

ANOTHER GROUP BITES THE DUST: THE FOURTH CIRCUIT’S RIGID DETERMINATION OF PARTICULAR SOCIAL GROUPS

Abstract: In 2022, in *Herrera-Martinez v. Garland*, the U.S. Court of Appeals for the Fourth Circuit held that “prosecution witnesses” are not a sufficiently particular social group (PSG) to warrant protection from deportation under the Immigration and Nationality Act. The Fourth Circuit’s decision added to varying interpretations of the requirements for establishing a PSG among other circuits and immigration courts. To qualify as a PSG in the Fourth Circuit, members of the group must share an immutable characteristic and the group must be defined with particularity and be socially distinct. The Seventh Circuit had previously refused to adopt all three requirements in its analysis of PSGs, and consequently, resisted deference to decisions issued by the Board of Immigration Appeals (BIA). This Comment argues that, although the Fourth Circuit accurately applied the three requirements for qualifying as a PSG, some requirements should be optional to provide more flexibility for noncitizen applicants, presiding agencies, and courts in applying the requirements.

INTRODUCTION

Upon entry into the United States, countless individuals are apprehended and deported under the “expedited removal”¹ system unless they relay fears of returning to their home country to an asylum officer.² Once an individual claims fear, an immigration judge (I.J.) must determine whether that individual should nonetheless be removed pursuant to federal law.³ If the individual is

¹ See AM. IMMIGR. COUNCIL, A PRIMER ON EXPEDITED REMOVAL 1–2 (2019) (defining expedited removal as a process where immigration officers with unchecked discretion can swiftly deport individuals who are undocumented or unauthorized). Expedited removal occurs when people are apprehended at the U.S. border or when individuals are within 100 miles of the borders and stopped within 14 days of entering the United States. *Id.* at 1.

² See AM. IMMIGR. COUNCIL, THE REMOVAL SYSTEM OF THE UNITED STATES: AN OVERVIEW 2–3 (2022) (explaining the different removal proceedings immigrants may be subject to upon entrance to the United States). Expedited removals comprised forty-one percent of removals from the United States in Fiscal Year (FY) 2020. *Id.* at 2. Reinstatement of removals, which comprised another forty percent of removals in FY 2020, occur when those who have been deported in the past re-enter the United States without required documentation. *Id.*

³ See *id.* at 2–3 (explaining that a prosecutor for the Department of Homeland Security initiates the immigration court process by filing a “Notice to Appear” that lays the foundation for removal, and that an I.J. uses federal law to then determine when an individual is removable). The prosecution bears the burden of showing that the individual is not a legal U.S. citizen, before the burden shifts to the

deemed removable, the individual can seek several forms of relief to prevent removal, including but not limited to withholding of removal under 8 U.S.C. § 1231.⁴ Section 1231 prevents removal if an individual can demonstrate a likelihood of persecution in the noncitizen's home country based upon membership in a protected group.⁵ Although protected categories include "race, religion, nationality, membership in a particular social group, or political opinion," the definition of a particular social group (PSG) has created the most significant confusion across the immigration system.⁶ The Board of Immigration Appeals (BIA) and the United States Circuit Courts of Appeals wrestled for decades to identify the contours of a PSG.⁷ Because PSG is undefined in the

individual to establish that they should be admitted to the United States "clearly and beyond doubt." *Id.* at 3. If the individual has already been admitted to the United States, the prosecution must demonstrate removability by "clear and convincing evidence." *Id.*

⁴ See, e.g., 8 U.S.C. § 1231(b)(3)(A) (preventing removal of an individual's "life or freedom would be threatened in that country because of . . . race, religion, nationality, membership in a particular social group, or political opinion"); AM. IMMIGR. COUNCIL, *supra* note 2, at 4–5 (explaining the varying forms of relief that eligible noncitizens may receive in removal proceedings).

⁵ See § 1231(b)(3) (describing the process for withholding of removal and the relevant exceptions). Forms of relief within immigration removal proceedings include: cancellation of removal, where a former record of removal may be cancelled; asylum, where a noncitizen in the United States is protected from removal if they demonstrate an evidenced "fear of persecution"; withholding of removal, where the noncitizen demonstrates likely persecution in the noncitizen's home country based on membership in a protected group; adjustment of status, where a noncitizen's status can change to lawful permanent residency; and various forms of judicial relief once a removal has been ordered, such as motions to reconsider a noncitizen's case or administrative appeals. AM. IMMIGR. COUNCIL, *supra* note 2, at 4; see § 1231(b)(3)(A) (establishing that the U.S. Attorney General must refrain from removing a noncitizen when the noncitizen's "life or freedom would be threatened in [the] country" of removal). There are many terms used to refer to noncitizens in academic discourse, but this Comment elects to use the term "noncitizen." See generally Memorandum from Jean King, Acting Director, Exec. Off. for Immigr. Rev. (July 23, 2021), <https://www.justice.gov/eoir/book/file/1415216/download> [<https://perma.cc/LJ6X-GFNQ>] (notifying the Executive Office of Immigration Review to make a terminology shift, for inclusion purposes, from using the term "illegal alien" to using the term "noncitizen" to describe migrants in the United States without proper documentation or authorization); Jonathan Kwan, *Words Matter: Illegal Immigrant, Undocumented Immigrant, or Unauthorized Immigrant?*, IMMIGR. ETHICS BLOG FOR THE MARKKULA CTR. FOR APPLIED ETHICS (Feb. 11, 2021), <https://www.scu.edu/ethics/focus-areas/immigration-ethics/immigration-ethics-resources/immigration-ethics-blog/words-matter-illegal-immigrant-undocumented-immigrant-or-unauthorized-immigrant/> [<https://perma.cc/AS88-DYDF>] (discussing the social implications and significance of using accurate and culturally sensitive terms for persons subject to the U.S. immigration system).

