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February 21, 2014

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
Washington, DC 20530

Dear Attorney General Holder,

On January 23, 2014 the U.S. Court of Appeals for the 4th Circuit issued a decision in *Martinez v. Holder*. In this case, an individual sought and received withholding of removal based on his claimed "former" membership in a gang – specifically the notoriously deadly MS-13. To counteract the growth of this group in the United States, the Federal Bureau of Investigation (FBI) formed the MS-13 National Gang Task Force in December 2004. According to the FBI, MS-13:

"perpetrate[s] violence—from assaults to homicides, using firearms, machetes, or blunt objects—to intimidate rival gangs, law enforcement, and the general public. They often target middle and high school students for recruitment. And they form tenuous alliances...and sometimes vicious rivalries...with other criminal groups, depending on their needs at the time.¹

As you know, withholding of removal may be granted to an individual who can demonstrate that his or her life or freedom would be threatened on account of race, religion, nationality, political opinion, or membership in a particular social group.² These five bases for

¹ *The MS-13 Threat - A National Assessment*, available at http://www.fbi.gov/news/stories/2008/january/ms13_011408

² Like asylum, withholding of removal prohibits the U.S. government from removing an alien to a country where their life or freedom would be threatened on account of a protected ground. Asylum allows an alien to remain in the United States under legal status because he or she has suffered past persecution in his home country or country of last habitual residence, or because he has a *well-founded* fear of future persecution in his home country. After an alien qualifies for asylum, they can subsequently apply for legal permanent residency and then citizenship. However, withholding does not qualify an alien for permanent residence. A claim for withholding of removal is factually related to an asylum claim, but the alien bears a heavier burden of proof to merit relief. For withholding, the applicant must demonstrate that, if returned to his country, his life or freedom *would be* threatened on account of one of the protected grounds. To make this showing, the alien must establish a "clear probability" of persecution, meaning that it is "more likely than not" that he will be subject to persecution on account of a protected ground if returned to the country from which he seeks withholding of removal consistent with *Cardoza-Fonseca*, 480 U.S.

withholding and asylum are known as “protected grounds.” A “particular social group” is defined on a case-by-case basis based on the Board of Immigration Appeals’ (BIA) decision in *Matter of Acosta*.³

In *Acosta*, the BIA defined a particular social group as a group of individuals who share a certain immutable characteristic that cannot be changed or is so fundamental to their identity that they should not be required to change. Since *Acosta*, various groups have been recognized as social groups for the purposes of asylum and withholding. Additionally, in *Matter of C-A*,⁴ the BIA clarified the standard in *Acosta* and held that members of a particular social group must “be easily recognizable and understood by others to constitute social groups.”

In *Martinez*, the 4th Circuit considered whether a man who claims to be a former gang member can obtain withholding of removal under U.S. law. In a previous decision⁵ the BIA correctly decided that Congress could not have intended gang membership (and therefore former gang membership) to create an opportunity for protection under U.S. asylum and withholding law – that Congress could not have intended for criminal gangs to be social groups worthy of protections. The 4th Circuit considered whether former gang membership is an “immutable” characteristic that warrants such protection. Contrary to congressional intent, on January 23, 2014, the court held:

We conclude that Martinez’s proposed particular social group of former MS-13 members from El Salvador is immutable for withholding of removal purposes in that the only way that Martinez could change his membership in the group would be to rejoin MS-13. We hold therefore that the BIA erred in its ruling declining — on immutability grounds — to recognize the particular social group of former members of MS-13 who have renounced their membership in the gang.

Indeed, consistent with congressional intent, the government argued that the Immigration and Nationality Act disqualifies groups whose members had formerly participated in antisocial or criminal conduct.

We are concerned that based on this decision, gang members will be able to receive asylum or withholding in the U.S., simply by telling immigration authorities that they have renounced their membership in the gang. In the *Martinez* case, an MS-13 gang member did just that. Surely it is likely that when gang members are placed in removal proceedings, they will claim that they are no longer a member of a gang and have renounced gang membership in an attempt to circumvent removal. Even aliens who have in fact left gangs were members of criminal organizations and do not deserve the protections of asylum or withholding.

421. Most individuals who apply for withholding do so because they seek asylum but were time barred, previously firmly resettled in another country (all of which are bars to asylum relief), or have committed certain acts barring them from asylum.

³ 19 I&N Dec. 211 (1985).

⁴ 23 I&N Dec. 951 (BIA 2006).

⁵ *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008) citing *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007).

We are deeply troubled by this decision as it interferes with the Federal Government's ability to effectively enforce our immigration laws. Decisions such as this are serious impediments to both the Department of Justice's (DOJ) and the Department of Homeland Security's (DHS) ability to promote public safety through the removal of deportable aliens who may be involved with organized criminal activity.

It is no secret that criminal gangs are a continuing national problem. In a 2011 survey analysis, the Bureau of Justice National Gang Center found that "Following a marked decline from the mid-1990s to the early 2000s, the prevalence rate of gang activity significantly increased between 2001 and 2005 and has since remained fairly constant."⁶ Gangs do not only engage in street crimes, such as homicide, robbery, burglary, and auto theft, but also engage in other criminal conduct such as alien smuggling, counterfeiting, identity theft, and fraud. With increasing membership and an expanded crime portfolio, something must be done to mitigate the threat posed by gangs. Rewarding their members with asylum or withholding certainly should not be one of those things. Current and former gang members should not be shielded by our asylum or withholding system. Indeed, the Committee has already marked up legislation, HR. 2278 – the SAFE Act, which clarifies that anyone who is or has been a member of a gang may not receive asylum or withholding on any grounds.

While the Committee has done its part, we would like to know what DOJ plans to do to address this problem. We have previously asked DOJ whether they plan to seek certification to the Supreme Court regarding this decision, but to date we have not received a response. In submitting this query we noted on this particular matter there is a circuit split that should be resolved, where different circuits have ruled in varying manners as to whether gang members or former members are ineligible for asylum or withholding. DOJ has informed us that they would only share the information with us regarding the appeal status "once it is public." However, the appeal time frame will run within 30 days of the decision (February 22, 2014). We would like to also know if DOJ alternatively plans to seek rehearing en banc on this case or file a motion for panel reconsideration. Please respond to this letter before the appeal deadline.



BOB GOODLATTE
Chairman
House Committee on the Judiciary

Sincerely,



J. RANDY FORBES
Member
House Committee on the Judiciary

⁶ National Youth Gang Survey Analysis available at, <http://www.nationalgangcenter.gov/survey-analysis/prevalence-of-gang-problems>.