MOOT COURT BRIEF

UC DAVIS ASYLUM AND REFUGEE LAW MOOT COURT COMPETITION
BEST BRIEF: 2015

San Joaquin College of Law students Amanda Kendroza, J.D. and Skye Giacomini Emery won "Best Brief" at the Eighth Annual UC Davis Asylum and Refugee Law Moot Court, February 2015. Ms. Kendroza and Ms. Emery prepared a brief related to a complex asylum law problem that integrated both domestic immigration law and international human rights standards for the protection of refugees and asylum seekers. The SJCL team was coached by Professors Jessica Bobadilla and Justin Atkinson. Alumni Kristina Garabedian (Law '14) and Jesse Molina (Law '13), both of whom actually represented SJCL in the same competition during their time as students, also assisted in coaching.

The UC Davis Asylum & Refugee Law National Moot Court Competition is the only competition in the nation devoted exclusively to the topic of asylum and refugee law. This competition is the only immigration law moot court competition on the West Coast. It provides law students from across the country the opportunity to participate in a hypothetical appeal to the U.S. Supreme Court. The competition is judged by prominent judges, attorneys and scholars who specialize in the areas of immigration law and/or appellate advocacy.

The brief is unedited by the San Joaquin Agricultural Law Review but has undergone minor formatting changes for publication.

NO. 2014-121

IN THE SUPREME COURT OF THE UNITED STATES

February Term, 2015

MIGUEL RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES
COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Under the Immigration and Nationality Act, does "former membership as a teenager with the PR25 gang" place the petitioner under a protected particular social group for asylum purposes when:

a. The BIA's interpretation of membership in a "particular social group" is reasonable and is due deference?

b. "Former membership as a teenager in the PR25 gang" does not qualify as a "particular social group" because it lacks sufficient particularity and social distinction?

2. Under the Immigration and Nationality Act, does Petitioner's participation in a car-burning protest and throwing rocks at police officers bar his application for asylum when:

a. The protest and rock throwing constitute a serious nonpolitical crime?

b. Petitioner's admits to his crimes?

c. Vehicle burning is a crime of an atrocious nature?

d. The serious nature of the crimes outweighs their political nature?

e. Petitioner committed multiple crimes as a juvenile within five years of applying for asylum?

JURISDICTIONAL STATEMENT

A statement of jurisdiction has been omitted in accordance with the rules of the U.C. Davis School of Law Asylum and Refugee Law National Moot Court Competition.

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

Miguel Rodriguez (hereinafter "Rodriguez") was born and raised in Honduron, a country in South America. (R. 5.) Honduron has experienced social and political instability. (R. 5.) During his adolescence, Rodriguez and his sister received threats from local gangs. (R. 5.) When he refused to join a gang, Rodriguez faced beatings. (R. 5.) He sought protection from the gangs at age fourteen by joining a gang in his neighborhood. (R. 5.) He then found out that he was part of PR25, a transnational criminal organization. (R. 5.)

PR25 originated in the United States, in the State of Georgia. (R. 5.) It then spread to other parts of the United States, Central America, and South America. (R. 5.) PR25 is notorious for their use of violence and fatal retributions. (R. 5.) Their criminal acts include drug dealing, illegal selling of guns, human trafficking, burglary, attacking police officers, and murder. (R. 5.) PR25 is also known to have connections within the Honduron government. (R. 5.)

At age sixteen, Rodriguez was forced to get a neck tattoo common for members of the PR25. (R. 5.) This tattoo is known in Honduron to be an identifier for members of PR25 and results in employers refraining from employing people with the tattoo. (R. 5.)

When Rodriguez was seventeen the Honduron government enacted legislation reinstating the death penalty. (R. 5.) Rodriguez and other members of PR25 participated in a protest against this legislation. (R. 5.) The protest was two blocks away from City Hall and involved burning an obsolete vehicle, which was owned by one of the members of PR25. (R. 5.) The fire was controlled by removing easily explosive parts of the car and burning the vehicle near a fire hydrant away from civilian areas. (R. 6.) Fire extinguishers were kept nearby. (R. 6.) No one was injured physically or financially by the burning of the vehicle. (R. 6.)

Police officers were sent to manage the protest. (R. 6.) They utilized shields and rubber bullets to control the crowd. (R. 6.) Rodriguez and

some of the other members of the group threw rocks at the police officers in response. (R. 6.)

Rodriguez claims that his participation in the protest was complicated. (R. 6.) He holds a personal belief that the death penalty is not an effective and moral way to combat criminal activities, but he did not want to participate in PR25's version of protest. (R. 6.) He has submitted evidence that he was threatened by PR25 into participating with threatened beatings and prison. (R. 6.) Reluctantly Rodriguez agreed to participate in the protest, but he pushed minimizing the potential of harming others by having the controlled vehicle burn. (R. 6.)

Rodriguez renounced his membership with PR25. (R. 6.) Following his renunciation Rodriguez suffered a beating and threats to his and his family from PR25. (R. 6.) He also found dead animals at his front door and threats written in red graffiti on the wall of his house. (R. 6.) Rodriguez fled with his sister to the United States on July 8, 2007 using a false passport. (R. 6-7.) He was eighteen years old at the time and has refrained from engaging in criminal activities since then. (R. 7.)

On February 9, 2008, Rodriguez was arrested for driving without a license. (R. 7.) The local police enforcement discovered that Rodriguez had entered the United States without a valid passport. (R. 7.) Immigration and Customs Enforcement took over Rodriguez's case and initiated removal proceedings based on 8 U.S.C. § 1325(a), illegal entry with willful misrepresentation. (R. 7.) On June 6, 2008, Rodriguez filed for asylum based on his former membership in PR25. (R. 7.)

