No. 19-1904

In the

United States Court of Appeals

For the Fourth Circuit

Miguel Angel Arevalo Quintero,

Petitioner,

v.

William P. Barr, Attorney General,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

CUSTODY STATUS: DETAINED

Petitioner's Reply Brief

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INTRODUCTION

Miguel Angel Arevalo Quintero petitioned this Court to vacate and remand a decision from the Board of Immigration Appeals ("BIA") denying him withholding of removal or relief under the Convention Against Torture (the "CAT"). As shown in his opening brief, the BIA erred in concluding that Miguel, who appeared *pro se* before the Immigration Judge ("IJ"), was ineligible for withholding of removal based on membership in a particular social group ("PSG") of which he never claimed to be a member—"current gang members who are threatened for wanting to leave the gang."

Respondent invites this Court to make the same error on appeal. Overlooking the flaws in *how* the BIA determined that Miguel was seeking relief based on a PSG tied to current, rather than former, gang membership, Respondent asks the Court to deny the petition based solely on the invalidity of that PSG. With the clear goal of limiting the Court's review to that particular question, a good portion of Respondent's brief

addresses an issue that is not seriously in dispute: whether the BIA must consider PSGs addressed for the first time in appeal.[1]

That process remains indefensible. Miguel has repudiated his prior gang membership. Miguel is therefore entitled to request withholding of removal based on a PSG dependent on him leaving the gang.

This flawed process also underscores the necessity, as Miguel argued in his opening brief, for immigration judges to ask questions designed to develop the record for *pro se* applicants like Miguel about their PSG(s). A remand would end the confusion, entirely of the BIA's making, about whether any PSG proffered by Miguel is cognizable.

Respondent also failed to defend the BIA's scant analysis about Miguel's claim under the CAT. Earlier this year, in *Rodriguez-Arias v.*

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[1] In the same vein, Respondent devotes many pages to arguing that an applicant for immigration relief bears the burden to show that he or she is eligible for that relief. Resp. Br. at 41–43. Petitioner does not contend otherwise. Nor does Petitioner advocate a rule that would overturn the adversarial process or conscript the IJ as the applicant's advocate. *Id.* at 45–47. Respondent's strawman arguments are a distraction from the real issue in this case: whether a *pro se* applicant is limited to whatever PSG the IJ defined for him, even where it is undisputed that the *pro se* applicant did not expressly identify his PSGs—something he had no way of knowing he should do—and the IJ never followed up to clarify on the record what PSGs were the basis of the applicant's claim.

Whitaker, 915 F.3d 968 (4th Cir. 2018), this Court reminded the BIA of its solemn obligation to show its work before it denies an applicant relief under the CAT. Respondent's brief shows that the conclusory—and legally erroneous—analysis the BIA accepted in this case is just like the fatally flawed analysis this Court rejected in *Rodriguez-Arias*. The BIA's failure to show its work creates an independent reason for this Court to vacate and remand.

ARGUMENT

I. The BIA Committed Reversible Error In Declining Miguel's Request For Relief Based On Withholding Of Removal.

Miguel demonstrated in his opening brief that the BIA made a reversible error in rejecting his claim for withholding of removal. Pet. Br. at 18–32. The BIA made its decision based solely on a holding that membership in a PSG consisting of current gang members cannot support such a claim. But Miguel never based his claim for relief on that PSG. This fundamental error requires remand to correct.

A. The Immigration Judge's Analysis Regarding A PSG Miguel Did Not Assert Warrants Remand.

Respondent urges this Court to affirm the BIA's decision denying Miguel withholding of removal on the ground that "current gang

members who are threatened for wanting to leave the gang" is not a cognizable PSG. Resp. Br. at 21; *see also* AR 03. This is not a PSG Miguel has ever proffered—not before the IJ, not on appeal to the BIA, not now, not ever. As Respondent recognizes, "when immigration judges substitute their view of the relevant group for the group the applicant has chosen, the courts regularly reverse the agency decision as inconsistent with the applicant's right to control his or her claim." Resp. Br. at 47; *see also Alvarez Lagos v. Barr*, 927 F.3d 236, 253 (4th Cir. 2019) (recognizing that mischaracterizing the proposed PSG constitutes a "critical legal error"); *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) (finding legal error where the BIA's removal order addressed a PSG different from the one proposed by the applicants). What Respondent fails to acknowledge, is that substitution is precisely what the BIA and IJ did here.

