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**JURISDICTIONAL STATEMENT**

Petitioner originally filed an application for Asylum, pursuant to Section 208 of the Immigration and Nationality Act, 8 USC § 1158. The BIA has proper subject matter jurisdiction under 8 U.S.C. § 1252(a). Petitioner timely appealed the Immigration Judge's denial of his application to the Board of Immigration Appeals on December 20, 2013. The Petition for Review was timely filed within thirty days of the BIA's final decision under 8 U.S.C. §1252(b)(1). Subject matter the jurisdiction is again proper under 8 U.S.C. § 1252(a) because the Petition for Review raises a question of law. Venue is proper under 8 U.S.C. § 1252(b)(2) because the Immigration Judge completed its proceedings in Kendall, Calizonia, and is within the jurisdiction of the Fourteenth Circuit.

**STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Is Alonso Serrano-Serra entitled to asylum under 8 U.S.C. § 1101(a)(42) because of his membership in the particular social group of former MS-13 gang members sought by the Salvadoran government as witnesses against the gang?
2. Should the Immigration and Naturalization Act’s “persecutor bar” to asylum, 8 U.S.C. section 1158(b)(2)(a)(i), be triggered by Serrano-Serra’s involvement in an attack on his Professor as a minor under duress?

**STATEMENT OF THE CASE**

This is a petition for review on appeal from the Board of Immigration Appeals. Petitioner Alonso Serrano-Serra presented himself to Customs and Border Patrol at the United States border with Mexico on October 15, 2013 and was placed in removal proceedings. On December 10, Serra applied for asylum. The Immigration Judge denied his application because (1) the claimed social group was too large and amorphous to be considered particular; (2) the gang’s actions were intended to further their criminal enterprise and not to persecute Serra; and (3) Serra assisted in the persecution of others and is therefore ineligible for asylum.

On December 12, Serra appealed to the Board of Immigration Appeals. The Department of Homeland Security filed a motion for summary affirmance. On February 24, 2014 the Board of Immigration Appeals found Serra credible and that the harm he suffered rose to the level of persecution. Nevertheless, it granted the motion, affirming the Immigration Judge’s decision.

On September 1, 2014 Serra filed this appeal with the United States Court of Appeals for the Fourteenth Circuit.

**STATEMENT OF THE FACTS**

      Alonso Serrano-Serra was forced to join the violent Salvadoran gang *Mara Salvatrucha* (MS-13) when he was 13 years old. (AR-21). After a year of resistance to recruitment, one gang member told Serra that if he did not join MS-13, the organization would assume that he had committed to the rival 18th Street Gang. (AR-22). Shortly after, on his way home from school, three adult gang members violently attacked him and left him in a park, bleeding from his head and unable to walk. When his mother came looking for him, he was taken to a hospital but was still unable to walk for some time (*Id.*). This was thirteen year-old Serra’s initiation into MS-13.

The gangs of El Salvador originated in the United States when refugees fled the Salvadoran Civil War during the 1980s. (AR-29).  MS-13 developed mostly in Los Angeles and was brought back to the country when the U.S. began to deport Salvadorans with criminal records after the war. (AR-29-30). These gangs are well-armed and violent, engaging in narcotics and arms trafficking, murder for hire and violent street crime. (AR-61). Reports indicate that gangs are responsible for more than 50 percent of the homicides in El Salvador. (AR-52). Thirty-five percent of those murdered are gang members. (*Id.*).

     Recruitment is often effected by force upon children as young as eight or nine. (AR-51). It is incredibly difficult to successfully leave a gang because gangs rarely allow their members to do so. (AR-33). Leaving is considered traitorous and most of those who attempt it are killed. (AR-51). Neither the Salvadoran police nor the military have been successful in combating the influence and reach of the gangs. (AR-30). Corruption is also a problem as is lack of resources. (AR-30-31). The government has attempted reforms, most notably a Witness Protection program; however at least ten people in the program have been ordered to render testimony with no voice distortion or face covering. (AR-55). This type of action further erodes trust in the government and judicial system. (*Id.*).

Serra’s situation typifies this history.  He lived in a section of San Salvador controlled by MS-13 and once he and his friends got to the age of ten or twelve, the pressure to join began. (AR-21).  “Everyone who lives in the neighborhood knows who is with a gang,” he explained. (*Id.*). The members “would come up to us at all places . . . and tell us it was time for us to become men and join.” (*Id.*). Serra didn’t want to join and told them so but, “they would laugh,” he said, “and sa[y] we’ll wait, but you have to join.”  (*Id.*). This pressure became more intense when he turned thirteen and it was then that the beating that changed his life occurred. (*Id.*).

After his rough initiation, neither Serra nor his parents went to the police, knowing that it was no use. (AR-22). “The gangs are too strong,” he testified. “They take bad vengeance on anyone who opposes them.” (*Id.*). Serra was designated as the gang’s school contact. He was forced to take messages to people at school and to deliver drugs. (AR-23). Serra did not feel like he could refuse, fearing that the gang members would beat him, or worse, kill him. (*Id.*). Moreover, it was out of the question for Serra to report crimes or testify against the gang, because he knew a boy in his neighborhood who was killed for precisely that reason. (AR-28). The fear of violent retaliation or death was too strong. (AR-22).

One of the teachers at Serra’s school, Professor Requena, reported a gang member for selling drugs. Chunky, the same gang member that violently initiated Serra, ordered him to set up a meeting with the professor and let the other gang members into the school building. (AR-25). Serra knew that harm was likely to come to Professor Requena, regardless of his involvement. Even more troubling, if he warned his teacher or in any way disobeyed the command of MS-13, Serra feared the gang would beat him up again, or more likely, kill him for his disobedience. Serra had seen what the gang does to people who oppose them, and he knew about teenagers even younger than him being killed. (AR-26).

