the [*Auer*] test . . . may suggest a caricature of the doctrine, in which deference is 'reflexive.'"[147] Throughout the opinion, the Court went to great lengths to explain why it thought *Auer* deference was still a valuable doctrine for courts to follow and to clarify the doctrine's boundaries.[148] The Court began by stating that "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of constructions," citing to *Chevron* as "adopting the same approach for ambiguous statutes."[149] It emphasized that "only when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is 'more [one] of policy than of law.'"[150] The Court then explained that to demonstrate that effort, "a court must 'carefully consider . . .' the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on," leaving little doubt about the depth of inquiry it expects.[151]

The Court then went on to explain that even if a court concludes there is genuine ambiguity in the language, this does not mean automatic deference to an agency's reading, noting that "[u]nder *Auer*, as under *Chevron*, the agency's reading must fall 'within the bounds of reasonable interpretation.'"[152] Justice Kagan was joined by Justices Ginsburg, Breyer, and Sotomayor as to this analysis, with Chief Justice Roberts notably concurring in upholding *Auer* deference only because of stare decisis.[153]

Taken together, Justice Kennedy's concurrence in *Pereira v. Sessions* and *Kisor v. Wilkie* provide evidence that the time may be ripe for a new challenge to BIA interpretations of immigration law including,

146. *Id.* at 2423–24.

147. *Id.* at 2415 (citing Pereira v. Sessions, 585 U.S. 2105, 2120 (2018) (Kennedy, J., concurring)).

148. *Id.* at 2415–18.

149. *Id.* at 2415 (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984)).

150. *Id.* (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991)).

151. *Id.* (citations omitted).

152. *Id.* at 2416 (quoting City of Arlington v. FCC, 569 U.S. 290, 296 (2013)).

153. *Id.* at 2424–25 (Roberts, C.J., concurring).

and perhaps especially so, in the context of the BIA's controversial and problematic PSG standard.[154]

F. THE CURRENT STATUS OF UNITED STATES ASYLUM LAW

The need for clarity in asylum law is more dire than ever because broad policy changes undertaken by President Trump's administration have severely curtailed asylum seekers' access to relief.[155] These dramatic changes in asylum policy have been reflective of President Trump's expressed contempt for the right to apply for asylum.[156] For example, on October 8, 2017, President Trump released a list of his "Immigration Principles and Policies," which included "tighten[ing] standards . . . in our asylum system."[157] The document also listed hiring more IJs and Immigration and Customs Enforcement (ICE) attorneys to accomplish the "swift return of illegal border crossers."[158] A few days later, then-Attorney General Jeff Sessions called for actions to close "loopholes" in asylum laws, stating that "the system is being gamed" by immigrants who only claim a fear of persecution to gain "an easy ticket to illegal entry into the United States."[159]

In March 2018, the EOIR announced a new set of performance metrics that pressure IJs to quickly finish cases making it more challenging for them to ensure a fair process.[160] The new system, which

154. *See infra* Part III.

155. *E.g.*, Brian Melley & Elliot Spagat, *Appeals Court: Trump Can Make Asylum Seekers Wait in Mexico*, AP NEWS (May 8, 2019), https://apnews.com/article/6d55573fb3444e9f8c796887a2067ebc [https://perma.cc/SPS7-5H7M].

156. John Wagner, *Trump: Immigration Is "Changing the Culture" of Europe and Its Leaders "Better Watch Themselves*," WASH. POST (July 13, 2018, 11:22 AM), https://www.washingtonpost.com/politics/trump-immigration-is-changing-the-culture-of-europe-and-its-leaders-better-watch-themselves/2018/07/13/afb5d9a6-868b-11e8-8f6c-46cb43e3f306_story.html [https://perma.cc/R7DX-2A64] (quoting the President in a joint news conference with British Prime Minister Theresa May, remarking "[y]ou walk across the border, you put one foot on the land, and now you're tied up in a lawsuit for five years. It's the craziest thing anyone's ever seen.").

157. Letter from Donald J. Trump, President, to House and Senate Leaders (Oct. 8, 2017), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-letter-house-senate-leaders-immigration-principles-policies [https://perma.cc/7CWD-3FQJ].

158. *Id.*

159. Remarks from Jeff Sessions, Att'y Gen., to the Exec. Off. for Immigr. Rev. (Oct. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review [https://perma.cc/34PG-Y8ZU].

160. Memorandum from James McHenry, Dir., Exec. Off. for Immigr. Rev., to All EOIR Judges on Immigration Judge Performance Metrics (Mar. 30, 2018), https://www

took effect in October 2018, "deemed [the performance of an IJ] unsatisfactory or in need of improvement if the judge completes fewer than 700 cases per year, completes less than 95% of credible fear and reasonable fear reviews at the first hearing, or has over 15% of cases remanded on appeal."[161]

In June 2018, then-Attorney General Sessions overturned an IJ's decision to grant asylum to a woman fleeing intimate partner violence by issuing a decision in *Matter of A-B-*.[162] In doing so, the Attorney General "entirely ignore[d] the importance of social and cultural views of gender and subordination as the underlying reasons for the abuse and a country's inability or unwillingness to provide protection."[163] This decision—which attempts to announce a policy change that would make domestic violence- and gang violence-related claims no longer qualify for asylum—has already received pushback from the judiciary.[164]

More recently, the COVID-19 pandemic has led to policies that have included the suspension of asylum hearings[165] and an order by

.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics [https://perma.cc/83W7-TCKR].

161. Marouf, *supra* note 53, at 734.

162. A-B-, 27 I. & N. Dec. 316, 317, 346 (Att'y Gen. 2018), *abrogated by* Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018).

163. 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, 345–46 (2019).

164. *See* Grace v. Barr, 965 F.3d 883, 897–900 (D.C. Cir. 2020) (holding that the policy change requiring asylum applicants to demonstrate their native country governments condoned persecution or were completely helpless to protect victims was arbitrary and capricious, abrogating *Matter of A-B-* in part).

