FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JONNY SAVIER VASQUEZ-RODRIGUEZ, *Petitioner*, v. MERRICK B. GARLAND, Attorney General, *Respondent.*	No. 19-71445 Agency No. A098-489-762 OPINION

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted June 10, 2020
San Francisco, California

Filed August 5, 2021

Before: Eric D. Miller and Danielle J. Forrest,[*] Circuit Judges, and Douglas L. Rayes,[**] District Judge.

Opinion by Judge Miller

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[*] Formerly known as Danielle J. Hunsaker.

[**] The Honorable Douglas L. Rayes, United States District Judge for the District of Arizona, sitting by designation.

SUMMARY[***]

Immigration

Granting Jonny Vasquez-Rodriguez's petition for review of the denial of withholding of removal and protection under the Convention Against Torture, the panel remanded for the Board of Immigration Appeals to consider in the first instance Vasquez-Rodriguez's social group claim based on his perceived gang membership, and to reconsider Vasquez-Rodriguez's CAT claim.

First, the panel upheld the agency's determination that Vasquez-Rodriguez did not establish eligibility for withholding of removal on account of his political opinion.

Turning to Vasquez-Rodriguez's social group claim based on individuals erroneously perceived to be gang members, the panel first addressed the exhaustion requirement of 8 U.S.C. § 1252(d)(1), and concluded that it contains an exception for cases in which exhaustion would be futile. The panel explained that this circuit has recognized a futility exception to the exhaustion requirement, and has held that where the agency's position on the question at issue appears already set, and it is very likely what the result of recourse to administrative remedies would be, such recourse would be futile and is not required.

The panel held that the futility exception was satisfied here. The panel explained that in *Matter of E-A-G-*,

[***] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

24 I. & N. Dec. 591 (B.I.A. 2008), the Board adopted a legal rule categorically barring people erroneously perceived to be gang members from recognition as a particular social group. Although the Board later emphasized in *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014), that its decision in *Matter of E-A-G-* should not be read as a blanket rejection of all factual scenarios involving gangs, it nonetheless upheld *Matter of E-A-G-*'s conclusion that, as a matter of law, perceived membership in a criminal gang cannot constitute a particular social group. Thus, the panel concluded that the Board would have been required to reject Vasquez-Rodriguez's claim. The panel observed that Vasquez-Rodriguez could have relied on out of circuit precedent to urge the Board to depart from *Matter of E-A-G-*. However, because this circuit had not previously considered the issue, and with rare exceptions, the Board follows the law of the circuit in which an individual case arises, the panel concluded that Vasquez-Rodriguez could not have made a meritorious argument that *Matter of E-A-G-* no longer constituted binding law under this circuit's precedent. Thus, the panel held that exhaustion was not required.

Addressing the merits of Vasquez-Rodriguez's social group claim, the panel concluded that the approach set forth in *Matter of E-A-G-* is inconsistent with the requisite fact-based analysis required for proposed particular social groups. The panel explained that in *Matter of E-A-G-*, the Board relied on *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007), in which this court held that actual members of a gang could not constitute a particular social group. In *Arteaga*, this court reasoned that it was impossible to believe that Congress intended to offer refugee protection to violent street gangs who assault people, traffic in drugs, and commit theft, and that it would pervert the manifest humanitarian purpose of the statute to create a sanctuary for universal

outlaws. The panel observed that those considerations do not apply to persons who are not members of a gang and instead are incorrectly perceived to be gang members. Moreover, the panel explained that the Board may not reject a group solely because it had previously found a similar group in a different society to lack social distinction or particularity. The panel wrote that it was not suggesting that the proposed group would necessarily qualify. Rather, because the Board had not yet had an opportunity to decide the issue, the panel remanded for the Board to decide the issue in the first instance.

Finally, the panel held that substantial evidence did not support the Board's denial of CAT protection. The panel explained that the Board's reliance on Vasquez-Rodriguez's uncle's continuing safety in El Salvador was unreasonable when Vasquez-Rodriguez's fear of persecution was based on his own perceived gang membership—not his uncle's. The panel also explained that the immigration judge identified no evidence suggesting that Vasquez-Rodriguez could safely relocate to another part of the country, and that the relocation finding was impossible to reconcile with Vasquez-Rodriguez's testimony, which the Board assumed to be credible. The panel therefore remanded for further consideration of Vasquez-Rodriguez's CAT claim.