The gang members attacked Professor Requena with sticks and a knife (AR-23), leaving her with permanent injuries. (AR-27). However, Serra was not involved in inflicting these physical injuries (*Id.*), nor has he ever committed violence on behalf of MS-13.

This fear of death began with Serra’s vicious and involuntary initiation into the gang that left him hospitalized. Serra frequently witnessed, with the rest of El Salvador, violence against those who opposed the gang, (AR-27) and his fear was substantiated further when Professor Requena was brutally attacked for her opposition. (AR-26).

After the attack on Professor Requena, Serra stopped going to school. (AR-23). Chunky warned him not to talk about the teacher and told him to return to school as their contact. (AR-24).  Serra fled the area, going to live with his uncle in another part of San Salvador.  (*Id.*).  He moved from house to house, staying with relatives and trying not to go outside in an attempt to evade capture by the gang.  (*Id.*).  Even so, they found him.  One day, when he left his cousin’s home, four MS-13 gang members jumped him and beat him so savagely that he lost the vision in his right eye.  (AR-24, 49).  Though he didn’t know their faces, he could see “MS-13” tattooed across their knuckles as they pummeled him with fists and sticks.  (AR-24).  They showed him a gun and told him that MS-13 did not allow retirement from the gang. (*Id.*).  They also warned him not to go to the police or the military.  (*Id.*).

An army corporal who wanted the boy to speak to the army about the gang had already contacted Serra.  (AR-25).  Serra refused.  He told the man, named Rosales, that the gang would kill him if he spoke to anyone, but Rosales continued to pressure him.  (*Id.*).  His fear of reprisal grew steadily worse.  “If the gang thought I was going to testify against them, they would never let me live,” he explained.  (*Id.*).  Serra had good reason to believe this.  A boy in his neighborhood was killed because the gang thought he had gone to the police.  (AR-28). The mounting pressure from both the gang and Corporal Rosales eventually became too much for the boy. (AR-13).  In fear for his life, afraid he would be forced to bear witness against his persecutors, Serra left El Salvador in September of 2013.  (*Id.*).

**SUMMARY OF ARGUMENT**

Alonso Serrano-Serra’s request for asylum should be granted because Serra has fulfilled the requirements of the *Acosta* standard for immutability and therefore proved his membership in a particular social group. As a former gang member, the only way he can change his status as a member of that group is to rejoin the gang. It would be unconscionable to expect him to do that.

While some circuits have chosen to afford deference to the Board of Immigration’s new requirements of social visibility and particularity, the Fourteenth Circuit would be wise to follow the lead of the Third and Seventh Circuits and reject them as an unnecessary addition. The added factors have created a circuit split and resulted in conflicting decisions. In the interest of uniform precedent and clarity, they should be rejected.

Even if the Circuit chooses to recognize them however, Serra has shown that his particular social group is recognized throughout society in El Salvador and that it has specific boundaries, fulfilling the new requirements. Serra was forced to go into hiding because of his visibility as a former gang member. In addition, the group is only made up of those who manage to leave the gang entirely, making its boundaries clear.

Furthermore, there is a clear nexus between the persecution he suffered and his membership in that group. The words and actions of his persecutors who told him there was “no retirement from” the gang as they beat him attest to this fact. In addition, Serra’s family helped him hide after his defection and his mother continues to receive threats from the gang that he will be killed if he does not rejoin.

If Serra is otherwise eligible for asylum, the Immigration and Nationality Act’s (INA) persecutor bar should not be triggered by his involvement in the attack on his Professor because he was a minor under duress. First, Serra did not assist or otherwise participate in persecution when he scheduled a meeting with Professor Requena, and he did not take part in any violence. Second, Professor Requena cannot claim membership in a particular social group of protected persons, so the injuries she suffered at the hand of MS-13 are not as a result of persecution. Thus, Serra’s conduct should not trigger the persecutor bar.

Even if Serra’s conduct rises to the level of assistance, the Fourtheenth Circuit should recognize the duress exception to the persecutor bar, especially for minors under duress. This court should not afford any deference to the BIA’s determination that there is no duress or coercion exception. The administrative decision was unreasonable and unpersuasive insofar as it states that the statute is instructive but neglects to explain how-so. Instead, the plain language of the INA suggests that courts read these exceptions into the law. Moreover, defenses to the persecutor bar based on duress are consistent with Congress’ intent to bring the United States into compliance with its international obligations under the United Nations Refugee Protocol.

If the court recognizes an exception to the persecutor bar for duress, Serra must show that he was under duress when he acted under orders of *Mara Salvatrucha*. The gang’s previous attack against Serra, and the murderous reputation of MS-13, caused him to believe that the only way to avoid imminent death or serious bodily injury was to assist MS-13 in persecution. Therefore, Serra did act under duress and the persecutor bar should not be triggered.

**STANDARD OF REVIEW**

Factual findings of the Board of Immigration Appeals are reviewed to determine if they are supported by substantial evidence in the record. *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). Conclusions of law are reviewed *de novo*. *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1990).

However, when an administrative agency has authority under the relevant statute, and the rendered decision is precedential, the court affords deference to that decision, unless the decision is arbitrary or capricious. *Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984). When the decision is not precedential, the court affords *Skidmore* deference if the decision is thorough, reasonable, consistent, and persuasive. *Skidmore v. Swift*, 323 U.S. 134, 140 (1944).

