No. 21-1267

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROMMEL ALEXANDER CHAVEZ

Petitioner

v.

MERRICK B. GARLAND, Attorney General

Respondent

OPENING BRIEF FOR PETITIONER

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

Custody status: Non-detained

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STATEMENT REGARDING ORAL ARGUMENT

Petitioner believes that oral argument will assist this Court in its consideration of the complex legal issues presented by this appeal. Resolution of the underlying issues in this case will have significant and far-reaching effects for Petitioner and other withholding of removal applicants. *See* Local Rule 34.0(a).

INTRODUCTION

In a recent indictment issued by the Department of Justice in the Eastern District of New York against MS-13 gang members, the Department describes MS-13 as a transnational criminal organization that engages in terrorist activity and violence "to obtain concessions from the government of El Salvador, *achieve political goals* and retaliate for government actions against MS-13's members and leaders." Indictment at p. 2, ¶ 1, *USA v. Henriquez et. al.*, No. 2:20-cr-00577-JFB (E.D.N.Y. Dec. 16, 2020) (emphasis added).[1] The Department further explains how MS-13 "gained political influence as a result of the violence and intimidation" and has "continued to negotiate with political parties in El Salvador and to use its control of the level of violence to influence the actions of the government in El Salvador." *Id*. at 11-13, ¶¶ 23, 26. In sum, the Department believes that MS-13 is an organization that exerts political influence to achieve its political objectives. *See* 8 U.S.C. § 1252(b)(4)(A).

In this immigration case, Petitioner Rommel Alexander Chavez agrees with the Department's description of MS-13. Here, Mr. Chavez has presented an expert—Dr. Lawrence Ladutke—and other country conditions evidence explaining

[1] Press Release, MS-13's Highest-Ranking Leaders Charged with Terrorism Offense in the United States, Department of Justice (Jan. 14, 2021), https://www.justice.gov/usao-edny/pr/ms-13-s-highest-ranking-leaders-charged-terrorism-offenses-united-states.

in detail MS-13's social and political status in El Salvador. *See, e.g.,* AR 390 (¶15), 225, 392 (¶21), 393 (¶23), 943, 871, 877-884. And, here, Mr. Chavez—despite MS-13's immense power—courageously took on MS-13 in El Salvador. AR 125-126, 135-138, 158-159, 204, 217. Mr. Chavez acts against MS-13 were not trivial. While many Salvadorans in similar conditions of poverty and helplessness have succumbed to MS-13's power, Mr. Chavez openly refused to do so—and instead openly challenged MS-13—out of a deeply held belief that MS-13 engages in dreadful behavior. Due to these actions, Dr. Ladutke opined that "Mr. Chavez is lucky that he was not killed for challenging [MS-13] in this manner." AR 391 (¶16). Dr. Ladutke also explained how MS-13 viewed Mr. Chavez's actions as a challenge to its authority and goals. AR 232, 391 (¶16).

The BIA and IJ, in denying Mr. Chavez relief against removal, did not address any of this evidence in the record before it concluded that (i) Mr. Chavez's actions were apolitical and (ii) MS-13 did not perceive his action as political. While the IJ, as a factual finder, does not have to "accept all the testimony and opinions provided as facts," *see Matter of M-A-M-Z-*, 28 I. & N. Dec. 173, 177 (BIA 2020), the IJ must, at a minimum, "explain the reasons behind the factual findings" if the findings are "not consistent with an expert's opinion." *Id*. at 177-78. Nonetheless, the IJ did no such thing in assessing Mr. Chavez's political opinion claim in this case; indeed, the IJ neither questioned nor gave reduced

weight to the expert evidence in this case. AR 62-63. Rather, the IJ simply ignored this expert and country conditions evidence and *solely* relied on Mr. Chavez's testimony to conclude that his actions and how MS-13 perceived his actions were apolitical. AR 63. Before the BIA, Mr. Chavez complained that the IJ's failure to consider this uncontradicted objective evidence was in error. AR 27-32. But the BIA rubber stamped the IJ's reasoning and conclusion. AR 7.

For those who do not know the conditions in El Salvador, it can be difficult to fathom what it is like to live under the terror of MS-13, let alone contemplate how even small acts of rebellion against MS-13 can immediately trigger execution. The objective evidence in this case—which the BIA failed to consider—establishes this danger. Yet, the BIA wrongfully dismissed Mr. Chavez's plea for protection by ignoring the uncontradicted evidence in the record, including the testimony of a country conditions expert. This Court is the last resort to undo the agency's wrongful decision. *See Segran v. Mukasey*, 511 F.3d 1, 5 (1st Cir. 2007) (noting that the "court's role is not reduced to that of a rubber stamp"). This is not a normal case. This case has "life or death consequences, and so the costs of error are very high." *Albathani v. I.N.S.*, 318 F.3d 365, 378 (1st Cir. 2003).

STATEMENT OF JURISDICTION

This Court has jurisdiction to review final orders of removal against noncitizens. *See* 8 U.S.C. § 1252.

STATEMENT OF THE ISSUES

1. As to Petitioner's actual anti-MS-13 political opinion claim, whether the BIA committed an error of law when it cursorily—and without explanation—concluded that Petitioner did not actually hold an anti-MS-13 political belief. *See infra* Section II.B.

2. As to Petitioner's actual and imputed anti-MS-13 political opinion claims, whether the BIA erred in concluding that his actions did not constitute actual political opinion and were not perceived to be political opinion by MS-13, especially where the BIA failed to give any meaningful consideration to the objective evidence in this case, including the unchallenged expert evidence. *See infra* Section II.B-C.

3. As to Petitioner's actual and imputed anti-MS-13 political opinion claim, whether the record compels the conclusion that Petitioner actually held and was perceived to hold anti-MS-13 political beliefs. *See infra* Section II.B-C.

4. As to the nexus requirement evaluating the connection between the persecution to be suffered and Petitioner's actual and/or imputed anti-MS-13 political opinion, whether the BIA erred in concluding that MS-13 did not or would not persecute him because of his actual or perceived political opinion, especially where the BIA failed to give any meaningful consideration to the objective evidence in this case, including the unchallenged expert evidence. *See infra* Section II.D.

5. As to the nexus requirement evaluating the connection between the persecution to be suffered and Petitioner's actual and/or imputed anti-MS-13 political opinion, whether the record compels the contrary conclusion of the BIA's findings. *See infra* Section II.D.

6. Whether this Court should reject the "one central reason" standard from *Matter of C-T-L-*, 25 I. & N. Dec. 341 (BIA 2010) when evaluating withholding of removal claims because the statute governing withholding of removal claims is clear and unambiguous that an applicant only needs to establish "a reason" instead of "one central reason" in meeting the nexus requirement. *See infra* Section III.

7. As to the imputed gang membership based particular social group claim, whether this Court should reject *Matter of E-A-G-*, 24 I. & N. Dec. 591

(BIA 2008) because it impermissibly—and categorically—bars any incorrectly perceived gang membership based withholding of removal claim. *See infra* Section IV.

8. As to the Convention Against Torture (CAT) claim, whether the BIA erred when it failed to apply the individualized factual inquiry in assessing if officials or persons under color of law would breach their legal responsibilities to MS-13's torture on Petitioner. *See infra* Section V.B.

9. In assessing private actor based CAT claim, whether the BIA erred when it applied the willful blindness standard to the second "breach of legal responsibility" element under 8 C.F.R. § 1208.18(a)(7). *See infra* Section V.B.

10. In assessing private actor based CAT claim, whether the record compels the conclusion, contrary to the BIA's assessment, that officials or persons under color of law would turn a blind eye to MS-13's torture on Petitioner. *See infra* Section V.B.

11. As to Petitioner's CAT claim, whether the BIA erred in concluding that Petitioner failed to establish past or future torture by officials or persons under color of law, especially where the BIA failed to give any meaningful consideration to the objective evidence in this case, including the unchallenged expert evidence. *See infra* Section V.C.

STATEMENT OF THE CASE AND FACTS

A. Petitioner's Life in El Salvador until 1997

While still a child, Petitioner Rommel Alexander Chavez's eldest brother, Oscar, was shot and killed by the police merely for breaking curfew. AR 151. Oscar's murder instilled in Mr. Chavez a deep distrust of authority that was later reinforced by interactions with the police. AR 119-120, 495. In one particularly horrific incident when Mr. Chavez was about 15 or 16 years old, security officials shot both him and his brother—Omar—when Mr. Chavez told the officials to stop harassing his friends, refused to give them his bicycle, and ran towards his house after seeing multiple officials coming at him. AR 115-119, 200-202. These officials started to shoot at them. Mr. Chavez still has a bullet lodged in his backside, and his brother is permanently disabled following this incident. AR 118-119. Both he and Omar were sent to prison on "ginned up" charges of "resisting arrest." AR 118-119. After he was released from jail, Mr. Chavez continued to face harassment at the hands of police officers, who searched and beat him at their whim. AR 199. As a teenager, Mr. Chavez also got a small tattoo on his left hand, between his thumb and forefinger. AR 199. Although that symbol later came to be associated with M18 (the rival gang of MS-13), Mr. Chavez got the tattoo at the time to simply capture his feeling that he would not be cowed by a corrupt and violent police force. AR 151, 199, 407.

As a teenager, Mr. Chavez also started facing significant pressure from MS-13 to join its ranks. AR 126. Mr. Chavez refused to do so because he was always against MS-13. AR 125-126. Instead, he challenged MS-13. For example, he told MS-13 that he did not like their symbol painting, he erased the symbol on walls numerous times, and he, at one point, tagged a giant "18"—the call sign of MS-13's rival—on top of an MS-13 symbol. AR 125, 204, 217. These acts of defiance led to a fierce beating in which MS-13 members broke his rib. AR 126. Mr. Chavez also started receiving death threats from an incarcerated MS-13 member—"Churro"—who found out that Mr. Chavez had disclosed that member's involvement in a robbery. AR 127. In 1997, with threats encroaching from so many sides, Mr. Chavez fled to the United States for the first time. AR 113.

B. Petitioner's First Removal Proceedings

In 2011, Mr. Chavez was placed in removal proceedings and applied for asylum, relying on the threat he had received from Churro—the incarcerated MS-13 member—before he fled El Salvador in 1997. In seeking asylum relief, he also relied on the more recent murders of his friend Mauricio in 2007 and his nephew Oscar in 2009 by MS-13. AR 157-160. Unfortunately, in seeking this relief, Mr. Chavez's attorney failed to uncover or present the other experiences with MS-13 and the police that led Mr. Chavez to flee the country in 1997. Instead, Mr. Chavez's attorney argued for asylum protection solely on the basis that Mr. Chavez

was a member of a particular social group consisting of "those who actively oppose gangs in El Salvador by agreeing to appear as a prosecutorial witness"—a group to which he did not belong, as Mr. Chavez has never been asked to appear as a "prosecutorial witness." AR 1266, 1274-1275. In 2012, failing to obtain relief, Mr. Chavez was removed to El Salvador. AR 1261.

C. Petitioner's Two Month Presence in El Salvador

Mr. Chavez's fear of returning to El Salvador was confirmed upon his return to El Salvador—a return that lasted only two months. AR 113, 135. The very day of his arrival, gang members visited his home—the same home in which his deceased nephew had lived—and fired their guns in the air. AR 130. This threat only increased Mr. Chavez's sense of insecurity. AR 130. Soon, the gang murdered his friend Javier. MS-13 murdered Javier apparently for having challenged the gang's theft of the livestock he was caring for. AR 133-134.

As a result, Mr. Chavez was living on tenterhooks. AR 499. Despite this fear, Mr. Chavez courageously advised a young MS-13 member to rethink what he was doing and scolded him for putting himself in a dangerous situation. AR 135. Soon, a number of MS-13 members showed up. AR 135. They warned him to stay out of their business. AR 135. The next day, the same young MS-13 member came searching for Mr. Chavez at his house "with a weapon in his hand." AR 137. This person stared at his house "like as if he was going to shoot, or posing a

threat." AR 137. Subsequently, MS-13 was asking for information on Mr. Chavez. AR 140. They said that they wanted to inspect him for tattoos. AR 140. Sensing the situation getting even worse, Mr. Chavez realized that MS-13 might come to kill him at any moment. As a result, soon thereafter, Mr. Chavez fled to the United States once again, unable to see any way to remain in his country safely. AR 140-141.

D. Petitioner's Withholding-Only Proceedings

Mr. Chavez entered the United States unlawfully for the second time in July 2012 by crossing the border. AR 113.

In March 2020, the Department of Homeland Security (DHS) took Mr. Chavez into custody. AR 1261. Although the Asylum Office at the United States Citizenship and Immigration Services (USCIS) gave Mr. Chavez a negative reasonable fear determination, an Immigration Judge (IJ) vacated that decision. AR 1239, 1225. After that, Mr. Chavez was placed in "withholding-only" proceedings. AR 1225. Mr. Chavez applied for statutory withholding of removal under 8 U.S.C. § 1231(b)(3) and protection under the Convention Against Torture (CAT) before the Boston Immigration Court. His individual hearings were held on July 16, 2020 and August 18, 2020, during which the IJ considered the testimony of both Mr. Chavez and Dr. Lawrence Ladutke, an expert on El Salvador. AR 92-258.

At his individual hearing, Mr. Chavez testified that he fled El Salvador in the 1990s because of problems he was having with MS-13 and because he was convinced that the gang would kill him if he remained. He explained how he defied MS-13, as the gang began to take control of his town. He noted how he "erase[d] their [symbol] markings on the walls all the time," and how he once "wrote the marking of the rival gang" directly "on top of what they had written already." AR 125. He also described the threats from Churro, as well as the murders of friends and family members by the gang, including of the nephew who was living at the house Mr. Chavez returned to in 2012. AR 127-129.

Mr. Chavez detailed the interactions with MS-13 that precipitated his new flight from El Salvador in 2012—the scolding of a young gang member, threats by senior members, inquiries into his tattoos, and the apparition of the young member with a gun searching for Mr. Chavez. AR 129-140. Mr. Chavez expounded on the significant of his hand tattoo and the risks that it poses for him in El Salvador, even though it was innocently acquired when he was a preteen. AR 144.

After Mr. Chavez's testimony, the IJ accepted Dr. Ladutke as an expert witness without objection from DHS. AR 224. He testified that MS-13 operates as a "*de facto* state[]" that enforces its territorial control and authority with violence, and manipulates state authorities through various mechanism of control. AR 225-227. Dr. Ladutke further detailed how MS-13 responds violently to any

perceived challenge to their authority—"having the wrong tattoo, looking at someone the wrong way . . . having a relative who's seen as suspect by gang members." He also emphasized the likelihood that Mr. Chavez's anti-MS-13 acts would be considered acts of "extreme disrespect" that put him at great risk. AR 230-232. Dr. Ladutke explained that a recent reduction in killings in El Salvador was not actually tied to reduced rates of violence, but to the way the Salvadoran government tabulates that violence. AR 228-234. On cross-examination, Dr. Ladutke emphasized that the security forces in El Salvador often use new anti-terrorist laws to kill "suspected or accused" gang members without due process. AR 238-239.

