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United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

In the matter of:

Mauricio Edgardo Valdiviezo-Galdamez

In removal proceedings

**THE UNITED NATIONS HIGH COMMISSIONER FOR
REFUGEES' *AMICUS CURIAE* BRIEF
IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICUS CURIAE*

The United Nations High Commissioner for Refugees (“UNHCR”) has a direct interest in this matter as the organization entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees, and, together with Governments, for seeking permanent solutions for their problems. Statute of the Office of the UNHCR ¶ 1(a), U.N. Doc. A/RES/428(v) (Dec. 14, 1950) (“UNHCR Statute”).¹ According to its Statute, UNHCR fulfills its mandate by, *inter alia*, “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.” *Id.* ¶ 8. UNHCR’s supervisory responsibility is also reflected in the Preamble and Article 35 of the *1951 Convention Relating to the Status of Refugees*, July 28, 1951, 19 U.S.T. 6259 (“*1951 Convention*”)² and Article II of the *1967 Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 606 U.N.T.S. 267 (“*1967 Protocol*”),³ which obligate States to cooperate with UNHCR in the exercise of its mandate and to facilitate its supervisory role.

UNHCR exercises its supervisory responsibility in part by issuing interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the *1951 Convention*. The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, U.N. Doc. HCR/IP/4/Eng/ REV.1 (1979,

¹ Available at <http://www.unhcr.org/refworld/docid/3ae6b3628.html> (last visited Aug. 9, 2012).

² Available at <http://www.unhcr.org/3b66c2aa10.html> (last visited Aug. 9, 2012).

³ Available at <http://www.unhcr.org/3b66c2aa10.html> (last visited Aug. 9, 2012).

re-edited Jan. 1992; reissued Dec. 2011) (“*Handbook*”) ⁴ represents the first comprehensive example of such guidance and has subsequently been complemented by a number of UNHCR *Guidelines on International Protection* (“*Guidelines*”),⁵ including on “Membership of a Particular Social Group.”

UNHCR has won two Nobel Peace Prizes for its work and currently cares for over 33 million refugees and uprooted people in 125 countries. The views of UNHCR are informed by more than six decades of experience supervising the treaty-based system of refugee protection established by the international community. UNHCR’s interpretation of the provisions of the *1951 Convention* and its *1967 Protocol* are both authoritative and integral to promoting consistency in the global regime for the protection of refugees. Accordingly, the Supreme Court has “consistently turned [to UNHCR] for assistance in interpreting our obligations under the Refugee Convention.” *N-A-M v. Holder*, 587 F.3d 1052, 1061-62 (10th Cir. 2009) (Henry, J., concurring) (per curiam) (citing cases).

UNHCR has a direct interest in this matter, which involves the definition of the term “membership of a particular social group” found in the *1951 Convention* and its *1967 Protocol* and as implemented in United States law at section 101(a)(42) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101(a)(42) (2006). The proper interpretation of this term presents questions involving the status of refugees within the mandate of UNHCR. It is of national significance and has been the subject of a number

⁴ Available at <http://www.unhcr.org/refworld/docid/4f33c8d92.html> (last visited Aug. 9, 2012). See *infra* Part II for a discussion of the *Handbook*.

⁵ UNHCR issues the *Guidelines* pursuant to its mandate, as contained in the UNHCR Statute, in conjunction with Article 35 of the *1951 Convention*. See *infra* Part II for a discussion of the *Guidelines*.

of high-profile immigration appeals in which UNHCR has participated as *amicus curiae*, including this case.⁶

Consistent with its approach in other cases, UNHCR submits this brief *amicus curiae* to provide guidance to the Board of Immigration Appeals (“Board”) on the relevant international standards and not to offer an opinion directly on the merits of Respondent’s claim.

SUMMARY OF THE ARGUMENT

“Membership of a particular social group” is one of the five protected grounds for refugee protection. United States national law incorporates the international refugee definition, including the “membership of a particular social group” ground for protection. Until recently, the Board largely defined this term by reference to a “protected” characteristic that is either immutable or is fundamental to one’s identity or conscience, an approach first articulated in the seminal decision in *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985), *overruled in part on other grounds*, *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). In recent years, however, the Board has adopted an “*Acosta*-and” approach, which requires that members of social groups *also* demonstrate “social visibility” and “particularity.”

In imposing the “social visibility” and “particularity” requirements, the Board cited for support the UNHCR *Guidelines on International Protection: “Membership of a Particular Social Group,” Within the Context of Article 1A(2) of the 1951 Convention*

⁶ See *Gonzalez-Zamayo v. Holder* (No. 09-3514) (2d Cir.); *Valdiviezo-Galdamez v. Holder* (No. 08-4564) (3d Cir.); *S.E.T.-E. v. Holder* (No. 09-2161) (3d Cir.); *Orellana-Monson v. Holder* (No. 08-60394) (5th Cir.); *Doe v. Holder* (No. 09-2852) (7th Cir.); *Gaitan v. Holder* (No. 10-1724) (8th Cir.); *Henriquez-Rivas v. Holder* (No. 09-71571) (9th Cir.); *Mercado v. Holder* (No. 10-71311) (9th Cir.); *Rivera-Barrientos v. Holder* (No. 10-9527) (10th Cir.).

and/or its 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) (“*Social Group Guidelines*”).⁷ See, e.g., *Matter of C-A-*, 23 I. & N. Dec. 951, 960 (BIA 2006); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 586 (BIA 2008). However, the Board’s interpretation of the *Social Group Guidelines* is incorrect. Requiring “social visibility” and “particularity” to identify a social group does not accord with the *Guidelines* or with the text, object, or purpose of the 1951 Convention and its 1967 Protocol.