The improper inference of Miguel's PSG(s) began at the IJ level. The IJ's decision did not focus on the legal validity of any PSG, and she relegated her entire PSG discussion to a three-sentence footnote. AR 136 at n.1. She did not find that Miguel proposed a PSG and then analyze whether that PSG was cognizable. Rather, she asserted without

explanation or analysis that someone who is "threatened while still a gang member for indicating he wanted to leave" cannot claim withholding of removal based on membership in a PSG. AR 136 at n.1.

Nevertheless, in its final decision, the BIA converted this footnoted remark to a finding that Miguel proposed a PSG based on current gang membership—quite the opposite of his actual claim. *See* AR 03 (denying relief based on "his membership in the particular social group consisting of current gang members who are threatened for wanting to leave the gang"). This alone warrants remand. *Alvarez* Lagos, 927 F.3d at 253.

B. Miguel's Testimony Indicated That He Asserted A PSG Based On Former, Not Current, Gang Membership.

1. The Record Indicates That Miguel Repudiated MS-13.

Respondent tries to defend the PSG the IJ imposed upon Miguel by arguing that his testimony showed that his "proposed social group consisted of current gang members." Resp. Br. at 37. Respondent argues that Miguel remained a gang member in MS-13 because he did not provide formal notice to the gang of his departure. *Id.* But this defies common sense. Gangs are not social clubs. They do not accept resignations, and they kill those who try to leave. *See, e.g.*, AR 214 (gangs like MS-13 demand "[l]ifelong loyalty" and those who "desert" are

"routinely pursued and killed by their own gang as punishment."). It makes no sense to expect Miguel to give the same gang that had threatened to kill him a heads up before fleeing them.

Moreover, it makes no difference exactly how Miguel repudiated the gang, or whether he did so prior to fleeing El Salvador. What matters is that he *did* repudiate MS-13. The record—including Miguel's testimony that the BIA accepted as credible—indicates that Miguel quit the gang long before he sought immigration relief. *See* Pet. Br. at 26–29.[2] When Miguel told MS-13 that he wanted to leave the gang, they beat him and warned him that if he left, he would be "playing with fire." AR 169. Following up on this threat, someone called Miguel and told him he could not leave the gang because otherwise he and his family would be in danger. *Id.* Miguel stated on his I-589 form that MS-13 wants him "in or dead." AR 347. Then, while in the United States, MS-13 gang members threatened his life via his Facebook page. AR 174–75. These

[2] Perhaps in light of the profound due process concerns raised by the IJ's adverse credibility finding concerning Miguel's gang membership (*see* AR 39–49, Pet. Br. at 17 n.2), the BIA twice expressly declined to affirm that finding by the IJ. AR 03 & 91. Because the BIA assumed that Miguel credibly testified that he left MS-13, this Court must also assume that Miguel is no longer an MS-13 gang member. Pet. Br. at 17.

MS-13 gang members accused him of deserting the gang ("You don't remember us anymore"), and warned him, "we don't forget." *Id.* at 174.

One requirement of a PSG is that the group must share "common immutable characteristics." *Oliva v. Lynch*, 807 F.3d 53, 61 (4th Cir. 2015) (quoting *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (B.I.A. 2014)). Immutability is different for *current* and *former* gang members. Current gang membership is not immutable because they can change their status as current gang members, and because gang membership cannot be so fundamental to one's identity or conscience to not expect them to change. *Martinez v. Holder*, 740 F.3d 902, 912 (4th Cir. 2014).

In contrast, *former* gang membership is immutable because a former gang member "cannot change his status as a former gang member" except by taking the unconscionable action of rejoining the gang. *Id.* at 911. But neither the IJ, the BIA, nor Respondent ever explain why "current" and "former" gang status is frozen at the time Miguel fled El Salvador in 2012. Such a rule runs contrary to the fundamental purpose and design of the laws prohibiting removal where an alien's life and freedom are imperiled by removal.