The IJ found Mr. Chavez credible and did not question Dr. Ladutke's expertise or opinion. AR 59-60. Nonetheless, the IJ denied Mr. Chavez's withholding of removal and CAT relief. AR 60-67. First, the IJ categorically rejected Mr. Chavez's proposed social group—imputed gang membership—based on *Matter of E-A-G-*, 24 I. & N. Dec. 591 (BIA 2008). AR 60-61. The IJ further held that the absence of harm to Mr. Chavez and his family members by the police following his shooting made it unlikely that he would be harmed on account of such membership in the future, even assuming that his social group is valid. AR 61. Second, the IJ rejected Mr. Chavez's anti-gang political opinion claim. AR 62-64. The IJ determined that Mr. Chavez did not suffer harm rising to the level of

past persecution by MS-13, and that he was targeted as "a local concerned citizen" and as a result of a "personal dispute," rather than on account of anti-MS-13 political opinion. AR 62-63. Combined with the lack of harm to his family members since 2012, the IJ concluded that Mr. Chavez did not have a well-founded fear of persecution by MS-13. AR 63-64. However, the IJ did not discuss the expert evidence or other objective evidence. AR 61-64.

The IJ further found that the Salvadoran government would be able and willing to protect Mr. Chavez based on the following: (i) the government's incarceration of Churro on charges of rape, even though the IJ acknowledged that this arrest "was unrelated to the incident involving [Mr. Chavez]"; (ii) the government's classification of gangs as "terrorist"; (iii) the lack of evidence that the police would harm him upon deportation; and (iv) a 2019 *NY Times* article stating that the homicide rate has dropped, soldiers have been deployed to commercial areas, and some gang members have been sentenced to prison for murder. AR 64-66. However, the IJ did not explain why Dr. Ladutke's opinion—which was that the reduction of the statistical rate on homicide was not tied to the actual reduction of homicide—should not be accepted as a fact when there was no other evidence contradicting this opinion. *Cf.* AR 228-234. Further, the IJ found that Dr. Ladutke, "upon questioning from the parties and from the [IJ][,] said there was insufficient evidence that the police would harm [Mr. Chavez] or detain him

upon his deportation." AR 65. However, this statement from the IJ mischaracterizes Dr. Ladutke's testimony. Dr. Ladutke only conceded that no harm would occur to ordinary deportees. Dr. Ladutke did *not* opine that no harm would occur to a person like Mr. Chavez whom the police would target as a suspected gang member with a tattoo and if they become "aware of [Mr. Chavez's] past record." AR 241. Further, Dr. Ladutke also testified that "the [Salvadoran] government has been detaining *everyone* entering El Salvador" for the COVID-19 quarantine purposes. AR 234 (emphasis added).

With respect to the CAT relief, the IJ concluded that Mr. Chavez's shooting by the officials when he was a teenager did not constitute past torture because Mr. Chavez was running away from the officials at the time. AR 66. The IJ also found and that he had no objective fear of future torture because he had not had other interactions with police since 1991 or 1992. AR 66. But the IJ, once again, did not discuss the expert evidence or other objective evidence. AR 66-67. In evaluating whether officials or persons under color of law would turn a blind eye to MS-13's torture on Mr. Chavez, the IJ referenced his analysis on the Salvadoran government's unwillingness or incapability in the withholding of removal context and concluded that Mr. Chavez's evidence failed to meet this acquiescence prong. Lastly, the IJ determined that Mr. Chavez could not succeed on a CAT claim because he had "not been in El Salvador since 2012 in order to show that he could

not internally relocate." AR 67. Following the IJ's decision, Mr. Chavez timely appealed it to the BIA.

E. Petitioner's BIA Appeal

On March 9, 2021, the BIA dismissed Mr. Chavez's appeal and affirmed the IJ's decision. AR 4-7. First, the BIA categorically rejected Mr. Chavez's proposed social group—imputed gang membership—after relying on this Court's decision in *Cantarero v. Holder*, 734 F.3d 82 (1st Cir. 2013). AR 5. The BIA also cited *Matter of E-A-G-*, 24 I. & N. Dec. 591 (BIA 2008), for this conclusion. AR 5.

Second, the BIA held that Mr. Chavez "did not establish he was or would be harmed based on his actual or imputed anti-gang . . . political opinion." AR 5. The BIA reasoned that Mr. Chavez's "evidence that he was the victim of gang violence, resisted gang recruitment, reported criminal activity to the police, and painted graffiti of a rival gang, . . . does not establish that [he] actually held or was perceived to hold a political opinion." AR 5. However, the BIA did not provide any further explanations for the conclusion that Mr. Chavez did not hold an actual MS-13 political opinion. AR 5.

As to the requirement that Mr. Chavez establish a nexus between the anticipated persecution and his political opinion, the BIA found that Mr. Chavez "did not present sufficient evidence that the actions of gang members or the police

were or would be motivated by a political agenda imputed to him." AR 5. "Instead, [the BIA observed] that gang members attacked him because they presumably believed he was part of a rival gang and perceived him as a threat . . . ." AR 5. However, the BIA's analysis is silent on Dr. Ladutke's testimony that MS-13 perceived him as a threat to its authority. *Cf.* AR 232, 391 (¶16). With respect to Mr. Chavez's argument that the BIA should revisit *Matter of C-T-L-*, 25 I. & N. Dec. 341 (BIA 2010) to apply "a reason" nexus requirement, the BIA "decline[d] to revisit [its precedent]." AR 6 n.4.

Third, the BIA denied Mr. Chavez's CAT application. AR 6. The BIA found that Mr. Chavez "did not submit evidence that he was tortured in the past, nor does generalized evidence of official corruption in the Salvadoran law enforcement community suffice to prove that a Salvadoran public would more likely than not torture him, or consent to or acquiesce in his future torture by gang members." AR 6. The BIA agreed with the IJ that the police shooting of Mr. Chavez as a teenager was not past torture. AR 6. With respect to the question of whether officials or persons under color of law would turn a blind eye to MS-13's torture on Mr. Chavez, the BIA held that the Salvadoran officials "have taken actions to prosecute gang members and to prevent gang violence" and thus no acquiescence including willful blindness can be met. AR 7.

Lastly, the BIA rejected Mr. Chavez's argument that the IJ did not consider

or review all evidence. AR 7. The BIA viewed that the IJ considered all evidence including the expert testimony because the IJ noted that he considered them and was "not required to discuss every piece of evidence."

SUMMARY OF THE ARGUMENT

This Court should reverse the BIA's decision for the following reasons.

First, the Court should vacate the BIA's conclusion that Mr. Chavez did not establish an actual anti-MS-13 political opinion sufficient to justify withholding relief. The BIA committed an error of law because it did not provide sufficient reasoning for its bare conclusion. Similarly, the BIA did not consider Dr. Ladutke's testimony and other objective country conditions evidence in assessing whether Mr. Chavez's belief, expression, and action constituted an actual political opinion, thereby failing to apply a contextual factual inquiry. This failure is especially notable where neither the BIA nor the IJ questioned Dr. Ladutke's expertise or found his opinion unpersuasive.

Second, the Court should also vacate the BIA's conclusions that MS-13 would not persecute Mr. Chavez because of a perception that he had an anti-MS-13 political opinion, and Mr. Chavez failed to demonstrate a nexus between any actual and/or imputed anti-MS-13 political opinions and any persecution he would suffer. In support of these conclusions, the BIA relied on the IJ's factual findings. However, neither the BIA nor the IJ applied a contextual factual inquiry for their

conclusions that MS-13 perceived Mr. Chavez as a mere "threat." Here, without assessing Dr. Ladutke's testimony, the BIA and IJ both construed the meaning of a "threat" in the context of Mr. Chavez simply being a concerned citizen, as opposed to the more appropriate context of Mr. Chavez's anti-MS-13 political opinion. This failure is critical not only in this case, but also in political opinion asylum claims more generally. This is because a person's conduct may not appear to be political in one country, but may nonetheless be political in the applicant's country when examining the context of that country. For this inquiry, it is essential to review the objective country conditions evidence to assess the political context in the applicant's country. This did not occur here, which is reversible error.

Third, as to the nexus requirement where Petitioner must establish the connection between the persecution he would suffer and his actual or imputed anti-gang political opinion, this Court should reject *Matter of C-T-L-*, 25 I. & N. Dec. 341 (BIA 2010). In *C-T-L-*, the BIA concluded that, the "one central reason" standard that applies to asylum applications pursuant to section 208(b)(1)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(B)(i) (2006), also applies to applications for withholding of removal under section 241(b)(3)(A) of the Act, 8 U.S.C. § 1231(b)(3)(A) (2006). Here, in evaluating Mr. Chavez's withholding claim, the BIA held that Mr. Chavez's evidence was insufficient to prove that his genuine belief against MS-13 was not at least "one central reason"

for MS-13 to target him under *C-T-L-*. The BIA also declined to revisit *C-T-L-*. AR 6 n.4. However, *C-T-L-* is inconsistent with the withholding statute because the plain statutory language does not employ "one central reason" but "a reason." 8 U.S.C. § 1231(b)(3)(C). Because the plain meaning of "a reason" is less demanding than "one central reason," this Court should reject *C-T-L-*.

Fourth, the BIA erred when it impermissibly relied on *Cantarero v. Holder*, 734 F.3d 82 (1st Cir. 2013) to categorically reject Mr. Chavez's proposed social group—here, imputed gang membership. The targeted social group subjected to categorical bar in *Cantarero* was *actual* (current, inactive, or former) gang membership because Congress did not mean to provide humanitarian protections based on the voluntary association of "violent criminal undertakings." *See id*. at 86. However, Mr. Chavez has never been a gang member. Because of this factual distinction, the BIA could not rely on *Cantarero* to categorically reject Mr. Chavez's social group.

Furthermore, this Court should reject *Matter of E-A-G-*, 24 I. & N. Dec. 591 (BIA 2008), which categorically bars any perceived gang memberships as a basis for particular social groups. This categorical bar to withholding relief is directly contrary to the statute on exceptions to withholding of removal. Even if the statute is ambiguous on this question, *E-A-G-* should still be rejected because it is arbitrary, capricious, and manifestly contrary to the statute.

Fifth, the Court should reverse the BIA's conclusion that Mr. Chavez has not met the burden for the CAT. The BIA implicitly acknowledged that the harm Mr. Chavez faces from MS-13 arises to the level of torture for the private actor torture claim. However, the BIA erred when it failed to assess the evidence on how Salvadoran officials or other persons under color of law would react to MS-13's harm *on Mr. Chavez* who has a prior record with the police and tattoo.

The BIA also misapplied the standard in determining whether the torture to be inflicted by MS-13 would be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1). The applicable regulations state that acquiescence of a public official to torture requires that the public official, prior to the activity constituting torture, "[i] have awareness of such activity and [ii] thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 1208.18(a)(7). Here, in evaluating acquiescence, the BIA improperly required "willful blindness" as the standard Mr. Chavez must meet in demonstrating the second element—namely, whether a public official will "breach his or her legal responsibility to intervene to prevent such activity." The "willful blindness" standard, however, *only* applies to the first element concerning "awareness of such activity." *See Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004) (correctly applying the willful blindness standard to the awareness element,

but not to the breach of legal responsibility element). Furthermore, even assuming that the BIA employed the correct "willful blindness" standard as part of its analysis under Section 1208.18(a)(7), the record compels the contrary conclusion of the BIA's finding. Here, the Salvadoran officials will turn a blind eye to MS-13's torture of Mr. Chavez because of his tattoo and prior record.

Finally, as to Mr. Chavez's claim under the CAT that he will be tortured by officials under color of law, the BIA's finding that the police's shooting of Mr. Chavez when he was a teenager was not past torture should be vacated. The BIA and IJ failed to consider the objective evidence, which demonstrates that these security forces committed human rights violations at that time. Moreover, the BIA's conclusion that Mr. Chavez has not established the likelihood of future torture by Salvadoran officials should also be vacated. Here, the BIA mischaracterized Mr. Chavez's evidence as generalized evidence of official corruption and, in doing so, ignored Dr. Ladutke's testimony.

ARGUMENT

I. STANDARD OF REVIEW

The Court has jurisdiction to review constitutional claims, questions of law, and questions of fact raised upon a petition for review of a final order of removal against a noncitizen. 8 U.S.C. § 1252. Questions of law are reviewed *de novo*. *Pan v. Gonzales*, 489 F.3d 80, 85 (1st Cir. 2007). This Court gives some deference

to the agency's expertise in interpreting its statutes only if they are ambiguous on the issues in question, provided that the interpretation is not arbitrary, capricious, or manifestly contrary to the statute. *Johnson v. Guzman Chavez*, No. 19-897, 2021 U.S. LEXIS 3562, at *36 n.9 (June 29, 2021); *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

To determine whether there is ambiguity in the statute, this Court first employs traditional tools. *See Mosquera-Perez v. INS*, 3 F.3d 553, 554-55 (1st Cir. 1993). "First and foremost, this requires beginning with a textualist approach, as the 'plain meaning' of statutory language controls its construction." *Flock v. United States DOT*, 840 F.3d 49, 55 (1st Cir. 2016). This plain and ordinary meaning of the statute is critical because "the Court need not resort to *Chevron* deference . . . for Congress has supplied a clear and unambiguous answer to the interpretative question at hand." *Pereira v. Sessions*, 138 S. Ct. 2105, 2114 (2018). If the statute is ambiguous, the agency's interpretation of a statute is entitled to deference unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 842. To be sure, "even if not manifestly contrary to the statute, [the agency's decision] is still unreasonable if it is 'arbitrary or capricious in substance.'" *Amaya v. Rosen*, 986 F.3d 424, 432 (4th Cir. 2021).

With respect to factual questions, this Court reviews them under the

"substantial evidence standard," which requires the Court to reverse the BIA's decision if the record "compel[s] a reasonable factfinder to reach a contrary determination." *Chhay v. Mukasey,* 540 F.3d 1, 5 (1st Cir. 2008); *see Singh v. Holder*, 750 F.3d 84, 86 (1st Cir. 2014); 8 U.S.C. § 1252(b)(4)(B). Further, the BIA's factual findings must be "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). Relatedly, when the IJ finds a noncitizen credible, as it happened in this case, after an evidentiary hearing, this Court accepts his testimony regarding historical facts as true. *Palma-Mazariegos v. Gonzales*, 428 F.3d 30, 33 (1st Cir. 2005).