The Board’s interpretation conflicts with the *Guidelines* and the case law from a variety of jurisdictions in at least two respects. First, drawing on this jurisprudence, the *Social Group Guidelines* identify that there are two separate, *alternative* approaches to defining a particular social group consistent with the 1951 Convention and 1967 Protocol: the “protected characteristics” approach and the “social perception” approach. The *Guidelines* do not require applicants to meet both approaches to establish a particular social group. Second, the “social perception” approach in the *Guidelines* does not require that members of a particular social group be “visible” to the naked eye as the term has been mistakenly interpreted to mean, but rather looks to whether there is an awareness of the existence of such a group within the society. Third, the Board’s “particularity” requirement serves no useful purpose, as it is already subsumed within both the “protected characteristics” and “social perception” approaches.

While UNHCR welcomes the Government’s rejection of the requirement that the characteristic literally be *visible* to the eye, in all other respects, the Government’s proposed “social distinction” test merely merges the Board’s dual “social visibility” and “particularity” tests into one test with two requirements. As such, just like the Board’s

⁷ Available at <http://www.unhcr.org/refworld/docid/3d36f23f4.html> (last visited Aug. 9, 2012).

current standard, the Government’s “social distinction” test requires applicants to satisfy both the “protected characteristics” and “social perception” approaches to determining membership of a particular social group. And just like the current standard, the “social distinction” test maintains the unnecessary “particularity” requirement. Both the existing standard and the Government’s proposed test are inconsistent with the *Social Group Guidelines* and the refugee definition they interpret.

UNHCR submits that the Board should return to its well-respected and widely adopted framework in *Acosta*. The Board’s approach in *Acosta* has been highly influential. It was cited with approval and largely followed in the Canadian Supreme Court’s *Ward* decision⁸ and has been widely cited in cases arising in other jurisdictions as well.⁹ Retaining the “*Acosta*-and” approach—or adopting the Government’s reformulated “social distinction” test—may result in refugees being erroneously denied international protection and subjected to refoulement—return to a country where their “life or freedom would be threatened”—in violation of the United States’ fundamental obligations under the *1951 Convention* and the *1967 Protocol*.

⁸ *Canada v. Ward*, [1993] 2 S.C.R. 689 (Can.), available at <http://www.unhcr.org/refworld/docid/3ae6b673c.html> (last visited Aug. 9, 2012).

⁹ See, e.g., *Islam v. Secretary of State for the Home Department and Regina v. Immigration Appeal Tribunal and Another, Ex Parte Shah*, [1999] 2 A.C. 629, available at <http://www.unhcr.org/refworld/docid/3dec8abe4.html> (last visited Aug. 9, 2012); *Secretary of State for the Home Department v. K and Fornah v. Secretary of State for the Home Department*, [2006] UKHL 46, [2007] 1 A.C. 412, available at <http://www.unhcr.org/refworld/docid/4550a9502.html> (last visited Aug. 9, 2012).

ARGUMENT

I. THE UNITED STATES IS BOUND BY THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES.

The *1951 Convention* and its *1967 Protocol* are the key international instruments governing the protection of refugees and address who is a refugee, the rights and responsibilities, and the legal obligations of States. The *1967 Protocol* binds States Parties to comply with the substantive provisions of Articles 2 through 34 of the *1951 Convention* with respect to “refugees” as defined in Article 1A(2) of the Convention. *1967 Protocol* Art. I ¶ 1. The *1967 Protocol* also removes from the Convention refugee definition in Article 1 the geographical and temporal limitations to events that occurred in Europe before January 1, 1951, thus universalizing the refugee definition. *Id.* ¶¶ 2-3. The core of both the *1951 Convention* and its *1967 Protocol* is the obligation to provide protection to refugees and to safeguard the principle of non-refoulement, which is the obligation not to return a refugee to any country where she or he would face danger.¹⁰ In 1968, the United States acceded to the *1967 Protocol*, see *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987), thereby binding itself to the international refugee protection regime and the definition of a refugee in the *1951 Convention*.

Congress enacted the Refugee Act of 1980 expressly to “bring United States refugee law into conformance with the [*1967 Protocol*].” *Id.* (citing H.R. Conf. Rep. No. 96-781, at 19 (1980); H.R. Rep. No. 96-608, at 9 (1979); S. Rep. No. 96-256, at 4 (1979)); see also *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999). In fulfilling the requirements of the *1967 Protocol*, Congress provided a path for refugees to seek and receive protec-

¹⁰ The prohibition against “refoulement,” a cornerstone of refugee protection, is addressed under Article 33 of the *1951 Convention* and is incorporated by reference in the *1967 Protocol* under Article I(1).

tion in the United States. 8 U.S.C. §§ 1101(a)(42) & 1158 (2006). Congress also obligated the United States to refrain from returning refugees to a place where they would face danger so as to comply with the fundamental principle of non-refoulement. See *INS v. Stevic*, 467 U.S. 407, 421 (1984) (citing 8 U.S.C. § 1253(h) (1976), now codified at 8 U.S.C. § 1231(b)(3) (2006)).