⁶ See § 1231(b)(3)(A) (providing the list of protected groups); Dagmar R. Myslinska, *What a "Particular Social Group" Means for Asylum Purposes*, NOLO, <https://www.nolo.com/legal-encyclopedia/what-particular-social-group-means-asylum-purposes.html> [<https://perma.cc/MEE2-XDSG>] (noting that of the five protected grounds, establishing membership in a PSG is the most troublesome as courts and executive agencies alike continue to issue conflicting interpretations of the requirements); see also *infra* note 73 and accompanying text (discussing that the three requirements for establishing a PSG unnecessarily complicate the protection from deportation processes, especially for applicants that lack the requisite legal representation and education to make a sufficient case).

⁷ See Natalie Nanasi, *Death of the Particular Social Group*, 45 N.Y.U. REV. L. & SOC. CHANGE 260, 278–90 (2021) (outlining the evolution of the BIA's PSG requirements from a sole immutability

Immigration and Nationality Act (INA) itself, noncitizens are left perplexed as to how they can establish the existence of (and prove their membership in) a protected PSG.⁸ Even an Executive Order from President Biden in February 2021 ordered the Departments of Homeland Security and Justice to jointly establish a uniform definition of a PSG.⁹

Part I of this Comment gives an overview of the requirements noncitizens must demonstrate to avoid deportation at the time the U.S. Court of Appeals for the Fourth Circuit decided *Herrera-Martinez v. Garland*, and explains the factual and procedural background of *Herrera-Martinez*.¹⁰ In 2022, in *Herrera-Martinez*, the Fourth Circuit grappled with the question of whether prosecution witnesses should qualify as a PSG under BIA precedent, such that a noncitizen would be protected from being deported to Honduras and facing potential life-threatening harm.¹¹ Ultimately, the court denied such protection, asserting that prosecution witnesses were not sufficiently specific to merit PSG qualification.¹² Part II examines and discusses the inconsistent interpretations of PSGs by different circuit courts and the BIA.¹³ Finally, Part III argues that a more flexible approach to PSG requirements properly emulates international law, rather than the BIA's contradictory guidance.¹⁴

I. THE LEGAL, FACTUAL, AND PROCEDURAL BACKGROUND OF *HERRERA-MARTINEZ V. GARLAND*

In 2022, in *Herrera-Martinez v. Garland*, the U.S. Court of Appeals for the Fourth Circuit held that prosecution witnesses are not a particular enough group to qualify as a PSG, a status that would require withholding of removal under 8 U.S.C. § 1231.¹⁵ Section A of this Part discusses the statutory require-

standard to a three-part test with the addition of “particularity” and “social distinction” requirements and discussing the often-inconsistent applications of such requirements).

⁸ See 8 U.S.C. § 1101(a)(42) (defining the term “refugee” and providing protected grounds for asylum applications) *infra* note 73 and accompanying text (explaining the unnecessary complexity of the BIA's three PSG requirements).

⁹ See Exec. Order No. 14010, 86 Fed. Reg. 8267, 8271 (Feb. 5, 2021) (calling for a definition of PSG); CTR. FOR GENDER & REFUGEE STUD., UNIV. OF CAL. HASTINGS COLL. OF L., DEADLY INERTIA: NEEDLESS DELAY OF “PARTICULAR SOCIAL GROUP” REGULATIONS PUTS ASYLUM SEEKERS AT RISK 1, 1–2 (2022), https://cgrs.uchastings.edu/sites/default/files/Deadly%20Inertia%20-%20PSG%20Regs%20Guide_Feb.%202022.pdf [<https://perma.cc/J4JR-84Q5>] (discussing President Biden's Executive Order calling on executive agencies to address multiple issues within the U.S. asylum system, including redefining a particular social group).

¹⁰ See *Herrera-Martinez v. Garland*, 22 F.4th 173, 182–87 (4th Cir. 2022) (discussing the holding that witnesses for the prosecution in a case are not sufficiently particular to qualify as a protected PSG); *infra* notes 15–42 and accompanying text.

¹¹ See *Herrera-Martinez*, 22 F.4th at 182–87 (discussing the court's holding and analysis).

¹² *Id.* at 183–85 (holding that the alleged PSG lacks particularity sufficient to withhold removal).