Congress prohibits Respondent from removing an alien if he

"decides that the alien's life or freedom would be threatened in [the country of removal] because of the alien's . . . membership in a particular social group." 8 U.S.C. § 1231(b)(3)(A). This analysis is forward looking. That is why past persecution does not guarantee withholding of removal and instead creates a *presumption* that the applicant's life or freedom would be threatened in the future in the country of removal. *See* 8 C.F.R. § 208.16(b)(1)(i). And it is also why it is common for courts to grant claims for relief "based on fear of persecution that arise only once petitioners are in the United States." *Wiransane v. Ashcroft*, 366 F.3d 889, 899 (10th Cir. 2004) (collecting cases).

Miguel's PSG must be forward looking too: will Miguel be treated as a current or a former gang member if forced to return? In this regard, it does not matter that Miguel left the gang by fleeing El Salvador without first risking his life (again) by directly informing MS-13 of his intention to leave the gang. What matters is how MS-13 will perceive him if he is forced to return. Miguel's testimony shows that he is a former gang member who left without permission, and that MS-13 will treat him as such.

2. The IJ May Not Unilaterally Control The Applicant's Claim.

Respondent urges the Court to uphold the IJ's identification of a PSG based on current gang membership because it allegedly was supported by substantial evidence. Resp. Br. at 21. That is a remarkable position. Substantial evidence is a deferential standard of review under which a court will reverse an agency's decision only if the evidence was "so compelling that no reasonable factfinder" could support the agency's finding. *Ngarurih v. Ashcroft*, 371 F.3d 182, 188 (4th Cir. 2004).

Respondent is advocating a rule that would allow the IJ to identity and evaluate any PSG supported by substantial evidence, and would then deem the applicant to have waived any PSG the IJ did not choose to evaluate—including, apparently, other PSGs that were also supported by substantial evidence. If that were the rule, the IJ would truly become the master of the applicant's claim—exactly what the Government concedes is inappropriate. Resp. Br. at 47–48. In any case, that is not the rule. *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018), the BIA decision Respondent holds up as requiring affirmance, obligates the IJ to seek clarification of the applicant's PSGs.

C. The Immigration Judge Failed To Clarify Miguel's PSG.

The mess created by the IJ's substitution of a PSG Miguel did not assert, and the BIA's affirmance based on a three-sentence footnote, makes appellate review difficult. But it is a mess that the IJ could have easily avoided. All the IJ had to do was to fulfill her obligation under BIA precedent to create a record about the PSG at issue:

> If an applicant is not clear as to the exact delineation of the proposed social group, the Immigration Judge should seek clarification, as was done in this case. It is important to our appellate review that the proposed social group is clear and that the record is fully developed.

Matter of W-Y-C-, 27 I&N Dec. at 191.

Although Respondent urges the Court to generally hold that *Matter of W-Y-C-* is entitled to deference, the issue before the Court is much narrower. Petitioner assumes the correctness of *Matter of W-Y-C-*'s direction that an IJ should seek clarification if the applicant does not precisely delineate a proposed PSG, as does Respondent. *See* Resp. Br. at 47–53. As to *Matter of W-Y-C-*'s ruling that a *represented* applicant will forfeit a PSG that was not exactly delineated, that is an issue for another day. The issue here is the burden placed on a *pro se* applicant to articulate his asserted PSG(s). BIA has not held that *Matter of W-Y-C-*'s

"exact delineation" standard applies to *pro se* applicants—not in *Matter of W-Y-C-* itself, nor in any subsequent precedential opinion. *See* Resp. Br. at 41 (conceding that *W-Y-C-* did not address the situation of a *pro se* applicant).[3] Miguel argues that the burden on a *pro se* applicant is to submit the necessary *facts* to establish eligibility for relief, including the facts to put the IJ on notice about an applicant's PSG. Pet. Br. at 24–25. He did that. *See* Pet. Br. at 26–32; *see also supra* at I.B.

Respondent, however, argues that even *pro se* applicants bear a heavy burden to precisely articulate a PSG. Resp. Br. at 43. However, Respondent can offer no authority addressing the precise contours of this burden for *pro se* applicants. *See id.* (citing *Matter of A-T-*, 24 I&N. Dec. 617, 623 n.7 (A.G. 2008) (applicant represented by counsel)[4]); *see also*

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[3] The single-member BIA decision in this case applying *Matter of W-Y-C-* to Miguel is not itself entitled to deference. *Martinez*, 740 F.3d at 909.