The Refugee Act thus serves to bring the United States into compliance with its international obligations under the *1967 Protocol*, and through this *Protocol* the *1951 Convention*. It should thus be interpreted and applied in a manner consistent with those instruments. More generally, courts have a responsibility to construe federal statutes in a manner consistent with United States treaty obligations to the fullest extent possible. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained . . . by the courts . . . of appropriate jurisdiction”).

The *1951 Convention* and its *1967 Protocol*, as well as the 1980 Refugee Act, define “refugee” to include any person who has a well-founded fear of persecution due to “membership of a particular social group.” *1951 Convention* art. 1A(2) as amended by *1967 Protocol* art. I ¶¶ (2)-(3); 8 U.S.C. § 1101(a)(42) (only changing the “of” to “in,” such that it reads “membership *in* a particular social group” (emphasis added)).

II. UNHCR PROVIDES AUTHORITATIVE GUIDANCE IN INTERPRETING THE REFUGEE DEFINITION INTERNATIONALLY AND IN THE UNITED STATES.

Over the 60 years of its existence, UNHCR has issued authoritative guidance on the interpretation of the refugee definition. In particular, UNHCR’s *Handbook* is recog-

nized internationally and in the United States as an important source of interpretation of international refugee law.

The *Handbook* was prepared by UNHCR in 1979 at the request of Member States of the Executive Committee of the High Commissioner's Programme, which then and now includes the United States, to provide guidance to governments in applying the terms of the *1951 Convention* and *1967 Protocol*. The Supreme Court has determined that, although the UNHCR *Handbook* is not legally binding on United States officials, it nevertheless provides "significant guidance" in construing the *1967 Protocol* and in giving content to the obligations established therein. See *Cardoza-Fonseca*, 480 U.S. at 439 n.22; see also *Matter of S-P-*, 21 I. & N. Dec. 486, 492 (BIA 1996) (noting that in adjudicating asylum cases the Board must be mindful of "the fundamental humanitarian concerns of asylum law" and referencing the UNHCR *Handbook*).

As discussed below, UNHCR has issued *Guidelines on International Protection* as a complement to the interpretative guidance in the *Handbook*.¹¹

A. The UNHCR *Guidelines on International Protection* Are Authoritative Guidance in Interpreting the *1951 Convention* and *1967 Protocol* Refugee Definition in the United States Context.

UNHCR began issuing *Guidelines on International Protection* in 2002,¹² as envisaged under the 2002 UNHCR Agenda for Protection,¹³ which was endorsed by the Ex-

¹¹ The *Handbook* was reissued in December 2011 and now includes all eight of the current *Guidelines on International Protection*.

¹² Pursuant to its statutory mandate, UNHCR issues *Guidelines on International Protection* to provide legal interpretative guidance for governments, legal practitioners, decision-makers, the judiciary, and UNHCR staff who conduct refugee status determinations. To date UNHCR has issued eight *Guidelines*, available at <http://www.unhcr.org/refworld/docid/4f33c8d92.html>, at 77-170 (last visited Aug. 9, 2012).

ecutive Committee¹⁴ and the UN General Assembly.¹⁵ These *Guidelines* are complementary to the UNHCR *Handbook* and draw upon applicable international legal standards and State practice and jurisprudence, and are often issued at the request of States. The *Social Group Guidelines*, which were issued at the request of States, offer a detailed interpretation of the “membership of a particular social group” protection ground, and was one of the first of the *Guidelines* to be published.

By design, the *Social Group Guidelines* provide legal interpretive guidance for governments, legal practitioners, and decision-makers, including the judiciary. Courts have expressly relied on the *Social Group Guidelines* in assessing refugee claims based on a particular social group and have recognized that UNHCR’s “analysis provides significant guidance for issues of refugee law.” *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005).

B. The *Social Group Guidelines* Interpret the Term “Membership of a Particular Social Group” To Include Two Alternative Approaches.

Of the five grounds for refugee protection, that pertaining to “membership of a particular social group” has posed the greatest interpretive challenges. Neither the *1951 Convention* nor the *1967 Protocol* provides a definition for this category, and the drafting

¹³ UNHCR, *Agenda for Protection [Global Consultations on International Protection/General]*, Goal 1, 26 June 2002, A/AC.96/965/Add.1, at 5, available at <http://www.unhcr.org/refworld/docid/3d4fd0266.html> (last visited Aug. 9, 2012).

¹⁴ UNHCR Executive Committee, *General Conclusion on International Protection*, No. 92 (LIII) – 2002, 8 October 2002, available at <http://www.unhcr.org/refworld/docid/3dafdce27.html> (last visited Aug. 9, 2012).