¹³ See *infra* notes 44–70 and accompanying text.

¹⁴ See *infra* notes 71–85 and accompanying text.

¹⁵ *Herrera-Martinez*, 22 F.4th at 182–87.

ments of withholding of removal claims by noncitizens under § 1231(b)(3).¹⁶ Section B discusses the factual and procedural history of *Herrera-Martinez*.¹⁷

A. Withholding of Removal Requirements

Noncitizens seeking protection from persecution or torture in their native countries have several options for relief within the U.S. immigration system, such as applying for asylum,¹⁸ withholding of removal under § 1231(b)(3)(a),¹⁹ or withholding of removal under the Convention against Torture (CAT).²⁰ Although asylum protection paves a path toward permanent work and residency in the United States, some noncitizens remain ineligible for asylum protection.²¹ Those banned from asylum can still apply for withholding of removal, but that protection is more temporary and uncertain than asylum.²²

¹⁶ See *infra* notes 18–29 and accompanying text.

¹⁷ See *infra* notes 30–42 and accompanying text.

¹⁸ See AM. IMMIGR. COUNCIL & NAT'L IMMIGR. JUST. CTR., THE DIFFERENCE BETWEEN ASYLUM AND WITHHOLDING OF REMOVAL 1–2 (2020) (explaining that asylum is granted to noncitizens who are already located in the United States or qualify as a refugee at the border). The United Nations defines a refugee as a person who cannot return to their native country safely due to fear of persecution based on “race, religion, nationality, membership in a particular social group, or political opinion,” essentially the same standard as a noncitizen applying for withholding of removal. *Id.* at 1 (quoting U.N. Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137, 267); see also AM. IMMIGR. COUNCIL, *supra* note 2, at 2–3 (elaborating on the different forms of relief noncitizens can seek after claiming “a fear of persecution in their home country”).

¹⁹ 8 U.S.C. § 1231(b)(3)(A) (restricting removal of noncitizens to countries where their “life or freedom would be threatened in that country because of the [noncitizen’s] race, religion, nationality, membership in a particular social group, or political opinion”).

²⁰ See G.A. Res. 39/46, art. 3, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984); Withholding of Removal Under Section 241(b)(3)(B) of the Act and Withholding of Removal Under the Convention Against Torture, 8 C.F.R. § 208.16(c)(2) (2022) (outlining that a noncitizen is eligible for withholding of removal under CAT if they can demonstrate that it is “more likely than not that [an applicant] would be tortured if removed to the proposed country of removal”).

²¹ 8 U.S.C. § 1158(b)(2)(A) (noting some of the criteria that make a noncitizen ineligible for asylum, such as having previously been removed, failure to seek asylum within a year of entering the United States, persecution of others, convictions for certain crimes, threats to U.S. national security, and “resettl[ing] in another country” before arrival to the United States). Those able to secure asylum protection receive a chance to create more permanence and security in the United States because they can apply for work authorization, “a Social Security card,” government healthcare and welfare programs, and can bring family members to join them in the United States. See AM. IMMIGR. COUNCIL & NAT'L IMMIGR. JUST. CTR., *supra* note 18, at 1–2 (discussing the difference in work and program eligibility between noncitizens granted asylum and those granted withholding of removal). Although those granted withholding of removal can also stay and legally work in the United States, they cannot bring family members to join them, and are not eligible for permanent residence. *Id.* Further, government officials can rescind a grant of withholding of removal and deport noncitizens to their home country should conditions in the home country improve. *Id.* at 2.

²² See AM. IMMIGR. COUNCIL & NAT'L IMMIGR. JUST. CTR., *supra* note 18, at 1–5 (explaining that asylum creates a path to lawful permanent U.S. citizenship whereas withholding of removal solely allows for deportation protection and a work permit in the United States); see also Danielle L. Schmalz Fullam, Note, *The Folly of the Famous Family: Why Matter of L-E-A-’s Definition of Dis-*

For an I.J. to grant withholding of removal under § 1231(b)(3), noncitizens must demonstrate that their freedom would likely be jeopardized in the country of removal, or the country to which they would be deported, “because of the[ir] race, nationality, religion, particular social group, or political opinion.”²³ Section 1231(b)(3), however, does not explicitly define what a PSG is.²⁴ In 1985, in *Matter of Acosta*, the BIA first interpreted a PSG by comparing it to the other protected groups in § 1231(b)(3), like race and religion, and concluded that because all of those protected grounds shared an immutable characteristic, so too should a protected PSG.²⁵ Then, in 2008, in both *Matter of S-E-G-* and *Matter of E-A-G-*, the BIA added that, along with sharing an immutable characteristic, PSGs must also be particularly defined and “socially distinct.”²⁶

inction Does Not Merit Deference, 53 CONN. L. REV. 154, 160 n.23 (2021) (noting that asylum determinations are discretionary, allowing adjudicators to determine whether a noncitizen merits a path toward naturalization, whereas withholding of removal findings require mandatory protection from deportation but lack a pathway to American citizenship); *see also supra* note 21 and accompanying text (discussing the factors that allow for more stable protection under grants of asylum compared to withholding of removal grants).