COUNSEL

Nienke Schouten (argued), Law Office of Nienke Schouten, Pinole, California, for Petitioner.

Nehal Kamani (argued), Attorney; Holly M. Smith, Senior Litigation Counsel; Civil Division, United States Department of Justice, Washington, D.C.; for Respondent.

OPINION

MILLER, Circuit Judge:

Jonny Vasquez-Rodriguez has repeatedly left El Salvador, illegally entered the United States, and been removed to El Salvador. Having once again entered the United States, he applied for withholding of removal and protection under the Convention Against Torture. The immigration judge denied relief, and the Board of Immigration Appeals dismissed his appeal. The agency did not consider whether Vasquez-Rodriguez was eligible for withholding of removal on account of his membership in the particular social group of people erroneously believed to be gang members. Although Vasquez-Rodriguez did not present that claim to the agency, we conclude that we may consider it now because presenting it to the agency would have been futile. We also conclude that the agency failed to consider certain evidence in the record showing that it is more likely than not that Vasquez-Rodriguez would be tortured if removed to El Salvador. We therefore grant the petition for review and remand.

I

Vasquez-Rodriguez was born in El Salvador and resided there until 2004, when he unlawfully entered the United States with his mother and siblings. In 2008, he was removed to El Salvador. The next year, he returned to the United States and was again removed.

According to Vasquez-Rodriguez, he lived with his uncle in San Vicente, El Salvador, where the local police harassed and beat him because he has several tattoos and the officers mistakenly believed him to be a gang member. Then, his uncle ran for mayor, and Vasquez-Rodriguez

volunteered with the campaign. Vasquez-Rodriguez says that the incumbent mayor, and a handful of officers who were loyal to her, retaliated against him. They targeted him, rather than his uncle, because his uncle was well liked within the community. They beat Vasquez-Rodriguez and falsely accused him of marijuana possession, an offense to which he pleaded guilty so he could get out of jail. But officers continued to target him for harassment and violence. Eventually, he reported the officers to the police department and, when the department refused to help, to a human-rights organization. But the attacks continued, so he fled yet again to the United States.

In 2013, Vasquez-Rodriguez was removed to El Salvador a third time. He claims that the police detained him at the airport because, by leaving the country, he had violated the conditions of his release from jail on the marijuana conviction. He says that he was then turned over to San Vicente officers, only to be beaten and jailed once again. At one point, one of the officers raped him. He eventually went into hiding in the mountains, where he lived for almost a year before escaping to the United States.

In 2018, Vasquez-Rodriguez pleaded guilty to misdemeanor domestic battery in California state court, and his earlier removal order was reinstated under 8 U.S.C. § 1231(a)(5). Vasquez-Rodriguez expressed a fear of persecution in El Salvador on the basis of his political opinion, and an asylum officer referred him for withholding-only proceedings after determining that he was not eligible for asylum. Vasquez-Rodriguez filed applications for withholding of removal and for relief under the Convention Against Torture (CAT).

The immigration judge found Vasquez-Rodriguez not credible and denied both applications. The immigration

judge also found that, even assuming his credibility, Vasquez-Rodriguez was not eligible for withholding of removal because he did not show that he had been persecuted or establish a well-founded fear of future persecution on account of any statutorily protected ground. And the immigration judge found that Vasquez-Rodriguez was ineligible for CAT relief because he could safely relocate to another part of El Salvador.

The Board assumed that Vasquez-Rodriguez was credible but affirmed the immigration judge's other findings and dismissed Vasquez-Rodriguez's appeal.

II

The Attorney General must withhold removal of an alien to a country if "the alien's life or freedom would be threatened in that country because of the alien's . . . membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). Vasquez-Rodriguez argues that he is entitled to withholding of removal because he faces persecution on account of his political opinion and on account of his membership in the particular social group of people erroneously believed to be members of gangs. We begin by considering the political-opinion claim.