II. THE COURT SHOULD REVERSE THE BIA'S CONCLUSION THAT PETITIONER HAS NOT ESTABLISHED ANTI MS-13 (ACTUAL AND IMPUTED) POLITICAL OPINION BASED WITHHOLDING OF REMOVAL

A. Legal Framework of Political Opinion

To qualify for withholding of removal under 8 U.S.C. § 1231(b)(3), an applicant must establish a "clear probability" that his life or freedom would be threatened in the proposed country of removal because of a protected ground. *See Ang v. Gonzales*, 430 F.3d 50, 58 (1st Cir. 2005); *accord INS v. Stevic*, 467 U.S. 407, 413 (1984). This clear probability standard is "more likely than not" that the applicant would be subject to persecution. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987). If past persecution is established, then it is presumed that the

applicant's life or freedom would be threatened in the future based on the original claim. *See* 8 C.F.R. § 1208.16(b)(1)(i).

A withholding applicant can put forward an actual *or* imputed political opinion claim to establish his eligibility for withholding of removal. *See Vasquez v. INS*, 177 F.3d 62, 65 (1st Cir. 1999); *Alvarez-Flores v. INS*, 909 F.2d 1, 4 (1st Cir. 1990). To prevail on an actual political opinion claim, the applicant must (1) specify the political belief on which he relies, actually holds, and acted in furtherance of, (2) prove the persecutors were aware of this political belief, and (3) prove that the persecution was because of that political belief. *See Mendez-Barrera v. Holder*, 602 F.3d 21, 27 (1st Cir. 2010); *Zhakira v. Barr*, 977 F.3d 60, 67 (1st Cir. 2020).

On the other hand, to prevail on an imputed political opinion claim, the applicant does not need to prove that he had a political belief. Instead, the claim is satisfied if (1) the persecutor correctly or incorrectly perceived the applicant to hold a political belief and (2) the persecution was because of that perceived political belief. *Archila v. Holder*, 495 F. App'x 98, 99 (1st Cir. 2012) (unpublished); *Mendez v. Whitaker*, 910 F.3d 566, 571 (1st Cir. 2018).

B. The BIA Erred In Concluding that Petitioner's Evidence Did Not Establish that He Actually Held a Political Opinion (Actual Political Opinion)

1. The BIA erred by not providing sufficient reasons for its conclusion

The BIA erred by not providing any reasoning for its conclusion that "the evidence that Petitioner was the victim of gang violence, resisted gang recruitment, reported criminal activity to the police, and painted graffiti of a rival gang[2] did not establish that Petitioner actually held an anti-gang political opinion." AR 5. Other than this one-sentence conclusion, the BIA provided no other explanation. This absence of sufficient reasoning is a legal error.

Although there is no obligation for the BIA to "spell out every last detail of its reasoning where the logical underpinnings are clear from the record[,]" the BIA must offer sufficient reasoning to address the noncitizen's contention. *See Enwonwu v. Gonzales*, 438 F.3d 22, 35 (1st Cir. 2006); *see also Sok v. Mukasey*, 526 F.3d 48, 54 (1st Cir. 2008); *Gailius v. INS*, 147 F.3d 34, 47 (1st Cir. 1998); *Renaut v. Lynch*, 791 F.3d 163, 169 (1st Cir. 2015); *SEC v. Chenery Corp.*, 332

[2] The BIA omitted Mr. Chavez's action, expression, and belief against MS-13. As to actions, Mr. Chavez did not only pain graffiti of a rival gang over an existing MS-13 marking but also "erased [MS-13's] markings on the walls all the time." AR 125, 204. As to expression, Mr. Chavez told MS-13 numerous times that he did not like their painting of MS-13 symbols on the wall and their breaking glass bottles. AR 217. Lastly, as to his belief, Mr. Chavez testified that he was always against MS-13. AR 125.

U.S. 194, 196-97 (1947).

While the BIA affirmed the IJ's conclusion that Mr. Chavez did not hold a political opinion, the BIA did not cite to any portion of the IJ decision to clarify the basis of the BIA's decision. Instead, the BIA merely cited Mr. Chavez's testimony and his BIA brief without any explanations as to how and why these portions of the record weighed into its reasoning. *See* AR 5 (citing "Tr. at 28-34, 36-42; Applicant's Br. at 13-14").

Nor does the BIA's citations of three cases shed light on its reasoning. AR 5 (citing *Elias-Zacarias*, 502 U.S. at 481-83; *Mendez*, 910 F.3d at 571, and *E-A-G-*, 24 I. & N. Dec. at 596). This is because Mr. Chavez's evidence is easily distinguishable from these cases. In *Elias-Zacarias*, the Supreme Court did not find the noncitizen's resistance to a guerrilla organization's recruitment an actual political opinion *because the noncitizen was afraid of retaliation* from the government. 502 U.S. at 480. Similarly, in *E-A-G-* the BIA held that the noncitizen's *mere* refusal to join a gang without more did not constitute a political opinion. 24 I. & N. Dec. at 596. In *Mendez*, this Court also rejected a noncitizen's reporting of gang members' extortion to the police as a political opinion because there was *no evidence* in the record to suggest that the gang members *were ever aware* that the noncitizen had reported them to the police or that the noncitizen reported the gang's activities to *express a political opinion*. 910 F.3d at 571.

Unlike these cases, Mr. Chavez knew MS-13's goal and was (and still is) against the principles of this organization. AR 165 (knowledge that MS-13 "instill[s] fear in people [and extorts people] to maintain their power" and "further their own criminal enterprises"), 123, 125 ("I was always against [MS-13]"), 126 (MS-13's breaking bottles hurt "many kid who would walk barefooted"), 128-129 (MS-13 killing of Mr. Chavez's nephew); *see Zelaya-Moreno v. Wilkinson*, 989 F.3d 190, 202 (2d Cir. 2021) ("[T]o qualify as a political opinion, an opinion must involve some support for or disagreement with the belief system, policies, or practices of a government and its instrumentalities."); *Saldarriaga v. Gonzales*, 402 F.3d 461, 466 (4th Cir. 2005) (establishing that a political opinion can be met by evidence of verbal or openly expressive behavior in furtherance of a particular cause). For example, Mr. Chavez told MS-13 that he did not like their symbol painting. He erased MS-13 markings on walls numerous times. He once painted graffiti of a rival gang on top of an MS-13 symbol. He also advised an MS-13 member to quit. AR 125, 135-138, 204, 217.

Against this backdrop, at minimum, the BIA was required to provide a more robust explanation as to why Mr. Chavez's belief, expression, and actions were insufficient to demonstrate that he did not actually have a political belief against MS-13. This absence of sufficient reasoning alone warrants vacatur of the BIA's decision. *See Gailius*, 147 F.3d at 47 (finding that remand is a proper remedy);

Enwonwu, 438 F.3d at 35 (same); *Sok*, 526 F.3d at 58 (same); *Renaut*, 791 F.3d at 171 (same); *INS v. Ventura*, 537 U.S. 12, 16 (2002) ("the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation").

2. The BIA erred by failing to apply the contextual factual inquiry

Relatedly and independently, the BIA failed to apply the required contextual factual inquiry to analyze whether or not Mr. Chavez's anti-MS-13 beliefs constituted an actual political opinion.

This contextual factual inquiry requires a review of "the nature of the asylum applicant's activities in relation to the political context in which the dispute took place." *Hernandez-Chacon v. Barr*, 948 F.3d 94, 103 (2d Cir. 2020); *Zelaya-Moreno*, 989 F.3d at 196-97 (citing *Osorio v. INS*, 18 F.3d 1017 (2d Cir. 1994)); *Marroquin-Ochoma v. Holder*, 574 F.3d 574, 577 (8th Cir. 2009) (stating that it is necessary for the agencies and court to pay careful attention to the particular circumstances surrounding the alleged persecution); *Jahed v. INS*, 356 F.3d 991, 998 (9th Cir. 2004) (holding that "[t]he undeniable political context of th[e] extortion . . . cannot be ignored or discounted"); *see also Berhe v. Barr*, 837 F. App'x. 255, 259 (5th Cir. 2020) (unpublished) (remanding because the IJ and BIA failed to consider "political dimension of [the applicant's] punishment"); *Liu v. Holder*, 501 F. App'x. 564, 566 (7th Cir. 2013) (unpublished) (finding that

whether an act has "a political dimension requires an inquiry into the broader political context and the government's response"); *Rodas Castro v. Holder*, 597 F.3d 93, 106 (2d Cir. 2010) ("a claim of political persecution cannot be evaluated in a vacuum" and must be defined with reference to the specific conditions in the country in question). This inquiry is "critical to evaluating a political opinion claim" because a political opinion claim "must involve some support for or disagreement with the belief system, policies, or practices of a government and its instrumentalities." *Zelaya-Moreno*, 989 F.3d at 197, 199; *see also Matter of S-P-*, 21 I. & N. Dec. 486, 493 (BIA 1996) ("the evidence must be evaluated in the *context* of the ongoing civil conflict to determine" political opinion claims) (emphasis added).[3] To apply this inquiry, the IJ and BIA must review the objective country conditions evidence, especially for withholding of removal claims. *See Aguilar-Escoto v. Sessions*, 874 F.3d 334, 338 (1st Cir. 2017) (holding that "in the withholding context, the inquiry is a strictly objective one"); s*ee also Orellana v. Barr*, 925 F.3d 145, 152 (4th Cir. 2019) (the BIA's arbitrary ignoring of the critical testimony "constitutes an abuse of discretion"); *Acharya v. Holder*, 761 F.3d 289, 300 (2d Cir. 2014) (the BIA cannot overlook material factual evidence or

[3] UNHCR has also provided guidance that political opinion claims must "be understood in a broad sense to encompass any opinion on any matter in which the machinery of State, government, society, or policy may be engaged." UNHCR, *Guidance Note on Refugee Claims to Relating Victims of Organized Gangs* (Mar. 2010), ¶ 45.

mischaracterizing the record).

Notwithstanding this requirement to engage in a contextual factual inquiry, the BIA analyzed whether Mr. Chavez's evidence constituted an actual political opinion in a vacuum. *See* AR 5. After affirming the IJ's finding that Mr. Chavez did not establish an actual political opinion, the BIA failed to cite or refer to Dr. Ladutke's declaration or testimony, or any of the country conditions documentary evidence submitted by Mr. Chavez. *See id.* In so doing, the BIA failed to take into account the political landscape in El Salvador, how Mr. Chavez's actions were extreme in context, and how Mr. Chavez's actions expressed his anti-MS-13 political beliefs. *See Hernandez-Chacon*, 948 F.3d at 103 (reviewing the country conditions evidence to determine whether the agency applied the contextual factual inquiry); *Rodas Castro*, 597 F.3d at 106 (same).

This failure was critical because Mr. Chavez's actions, analyzed within the correct contextual factual inquiry, (i) compel the conclusion that his actions were driven by disagreement with the policies and practices of MS-13 and (ii) demonstrated a clear challenge to MS-13's authority. AR 390 (¶15) ("The gangs have gained concessions from the government and other political ends by asserting control over the rate of homicides and other forms of violence."), 225-226 (MS-13 acts as a *de facto* state), 387 (¶9) ("President Bukele has himself negotiated with the gangs while serving as the Mayor of San Salvador."), 871 (President Bukele's

concession that MS-13 "has a *de facto* power"), 877-884 ("El Salvador Gangs Influence Local Politics in the Capital"), 232 (Dr. Ladutke's explanation that Mr. Chavez's actions have "shown [MS-13] what they would consider to be extreme disrespect, and disrespect undermines their authority, which undermines their ability to control territory and collect extortion payments."), 391 (¶16) ("To MS-13 members, graffiti associated with a rival gang would be one of the highest challenges to their control over an area and therefore an egregious threat to their authority."; Mr. Chavez is lucky that he was not killed for challenging [MS-13] in this manner."). *Cf. Zelaya-Moreno*, 989 F.3d at 201 (noting that there was no "evidence in the administrative record that MS . . . advocate[s] for a political agenda or that gangs employ tactics in service of a political philosophy").

Notwithstanding this abundant country conditions evidence, the BIA's one-sentence conclusion does not even hint that the BIA considered any of this evidence. This failure to apply to contextual factual inquiry and failure to consider the unchallenged objective evidence is a reversible error. *See Un v. Gonzales*, 415 F.3d 205, 209 (1st Cir. 2005) (at minimum, the Court "expect[s] an agency to make findings, implicitly if not explicitly, on all grounds necessary for decision"). Further, the absence of any explanations as to why Dr. Ladutke's opinion was ignored is inconsistent with the BIA's own precedent. *See M-A-M-Z-*, 28 I. & N. Dec. at 177-78 (it is important for IJs to "explain the reasons behind the factual

findings" that are inconsistent with experts' opinions).

C. The BIA Erred In Concluding that MS-13's Perception of Petitioner's Actions Did Not Constitute an Imputed Political Opinion

As an independent claim, the BIA committed an error of law when it failed to consider the objective evidence in assessing Mr. Chavez's imputed political opinion claim, thereby failing to apply the contextual factual inquiry. Under this inquiry, the record compels the contrary conclusion of the BIA's finding.

1. The BIA failed to apply the contextual factual inquiry

The BIA concluded that MS-13 "presumably believed [Mr. Chavez] was part of a rival gang and perceived him as a threat." AR 5. For this factual conclusion, unlike the actual political opinion claim, the BIA relied on the IJ's factual findings. *Id.* (citing "IJ at 5"). The IJ made a factual finding that MS-13 "thought [Mr. Chavez] was a rival [gang]" and separately "thought [Mr. Chavez] was a threat to [MS-13]" as "a local concern citizen opposed to criminal acts within his neighborhood." AR 63. Indeed, this finding is consistent with Mr. Chavez's testimony. *See* AR 141 (MS-13 perceived him "as a threat" because of his series of defiance), 203 (MS-13 also perceived him as "a rival" because of his tattoo). However, neither the BIA nor the IJ assessed the meaning of *this threat* to MS-13 based on the objective country conditions evidence. Moreover, neither the BIA nor the IJ provided any explanations as to why the evidence was ignored. This constituted legal error. The BIA's failure to consider any of this evidence

reflects that the BIA did not apply the contextual factual inquiry as required by the BIA's own precedent. *See Hernandez-Chacon*, 948 F.3d at 103; *M-A-M-Z-*, 28 I. & N. Dec. at 177; *S-P-*, 21 I. & N. Dec. at 494.