II. PROCEDURAL HISTORY

Petitioner submitted evidence, testimonials, and expert testimony regarding his asylum claim. Petitioner included evidence that a nineteen year old Hempstead woman and her two year old son were killed by PR25. (R. 7.) The prosecutor stated the killing was authorized because the woman had spoken with another gang member in a bar. (R. 7.) A Honduron police officer testified that "[e]veryone here knows that once you join the PR25, you are forever in the gang. The PR25 aggressively punishes those who want out." (R. 7.)

Testimonials from Honduron citizens indicated that members of society are reluctant to protect former gang members. (R. 7.) In the town Petitioner is from, gang members force the locals to report former gang members' locations and will not allow the locals to help the former members. (R. 8.) It is also difficult for former gang members to find protection in other cities because of the widespread nature of PR25. (R. 8.)

Expert testimony suggests that finding gainful employment is unlikely for former gang members because their tattoos are recognizable. (R. 8.) Former PR25 members tend to become social outcasts and must also avoid contact with any gang members. (R. 8.) Local governments tend to avoid getting involved in PR25 matters. (R. 8.)

At Petitioner's initial immigration court trial, he represented himself *pro se* because he could not afford an attorney. (R. 8.) His asylum application was denied and he was ordered removable by the immigration judge (hereinafter "IJ"). (R. 8.) Petitioner appealed the IJ's decision to the Board of Immigration Appeals (hereinafter "BIA"). (R. 8.) The BIA affirmed the IJ's holding that "former gang membership" does not qualify as a protected particular social group. (R. 8.) Additionally, the BIA found that Petitioner's involvement in a protest of Honduron's death penalty while still residing in that country barred his asylum application as constituting a nonpolitical serious crime. (R. 8.)

Petitioner appealed to the Fourteenth Circuit Court of Appeals on the grounds that the BIA erred in not recognizing "former gang membership" as a protected particular social group and that the events during the death penalty protest were not a nonpolitical serious crime. (R. 8.) The Fourteenth Circuit upheld the BIA's decision on both issues and Petitioner now appeals to the Supreme Court on the same grounds. (R. 8.)

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit was correct when it denied Petitioner's asylum application and this Court should affirm its decision. First, the Fourteenth Circuit was correct because Petitioner cannot claim membership in a particular social group. Second, the Fourteenth Circuit correctly determined that Petitioner had committed serious nonpolitical crimes.

In order to claim asylum an alien must first illustrate that he qualifies for refugee status. *See Matter of Acosta*, 19 I. & N. Dec. 211, 219 (BIA 1985). To demonstrate refugee status, the alien must show: (1) a subjective fear, (2) which is objectively well-founded, (3) based on a protected ground, and (4) that he is unable to return to his home country. *Id*. Here, Petitioner claims that he qualifies under one of the enumerated protected grounds: membership in a particular social group. He claims that "former membership as a teenager in PR25" is a particular social group.

The BIA has defined membership in a particular social group as possessing an immutable characteristic, which is both sufficiently particular and socially distinct. *See Matter of M-E-V-G*, 26 I. & N. Dec. 227, 232 (BIA 2014). Petitioner fails to prove that "former membership as a teenager in PR25" is sufficiently particular and socially distinct. Petitioner's proffered social group is amorphous because it fails to demonstrate a meaningful connection to one's experience in a gang. He fails to demonstrate social distinction because he mistakenly relies on a visible marker (a tattoo) to establish visibility without understanding that the ocular signifier does not necessarily create a unique or shared cultural experience and history. The Fourteenth Circuit was correct when it determined that Petitioner had failed his burden of proving membership in a particular social group. Were a court to find that Petitioner had proved his membership in a particular social group, his asylum application should be denied on other grounds.

Petitioner has committed serious nonpolitical crimes which bar his asylum application. 8 U.S.C. § 1158(b)(2)(A)(iii) (2009). Petitioner admits to engaging in the separate crimes of burning a vehicle and throwing rocks at police officers. (R. 6.) Burning a vehicle is an atrocious act tantamount to an act of terrorism because it intended to create chaos and fear. *See Matter of McMullen*, 19 I. & N. Dec. 90, 98 (BIA 1984). While Petitioner claims the vehicle burning was a political protest against the Honduron death penalty, the serious nature of the crime outweighs its political nature because the location was too far removed to be viewed as political and Petitioner admits his motivation was not political. *See Matter of E-A*, 26 I. & N. Dec. 1, 4 (BIA 2012). The rock throwing was a separate act that is completely lacking in any political motivation. Furthermore, Petitioner cannot claim his juvenile status at the time of the crimes because he committed multiple crimes and these crimes were committed within five years of his application for asylum. *See* 8 U.S.C. § 1182(a)(2)(A)(ii)(I) (2013).

None of the evidence presented could compel a reasonable fact finder to reach a contrary conclusion regarding either issue. Therefore, this Court should affirm the decision of the Fourteenth Circuit.

ARGUMENT

THIS COURT SHOULD AFFIRM THE FOURTEENTH CIRCUIT COURT OF APPEALS' DECISION DENYING THE PETITIONER'S REQUEST FOR ASYLUM BECAUSE THE PETITIONER DOES NOT QUALIFY AS A REFUGEE UNDER THE IMMIGRATION AND NATIONALITY ACT.

The Attorney General is charged with making determinations whether statutory conditions for withholding and asylum are met. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). The Attorney General, in turn, has vested the Board of Immigration Appeals (hereinafter "BIA") with exercising discretion and authority regarding cases before it. *Id*. at 425. The decisions of the BIA are subject to de novo review. *Arteaga v. Mukasey*, 511 F.3d 940, 944 (9th Cir. 2007); *Cantarero v. Holder*, 734 F.3d 82, 84 (1st Cir. 2013).

The BIA has nationwide jurisdiction over exclusion, deportation, and cases. 8 C.F.R. § 1003.1 (2009). According to the Department of Justice, the BIA is regarded as the highest administrative body able to interpret and apply immigration laws. A determination by the BIA that asylum should not be granted must be upheld if it is "supported by reasonable, substantial, and probative evidence on the record considered as a whole." *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). Such a decision may only be reversed where the evidence presented would lead a reasonable factfinder to conclude that "the requisite fear of persecution existed." *Id*.