[4] Notably, *Matter of W-Y-C-* drew the "exact delineation" language from a case in which the BIA remanded to the IJ and stated that the applicant, who was represented by counsel, would need to provide "the exact delineation of any [claimed] particular social group(s)." *Matter of A-T-*, 25 I&N Dec. 4, 10 (BIA 2009). *Matter of A-T-* did not hold that failure to provide an "exact delineation" would constitute a waiver of any PSG not so delineated.

Cantarero-Lagos v. Barr, 924 F.3d 145, 154 (5th Cir. 2019) (affirming "exact delineation" obligation when "Petitioners were represented by counsel at each material stage of their proceedings").

Despite this lack of precedent, Respondent faults Miguel for not "specify[ing] his social group" at his hearing. Resp. Br. at 34. But the only reason a "particular social group" was never discussed during Miguel's hearing was because the IJ never brought it up. "Particular social group" is a complex legal concept that challenges even "experienced immigration attorneys." *Cantarero-Lagos*, 924 F.3d at 154 (Dennis, J., concurring). Thus, the IJ should have asked questions like "Are you a member of a social group that is being persecuted or targeted with violence?" Or the IJ could ask how society or his persecutors might identify him. As the amicus brief filed on behalf of former Immigration Judges makes clear, there are plenty of questions an IJ can ask to develop the record while remaining a neutral arbiter. ECF No. 29.

Asking these simple questions is part and parcel of "the IJ's duty to fully develop the record" when an applicant appears *pro se*. *Dent v. Holder*, 627 F.3d 365, 373–74 (9th Cir. 2010); *see also Jehovah v. Clarke*, 798 F.3d 169, 176 (4th Cir. 2015) (recognizing requirement of "liberal

construction" of *pro se* complaints). Making an effort to develop the record will also avoid the judicial inefficiency this case exemplifies created by confusion over the PSG at issue on appeal. The record would then be clean and clear regarding what, if any, PSG formed the basis of any withholding of removal claim. A remand back to the IJ will eliminate any confusion about the PSG at issue.

There is no dispute that the IJ failed to ask Miguel what PSG he belonged to that formed the basis of his withholding of removal claim. Such an error is inconsistent with the BIA's own requirements to develop a clear record for appeal, and the IJ's particular obligation to ensure the record for *pro se* applicants is fully developed. This failure also led to the BIA improperly inferring a PSG Miguel never intended to proffer and denied him the right to control his own claim. As a result, the Court should remand the case back to the IJ so these errors can be corrected.

D. Remand Is Necessary To Correct The BIA's And IJ's Numerous Errors.

1. Miguel Is Not Required To Challenge Non-final BIA Decisions Or Defend PSGs Not Before This Court.

The BIA made a fundamental legal error by failing to require the IJ to develop a clean record regarding the PSGs on which Miguel bases

his withholding claim. Thus, there is no PSG for this Court to analyze on appeal.

Nevertheless, Respondent argues that this Court can affirm because remand would be futile in light of the BIA's July 2018 opinion stating that "former member of MS-13 in El Salvador who left the gang without permission" is not a cognizable PSG. Resp. Br. at 36 n.5 (citing AR 91-92). But that opinion has never been reviewed, and is not before the Court now. This case concerns the BIA's August 2019 final order dismissing Miguel's appeal—a decision that specifically declined to rule on the validity of any of Miguel's PSGs. *See* AR 03 ("[U]nlike our prior decision, we now conclude that it is unnecessary to determine whether the respondent's proposed [PSG] of former members of the MS-13 gang in El Salvador who left the gang without permission constitutes a cognizable [PSG]."). This Court lacks jurisdiction to decide an issue not included in a final order. 8 U.S.C. § 1252(a)(1); *see also Camara v. Ashcroft*, 378 F.3d 361, 366 (4th Cir. 2004).

A remand is necessary to permit the IJ to determine in the first instance the validity of the PSGs Miguel asserts. *Matter of L-E-A-*, 27 I&N Dec. 40, 42 (BIA 2017) ("A determination whether a social group is

cognizable is a fact-based inquiry made on a case-by-case basis, depending on whether the group is immutable and is recognized as particular and socially distinct in the relevant society.").