¹⁵ UN General Assembly, Office of the United Nations High Commissioner for Refugees, *Resolution Adopted by the General Assembly*, 6 February 2003, A/RES/57/187, ¶ 6, available at <http://www.unhcr.org/refworld/docid/3f43553e4.html> (last visited Aug. 9, 2012).

history does not specify its exact meaning.¹⁶ Still, over time and as reflected in the *Social Group Guidelines*, expert commentary and international jurisprudence have clarified the meaning of this term. UNHCR's *Social Group Guidelines* highlight that there are two dominant approaches to defining a social group in national jurisprudence: "protected characteristics" and "social perception." *Social Group Guidelines* ¶¶ 6-7.

As the *Social Group Guidelines* articulate, the "protected characteristics" approach, embodied by the Board's seminal and influential decision in *Matter of Acosta*, involves assessing whether the common attribute of a group is either: 1) innate and thus unchangeable; 2) based on a past temporary or voluntary status that is unchangeable because of its historical permanence; or 3) so fundamental to human dignity that group members should not be compelled to forsake it. *Id.* ¶ 6.

The "social perception" approach, established in *Applicant A and Another v. Minister for Immigration & Ethnic Affairs*, 190 C.L.R. 225, 226 (1997),¹⁷ by the High Court of Australia, "examines whether or not a group shares a common characteristic which

¹⁶ The term "membership of a particular social group" was added near the end of the deliberations on the draft *1951 Convention*; all that the drafting records reveal is the Swedish delegate's observation: "[E]xperience has shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included." Summary Record of the Third Meeting, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, at 14, U.N. Doc. A/Conf.2/SR.3 (July 3, 1951); see also *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 594 (3d Cir. 2011) (reciting this history).

¹⁷ Available at <http://www.unhcr.org/refworld/docid/3ae6b7180.html> (last visited Aug. 9, 2012).

makes them a *cognizable* group or *sets them apart* from society at large.” *Social Group Guidelines* ¶ 7 (emphases added).¹⁸

UNHCR concluded that these two approaches needed to be reconciled and thus adopted a standard definition that accommodates both as *alternative* approaches:

[A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. 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.

Id. ¶ 11. Thus, the *Guidelines* make clear that only one of the two approaches must be met to satisfy the social group definition.

Until recently, the Board’s interpretation of membership of a particular social group conformed to UNHCR’s authoritative view. In *Matter of Acosta*, 19 I. & N. Dec. at 233, the Board established a definition of membership of a particular social group that guided Immigration Judges (“IJs”), the Board, and the courts of appeals for over twenty years. That definition provides that membership of a particular social group refers to:

a group of persons all of whom share a common, immutable characteristic [that] . . . might be an innate one such as sex, color, or kinship ties, or . . . a shared past experience such as former military leadership or land ownership. . . . The [characteristic] . . . must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

¹⁸In civil law jurisdictions, the social group ground is generally less well developed, but both the protected characteristics and the social perception approaches have received mention. *Social Group Guidelines* ¶ 8.

Id. Like the “protected characteristics” approach in the *Social Group Guidelines*, the *Acosta* standard assesses the immutability or fundamentality of the characteristic without requiring more.

III. THE BOARD’S SOCIAL VISIBILITY AND PARTICULARITY APPROACH IS INCONSISTENT WITH THE OBJECT AND PURPOSE OF THE 1951 CONVENTION AND 1967 PROTOCOL AND MISCONSTRUES THE SOCIAL GROUP GUIDELINES.

The Board recently diverged from its approach in *Acosta*, creating an “*Acosta*-and” standard that requires an asylum-seeker also to show that the group’s members have “social visibility” and can be defined with sufficient “particularity.” *See, e.g., Matter of S-E-G-*, 24 I. & N. Dec. at 582. As set forth below, however, the imposition of these additional requirements is contrary to the object and purpose of the *1951 Convention* and *1967 Protocol* as well as to the express interpretation in the *Social Group Guidelines*.

A. “Protected Characteristics” and “Social Perception” Are Alternative Approaches to Defining Social Group Membership and Not Dual Requirements.

1. Under the *Social Group Guidelines*, “Protected Characteristics” and “Social Perception” Are Alternative Approaches.

In UNHCR’s view, the only requirements to establish a “particular social group” are those recited in the “protected characteristics” approach or, *only in the event these are not met*, those in the “social perception” approach. To require more would likely lead to erroneous decisions and a failure to protect refugees in contravention of the *1951 Convention* and its *1967 Protocol*. As articulated in the *Social Group Guidelines*, the first step in any social group analysis is to determine whether the group in question is based on a shared immutable or fundamental characteristic. If, at the end of this assessment, the group is found *not* to share a characteristic that can be defined as either innate or funda-

mental, “further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society.” *Social Group Guidelines* ¶ 13. This second inquiry is an alternative to be considered only if it is determined that the group characteristic is neither immutable nor fundamental. In other words, if the defining characteristic of a social group is determined to be either innate or fundamental to an individual’s identity, conscience, or human rights, membership of a particular social group has been established.