165. *Joint DHS/EOIR Statement on MPP Rescheduling*, DEP'T HOMELAND SEC. (June 16, 2020), https://www.dhs.gov/news/2020/06/16/joint-dhseoir-statement-mpp-rescheduling [https://perma.cc/42TN-39AF]. In July 2020, DHS announced a plan to restart removal hearings for noncitizens subject to the Migrant Protection Protocols (MPP). *Department of Homeland Security and Department of Justice Announce Plan to Restart MPP Hearings*, DEP'T HOMELAND SEC. (July 17, 2020), https://www.dhs.gov/news/2020/07/17/department-homeland-security-and-department-justice-announce-plan-restart-mpp [https://perma.cc/BS7R-QQ77]. However, COVID-19 has been devastating to asylum seekers forced to wait at the U.S.-Mexico border while their cases are pending through MPP; thousands of individuals are currently living in "cramped and unsanitary conditions" while they await an opportunity to seek refuge in the United States. Jasmine Aguilera, *Many Asylum Seekers in Mexico Can't Get U.S. Court Hearings Until 2021. A Coronavirus Outbreak Could 'Devastate' Them*, TIME (May 19, 2020), https://time.com/5830807/asylum-seekers-coronavirus-mpp [https://perma.cc/BT8J-7TCN]; *see Coronavirus Case in Refugee Camp on US-Mexico Border Raises Alarm*, AL JAZEERA (June 30, 2020), https://www.aljazeera.com/news/2020/06/coronavirus-case-refugee-camp-mexico-border-raises-alarm-200630164210542.html [https://perma.cc/GSM3-7JK7].

the Center for Disease Control and Prevention (CDC) that essentially allows any individual who crossed the border into the United States without permission to be expelled immediately, without the opportunity to apply for asylum.[166] These recent developments have had an immediate and broad-reaching impact that have throttled most of asylum adjudication for individuals at the U.S.-Mexico border[167] as well as individuals residing in the United States with cases pending in front of USCIS or the immigration courts.[168]

Finally, on June 15, 2020, the Trump administration proposed a new rule[169]—including a radical change to the definition of "particular social group"—that if implemented would effectively quash the possibility of average asylum seekers getting asylum.[170] "The proposed regulation provides a 'nonexhaustive' list of nine 'circumstances' that . . . would be considered 'generally insufficient to demonstrate'" a basis for asylum, eliminating multiple PSGs that were previously recognized and protected.[171] As this Note goes to press, major questions remain regarding whether the Trump administration can and will pass the

166. Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,060, 17,060–88 (Mar. 26, 2020).

167. *See supra* note 165; Joel Rose, *Ending 'Asylum as We Know It': Using Pandemic to Expel Migrants, Children at Border*, NPR (Aug. 6, 2020), https://www.npr.org/2020/08/06/898937378/end-of-asylum-using-the-pandemic-to-turn-away-migrants-children-seeking-refuge [https://perma.cc/CAV2-4S9X].

168. *See* Jennie Kneedler, *Impact of COVID-19 on the Immigration System*, A.B.A., https://www.americanbar.org/groups/public_interest/immigration/immigration-updates/impact-of-covid-19-on-the-immigration-system [https://perma.cc/AC5G-X6QG].

169. *See generally* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264, 36,264–306 (June 15, 2020) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, 1235) (outlining the Trump administration's amendment to "the regulations governing credible fear determinations").

170. *See* Zolan Kanno-Youngs, *Asylum Officers Condemn What They Call 'Draconian' Plans by Trump*, N.Y. TIMES (July 15, 2020), https://www.nytimes.com/2020/07/15/us/politics/asylum-officers-trump.html [https://perma.cc/E87V-BG5F] (quoting a spokesman representing employees of USCIS); Priscilla Alvarez & Geneva Sands, *Trump Administration Proposes Sweeping Changes to US Asylum System in New Rule*, CNN (June 10, 2020), https://www.cnn.com/2020/06/10/politics/us-asylum-draft-rule/index.html [https://perma.cc/WNP6-RUPN] (quoting Aaron Reichlin-Melnick, policy counsel at the American Immigration Council, as criticizing the proposal as an attempt "to make asylum impossible to win").

171. Bill Frelick, *Comment on Proposed Changes to Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear*, HUM. RTS. WATCH (July 15, 2020, 9:00 AM), https://www.hrw.org/news/2020/07/15/comment-proposed-changes-procedures-asylum-and-withholding-removal-credible-fear [https://perma.cc/N62Z-2RVJ].

regulation before the November 2020 election. The uncertainty about whether the new rule will be passed and the very high likelihood that it will encounter major pushback even if it is passed[172] shows that the need to clarify the PSG definition remains relevant and urgent.

II. CHANGE TO AND CONFUSION REGARDING THE STANDARD FOR PARTICULAR SOCIAL GROUPS

The BIA's interpretation of the PSG definition in *Matter of Acosta* became the uniformly accepted standard across circuit courts and a model within asylum law around the world.[173] Remaining unchanged for close to twenty years, the ubiquitous acceptance of the *Acosta* definition facilitated increased clarity and consistency in asylum case adjudications until the BIA added additional requirements of particularity and social visibility in a series of decisions between 2006 and 2008.[174] These changes to the PSG standard led to an initial circuit court split, as some courts deferred to the BIA citing *Chevron* deference,[175] while others rejected the additions.[176] After several years of confusion regarding the application of particularity and social visibility to the PSG definition, the BIA purported to clarify the definition through a pair of cases in 2014 that maintained the particularity requirement and replaced "social visibility" with "social distinction."[177] These new changes to the PSG definition did not end the circuit split; circuits that deferred to the first changes now disagree on how to treat the 2014 definition,[178] while one of the circuits that declined to adopt the first additions has also refused to adopt the 2014 definition.[179] This Part analyzes the reasoning courts have used in their decisions to defer or not defer to the BIA's additional requirements and concludes that circuit courts that have deferred appear to have done so without fully "exhaust[ing] all the 'traditional tools' of [statutory]

172. *See, e.g.*, Tess Feldman, *Administration's Asylum Proposal Takes Aim at LGBTQ Survivors*, HILL (Aug. 11, 2020, 8:00 PM), https://thehill.com/opinion/civil-rights/511604-administrations-asylum-proposal-takes-aim-at-lgbtq-survivors [https://perma.cc/USD6-S3S8] (arguing that the proposed regulation has already been heavily criticized as unconstitutionally curtailing due process rights and violating the intention of the Refugee Act of 1980).

173. *See supra* notes 76–77 and accompanying text.

174. *See infra* Part II.A.

175. *See infra* Part II.B.1.

176. *See infra* Part II.B.2.

177. *See infra* Part II.C.

178. *See infra* Part II.D.

179. *See infra* Part II.D.

construction" as required by the Supreme Court in *Kisor v. Wilkie* for *Auer* deference.[180]

A. FIRST ROUND OF CHANGE: THE BIA ADDS PARTICULARITY AND SOCIAL VISIBILITY REQUIREMENTS

Through several decisions issued between 2006 and 2008, the BIA changed the definition of "particular social group" by adding two additional requirements. The first signal of change came in *Matter of C-A-*, a 2006 decision in which the BIA stated that social visibility was an important consideration in identifying the existence of a PSG.[181] The Board rejected the proposed PSG of "noncriminal drug informants working against the Cali drug cartel."[182] The case involved an individual who had acquired information about the Cali drug cartel in Colombia from the head of security for the cartel and then passed along what he learned to another friend working within the government.[183] The cartel learned of what the respondent had done and retaliated by trying to kidnap him and beating his son so brutally that he needed reconstructive surgery.[184] The only issue before the Board was whether the respondent's proposed group was a PSG,[185] which it declined to find because "the very nature of the conduct at issue is such that it is generally out of the public view."[186]

In 2007, the BIA published *Matter of A-M-E- & J-G-U-*, which included "social visibility" and "particularity" in its PSG analysis but did not provide details as to how these factors related to the *Acosta* definition.[187] Citing to *Matter of C-A-*, the Board generally seemed to treat these as additional factors for a judge to consider after applying the immutable characteristics test; however, in some parts of the opinion the Board seemed to point to the new elements as independent tests for determining a PSG.[188] The case ultimately held that "wealthy Guatemalans" are not a PSG because the terms "wealthy" and "affluent"

180. Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019).