Furthermore, when a court is reviewing an agency's interpretation of a statute the agency is responsible for administering, the agency is entitled to *Chevron* deference. Where Congress has directly addressed the issue, the court and agency must honor unambiguous legislative intent. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984). However, where legislative intent is not clear, the agency's interpretation of the statute is entitled to deference. *Id*.

In order to seek asylum, an alien must be able to demonstrate that he is eligible for refugee status. *See Matter of Acosta*, 19 I. & N. Dec. 211, 219 (BIA 1985). Refugee status is achieved where there is a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101 (a)(42)(A) (2014). The alien has the burden of proving that he would be subject to persecution in his country of origin. *See Matter of Acosta*, 19 I. & N. Dec. 211, 215 (BIA 1985). Rodriguez has failed to prove that he would be subject to persecution in Honduron. Specifically,

Rodriguez has failed to prove that he will be subject to persecution based on his former membership in the PR25 gang as a teenager.

In order to demonstrate refugee eligibility, Rodriguez must satisfy four elements: (1) a subjective fear of persecution; (2) which is objectively well-founded; (3) based on a protected ground; and (4) that he is unable to return either to his country of origin or the country where he last habitually resided. *See Matter of Acosta*, 19 I. & N. Dec. 211, 219 (BIA 1985).

A subjective fear of persecution signifies that fear is the primary motivation behind an alien's decision to leave a country. *Matter of Acosta*, 19 I. & N. Dec. 211, 220 (BIA 1985). Here, Rodriguez does possess a subjective fear. After renouncing his membership with PR25, the gang beat him up and threatened to kill him. (R. 6.) Furthermore, Rodriguez submitted evidence that the gang had targeted individuals presumed to have betrayed the gang before. (R. 7.) This fear appears to be the primary motivation behind Rodriguez's decision to leave Honduron because Rodriguez claims he worried about his safety as well as his sister's safety if they remained in Honduron. (R. 6.) Therefore, he satisfies the first element by demonstrating a subjective fear. This fear appears to be the primary motivation behind Rodriguez's decision to leave Honduron. Rodriguez claims he worried about his safety as well as his sister's safety if they remained in Honduron.

The fear must be objective as well. The fear must "have its basis in external, or objective, facts that show there is a realistic likelihood he will be persecuted upon his return to a particular country." *Matter of Acosta*, 19 I. & N. Dec. 211, 225 (BIA 1985). Here, Rodriguez has submitted evidence suggesting that PR25 responds to signs of betrayal with force. A Hempstead woman and her two-year-old son were killed after she spoke with another gang member in a bar. (R. 7.) A Honduron police officer affirmed, "[e]veryone here knows that once you join the PR25, you are forever in the gang. The PR25 aggressively punishes those who want out." (R. 7.) The evidence does suggest that there may be a realistic likelihood Rodriguez could face persecution from PR25. Rodriguez satisfies the second element by demonstrating an objective likelihood of harm.

Rodriguez must also demonstrate that he will be persecuted on the basis of a protected ground. A protected ground would be race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42)(A) (2014). Here, Rodriguez claims that he should be granted asylum based on his membership in a particular social group because he is a former gang member. However, he fails to

demonstrate an immutable characteristic that is sufficiently particular and socially distinct. Ultimately, Rodriguez cannot satisfy the third element by providing a protected ground for which he should be granted refugee status.

Rodriguez must also show that he cannot return to Honduron. Rodriguez claims that if he were to return he would be persecuted in Honduron. However, the testimonials submitted to the court simply show that former members of PR25 are not protected or accepted by society. (R. 7-8.) This hardly suggests that society will persecute Rodriguez or his sister. Rodriguez's expert testimony, at worst, suggests that Rodriguez may be a social outcast, but his life will not be threatened by members of society. (R. 8.) Rodriguez would simply have to avoid gang members. Rodriguez has yet to submit evidence demonstrating that there is no way for him to avoid members of PR25. We are aware that PR25 has a large presence in Honduron, but there may be areas where he could avoid contact and therefore avoid persecution. Furthermore, Rodriguez has failed to seek refugee status in a safe third country, which is particularly of interest considering the PR25 gang originated in the United States. *See* 8 U.S.C. §1158(a)(2)(A) (2013).

Rodriguez has failed to satisfy his burden of proof. He should not be granted asylum because he has not provided substantial evidence that he qualifies for refugee status. The BIA has not extended asylum to family members of those who refuse recruitment and will likely not be extended to family members of those who do not refuse recruitment. *See Matter of S-E-G*, 24 I. & N. Dec. 579, 590 (BIA 2008). Therefore, Rodriguez's sister will be unable to claim asylum based on an imputed particular social group from her brother.

I. THIS COURT SHOULD AFFIRM THE DECISION OF THE FOURTEENTH CIRCUIT COURT OF APPEALS BECAUSE "FORMER MEMBERSHIP AS A TEENAGER IN THE PR25 GANG" DOES NOT QUALIFY AS A "PARTICULAR SOCIAL GROUP."

Rodriguez has claimed that he should be granted asylum based on his membership in a particular social group. (R. 8.) He claims that because he was a former member in PR25 as a teenager, he should be part of this enumerated protected class. (R. 8.) The Fourteenth Circuit, following the decisions of the BIA, has determined that Rodriguez's former gang membership does not constitute a particular social group. (R. 8.)

A. The Fourteenth Circuit properly deferred to the BIA's interpretation of membership in a "particular social group" because the BIA's definition is reasonable and is due deference.