Inexplicably, and without justification, recent Board decisions have turned this disjunctive into a conjunctive. Put differently, “*Acosta-or*” has become “*Acosta-and*.” See *Valdiviezo-Galdamez*, 663 F.3d at 615 n.4 (Hardiman, J., concurring). UNHCR has never endorsed this conjunctive approach and the *Social Group Guidelines* expressly articulate a protected characteristics or “*Acosta-or*” approach. This newly restrictive view is inconsistent with the *1951 Convention* and the *1967 Protocol*, and it inappropriately limits the ability of individuals in need of international protection to receive it. It likewise contravenes the purpose of the Refugee Act of 1980, which was to ensure that the United States fulfills its obligations under the *1951 Convention* and *1967 Protocol*. Under the Board’s recent interpretation, the United States would provide *less*—not equal—protection than that established under international standards.

Contrary to its current litigation position, discussed in more detail at Part IV below, the Government previously recognized the problems of an *Acosta-and* standard. It stated that, while factors such as “social perceptions may provide evidence of the immutability or fundamentality of a characteristic,” imposing additional requirements beyond the protected characteristics assessment “departs from the sound doctrine the Board established nearly 20 years ago in *Acosta*, and *there is no reason for such a departure*.”

Department of Homeland Security's Position on Respondent's Eligibility for Relief, at 25 (Feb. 19, 2004) (“*DHS Position in R-A-*”), submitted in *Matter of R-A-*, 23 I. & N. Dec. 694 (A.G. 2005) (emphasis added).¹⁹

2. The Conjunctive Standard Conflicts with the Standard Generally Applied in Other Common Law Jurisdictions.

Common law countries with well-developed bodies of refugee law have generally endorsed *Acosta's* “protected characteristics” test for membership of a particular social group. The seminal Canadian decision *Ward*, [1993] 2 S.C.R. at 739, approves of *Acosta* as a “good working rule” that takes into account the “general underlying themes . . . that form the basis for the international refugee protection initiative” and adopts a very similar approach. In the United Kingdom, the House of Lords has also endorsed the “*eiusdem generis* approach so cogently stated in *Acosta*,”²⁰ and has explicitly rejected the use of a conjunctive approach to defining membership of a particular social group.²¹ And in New Zealand, the Refugee Status Appeals Authority has similarly adopted *Acosta* as its guide. Refugee Appeal No. 1312/93 *Re GJ* [1995], 1 NLR 387 (N.Z.).²²

3. The European Union Qualification Directive Does Not Mandate a Conjunctive Standard.

Presumably because the Government’s proposed approach is not in accordance with the *Social Group Guidelines*, the Government chose to ignore the *Guidelines* in its brief to the Board in this case. Instead, the Government invokes a Directive of the Euro-

¹⁹ Available at http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf (last visited Aug. 9, 2012).

²⁰ *Islam*, [1999] 2 A.C. at 643.

²¹ See *Fornah and K*, [2006] UKHL 46.

²² Available at <http://www.unhcr.org/refworld/docid/3ae6b6938.html%C2%A0> (last visited Aug. 9, 2012).

pean Union for the proposition that, in Europe, “in order to be considered a ‘particular social group,’” members must share an immutable characteristic “*and . . .* ‘a distinct identity in the relevant country.’” Gov’t Br. at 11 (quoting European Union (“EU”) Council Directive 2004/83/EC, *Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Person as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, Art. 10.1(d) (2004) (“Qualification Directive”)).²³

While the Qualification Directive appears to support the proposition that a conjunctive test may be permitted, there is as yet no definitive interpretation of this provision at the European level or ruling by the Court of Justice of the European Union, and a number of States reject such an interpretation.²⁴ In particular, the Qualification Directive also makes clear that it is establishing only ‘minimum standards’, as indicated in its title and reiterated in the Directive itself.²⁵ *See, e.g.*, Qualification Directive, Preamble ¶ 6 &

²³ Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:304:0012:0023:EN:PDF> (last visited Aug. 9, 2012). As the Government noted in a supplemental brief, on December 20, 2011, the European Parliament and the European Council published Directive 2011/95/EU on *standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted* (2011) (“2011 Directive”), available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:01:EN:HTML> (last visited Aug. 9, 2012). The 2011 Directive retains the previous definition of “particular social group.” 2011 Directive Art. 10.1(d). Like the 2004 Qualification Directive, the 2011 Directive provides that “Member States may introduce or retain more favourable standards for determining who qualifies as a refugee.” Art. 3; *see also* Preamble ¶ 14.

²⁴ *See, e.g.*, Michelle Foster, *The ‘Ground with the Least Clarity’: A Comparative Study of Jurisprudential Developments relating to ‘Membership of a Particular Social Group’*, at 17 n.98 (2012), available at <http://www.unhcr.org/4f7d8d189.pdf> (last visited Aug. 9, 2012).

²⁵ The US Government also acknowledges this “minimum standards” aspect of the Directive in its brief to the Board. Gov’t Br. 11 n.13.