**ARGUMENT**

I. SERRA SHOULD BE GRANTED ASYLUM BECAUSE HIS STATUS AS A FORMER GANG MEMBER IS AN IMMUTABLE CHARACTERISTIC AND BECAUSE HE WAS PERSECUTED ON ACCOUNT OF THAT CHARACTERISTIC.

For nearly thirty years, courts have used the *Acosta* standard for determining membership in a particular social group. This standard requires that membership is defined by a shared characteristic that the individual member either cannot or should not have to change, and that has led to his or her persecution at the hands of others. This framework has provided guidance that has allowed courts to set clear precedent and issue consistent opinions.

In recent years however, the Board of Immigration has recognized the additional criteria of social distinction and particularity, which has led to a circuit split because of their lack of clarity. These criteria are not entitled to deference by this Court and the Fourteenth Circuit should not adopt them. The BIA has been unable to effectively define them in such a way that they can be consistently applied. Instead, their application has resulted in confusion and increased litigation.

Mr. Serrano-Serra’s status as a former member of the Salvadoran gang *Mara Salvatrucha* fulfills the *Acosta* standard of immutability and qualifies him as a member of a particular social group. Serra belongs to a discrete group of persons who courageously rejected their forced recruitment into El Salvador’s brutal gang culture and suffered violent persecution because of it. This is the type of shared experience the BIA described when it set the standard in *Acosta*.

Even if the Fourteenth Circuit adopts the added criteria, Serra fulfills their requirements as well. Former gang members are recognized as a distinct group in El Salvador and this is a group with a discernable outer boundary. Furthermore, the events surrounding his repeated beatings, his attempts to hide from the gang, and their ruthless pursuit of him reveal a clear nexus between his membership in the group and the violence he endured.

1. Serra’s membership in the particular social group of former gang members sought by the Salvadoran government as witnesses against the gang satisfies the *Acosta* standard of immutability.

Whether Serra’s membership in a particular social group meets the *Acosta* standard of immutability is a mixed question of law and fact and is therefore subject to review under the substantial evidence standard. *I.N.S v. Elias-Zacarias*, 502 U.S. 478, 481.

In 1985, the Bureau of Immigration Appeals set out a clear standard for determining whether a subject belongs to a particular social group. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). An applicant for asylum must show that he is a refugee. 8 U.S.C. § 1158(b)(1)(A). “Refugee” is defined as someone who is unable or unwilling to return to his home country because he fears persecution on account of “race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42). Using the doctrine of *ejusdem generis* (general words used along with specific language should be construed in a manner similar to the specific words), the court reasoned ‘particular social group’ when construed similarly to race, religion, nationality and political opinion, indicated a commonality based on an immutable characteristic. *Acosta,* 19 I*.* & N. Dec.at 233. In other words, the characteristic either cannot be changed (race, nationality) or the individual should not have to change it (religion, political opinion). *Id*. at 233. This shared characteristic can be based on innate qualities like kinship or sex, or it might be based on a shared past experience. *Id*. at 233.

The Fourth Circuit recognized the immutability of a group consisting of former gang members and based on shared past experience in *Martinez v. Holder*, 740 F. 3d 902, 911. There, like Serra, a young Salvadoran man was forcibly inducted into the MS-13 gang whose members killed two of his friends who tried to leave. *Id.* at 907. The court pointed out that Martinez should not be required to change his status because he could only do so by rejoining the gang. *Id.* at 910-11.

Like the petitioner in *Martinez*, the only way Serra can change his status as a member of the particular social group to which he belongs is to rejoin the gang. It is difficult to believe that any court would think rejoining a violent and criminal group that has already tried to kill him was a viable solution for Serra’s problems. Both the Fourth and the Seventh Circuit have pointed out the absurdity of this stance. *See Martinez v. Holder*, 740 F. 3d 902, 911 (4th Cir. 2014) (“it would be ‘perverse’ to interpret the INA to force individuals to rejoin such gangs to avoid persecution.”); *see also Benitez-Ramos v. Holder*, 589 F. 3d 426, 430 (7th Cir. 2009) (Ramos’ only hope of survival if sent back to El Salvador “will be to abandon his Christian scruples and rejoin the gang.”).

In much the same way, agreeing to testify against the gang is no solution to his dilemma. Serra provided extensive country condition reports citing lack of training and resources, as well as the rampant corruption that hampers Salvadoran efforts to deal effectively with gang violence. (AR 30-31) Witnesses in the Witness Protection Program have been forced to testify without any protective measures, thereby exposing them to harsh retaliation. (AR-55) This is a serious risk to ask anyone to take but is especially so when the witness is a minor.

Serra’s case can be distinguished from cases where the petitioner’s cited characteristic not held to be immutable. *See Acosta*, 19 I. & N. Dec. at 234 (taxi drivers who formed a cooperative did not share an immutable characteristic because they could change jobs). The petitioner’s choice in *Acosta* was unfortunate but different from that of Serra. Serra’s choice is to either join a criminal gang or risk violence while the taxi drivers could avoid violence by choosing a new occupation.

The Government argues that granting Mr. Serra asylum is contrary to the spirit of the asylum statute because his status as a former gang member marks him as a criminal “comparable to persecutors or particularly serious criminals.” Brief for Respondent at 14, *Serra v. Holder*, No. A 077 224 173 (14th Cir. Oct. 1, 2014). This analysis is based on an incorrect reading of *Arteaga v. Mukasey*, 511 F. 3d 940, 945-6 (9th Cir. 2007) (petitioner not qualified for asylum because of status as *current* but inactive gang member (emphasis added)). Serra, on the other hand, has completely severed ties with the gang and should not be penalized for his former membership.