181. C-A-, 23 I. & N. Dec. 951, 959–61 (B.I.A. 2006).

182. *Id.* at 957–58.

183. *Id.* at 952.

184. *Id.* at 952–53.

185. *Id.* at 954.

186. *Id.* at 960.

187. A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 73 (B.I.A. 2007) (noting with approval that the immigration judge had correctly applied *Acosta* with a Second Circuit decision without further explanation).

188. *See id.* at 74 (framing *C-A-* as a recent affirmation of "the importance of social visibility as a factor" in determining a PSG, but only a few paragraphs later describing how "requisite" social visibility is to be determined).

standing alone are too "amorphous" to meet the particularity requirement.[189]

These early indications of changes to the BIA's approach to analyzing PSGs crystalized in 2008 in two landmark precedential decisions, *Matter of S-E-G-*[190] and *Matter of E-A-G-*.[191] In *S-E-G-*, the Board rejected the proposed PSGs "Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities"[192] and "the family members of such Salvadoran youth."[193] The case involved two young brothers who refused recruitment efforts by the dangerous MS-13 gang; the gang retaliated by physically assaulting the brothers and threatening to kill them as well as rape and harm their older sister.[194] In its denial, the BIA outlined what members of a proposed PSG would need to show to prove their group had social visibility. "[C]onsidered in the context of the country of concern and the persecution feared," members must share some "discrete" characteristic that sets them apart and indicates they are "'perceive[d] as a group' by society."[195] The Board concluded that there was insufficient evidence showing that those who refuse gang recruitment are socially distinct.[196]

The Board also defined the particularity requirement, explaining that "[t]he essence of the 'particularity' requirement . . . is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons."[197] This means a group must have "particular and well-defined boundaries"[198] and be able to be articulated using terms that are an adequate "benchmark for determining group membership."[199] While the brothers had tried to further narrow their

189. *Id.* at 76.

190. S-E-G-, 24 I. & N. Dec. 579, 582 (B.I.A. 2008).

191. E-A-G-, 24 I. & N. Dec. 591, 595 (B.I.A. 2008).

192. *S-E-G-*, 24 I. & N. at 581.

193. *Id.* at 588.

194. *Id.* at 580.

195. *Id.* at 586–87.

196. *Id.* at 587 ("[Individuals who refuse gang recruitment are] not in a substantially different situation from anyone who has crossed the gang, or who is perceived to be a threat to the gang's interests.").

197. *Id.* at 584 (citing Davila-Mejia v. Mukasey, 531 F.3d 624, 628–29 (8th Cir. 2008)).

198. *Id.* at 582.

199. *Id.* at 584.

PSG based on their gender, lower socioeconomic status, and residence in a gang-controlled area, the BIA found these to be both too amorphous as well as unlikely reasons a gang would use in identifying who to recruit.[200] The BIA found the sister's PSG to be too ill-defined because "family members" was not sufficiently narrow and could encompass extended family relatives.[201]

The BIA took a parallel approach in *Matter of E-A-G-*, holding that Honduran youth who rejected gang recruitment efforts did not constitute a PSG.[202] The proposed group failed the social visibility requirement because the Board concluded there was no distinguishing characteristic that would allow others in Honduras to identify the petitioners as such.[203] Together, these cases essentially found that resistance to gang membership would not satisfy the newly added requirement of particularity and social visibility for individuals seeking asylum based on membership in a PSG.[204]

B. UNCERTAINTY AND CONFUSION: CIRCUIT COURTS SPLIT ON NEW PARTICULAR SOCIAL GROUP REQUIREMENTS

The BIA's decisions in *Matter of S-E-G-* and *Matter of E-A-G-* were met with varying responses from the circuit courts in ensuing litigation. Some circuits applied *Chevron* deference and accepted both new additions to the PSG standard.[205] Most at least deferred to the BIA's addition of the social visibility requirement.[206] However two circuits, the Third and the Seventh, expressly rejected the social visibility requirement as problematic and inconsistent with the BIA's prior case law.[207]

1. Circuits Deferring to the New Additions Under *Chevron*

Even before the BIA made social visibility and particularity official requirements to the PSG standard, the Eleventh and Second Circuits deferred to the addition of these factors.[208] However, neither circuit court's opinion demonstrated a particularly searching analysis of the applicability of *Chevron*. The Eleventh Circuit reviewed the direct

200. *Id.* at 585–86.
201. *Id.*
202. E-A-G-, 24 I. & N. Dec. 591, 595 (B.I.A. 2008).
203. *Id.* at 595–60.
204. *See id.* at 594.
205. *See infra* Part II.B.1.
206. *See infra* Part II.B.1.
207. *See infra* Part II.B.2.
208. Casper et al., *supra* note 44, at 10.

appeal of *Matter of C-A-* and provided a fairly cursory reference to *Chevron*, framing the BIA's action as simply a "further articulation of the *Acosta* formulation" without explaining precisely why this was so.[209] Similarly, in its review of the direct appeal of *Matter of A-M-E- & J-G-U-*,[210] the Second Circuit deferred to social visibility and particularity after citing *Chevron* without further elaboration of precisely how the statutory phrase "particular social group" is ambiguous.[211]

Four circuits—the First, Fifth, Tenth, and Sixth—deferred completely to the requirements of social visibility and particularity, all in cases involving individuals resisting gangs similar to the applicant in *S-E-G-*.[212] The Fourth Circuit deferred only to the particularity requirement but declined to defer to social visibility.[213] Meanwhile, the Ninth Circuit initially deferred to both social visibility and particularity in multiple published opinions[214] but later took up the issue again and explained its views on the requirements in more detail.[215]

In *Mendez-Barrera v. Holder*, the First Circuit considered the proposed group of "young [Salvadoran] women recruited by gang members who resist such recruitment" and accepted the new requirements as "an elaboration of how [the immutable characteristic requirement] operates."[216] The court did not engage in a thorough examination of the meaning of "particular social group," noting that the term is ambiguous because it "is not defined by statute" and quickly pointing out that it had previously upheld the BIA's description of the term under *Acosta*.[217]

In *Orellana-Monson v. Holder*, the Fifth Circuit also determined that the BIA's incorporation of particularity and social visibility was a permissible construction "of a statute that is decidedly vague and

209. Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190, 1197 (11th Cir. 2006); *see also* Jimenez-Perez v. U.S. Att'y Gen., 817 F. App'x 676, 682 (11th Cir. 2020) (citing *Castillo-Arias* without further explaining why the BIA's interpretation of PSGs is owed deference).

210. Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007) (per curiam).

211. *Id.* at 72.

212. Casper et al., *supra* note 44, at 11–12.

213. Martinez v. Holder, 740 F.3d 902, 910 (4th Cir. 2014), *as revised*, (Jan. 27, 2014); Zelaya v. Holder, 668 F.3d 159, 165 n.4 (4th Cir. 2012).

214. *See, e.g.*, Barrios v. Holder, 581 F.3d 849, 855 (9th Cir. 2009); Ramos-Lopez v. Holder, 563 F.3d 855, 859–60 (9th Cir. 2009).

215. Henriquez-Rivas v. Holder, 707 F.3d 1081, 1093 (9th Cir. 2013) (en banc) (holding that the social visibility requirement does not require "on-sight" visibility).

216. Mendez-Barrera v. Holder, 602 F.3d 21, 25–26 (1st Cir. 2010).

217. *Id.* at 25.

ambiguous."[218] The court determined that the first step of *Chevron* had been fulfilled because "'particular social group' is not defined by the INA" but "does however occur in the statute defining the term 'refugee', which the BIA administers."[219] The court went on to find that the BIA had met Step Two of *Chevron* because the additional tests were "not a radical departure from prior interpretation, but rather a subtle shift that evolved out of the BIA's prior decisions on similar cases and is a reasoned interpretation, which is therefore entitled to deference."[220] The court held that the proposed PSG of "men who refused to join the Mara 18 gang" was not particular enough because it encompassed a "wide swath of society," and also failed the social visibility requirement because members of society, including the Mara 18, would not view "non-recruits" as a group but rather only as individuals who go "against the gang's interest."[221]

The Tenth Circuit rejected a proposed particular social group of "women in El Salvador between the ages of 12 and 25 who resisted gang recruitment" and deferred to both additional requirements.[222] The Tenth Circuit's application of *Chevron* was even more cursory than the Fifth Circuit's, noting simply that "Congress did not define the term 'particular social group' in the INA, so we defer to the BIA's interpretation unless it is unreasonable."[223] The court affirmed the BIA, stating that "the particularity requirement flows quite naturally from the language of the statute . . . . It is the BIA's responsibility to give meaning to all of the language of the statute, especially when there is some ambiguity as to its scope and application."[224] The Tenth Circuit also reasoned that as long as the social visibility requirement was not read too narrowly, the BIA's addition of this test was neither "inconsistent" nor "illogical" with the definition set out in *Acosta*.[225]

The Sixth Circuit upheld social visibility and particularity requirements for PSG claims in *Umana-Ramos v. Holder* and rejected a claim by "young Salvadoran males who refused recruitment by 'Maras' [or gangs]."[226] Interestingly, the court did not cite *Chevron* at all. Instead, it cited a previous Sixth Circuit case for its standard of review

218. Orellana-Monson v. Holder, 685 F.3d 511, 521 (5th Cir. 2012).
219. *Id.* at 520.
220. *Id.* at 521.
221. *Id.* at 522.
222. Rivera-Barrientos v. Holder, 666 F.3d 641, 647 (10th Cir. 2012).
223. *Id.* at 648.
224. *Id.* at 649.
225. *Id.* at 652.
226. Umana-Ramos v. Holder, 724 F.3d 667, 670 (6th Cir. 2013).

of "substantial deference . . . to the BIA's interpretation of the INA and accompanying regulations."[227] In its implicit application of *Chevron*, the court stated that "[t]he BIA's definition of 'particular social group' warrants deference" but did not further elaborate on why this was its determination.[228]

The Fourth Circuit deferred to the BIA's addition of particularity citing *Chevron*, after determining that "particular social group" is ambiguous because "neither the relevant statute nor its associated regulations specifically define the term."[229] However, it did not further analyze the BIA's decision and summarily stated that it would defer to the Board's "reasonable interpretation of the term."[230] The court declined to decide whether or not to defer to the requirement of social visibility, citing criticism of the addition by the Seventh Circuit.[231]

The Ninth Circuit in *Ramos-Lopez v. Holder* held that the new definition required *Chevron* deference and was reasonable because the BIA had implicit authority from Congress to resolve any ambiguity since the INA did not define "particular social group."[232] The court affirmed the BIA's decision to reject "young Honduran men who have been recruited by MS-13, but who refuse to join" as a PSG, holding it was reasonable for the BIA not to find this to be a group because gangs target all young men in Honduras, making the proposed PSG insufficiently particular.[233] The proposed group lacked social visibility because only the gang, not the society at large, would recognize individuals who resisted recruitment and then only because the gang would keep tabs on them.[234] A few years later in *Henriquez-Rivas v. Holder*, the Ninth Circuit clarified that it did not define social visibility as "on-sight visibility" and therefore did not find the new requirement inconsistent with BIA precedent.[235]

As these opinions demonstrate, circuit courts that deferred to the BIA's additional requirements after the first round of changes to the

227. *Id.* (quoting Khalili v. Holder, 557 F.3d 429, 435 (6th Cir. 2009)).

228. *Id.* at 671 (citing Castellano-Chacon v. INS, 341 F.3d 533, 546 (6th Cir. 2003)).

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

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

231. *Id.* at 447 n.4 ("Because social visibility is not essential to the result we reach here, we need not separately evaluate that criterion.").

232. Ramos-Lopez v. Holder, 563 F.3d 855, 858–62 (9th Cir. 2009).

233. *Id.* at 861–62.

234. *Id.* at 862.

235. Henriquez-Rivas v. Holder, 707 F.3d 1081, 1088–91 (9th Cir. 2013) (en banc) ("We agree that a requirement of 'on-sight' visibility would be inconsistent with previous BIA decisions and likely impermissible under the statute. However, we do not read *C-A-* and subsequent cases to require 'on-sight' visibility.").