Art. 1 (“The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals . . . as refugees . . .”). EU member states retain the power to “introduce or maintain more favorable provisions.” Preamble ¶ 8; *see also* Art. 3 (stating that “Member States may introduce or retain more favourable standards for determining who qualifies as a refugee”). In other words, the Qualification Directive’s approach to defining “membership of a particular social group” operates as a floor, not a ceiling. The House of Lords of the United Kingdom²⁶ has interpreted the Qualification Directive as *not* imposing a dual requirement on Member States:

If . . . this article were interpreted as meaning that a social group should only be recognised as a particular social group for purposes of the Convention if it satisfies the criteria in both of sub-paragraphs (i) and (ii), then in my opinion it propounds a test more stringent than is warranted by international authority.

Fornah and K, [2006] UKHL 46 ¶ 16 (addressing Article 10(d), which discusses the criteria for assessing a “particular social group”). UNHCR has specifically criticized the appearance of a dual approach reflected in the Qualification Directive. *See, e.g., UNHCR Annotated Comments on the EC Council Directive 204/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304/12 of 30.9.2004)*, at 23 (2005) (stating that the results under the “protected characteristics” and “social perception” approaches “may frequently converge [but] this is not always the case. To avoid any protection gaps,

²⁶ As of October 1, 2009, the United Kingdom Supreme Court replaced the House of Lords as the highest court and the House of Lords no longer has judicial decision-making authority.

UNHCR therefore recommends that Member States reconcile the two approaches to permit alternative, rather than cumulative, application of the two concepts.”).²⁷

B. There Is No Requirement Under the Protected Characteristics or the Social Perception Approach that a Particular Social Group Be Visible.

The current approach is inconsistent with the *Social Group Guidelines* for an additional, independent reason. The *Guidelines* do not set forth any “social visibility” requirement. In cases where no “protected characteristic” is identified and the “social perception” approach is thus invoked, the analysis focuses on whether members of a social group share a common attribute that is understood to exist in society or that in some way sets them apart or distinguishes them from society at large. “Social perception” requires neither that this common attribute be literally visible to the naked eye nor that it be easily identifiable by the general public. It does not suggest the sense of community or group identification that might exist for members of an established organization—social group members may not be recognizable even to each other. Rather, the “social perception” determination rests simply on whether a group is “cognizable” or “set[] . . . apart from society” in some way. *Social Group Guidelines* ¶ 7; see also, e.g., *Gatimi v. Holder*, 578 F. 3d 611, 615 (7th Cir. 2009) (“If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the targeted group are successful in remaining invisible, they will not be ‘seen’ by other people in society ‘as a segment of the population.’”). This is the same approach taken with respect to the other grounds in the refugee definition such as religion or political opinion; persons persecuted

²⁷ Available at: <http://www.unhcr.org/refworld/docid/4200d8354.html> (last visited Aug. 9, 2012).

for their religious or political beliefs may obtain refugee status regardless of whether their belief manifested itself in non-visible private ways or more visible public ways. *Social Group Guidelines* ¶ 15.

The articulation of the “social visibility” requirement suggests that groups must be literally visible. *See, e.g., Matter of C-A-*, 23 I. & N. Dec. at 960 (“When considering the visibility of groups of confidential informants, the very nature of the conduct at issue is such that it is generally out of the public view.”). This literal visibility requirement is inconsistent with the *Guidelines* and, in the words of the Seventh Circuit, “makes no sense.” *Gatimi*, 578 F.3d at 615. A group of individuals may seek to avoid visibility in society precisely to avoid attracting persecution. *See id.; Valdiviezo-Galdamez*, 663 F.3d at 607. That a group or characteristic can be identified visually may reinforce a finding that an applicant belongs to a particular social group, but it is not a pre-condition for recognition of the group. Notably, even in jurisdictions adopting the “social perception” approach, social visibility, or “public perception,” of the group has not been a prerequisite to the finding of a social group. *See A and Another*, 190 C.L.R. 225, text accompanying note 126 (High Court of Australia, per McHugh, J.) (“A group may qualify as a particular social group, however, even though the distinguishing features of the group do not have a public face. It is sufficient that the public is aware of the characteristics or attributes that, for the purposes of the Convention, unite and identify the group.”).²⁸

²⁸ The Australia High Court continues, stating: “In Roman times, for example, Christians were a particular social as well as religious group although they were forced to practise their religion in the catacombs.” *Id.*

The “social visibility” requirement is also inconsistent with *Acosta*. Many social groups recognized by the Board in previous cases applying *Acosta* would be unlikely to satisfy the “social visibility” requirement. *See Valdiviezo-Galdamez*, 663 F.3d at 604 (discussing previous cases).

The *Social Group Guidelines* do mention visibility, stating: “[P]ersecutory action toward a group may be a relevant factor in determining the *visibility* of a group in a particular society.” *Social Group Guidelines* ¶ 14 (emphasis added); *see also UNHCR Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* ¶ 35 (Mar. 31, 2010) (“*Guidance Note*”) (“[T]he fact that members of a group have been or are being persecuted may serve to illustrate the potential relationship between persecution and a particular social group.”).²⁹ This language relates to the role of persecution in defining a particular social group and is meant to illustrate how being targeted can, under some circumstances, lead to the identification or even the creation of a social group by its members being set apart in a way that renders them subject to persecution. This illustration of the potential relationship between persecution and a social group, however, has no relation to the “social perception” approach.