1. The requirements of social distinction and particularity are not entitled to deference and should not be adopted because they are not clearly defined, arbitrary, and inconsistently applied.

An agency’s legal conclusions of law are reviewed *de novo* unless they are based on the agency’s interpretation of a silent or ambiguous provision of a statute administered by that agency. *Chevron*, 467 U.S. at 843. Then, the agency’s interpretation is given deference by the court, unless it is “arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 844. The Board of Immigration requirements of social visibility and particularity are not entitled to deference because they lack clarity and have been applied inconsistently.

The Board expanded on the *Acosta* framework in two decisions issued on 2008. Both cases involved gang membership and for the first time, the Board added two new requirements to the immutability standard of *Acosta*. The new standard requires that “the group have particular and well-defined boundaries” and “that it possess a recognized level of social visibility.” *Matter of S-E-G-,* 24 I. & N. Dec. 579, 582 (BIA 2008); *Matter of E-A-G-*, 24 I. & N. Dec. 591, 594-95 (BIA 2008). In 2014, the Board attempted to further clarify these requirements. *See Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 238 (BIA 2014) (particularity relates to the group’s boundaries while social distinction “considers whether [members] are set apart, or distinct, from other persons within the society in some significant way”); *see also Matter of W-G-R-*, 26 I. & N. Dec. 208, 214, 216 (BIA 2014) (particularity provides “a clear benchmark for determining who falls within the group,” while social distinction relates to how the group is perceived by society).

Courts have struggled to define these requirements ever since, a task made more difficult because there is no clear evidence of legislative intent behind the phrase “particular social group.” *Valdiviezo-Galdamez v. AG of the United States*, 663 F. 3d 582, 594 (3rd Cir. 2011). In fact, a circuit split has developed around this issue. Both the Third and the Seventh Circuits have rejected the added requirements. The remaining circuits have accepted them but struggle with how to apply them. Thus we have opinions such as *Henriquez-Rivas v. Holder*, 707 F. 3d 1081 (9th Cir. 2013) in which the court admits that “it is difficult to articulate precisely what the BIA meant by “social visibility.” *Id.* at 1088. The opinion goes on to suggest that social visibility need not be viewed in terms of society as a whole but only in the perceptions of persecutors. *Id.* at 1089. The Fourth Circuit, on the other hand, defined the requirement as “possess[ing] characteristics visible and recognizable by others in the native country,” which directly contradicts the Ninth Circuit interpretation. *Zelaya v. Holder*, 668 F. 3d 159, 166 (4th Cir. 2012). And the Eleventh Circuit rejected the particular social group of Colombian informants against the Cali drug cartel because “the very nature of the activity prevents them from being recognized by society at large.” *Castillo-Arias v. United States AG*, 446 F. 3d 1190, 1197 (11th Cir. 2006). “Particularity” has baffled interpretation as well, with the Third Circuit concluding that the requirement “appears to be little more than a reworked definition of ‘social visibility.’” *Valdiviezo-Galdamez*, 663 F. 3d at 608. In short, none of the circuits have a clear idea of how to apply them. This diversity of approaches unnecessarily muddies the waters of immigration law. Petitioners and their counsel have no clear guidance as to the requirements they need to meet and the courts do not have clear precedents to follow. In the interest of uniform precedent and clarity, the Fourteenth Circuit should follow the lead of the Third and Seventh and reject social distinction and particularity.

1. Even if the Fourteenth Circuit decides to adopt the additional requirements, Serra qualifies as a member of a particular social group because the group is (1) recognized within Salvadoran society and (2) identifiable as a discrete class of persons.

The question of whether Serra meets the additional requirements of social visibility and particularity is a mixed question of law and fact and is therefore subject to review under the substantial evidence standard. *I.N.S v. Elias-Zacarias*, 502 U.S. 478, 481.

In the somewhat murky definitions of social distinction and particularity, there is a general agreement that the particular social group in question must be recognized within the individual’s society to satisfy social distinction, and identifiable as a group with definite boundaries to satisfy particularity. *Henriquez-Rivas,* 707 F. 3d at 1090; *Crespin-Valladares v. Holder*, 632 F. 3d 117, 125 (4th Cir. 2011). The group to which Serra belongs fulfills both these requirements.

In a country ripped apart by gang violence, those who leave the gang stand out. Gang members in El Salvador number about 60,000 members according to expert testimony. Serra testified that everyone in the neighborhood knew who belonged to the gang, from which we can infer that everyone knew who did not. Family members offered shelter to him because they knew the perils associated with defection. He explained that the gang takes “bad vengeance” on anyone who opposes them. Serra himself knew one boy who was killed because the gang thought he had gone to the police. In short, those who leave the gang are socially distinct in the most chilling way possible. They are targets for the gang and a source of anxiety and fear for their families and friends.

Similarly, the Eighth Circuit held that former members of a violent Kenyan gang are socially visible when it decided *Gathungu v. Holder*, 725 F. 3d 900, 907 (8th Cir. 2013) (former member of the Mungiki is a member of a particular social group). The court held that although defectors are not identifiable by sight, Kenyan society recognizes that they are a specific group targeted by the Mungiki. *Id.* at 908.

Serra’s group passes the particularity test of having clear boundaries as well. The group is made up only of those who have successfully and completely left the gang. By leaving his home and fleeing to the United States, Serra has made a clean break with his past. The Government will contend that the proposed group is too broad to pass the standard. This is not the case. As the Seventh Circuit pointed out, “[i]t would be antithetical to asylum law to deny refuge to a group of persecuted individuals who have valid claims merely because too many have valid claims.” *Cece v. Holder*, 733 F. 3d 662, 675 (7th Cir. 2013). Serra’s claim that he belongs to a particular social group is valid no matter what definition one uses.