²³ 8 U.S.C. § 1231(b)(3)(A); *see* *Herrera-Martinez v. Garland*, 22 F.4th 173, 180 (4th Cir. 2022) (discussing the definition of a “particular social group”); *see also* *Djadjou v. Holder*, 662 F.3d 265, 272 (4th Cir. 2011) (explaining the burden of proof that noncitizens must demonstrate: a “‘clear probability of persecution’ on account of a protected ground” (quoting *INS v. Stevic*, 467 U.S. 407, 430 (1984))).

²⁴ *See* § 1231(b)(3)(A) (providing restrictions on deportation of noncitizens where their life would be threatened due to their protected group status, including PSGs, but lacking any definition or example of what a PSG entails).

²⁵ *See* *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (applying the *ejusdem generis* (“of the same kind”) doctrine to clarify that the PSG requirement should require noncitizens to demonstrate that members of the proposed group share an element that either cannot be changed, such as sex, race, or family relation, or a shared prior experience), *overruled in part on other grounds by* *Matter of Mogharabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

²⁶ *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582 (B.I.A. 2008); *Matter of E-A-G-*, 24 I. & N. Dec. 591, 593–94 (B.I.A. 2008); *see* U.S. CITIZENSHIP & IMMIGR. SERVS., RAIO DIRECTORATE OFFICER TRAINING: NEXUS—PARTICULAR SOCIAL GROUP 11–18 (2021), https://www.uscis.gov/sites/default/files/document/foia/Nexus_-_Particular_Social_Group_PSG_LP_RAIO.pdf [<https://perma.cc/USU5-P5RL>] (noting examples of each PSG requirement). According to the U.S. Citizenship and Immigration Services, the immutable characteristic requirement can be met by demonstrating an unchangeable trait, such as a biological feature; shared experience, such as military veteran status; or a characteristic that the law should not require persons to change, such as those characteristics core to a person’s identity, morals, or values. *Id.* at 11–12. Initially, the BIA introduced social distinction as “social visibility.” *Id.* at 13–14. After confusion regarding whether social visibility required the group to be literally visible to society, the BIA renamed the requirement “social distinction.” *Id.*; *see also* *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 238 (B.I.A. 2014) (clarifying that PSG social visibility does not require literal visibility). Now, social distinction is a case-by-case element that requires the proposed group be recognized as discrete in society, whether that recognition is public or private. U.S. CITIZENSHIP & IMMIGR. SERVS., *supra*, at 14–16. To satisfy the particularity requirement, noncitizens must propose a group that has clear boundaries to determine who is and who is not a member. *See id.* at 17 (noting examples of BIA decisions surrounding particularity of proposed PSGs); *see also* *Matter of M-E-V-G-*, 26 I. & N. Dec. at 237 (clarifying that the BIA now requires all three elements to satisfy a PSG).

Noncitizen applicants must now demonstrate not only that they belong to a PSG that shares an immutable trait, particularity, and socially distinction, but also that they have a “well-founded fear” of persecution because of their membership in that group.²⁷ Courts have recognized groups as § 1231 PSGs based on characteristics such as family membership, age, gender, sexual orientation and gender identity, domestic violence, ancestry, physical and mental disorders, gang affiliation, and law enforcement assistance.²⁸ In the following Section, however, this Comment details a case where the Fourth Circuit affirmed the denial of an individual’s claimed status as a member of a PSG.²⁹

B. Factual and Procedural History of Herrera-Martinez v. Garland

In Honduras, in 2002, two narcotraffickers asked Walter Roland Herrera-Martinez, a successful restaurateur and Honduran native, to use Herrera-Martinez’s businesses to sell drugs.³⁰ Herrera-Martinez declined the proposition and eventually informed the police of the narcotraffickers’ activities.³¹ Allegedly, because the police made the narcotraffickers aware of his report, the traffickers physically beat him at his restaurant, threatened his life, and recruited a hitman to murder him.³² Consequently, Herrera-Martinez fled to the United States and reported his presence to immigration officials upon arrival, but was eventually deported to Honduras after missing his last immigration hearing.³³ Herrera-Martinez re-entered the United States several times over many years and was deported due to a string of run-ins with the police.³⁴ Upon returning to the United States for the third time, Herrera-Martinez recounted his experience with the narcotraffickers in Honduras to an immigration officer,

²⁷ 8 U.S.C. § 1101(a)(42); *id.* § 1231(b)(3)(A); *see also Matter of M-E-V-G-*, 26 I. & N. Dec. at 237 (outlining the requisite elements to qualify as a PSG).

²⁸ § 1231(b)(3)(A); U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 26, at 21–51 (providing examples of the various PSGs that circuit courts have recognized). Circuit courts have upheld PSGs including “parents of Burmese student dissidents,” and relatives of those who renounce gangs in El Salvador by publicly prosecuting against them. U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 26, at 22–23. Furthermore, the Seventh Circuit explained that although wealthy residents of Guatemala did *not* satisfy PSG requirements, wealthy, educated Colombians who owned land and farmed cattle did because of added limiting language. *Id.* at 37–38; *see also In re Kasinga*, 21 I. & N. Dec. 357, 365–67 (B.I.A. 1996) (holding that young women in a certain tribe who had opposed, and thus not undergone, female genital mutilation met the social distinction requirement of a PSG).