Congress intended the definition of refugee to correspond to the definition as understood in the United Nations Protocol Relating to the Status of Refugees. The Protocol states that individuals who have a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" are refugees. Protocol Relating to the Status of Refugees Done at New York January 31, 1967, [1968] 19 U.S.T. 6223. The Immigration and Nationality Act (hereinafter "INA") conforms its definition to that found in the Protocol. *See* 8 U.S.C. § 1101(a)(42)(A) (2014). However, it is well understood that interpretive measures remain firmly at the discretion of the courts. *See Matter of Acosta*, 19 I. & N. Dec. 211, 220 (BIA 1985). The Protocol is an appropriate source to turn to in order to gain understanding of refugee status as understood by the United Nations, but interpretive endeavors rest squarely on the shoulders of the United States judicial system.

Rodriguez claims that he is a member of a particular social group because of his former membership in the PR25 gang as a teenager. Membership in a particular social group is an ambiguous concept, entitled to *Chevron* deference. *See Matter of Acosta*, 19 I. & N. Dec. 211, 232 (BIA 1985); *see Matter of M-E-V-G*, 26 I. & N. Dec. 227, 231 (BIA 2014). The terminology is derived from the United Nations Protocol and was adopted by Congress without definition. *See Matter of Acosta*, 19 I. & N. Dec. 211, 232 (BIA 1985). The United Nations Refugee Agency defines membership in a particular social group utilizing social perception analysis:

> 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. UNHCR, Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Doc. HRC/GIP/02/02, ¶ 11 (May 7, 2002).

B. "Former membership as a teenager in the PR25 gang" does not qualify as a particular social group because it lacks sufficient particularity and social distinction.

Acosta has provided the test for membership in a particular social group and defines it as "a group of persons all of whom share a common, immutable characteristic" or a shared past experience. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). It further explains that the characteristic should 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." *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). Simply being at risk of persecution does not create a social group. *Orellana-Monson v. Holder*, 685 F.3d 511, 518 (5th Cir. 2012).

Rodriguez claims that being a former gang member is an immutable characteristic because he cannot change his status. This point is not without some merit, for in order to transform his status from former gang member he would necessarily have to re-initiate into a gang. *Martinez v. Holder*, 740 F.3d 902, 906 (4th Cir. 2014). However, gang affiliation, former or otherwise, has historically been found in the majority of circuits not to be membership in a particular social group for the purposes of granting asylum.

The Fourth Circuit noted that "membership in a group that constitutes former MS-13 members is immutable." *Martinez v. Holder*, 740 F.3d 902, 911 (4th Cir. 2014). When the applicant was twelve years old, he lost his father. *Id*. at 906. By age fourteen he had befriended some local boys who had faced similar losses. *Id*. at 907. The group of boys was associated with MS-13, but not actually a part of the gang. *Id*. This status changed when members of MS-13 returned to the area and incorporated the group into the gang. *Id*. The boys were initiated and ordered to get tattoos. *Id*. The applicant decided to leave the gang prior to fleeing to the United States. *Id*. The court only addressed the issue of immutability, noting former membership in a gang was an immutable characteristic based on the applicant's rejection of the gang. *Id*. at 912.

This is distinguishable from Rodriguez's involvement because the applicant in Martinez never joined the gang volitionally. *Id*. at 907. He was incorporated into it because he had befriended a group which later became part of MS-13. *Id*. Rodriguez joined PR25 for protection. Like the applicant in Martinez, Rodriguez sought a familial connection due to his own fatherlessness. (R. 5.) The primary difference is that Rodriguez knew he was joining a gang, he was just unaware of how

notorious the gang was. The applicant in Martinez was simply spending time with friends when he found himself forced to become a member of MS-13. *Martinez v. Holder*, 740 F.3d 902, 908 (4th Cir. 2014).

In *Cantarero v. Holder*, 734 F.3d 82 (1st Cir. 2013), the applicant, a citizen of El Salvador, was denied asylum based on membership in a particular social group. He had entered the United States at the age of twelve to join his parents. *Id*. at 83. When he was sixteen years old, he joined the 18th Street gang, a notorious gang throughout the United States and Latin America. *Id*. Like Rodriguez, the applicant decided that he did not enjoy the violent nature of the gang. *Id*. at 84. The applicant converted to Christianity and determined that he would leave the gang. *Id*. The applicant believed he was "an easy target" mostly due to his prominent tattoos. *Id*. The Immigration Judge, the BIA, and ultimately the First Circuit, all determined that he should not be granted asylum. *Id*. at 85. The First Circuit argued that the BIA was permitted to consider that a former gang member had been a gang member and such voluntary associations were typically violent and could involve past persecution of others resulting in a bar to asylum. *Id*. at 86-87.

While this applicant is distinguishable because he resided within the United States at the time of his gang membership, the reasons to deny particular social group remain the same. Congress never intended to grant asylum to former gang members just as it specifically bars persecutors and those involved in serious nonpolitical crimes. *Cantarero v. Holder*, 734 F.3d 82, 87 (1st Cir. 2013). Former gang members likely fall into both of these categories. Rodriguez notes that he did not enjoy the lifestyle, only pursued it for protection, and later realized the severity of PR25's crimes. One fails to see how this is any different than someone who realized that he received more than he bargained for in joining the 18th Street gang. Granting Rodriguez asylum would be arbitrarily determining that he was somehow more worthy than the applicant in *Cantarero,* a scared child, just like Rodriguez.

While former membership in a gang is an immutable characteristic because one should not be forced to change status from "former" to "current" gang member, gang members are typically involved in crimes which bar them from receiving asylum. There is sufficient evidence to believe that Rodriguez has engaged in serious nonpolitical crimes which would bar his asylum application. Furthermore, demonstrating an immutable characteristic is not enough to demonstrate membership in a particular social group.

i. Petitioner's proffered group lacks sufficient particularity to qualify as a "particular social group" for asylum purposes.