1. The statements and actions of gang members who persecuted and injured Serra show a clear nexus between that persecution and his membership in the particular social group to which he belongs.

The question of whether there is a clear nexus between Serra’s persecution and his membership in a particular social group is a mixed question of law and fact and is therefore subject to review under the substantial evidence standard. *I.N.S v. Elias-Zacarias*, 502 U.S. 478, 481.

“Persecution occurs on account of a protected ground if that ground serves as ‘at least one central reason for’ the feared persecution.” *Crespin-Valladares,* 632 F. 3d at 127. Though it does not have to be the single or dominant reason, it must be more than “an ‘incidental, tangential, superficial, or subordinate’ reason.” *Id.* at 127.

Serra was brutalized, beaten and pursued not because of some general bad luck but directly on account of his defection from MS-13. The statements his persecutors made as they delivered the beating that took his sight make this clear. There is no retirement from the gang, they told him as they pummeled him. Since he left El Salvador, gang members have contacted his mother, telling her that if he does not report to them, his life is forfeit. These facts point to a clear nexus between his status as a former member of the gang and the persecution he suffered.

Serra’s case is analogous to *Crespin-Valladares*, 632 F. 3d at 127 (cousin of a man murdered by MS-13 proved sufficient nexus between his own persecution and his status as a particular social group). The court held that the threats the petitioner received were not general but targeted toward him so he would not testify, thereby providing a sufficient nexus between his status as an informer and the persecution he suffered. *Id.* at 127. Like Mr. Crespin, Serra was targeted because of his specific characteristic; that of a former gang member, thus fulfilling the nexus requirement.

Contrast this with *Zetino v. Holder*, 622 F. 3d 1007, 1015 (9th Cir. 2010) (man who sought asylum because bandits wanted to steal his family’s farm did not show sufficient nexus). The bandits in this case did not target his family because they belonged to a specific group but because they wanted the family land. *Id.* at 1016. Therefore, there was no nexus between the family’s persecution and their membership in a particular social group. Similarly, a man seeking asylum because he informed on a Colombian drug cartel and feared retaliation failed to establish a nexus between his status as an informer and the feared persecution. *Castillo-Arias*, 446 F. 3d at 1198. The evidence indicated that the cartel did not treat informers any differently than they treated anyone else who interfered with its activities. *Id.* at 1198.

The government argues that Serra was targeted to keep him in the gang. The facts do not support this because Serra had already left the gang when he was attacked. He was persecuted because he defected, not so that he would stay.

1. THE IMMIGRATION AND NATIONALITY ACT’S PERSECUTOR BAR TO ASYLUM SHOULD NOT BE TRIGGERED BY PETITIONER SERRA’S ACTIONS AS A MINOR CHILD UNDER DURESS.

If the Petitioner is otherwise eligible for asylum, his application may still be denied under the INA’s “persecutor bar to asylum.” The persecutor bar denies asylum to an applicant if “the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1158(b)(2)(a)(i) (West 2014). First, the attack on Professor Requena was not “on account” of a protected ground and therefore was not persecution. Even if it was, Serra did not assist or otherwise participate in the attack. Second, if this court does find that Serra assisted in persecution, it should not give any Skidmore deference to the BIA’s decision that there is no duress exception. Instead, the Fourteenth Circuit should recognize a duress exception to the persecutor bar because the plain language of the INA requires that participation in persecution be voluntary. Moreover, defenses to the persecutor bar based on duress are consistent with the legislative intent of the INA and the United States’ obligations under the United Nations Refugee Protocol. Therefore, a persecutor bar should not be triggered and Serra should be granted asylum.

1. Serra did not assist in persecution on account of a protected ground when he scheduled a meeting with Professor Requena but did not take part in the violence.

The persecutor bar provides two elements that must be satisfied in order to trigger exclusion from asylum. First, the conduct in question must be “on account” of one of the enumerated, protected grounds. Second, the Petitioner must have been sufficiently involved in the conduct so that his actions amount to assistance or participation in the alleged persecution.

1. *The injuries suffered by Professor Requena were not “on account” of a protected ground under § 1158(b)(2)(a)(i).*

The statute requires that the persecution be “on account” of a protected ground. As a mixed question of law and fact, the Court reviews the Record for substantial evidence regarding Professor Requena’s membership in one of those groups, and also to establish a causal nexus between the injuries suffered by her and her membership in that group. Failing this evidentiary burden, the Court must find that the attack was not “on account” of a protected ground and the persecutor bar should not apply to Serra.

The attack that Professor Requena suffered must have been caused by her religion, nationality, membership in a particular social group, or political opinion. MS-13 was motivated to attack Professor Requena because she informed on a gang member selling drugs, not because of any protected ground. However, the government will argue that Professor Requena is a member of a particular social group of either informants or professors, and that she was attacked because of her membership in that group.

Professor Requena, however, does not qualify for membership in a particular social group. *Acosta* provides that this protected classification is imputed where a person “is a member of a group of persons all of whom share a common, immutable characteristic.” *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (1985). Where a characteristic can be changed, *Acosta* recognizes a narrow exception for any “characteristic…. that is so fundamental to individual identity or conscience that it ought not be required to be changed,” or where the group has particular social visibility. *Id*. The Administrative Record provides very little information about Professor Requena and the facts that surround her informing on MS-13, outside of the attack, itself. Where the Record does speak, it is regarding her employment as a professor and her status as an informant. These two characteristics – occupation and status as informant – do not qualify Professor Requena under *Acosta* for membership in a particular social group.