Unlike actual political opinion, imputed political opinion claims focus on the persecutor's *perception* of the applicant's actions and beliefs. *See Archila*, 495 F. App'x at 99 ("[The applicant] must show that his persecutors attributed a political opinion to him . . . ."); *Alvarez Lagos v. Barr*, 927 F.3d 236, 254 (4th Cir. 2019) ("[T]he relevant inquiry is not the political views sincerely held or expressed by the victim, but rather the persecutor's *subjective perspective* of the victim's views.") (emphasis added). To show the persecutor's subjective perspective, the IJ and BIA must review objective evidence (e.g., expert evidence) because "a claim of political persecution cannot be evaluated in a vacuum." *See Rodas Castro*, 597 F.3d at 106. *See also, e.g.*, *Vumi v. Gonzales*, 502 F.3d 150, 157-58 (2d Cir. 2007) (remanding because the BIA failed to consider the political dimension of the persecution in the political context of the country); *Cordon-Garcia v. INS*, 204 F.3d 985, 992 (9th Cir. 2000) (remanding because the BIA failed to review the persecutor's perception based on the record in the case); *Espinosa-Cortez v. U.S. Att'y Gen.*, 607 F.3d 101, 111 (3d Cir. 2010) (same); *Gomez-Saballos v. INS*, 79 F.3d 912, 917 (9th Cir. 1996) (same). This is why the BIA's own precedent requires the review of "direct or *circumstantial* evidence." *S-P-*, 21 I. &

N. Dec. at 494 (emphasis added).

Here, MS-13 perceived Mr. Chavez's actions as acts of challenge and as a direct threat to their authority, which led and would lead the gang to impute an anti-MS-13 political opinion to Mr. Chavez. Mr. Chavez refused to join MS-13. AR 126. He erased MS-13's markings on the town walls "all the time" and he once wrote the marking of MS-13's rival gang over where MS-13 had already written their marking. AR 125. Mr. Chavez also expressed his anti-gang opinion directly to MS-13. On a number of occasions, he told MS-13 members that he did not like when they painted on the walls or broke glass bottles in the streets. AR 217. He once reported an MS-13 member to the police and, at a different time, he tried to convince an MS-13 member to quit his membership. AR 135, 158-59. There is no question that MS-13 was aware of Mr. Chavez's actions, and it is evident MS-13 viewed him as a threat because of these actions. *See* AR 141. In fact, the BIA and IJ do not dispute that MS-13 considered him as a threat as "a local concern citizen opposed to criminal acts within his neighborhood." AR 63, 5. However, nowhere in their decisions is there a hint that this threat was reviewed through the lens of the objective country conditions evidence.[4]

[4] For this reason, the BIA's rejection of Mr. Chavez's contention that the IJ failed to consider all evidence is erroneous. AR 7. As the BIA noted, the IJ's decision must "reflect[] meaningful consideration of the relevant substantial evidence." AR 7. Yet, the IJ's decision does not even implicitly reflect that he considered, at minimum, the unchallenged expert evidence. *See Un*, 415 F.3d at 209.

2. The record compels the conclusion that MS-13 imputed an anti-MS-13 political opinion to Mr. Chavez

The failure to apply the contextual factual inquiry was a critical error because the record compels the finding that MS-13 imputed an anti-MS-13 political opinion to Mr. Chavez. MS-13 operates in El Salvador as a quasi-state or *de facto* state and it maintains power through its use of violence and control of territory. *See* AR 391 (¶¶13-14, 16), 551 (¶7) ("To a significant degree, gangs in El Salvador are commonly recognized as political actors that have usurped control over territories from the Salvadoran state."), 226, 871, 997 ("[Political] [c]andidates have to work with [MS-13] to get permission to campaign in those neighborhoods, and [MS-13] control[s] local politics through intimidation and corruption."). MS-13 maintains this quasi-state control partly through its demand for respect, so much so that "[p]ersons who resist the authority of the local gang or who even just inadvertently cross it, or who collaborate . . . with rival gangs, are reportedly subjected to swift and brutal retaliation from the gang." AR 694-95; *see also* AR 226 (MS-13 "kill[s] people who they see as any threat to their authority, anyone who doesn't cooperate with them"). MS-13 also maintains power by requiring strict obedience to its dictates, as such acts of defiance are an existential political threat to its authority as a quasi-state actor. *See* AR 848 (¶6) ("refusals to succumb to a gang's demands and/or any actions that challenge or thwart the gang are perceived as acts of disrespect").

Applying these principles, and to use the same example from above, erasing MS-13 symbols off walls may seem like an innocuous act. However, as Dr. Ladutke explains, this is seen by MS-13 as one of the "highest challenges to their control over an area and therefore an egregious threat to their authority." AR 391 (¶16). Therefore, no matter what political opinion Mr. Chavez might have actually held, MS-13 perceived (and would perceive) this action as an expression of Mr. Chavez's anti-MS-13 political opinion, thereby imputing this opinion to Mr. Chavez. The same can be said of Mr. Chavez trying to talk a gang member into quitting, as well as the perception that Mr. Chavez informed another gang member to the police. *See* AR 135, 158-159. As explained above, MS-13 maintains power through demands for respect and obedience. Mr. Chavez's acts were and would be viewed as a direct affront to MS-13's authority and power. *See* AR 711 (criticizing the gang is commonly construed as a challenge to the gang's authority), 229 (the police witnesses "are too afraid to cooperate with authorities because they know they'll be killed"), 230 (explaining how MS-13 cannot survive without extortion and any challenge to that authority such as "cooperating with the authorities" is a threat); 394 (¶25) (the Salvadoran officials' reliance on witness testimony to prosecute MS-13 members "creates a strong incentive for [MS-13] members . . . to silence potential witnesses by threatening or physically eliminating them"), 706-

707 (same), 714 (same); 997 (it is important for MS-13 members to "avoid formal prosecution for crimes committed against the communities they control").

In sum, the BIA committed a legal error when it failed to apply the contextual factual inquiry and ignored the objective country conditions evidence. Under this inquiry, the record compels the contrary conclusion of the BIA's finding that Mr. Chavez's "evidence . . . does not establish that [he] . . . was perceived to hold a political opinion." AR 5.

D. The BIA Erred in Concluding that Petitioner Did Not Meet the Nexus Requirement Because It Failed to Apply the Contextual Factual Inquiry

As to the nexus requirement where Petitioner must establish the connection between the persecution he would suffer and his actual or imputed anti-gang political opinion, the BIA erred by finding that the gang members did not or would not attack Mr. Chavez because of his actual or imputed anti-gang political opinion. Indeed, for both actual and imputed political opinion claims, Mr. Chavez is required to demonstrate that his anti-MS-13 political opinion was or would be a reason (or at least one central reason[5]) to MS-13's persecution. *See Mendez-Barrera*, 602 F.3d at 27 ("There must be evidence that the would-be persecutors

[5] As set forth below, Petitioner argues that the nexus standard for withholding of removal is not "one central reason." *See infra* Section III. However, even assuming that "one central reason" is the proper standard, the BIA's conclusion is still erroneous.

knew of the beliefs and targeted the belief holder *for that reason*" for actual political opinion) (emphasis in original); *Archila*, 495 F. App'x at 99 (same).

Here, the BIA found that Mr. Chavez "did not present sufficient evidence that the actions of gang members . . . were or would be motivated by a political agenda imputed to him." AR 5. The BIA relied on the IJ's factual findings and reasoned that "the gang members attacked him because they presumably believed he was part of a rival gang and perceived him as a threat." *Id.* (citing the IJ decision). The IJ explained that, first, Mr. Chavez "himself testified that [MS-13] attacked [him] because they thought he was a rival," and, second, "he also testified that [MS-13] members thought he was a threat to them [as a local concerned citizen opposed to criminal acts within his neighborhood]." AR 63. Because the BIA assessed multiple motives, it appears that the BIA properly applied the mixed-motive standard. *Aldana-Ramos v. Holder*, 757 F.3d 9, 19 (1st Cir. 2014); *Ordonez-Quino v. Holder*, 760 F.3d 80, 90 (1st Cir. 2014).

Nonetheless, the BIA and IJ only focused on Mr. Chavez's testimony *alone* without considering the objective country conditions evidence. AR 5 (citing "IJ at 5, 8; Tr. at 29-34, 36-42"). This is a critical error because the BIA must have reviewed the objective country conditions evidence to construe the meaning of "threat" from MS-13's perspective. *See Javed v. Holder,* 715 F.3d 391, 396-97 (1st Cir. 2013) (reversing the BIA's determination that the applicant had not

established that he was targeted due to an imputed political opinion basing its reasoning on the political and social context of the conflict); *S-P-*, 21 I. & N. Dec. at 494.

As applied to the present case, critical to the factual contextual analysis is an understanding of how MS-13 operates in El Salvador. *See Rodas Castro*, 597 F.3d at 93. As discussed above, MS-13 operates as a *de facto* state in the territory it controls. AR 225-27. The gang "monopolize[s] violence and it uses this violence to carry out state functions. AR 226. MS-13 also acts like a *de facto* state by imposing its own forms of justice. *Id.* MS-13 views any acts of disrespect as threats to its authority or control, and MS-13 meets such acts with extreme violence. AR 391 (¶ 16), 226. Beyond acting as a *de facto* state, MS-13 is heavily involved in local and domestic politics. AR 225-27, 391 (¶ 15), 387 (¶9); AR 390 (¶15), 997. With this political context, the meaning of the *threat* was directed at MS-13, a *de facto* state and political actor. *See* AR 225-26. MS-13 viewed Mr. Chavez's acts of disobedience and defiance as a threat to its authority as a quasi-state actor. *See* AR 232. Dr. Ladutke testified that Mr. Chavez has "shown them what they would consider to be extreme disrespect, and disrespect undermines their authority, which undermines their ability to control territory and collect extortion payments." AR 232; *see also* AR 694 ("[i]t is equally forbidden for inhabitants to show 'disrespect' for the gang, a subjective evaluation on the part of

the gang members that . . . encompass[es] a multitude of perceived slights and offences"). Therefore, to MS-13, the meaning of threat caused by Mr. Chavez is a challenge to the organization's policies and practices. *See Zelaya-Moreno*, 989 F.3d at 199.[6]

Further, and independently, the BIA's conclusion on nexus for clear probability of future persecution is also erroneous. The BIA's decision is silent on why it denied Mr. Chavez's *future* persecution based on his anti-MS-13 political opinion claim. AR 5. It appears that the BIA relied on the IJ's factual findings. *Id.* (citing "IJ at 3-6, 8"). As this Court emphasized, "the inquiry [of future persecution for withholding] is a strictly objective one." *Aguilar-Escoto*, 874 F.3d at 338. Thus, "the BIA was . . . obliged to consider documentary evidence potentially capable of establishing [Mr. Chavez's] likelihood of suffering further abuse" because of actual or imputed political opinion. *Id*. This "documentary evidence" obviously includes uncontradicted and unchallenged expert evidence. This Court previously held that the BIA's adoption of parts of the objective evidence but not others, such as expert evidence, is a reversible error. *See Gailius*, 147 F.3d at 46 (emphasizing that the BIA should "not jump over the issue of the

[6] Thus, Mr. Chavez's specific and individualized evidence is distinguishable from the cases the BIA cited: *Amilcar-Orellana v. Mukasey*, 551 F.3d 86, 91 (1st Cir. 2008) (no nexus evidence) and *Nikijuluw v. Gonzales*, 427 F.3d 115, 121 (1st Cir. 2005) (no corroborating or other evidence other than the petitioner's testimony).

[persecution]" because the BIA did not address the petitioner's expert witness evidence).

Here, once again, the IJ failed to provide any consideration to Dr. Ladutke's testimony. Instead, the IJ focused solely on the fact that Mr. Chavez has been absent in El Salvador since 2012, no harm has been occurred to his family members, and one threat at gunpoint in 2012 was a personal dispute. AR 63. Putting aside the validity of these factual findings (because the BIA did not explain whether it was adopting all of the IJ's factual findings on these points), it is clear that the IJ failed to review the expert evidence. Dr. Ladutke concluded that "[i]t is . . . *extremely likely* that the [MS-13] members will continue to target him and eventually kill him should he be forced to return to El Salvador" *because of Mr. Chavez's series of defiance*. AR 402-403 (¶45) (emphasis added), 230 (explaining how MS-13 does not tolerate any challenge to its authority). Dr. Ladutke also emphasized that, "[i]n addition to killing him, [MS-13] [is] likely to torture Mr. Chavez as a grisly example to others who might think of failing to cooperate with them." AR 403 (¶45). It is difficult to imagine better evidence that establishes Mr. Chavez's clear probability of future persecution because of his anti-MS-13 based actual and imputed political opinion. *See Alvarez Lagos*, 927 F.3d at 255 (finding abuse of discretion when the BIA and IJ failed to address the petitioner's expert testimony regarding his political opinion claim); *S-P-*, 21 I. & N. Dec. at 494.

In sum, the record compels the conclusion that Mr. Chavez has met the nexus requirement for actual and imputed political opinion.

III. THE COURT SHOULD REJECT *MATTER OF C-T-L-*, 25 I. & N. Dec. 341 (BIA 2010) BECAUSE IT IS INCONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE

The Court should reject *Matter of C-T-L-*, 25 I. & N. Dec. 341 (BIA 2010), which held that the "one central reason" standard that applies to asylum applications pursuant to section 208(b)(1)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(B)(i) (2006), also applies to applications for withholding of removal under section 241(b)(3)(A) of the Act, 8 U.S.C. § 1231(b)(3)(A) (2006). This Court should hold that "a reason" in the withholding of removal statute is not identical to—and is less demanding than—the asylum statute's "one central reason" standard.[7] *See* 8 U.S.C. § 1231(b)(3)(C).

Prior to the REAL ID Act, Congress did not specify what standard the nexus ("on account of") prong requires on either asylum or withholding of removal (withholding of deportation).[8] *See Guzman-Vazquez*, 959 F.3d at 270. The BIA applied "at least in part" standard for both forms of relief. *See S-P-*, 21 I. & N.

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[7] There is currently a circuit split on this issue. *Compare Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017) (a reason is the proper standard for withholding), *Guzman-Vazquez v. Barr*, 959 F.3d 253 (6th Cir. 2020) (same) *with Gonzalez-Posadas v. Att'y Gen.*, 781 F.3d 677, 685 n.6 (3d Cir. 2015) (one central reason is the proper standard for withholding).

[8] Congress changed the term of "withholding of deportation" to "withholding of removal." *See Hernandez-Barrera v. Ashcroft*, 373 F.3d 9, 21 n.11 (1st Cir. 2004).

Dec. at 494 (applying "in part" standard for asylum); *Matter of V-T-S-*, 21 I. & N. Dec. 792, 796 (BIA 1997) (same for withholding of removal). Through the REAL ID Act, Congress adopted "at least one central reason" for asylum. *Aldana-Ramos*, 757 F.3d at 18; 8 U.S.C. § 1158(b)(1)(B)(i). However, Congress did not adopt the same statutory language for withholding of removal but, instead, included "a reason" language. *See* 8 U.S.C. § 1231(b)(3)(C).