To qualify for withholding of removal, an applicant must show that "it is more likely than not that" he would be persecuted because of a protected ground. *INS v. Stevic*, 467 U.S. 407, 424 (1984). The applicant need not demonstrate that the protected ground is a central reason for his persecution; it is enough for it to be "a reason." *Barajas-Romero v. Lynch*, 846 F.3d 351, 360 (9th Cir. 2017) (quoting 8 U.S.C. § 1231(b)(3)(C)). Here, the Board determined that Vasquez-Rodriguez "was targeted by the police because he was a suspected gang member, not because of his political

(or imputed political) opinion." Because "[a] persecutor's actual motive is a matter of fact," we review that finding for substantial evidence. *Matter of N-M-*, 25 I. & N. Dec. 526, 532 (B.I.A. 2011); *see also Regalado-Escobar v. Holder*, 717 F.3d 724, 726–27 (9th Cir. 2013). We conclude that substantial evidence supports the Board's determination.

In his declaration, Vasquez-Rodriguez stated that the officers initially targeted him because he had his own credit card, because "they didn't like the way [he] answered . . . their questions," and because he had tattoos. That statement is consistent with his other documentary submissions, including his aunt's statement that Vasquez-Rodriguez was accused "of being a member of a gang because of his tattoos." It is also consistent with his earlier statements. For example, when Vasquez-Rodriguez reported the abusive officers to a human-rights organization, he did not mention his uncle's campaign, the mayor, or any other political motivation for the officers' attacks. Instead, he reported that the police "ask[ed] him about his belonging to gangs" and "express[ed] that he has tattoos."

In challenging the agency's finding, Vasquez-Rodriguez relies on his own testimony and his family members' letters of support stating that the mayor targeted him at least in part because of his involvement in his uncle's political campaign. But Vasquez-Rodriguez's testimony casts doubt on whether the mayor's actions were motivated by politics rather than by her suspicion that he was a gang member "because [he] ha[s] tattoos," by his involvement in criminal activity, or perhaps by her belief that he "was disrespecting her." Thus, although the Board assumed Vasquez-Rodriguez to be credible, his ambiguous testimony does not compel the conclusion that his political opinion was a reason for his persecution. *See Garland v. Ming Dai*, 141 S. Ct. 1669, 1680

(2021) ("[E]ven if the [Board] treats an alien's evidence as credible, the agency need not find his evidence persuasive or sufficient to meet the burden of proof."); *Singh v. Holder*, 753 F.3d 826, 836 (9th Cir. 2014). Because the record does not compel a conclusion contrary to that reached by the agency, we uphold the agency's determination that Vasquez-Rodriguez did not establish eligibility for withholding of removal on this ground. *See* 8 U.S.C. § 1252(b)(4)(B); *Ming Dai*, 141 S. Ct. at 1678.

III

Vasquez-Rodriguez also argues that he is eligible for withholding of removal because he faces persecution on account of his membership in the particular social group of persons erroneously believed to be gang members. He admits that he did not exhaust that claim by presenting it to the agency, but he maintains that we may consider it now because raising it before the agency would have been futile. We conclude that the exhaustion requirement contains an exception for cases in which exhaustion would be futile, that the futility exception is satisfied here, and that the agency's treatment of claims of persecution based on imputed gang membership is legally flawed.

A

We begin by examining the exhaustion requirement and its futility exception. Congress has authorized us to review "a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. § 1252(d)(1). On its face, that provision appears to require only that the alien exhaust available remedies—that is, procedures for challenging an adverse decision. Nevertheless, we have held that the statute also requires issue exhaustion, or, in other words, that it permits us to

consider only those issues that the petitioner properly raised before the agency. *Juarez Alvarado v. Holder*, 759 F.3d 1121, 1127 n.5 (9th Cir. 2014); *accord Barron v. Ashcroft*, 358 F.3d 674, 677–78 (9th Cir. 2004); *see Sims v. Apfel*, 530 U.S. 103, 106–07 (2000) (distinguishing between exhaustion of remedies and issue exhaustion). On this point, our interpretation of section 1252(d)(1) is consistent with that of the other courts of appeals. *See Perez Batres v. Lynch*, 796 F.3d 157, 159–60 (1st Cir. 2015); *Lin Zhong v. United States Dep't of Just.*, 480 F.3d 104, 122 (2d Cir. 2007); *Bin Lin v. Attorney Gen.*, 543 F.3d 114, 119–20 (3d Cir. 2008); *Cabrera v. Barr*, 930 F.3d 627, 631 (4th Cir. 2019); *Vazquez v. Sessions*, 885 F.3d 862, 868 (5th Cir. 2018); *Ramani v. Ashcroft*, 378 F.3d 554, 558–60 (6th Cir. 2004); *Zeqiri v. Mukasey*, 529 F.3d 364, 369–70 (7th Cir. 2008); *Etchu-Njang v. Gonzales*, 403 F.3d 577, 582–84 (8th Cir. 2005); *Robles-Garcia v. Barr*, 944 F.3d 1280, 1283 (10th Cir. 2019); *Sundar v. INS*, 328 F.3d 1320, 1323 (11th Cir. 2003).