Professor Requena’s occupation is mutable insofar as she could change jobs, and, outside of the context of her workplace, it would probably be difficult to identify her as a professor based on her appearance. Moreover, employment should not be considered so fundamental to individual identity that it “ought not be required [to] change.” Nor should Professor Requena’s status as an informant, alone, be recognized as a particular social group. *Castillo-Arias* notes that “‘The very nature of [informing] is such that it is generally out of the public view,’ and…thereby [lacks] the necessary social visibility to be recognized as a ‘particular social group.’” 446 F.3d 1190, 1194 (11th Cir. 2006).

If Professor Requena does belong to a particular social group, the injuries suffered by her must additionally be “on account” of her membership in that group. This nexus between the harm suffered and a particular social group can only be established by showing that MS-13 attacked Professor Requena *because* of her membership in that group. Chunky articulated the gang’s an explicit motivation in the Record when he told Serra that Professor Requena had reported one of the MS-13 gang members for selling drugs, and that “they were going to teach her a lesson.” (AR-23).

Chunky’s statement, read alone, leads to the conclusion that MS-13 attacked Professor Requena because she was an informant. As discussed, informants do not qualify as a particular social group under *Acosta.* Therefore, the attack on Professor Requena was not “on account” of a protected ground and the persecutor bar to asylum should not be triggered.

1. *Serra did not assist or otherwise participate in the alleged persecution.*

If Professor Requena suffered injuries *on account* of a protected class, the injurious conduct is considered persecution. The second element of the persecutor bar excludes applicants to asylum who “ordered, incited, assisted, or otherwise participated in” persecution. 8 U.S.C. § 1158(b)(2)(a)(i) (West 2014). Satisfaction of the second element requires an inquiry into the extent and degree of Serra’s involvement in the persecution, and whether that involvement was causally determinative of the Professor Requena’s injuries.

The Supreme Court held that assessing whether an individual “assisted” in persecution under the Displaced Persons Act should “focus[] on whether *particular* *conduct* can be considered assisting in the persecution of civilians.” *Fedorenko v. U.S.*, 449 U.S. 490, 512, n. 34 (1981). *Fedorenko* focuses on whether the particularized conduct and the degree to which it contributes to the persecution. The Circuits have distinguished this degree of participation as either “active participation,” which rises to the level of assistance, or “passive participation,” and not rising to the level of assistance. The Eleventh Circuit is a representative amalgam of the other Circuits’ decisions: “The standard for determining whether an…[assisted] in persecution is a particularized, fact-specific inquiry into whether the applicant's personal conduct was merely indirect, peripheral and inconsequential association or was active, direct and integral to the underlying persecution.” *Chen v. U.S. Atty. Gen.,* 513 F.3d 1255, 1259 (11th Cir. 2008).

Serra’s involvement in the attack on Professor Requena does not rise to the level of “assistance” in persecution because his actions were indirect, peripheral, and inconsequential to harm that Professor Requena suffered. To find otherwise would require substantial evidence in the record that Serra’s actions were active, direct, and integral to effectuating the harm suffered by his teacher.

To the extent that Serra was involved at all, his actions were peripheral and inconsequential to carrying out the violence. He merely set up a meeting and let the gang members into the building. *Fedorenko* notes a person should not be found to “assist” persecution where an individual did no more than cut the hair of female inmates before they were executed.” 449 U.S. 490, 534 (2009). Serra’s cooperation with MS-13 in setting up the meeting is analogous to the facts of *Fedorenko*. In both cases, the limited participation did not effectuate any actual harm, but was passive and indirect in comparison to the actual injuries. The harm inflicted on Professor Requena was inflicted by Chunky and other members of MS-13 when they beat and stabbed her, not by Serra, who was simply set up the meeting. This attenuates the causal link between Serra’s involvement and Professor Requena’s injury and places his actions more squarely in the realm of indirect, passive action that would be excused under *Chen*.

In *Abdallahi v. Holder*, the Sixth Circuit found that a Mauritanian applicant for US asylum assisted in persecution when “he picked up student protesters who were then tortured…brought prisoners to interrogation rooms, where they were tortured,” and stood guard outside. 690 F.3d at 476. While Serra similarly arranged for arranged for Professor Requena to meet MS-13 by scheduling an appointment, the Sixth Circuit ultimately elevated *Abdallahi’s* participation to assistance because his duties “required that he pour cold water on black prisoners, kick them, and ensure that they had no food or toilet access.” *Id.* at 470. While Abdallahi’s conduct actually inflicted harm, Serra’s conduct remained passive and tangential to the harm.

Furthermore, Serra’s association with MS-13, without more, is insufficient to elevate his peripheral involvement in the attack to “active” conduct. The BIA has long held that membership in an organization, “even one which engages in persecution,” is not sufficient. *Matter of Rodriguez-Majano*, 19 I. & N. Dec. 811 (BIA 1988).

Therefore, Serra did not assist in persecution and the persecutor bar to asylum should not be triggered.