2. Remand Would Not Be Futile.

If the Court decides it has jurisdiction to reach questions presented by the BIA's July 2018 opinion, the Court should still decline to affirm based on futility. Remand is not futile for at least three reasons. First, Respondent is estopped from requesting affirmance based on the alleged invalidity of PSGs he expressly asked this Court not to consider. Second, neither the Attorney General nor the BIA ever analyzed all three of the PSGs Miguel proposed on his appeal to the BIA, meaning the result on remand is not certain. Finally, at least one of the PSGs Miguel proffered is cognizable.

a. Respondent Cannot Demand Review Of A PSG After Successfully Convincing The Court To Remand To Avoid That Review.

Affirming on futility grounds would reward Respondent for having avoided full and proper briefing on the very issue Respondent now claims is settled. A recapitulation of lengthy procedural history—during which Miguel has remained detained—is necessary to see why.

In a July 9, 2018 opinion, the BIA considered whether Miguel was entitled to withholding of removal based on a PSG consisting of "former members of the MS-13 gang in El Salvador who left the gang without permission." AR 92. The BIA held that, notwithstanding this Court's decision in *Martinez*, 740 F.3d 902, such a PSG cannot support an asylum or withholding claim because the PSG is not "defined with particularity" and is not "socially distinct." *Id.*

After Miguel petitioned this Court for review of the July 2018 opinion, Respondent moved for a remand. AR 84–88. In seeking remand, Respondent argued that the PSG the BIA analyzed was presented "[f]or the first time on appeal" to the BIA. AR 84. Respondent asked this Court to remand to the BIA so it may "reconsider" Miguel's asylum and withholding of removal applications, in light of the holding in *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018) that the BIA will not consider a PSG proposed for the first time on appeal. *Id.* at 85.

The Court granted the motion for remand on December 11, 2018. AR 82–83. As noted above, the BIA's August 5, 2019 decision declined to analyze the validity of Miguel's PSGs. *See* AR 03.

Affirming on futility grounds would reward Respondent for

avoiding review of the BIA's July 2018 decision. No litigant should be allowed to play so "fast and loose" with the Courts. *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982) ("'Judicial estoppel' is invoked in these circumstances to prevent the party from 'playing fast and loose' with the courts, and to protect the essential integrity of the judicial process."). As the Supreme Court explained, courts have an obligation to "protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749–50 (2001) (internal quotation marks omitted). Respondent should therefore be estopped from playing games with the scope of this Court's review. *Martineau v. Wier*, 934 F.3d 385, 394 (4th Cir. 2019) (recognizing judicial estoppel is fact-specific and not dependent on any "inflexible" rule or standard).

b. The BIA Has Never Considered All Of Miguel's PSG.

The Court should also decline to affirm on futility grounds for the simple reason that Miguel has offered PSGs that the BIA never considered—including PSGs that Respondent does not address in his Brief. As Respondent acknowledged, the "agency does not require an

applicant to choose" one PSG and "forego other possible formulations." Resp. Br. at 43 n.7. Consistent with this understanding, Miguel offered three potential PSGs on appeal to the BIA: (1) "Former member of the MS-13 gang in El Salvador who left the gang without its permission"; (2) "Salvadorian labelled as a member of MS-13 gang by the US government"; and (3) "Family of Jose Romero." *See* AR 33–39. The BIA never considered whether the last two PSGs are cognizable, *see* AR 1–4; 90–93, and Respondent's futility argument notably fails to address them. The result of a remand cannot be a "foregone conclusion" because the BIA has never evaluated two of Miguel's proposed PSGs.

c. At Least One Of Miguel's PSG Is Immutable, Particular, And Socially Distinct.

The record in this case, consistent with precedent in this Circuit, supports the conclusion that Miguel's proffered PSG of "former members of the MS-13 gang in El Salvador who left the gang without its permission" is legally cognizable. A PSG is cognizable if the group is "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." *Oliva*, 807 F.3d at 61 (quoting *Matter of M-E-V-G-*, 26 I&N Dec. at 237 . Miguel's PSG based on being a former

gang member satisfies those requirements.

The PSG is Immutable. As explained above, this Court has already held that former membership in a gang is an immutable characteristic. *Martinez*, 740 F.3d at 911.