²⁹ *See infra* notes 30–42 and accompanying text.

³⁰ *Herrera-Martinez v. Garland*, 22 F.4th 173, 176 (4th Cir. 2022).

³¹ *Id.*

³² *Id.*

³³ *Id.* Herrera-Martinez claimed he intentionally missed his last immigration hearing because his attorney informed him that if he attended, the “[I.] was going to give [him] voluntary departure.” *Id.*

³⁴ *Id.* at 176–77. After his initial deportation, Herrera-Martinez returned to the United States, but “pled guilty to burglary of a habitation with intent to commit theft” and was deported a second time to Honduras after serving his sentence. *Id.* Herrera-Martinez then entered the United States for a third time, but law enforcement arrested him for illegal reentry during a civil traffic infraction stop. *Id.* at 177.

received a credible fear interview, and applied for withholding of removal and protection under the CAT.³⁵

The I.J. determined that Herrera-Martinez did not sufficiently establish a withholding of removal claim, as he did not establish membership in any protected group or a reasonable fear of persecution based on such membership.³⁶ Herrera-Martinez appealed the I.J.'s decision to the BIA and argued that the I.J. erred in finding that his proposed PSG of prosecution witnesses was insufficient.³⁷ The BIA affirmed the I.J.'s denial of the § 1231 withholding claim because prosecution witnesses, like Herrera-Martinez, did not meet the particularity requirement and thus did not qualify as a PSG.³⁸ Nevertheless, the BIA partially remanded the case to the I.J. to reconsider Herrera-Martinez's credibility and his CAT claim.³⁹ After the I.J. again found against him, Herrera-Martinez appealed to the BIA for a second time, which ultimately affirmed and adopted the I.J.'s findings.⁴⁰ Herrera-Martinez then petitioned the Fourth Circuit

³⁵ *Id.* at 177. When officials decide to deport a noncitizen, should the noncitizen fear deportation to the country of removal, the noncitizen must immediately be interviewed for a credible fear determination. See 8 C.F.R. § 208.16(b)(2), (c)(2) (2022) (explaining that if the noncitizen successfully demonstrates that they will "more likely than not" be persecuted or tortured in their home country due to membership in a protected group, the noncitizen's case will be referred to an I.J.).

³⁶ *Herrera-Martinez*, 22 F.4th at 177–78. The I.J. found that Herrera-Martinez's testimony and evidence did not sufficiently establish a fear of persecution, but rather only severe harassment. *Id.* at 178. Further, the I.J. noted that the narcotraffickers' alleged death threats were "significantly different" than those that qualified as persecution in previous Fourth Circuit cases. *Id.*; see, e.g., *Bedoya v. Barr*, 981 F.3d 240, 246 (4th Cir. 2020) (emphasizing that death threats qualify as persecution and discussing various death threats experienced by noncitizens that substantiate reasonable fears of persecution, including written death threats in letters and text messages, "'parallel threats directed at' [the noncitizen's] family members," and threatening telephone calls). Moreover, the I.J. concluded that because Herrera-Martinez initially sought protection based on membership in several different PSGs, including but not limited to "business owners in Honduras," "business owners who refuse to cooperate with narcotraffickers," "people who refuse to cooperate with narcotraffickers," and "business owners who refuse to cooperate with narcotraffickers," his argument and credibility lacked clarity. *Herrera-Martinez*, 22 F.4th at 178. The I.J. also denied Herrera-Martinez's CAT claim because the evidence and testimony presented did not credibly substantiate a reasonable fear of torture in Honduras. *Id.* at 179. Although Herrera-Martinez submitted news articles discussing Honduran police efforts to arrest local narcotraffickers, the I.J. reasoned that the articles along with other evidence presented and testimony from his family was not reliable for a variety of reasons. *Id.* at 178–79. Specifically, the judge found that two decades had passed since Herrera-Martinez's initial encounters with the narcotraffickers, the articles contradicted arguments that the Honduran government would consent to his torture, and his family's testimony did not sufficiently align with that of Herrera-Martinez. *Id.*

³⁷ *Herrera-Martinez*, 22 F.4th at 178.