1. The Fourteenth Circuit should recognize exceptions to the persecutor bar for minors under duress.

Whether the INA contains an exception to the persecutor bar for minors under duress is a pure matter of law and should be reviewed *de novo.*

*Fedorenko* is good law insofar as all Circuits require a fact-specific inquiry into whether an applicant’s particular conduct had the effect of assisting persecution. However, beyond using *Fedorenko* to establish sufficient causation, the Circuits are split regarding whether persecutory conduct can be excused under the doctrine of duress when the conduct in question was involuntary. The holding in *Fedorenko,* that the Displaced Persons Act’s silence regarding voluntariness is indicative of the statute’s intent to not include a duress exception, has been distinguished from the INA by the Supreme Court, which held that the silence in the Act is “not conclusive.” *Negusie v. Holder*, 555 U.S. 511, 173 (2009). The Sixth Circuit explains its application of *Fedorenko*, post-*Negusie*, writing, “Given that *Negusie* analyzed *Fedorenko's* application only in the context of allegedly involuntary actions, we find that *Fedorenko*'s analysis of what constitutes persecution remains instructive where voluntariness is not at issue.” *Parlak v. Holder*, 578 F.3d 457, 469 (6th Cir. 2009). In other words, if Serra’s conduct does rise to the level of assistance or participation, *Negusie* tells us that the INA may nonetheless provide protection for Serra if the statute is found to contain a duress exception.

At one end of the Circuit split, the FifthCircuit held that “the syntax of the statute suggests that the alien's personal motivation is not relevant,” *Bah v. Ashcroft*, 341 F.3d 348, 351 (5th Cir. 2003), agreeing with *Fedorenko*. On the other hand, several courts have considered *Negusie* and read the duress exception into the statute, arguing that assistance to persecution “requires a particularized evaluation of both personal involvement and purposeful assistance in order to ascertain culpability.” *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 927 (9th Cir. 2006).

1. *This court should not afford any Skidmore deference to the BIA’s determination that there is no duress or coercion exception to the persecutor bar.*

It sometimes appropriate to give *Skidmore* deference to administrative decisions that lack the force of law because unpublished, administrative determinations “do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944). The amount of deference given to such a judgment will depend on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Ibid*.

The BIA’s decision in Serra’s case, however, does not satisfy the factors that *Skidmore* demands. The thoroughness of the decision is not evident in its consideration or substantiated by the validity of its reasoning. The BIA found that “the language of the [INA] remains instructive” to determining whether a duress exception should exist. The Board reasons that the persecutor bar should be triggered for “*any* alien who ordered, incited assisted, or otherwise participated in the persecution of any person on account of a protected ground.” (AR-4). However, this reasoning is simply a restatement of § 1158(b)(2)(a)(i), verbatim, with emphasis added on the modifier “any.” The BIA fails to explain how the added emphasis impacts their analysis, whatsoever. This conclusory explanation indicates a lack of argumentative reasoning and thoroughness, altogether. For this reason, the BIA’s administrative decision should not be given any deference.

The Board’s cursory acknowledgment and disposal of the holding in *Negusie, that* “silence is not conclusive,”without more, is not persuasive. The Board’s remaining analysis, which is predicated on the unexplained emphasis of “any,” is simply a regurgitation of *Fedorenko.*  For this reason, the Fourteenth Circuit should give no weight to the BIA’s administrative decision under *Skidmore*. Instead, the Court should review whether there should be a duress exception to the persecutor bar *de novo*.

1. *The plain language of the Immigration and Nationality Act’s persecutor bar requires that participation in persecution be voluntary, and that an exception for duress be read into the statute.*

Silence in the INA’s persecutor bar is “ambiguous as to whether coercion or duress [is] relevant in determining the existence of… participation [in persecution].” *Negusie v. Holder*, 555 US 511, 173. This ambiguity is at the center this case. The Government argues that the statute’s silence is telling of Congress’ intent to exclude duress and coercion exceptions, especially when such intent is expressly written into other sections of the INA. However, this argument is unconvincing given the immediately surrounding text and precise language of the statute.

The plain language meaning of this statute should be “determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co*., 519 U.S. 337, 341 (1997). This concept - that statutes should be read contextually with the language that surrounds it – is a basic tenant of statutory interpretation and informs the meaning of the text.

First, it is revealing that “persecution” is qualified by the verbs “ordered, incited, assisted, or otherwise participated.” Persecution, a noun, describes a large and hard to define scheme of violence and inequality. However, if the language is meant to *exclude* all persons who persecute, the statute would have been more effective by simply using “persecute,” so that the statute reads, “*any person who persecutes on account of…”*

Instead, the statute explicitly recognizes the particular ways in which a person may implicate themselves in the larger scheme of “persecution.” The idea that a person can be brought under the guise of §1158(b)(2)(a)(1) involuntarily is contrary to the notion that they must first implicate themselves. For this reason, the plain language of the persecutor bar requires that participation in the persecution be voluntary.

Under the doctrine of *ejusdem generis*, “general words are confined to the class [of specific words] and may not be used to enlarge it.” *Cleveland v. United States*, 329 U.S. 14, 18 (1946). “Order” and “incite” are both specific ways to perform persecutory action under the INA, and both imply voluntary action by an actor. To “assist,” on the other hand, is a general way that an actor can participate in persecution. Assistance could manifest in many conceivable forms – voluntary assistance or assistance under duress, for example. However, because “order” and “incite” are both voluntary ways to invoke the persecutor bar, “assist” should not be read to enlarge this class. Therefore, assistance in persecution must be voluntary.