PSG definition did so without rigorously examining the ambiguity of the term "particular social group." This easy deference reflects how, despite the fact that U.S. asylum law is foundationally tethered to international law, courts have been "surprisingly willing to discount international law governing domestic asylum statutes by deferring to expansive executive agency statutory interpretations that do not conform—and in many cases, have made no effort to conform—to limitations created by U.S. international treaty obligations."[236] The frequency with which *Chevron* deference was afforded is even more concerning considering how "the BIA rarely adequately explains its variance in decision making."[237]

2. Circuits Rejecting the Social Visibility Test

Not all of the circuits deferred to the BIA's additions, however. The Seventh Circuit created a circuit split by repudiating *S-E-G-* and its predecessors in *Gatimi v. Holder*,[238] and the Third Circuit later followed suit in the second round of litigation in *Valdiviezo-Galdamez v. Attorney General of U.S.*[239] The Seventh Circuit explicitly rejected the addition of the social visibility requirement, finding "the government's position that an individual's success in hiding a characteristic defeats her claim of membership in a particular social group defined by that characteristic" to be problematic.[240] The court determined that accepting the social visibility requirement would "condone arbitrariness," reasoning that rejecting PSGs based on invisible characteristics would be inconsistent with previous BIA decisions.[241] The court gave three examples of prior groups the BIA had recognized as PSGs that do not have a socially visible characteristic: women within tribes who are at risk of female genital mutilation, homosexuals living in homophobic societies, and former members of the military police.[242] The

236. Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond* Chevron, 60 DUKE L.J. 1059, 1062–63 (2011).

237. 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, 215 (2018).

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

239. Valdiviezo-Galdamez v. Att'y Gen. of U.S. (*Valdiviezo-Galdamez I*), 502 F.3d 285, 290 (3d Cir. 2007); Valdiviezo-Galdamez v. Att'y Gen. of U.S. (*Valdiviezo-Galdamez II*), 663 F.3d 582, 588 (3d Cir. 2011).

240. Casper et al., *supra* note 44, at 13 (citing *Gatimi*, 578 F.3d at 616).

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

242. *Id.* at 615–16 (referring to Kasinga, 21 I. & N. Dec. 357, 365–66 (B.I.A. 1996); Toboso-Alfonso, 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990); and Fuentes, 19 I. & N. Dec. 658, 662 (B.I.A. 1988), respectively).

Seventh Circuit reasoned that because the BIA had never mentioned social visibility in those prior cases, and because it had added social visibility as a requirement without explaining how it was consistent with them, the new definition was inconsistent with the *Acosta* definition.[243]

The Third Circuit also concluded that the BIA's addition of the particularity and social visibility requirements were not entitled to *Chevron* deference.[244] Using similar reasoning to the Seventh Circuit, the court noted that the social visibility test was inconsistent with the BIA's prior cases.[245] The court asserted that the BIA's articulation of social visibility in *Matter of C-A-* limiting PSGs to those defined by "characteristics that were highly visible and recognizable by others in the country in question" was inconsistent with *Kasinga*, *Toboso-Alfonso*, and *Fuentes*.[246] Citing *Gatimi*, the Third Circuit also found that requiring social visibility did not make sense because asylum claims are commonly based on membership in groups characterized by identities that are not externally visible and that its members may go to lengths to keep hidden.[247] The court remanded to the BIA, stating that the addition of the two requirements was "inconsistent with its prior decisions, and the BIA has not announced a principled reason for its adoption of those inconsistent requirements."[248]

In 2013, right before the second round of changes by the BIA regarding its addition of social visibility and particularity as requirements, the Seventh Circuit issued a decision with its most thorough opinion analyzing the PSG standard.[249] In *Cece v. Holder*, the court en banc recognized the petitioner's claim based on membership in the PSG "young Albanian women who live alone"[250] and in doing so "addressed the floodgates concern that seem[ed] to animate the Board's additional restrictions."[251] In analyzing the application of *Chevron*, the court explained that "[w]hether a group constitutes a particular social group under the Immigration and Nationality Act is a question of law that we review *de novo*, while giving *Chevron* deference to the Board's reasonable interpretation set forth in precedential opinions

243. *Id.* at 616.
244. *Valdiviezo-Galdamez II*, 663 F.3d at 604.
245. *Id.* at 603–04.
246. *Id.* at 604.
247. *Id.* at 605 (citing *Gatimi*, 578 F.3d at 615).
248. *Id.* at 608 (internal quotation marks omitted).
249. Cece v. Holder, 733 F.3d 662, 673 (7th Cir. 2013) (en banc).
250. *Id.*
251. Casper et al., *supra* note 44, at 15.

interpreting the statute."[252] Finding that Congress had not spoken directly to the definition of "particular social group," the court went on to discuss its deference to the BIA's interpretation of the term in *Acosta*.[253] The Seventh Circuit noted that its duty was "to uphold the Board's determination if it [wa]s supported by *substantial evidence*—that is, reasonable, substantial, and probative evidence on the record considered as a whole."[254] The court explained that just because individuals share a heightened risk or experience of persecution does not mean they lack other shared protected characteristics, and a group can be defined in part by persecution as long as it is not the only characteristic that defines the group.[255] The court went on to discuss how membership in a PSG is only the first step toward an asylum seeker being granted relief, and that the nexus requirement is "where the rubber meets the road."[256] Therefore, the potential breadth of a PSG does not have a significant bearing on the number of people who actually qualify for asylum since an individual must demonstrate a fear of persecution on account of her protected characteristic.[257] Dispensing forcefully with the idea that overbreadth is a concern in granting asylum, the court emphasized that "[i]t would be antithetical to asylum law to deny refuge to a group of persecuted individuals who have valid claims merely because too many have valid claims."[258]

C. 2014: THE BIA ENTRENCHES CHANGES TO THE *ACOSTA* DEFINITION IN *MATTER OF W-G-R-* AND *MATTER OF M-E-V-G-*

On remand, *Valdiviezo-Galdamez II* was renamed *Matter of M-E-V-G-*,[259] and the BIA accepted supplemental briefs from both parties. The UNHCR submitted an amicus brief on behalf of the petitioner arguing that the additions of particularity and social visibility put the United States at odds with the 1951 Convention and 1967 Protocol by

252. *Cece*, 733 F.3d at 668.

253. *Id.* at 668–69.

254. *Id.* at 669 (emphasis added).

255. *Id.* at 671.

256. *Id.* at 673; *see also supra* note 74 and accompanying text (discussing the nexus requirement).

257. *Cece*, 733 F.3d at 673–74 (discussing how the court analogized this aspect of asylum to Title VII and that under Title VII, the number of people that hypothetically qualify within the protected groups of women or African Americans is very large, but those that have legitimate claims of discrimination is not).

258. *Id.* at 675.