The PSG is Defined with Particularity. The BIA's decision in *Matter of W-G-R*, 26 I&N Dec. 208 (2014), does not demand a finding that Miguel's PSG is not defined with particularity. There, the BIA found, *based on the record in that case*,[5] that the applicant's proposed PSG of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership," lacked particularity because it was "too diffuse, as well as . . . too broad and subjective" and was "not limited to those who have had a meaningful involvement with the gang and would thus consider themselves—and be considered by others—as 'former gang members.'" 26 I&N Dec. at 221.

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[5] *See Pirir-Boc v. Holder*, 750 F.3d 1077, 1082–83 (9th Cir. 2014) ("In *W-G-R-*, the BIA considered the putative social group of 'former members of the Mara 18 gang in El Salvador who have renounced their gang membership' and rejected it as a social group *due to a lack of evidence to that effect introduced at the proceedings*." (emphasis added)); *see also Matter of W-G-R-*, 26 I&N Dec. at 221 (rejecting proffered PSG on the ground that the record contained "very little documentation discussing the treatment or status of former gang members").

W-G-R- did not hold, and could not have held, that as a matter of law no PSG defined, in whole or in part, by former gang membership could ever be valid. While the "scant evidence" of record in *W-G-R-* may not have been sufficient to establish a cognizable PSG, *id.*, determination of whether an applicant has put forth a cognizable PSG is a determination that "must be made on a case-by-case basis," *Matter of M-E-V-G-*, 26 I&N Dec. at 242. The record here is distinguishable, more substantial, and further detailed.

There is no question based on the record presented that Miguel's involvement with MS-13 was enough for him to be considered a former member of MS-13 by others. As Miguel testified before the IJ, his association with MS-13, although brief, was enough to prompt threats and violence at the hands of MS-13 at the mere notion of his leaving. After telling MS-13 that he wanted to leave the gang, MS-13 beat and threatened to kill him. AR 171–73. MS-13 members warned him that he was "playing with fire and that those who play with fire get burnt." AR 129; *see also* AR 169, 172. This threat was not isolated: Miguel also received a threatening phone call from a gang member who told him he could not leave MS-13 because he knew too much about its operations.

AR 169–70, 172. And even after fleeing to the United States, Miguel received a threatening message from MS-13 via Facebook—"we take some time, but we don't forget"—a message Miguel understood to mean that he was, and would continue to be, on MS-13's hit list for leaving the gang without permission. AR 174–75.

The PSG is Socially Distinct. The fact that gangs in El Salvador are a large social problem also does not negate the fact that Miguel's proposed PSG is socially distinct. While social distinction may not be defined solely by the persecutor's perception, the persecutor's perception is "indicative of whether society views the group as distinct." *Matter of M-E-V-G-*, 26 I&N Dec. at 244. As discussed in Miguel's opening brief, former members of MS-13 in El Salvador who left the gang without permission are specifically targeted by MS-13 and former rival gangs, and this particularized harm is well known by society at large. Pet. Br. at 35–36. The record includes several exhibits in which the group of "former gang members" is used, signifying that the Salvadorian people know exactly what it means, and know how to identify which individuals fall within this particular group. *See, e.g.*, AR 256–64 (identifying factors distinguishing gang members from non-gang members).

To the extent the BIA, or Respondent in this appeal, assert that Miguel's proffered PSG of "former MS-13 in El Salvador who left the gang without permission" is nevertheless too diffuse or ambiguous, the IJ should have sought "clarification." *See Matter of W-Y-C-*, 27 I&N Dec. 189, 191 (2018). But the IJ did not. The IJ did not inquire into the commonly understood meaning of "former MS-13." Miguel was not asked to define his PSG or the term, explain how it is used or understood, who uses it, who it is directed toward, how individuals falling within the characterization might identify or be identified by others, or whether the general population comprehends its meaning. *See generally* AR 165–92.

* * *

Remand is neither a foregone conclusion nor mere formality. Remand is required for consideration of whether Miguel's proposed PSGs are cognizable in light of all of the relevant evidence presented.

II. Remand Is Necessary Because The BIA Failed To Properly Evaluate Miguel's CAT Claim.

As shown in Petitioner's opening brief, the BIA erred when it denied his CAT claim because it (1) did not aggregate the risk of torture from multiple sources, and (2) did not properly consider the country conditions evidence showing that the El Salvadorian government likely would turn

a blind eye to his torture. *See* Pet. Br. at 33–45. Faced with these same errors in *Rodriguez-Arias*, this Court vacated and remanded to the BIA. Respondent has failed to distinguish *Rodriguez-Arias*, and remand is necessary here too.