The BIA has enhanced its *Acosta* test in order to grant applying courts a more concise understanding. *See generally Matter of M-E-V-G*, 26 I. & N. Dec. 227 (BIA 2014); *Matter of W-G-R*, 26 I. & N. Dec. 208 (BIA 2014). The *Acosta* test developed only five years after the Refugee Act of 1980 was enacted. *See Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985). At the time, a flexible approach was needed and not many claims were based on membership in a particular social group. *See Matter of M-E-V-G*, 26 I. & N. Dec. 227, 231 (BIA 2014). Thirty years later, this is not the case. Membership in a particular social group is frequently claimed and requires a deeper level of understanding. *Matter of M-E-V-G*, 26 I. & N. Dec. 227, 231 (BIA 2014). The BIA clarified that membership in a particular social group required "particularity" and "social distinction" in addition to *Acosta's* immutable characteristic. *See Matter of M-E-V-G*, 26 I. & N. Dec. 227, 232 (BIA 2014); *Matter of W-G-R*, 26 I. & N. Dec. 208, 210 (BIA 2014). While Rodriguez may perhaps satisfy the immutability requirement, immutability on its own does not establish membership in a particular social group, especially in the context of fear of persecution.

In order to satisfy the particularity element, the social group must be well defined. *See Matter of M-E-V-G*, 26 I. & N. Dec. 227, 239 (BIA 2014). There must be clear characteristics that accurately and universally describe members of the group within a particular society. *See id.* The group must have distinct boundaries of who is in the group and who is not. *See id*. Large groups do not qualify as particular social groups for asylum purposes. Large groups are by their very nature too broad to be particular. Honduron is known for its many gangs. Therefore, gang membership in Honduron is common and puts one in a category outside of those available for asylum claims because it lacks particularity.

The respondent in *Matter of W-G-R*, 26 I. & N. Dec. 208, 209 (BIA 2014), was a member of Mara 19 gang in El Salvador. After being a member for less than a year, he decided to leave. *Id*. He fled to the United States after being confronted and shot during one of the attacks he faced when he renounced his membership. *Id*. The BIA considered whether "former Mara 19 gang members in El Salvador who have renounced their gang membership constitute a particular social group." *Id*. The court held that "[t]he group as defined lacks particularity because it is too diffuse, as well as being too broad and subjective. *Id*.

at 221. The court noted that it could include too many types of people and did not necessitate a "meaningful involvement with the gang." *Id*.

Rodriguez similarly suggests a particular social group that is amorphous. Rodriguez argues that former gang membership as a teenager is well defined. However, this fails for being too broad. It does not take into account the duration of one's membership in the gang. Someone who was in the process of being recruited by a gang and failed to initiate could potentially be part of the group as that individual would likely fear retaliation as well. On the other hand, someone who had been deeply entrenched in the gang might also attempt to claim former status in order to gain asylum in the United States. Here, Rodriguez was involved in the gang for three years. These years were also during a crucial, formative time in his development. As an adolescent he learned behaviors and ways of navigating life from the gang which are likely not easily un-learned. Participation in a gang does not come with an "on/off switch". Furthermore, disassociating from one group does not automatically result in membership in another group. *Arteaga v. Mukasey*, 511 F.3d 940, 946 (9th Cir. 2007). It may assist in categorizing individuals, but such labels are not particular social groups. *See id*. Were such a claim available, then any time someone ceased being something, such as a former spouse or a former student, there would be a new claim for asylum. This was never the intention behind including particular social groups as protected grounds.

In *Matter of M-E-V-G*, 26 I. & N. Dec. 227, 249 (BIA 2014), the respondent was denied asylum for failing to demonstrate sufficient particularity of a social group. The court noted that his fear was based on individual concerns of retaliation, not because he was a member of a social group. *Id*. Rodriguez has a similar fear. His is not a fear based on being in a particular social group, but on his knowledge that changed behavior is viewed as a threat to the gang. Rodriguez used to comply with the gang's requests, but now he chooses not to conform to their standards. By changing his behavior and actions regarding his participation in gang activity, Rodriguez has put himself at risk. His was an act of betrayal, however justified, not an act of identity.

Former membership in PR25 as a teenager is not sufficiently particular. Rodriguez has failed to set meaningful qualifications and parameters in order to establish sufficient particularity necessary to form membership in a particular social group.

ii. Petitioner's proffered group does not qualify as a "particular social group" because members are not socially distinct.

The group must also be socially distinct, or visible. Visibility does not need to be ocular, but members of society must be able to recognize an individual's membership in the particular social group. *Matter of M-E-V-G*, 26 I. & N. Dec. 227, 240 (BIA 2014). Here, Rodriguez claims that he meets the social distinction requirement because he has a neck tattoo that identifies him as a former member of PR25. (R. 5.) However, this description is not enough. Rodriguez is not claiming particular social group simply because he joined a gang, but because he left it. The neck tattoo demonstrates who is in the gang, not who has left it. Rodriguez is not claiming that the particular social group he belongs to is PR25. His claim is based on his former involvement and subsequent renunciation. While there is reason to believe that current members of PR25 are aware of his recent decision to leave the gang, there is nothing to suggest that members of society are aware of his former membership. Furthermore, Rodriguez's argument relies on a visible marker, indicating a misunderstanding of what is meant by socially visible. The BIA changed its verbiage in *W-G-R* in order to help clarify what was meant by social visibility from social visibility to social distinction. *Matter of W-G-R*, 26 I. & N. Dec. 208, 216 (BIA 2014). A visible marker of group membership does not necessarily make one a member of a particular social group which is likely to face persecution.

The Ninth Circuit addressed the issue of tattoos signifying gang membership in *Arteaga v. Mukasey*, 511 F.3d 940, 942 (9th Cir. 2007). The petitioner had been marked with indelible tattoos which signified his participation in New Hall 13, a gang in the United States. *Id*. at 942-943. The petitioner believed the tattoos marked him so that the police and rival gang members would notice him and target him. *Id*. at 945. The court noted that this identification was not based on "a unique and shared cultural experience and history, but because they identify him as a member of New Hall 13" which was not enough to amount to social distinction for the purposes of determining a particular social group. *Id*. Indeed, "tattooed individuals" itself does not satisfy the particularity requirement. *Id*. Therefore, Rodriguez cannot claim that his tattoo sets him apart as having a unique and shared cultural experience, only that he was part of PR25. He even argues that his membership was not like others in the gang because he did not want to participate in certain behaviors typical for gang members. Furthermore, there is no indication that Rodriguez's tattoos are indelible. He may have them removed and

will no longer have to worry about facing the burden of society's distrust.