Significantly, the Government agrees with the view that a member of a particular social group “may, but does not necessarily have to, be literally visually identifiable as a group member.” Gov’t Br. at 8. Its proposed “social distinction” test, discussed in more detail below, would not require a showing of literal visibility. *See infra* Part IV.C.

²⁹ Available at <http://www.unhcr.org/refworld/docid/4bb21fa02.html> (last visited Aug. 9, 2012).

In sum, nothing in the *Social Group Guidelines* or the *1951 Convention* and the *1967 Protocol* supports the imposition or use of a “visibility” test to make a social group determination.

C. The Board’s “Particularity” Requirement Is Unnecessary and Inconsistent with the *Guidelines*.

Some proposed social groups have been rejected for failure to satisfy a “particularity” test. *See, e.g., Matter of S-E-G-*, 24 I. & N. Dec. at 582. The “particularity” test asks whether the group has “particular and well-defined boundaries.” *Id.* In the view of UNHCR, framing “particularity” as a separate requirement is unnecessary and may confuse the social group analysis. The “protected characteristics” and “social perception” approaches inherently include such an inquiry. Under the “protected characteristics” approach, which is embodied by the *Acosta* standard, it is the immutable or fundamental characteristic that defines the social group and makes it particular. Under the “social perception” approach, it is the awareness or cognizance within society of such a group that defines it and makes it particular. As a result, there is no need to conduct a separate “particularity” analysis. When “particularity” is invoked to impose an additional and distinct burden on an applicant, it is inconsistent with the *Guidelines*.

The imposition of this “particularity” requirement seems to stem from a general concern about the potential for unlimited expansion of the social group ground. It is a well-established principle that “the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.” *Social Group Guidelines* ¶ 18; *see also, e.g., UNHCR Guidance Note* ¶ 35. None of the 1951 Convention grounds is—or should be—limited by size. Moreover, this concern is misplaced because it is already addressed by the overall approach to defining a

particular social group as well as by the other elements of the refugee definition that must be satisfied.

The U.S. Government itself has identified well how the concern about the potential for unlimited expansion of the social group ground has led adjudicators to conflate separate elements of the refugee definition. For example, a finding that not all the members of a proposed social group could have a well-founded fear of persecution based on their membership in the group goes to the well-founded fear assessment, not the social group assessment. The Government further clarifies, stating that “[t]here is no requirement that all those who possess a protected characteristic have a well-founded fear in order for the protected characteristic to qualify as a protected one. . . . Clearly, not all Catholics are at risk of persecution, but Catholicism is undoubtedly a religion.” *DHS Position in R-A-* at 22-23. These two elements of the refugee definition require separate—and very distinct—determinations.

The example above underscores a basic tenet of refugee status determinations that to establish eligibility for international protection, each element of the refugee definition must be met within a holistic assessment: that the fear is well-founded, that the feared or experienced harm rises to the level of persecution, that the harm is or would be based on one of the five grounds, and that the refugee is unable to avail him or herself of the protection of the country of origin or that the State is unable or unwilling to offer protection. For a claim based on membership of a particular social group, it is insufficient to prove mere membership in the invoked category. *Social Group Guidelines* ¶¶ 16, 19. Properly interpreting and assessing all of the elements of the refugee definition would better serve to accurately determine which claims should be recognized.

IV. THE GOVERNMENT’S PROPOSED “SOCIAL DISTINCTION” TEST AS AN ADDITIONAL REQUIREMENT IS EQUALLY INCONSISTENT WITH THE OBJECT AND PURPOSE OF THE 1951 CONVENTION, ITS 1967 PROTOCOL, AND THE SOCIAL GROUP GUIDELINES.

The Government purports to propose a reformulation of the “social visibility” and “particularity” requirements through a single “social distinction” test. Gov’t Br. at 7-8. Importantly, this test rejects the need for “social visibility”; however, as articulated by the Government, the “social distinction” test as a whole simply merges the Board’s current approach from two requirements into one requirement with two prongs, and, for all the same reasons, is inconsistent with the object and purpose of the *1951 Convention* and *1967 Protocol* and with the *Social Group Guidelines* and does not resolve the confusion raised by the current approach.

A. The Social Distinction Test Merely Repackages the Existing Test and Maintains a Cumulative Approach.

As is the case with the *Acosta*-and approach, the “social distinction” test runs counter to the prevailing international interpretation of the *1951 Convention* and *1967 Protocol*. The “social distinction” test again requires applicants to satisfy *both* the “protected characteristic” *and* “social perception” prongs of the *Social Group Guidelines*’ definition of “particular social group.” *See id.* at 8. The test thus maintains the principal concern with the Board’s recent approach of turning the disjunctive of two alternative approaches into a conjunctive requiring both elements be met in every case. *See id.* at 7-12. As such, this “social distinction” test raises precisely the same concerns as the *Acosta*-and test and is inconsistent with the *Social Group Guidelines*. Moreover, this test, as does the *Acosta*-and test, conflates various elements of the refugee definition. *See supra* at 21; Gov’t Br. at 8. Finally, to the extent the Board continues to believe that the *ejusdem generis* canon of construction is “most helpful in construing the phrase ‘membership

in a particular social group,” *Matter of Acosta*, 19 I. & N. Dec. at 233, the “social distinction” test finds no support in that canon.