But we have gone beyond simply holding that section 1252(d)(1) mandates issue exhaustion; we have "held that issue exhaustion is a jurisdictional requirement." *Juarez Alvarado*, 759 F.3d at 1127 n.5. Thus, as we have construed the statute, it "bars us, for lack of subject-matter jurisdiction, from reaching the merits of a legal claim not presented in administrative proceedings below." *Barron*, 358 F.3d at 678. That interpretation is well established in circuit law. *See, e.g.*, *Honcharov v. Barr*, 924 F.3d 1293, 1296 n.2 (9th Cir. 2019) (per curiam); *Juarez Alvarado*, 759 F.3d at 1127; *Sola v. Holder*, 720 F.3d 1134, 1135 (9th Cir. 2013) (per curiam). And several other courts of appeals agree. *See Sousa v. INS*, 226 F.3d 28, 31–32 (1st Cir. 2000); *Bin Lin*, 543 F.3d at 120; *Cabrera*, 930 F.3d at 631; *Ramani*, 378 F.3d at 560; *Etchu-Njang*, 403 F.3d at 583; *Robles-Garcia*, 944 F.3d at 1283–84; *Sundar*, 328 F.3d at 1323.

We note, however, that in recent years, the Supreme Court has cautioned against "profligate use" of the word "jurisdiction." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013); *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) ("Jurisdiction . . . is a word of many, too many, meanings." (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996))). Under the Court's modern approach, "the word 'jurisdictional' is generally reserved for prescriptions delineating the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction)." *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1848 (2019). The Court has explained that when a statute "clearly states that a threshold limitation on a statute's scope shall count as jurisdictional," then it should be treated as such. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006). On the other hand, "when Congress does not rank a statutory limitation . . . as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Id.* at 516; *accord Gonzalez v. Thaler*, 565 U.S. 134, 141–42 (2012).

Because section 1252(d)(1) does not use jurisdictional terms or otherwise describe the class of cases that courts have authority to adjudicate, some courts of appeals have held that its issue-exhaustion requirement, although mandatory, is not jurisdictional. *See, e.g.*, *Lin Zhong*, 480 F.3d at 118–22, 125 n.25; *Korsunskiy v. Gonzales*, 461 F.3d 847, 849 (7th Cir. 2006). And some courts of appeals, although adhering to circuit precedent treating issue exhaustion as jurisdictional, have expressed doubts about that position. *See, e.g.*, *Sousa*, 226 F.3d at 31–32; *Bin Lin*, 543 F.3d at 120 n.6; *Robles-Garcia*, 944 F.3d at 1283–84.

We join those courts in expressing our doubts, but as we have already explained, the precedent of this circuit is clear: Issue exhaustion is a jurisdictional requirement. No intervening decision of the Supreme Court is "clearly irreconcilable" with that precedent, so it binds us here. *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc).

We have discussed the jurisdictional nature of the issue-exhaustion requirement at some length because it is important for understanding the availability of a futility exception. Futility is a traditional exception to judicially created exhaustion requirements because "[i]t makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested." *Carr v. Saul*, 141 S. Ct. 1352, 1361 (2021). But if an exhaustion requirement is jurisdictional, it should not allow non-statutory exceptions. By definition, a jurisdictional requirement limits the authority that Congress has granted to a court, which means that a court "has no authority to create equitable exceptions to jurisdictional requirements." *Bowles v. Russell*, 551 U.S. 205, 214 (2007); *see Robles-Garcia*, 944 F.3d at 1284.