"When called on to resolve a dispute over a statute's meaning, this Court normally seeks to afford the law's terms their ordinary meaning at the time Congress adopted them." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021); *Pereira*, 138 S. Ct. at 2114 (assessing whether "[t]he statutory text alone is enough to resolve this case"). This ordinary meaning inquiry is "a textualist approach, as the 'plain meaning' of statutory language controls its construction." *Flock*, 840 F.3d at 55. The statute provides that, "[i]n determining whether an alien has demonstrated that the alien's life or freedom would be threatened for <u>*a reason*</u> [of five enumerated protective grounds], the trier of fact shall determine whether the alien has sustained the alien's burden of proof." 8 U.S.C. § 1231(b)(3)(C) (emphasis added). The statute only contains "a reason" not "one central reason." *Id*. This Court should "assume that the legislative purpose is expressed by the ordinary meaning of the words used." *Id*. at 431. The plain meaning of "a reason" is naturally less demanding than "one central reason." *See Barajas-Romero*, 846

F.3d at 360; *Guzman-Vazquez*, 959 F.3d at 272. Thus, "the language [same] Congress used to describe the two standards conveys very different meanings." *Cardoza-Fonseca*, 480 U.S. at 430. "The different emphasis of the two standards which is so clear on the face of the statute is significantly highlighted by the fact that the same Congress simultaneously" adopted one central reason for asylum and a reason for withholding of removal. *Id*. at 432.

The statutory scheme further confirms that Congress did not intend to apply the "one central reason" standard of asylum to withholding of removal. "When Congress amended the withholding of removal statute to clarify the applicable burden of proof, it cross-referenced clauses (ii) and (iii) of the asylum statute's burden-of-proof provision, but not clause (i)"—the clause adopting one central reason. *Barajas-Romero*, 846 F.3d at 358. Thus, this omission was a deliberate choice. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Cardoza-Fonseca*, 480 U.S. at 432. (internal quotations omitted). On this point, *C-T-L-* acknowledges it. 25 I. & N. Dec. at 344-45. Yet, it relied on *Negusie v. Holder*, 555 U.S. 511, 518 (2009) to note that "silence is not conclusive" in the statutory interpretation. *Id*. at 345. Thereafter, the BIA made a leap and reasoned that "[t]here is no indication that Congress intended to change this [uniform]

approach that [the BIA] had traditionally applied when it passed the REAL ID Act." *Id*. The BIA went even further and concluded that "all indications are that Congress intended to apply the 'one central reason' standard uniformly to both asylum and withholding claims." *Id*.

The BIA's reliance on *Negusie*'s canon of statutory construction is misplaced. Indeed, the Supreme Court in *Negusie* held that the statute in question—8 U.S.C. § 1101(a)(42)—was silent on "whether the statutory text mandates that coerced actions must be deemed assistance in persecution." *Negusie*, 555 U.S. at 518. Section 1101(a)(42), which is known as the so-called "persecutor bar," only mentions that "any person who ordered, incited, assisted, or otherwise participated in the persecution" is not a refugee. As the Supreme Court noted, this statutory language is silent on whether this persecutor bar does not include a "coerced actions" exception since the statutory language does not appear to have any exceptions. On the other hand, 8 U.S.C. § 1231(b)(3)(C) is not silent on whether "one central reason" or "a reason" is applicable for withholding of removal. Again, Congress explicitly included "a reason" for nexus instead of "one central reason." 8 U.S.C. § 1231(b)(3)(C). Thus, the BIA's observation that the statute is silent on which nexus standard Congress included for withholding of removal is contrary to the statutory text. The inquiry should end here. "[T]he Court need not resort to *Chevron* deference . . . for Congress has supplied a clear

and unambiguous answer to the interpretative question at hand." *Pereira*, 138 S. Ct. at 2113.

To the extent that this Court may review legislative history for determining whether the statutory language in question is "genuinely ambiguous,"[9] legislative history further confirms there was no Congressional intent to adopt "one central reason" uniform standard for asylum to withholding of removal. *See Castañeda v. Souza*, 810 F.3d 15, 23-24 (1st Cir. 2015) (review of the legislative history for the first step of *Chevron* is permissible); *Succar v. Ashcroft*, 394 F.3d 8, 31 (1st Cir. 2005); *Pereira*, 138 S. Ct. at 2119 (rejecting the government's legislative history argument because it does not support the government's "atextual position"). The withholding of removal section in the Conference Report explains how Congress enacted 8 U.S.C. § 1231(b)(3). *See* H.R. Rep. No. 109-72 at 168-69 (2005). Congress first explained that "withholding of removal involves similar consideration of credibility and corroboration factors and some of the same issues regarding Ninth Circuit jurisprudence." *Id*. at 169 (emphasis added). Nonetheless, Congress did not cross-reference the nexus standard for asylum to withholding of

[9] In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the Supreme Court articulated the standard for when deference to an agency's interpretation is appropriate under *Auer v. Robbins*, 519 U.S. 452 (1997). The *Kisor* Court explained that courts must first find that "the regulation is *genuinely* ambiguous." *Kisor*, 139 S. Ct. at 2415 (emphasis added). Although this ruling was in the context of regulatory interpretation, Petitioner believes that the same approach should be applied here.

removal. Nor did Congress define "a reason" as "one central reason." Instead, Congress stated that it was codifying "withholding of removal applications the same standards for sustaining the applicable burden of proof and for assessing credibility that would be used for asylum adjudications under clauses *208(b)(1)(B)(ii)* and *(iii)* of the INA" not clause (i)—one central reason. *Id*. (emphasis added).

Moreover, a subsequent legislative proposal further supports that Congress did not mean to apply the same nexus standard for asylum and withholding. In 2017, the House Judiciary Committee approved an amended version of the Asylum Reform and Border Protection Act of 2017. H.R.391, 115th Cong. This version contained a proposed amendment to 8 U.S.C. § 1231(b)(3)(C) to replace "a reason" with "one central reason." *Id*. at 17. During the hearing before the House Judiciary Committee, U.S. Congressman Mike Johnson noted that "H.R.391 brings the standard for withholding [of] removal in line with that of asylum." H.R. 391, The "Asylum Reform and Border Protection Act"; And H. Res. 446, The "Resolution of Inquiry": Hearing Before the Comm. On the Judiciary, 115 Cong. 1 (2017) (Jul. 26, 2017) (Statement of Mike Johnson). This bill, at minimum, acknowledges that the meaning of "a reason" Congress adopted for withholding of removal in the REAL ID Act was not the identical standard to one central reason for asylum. *See generally MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218,

232-33 (1994) (reviewing legislative histories of later enactments); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (same).

Thus, the BIA's point that it can apply "one central reason" to withholding of removal because there are all indication that Congress intended to apply a uniform standard for both asylum and withholding of removal is an erroneous interpretation. Accordingly, this Court should reject *C-T-L-*.

IV. THE COURT SHOULD REJECT THE BIA'S CONCLUSION THAT "IMPUTED GANG MEMBERSHIP" MUST BE CATEGORICALLY REJECTED FOR PARTICULAR SOCIAL GROUP

A. Legal Framework of Particular Social Group

A noncitizen seeking withholding of removal, akin to asylum, must demonstrate that his life "would be threatened in that country" because of one of five statutorily enumerated protected grounds, including "membership in a particular social group." 8 U.S.C. § 1231(b)(3)(A). Indeed, the "threshold of eligibility for withholding of removal is similar to the threshold for asylum," however, "withholding requires a higher standard." *See, e.g., Sinurat v. Mukasey*, 537 F.3d 59, 62 (1st Cir. 2008). This higher standard is "a clear probability of persecution, rather than merely a well-founded fear of persecution." *Ang*, 430 F.3d at 58.

When a withholding of removal applicant bases his application on his "membership in a particular social group," he must establish that the proposed

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." *De Pena-Paniagua v. Barr*, 957 F.3d 88, 95-96 (1st Cir. 2020) (internal quotations omitted). The BIA determines whether a social group is cognizable only after performing a case-specific analysis. *Matter of L-E-A-*, 27 I. & N. Dec. 581, 584 (2019); *Paiz-Morales v. Lynch,* 795 F.3d 238, 245 (1st Cir. 2015) ("Social group determinations are made on a case-by-case basis."); *De Pena-Paniagua*, 957 F.3d at 94, 98 (remanding the BIA's decision because it categorically concluded that the petitioner's particular social group was not cognizable).

B. The BIA Committed an Error of Law When It Categorically Rejected Petitioner's Proposed Social Group—Imputed Gang Membership—Based on *Cantarero v. Holder*, 734 F.3d 82 (1st Cir. 2013)

The BIA committed an error of law when it categorically rejected Mr. Chavez's proposed social group—imputed gang membership—based on this Court's decision in *Cantarero v. Holder*, 734 F.3d 82 (1st Cir. 2013). In support of this conclusion, the BIA reasoned that "Congress did not mean to grant asylum [or withholding of removal] to those whose association with a criminal syndicate has caused them to run into danger." AR 5 (quoting *Cantarero*, 734 F.3d at 86). However, the concern this Court had in *Cantarero* involved an actual gang member. This Court noted that providing humanitarian protection to actual

(current, former, or inactive) gang members "would reward membership in an organization that undoubtedly wreaks social harm in the streets of our country." *Cantarero*, 734 F.3d at 86. This rationale also applied to former gang members because that the applicant's "renounce[ment of] the gang [membership] does not change the fact that [the applicant] is claiming protected status *based* on his prior gang membership, and he does not deny the violent criminal undertakings of what voluntary association." *Id*. (emphasis in original).

Unlike the petitioner in *Cantarero*, Mr. Chavez has never been a gang member. Because *Cantarero* is inapplicable to the present case, the BIA's reliance is an error of law. *See Mukamusoni v. Ashcroft*, 390 F.3d 110, 121 (1st Cir. 2004) (finding that the BIA's reliance on distinguishable case law to reject the petitioner's argument is an error of law).

C. The Court Should Reject the BIA's categorical rejection of Petitioner's Social Group and *Matter of E-A-G-*, 24 I. & N. Dec. 591 (BIA 2008)

The Court should also reject the BIA's categorical denial of Petitioner's social group because it is directly contrary to Congressional intent. In this case, the BIA held that "an asylum [or withholding] applicant *cannot* establish particular social group status based on its incorrect perception by others that he is a gang member." AR 5 (emphasis added). In support of this conclusion, the BIA cited *Matter of E-A-G-*, 24 I. & N. Dec. 591, 595-96 (BIA 2008). The BIA's holding is

directly contrary to the statute.

When Congress enacted the statute governing withholding of removal relief, it provided only four exceptions in which the Attorney General can bar noncitizens from being eligible for withholding of removal considerations. *See* 8 U.S.C. § 1231(b)(3)(B). None of these exemptions provides any basis for the government to categorically reject the ground advanced by Petitioner for withholding protection—here, an incorrectly perceived as a gang member. *See* H.R. Rep. No. 104-828, at 216 (1996) ("Subsection (b)(3)(B) specifies that an alien is barred from this form of relief if, having been convicted of a particularly serious crime, the alien is a danger to the community."). Put another way, Congress did not permit the Attorney General to categorically bar a noncitizen's withholding application that is not covered by the exemptions. *See Succar*, 394 F.3d at 23-24 (finding that Congress did not permit the Attorney General to "categorically exclude[] from application for adjustment of status a category of otherwise eligible aliens").

Even if the Court finds that the statute is ambiguous as to whether the Attorney General can categorically bar Petitioner's social group, the Court should still reject the BIA's conclusion. Because the BIA primarily relied on *E-A-G-* to reject Petitioner's social group, the dispositive question is whether *E-A-G-* is "arbitrary, capricious, or manifestly contrary to the statute." *Cabral v. INS*, 15 F.3d 193, 194 (1st Cir. 1994).

In determining whether an agency's decision is arbitrary and capricious, this Court "must examine the evidence relied on by the agency and the reasons given for its decision." *Minuteman Health Inc. v. United States HHS*, 291 F. Supp. 3d 174, 190 (D. Mass. 2018). *See, e.g., Amaya*, 986 F.3d at 434 (rejecting the particularity element under *Matter of W-G-R-* because it required the factors that "ha[ve] no bearing on the particularity analysis"); *De Pena-Paniagua*, 957 F.3d at 93-94 (holding that the BIA's categorical rejection of a proposed social group involving "its members' inability to leave relationships with their abusers" by relying on *Matter of A-B-*, 27 I. & N. Dec. 316 (BIA 2018) is arbitrary because "[i]t [erroneously] presumes that the inability to leave is always caused by the persecution from which the noncitizen seeks haven"). Further, "unexplained inconsistency in an agency's interpretation of a statute can be a reason for holding the agency's actions to be arbitrary and capricious change from agency practice." *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 115 (1st Cir. 2009). "The agency's explanation must be accompanied by some reasoning that indicates that the shift is rational and, therefore, not arbitrary and capricious." *Id*. (citing *Citizens Awareness Network v. United States Nuclear Regulatory Comm'n*, 59 F.3d 284, 291 (1st Cir. 1995)).

Under these principles, the BIA's *Matter of E-A-G-*, 24 I. & N. Dec. 591 (BIA 2008), is arbitrary, capricious, and manifestly contrary to 8 U.S.C. §

1231(b)(3). In *E-A-G-*, although the BIA noted that "social visibility" of "young persons who are perceived to be affiliated with gangs" was "less clear-cut," it nonetheless held that "[t]reating affiliation with a criminal organization as being protected membership in a social group [wa]s inconsistent with the principles underlying the bars to asylum and withholding of removal based on criminal behavior." *Id*. at 596 (citing 8 U.S.C. § 1231(b)(3)(B)). In support of this conclusion, the BIA relied on the Ninth Circuit's *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007). The Ninth Circuit found that it "cannot conclude that Congress, in offering refugee protection for individuals facing potential persecution through social group status, intended to include violent street gangs who assault people and who traffic in drugs and commit theft." *Id*. at 945-46.

However, *E-A-G-* did not limit its reasoning and holding to individuals with violent gangs or otherwise criminals. Rather, it expansively and categorically rejected any individuals who are incorrectly perceived as gang members (who are not actual gang members). *E-A-G-*, 24 I. & N. Dec. at 596. For this conclusion, the BIA does not explain why and how it can categorically reject a social group involving individuals who are not actual gang members. The central rationale of categorically barring applicants from basing their asylum or withholding of removal on past-criminal behavior traits does not exist for these individuals. The Tenth Circuit characterized this conclusion as an "irrational leap" and rejected *E-*

A-G-. *See Escamilla v. Holder*, 459 F. App'x 776, 786 (10th Cir. 2012) (unpublished) ("[t]he concerns expressed by the Ninth Circuit simply are not present for aliens who have never been a part of a gang yet are perceived as gang members"). The Court should consider the reasoning of *Escamilla* as persuasive in concluding that *E-A-G-* is arbitrary and capricious.