259. M-E-V-G-, 26 I. & N. Dec. 227 (B.I.A. 2014); *see supra* note 246 and accompanying text.

limiting availability of international protection.[260] This supported the petitioner's argument that, to the extent the additional requirements were to exclude particular groups because of their size, it is inconsistent with international refugee agreements.[261] On the other side, the government argued for a new test of "social distinction" saying it was a necessary clarification to *Acosta*.[262] Specifically, it argued that to be recognized as a particular social group, a proposed PSG must demonstrate that "(1) the group is composed of members who share a common, immutable characteristic; (2) the group must be perceived by the society in question as distinct; and (3) the social group must exist independently of the fact of persecution."[263] The government cited to *FCC v. Fox Television Stations, Inc.*[264] as allowing the BIA to depart from its own precedent and argued that it had satisfied the minimum requirement of "demonstrating awareness" of the new elements added to the *Acosta* standard.[265]

On February 7, 2014, the BIA issued its decision.[266] While it conceded some overlap between requirements for particularity and social visibility, rather than removing either requirement the BIA doubled down.[267] The BIA maintained that the additional requirements did not change the *Acosta* immutability requirement but were simply a clarification to increase uniformity.[268] The Board also renamed "social visibility" as "social distinction" following the test proposed by DHS.[269] In defining "social distinction," the Board clarified that there is no requirement of "on-sight" or "ocular" visibility; rather, it requires proposed PSGs be "perceived as a group by society."[270] The BIA's consideration of the international standards the U.S. asylum definition is based on was bare; it stated that the international standards did not control and that its own interpretation "more accurately captures the

260. Brief for the United Nations High Commissioner for Refugees as Amicus Curiae Supporting Respondent at 6–7, Valdiviezo-Galdamez, 26 I. & N. Dec. 227 (B.I.A. 2014) (No. A097-447-286).

261. *Id.*

262. Brief of DHS on Remand from the U.S. Court of Appeals for the Third Circuit, *Valdiviezo-Galdamez*, 26 I. & N. Dec. 227 (No. A097-447-286) [hereinafter Brief of DHS].

263. *Id.* at 8 (footnotes omitted).

264. FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).

265. Brief of DHS, *supra* note 262, at 12 n.14.

266. M-E-V-G-, 26 I. & N. Dec. 227, 227 (B.I.A. 2014).

267. *Id.* at 239–41.

268. *Id.* at 234.

269. *Id.* at 236, 238. The BIA did note, however, that its conception of "social distinction" was not exactly the same as the one DHS proposed in its brief. *Id.* at 236 n.11.

270. *Id.* at 240.

concepts underlying the United States' obligations under the Protocol," again invoking *Chevron* deference.[271]

The same day, the BIA issued a companion case to *M-E-V-G-* which rejected a claim based on membership in the PSG "former members of the Mara 18 gang in El Salvador who have renounced their gang membership."[272] *Matter of W-G-R-* used very similar language to *M-E-V-G-* and concluded the proposed group was too "diffuse, . . . broad[,] and subjective."[273]

D. PRIMARY CRITICISMS OF THE BIA'S DECISIONS IN *M-E-V-G-* AND *W-G-R-*

The critiques of the BIA's 2014 decisions cementing social distinction and particularity as additional requirements center around three main concerns.[274] First, the new test is inconsistent with the statute and disparately restricts access to refugee protections for applicants with PSG claims compared to those with claims based on other protected grounds.[275] Second, it contradicts earlier decisions under the *Acosta* standard without adequately distinguishing or explaining the tensions with the analysis in those cases.[276] And third, the new requirements erect significant new barriers to equity for applicants and create administrability challenges for the immigration courts.[277]

In particular, the new requirements have the effect of preventing recognition of PSGs that may encompass large numbers of people.[278] They also create major practical challenges for asylum seekers, especially those who are pro se.[279] Pro se applicants must now, on their own,

> articulate a group that conforms to the competing social distinction and particularity standards and [] meet the substantial evidentiary burden imposed. An applicant must ensure that her particular social group is well-defined by characteristics that are precise, have a common definition, and are not amorphous, overbroad, diffuse, vague, or subjective. Additionally, the group must be perceived as one by society, and not just by the applicant's persecutors.

271. *Id.* at 247–49.
272. W-G-R-, 26 I. & N. Dec. 208, 209 (B.I.A. 2014).
273. *Id.* at 221.
274. Casper et al., *supra* note 44, at 17–18.
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. *See generally* Bednar, *supra* note 22 (analyzing the restrictively high standards of particularity and social distinction on pro se applicants).

> To do this, the Board suggest[ed] providing expert testimony, country condition reports, and press accounts.[280]

These additions to the PSG standard impermissibly narrowed the PSG definition, making it much more difficult for asylum seekers with PSG claims to succeed and bringing U.S. asylum adjudication further away from congressional intent and internationally recognized norms for protecting individuals fleeing persecution.

E. CIRCUIT COURTS' ANALYSES POST-*M-E-V-G-* AND *W-G-R-*

After *M-E-V-G-* and *W-G-R-*, circuit courts that had previously accepted the three-part PSG definition have so far adopted the new version.[281] However, while the Seventh Circuit has continued to reject any post-*Acosta* additions to the PSG requirements,[282] the Third Circuit accepted the BIA's revised definition in *S.E.R.L. v. Attorney General*.[283]

1. Quick to Say Yes: The Eleventh Circuit Example of Cursory Deference

The Eleventh Circuit's 2016 decision in *Gonzalez v. U.S. Attorney General*[284] provides an example of the sort of analysis circuits have used to justify deference to the BIA post-*M-E-V-G-* and *W-G-R-*. The opinion began by noting that while the Eleventh Circuit's standard is to apply de novo review to BIA decisions, precedential decisions by the Board are entitled to *Chevron* deference.[285] It observed that its own precedent held that the term "particular social group" is ambiguous in the INA and that therefore the BIA's interpretations merited *Chevron* deference.[286] The court briefly mentioned the *Acosta* definition before turning to the new requirements. First, the court observed that "[i]n subsequent decisions [to *Acosta*], the BIA has elaborated that a particular social group must also be 'defined with particularity' and

280. Casper et al., *supra* note 44, at 19–20 (footnotes omitted).

281. *See, e.g.*, Reyes v. Lynch, 842 F.3d 1125, 1135 (9th Cir. 2016) ("We now hold that the BIA's interpretation in *W-G-R-* and *M-E-V-G-* of the ambiguous phrase 'particular social group,' including the BIA's articulation of the 'particularity' and 'social distinction' requirements is reasonable and entitled to *Chevron* deference."); Reyna v. Lynch, 631 F. App'x 366, 370–71 (6th Cir. 2015); Oliva v. Lynch, 807 F.3d 53, 61 (4th Cir. 2015) (citing M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014)); Gonzalez v. U.S. Att'y Gen., 820 F.3d 399, 404–05 (11th Cir. 2016).

282. *See* Gutierrez v. Lynch, 834 F.3d 800, 805 (7th Cir. 2016); R.R.D. v. Holder, 746 F.3d 807, 809–10 (7th Cir. 2014).