A. The BIA Failed To Aggregate Miguel's Risk Of Torture From Gangs, Vigilante Groups, And The Police.

Although Respondent attempts to explain away the BIA and IJ's failure to aggregate the risks of torture, none of Respondent's arguments are persuasive.

Respondent's first argument is a non-sequitur. Respondent repeats the BIA's rationale that Miguel is resting on a chain of assumptions to prove his CAT claim. This is the same irrelevant analysis this Court rejected in *Rodriguez-Arias*. Miguel, like Rodriguez, "never attempted to prove a string of events." 915 F.3d at 973. Rather, he has asserted fear of torture "from three separate entities: police, gangs, and vigilante groups." *Id.*; Pet. Br. at 34–40.

As the *Rodriguez-Arias* court recognized, a requirement to aggregate the risks of torture is a *legal* requirement stemming from the requirement in 8 C.F.R. § 1208.16(c)(3) requiring the BIA to consider "all evidence relevant to the possibility of future torture." 915 F.3d at 972–

73. On the other hand, the BIA's conclusion that evidence turned on a "chain of assumptions" goes solely to the weight of the evidence. *In Re M-B-A-*, 23 I&N Dec. 474, 479 (BIA 2002) (concluding claim under CAT "based on a chain of assumptions and a fear of what might happen" failed to show that respond met "her burden demonstrating that it is *more likely than not* that she will be subjected to torture"). Despite being directly presented with the *Rodriguez-Arias* precedent (AR 49–52), the BIA still refused to apply the correct legal standard; the BIA neither aggregated the risks nor explained why such aggregation was unnecessary here. This plain legal error demands remand.

The evidence of record amply demonstrates the danger to Miguel from multiple sources, thus obligating the BIA and IJ to aggregate the risk of torture from all of them. BIA had a legal duty to aggregate the risks of torture even if Miguel never testified at his individual calendar hearing about his fears of torture from the police, vigilante gang members, and other gangs, in addition to his fears of being tortured by MS-13 members.[6] This is because "there is no subjective component to

[6] Of course, the reason Miguel never testified about all of the different torture risks is because no one ever asked him. *See* AR 165–192. Regardless, Miguel was under no obligation to testify about matters

CAT eligibility." *Jian Tao Lin v. Holder*, 611 F.3d 228, 236 (4th Cir. 2010). Thus, so long as Miguel "provides independent evidence demonstrating that it is more likely than not that he would be tortured upon return to his country," he can be eligible for relief under CAT. *Id.* at 236–37. The CAT does not require Miguel to explain his subjective fear of torture in El Salvador. And Respondent cannot rely on the lack of live testimony about Miguel's subjective fear to excuse the BIA's and IJ's failure to fully evaluate the record evidence.

Respondent is also incorrect to claim that the lack of prior torture "negates" Miguel's claim. Resp. Br. at 54. While past torture is relevant to whether an applicant is likely to be tortured in the future, the absence of such evidence is not dispositive. The IJ must also consider "evidence of 'gross, flagrant or mass violations of human rights,' the country's conditions, and whether the applicant could relocate to a part of the country where he or she is unlikely to be tortured." *Suarez-Valenzuela v. Holder*, 714 F.3d 241, 245 (4th Cir. 2013); *accord* 8 C.F.R.

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already presented to the IJ via documentary evidence that was admitted without objection. *See* 8 C.F.R. § 1208.16(c) (requiring consideration of "all evidence relevant to the possibility of future torture").

§ 1208.16(c)(3). In any event, the actual weighing of any evidence must be completed in the first instance by the IJ. 8 C.F.R. § 1003.1(d)(3)(iv) ("the [BIA] will not engage in factfinding in the course of deciding appeals")

Nor can Respondent show that the objective evidence is so inapplicable that the BIA could disregard it without explanation. Objective facts exist in the record showing that El Salvadoran former gang members risk being tortured by the gang that seeks to punish the deserter, and by others—*e.g.*, rival gang members, the police, and vigilante death squads—who misperceive the former gang member to be a current gang member. *See* Pet Br. at 35–40. Respondent cannot offer any basis for ignoring this type of risk.