Relatedly, *E-A-G-*'s categorical bar on individuals who are not gang members runs contrary to the relevant statutes. Withholding of removal is a mandatory relief unless exceptions apply. *See Aguirre-Aguirre*, 526 U.S. at 419. As argued above, Congress provided specific categories of exceptions to withholding eligibility. *See* 8 U.S.C. § 1231(b)(3)(B). In fact, *E-A-G-* relies on this statute to reject the proposed social group. *E-A-G-*, 24 I. & N. Dec. at 596. Yet, such concern does not exist in Mr. Chavez's case since he does not base his protection claim on any criminal behavior or security concerns. Because the BIA's reasoning of categorically barring actual gang members is inapplicable to Petitioner (who is not an actual gang member), *E-A-G-* is contrary to 8 U.S.C. § 1231(b)(3).

Lastly, *E-A-G-* conflicts with the Refugee Convention. Under the *Charming Betsy* canon, the interpretation of a statute "ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Similar to 8 U.S.C. §

1231(b)(3)(B), the Refugee Protocol through Article 33.2 of the Refugee Convention, "allows the United States to refoul an individual whom there are reasonable grounds for regarding as a danger to the security." *Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009) (internal quotations omitted). In the absence of any danger to the security, the government must not deport a refugee "to the frontiers of territories where his life or freedom would be threatened on account of his . . . membership of a particular social group . . . ." 19 U.S.T 6223, 6276 (Nov. 6, 1968). Further, the Untied Nations High Commissioner for Refugee (UNHCR) focuses on "individual responsibility" to determine whether the applicant should be excluded from protection. UNHCR, *Guidance Note on Refugee Claims to Relating Victims of Organized Gangs* (Mar. 2010), ¶¶ 59-60. Put another way, "[f]or exclusion to be justified," UNHCR focuses on "(i) the involvement of the applicant in the excludable act; (ii) the applicant's mental state (*mens rea*); and, (iii) possible grounds for rejecting individual responsibility." *Id*. at ¶59.

Here, none of these issues and concerns are applicable to Mr. Chavez's case. Mr. Chavez does not base any security grounds for the protected grounds. Thus, categorically barring Mr. Chavez's imputed gang membership based particular social group claim without assessing whether the evidence establishes the definition of refugee is inconsistent with the Refugee Convention.

In sum, this Court should reject *E-A-G-* and reverse the BIA's conclusion.

V. THE BIA ERRED WHEN IT CONCLUDED THAT PETITIONER FAILED TO ESTABLISH CAT CLAIM

A. Legal Framework of CAT Protection

As an independent basis for relief, Mr. Chavez also seeks relief under the CAT. Mr. Chavez bears the burden to establish eligibility for CAT protection. *See* 8 C.F.R. §§ 1208.16-18. To obtain CAT protection, Mr. Chavez must show that "it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 1208.16(c)(2). The CAT standard is an objective one, and it follows the two-prong test: (1) what is likely to happen to the applicant if removed?; and (2) does what is likely to happen amount to the legal definition of torture? *See Myrie v. AG United States*, 855 F.3d 509, 516 (3d Cir. 2017). The first prong is factual in nature and based on the record produced. *See Perez-Trujillo v. Garland*, Nos. 11-1481, 17-1586, 2021 U.S. App. LEXIS 19169, at *12 (1st Cir. June 28, 2021).

Relevant to this Court's inquiry in this petition, this first prong focuses on how Salvadoran officials or others under color of law will likely act in response to the harm Mr. Chavez faces from MS-13, as well as the likelihood of torture directly inflicted by Salvadoran officials themselves. The second prong addressing whether what is likely to happen constitute torture is legal in nature. *Id*.

B. The Likelihood of Future Torture by MS-13 With Officials' Acquiescence

1. The BIA and IJ's Failure to Apply Individualized Factual Inquiry

Although relief from removal under the CAT is provided if the torture is inflicted at the hands of officials, this relief can also be provided if the source of torture is a private actor and the torture "is inflicted . . . at the . . . acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1). The applicable regulations state that acquiescence of a public official to torture requires that the public official, prior to the activity constituting torture, "[i] have awareness of such activity and [ii] thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 1208.18(a)(7).

The BIA's reasoning and conclusion on acquiescence—which is germane to the first prong that evaluates how Salvadoran officials will likely act in response to the harm Mr. Chavez faces from MS-13—are erroneous. Here, neither the BIA nor the IJ reviewed the evidence on acquiescence through the lens of *individualized* factual inquiry. The BIA does not appear to dispute that MS-13 will likely harm Mr. Chavez upon his removal to El Salvador, but it found that "the [IJ] properly found that the government officials in El Salvador have taken actions to prosecute gang members and to prevent gang violence." AR 6, 66-67. However,

the BIA and IJ do not discuss how officials would react to MS-13's harm *on Mr. Chavez* who has tattoo and prior record with the police on the resisting arrest charge.[10] Instead, both decisions elaborate on what the Salvadoran officials are *generally* doing against gang members. AR 6-7 (BIA), 66-67 (IJ). This angle of the inquiry is a reversible error. For all CAT claims, the BIA requires that the evidence must lead to the conclusion that the applicant will *personally* be at risk. *Matter of J-E-*, 23 I. & N. Dec. 291, 303 (BIA 2002) ("Specific grounds must exist that indicate the individual would be personally at risk."); *Omar v. Barr*, 962 F.3d 1061, 1065 (8th Cir. 2020) (same).

To assess the likelihood of personal risk, the agency has a corresponding obligation to review the evidence on the likelihood of Salvadoran officials' response to MS-13's harm *on Mr. Chavez*. This inquiry is critical because "it is not clear . . . why the preventative efforts of some government actors should foreclose the possibility of government acquiescence, as a matter of law, under the

[10] The only part that might be considered as an individualized assessment is the IJ's point in the withholding's claim that Dr. Ladutke "upon questioning from the parties and from the [IJ] said there was insufficient evidence that the police would harm [Mr. Chavez] or detain him upon his deportation." AR 65, 66 ("as noted in the [IJ's analysis] above discussion on government action"). However, the IJ severely mischaracterized Dr. Ladutke's testimony. He only conceded that no harm would occur to ordinary deportees, not a person like Mr. Chavez whom the police would harm as a suspected gang member with tattoo and if they become "aware of [Mr. Chavez's] past record." AR 241. Further, Dr. Ladutke also testified that "the [Salvadoran] government has been detaining everyone entering El Salvador" for the COVID-19 quarantine purposes. AR 234.

CAT." *De La Rosa v. Holder*, 598 F.3d 103, 110 (2d Cir. 2010). As set forth below, the BIA and IJ's reviewing of the evidence solely on what the Salvadoran officials are generally doing against gangs is a violation of the regulation because the agency did not consider the evidence in assessing the likelihood of torture on *the applicant*. *See* 8 C.F.R. § 1208.16(c)(3).

2. The BIA's erroneous application of willful blindness to the "breach of legal responsibility" element

Another legal error the BIA committed is its application of the concept of willful blindness not only to the first "awareness" element of 8 C.F.R. § 1208.18(a)(7), but also to the second "breach of legal responsibility" element in Section 1208.18(a)(7). AR 6-7; *see also Khouzam*, 361 F.3d at 171 (correctly applying the willful blindness standard to the awareness element, but not to the breach of legal responsibility element); *see also* Jon Bauer, *Obscured by 'Willful Blindness': States' Preventive Obligations and the Meaning of Acquiescence under the Convention Against Torture*, 52.2 Col. Hum. Rts. L. Rev. 738, 769-770 (2021) (noting that the Second Circuit is the only circuit court that has "consistently stress[ed] that awareness and breach of legal responsibility are distinct elements").

When the Senate ratified the CAT, the Senate understood "acquiescence" to mean a public official's awareness of the torturous activity and breach a legal responsibility to intervene to prevent it. *See* S. Comm. On Foreign Rels., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment, S. Exec. Rep. No. 101-30, at *9 (1990) (hereinafter "Senate Report"). The Senate Report explains that "[t]he purpose of this condition is to make it clear that both actual knowledge and 'willful blindness' fall within the definition of the term 'acquiescence' in article 1 [of CAT]." *Id*. While the Senate identified both actual knowledge and willful blindness within the definition of acquiescence, the Senate meant to consider "willful blindness" as a necessary condition for "awareness" not for "breach of legal responsibility." *Id*. at 9. Indeed, the regulation has a two-part test: "awareness" and "thereafter breach his or her legal responsibility to intervene to prevent such activity." *See* 8 C.F.R. § 1208.18(a)(7). Surely, turning a blind eye to torturous acts (thus, willful blindness) is sufficient to demonstrate a breach of legal responsibility to intervene to prevent such activity. On the other hand, whether "evidence that [the] authorities are 'unable' to fulfill their legal responsibility of protection might [also] inform a determination about their 'acquiescence' in threatened torture" is an open question. *Scarlett v. Barr*, 957 F.3d 316, 335 (2d Cir. 2020). This Court has not yet answered this question with clarity. *Cf. Perez-Trujillo*, 2021 U.S. App. LEXIS 19169, at *12 ("Acquiescence includes willful blindness."); *Ramírez-Pérez v. Barr*, 934 F.3d 47, 52 (1st Cir. 2019) ("willful blindness of [the foreign] government authorities").

The BIA in this case—without providing any case law, rationale, or explanations—applied the willful blindness standard to the second "breach of legal

responsibility" element under Section 1208.18(a)(7). AR 6-7. The BIA indicated that the Salvadoran officials "have taken actions to prosecute gang members and to prevent gang violence." AR 6. This conclusion clearly demonstrates that the Salvadoran officials have knowledge on MS-13's activities including what it would do to Mr. Chavez. Thus, this conclusion satisfies the awareness prong. However, the BIA, with one sentence, found that "[t]he record does not sufficiently establish that any Salvadoran public official would . . . exhibit willful blindness toward any torture inflicted on him by any gang members or anyone else" by applying willful blindness to the breach of legal responsibility prong. AR 7. The BIA's assessment, made without any reasoning or case law, is an error of law. *See Enwonwu*, 438 F.3d at 35; *Sok*, 526 F.3d at 54.

3. The Record Compels the Contrary Conclusion of the BIA's Conclusion on Acquiescence

Even if the Court finds that the willful blindness standard governs the second "breach of legal responsibility" element under 8 C.F.R. § 1208.18(a)(7) as well as the first "awareness" element of Section 1208.18(a)(7), the record compels the conclusion that Salvadoran officials will more likely than not ignore torturous acts inflicted by MS-13 on Mr. Chavez.

MS-13's presence in El Salvador is significant that they are considered "as

de facto state[]."[11] AR 225, 871 (President's Bukele's concession that MS-13 "ha[s] a *de facto* power"). Within their territories, MS-13 "used this violence [of killing] to do things that we normally think of a state or government doing such as extorting . . . tax." AR 226. Despite designation of MS-13 as a terrorist organization, police forces "often collude[] with the gang members," to the extent that "[i]t is well-known in El Salvador that the police force includes gang members themselves and agents who perpetrate crime against citizens." AR 392 (¶21), 393 (¶23), 634, 705, 943, 980, 986.

Against this backdrop, the authorities are unlikely to be *willing* . . . to prevent this [harm inflicted by MS-13] from happening" to Mr. Chavez, who is "without significant financial resources or political connections." AR 402 (¶45) (emphasis added), 402 (¶42) ("often even the will to protect people who are targeted by MS-13"). Further, rather than attempting to protecting Mr. Chavez, Dr. Ladutke testified that the police would likely harm Mr. Chavez if they find out about his prior record with the police and mistake him as a member of a gang because of his tattoo. AR 231, 241. *See also* 407 (Petitioner's tattoo), 529 (Gang tattoo reference sheets), 653 ("Today, gangs, authorities, and death squads link tattoos to gang membership in El Salvador. Officials interviewed for this report

[11] Dr. Ladutke defined a state "as an institution that claims to have a monopoly on the legitimate use of force within a given territory." AR 535.

thought tattoos were the most common factors among deportees who were killed."), 654 ("Deportees who were disappeared and/or killed often had tattoos."), 581-582 (the police's torture of a person whom "they suspected of gang membership"), 590 (same), 589 ("the deportees at the highest risk of harm are . . . those alleged links to gangs"), 592-594, 735.

This objective evidence including the expert evidence compels the contrary conclusion of the BIA's finding on acquiescence.

C. The Likelihood of Future Torture by Officials under Color of Law

1. Past torture

Independently, the BIA's conclusion on Mr. Chavez's past torture by officials under color of law is erroneous. Neither the BIA nor the IJ meaningfully considered the objective country conditions evidence in assessing whether the Salvadoran officials' shooting of Mr. Chavez when he was a teenager constitutes *past torture*. The BIA held that the police's shooting of Mr. Chavez when he was a teenager was not torture. AR 6. Yet, the BIA does not provide any reasoning for its conclusion. The IJ explained that the police did not "specifically intend[] to cause severe mental pain or suffering . . . . Rather, [Mr. Chavez] had been stopped and detained by police, he was uncooperative with the police and unable to comply with their demands, and attempted to flee the scene when he was shot." AR 66. However, the BIA and IJ's reasoning is silent on the objective evidence. This is a

critical error. "[A] torturer's specific intent in a CAT claim may be established by direct or circumstantial evidence and inferred from evidence of prior harmful acts and practices." *Resendiz v. Barr*, 810 F. App'x. 538, 540 (9th Cir. 2020) (unpublished). According to Dr. Ladutke, when Mr. Chavez was shot, it was "either just before or just after the end of the civil war" during which "the military security forces retained complete control of police functions at that time." AR 392 (¶22). These militarized forces "were extremely corrupt and involved in some of the nation's worst human rights abuses." AR 392 (¶22). They were "identified by the United Nations Truth Commission Report as some of the main organizing grounds for the nation's infamous death the nation's infamous death squads." AR 386 (¶5). They also "became involved in organized crime, including kidnapping wealthy citizens for ransom." AR 386 (¶5); 231. Despite this context, both the BIA and IJ jumped the gun in declaring no specific intent without reviewing the evidence providing such context. This is an error of law. *See Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (reversing the BIA's conclusion because it did not "take this [country conditions evidence] into consideration when assessing an applicant qualifies under the Convention"); *Quintero v. Garland*, No. 19-1904, 2021 U.S. App. LEXIS 15775, *62-64 (4th Cir. May 26, 2021) (same); 8 C.F.R. § 1208.16(c)(3).

Moreover, no reasonable factfinder could agree with the agency's blanket

conclusion that there was no specific intent to cause severe pain or suffering in considering the country conditions evidence. An official stopped Mr. Chavez for no reason. Thereafter, again without any reason, the official hit "Mr. Chavez on his chest with a weapon." AR 116. After conducting an aggressive search on him, the official took a bicycle from Mr. Chavez and asked for papers. AR 117. When Mr. Chavez saw "a group of policeman coming towards" him, he started to flee the scene. AR 118. Thereafter, *multiple officials* "started shooting" guns at Mr. Chavez *on his back*, who was *a teenager without any arm*, when he started to *run towards his home*. AR 118. With the country conditions evidence, no reasonable factfinder would agree with the BIA's conclusion but find that these officials had "the purpose of inflicting severe pain or suffering." *Pierre v. AG of the United States*, 528 F.3d 180, 190 (3d Cir. 2008) (en banc); *accord Gourdet v. Holder*, 587 F.3d 1, 5 n.3 (1st Cir. 2009); *Oxygene v. Lynch*, 813 F.3d 541, 548-49 (4th Cir. 2016) ("specific intent [is] . . . akin to purpose or desire"). To be clear, even if these officials also had intent to prevent him from fleeing, "people commonly have dual purposes." *Pierre*, 528 F.3d at 190 n.7.