283. S.E.R.L. v. Att'y Gen., 894 F.3d 535, 540 (3d Cir. 2018).

284. *Gonzalez*, 820 F.3d at 399.

285. *Id.* at 403–04.

286. *Id.* at 404.

'socially distinct within the society in question'" and cited *M-E-V-G-*.[287] Next, the court cited *W-G-R-* as representing how, "[r]egarding the particularly requirement, the BIA has stated that '[t]he [proposed] group must also be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective.'"[288] Yet without further explanation of its thoughts on either of these new standards, the Eleventh Circuit concluded—at least in regards to particularity—that the BIA's decision deserved *Chevron* deference.[289] Other circuits that have deferred to the 2014 BIA decisions cementing the additional PSG requirements have similarly engaged in rather cursory *Chevron* analysis.

The BIA's additions to the PSG standard have therefore put asylum seekers in an even more vulnerable position than they were in prior to 2007 and caused a circuit split leading to nationwide confusion and inconsistency in asylum adjudication. Critically, the circuits that have deferred to these new additions—with the notable exception of the Seventh Circuit—have done so without rigorous analysis as to whether *Chevron* deference to the BIA's new requirements is appropriate. With key signals from the Supreme Court that it will no longer entertain this kind of reflexive deference, it is now time for the judiciary to reject the particularity and social distinction requirements and extend asylum to those entitled to protection from their persecutors under U.S. and international law.

III. MOVING BEYOND "REFLEXIVE" DEFERENCE: A POTENTIAL AVENUE FOR RE-LITIGATING THE PARTICULAR SOCIAL GROUP STANDARD

Since 2007, the BIA's additional requirements for the PSG definition have created legal and practical challenges for asylum seekers, advocates, and adjudicators. However, the reasoning in recent Supreme Court opinions suggests that, if the Court were to take up a case concerning the circuit courts' deference to the BIA on these additions, the Court would be likely to follow the reasoning of the Seventh Circuit and decline to adopt the particularity and social visibility

287. *Id.*

288. *Id.*

289. *Id.* at 405 ("Because the BIA decision relied on . . . *Matter of W-G-R-* . . . [a] precedential decision[] issued by a three-member panel of the BIA, the BIA's determination . . . is entitled to *Chevron* deference. We do not think either conclusion, either of which is sufficient to deny the relief sought by Gonzalez, is an unreasonable interpretation of 'particular social group' as used in 8 U.S.C. § 1231(b)(3)(A)."). Similarly, the contrast between the Third Circuit's reasoning in *Valdiviezo-Galdamez II* and the court's decision in *S.E.R.L. v. Att'y Gen.* is stark in its minimal analysis.

requirements. This Note argues that, taken together, Justice Kennedy's concurrence in *Pereira v. Sessions* and the restriction of *Auer* deference in *Kisor v. Wilkie* suggest that the time is ripe for an appropriate case to litigate the issue. At the very least, these developments in Supreme Court jurisprudence suggest that circuit courts that have deferred to the new PSG requirements should reconsider whether *Chevron* deference was proper. If they do so, circuit courts should find that the requirements of particularity and especially social distinction are an arbitrary departure from the *Acosta* standard and an unreasonable interpretation of the INA.

A. THE TIME IS RIPE FOR THE SUPREME COURT TO INTERVENE AND RESOLVE THE CIRCUIT SPLIT REGARDING THE PARTICULAR SOCIAL GROUP STANDARD

The recent developments in Supreme Court jurisprudence suggest that it is now even more urgent and appropriate for the Court to resolve the circuit split and ensuing confusion surrounding the particular social group standard. Justice Kennedy's concurrence in *Pereira v. Sessions* calling for a reexamination of "reflexive" *Chevron* deference, cross-referencing opinions of other Justices who have also called the *Chevron* doctrine into question, has gained heightened meaning with the Court's decision in *Kisor v. Wilkie*.[290] Together with the Court's recent cabining of *Auer* deference, these recent actions suggest that the Supreme Court is moving towards higher scrutiny of administrative deference. While *Auer* deference is distinct from *Chevron* in important ways, the reasoning in *Kisor* provides a helpful template for what the Court's approach might be in the statutory context. At the very least, the reasoning in *Kisor* suggests that the Supreme Court now expects that when courts review whether or not to give agency decisions deference, it will expect a robust analysis at Step One of *Chevron*.

This background provides a compelling way forward for advocates in the asylum context and especially regarding PSG analysis. *Chevron* Step One does not ask simply whether the statute is ambiguous but rather focuses on whether or not Congress has spoken to the particular issue at hand.[291] Moving forward, Justice Kennedy's concurrence in *Pereira v. Sessions* and *Kisor v. Wilkie* suggest that a court tasked with determining whether or not a proposed PSG is valid must first identify what the precise question at issue is. Then, it must exhaust all tools of statutory construction to determine whether or not "particular social group" is truly ambiguous within the INA. Finally,

290. *See supra* Part I.E.

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

even if the phrase is ambiguous, the court will need to determine whether, considering the BIA has continued to identify *Acosta* as the term's baseline definition, the additional requirements are truly reasonable and merit *Chevron* deference.

B. THE SUPREME COURT SHOULD FOLLOW THE SEVENTH CIRCUIT'S PERSUASIVE PARTICULAR SOCIAL GROUP ANALYSIS BECAUSE IT EMPLOYS RIGOROUS *KISOR*-ESQUE ANALYSIS

As discussed previously, most circuits have deferred to either the BIA's first or second round of additions to the *Acosta* definition.[292] However, there is good reason to believe that if the Supreme Court granted certiorari to a case challenging these additions, it would be inclined to adopt reasoning similar to the Seventh Circuit's. While a review of the deferring circuit court opinions demonstrates characteristics that Justice Kennedy's *Pereira* concurrence was expressly wary of, the Seventh Circuit in *Cece v. Holder* looks most like the rigorous analysis the Supreme Court is now likely to require after *Kisor v. Wilkie*.[293] In *Cece v. Holder*, the court did not assume that the term "particular social group" is ambiguous but rather undertook its own analysis of the term before concluding that Congress had not defined it.[294] It then reasoned that the BIA's interpretation of the term in *Acosta* was reasonable and therefore meritorious of *Chevron* deference.[295] However, in stark contrast to its sister circuits that deferred, the Seventh Circuit in analyzing the additions of particularity and social visibility closely examined whether or not they made sense within the BIA's own definition and the larger purpose of the INA.[296] With *M-E-V-G-* and *W-G-R-* cementing these requirements into the BIA's understanding of the PSG definition for the foreseeable future, the Supreme Court adopting *Kisor*-type scrutiny should find that "the BIA is not providing a reasoned explanation, nor is it adequately explaining its decision, rather it is 'rewriting prior decisions so they appear to conform to the new requirements.'"[297]

One pertinent counterargument to this proposal is that Chief Justice Roberts's concurrence pointedly states that *Kisor* does not change

292. *See supra* Part II.