Moreover, *Negusie* held that “silence is not conclusive” regarding the persecutor bar’s lack of an explicit exception for duress. 129 S. Ct. at 1164. This interpretation of the statute shows tremendous credence to the position that the plain language supports a duress exception because, however construed, ordering, inciting, and assisting do not constitute *involuntariness.*

1. *Defenses to the persecutor bar based on duress or coercion are consistent with the legislative history of the Immigration and Nationality Act and the United States’ obligations under the United Nations Refugee Protocol.*

The United States acceded to the United Nations Protocol Relating to the Status of Refugees in 1968. It was not until 1980, however, that the United States passed the Refugee Act, amending the INA to include asylum for refugees and a corresponding persecutor bar that conformed to its international obligations. “As this Court has twice recognized, one of Congress' primary purposes in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees… as well as the United Nations Convention Relating to the Status of Refugees” *Negusie v. Holder*, 555 U.S. 511, 520 (2009). Here, the Supreme Court explicitly acknowledges the historical precedent for interpreting the INA to be in conformity with the Protocol.

However, the United Nations Protocol and Convention are not self-executing agreements that bind the United States to international refugee law on signing. Instead, Congress legislated the United States into conformity with these obligations by enacting the 1980 Refugee Act, amending the INA. *Id.* The extent to which the Protocol affects US law, then, is the extent to which it is found in our laws, as informed by the legislative intent of conformity with the Protocol.

Even if the INA did not have such a rich legislative history, the statute should still be read to conform to the Protocol. “An act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.” *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). By reading in a duress exception, it is possible to construct § 1158(b)(2)(A)(i) in compliance with international law.

In *Aguirre-Aguirre*, the Supreme Court noted that, “The U.N. Handbook provides some guidance in construing the provisions added to the INA by the Refugee Act.” 526 U.S. at 427. While the Handbook, itself, is not controlling, the Supreme Court’s explicit endorsement of its guidance should inform the 14th Circuits construction of the statute. The Handbook unambiguously supports that refugees should not be denied asylum where their participation in persecution was involuntary, stating, “Factors generally considered to constitute defenses to criminal responsibility should be considered,” and, “in some cases, the individual may not have the mental capacity to be held responsible [for] a crime, for example… in the case of children, immaturity.” *Guidelines on Exclusion Clauses*, supra, n. 13, par. 22, 23.

The Fourteenth Circuit should recognize an exception to the persecutor bar for minors under duress because the plain language of the statute, the legislative history of the INA, and the United States’ obligations under international refugee law are support the duress exception.

1. Serrano-Serra is a minor under duress and therefore the Immigration and Nationality Act’s persecutor bar to asylum should not be triggered.

Whether Serra was under duress when he participated in persecution is a mixed question of law and fact and should be reviewed for substantial evidence. The Board found that Serra’s testimony was credible, so his testimony is taken as fact.

Duress requires, “(1) A person's unlawful threat (2) which causes the defendant reasonably to believe that the only way to avoid imminent death or serious bodily injury to himself or to another is to engage in conduct which violates the literal terms of the criminal law, and (3) which causes the defendant to engage in that conduct, gives the defendant the defense of duress to the crime in question unless that crime consists of intentionally killing an innocent third person.” 2 Subst. Crim. L. § 9.7 (2d ed.) To satisfy this definition, Serra must demonstrate that he was under an imminent threat of death or serious bodily injury at the time he participated in the attack.

First, Serra did reasonably believe that noncooperation in setting up the meeting would lead to his death or serious bodily injury. He testified that he did not warn Professor Requena because he was “afraid that the gang members would hurt [him],” and he did not report the attack to the police because he was “afraid the gang would kill [him].” Although the MS-13 did not specifically tell Serra that they would kill him, he testified that “They had beat [him] up before, and [he] saw what they did to other people who opposed them. They killed many people [his] age and even younger. They did not need to tell [him]. [He] knew [that they would kill me if I did not set up the appointment].” (AR-26).

Second, MS-13 did effectuate an “unlawful threat” toward Serra on several occasions. While the threats were not verbal, they were certainly explicit. Serra knew that death was the price of noncooperation in the attack on Professor Requena, or if he was lucky, serious bodily injury. Serra knew such extreme violence was would be sure to follow his noncooperation because he had witnessed gang members beat people up, and he testifies to seeing “bodies” every day. After the attack, Chunky even confirmed the gang’s violent policy for noncooperation. After showing Serra a gun, Chunky told Serra that MS-13 did not allow retirement from the gang. (AR-24). Nor can the threat of death or serious bodily injury be considered unsubstantiated. Serra was hospitalized twice for his opposition, and on the second occasion, he lost sight in one of his eyes. Moreover, the country condition reports in the Record give credibility to the threat of death: MS-13 is the most-murderous organization in El Salvador, and gang members are the most-murdered. The general threat of life or limb was imminent because his opposition to any request, such as his cooperation in the attack, was certain to lead to swift punishment by the gang.

Third, MS-13’s threat of death or serious bodily injury toward Serra, and Serra’s subjective belief that he would suffer such a fate, did cause him to participate in the attack, as he testified. (AR-26).

Furthermore, Serra was a minor at the time of Professor Requena’s attack. His mental immaturity is a common defense to culpability as recognized in the United Nations Handbook, is a common criminal defense should be a defense to assistance in persecution. *Guidelines on Exclusion Clauses*, supra, n. 13, par. 22, 23. At the very least, Serra’s age and immaturity informs whether he had a subjective fear of death from the gang when he participated in Professor Requena’s attack.

Therefore, the general threat to Serra’s life or limb by MS-13 caused him to reasonably believe that he would be killed if he did not comply with the gang’s orders. Therefore, Serra should be allowed to raise the defense of duress.

**CONCLUSION**

Because Alonso Serrano-Serra has proven his membership in a particular social group and shown that the persecutor bar should not apply to him, this Court should remand the case to the Board of Immigration Appeals for action consistent with these findings.

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8664 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using *Microsoft Word 2013* in Times New Roman, size 14 font.

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Dated: 10/30/14