³⁸ *Id.* The BIA concluded that the I.J. had not considered closely the narcotraffickers' consistent threats of harm to Herrera-Martinez and his family or the question of prosecution witnesses as a PSG. *Id.* The BIA further remanded the CAT claim to the I.J. because the BIA disagreed with the I.J.'s adverse credibility finding. *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 179. The I.J. pointed to several inconsistencies in Herrera-Martinez's evidence and testimony to substantiate the adverse credibility determination. *Id.* The I.J. concluded that the news articles contradicted Herrera-Martinez's claims and that Herrera-Martinez's testimony alleging the dangerous condition of his town in Honduras did not sufficiently suggest that the country generally or objectively

to review the BIA's denial of his claims.⁴¹ The Fourth Circuit affirmed the BIA's dismissal of Herrera-Martinez's CAT claim and the determination that prosecution witnesses are not particular enough to qualify for § 1231 withholding of removal as a PSG.⁴² The court noted that the issue of whether prosecution witnesses are a PSG was unresolved in the Fourth Circuit and used this case to determine that prosecution witnesses "without limiting language" are not particular enough to be protected from statutory removal.⁴³

II. THE CIRCUIT SPLIT OVER THE REQUIREMENTS OF A PSG

Circuit courts have adopted varied approaches to examining PSGs and deferring to BIA decisions.⁴⁴ Section A of this Part discusses the majority approach of deference to the BIA in applying requirements for PSGs.⁴⁵ Section B discusses the minority approach of several courts in applying a variation of the BIA requirements for PSGs.⁴⁶

A. Majority Deference to BIA Requirements and Interpretations

Many of the U.S. Courts of Appeals have consistently applied the BIA's three-part test requiring that PSGs be immutable, particular, and socially distinct, based on the deference principle set forth in *Chevron v. Natural Resources Defense Council*.⁴⁷ *Chevron* requires deference to a federal agency's

put him in such danger that he could not return safely. *Id.* The BIA agreed with the I.J.'s adverse credibility determination, citing Herrera-Martinez's omission that the narcotraffickers physically harmed him in his hearing testimony as a valid foundation for finding adverse credibility. *Id.* Although Herrera-Martinez argued that the affidavits confirmed his testimony, the BIA did not consider corroborations from family and friends as "independent evidence." *Id.*

⁴¹ *Id.* Herrera-Martinez argued that the prior decisions incorrectly evaluated his testimony and explanations for any inconsistencies, wrongly held that prosecution witnesses are not a protected PSG, and wrongly dismissed his CAT claim because his testimony established "a well-founded fear of future persecution should he be removed to Honduras." *Id.* at 179–80.

⁴² *Id.* at 185, 187–88. Although Herrera-Martinez applied for protection as a member of several different social groups in his initial hearing, the BIA only analyzed the proposed group of prosecution witnesses. *Id.* at 181. In his petition to the federal court, Herrera-Martinez did not argue that the BIA should have considered the other groups he advanced, but rather claimed that the BIA erred in its decision that prosecution witnesses are not a PSG. *Id.* Therefore, the Fourth Circuit only considered the particularity of prosecution witnesses as a social group. *Id.* at 181–82.

⁴³ *Id.* at 183–84.

⁴⁴ See, e.g., Grace Carney, *Re-defining Particular Social Group in the United States: Looking to International Guidance in the Wake of the Matter of A-B- Vacatur*, 45 FORDHAM INT'L L.J. 575, 589–600 (2022) (discussing the inconsistent interpretations among circuit courts regarding PSGs and the varied approaches to BIA deference). Compare Rivera Barrientos v. Holder, 658 F.3d 1222, 1230–35 (10th Cir. 2011) (deferring to the BIA's test for PSGs), with Gatimi v. Holder, 578 F.3d 611, 615–16 (7th Cir. 2009) (rejecting two of the three BIA requirements).

⁴⁵ See *infra* note 47–61 and accompanying text.

⁴⁶ See *infra* note 63–70 and accompanying text.

⁴⁷ See, e.g., Orellana-Monson v. Holder, 685 F.3d 511, 520 (5th Cir. 2012) (referencing the expansive precedent of cases where circuits have chosen to defer to the BIA's definition of PSGs);

interpretation of statutory language when Congress's intent for the language is otherwise ambiguous, and the agency's interpretation is reasonable.⁴⁸

For example, in 2011, in *Rivera Barrientos v. Holder*, the Tenth Circuit Court of Appeals decided that the BIA's three-part test was reasonable by looking to dictionary definitions for each requirement and examining the BIA's application of its test in ranging contexts.⁴⁹ The court stated that the added particularity requirement logically flowed from the INA's language and the BIA's application of the social distinction requirement was sufficiently broad and consistent with past precedent.⁵⁰ In 2012, in *Orellana-Monson v. Holder*, the Fifth Circuit Court of Appeals determined that the BIA's added requirements were a slight adjustment from former requirements that nonetheless warranted *Chevron* deference.⁵¹ The court upheld the agency's authority to adjust its own requirements, despite inconsistent BIA interpretations of PSGs.⁵² In 2013, in *Umaña-Ramos v. Holder*, the Sixth Circuit Court of Appeals also found the

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842–43 (1984) (holding that when a court reviews an executive agency's finding, it must determine whether Congress has already specified how to answer the question at hand, or, if Congress is silent on the issue, whether the agency's interpretation is "permissible"). Because neither the INA nor its corresponding regulations define PSGs, courts must determine whether to defer to the BIA's interpretations and accept such interpretations if found reasonable. See 8 U.S.C. § 1231(b)(3)(A) (outlining the requirements of withholding of removal or deportation without defining any of the requirements, including the PSG requirement).