There is ample record evidence showing that other potential persecutors in El Salvador will misperceive Miguel as a current gang member. For instance, Miguel has MS-13 gang tattoos. AR 187; AR 293. Like Rodriguez-Arias, Miguel faces a risk that his persecutors will view his tattoos as conclusive evidence of gang membership, and thus view Miguel as a target, even though he left the gang. *Rodriguez-Arias*, 915 F.3d at 970 (noting testimony that "in El Salvador, having tattoos is seen

as an automatic sign of gang membership and people do not bother investigating whether you are still an active gang member before harming you"); *see also, e.g.*, AR 237 (an individual who has left a gang continues to face an undiminished risk of assassination by members of rival gangs); AR 310 (recognizing police target those who fit the stereotype of gang members).

The Government's decision to identify Miguel as a current gang member in these removal proceedings also makes it likely that Miguel's potential persecutors will perceive him as one. As the DHS attorney said in closing argument, "the Government's position is he's not a former MS-13 gang member, but a current gang member." AR 191; *see also* AR 293 (I-213) (Miguel's I-213 labelling him as a "Suspected MS-13 Gang Associate"). This position will profoundly impact Miguel if he is removed.

As explained in his opening brief, Decree 717, recently enacted by El Salvadorian government, ensures that the Government's decision to accuse him (wrongly) of being a current gang member will follow him to El Salvador. *See* Pet. Br. at 39. Upon his return, El Salvadorian authorities will immediately interview and investigate Miguel to determine if he may be a member or collaborator of any gang. Decree

717, Art. 1–4 (AR 256–57). In deciding whether to require Miguel to register as a gang member, the El Salvadorian police force will review *all* of the reports generated by DHS. *See* Decree 717, Art. 6(f) (AR 258) (requiring El Salvador National Civil Police to review "[r]eports substantiated by immigration authorities or police from countries that carry out deportations").[7] Once the police identify Miguel as a likely gang member, they will put him on a registry and monitor him. *See id.* Art. 7, 9–10 (AR 258–60). And once the police start monitoring him, they can use that information to track and persecute him. *See* Pet. Br. at 39.

In sum, the record indicates that Miguel's persecutors likely will perceive him as a current gang member upon his return. The record also indicates that perceived gang members face a risk of torture from sources other than just the MS-13 gang that is either state-sanctioned or to which the government turns a blind eye. *See* Pet. Br. at 41–45. Of course, the IJ must be the one "to add the amount of risk that each group poses to

[7] In this regard, the formal basis for removal will have little impact on whether Miguel will be perceived as a gang member upon his return to El Salvador. It is therefore of no moment that the formal basis of removal may not turn on "any criminal activities that may identify [Miguel] as a member, past or present, of the MS-13 gang." Resp. Br. at 56 (quoting BIA's July 9, 2018 decision).

[Miguel] and then determine whether that sum is greater than 50%." *Rodriguez-Arias*, 915 F.3d at 973. But the IJ's failure to even attempt that analysis here requires remand. *Id.*

B. Respondent Does Not Defend The BIA's And IJ's Disregard Of The Country Conditions Evidence.

Respondent does not present a substantive argument to defend the BIA's and IJ's failure to meaningfully consider the country condition evidence about the El Salvadorian government turning a blind eye to his torture. Numerous sources reported that the gangs have infiltrated the police and the military, and that the government has refused to investigate and prosecute those who commit extrajudicial killings of suspected gang members. *See* Pet. Br. at 41–45.

Respondent ignores this. Instead, Respondent simply repeats the BIA's holding and asserts that the record does not "compel[] reversal." Resp. Br. at 56. This same failure required remand in *Rodriguez-Arias*, 915 F.3d at 974–75. And the same result should occur here.

* * * * *

CONCLUSION

For the foregoing reasons, and those reasons provided in Miguel's opening brief, the Court should grant Miguel's petition for review, vacate the BIA Order, and remand to the BIA with instructions to remand the proceedings to the IJ for further fact-finding.

Dated: December 16, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I certify that this brief complies with the type volume limitations in Federal Rule 32(a)(7)(B)(ii) and Circuit Rule 30(c) because it contains 6,333 words.

Dated: December 16, 2019 /s/ Susan Baker Manning

CERTIFICATE OF SERVICE

On December 16, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: December 16, 2019 /s/ Susan Baker Manning