Visible markers alone do not establish social distinction. Rodriguez does not meet the social distinction element of membership in a particular social group because he mistakenly believes that an ocular signifier creates a unique or shared cultural experience and history.

Lastly, Rodriguez has failed to consider options other than the United States for relocation. *See* 8 U.S.C. §1158(a)(2)(A) (2013). While it may be unsafe for Rodriguez to return to Honduron, the United States may not be safe either. Unfortunately, PR25 originated in the United States in the State of Georgia before spreading to other parts of the United States, Central America, and South America. (R. 5.) Rodriguez's neck tattoo would easily identify him as having some ties to PR25 and there is a likelihood that Rodriguez could unwittingly interact with a current member in the United States. It is unlikely that Rodriguez is familiar enough with PR25 in the United States to avoid its members as he claims is his intent through asylum in the United States. Rodriguez may resort to re-affiliating with PR25 out of necessity here. Rodriguez would be better served if he were to seek asylum in a country that was not the originating country of the gang he is trying to escape.

Even if no other safe third country is available, Rodriguez should be barred from receiving asylum in the United States. Recognizing former gang members would be contrary to the legislative intent of the INA. *Arteaga v. Mukasey*, 511 F.3d 940, 945-946 (9th Cir. 2007); *Cantarero v. Holder*, 734 F.3d 82, 85 (1st Cir. 2013). The INA was designed to grant access to people who otherwise would face grave injustices in their home countries. To grant asylum to former gang members would be to "pervert the manifest humanitarian purpose of the statute in question and to create a sanctuary for universal outlaws." *Arteaga v. Mukasey*, 511 F.3d 940, 946 (9th Cir. 2007). Indeed, allowing former gang members would be akin to admitting known former persecutors. Like persecutors, gang members make enemies by the very nature of their initiating into the criminal organization. Also like persecutors, sometimes friends become enemies when one no longer wishes to comply with the mandates of the gang. Congress never intended to allow nefarious characters to invade the sanctity and the sanctuary that asylum is meant to provide.

Even with an affirmative finding of membership in a particular social group there is no guarantee of asylum. *Urbina-Meja v. Holder*, 597 F.3d 360, 369 (6th Cir. 2010). Asylum and withholding of removal are not

available where the Attorney General determines that the alien has committed a serious, nonpolitical crime. *Id*.

II. RODRIGUEZ'S PARTICIPATION IN THE PROTEST AGAINST REENACTING HONDURON'S DEATH PENALTY CONSTITUTES A SERIOUS NONPOLITICAL CRIME, BARRING HIS APPLICATION FOR ASYLUM.

An applicant that would otherwise be successful in an asylum claim, may still be denied that asylum should it be found that he has committed a serious nonpolitical crime in his country of origin before entering the United States. Rodriguez committed crimes in Honduron that were serious and nonpolitical. His asylum application must be denied under 8 U.S.C. § 1158(b)(2)(A)(iii) (2013). The source behind this bar to asylum is the Office of the United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1992) at article 1(F)(b) which states that an applicant will be denied asylum if "he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee." The intention behind this statute is to protect United States citizens from criminals seeking refuge.

A. Petitioner's asylum application is subject to mandatory denial due to having committed serious nonpolitical crimes.

If an asylum applicant meets all requirements for admission, 8 U.S.C. § 1158(b)(2); INA §208(b)(2) (2013) enumerates the exceptions which may then bar the applicant's grant of asylum. Specific to Rodriguez's case is the exception described in 8 U.S.C. § 1158(b)(2)(A)(iii), "there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." Rodriguez committed two serious nonpolitical crimes during his time with the PR25 gang.

When an applicant faces fear for life or freedom in his country of origin, he may still be deported to such under the exceptions in 8 USC § 1231(b)(3)(B)(iii); INA §241(b)(3)(B)(iii) if "there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States." Rodriguez is deportable to Honduron because of his activities with the PR25 gang.

Chevron deference allows for an agency to interpret ambiguous terms according to the agency's own interpretation. The concept of Chevron deference refers to the holding from *Chevron, U.S.A., Inc. v. NRDC,*

Inc., 467 U.S. 837 (1984); where a statute is ambiguous, "a court must defer to the Board's reasonable interpretation, rather than substitute its own reading." *Scialabba v. Cuellar De Osorio*, 134 S. Ct. 2191, 2203 (2014). Therefore, the meaning of "atrocious," "serious," and "nonpolitical" should be determined by the BIA's use of the words as found in previous BIA decisions.

B. Petitioner's admission of his crimes proves the element of serious reasons to believe that the crime was committed because admission establishes probable cause.

Rodriguez has entered evidence regarding his actions and involvement with both the vehicle burning and throwing rocks at police. He claims that when readying the vehicle for burning, he took steps to contain the destruction. (R. 6.) Additionally, by claiming self-defense against the police crowd dispersement, Rodriguez admits to having thrown rocks at the police along with other members of PR25. (R. 6.)

A former conviction of the applicant would be the most convincing reason to believe that the applicant had committed a crime, but "[t]he BIA need not find as a matter of fact … either beyond a reasonable doubt or by a preponderance of the evidence. Rather, the statute [8 U.S.C. § 1253(h)(2)(C) (2013)] requires the BIA to find only 'serious reasons for considering that [he] has committed' such acts." *McMullen v. Immigration & Naturalization Serv*., 788 F.2d 591, 599 (9th Cir. 1986).