B. The “Social Distinction” Test Maintains the Unnecessary “Particularity” Requirement.

By including a separate inquiry into whether the group boundaries are “well-defined,” the Government’s proposed test maintains the current “particularity” requirement under the guise of a single “social distinction” test. As discussed above, the concerns underlying the existing “particularity” requirement are already satisfied by both the “protected characteristics” and “social perception” inquiries. *See supra* at 20. As a result, the “particularity” requirement—whether under the current approach or the Government’s “social distinction” test—is unnecessary and confusing.

C. The “Social Distinction” Test Properly Rejects a “Social Visibility” Requirement

Notwithstanding these flaws in the Government’s proposed “social distinction” test, there is one key aspect that is a significant improvement over the current approach. The Government makes clear its view that there is no need for the members of a particular group to be socially visible. *See Gov’t Br.* at 8.³⁰ As discussed above, this alone does not address the principal concern with imposing a cumulative test requiring both a protected characteristic and social perception. It is nevertheless significant in that it makes clear that the current “social visibility” approach ought to refer to “social perception” and not visibility to the eye. This aspect of the Government’s proposed test is more consis-

³⁰ *See also id* at 7 (quoting with favor the Board’s explanation in an earlier decision that “social visibility means the extent to which members of a society *perceive* those with the characteristics in question as members of a social group.” (quotation marks omitted) (emphasis added)).

tent with the *Social Group Guidelines* and the *1951 Convention* and *1967 Protocol* the *Guidelines* interpret.

V. THE BOARD SHOULD RETURN TO THE LONGSTANDING AND WELL-RESPECTED ACOSTA STANDARD.

The Board's decision in *Matter of Acosta* conforms to the prevailing international interpretation of "membership of a particular social group" and served IJs, the Board, and the courts of appeals well for many years. A return to this well-respected standard would not only resolve the concerns raised by both the divergence from the Board's longstanding approach and the Government's proposed alternative,³¹ it would, most significantly, bring the standard back into compliance with the *1951 Convention* and *1967 Protocol*, as interpreted in the *Social Group Guidelines*.

As noted above, the Government has unequivocally stated that "there is no reason for . . . a departure [from *Acosta*],"³² yet it now claims that the *Acosta* standard is "insufficient," Gov't Br. at 5, without describing what it believes these insufficiencies to be. The Government does cite several decisions by courts of appeals, principally dicta in those decisions, as support for its view. *Id.* at 6-7. In his Reply Brief, Respondent has shown that the cited cases do not hold that a departure from *Acosta* is necessary or desired. See Resp. Reply Br. at 6-9; see, e.g., *Sepulveda v. Gonzales*, 464 F.3d 770, 772 (7th Cir. 2006) (criticizing the Board for its failure to explain why the proposed social group did not satisfy *Acosta*); *Ucelo-Gomez v. Gonzales*, 464 F.3d 163, 171 (2d Cir. 2006) (criticizing the Board for "rarely stat[ing in its opinions] whether or not a particu-

³¹ Of course, adopting the "*Acosta-or*" framework embodied in the *Social Group Guidelines* would also resolve the problems created by the current "*Acosta-and*" test.

³² *DHS Position in R-A-* at 25.

lar group is protectable under the INA—*i.e.*, application of the *Acosta* principles by the agency has been sporadic, non-specific, and unhelpful”). This reliance on inapposite case law and the lack of meaningfully articulated inadequacies of the *Acosta* standard is telling.

Acosta establishes a straightforward, workable standard that was successfully applied in this country for two decades. As a sign of *Acosta*’s strength, virtually every court of appeals adopted and applied the *Acosta* standard. *See* Resp. Br. at 18-19 n.3. And, as noted above, the *Acosta* standard has been widely adopted in the international community, which is also reflected in the *Social Group Guidelines*. *See supra* at 14.

Given the level of domestic and international support received by the standard articulated by the Board in the *Acosta* decision, a return to its well-designed and well-respected interpretation of “membership in a particular social group” is in order. Failure to return to *Acosta* threatens to result in refugees being erroneously denied international protection and subjected to refoulement, in violation of the United States’ fundamental obligations under the *1951 Convention* and the *1967 Protocol*.

CONCLUSION

For the foregoing reasons, UNHCR respectfully urges the Board to consider the relevant international standards and the views of UNHCR in determining a framework for examining claims based on membership in a particular social group to ensure that the United States fulfills its obligations under the *1951 Convention* and its *1967 Protocol*.

Respectfully submitted,

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AMICUS CURIAE IN SUPPORT OF RESPONDENT

Dated: August 10, 2012

Mauricio Edgardo Valdiviezo-Galdamez
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PROOF OF SERVICE

On August 10, 2012, I, Amy Mason Saharia, mailed a copy of the United Nations High Commission for Refugees' *Amicus Curiae* Brief in Support of Respondent and any attached pages to the parties' counsel at the following addresses by placing a copy in my office's outgoing mail system in envelopes duly addressed.

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