Indeed, even if issue exhaustion under section 1252(d)(1) were not considered a jurisdictional requirement, it is still mandated by the statute, and "mandatory exhaustion statutes . . . establish mandatory exhaustion regimes, foreclosing judicial discretion." *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016); *accord United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1621 (2021); *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001). As we have observed in a different context, "where a statute specifically requires exhaustion, it . . . 'may not be dispensed with merely by a judicial conclusion of futility.'" *Saulsbury Orchards &*

Almond Processing, Inc. v. Yeutter, 917 F.2d 1190, 1196 (9th Cir. 1990) (quoting *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975)).

Despite the mandatory nature of the exhaustion requirement in section 1252(d)(1), many circuits have permitted some sort of futility exception. *See, e.g.*, *Sousa*, 226 F.3d at 32; *Valenzuela Grullon v. Mukasey*, 509 F.3d 107, 112–13 (2d Cir. 2007); *Calla Mejia v. Sessions*, 866 F.3d 573, 582 (4th Cir. 2017); *Goonsuwan v. Ashcroft*, 252 F.3d 383, 389 (5th Cir. 2001); *Iddir v. INS*, 301 F.3d 492, 498–99 (7th Cir. 2002). *But see Bah v. Mukasey*, 521 F.3d 857, 859 (8th Cir. 2008). We are among those circuits. *See Sun v. Ashcroft*, 370 F.3d 932, 942–43 (9th Cir. 2004).

In *Sun*, we held that aliens need not exhaust in cases "where resort to the agency would be futile." 370 F.3d at 943 (quoting *El Rescate Legal Servs., Inc. v. Executive Off. for Immigr. Rev.*, 959 F.2d 742, 747 (9th Cir. 1991)); *accord Szonyi v. Barr*, 942 F.3d 874, 891 (9th Cir. 2019); *Juarez Alvarado*, 759 F.3d at 1128. We reasoned that by "requir[ing] the exhaustion only of remedies 'available . . . *as of right*,'" Congress had excluded from the exhaustion requirement those remedies that were not available as of right. *Sun*, 370 F.3d at 941–42 (quoting 8 U.S.C. § 1252(d)(1)) (emphasis and omission in original). We concluded that "[t]o qualify as a remedy 'available to the alien as of right' under § 1252(d)(1), a remedy must enable the agency to give unencumbered consideration to whether relief should be granted." *Id.* at 942. We therefore held that "where the agency's position on the question at issue appears already set, and it is very likely what the result of recourse to administrative remedies would be, such recourse would be futile and is not required." *Id.* at 943 (quoting *El Rescate*

Legal Servs., 959 F.2d at 747). *Sun*'s holding governs our resolution of this case.

B

We now consider whether Vasquez-Rodriguez has adequately demonstrated futility in this case. The general administrative-law rule is that "[f]ailure to pursue administrative remedies will be excused for futility only upon a showing that an adverse decision was a *certainty*"—or, in other words, that seeking relief from the agency would have been truly futile, not merely unlikely to succeed. *National Sci. & Tech. Network, Inc. v. FCC*, 397 F.3d 1013, 1014 (D.C. Cir. 2005) (emphasis added). In the immigration context, those principles would mean that an alien's claim of futility would fail if "he cannot demonstrate that the [Board] was unable to provide the relief that he sought." *Valenzuela Grullon*, 509 F.3d at 113. Thus, as the Second Circuit has articulated the test, "the likelihood of adherence to precedent" by the agency is not enough; only "the factual impossibility of relief" is. *Id.*; *accord Sousa*, 226 F.3d at 32; *Goonsuwan*, 252 F.3d at 389; *cf. United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36–37 (1952).

But we have interpreted the standard more generously. We will excuse a failure to exhaust if "it is very likely what [the Board's] result would have been." *Sun*, 370 F.3d at 943 (quoting *SAIF Corp./Or. Ship v. Johnson*, 908 F.2d 1434, 1441 (9th Cir. 1990)). Thus, "[w]here the agency's position 'appears already set' and recourse to administrative remedies is 'very likely' futile, exhaustion is not required." *Szonyi*, 942 F.3d at 891 (quoting *El Rescate Legal Servs.*, 959 F.2d at 747).

In this case, the agency could not have given "unencumbered consideration" to Vasquez-Rodriguez's

argument that he is eligible for withholding of removal because he fears persecution on account of his imputed gang membership. *Sun*, 370 F.3d at 942. The agency's rejection of that argument "appear[ed] already set," and the resulting denial of relief was therefore "very likely." *Id.* at 943 (quoting *El Rescate Legal Servs.*, 959 F.2d at 747).