In sum, the BIA's conclusion on past torture must be vacated.

2. Future torture by officials under color of law

The BIA mischaracterized the objective evidence in the record in assessing the likelihood of future torture by officials under color of law. The BIA merely

noted that "*generalized* evidence of official corruption in the Salvadoran law enforcement community [does not] suffice to prove that a Salvadoran public official would more likely than not torture him . . . ." AR 6 (emphasis added). Such characterization is absurd because the BIA's reasoning does not even discuss Dr. Ladutke's testimony and affidavit as well as other material evidence, which is well tailored to Mr. Chavez's CAT application. *Cf.* AR 224-242, 385-403. In fact, this mischaracterization is notably troubling because neither the BIA nor the IJ questioned Dr. Ladutke's credibility or expertise. AR 220-242. Again, if the BIA and IJ disagree with the expert witness's opinion, they must provide reasons why the opinion is inconsistent with the record. *M-A-M-Z-*, 28 I. & N. Dec. at 177-78. The absence of any explanation is a reversible error. *See Billeke-Tolosa v. Ashcroft*, 385 F.3d 708, 712 (6th Cir. 2004) ("the BIA ha[s] no discretion to ignore its own precedent"); *Perez-Trujillo*, 2021 U.S. App. LEXIS 19169, at *21 (same); 8 C.F.R. § 1003.1(g).

With the objective "well-tailored" evidence, the record compels the conclusion that Mr. Chavez will more likely than not be severely harmed or killed by Salvadoran officials. The first source of torture by officials is those who are either MS-13 members or working for MS-13.[12] Since 1990s, MS-13 has become

[12] "[A]cts under color of law" or acts done "in an official capacity" are established "when [the torturer] misuses power possessed by virtue of . . . law and made

a "*de facto*" state actor where they now influence Salvadoran politics through violence such as "the rate of homicides."[13] AR 390 (¶14). "It is well-known in El Salvador that the police force includes gang members themselves and agents who perpetrate crime against citizens." AR 393 (¶23). The link between MS-13 and officials in El Salvador is very substantial that "President Bukele has himself negotiated with the gangs while serving as the Mayor of San Salvador." AR 387 (¶ 9), 634 ("authorities' offices have . . . been infiltrated by gangs"), 393 (¶23) (bodyguard for a politician was found to be a MS-13 member), 705 ("[t]he gangs reportedly have their own infiltrators in the police and the military, including certain elite units and the General Staff"), 943 ("MS-13's recent success is derived in part from a strategy, begun at least four years ago, of infiltrating members into the police and military"), 980 (same), 986 (same). Thus, it is realistic and clearly probable that officials, who are either MS-13 members or working for MS-13 but nonetheless under color of law, would more likely than not torture Mr. Chavez

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possible only because he was clothed with the authority of . . . law." *Ramirez-Peyro v. Holder*, 574 F.3d 893, 900 (8th Cir. 2009); *Matter of O-F-A-S-*, 28 I. & N. Dec. 35 (BIA 2020) (same).

[13] Although the BIA's decision is silent, the IJ appears to give significant weight to the New York Times article. AR 65. However, this article's point of the reduction of the homicide rate is not inconsistent with Dr. Ladutke's testimony. *Cf.* AR 228. He testified that this reduction stems from the way of counting homicide for political purposes. AR 228-229. Thus, to the extent that the IJ's point may be relevant to Mr. Chavez's CAT claim, the IJ and BIA must have provided its explanations as to why Dr. Ladutke's testimony on the reason for the reduction of homicide rate is unpersuasive. *M-A-M-Z-*, 28 I. & N. Dec. at 177-78.

upon his removal.

The second source of torture by officials is non-MS-13 affiliated officers. Dr. Ladutke testified that when "the [Salvadoran] police [would] be aware of [Mr. Chavez's] past record[,] they [would] hold [it] against him and potentially harm him." AR 241. The police would also "potentially mistake[]" Mr. Chavez as a member of a gang. AR 241. If such accusation occurs, military and police forces may kill him. AR 239, 580-583, 640. Indeed, such harm and accusation would occur "if [Mr. Chavez] has any conflicts with the police" not based on mere deportation. AR 241. However, the record compels the conclusion that Mr. Chavez has a history of distrusting police and fail to comply with their unreasonable demands. AR 121, 201. The realistic and likely scenario is that Mr. Chavez gets into trouble with the police or military after failing to comply with their unreasonable demands or because of his prior record with his tattoo, despite being no threat or having committed any crime. As to dispositive evidence, Dr. Ladutke testified that the police will use checkpoint on the road to look for Mr. Chavez's tattoo. AR 231. Moreover, the Salvadoran government has detained "everyone" who enters the country for the COVID-19 quarantine purposes. Thus, the chance of encountering the police is almost 100 percent, and the chance of the police finding out about Mr. Chavez's prior record and tattoo is at least more than 50 percent. As Dr. Ladutke opined, the police will more likely than not harm him

with these reasons. AR 241.

In sum, the BIA's factual conclusion on the likelihood of future torture must be vacated.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant his petition. This Court should reverse the BIA's decision, vacate the removal order, and remand for further proceedings consistent with the Court's decision.

Dated: August 1, 2021

Respectfully submitted,

Rommel Alexander Chavez

By and through Counsel,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief complies with the Court's order enlarging the word limit [no more than 18,000 words] and the typeface requirement of Fed. R. App. P. 32(a)(5)(A) [proportionally spaced face 14-point or larger]. The Brief, containing 17,649 words, exclusive of those items that, under Fed. R. App. P. 32(f), are excluded from the word count, was prepared in proportionally spaced Times New Roman 14-point type.

/s/ SangYeob Kim
SangYeob Kim (No. 1183553)

Dated: August 1, 2021

CERTIFICATE OF SERVICE

I certify that this Brief and Addendum are served to all counsel of record registered in ECF on August 1, 2021.

/s/ SangYeob Kim
SangYeob Kim (No. 1183553)

Dated: August 1, 2021

ADDENDUM

Page

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A095-057-109 – Boston, MA

Date: MAR - 9 2021

In re: Rommel Alexander CHAVEZ

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS[1]

APPEAL

ON BEHALF OF APPLICANT: Benjamin M. Haldeman, Esquire

APPLICATION: Withholding of removal; Convention Against Torture

The applicant, a native and citizen of El Salvador, appeals from the Immigration Judge's decision dated August 18, 2020, denying his applications for withholding of removal under section 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(A), and protection under the regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994) (CAT). 8 C.F.R. §§ 1208.16(c), 1208.18. The Department of Homeland Security has not responded to the appeal. The appeal will be dismissed.[2]

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The applicant seeks withholding of removal based on a fear of mistreatment by gang members and the police in El Salvador on account of his actual or imputed anti-gang and/or anti-government political opinions, and his imputed gang membership (IJ at 2; Tr. at 21-22; Exhs. 2, 3-5; Applicant's Br. at 1, 8-22).[3] The Immigration Judge determined that the applicant did not establish past harm rising to the level of persecution and did not show that the harm he experienced or fears upon his return to El Salvador will be inflicted on account of any protected characteristic (IJ at 2-6). *See* section 241(b)(3)(A) of the Act. With respect to the applicant's CAT claim, the Immigration Judge found that the applicant did not demonstrate that he will more likely than not be tortured in El Salvador by, at the instigation of, or with the consent or acquiescence of, any public official (IJ at 8-9).

[1] The applicant is in withholding-only proceedings due to the filing of a Notice of Referral to Immigration Judge (Form I-863) (Exh. 1). *See* 8 C.F.R. §§ 1208.2(c)(3), 1208.31(e), 1241.8(e).

[2] The request for oral argument is denied. 8 C.F.R. § 1003.1(e)(7).

[3] Throughout his brief the applicant repeatedly cites cases from outside of the United States Court of Appeals for the First Circuit, in whose jurisdiction this case arises. However, we are bound to apply the law of the circuit in cases arising in that circuit. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993); *Matter of Anselmo*, 20 I&N Dec. 25 (BIA 1989).

We affirm the Immigration Judge's determination that the applicant did not establish past persecution or a clear probability of persecution in El Salvador based on a protected ground necessary to meet his burden for withholding of removal under the Act (IJ at 2-6). *See* section 241(b)(3) of the Act; *see also* 8 C.F.R. § 1208.16(b). The Immigration Judge determined that, while credible, the applicant did not establish that his anti-gang and/or anti-government political opinions, membership in a particular social group, or any other protected ground, was or would be "at least one central reason" for his past or future fear of persecution (IJ at 2-6). *See Matter of N-M-*, 25 I&N Dec. 526, 529 (BIA 2011) (an applicant must prove that race, religion, nationality, membership in a particular social group, or political opinion was or will be "at least one central reason" for the claimed persecution).

We agree with the Immigration Judge that the applicant's proposed particular social group defined as "imputed gang membership" is not cognizable under the Act (IJ at 2-3; Tr. at 21-22; Applicant's Br. at 20-22). In *Cantarero v. Holder*, the First Circuit held that the Board has reasonably concluded that "Congress did not mean to grant asylum to those whose association with a criminal syndicate has caused them to run into danger." 734 F.3d 82, 86 (1st Cir. 2013). Moreover, we have previously held that because membership in a criminal gang cannot constitute a particular social group, an asylum applicant cannot establish particular social group status based on the incorrect perception by others that he is a gang member. *Matter of E-A-G-*, 24 I&N Dec. 591, 595-96 (BIA 2008), *clarified by Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), *and Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014), *vacated in part and remanded on other grounds by Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016), *cert. denied sub nom. Reyes v. Sessions*, 138 S. Ct. 736 (2018).

We also affirm the Immigration Judge's determination that the applicant did not establish he was or would be harmed based on his actual or imputed anti-gang and/or anti-government political opinion (IJ at 3-6, 8). *Vasquez v. INS*, 177 F.3d 62, 65 (1st Cir. 1999). The applicant's evidence that he was the victim of gang violence, resisted gang recruitment, reported criminal activity to the police, and painted graffiti of a rival gang, and experienced negative encounters with the police does not establish that the applicant actually held or was perceived to hold a political opinion (Tr. at 28-34, 36-42; Applicant's Br. at 13-14). *See generally INS v. Elias-Zacarias*, 502 U.S. 478, 481-83 (1992) (noting that a person might resist taking sides with a political faction for a variety of reasons, that such actions are not necessarily expressions of political opinion); *Mendez v. Whitaker*, 910 F.3d 566, 571 (1st Cir. 2018) (concluding evidence that the alien reported criminal activity to the police did not support the alien's claim of persecution on account of the imputed political opinion of "opposition to lawbreakers"); *Matter of E-A-G-*, 24 I&N Dec. at 596 (holding resistance to gang recruitment did not support finding of a political opinion).

The applicant did not present sufficient evidence that the actions of gang members or the police were or would be motivated by a political agenda imputed to him (IJ at 3-6, 8). Instead, the applicant testified that gang members attacked him because they presumably believed he was part of a rival gang and perceived him as a threat, and that the police stopped and detained him as a teenager because he was uncooperative, did not comply with their commands, and was shot when he attempted to flee the scene (IJ at 5, 8; Tr. at 29-34, 36-42). This evidence does not satisfy the applicant's burden to establish that his alleged persecutors believed or would believe he holds a political opinion. *See Amilcar-Orellana v. Mukasey*, 551 F.3d 86, 91 (1st Cir. 2008) (concluding

no evidence "that members of the gang imputed any political opinion to [the alien] on the basis of his statements to the police or testimony before the grand jury," based on those acts alone); *Nikijuluw v. Gonzales*, 427 F.3d 115, 121 (1st Cir. 2005) (harm associated with general conditions of criminality and violence is insufficient to support a grant of asylum).

In addition, regarding the applicant's encounter with the police as a teenager, the Immigration Judge properly found that the police never mentioned that they stopped him because of his tattoos; rather, he was stopped, frisked, and searched and asked for identification papers for his bicycle (IJ at 3; Tr. at 29-34). The applicant's appellate arguments to the contrary do not establish clear error in the Immigration Judge's decision (Applicant's Br. at 13-14).[4] *See Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017) (holding that on clear error review, "[a] finding that is 'plausible' in light of the full record – even if another is equally or more so – must govern").

We acknowledge the applicant's fear of returning to El Salvador. However, his general apprehension of being a victim of gang violence or coming to the attention of the police does not provide a basis for withholding of removal under the Act. *See Tay-Chan v. Holder*, 699 F.3d 107, 112-13 (1st Cir. 2012); *see also Matter of M-E-V-G-*, 26 I&N Dec. at 235 ("[A]sylum and refugee laws do not protect people from general conditions of strife, such as crime and other societal afflictions"); *Matter of Mogarrabi*, 19 I&N Dec. 439, 447 (BIA 1987) (stating that, "aliens fleeing general conditions of violence and upheaval in their countries would not qualify for asylum"). Therefore, we affirm the Immigration Judge's determination that the applicant has not established eligibility for withholding of removal under the Act.

Further, we agree with the Immigration Judge that the applicant has not met his burden of demonstrating eligibility for protection under the CAT (IJ at 8-9). The applicant has not shown that he would more likely than not be tortured by or at the instigation or with the acquiescence (including willful blindness) of a public official acting in his or her official capacity if removed to El Salvador. *See* 8 C.F.R. §§ 1208.16(c), 1208.18(a)(1)-(5); *Matter of Z-Z-O-*, 26 I&N Dec. 586, 590 (BIA 2015) (holding that "an Immigration Judge's predictive findings of what may or may not occur in the future are findings of fact, which are subject to a clearly erroneous standard of review"). The applicant did not submit evidence that he was tortured in the past, nor does generalized evidence of official corruption in the Salvadoran law enforcement community suffice to prove that a Salvadoran public official would more likely than not torture him, or consent to or acquiesce in his future torture by gang members (IJ at 8-9). Regarding the applicant's claim that he was shot by the police in the buttocks as a teenager when he fled the scene, we agree with the Immigration Judge that this condemnable act was not torture as defined by the regulations (IJ at 8; Tr. at 29-32; Exh. 3 at 5). 8 C.F.R. § 1208.18(a).