⁴⁸ See *Chevron*, 467 U.S. at 842–43 (discouraging courts from creating their own constructions of federal statutes when reviewing agency statutory interpretations, especially if agency interpretations are "permissible" and "reasonable"). See generally Nanasi, *supra* note 7, at 297–307 (outlining the *Chevron* doctrine and the procedural steps for judicial review of BIA decisions). Despite the *Chevron* doctrine's aims to remedy inefficiencies in appellate courts by endorsing deference to specialized agencies, the practical effects of deference are not always as productive as intended. See, e.g., Hannah Cohen, Note, *When Will Asylum Law Protect Women?: The Abusive Relationship Between Agency Decision Making and Asylum Claims Involving Domestic Violence*, 61 B.C. L. REV. 1855, 1869–71 (2020) (noting that immigration cases have accumulated so much that the average time appellants had to wait to receive a decision on their pending cases increased by over seventy percent from 2009 to 2019).

⁴⁹ See 658 F.3d 1222, 1230–35 (10th Cir. 2011) (conducting an analysis of how PSGs have been interpreted in past cases and in dictionary definitions).

⁵⁰ *Id.* The court reconciled the lack of a particularity requirement in the United Nations High Commissioner for Refugees (UNHCR) Guidelines regarding PSGs with the BIA's determination by asserting that the Guidelines only aid with interpretation, rather than serve as binding law. *Id.* at 1230–31. In assessing the social distinction requirement, the court noted that social distinction should not be applied so narrowly to only include those groups that are literally visible or recognizable in society. *Id.* at 1233. Although the social distinction requirement departs from the UNHCR Guidelines (the guidelines do not require asylum seekers to show that their group is recognizable in any way), the court found that this did not demonstrate that the BIA's interpretations were unreasonable. *Id.* at 1231; see also U.N. High Comm'r for Refugees, *Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, ¶ 11, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) (stating the UNHCR standard for PSGs).

⁵¹ See 685 F.3d at 521 (determining that the BIA interpreted PSG requirements relatively clearly and should therefore be entitled to deference).

⁵² See *id.* (noting that outcomes of PSG analyses need not be entirely consistent or "follow a straight path").

BIA's added requirements of particularity and social distinction reasonable, noting the Circuit's consistent deference to the BIA's requirements when assessing PSGs in the past.⁵³

The Fourth Circuit generally deferred to the BIA's added requirements of particularity and social distinction as reasonable constructions of § 1231, but wavered in deferring to the BIA's *interpretations* of those requirements.⁵⁴ In *Herrera-Martinez*, the Fourth Circuit applied a similarly narrowed analysis of the BIA's particularity requirement, but ultimately upheld the BIA's decision to reject prosecutorial witnesses as a PSG.⁵⁵ The court dissected the language of the proposed group and ultimately held that prosecution witnesses are too ambiguous of a group to ascertain who could be a member.⁵⁶

In its analysis of prior Fourth Circuit decisions, the *Herrera-Martinez* court rejected the argument that its decision in *Crespin-Valladares v. Holder*—that relatives of prosecution witnesses who openly defied gangs are a PSG—required the court to find prosecution witnesses alone to be a PSG.⁵⁷ Although both groups contain prosecution witnesses, the court explained that the group in *Crespin-Valladares* contained additional language that limited the group's scope to witnesses of a specific prosecution type and to witnesses providing

⁵³ See 724 F.3d 667, 671–72 (6th Cir. 2013) (beginning its analysis of PSGs by deferring to the BIA's added PSG requirements and noting that the court had already adopted the requirements in prior decisions); see also *Castro-Paz v. Holder*, 375 F. App'x 586, 590 (6th Cir. 2010) (per curiam) (determining that the BIA's three requirements are a reasonable interpretation of the INA).

⁵⁴ See *Carney*, *supra* note 44, at 590–91 (discussing the Fourth Circuit's wavering deference to BIA's requirements); see also *Amaya v. Rosen*, 986 F.3d 424, 433–34 (4th Cir. 2021) (rejecting the BIA's holding that former El Salvadoran gang members qualified as a PSG because the BIA incorrectly confused particularity with social distinction to include groups that were “sufficiently distinct” within their respective societies, despite finding that the BIA's three-part test logically followed from § 1231); *Temu v. Holder*, 740 F.3d 887, 895–97 (4th Cir. 2014) (rejecting the BIA's conclusion that a group of Tanzanians who suffered from bipolar disorder and demonstrated erratic behavior was not particular because each portion of the group was too broad and remanding the case back to the BIA to determine the particularity of the group as a whole rather than its individual parts).

⁵⁵ *Herrera-Martinez v. Garland*, 22 F.4th 173, 182–85 (4th Cir. 2022).

⁵⁶ *Id.*; cf. *Amaya*, 986 F.3d at 429 (explaining that PSGs must share discernible characteristics); *Lizama v. Holder*, 629 F.3d 440, 447 (4th Cir. 2011) (holding that affluence, socialization in America, renouncement of gangs, and criminal records remained too indefinite as categories to establish a PSG).