In *Matter of E-A-G-*, 24 I. & N. Dec. 591 (B.I.A. 2008), the Board rejected a nearly identical proposed social group: "young persons who are perceived to be affiliated with gangs." *Id.* at 595–96. The Board relied on *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007), in which we held that *actual* members of a gang could not constitute a particular social group. *Id.* at 945–46. In the Board's view, "[t]reating affiliation with a criminal organization as being protected membership in a social group is inconsistent with the principles underlying the bars to asylum and withholding of removal based on criminal behavior." *Matter of E-A-G-*, 24 I. & N. Dec. at 596. The Board reasoned that "because we agree that membership in a criminal gang cannot constitute a particular social group, the respondent cannot establish particular social group status based on the incorrect perception by others that he is such a gang member." *Id.* The Board did not address any society-specific evidence relevant to whether the proposed group was distinct within the society in question. Instead, it adopted a legal rule categorically barring people erroneously perceived to be gang members from recognition as a particular social group. *See id*. Although the Board later emphasized that its decision in *Matter of E-A-G-* "should not be read as a blanket rejection of all factual scenarios involving gangs," *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 251 (B.I.A. 2014), it nonetheless upheld *Matter of E-A-G-*'s conclusion that, as a matter of law, "perceived membership[] in a criminal gang cannot constitute a particular social group," *id.* at 249 n.16.

That conclusion would have required the Board to reject Vasquez-Rodriguez's claim. To be sure, the Board does not follow an absolute rule of stare decisis, and therefore Vasquez-Rodriguez could have urged the Board to depart from *Matter of E-A-G-*. *See In re E-L-H-*, 23 I. & N. Dec. 814, 823 (B.I.A. 2005) (en banc) (explaining that "published Board decisions remain binding" until they are "modified by the Board"); *see also* 8 C.F.R. § 1003.1(g)(1). In support of his argument, he could have cited cases from other circuits criticizing the Board's analysis in *Matter of E-A-G-*. *See, e.g.*, *Benitez Ramos v. Holder*, 589 F.3d 426, 429–30 (7th Cir. 2009); *Beltran Escamilla v. Holder*, 459 F. App'x 776, 786 (10th Cir. 2012). But this circuit has not previously considered the issue, and "[w]ith rare exceptions, the [Board] follows the law of the circuit in which an individual case arises." *Jama v. ICE*, 543 U.S. 335, 350 n.10 (2005). Vasquez-Rodriguez could not have made a meritorious argument that *Matter of E-A-G-* no longer constitutes binding law under this circuit's precedent. *See Juarez Alvarado*, 759 F.3d at 1129. And while he might have urged the Board to reconsider its position, the existence of Board precedent on the issue is sufficient to show that the agency's position was "already set," and therefore, under our interpretation of section 1252(d)(1), he was not required to exhaust the issue. *See Sun*, 370 F.3d at 943; *Szonyi*, 942 F.3d at 891.

C

Turning at last to the merits of Vasquez-Rodriguez's claim, we consider whether persons erroneously believed to be gang members constitute a particular social group. The Board has previously interpreted the phrase "particular social group" to refer to a group that is "(1) composed of members who share a common immutable characteristic,

(2) defined with particularity, and (3) socially distinct within the society in question." *Matter of M-E-V-G-*, 26 I. & N. Dec. at 237. We have upheld that interpretation as a reasonable reading of the statute. *Garay Reyes v. Lynch*, 842 F.3d 1125, 1136–37 (9th Cir. 2016). Under the Board's test, determining whether a proposed social group is cognizable necessarily involves "case-by-case determination[s] as to whether the group is recognized by the particular society in question." *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014).

We conclude that the approach set forth in *Matter of E-A-G-* is inconsistent with the requisite fact-based analysis of proposed particular social groups. As we have already explained, the Board in *E-A-G-* relied on our decision in *Arteaga*, in which we held that actual members of a gang could not constitute a particular social group. In *Arteaga*, we reasoned that it was impossible to believe "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," and that treating them as such "would be to pervert the manifest humanitarian purpose of the statute in question and to create a sanctuary for universal outlaws." 511 F.3d at 945–46. Those considerations do not apply to persons who are not members of a gang but who are incorrectly perceived to be gang members. We have held that the Board "may not reject a group solely because it had previously found a similar group in a different society to lack social distinction or particularity." *Pirir-Boc*, 750 F.3d at 1084; *see also Villegas Sanchez v. Garland*, 990 F.3d 1173, 1181 (9th Cir. 2021) ("The particular social group analysis does not occur in isolation, but rather in the context of the society out of which the claim for asylum arises." (quoting *Matter of M-E-V-G-*, 26 I. & N. Dec. at 238)). The

Board appears to have done just that in its treatment of this issue.