Simply stated, "defendant's admission to a particular offense is sufficient to establish probable cause to believe that he actually committed that offense." *Go v. Holder,* 640 F.3d 1047, 1053 (9th Cir. 2011). Rodriguez's admission of his past criminal actions present ample reason to believe that he did commit such acts while residing in Honduron.

C. Petitioner's participation in vehicle burning constituted a crime of an atrocious nature because the act's intention was to terrorize.

When determining whether a crime meets the "serious nonpolitical" criteria, there must first be a discussion of whether the crime rises to the level of "atrocious nature." *Matter of E-A-*, 26 I. & N. Dec. 1, 4 (BIA 2012). A crime defined as atrocious is *de facto* serious and the nonpolitical aspect is overcome by the severity of the act. Crimes that

are typically considered to meet this higher determination are those such as "terrorist bombings … universally condemned as atrocious in nature" as well as acts such as a "campaign of violence randomly directed against civilians." *Matter of McMullen*, 19 I. & N. Dec. 90, 98 (BIA 1984).

Petitioner and the other members of PR25 planned and executed the burning of a car two blocks from City Hall in the midst of a protest. It is unclear how this action might have any connection to a political protest. The intent behind burning a car (despite the so-called safety precautions that the group attempted) is to create a violent, dangerous hazard and an element of chaos and fear. Much like the "bombings" and "random violence" referred to in *McMullen*, the vehicle burning here was intended to create the same level of confusion and terror. The purpose of burning the car in the midst of a riotous crowd was solely to establish fear in the same way a random bombing "against civilians" is meant to scare and confuse bystanders. *Id.* If the purpose of a terrorist bombing is to invoke fear and disorder, then the act of lighting a car on fire in the midst of a mob constitutes the same intent to create an air of anarchy and terror.

While Rodriguez claims that PR25 meant no harm to protestors (R. 5-6.), the choice to burn a vehicle serves only to create mental harm and infuse the crowd with the feeling of instability and unrest. Actions taken such as removing flammable material would not be readily apparent to bystanders nor does remaining nearby with fire extinguishers override the intended creation of chaos. If this court does not believe that the crime rises to the level of atrocious, then it is clear that the crimes' serious natures outweigh their political component.

D. The serious nature of Petitioner's crimes outweighs their political connection because there was insufficient political intention behind the acts.

There is no doubt that there is a slight political aspect to the crimes committed by Rodriguez. However, there is an established balancing test to determine whether the crimes' serious natures outweigh their political aspects: "In evaluating the political nature of a crime, we consider it important that the political aspect of the offense outweigh its common-law character." *Id.* The two elements are viewed in relation to each other.

Rodriguez committed two distinct crimes, vehicle burning and rock throwing. In analyzing his actions and their effect on his asylum

application, they must be looked at separately in order to thoroughly determine the fact that the serious nature of both outweighs any political connection that they may have held.

The BIA's decision to bar Rodriguez's asylum application must be given full deference in relation to finding his crimes to be more serious than political. As long as there is a "reasonable path for reaching it," the BIA's decision should be upheld. *Berhane v. Holder*, 606 F.3d 819, 825 (6th Cir. 2010). This deference is not without discretion, however, and there must exist a sound, reasoned, and thorough analysis for the decision to bar the application.

i. This incidence of vehicle burning is a serious crime with no political connection because of location and personal gain motivating the act.

Rodriguez's action of burning a vehicle with the PR25 gang in Honduron represented less of a political statement and more of a disconnected serious crime. Rodriguez, along with the PR25 gang, burned a vehicle two blocks from City Hall in order to protest the government's reinstatement of the death penalty. (R. 5.)

Matter of E-A- presents three elements to determine where the crime falls on the spectrum between nonpolitical and political:

> An analysis of the political nature includes an assessment whether (1) the act or acts were directed at a governmental entity or political organization, as opposed to a private or civilian entity; (2) they were directed toward modification of the political organization of the State; and (3) there is a close and direct causal link between the crime and its political purpose. (*Matter of E-A-*, 26 I. & N. Dec. 1, 4 (BIA 2012).

These determining factors are directly from the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* at article 1(F)(b) at paragraph 152, but *Matter of E-A-* omitted a fourth element, "committed out of genuine political motives and not merely for personal reasons or gain." Rodriguez has admitted that his reason for participating in the events in question were because of coercion by the other members of the PR25 gang.

The vehicle was burned two blocks from City Hall. It is unclear what connection lies between a national policy to reinstate the death penalty in Honduron and a municipal City Hall. The facts might sway more in favor of a political action if the incident occurred near a national government building where the death penalty decision was settled rather than in the proximity of a City Hall. Further, two blocks from the City Hall is too great of a distance to view the vehicle burning as "directed

at" the "governmental entity" as opposed to having more of an effect on the private citizens and businesses two blocks from City Hall. The act had little to do with the government agency responsible for reinstating the death penalty and very high impact on the location where the vehicle burning actually occurred.

Rodriguez claims that PR25 chose to protest the death penalty reinstatement by burning the vehicle. It is difficult to find a connection between desiring the modification of a capital punishment policy and burning a vehicle blocks away from a City Hall. If PR25 has the sort of pull within Honduron politics and government concerns Rodriguez claims, then it is not reasonable to see a relation between protesting the death penalty and burning a vehicle. PR25 would have other methods available to express their disapproval.

For the third element, there must be a connection between the crime and a political purpose of the crime. Here, there is no connection between a vehicle burning and the reinstatement of the death penalty. The vehicle burning was nothing more than an intentional creation of an atmosphere of chaos and violence.

Perhaps the most damning evidence is that by Rodriguez's own admission, he did not find the vehicle burning to have a political motivation, but that he was participating as a member of PR25. It may be Rodriguez's "personal belief that the death penalty is not an effective and moral way to combat criminal activities," but he would not have participated in the vehicle burning if not for his membership in PR25. (R. 6.) Rodriguez's own explanation for his actions categorizes the crime; burning the vehicle was not a political act, but in direct relation to his connection to PR25.

ii. Throwing rocks at police is a serious crime without any political motivation because it was unrelated to the protest.