293. *See supra* Parts I.E, II.B.2.

294. Cece v. Holder, 733 F.3d 662, 673 (7th Cir. 2013) (en banc).

295. *Id.*

296. *Id.* at 672–74.

297. Quintero, *supra* note 237 (citing Petition for Writ of Certiorari at 28, Reyes v. Sessions, 138 S. Ct. 736 (2018) (mem.) (No. 17-241)).

the Court's interpretation of *Chevron* deference.[298] According to the Chief Justice, *Auer* raises different issues than *Chevron*.[299] On its face, this may seem to undercut the argument that the reasoning in *Kisor* could be applied more broadly. However, closer examination reveals that the essential root of the plurality's analysis in *Kisor* combined with the Supreme Court's trend toward limiting reflexive *Chevron* deference suggests that the dicta in Chief Justice Roberts's concurrence does not have any real teeth. Justice Kagan went to great lengths to examine the conditions under which *Auer* deference is proper as a way to demonstrate the plurality's position that the doctrine has not always been applied with sufficient rigor, and perhaps even too reflexively.[300] Additionally, the Court's chidings about how and when *Auer* should be applied could easily be said about *Chevron* deference.[301] Most importantly, "[i]t seems unlikely that a genuine ambiguity is ascertainable under *Chevron* more readily than a genuine ambiguity under *Auer*." As Professor Matthew Melone aptly asks, "Why should a court ignore its full interpretative toolkit in . . . [*Chevron*] but not . . . [*Auer*]?"[302] While Chief Justice Roberts may have been attempting to stem any immediate post-*Kisor* flow of challenges to *Chevron*, neither his concurrence nor the plurality opinion expresses any convincing reasoning that agency interpretations of statutes should be examined any less rigorously than agency interpretations of their own regulations. Therefore, it would be completely appropriate for the Supreme Court to resolve the circuit split regarding the particular social group standard by adopting the reasoning in *Cece v. Holder*, which determined after a searching statutory analysis of the INA and the BIA's prior case law that the post-*Acosta* additions to the PSG definition did not merit *Chevron* deference.

C. EVEN IF THE SUPREME COURT DOES NOT INTERVENE, LOWER COURTS SHOULD OVERTURN PRIOR RULINGS THAT REFLEXIVELY DEFERRED TO THE NEW REQUIREMENTS

If the Supreme Court does not take up resolving the circuit split regarding the PSG standard, lower courts should reconsider their prior decisions. Immigration advocates can develop new arguments based on the reasoning in *Kisor v. Wilkie* to demand the circuit courts

298. Kisor v. Wilkie, 139 S. Ct. 2400, 2425 (2019) (Roberts, C.J., concurring).

299. *Id.*

300. *Id.* at 2414–15.

301. Matthew A. Melone, Kisor v. Wilkie*:* Auer *Deference Is Alive but Not So Well. Is* Chevron *Next?*, 12 NE. U. L. REV. 581, 627 (2020).

302. *Id.*

undertake a more searching analysis of the statutory text prior to concluding the BIA deserves *Chevron* deference. For example, advocates in the Eleventh Circuit might now challenge *Gonzalez v. U.S. Attorney General*[303] or other opinions citing to its holding on the basis that it was too quick to assume ambiguity as to the specific question being reviewed and thereby push the courts to provide further analysis and explanation if they accept or reject the new standard. Fresh challenges to the recent changes to the PSG standard, all too easily adopted by the circuit courts throughout the past decade, could eventually lead to much needed clarification and standardization making asylum adjudication more equitable and accessible across the circuits.

D. A RETURN TO *ACOSTA*?

Courts engaging in more directed determinations of the meaning of "particular social group" will be able to move away from operating "under the mistaken perception that they are bound . . . to defer to the BIA's construction of U.S. refugee statutes, regardless of whether that construction is consistent with international law."[304] This is precisely the kind of reflexive deference that goes against Congress's purpose in its passage of the Refugee Act of 1980, which stated its desire to bring domestic asylum law into conformance with international obligations clearly and unambiguously.[305] Applying the more rigorous analysis of *Kisor v. Wilkie* to the context of *Chevron* deference, the Supreme Court or circuit courts could hypothetically determine that the term is not ambiguous at all. However, considering the role and establishment of the *Acosta* definition—and the lack of a circuit split as to its reasonableness—this version of the PSG definition would likely pass muster.

A challenge to the new PSG standard could be framed as examining the precise question of whether the *Acosta* immutability definition and the purpose of the INA *require* an applicant to provide evidence that their PSG is recognized in articulable terms in their home society in order to be *considered* for protection from persecution. This narrow question contesting the addition of the social distinction requirement could allow litigation that would get at the root of concerns expressed by advocates that "[r]ather than clarifying the particular social group standard, the BIA's decision in *M-E-V-G-* creates a game of semantics

303. Gonzalez v. U.S. Att'y Gen., 820 F.3d 399 (11th Cir. 2016).

304. Farbenblum, *supra* note 236, at 1064.

305. *Id.* at 1069 (noting that "the Refugee Act is one of a small number of 'incorporative statutes' that directly incorporate international treaty language and concepts into U.S. domestic law").

that requires an applicant to navigate the fine line between social distinction and particularity."[306] This does not mean that the BIA might not further elaborate a standard beyond or different from *Acosta* in the future that might survive more rigorous *Chevron* review. However, should the Supreme Court take up this circuit split and subject the PSG standard to a properly (re)calibrated *Chevron* analysis, it is possible and even likely that it would find the current inclusion of particularity and social distinction do not pass muster.

CONCLUSION

The BIA's additions to the particular social group standard between 2007 and 2014 created inconsistency and confusion in the adjudication of asylum claims. This has erected additional barriers for asylum seekers, especially those that are pro se, making it more likely for a court to reject their asylum applications before considering the substance of their claims. The Supreme Court's decision in *Kisor v. Wilkie*, Justice Kennedy's concurrence in *Pereira v. Sessions*, and the calls by various Justices to reexamine the deference afforded to administrative agencies under the *Chevron* doctrine suggest a new way forward for settling this important circuit split in asylum law. The Supreme Court should take up this issue and, in light of its recent jurisprudence, follow the reasoning of the Seventh Circuit declining to defer to the BIA's addition of social distinction and particularity to the PSG definition. If the Supreme Court continues to decline opportunities to resolve the circuit split surrounding the PSG standard, circuit courts should reexamine their decisions to determine whether they deferred too reflexively to the BIA's additions. Until the uncertainty and inconsistency of the PSG standard is resolved, asylum seekers with valid claims will continue to face the possibility that they will not be granted protection from persecution.

306. Bednar, *supra* note 22, at 357.