Of course, in order for those perceived as gang members to constitute a particular social group, Vasquez-Rodriguez would have to demonstrate that their defining characteristic is immutable, that they can be identified with particularity, and that they are understood to be distinct within Salvadoran society. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 237. We do not suggest that this group would necessarily qualify. Instead, because the Board has not yet had an opportunity to decide the issue, we must leave it for the Board in the first instance. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87–88 (1943); *INS v. Orlando Ventura*, 537 U.S. 12, 16–17 (2002) (per curiam).

IV

Remand will also allow the agency to reconsider whether Vasquez-Rodriguez is eligible for protection under the CAT. As it stands, the Board's determination that he is ineligible for such relief is not supported by substantial evidence.

Under the CAT, the applicant carries the burden to 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). In assessing "the possibility of future torture," the immigration judge must consider, among other things, "[e]vidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured." *Id.* § 1208.16(c)(3)(ii); *see Akosung v. Barr*, 970 F.3d 1095, 1101 (9th Cir. 2020).

Here, the Board offered two reasons for concluding that Vasquez-Rodriguez was ineligible for relief: that "his uncle, whose political campaign he supported, had not been harmed

in El Salvador," and that he "could relocate to another part of El Salvador." The former rationale is contradicted by the Board's determination that Vasquez-Rodriguez "was targeted by the police because he was a suspected gang member" and "not because of his political (or imputed political) opinion" based on his association with his uncle. It is irrelevant that Vasquez-Rodriguez's uncle can safely reside in El Salvador: Vasquez-Rodriguez fears persecution because the police perceive *him*—and not his uncle—to be a gang member. *See Kumar v. Gonzales*, 444 F.3d 1043, 1055 (9th Cir. 2006).

That leaves the finding of an ability to relocate. The Board expressly referred to the immigration judge's reasoning, so we review that reasoning as well. *Flores-Lopez v. Holder*, 685 F.3d 857, 861 (9th Cir. 2012) (When the Board "issues its own decision but relies in part on the immigration judge's reasoning, we review both decisions."). The immigration judge relied on Vasquez-Rodriguez's ability to "speak[] Spanish fluently" and "to find work throughout El Salvador." But his ability to reintegrate into Salvadoran society says little about how he might safely reside in a place in which he was for years abused by the police. *See Arrey v. Barr*, 916 F.3d 1149, 1161 (9th Cir. 2019).

The immigration judge determined that the country-conditions evidence "does not indicate that the entire country is unsafe," particularly in light of evidence that the Salvadoran government "does not condone torture and actively works to investigate and prosecute prosecutors, even those among the police force." But despite acknowledging "that the police and organized crime groups can be dangerous in certain parts of the country," the immigration judge identified no evidence suggesting that

Vasquez-Rodriguez could safely relocate to another part of the country. The government, for its part, cited a country-conditions report purportedly stating that police violence is confined to San Salvador. In fact, the report explains that "[r]eports of abuse and police misconduct were more often from residents of the metropolitan area San Salvador," which is hardly an endorsement of the safety of other areas. *See Davila v. Barr*, 968 F.3d 1136, 1143 (9th Cir. 2020).

The relocation finding is also impossible to reconcile with Vasquez-Rodriguez's testimony, which the Board assumed to be credible. When Vasquez-Rodriguez was removed in 2013, the San Salvador police detained him at the airport and then turned him over to the San Vicente police. And as recently as 2018, the San Vicente police were searching for Vasquez-Rodriguez and vowed to find him once he is removed to El Salvador. The Board erred by "failing to mention [that] highly probative or potentially dispositive evidence." *Cole v. Holder*, 659 F.3d 762, 772 (9th Cir. 2011).

PETITION GRANTED; REMANDED.

All pending motions are denied as moot.