The crime of throwing rocks at the police is a separate and distinct crime from the vehicle burning and should be independently analyzed under the *Matter of E-A-* factors. Rodriguez states that the "police officers used shields and rubber bullets to disperse the crowds" and in self-defense he and "some other members of the group threw rocks at the police officers." (R. 6.) The fact that Rodriguez admits that not all of those in the group threw rocks means that there was another possible course of action in the situation. Rather than retreat, Rodriguez opted to attack the police officers.

As opposed to the vehicle burning, the act of throwing rocks at the police officers was a direct act against a government entity, not a private

party. The police officers were acting within the scope of their position as government agents to disperse the group around the burning vehicle. By choosing to throw rocks instead of retreating, Rodriguez purposefully acted against the government. However, as in *Chay-Velasquez v. Ashcroft*, "The fact that police officers were the target of his bottle bombs rather than civilians does not convert his acts into political offenses." *Chay-Velasquez v. Ashcroft*, 367 F.3d 751, 755 (8th Cir. 2004). The act of targeting police officers is not enough to make Rodriguez's actions that of a political nature because, as with the bottle bombs in *Chay-Velasquez v. Ashcroft*, the rock throwing was in response to crowd control, not political oppression.

The second factor, acting towards the "modification of the political organization of the State," is in no way connected to the act of throwing rocks at police and modifying any sort of political organization. *Matter of E-A-*, 26 I. & N. Dec. 1, 4 (BIA 2012). If the reinstatement of the death penalty was the reason to burn the vehicle, there is no logical connection between throwing rocks in retaliation to police officers operating crowd control and any political motivation. Rodriguez states that his reason for throwing the rocks was to "defend" himself, offering no explanation of a political connection. (R. 6.)

In order to satisfy the third element under *Matter of E-A-*, there must be "a close and direct causal link between the crime and its political purpose." *Matter of E-A-*, 26 I. & N. Dec. 1, 4 (BIA 2012). Here, the crime of rock throwing has no connection to any sort of political end. *Id.* Rodriguez engaged in an attack on police officers as "defense" and without a political purpose of any sort. As above, even if it was supposed that the vehicle burning had a connection to a death penalty protest, the political nature ended with the vehicle burning and does not extend to the rock throwing while others retreated from the police officers.

Applying the test for nonpolitical factors against the facts as Rodriguez has presented them, it is clear that the act of throwing rocks at the police was nothing more than the serious crime of assault, unconnected to anything close to a political nature. It neatly fits the UNHCR *Handbook* element of "personal reasons or gain" and is wholly nonpolitical. (article 1(F)(b) at paragraph 152.)

iii. Petitioner's crimes were gang related and not political in nature because he acted for personal gain.

Rodriguez has presented conflicting reasons as to why his asylum application should be granted. On one side, he claims that his actions of burning the vehicle and throwing rocks at the police were due to

coercion by the PR25 gang because the gang "threatened to beat him and his younger sister if he did not participate in the protest." (R. 6.) Rodriguez's conflicting argument is that he must be granted asylum and can overcome the exception of 8 U.S.C. § 1158(b)(2)(A)(iii) because his actions were political in nature. His crimes may either be political in nature and of his own volition due to his political beliefs, or they may be a gang related activity, but they cannot be both.

Similar here to *Chay-Velasquez v. Ashcroft*, the petitioner there also claimed that his actions were political and not subject to the mandatory denial. The factual findings of the IJ that Rodriguez is subject to the same mandatory denial should be upheld here as they were in *Chay-Velasquez v. Ashcroft* on the same grounds:

> What Chay-Velasquez described as protest actions were more like riots according to the IJ. The judge also found that Chay-Velasquez's group had engaged in criminal activity; it had destroyed public property and placed "public safety at risk when buses were burned and government buildings were attacked." *Chay-Velasquez v. Ashcroft*, 367 F.3d 751, 754.

Rodriguez participated in vehicle burning and rock throwing as part of greater activities within the PR25 gang. To try and minimize those actions as political protest goes directly against the rationale behind asylum protection for those that truly act to change the political structure of their home country and then must seek asylum to avoid unjust persecution for their actions. These are not the conditions under which Rodriguez pleads for asylum.

E. Petitioner may not argue his juvenile status because his multiple crimes as a juvenile occurred within five years of his asylum application.

Rodriguez was 17 years old at the time the crimes in question were committed. His status as a minor means that he may qualify for an exception to the mandatory asylum bar of 8 U.S.C. § 1158(b)(2)(A)(iii) due to his age. However, the automatic rejection of the application at 8 U.S.C. § 1182(a)(2)(A)(ii)(I); INA §212(a)(2)(A)(ii)(I) provides that the exception:

> shall not apply to an alien who committed only one crime if the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the

> date of application for a visa or other documentation and the date of application for admission to the United States.

The two distinct crimes of (1) vehicle burning, and (2) throwing rocks at the police result in more than one crime committed; this negates the first part of the statute.

The timeline firmly places the crimes within the five year period prior to Rodriguez filing for asylum. Rodriguez entered the United States on July 8, 2007 at the age of 18. (R. 6-7.) He admits that his crimes occurred when he was 17 years old (R. 5.), just one year from applying for asylum protection in the United States. Conclusively, Rodriguez does not qualify for relief under 8 USCS § 1182(a)(2)(A)(ii)(I) (2013).

CONCLUSION

Petitioner has failed to prove that "former membership as a teenager in PR25" meets the standards established by the BIA because it lacks both sufficient particularity and social distinction. Where Petitioner does not meet the qualifications for asylum, his sister is also barred from claiming asylum based on imputed membership in a particular social group. Petitioner has also failed to prove that his crimes were not serious nonpolitical crimes. For the foregoing reasons, we respectfully request that this Court affirm the decision of the Fourteenth Circuit to deny Petitioner's asylum application.