To the extent the applicant fears torture by gang members, the Immigration Judge properly found that the government officials in El Salvador have taken actions to prosecute gang members and to prevent gang violence (IJ at 6-9; Tr. at 71-76; Exh. 8 at 69). Consequently, we discern no basis to disturb the Immigration Judge's finding that, while gang violence continues to be a

[4] To the extent the applicant argues that *Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010), was wrongly decided, we decline to revisit our decision in *Matter of C-T-L-* (Applicant's Br. at 13 n.19).

problem in El Salvador, the government is actively attempting to combat gangs (IJ at 8-9). The record does not sufficiently establish that any Salvadoran public official would seek to torture the applicant or would acquiesce in or exhibit willful blindness toward any torture inflicted on him by any gang members or anyone else. *See Mayorga-Vidal v. Holder*, 675 F.3d 9, 20 (1st Cir. 2012) (holding evidence of the Salvadoran government's management of gang activity was not "completely effectual" was nevertheless insufficient to establish acquiesce to gang activity); *Matter of J-F-F-*, 23 I&N Dec. 912, 917-21 (A.G. 2006).

Finally, we are not persuaded by the applicant's arguments on appeal that the Immigration Judge did not consider or review all evidence submitted in support of his application for relief and protection from removal (*see generally* Applicant's Br. at 19-24). Contrary to the applicant's contentions on appeal, the Immigration Judge considered the expert testimony, the record evidence relevant to his claim, and country conditions evidence as to the applicant's clear probability of persecution or risk of torture by gang members or the police in El Salvador (IJ at 7-8; Tr. at 134-53; Exh. 2, Tab E; Exhs. 4, 8). In his decision, the Immigration Judge noted that he considered the applicant's and expert witness's testimony, the numbered exhibits, and all the other evidence in the record, whether mentioned in the decision or not (IJ at 1-2). The Immigration Judge also specifically referenced documents the applicant submitted (IJ at 1-2, 7; Tr. at 10-20; Exh. 8 at 69). The Immigration Judge is not required to discuss every piece of evidence so long as his decision reflects meaningful consideration of the relevant substantial evidence. *See Morales v. INS*, 208 F.3d 323, 328 (1st Cir. 2000) (noting that an Immigration Judge need not discuss every piece of evidence presented when rendering a decision).

Because we have decided the appeal on the preceding basis, it is not necessary to address the applicant's remaining contentions on appeal. *See Matter of A-B-*, 27 I&N Dec. at 340 ("If an asylum application is flawed in one respect . . . an Immigration Judge or the Board need not examine the remaining elements of the asylum claim"); *see also INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) ("As a general rule[,] courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach").

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

NOTICE: If an applicant is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the applicant's departure pursuant to the order of removal, the applicant shall be subject to a civil monetary penalty of up to $813 for each day the applicant is in violation. *See* section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BOSTON, MASSACHUSETTS

File: A095-057-109 August 18, 2020

In the Matter of

ROMMEL ALEXANDER CHAVEZ	)	IN WITHHOLDING ONLY
PROCEEDINGS	)	
APPLICANT	)	

CHARGES:

APPLICATIONS: Withholding of removal under the Act; protection under the Convention Against Torture.

ON BEHALF OF APPLICANT: Ben Haldeman

ON BEHALF OF DHS: Jason Thomas

ORAL DECISION OF THE IMMIGRATION JUDGE

I have familiarized myself with the record of proceeding in this case. The respondent was in withholding only proceedings, and both parties prior to the evidence being heard agreed that the only relief the respondent was eligible for was withholding of removal under the INA and protection under the Convention Against Torture. The evidence in this case consists of the following. There were eight numbered exhibits numbered 1 through 8, as well as the testimony of the respondent and the testimony of the respondent's expert, Dr. Leduke [phonetic]. The court considered the numbered

exhibits, the testimony of both witnesses, and all the other evidence in the record, whether mentioned in this decision or not. An addendum of law has been entered into the record of proceeding. It will be mailed to each of the parties, and the addendum of law will be incorporated into this decision by reference.

STATUTORY BARS

The court finds that there are no statutory bars to the respondent's applications for withholding of removal and protection under the Torture Convention.

CREDIBILITY

The court will find the respondent was a credible witness. The court had the opportunity to observe his demeanor, candor, and responsiveness to the questions. His testimony was generally consistent with his application and the other materials in the record, and the Department did not argue in its closing that the court should find the respondent not credible. Based on the totality of the circumstances, the court will find the respondent was a credible witness.

LEGAL ANALYSIS AND BURDEN OF PROOF

Essentially, the respondent sought withholding of removal based on three specific enumerated grounds. The first was a particular social group of imputed gang membership, alleging that the persecutor with respect to that enumerated ground would be both the police and the gangs; the second enumerated ground was the political opinion of actual/imputed anti-MS-13 gang political opinion; and then the third enumerated ground was the political opinion of actual or imputed anti-government political opinion. The court will address each of these three enumerated grounds in turn, starting first with the particular social group of imputed gang membership. First, the court will find that the imputed gang membership particular social group is invalid as a matter of law. As argued by the Department in its closing and the court agrees, under

Matter of E-A-G-, which is I&N Decision 591 (BIA 2008), the BIA found that because membership in a criminal gang cannot constitute membership in a particular social group, the respondent could not establish that he was a member of the particular social group of "young persons who are perceived to be affiliated with gangs" based on the incorrect perception by others that he is such a gang member. For this reason, the court will find that the respondent has failed to assert a valid particular social group under the controlling case law, and therefore could not successfully meet his burden to show that he had been a victim of past persecution. Even if the respondent had asserted a valid particular social group, the court would've found that the respondent does not have an objective well-founded fear for the following reasons. First, the respondent has been in the United States since 2012. The first time he left El Salvador was in 1997. He was deported in 2012 and remained there for two months. In essence, in the last 23 years, the respondent has been in the country of El Salvador for a period of two months. Also, he has been in the United States since his last arrival for eight years, that is, since 2012. Since 2012, no one in his family has been harmed or contacted by the police or the gangs or anyone else in El Salvador. Also, when the respondent was deported back to El Salvador in 2012 -- again, for a period of two months -- he had no contact with the police. He was not harmed or threatened by any police or government officials. Going back to the respondent's encounter with the police when he was 15 or 16 years old, the police never mentioned that they were stopping him because of his gang membership or because he possessed any tattoos on his body; rather, they were essentially stopped and frisked him and searched him and sought his identification papers for his bicycle. There is insufficient evidence that this was done on account of imputed gang membership. The court will find the following. The respondent was 15 or 16 years old in about 1991 or 1992 time frame. He did

confirm today that he was born in 1976. However, the respondent did not leave El Salvador until 1997. Therefore, there was a period of approximately five to six years from 1991-92 time frame until the respondent's first departure from El Salvador in 1997. During that time period the respondent did not have any interactions with any police officers or government officials in El Salvador. The court does acknowledge with respect to the police that the respondent's family members were harmed by the police. In fact, the police shot his brother and killed his brother. However, these events occurred many years ago when the respondent was still a young minor living in El Salvador, and there's insufficient evidence that the police have targeted or harmed the respondent's family member in approximately 23 to 25 or even greater number of years. For all of these reasons, the court will find the respondent has failed to establish he would have an objective well-founded fear of future persecution even if he had asserted a valid particular social group. Next, with respect to the political opinion of actual/imputed anti-MS-13 gang political opinion, the respondent's counsel during his arguments asserted that the persecutor for this enumerated ground would be the MS-13 gang. First, the court will find that the harm suffered by the respondent on account of his political opinion is insufficient to rise to the requisite level to constitute past persecution. In essence, in 1997 the respondent was beat up by the gang members, and they also killed his nephew and neighbor. Both the respondent being beat up by the gangs and the killing of his nephew and neighbor occurred pre-1997. The court will find that these incidents occurred greater than some 23 years ago. Next, in 2012, there were two incidents that occurred to the respondent during the two months that he was in 2012. First, on the day of his arrival there was a shooting outside of his house; however, the respondent testified credibly that he did not see the shooter and was unaware of the identity of the shooter and never reported it to the police. Rather, he

speculated that this was a gang member. In any case, there is no evidence that the bullets were directed toward him, hit him, or he was never harmed during this incident. The second incident that occurred in 2012 was the respondent was threatened at gunpoint by a gang member. The court finds that the sum of this harm -- in other words, the incidents which occurred pre-1997 and then the two incidents in 2012 -- are insufficient to rise to the level of harm required in the First Circuit. They occurred over a long period of time, and the respondent in 2012 was never physically injured by anyone. For those reasons, the court will find the respondent failed to show sufficient harm. Moving on, still within this enumerated ground, the court will find there is insufficient evidence of a nexus to this political opinion. The respondent himself testified that the gangs attacked the respondent because they thought he was a rival. Furthermore, the court will find that the respondent was opposed to criminal acts as a concerned citizen within his area, and the court will find that based on this the respondent has failed to meet his burden to show sufficient evidence of a nexus to the political opinion of anti-MS-13 gang membership. There is insufficient evidence that the respondent was expressing an MS-13 gang political opinion; rather, he was a local concerned citizen opposed to criminal acts within his neighborhood, and he also testified that the gang members thought he was a threat to them. The court finds this is insufficient to constitute political opinion. Finally, with respect to this enumerated ground, the court will find that the respondent does not have an objective well-founded fear of future persecution. Once again, the respondent's been in the United States since 2012. There's been no harm to his family members in the record since 2012. In 2012, again, there was a shooting outside of his house by unknown individuals, and there was a threat at gunpoint of the respondent. The court will find that the threat at gunpoint of the respondent in 2012 was a result of a personal dispute with a gang member; it was not

on account of a anti-MS-13 political opinion. For all of these reasons, the court will find the respondent has failed to establish that it's more likely than not he would have a well-founded fear of future persecution based on actual/imputed anti-MS-13 gang political opinion. Finally, turning to the political opinion of actual/imputed anti-government political opinion, the court will find both that there is insufficient evidence of a nexus to this political opinion and no objective well-founded fear with respect to this political opinion. Counsel during his closing argument asserted that the persecutor for this enumerated ground would be the police. The court finds there is insufficient evidence of a nexus to this political opinion and no objective well-founded fear. The respondent has not had any contact with any police, government officials, or authorities since 1997. Furthermore, when he was deported in 2012, he was never harmed by the police or stopped or detained upon his arrival, nor during the two months that he lived there. And finally, he was never harmed or threatened by the police due to this political opinion. For all those reasons, the court will find there is insufficient evidence of a nexus or insufficient evidence of an objective well-founded fear of future persecution based on an anti-government political opinion. Finally, the court will turn to the issue of government action. For purposes of this discussion, this discussion will apply to all three enumerated grounds asserted by the respondent. The court will find the respondent has failed to meet his burden to show that the government would be unwilling or unable to protect him in El Salvador. First of all, there was evidence that an individual, a gang member by the name of El Churro [phonetic], was prosecuted in El Salvador. The court acknowledges that this prosecution was for a rape charge; it was unrelated to the incident involving the respondent. However, the court relies on this evidence as proof that the El Salvadoran government does generally prosecute gang members. El Churro relates to the respondent's case in that the respondent told a robbery victim that El

Churro was the perpetrator. The respondent himself testified that he does not know where El Churro is today. Returning back to government action, the respondent's expert testified that the gangs have been classified by the government as terrorists. Furthermore, the expert witness upon questioning from the parties and from the court said there was insufficient evidence that the police would harm the respondent or detain him upon his deportation. Finally, there is sufficient evidence in the record, most notably at Exhibit 8, which shows the government is willing to take actions to try to combat the gang members in El Salvador. Furthermore, the respondent's expert testified that strict laws including anti-terrorist laws, mano dura laws, while the expert claims they're ineffective, still show a willingness on the part of the government to try to prosecute crimes by gang members. Finally, with ability to control gang members, the court does find that the government does have the ability to control gang members, as evidenced in Exhibit 8, Page 69. This was the Department's submission. The Department's submission in Exhibit 8, the court will note that many of the articles are dated from 2016; however, the most recent article in that submission is found at Page 69, that's a August 2019 article, so almost exactly one year old, which reports that the justice minister in El Salvador had said the homicide rate has fallen to about 4.4 killings, half of the 2018 levels. The justice minister also said that homicides are declining across the country. The New York Times article also says, "Since taking office on June 1st, the president had deployed police and soldiers to shopping and commercial areas to combat extortions," and also it notes that a court on Friday had sentenced 72 Mara Salvatrucha members to prison terms of 260 years for the killings of 22 killings in 2014 and 2015, and says the sentences are symbolic, since the effective maximum is 60 years. The court finds that this article from the New York Times is recent and relevant and probative, and shows both the ability and willingness of the El Salvadoran

government under the new president to combat gang violence in the country, and for these reasons, the court will find notwithstanding the country conditions evidence that he has submitted and his expert testimony, the court will find he has failed to meet his burden to show the government is unwilling or unable to control the actions of the gang members. Finally, with respect to protection under the Convention Against Torture, the court will find the respondent has failed to meet his burden to show that it's more likely than not he would be tortured in the country of El Salvador. The respondent himself was never tortured by any government officials or anyone acting on behalf or with their acquiescence in the country of El Salvador. To the extent that the respondent was shot at and hit in the buttocks by the police when he was a teenager, the court will find that this is not torture because it was not an act that was specifically intended to cause severe mental pain or suffering as required by the torture regulations. Rather, the respondent had been stopped and detained by police, he was uncooperative with the police and unable to comply with their demands, and attempted to flee the scene when he was shot. The court will find that under the regulations, this does not constitute torture. Even if it had constituted torture, the court would find the respondent has still failed to meet his burden to show it's more likely than not he would be tortured. As noted, he has had no interactions with the police at least since he was 15 or 16 years old, so this is going back to approximately 1991 or '92 time frame. Even when he was deported back to El Salvador in 2012, he never had any interactions with any government officials. To the extent he would be persecuted by a private actor acting on behalf or with the acquiescence of the El Salvadoran government, as noted in the court's above discussion on government action, the court finds that the actions of the gang members in El Salvador are not done with the acquiescence or on behalf of the government officials; rather, government officials are attempting to prosecute and

prevent any violent criminal actions by the gang members. For all these reasons, the court will find the respondent has failed to meet his burden to show that it's more likely than not he'd be tortured in El Salvador. Finally, one last note with respect to protection under the Convention Against Torture. The respondent has not been in El Salvador since 2012 in order to show that he could not internally relocate within the country of El Salvador to avoid the likelihood of torture. For all these reasons, the court will deny his application for the Convention Against Torture. Based on the foregoing, the following orders will issue.

ORDERS

The respondent's applications for withholding of removal under the Act and protection under the Convention Against Torture are hereby denied.

Please see the next page for electronic signature

MASTERS, TODD A.
Immigration Judge

//s//

Immigration Judge MASTERS, TODD A.

i:0e.t|eoir federation services|todd.a.masters@usdoj.gov on September 30, 2020 at 10:51 AM GMT