⁵⁷ *Herrera-Martinez*, 22 F.4th at 182; see *Crespin-Valladares v. Holder*, 632 F.3d 117, 125–26 (4th Cir. 2011) (describing the issues with the BIA's interpretation and application of its PSG requirements to find that prosecution witnesses from a particular family qualify as a PSG). The *Herrera-Martinez* court analyzed several of the Fourth Circuit's prior decisions related to prosecution witnesses as a PSG. *Herrera-Martinez*, 22 F.4th at 182–83; see *Solomon-Membreno v. Holder*, 578 F. App'x 300, 307 (4th Cir. 2014) (Wynn, J., concurring) (concluding that the court had yet to determine whether prosecution witnesses would qualify as a PSG); *Zelaya v. Holder*, 668 F.3d 159, 165–67 (4th Cir. 2012) (holding that young males in Honduras who refused to join a gang, notified the authorities of the gang, and had identified a gang member who harassed them was not a particular enough social group). In his concurrence, Judge Floyd noted that previous decisions only included the family members of prosecution witnesses as protected from removal, rather than the witnesses themselves. *Zelaya*, 668 F.3d at 169 (Floyd, J., concurring).

public testimony.⁵⁸ Further, the group in *Crespin-Valladares* only included family members of the prosecution witnesses rather than the witnesses themselves, partly because family membership is sufficiently self-limiting in nature.⁵⁹ The *Herrera-Martinez* court noted that although the group in *Crespin-Valladares* was sufficiently particular, each of the group's components standing alone would not necessarily qualify as a PSG.⁶⁰ The court also cited the BIA's recent decision in 2021 in *Matter of H-L-S-A* holding that prosecutorial witnesses are not a PSG to bolster its decision in *Herrera-Martinez*.⁶¹

B. Minority Variations of PSG Requirements and Interpretations

Conversely, some U.S. Courts of Appeals have rejected some or all of the BIA's three-part test.⁶² The Seventh Circuit has consistently refused to apply the BIA's added requirements of particularity and social distinction altogether.⁶³ For example, in 2009, in *Gatimi v. Holder*, the Seventh Circuit deemed the added requirements illogical and contradictory to uniform applications of PSGs, ultimately forcing courts to cherry-pick BIA decisions in order to produce consistent holdings.⁶⁴ As a result, the Seventh Circuit analyzes PSGs using the original test set forth in *Matter of Acosta*, which solely looked to whether the group members possess a "common, immutable characteristic."⁶⁵

⁵⁸ *Herrera-Martinez*, 22 F.4th at 182; see *Crespin-Valladares*, 632 F.3d at 125 (explaining that relatives of prosecution witnesses who openly defied gangs qualifies as a sufficient PSG because PSGs based on "family membership" typically satisfy PSG requirements).

⁵⁹ See *Crespin-Valladares*, 632 F.3d at 125 (noting that defining PSGs based on family membership can be sufficiently particular). Courts have asserted that PSGs should be self-limiting to make the group distinguishable and ensure the group has "definable boundaries." See U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 26, at 17 (cautioning that those applying for asylum through PSG determinations should not choose a group that is too general or sweeping).

⁶⁰ *Herrera-Martinez*, 22 F.4th at 183 (quoting *Temu v. Holder*, 740 F.3d 887, 896 (4th Cir. 2014)); see *Temu*, 740 F.3d at 896 (explaining that although the PSG upheld in *Crespin-Valladares* included prosecution witnesses, such witnesses alone without other limiting language may be "too broad"); *Crespin-Valladares*, 632 F.3d at 125 (holding that a group of relatives of prosecution witnesses who openly defied gangs was a PSG).

⁶¹ *Herrera-Martinez*, 22 F.4th at 184; see *Matter of H-L-S-A-*, 28 I. & N. Dec. 228, 238–39 (B.I.A. 2021) (holding that a noncitizen did not properly demonstrate that "prosecutorial witnesses" was a "valid" PSG).

⁶² See, e.g., *Gatimi v. Holder*, 578 F.3d 611, 615–16 (7th Cir. 2009) (rejecting the social distinction and particularity requirements of the three-part test); *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1576–77 (9th Cir. 1986) (adopting a test different from that of the BIA).

⁶³ See NAT'L IMMIGR. JUST. CTR., PARTICULAR SOCIAL GROUP PRACTICE ADVISORY: APPLYING FOR ASYLUM BASED ON MEMBERSHIP IN A PARTICULAR SOCIAL GROUP 12 (2021) (discussing the Seventh Circuit's over-two-decade history of adhering to the immutability characteristic test and refusing to defer to the BIA's additional requirements for establishing a PSG).

⁶⁴ 578 F.3d at 615–16; see *Nanasi*, *supra* note 7, at 289–90 (discussing the Seventh Circuit's rejection of the particularity and social distinction requirements even after the BIA's clarification that social distinction does not require literal group visibility).

⁶⁵ See, e.g., *Lwin v. I.N.S.*, 144 F.3d 505, 511, 512 (7th Cir. 1998) (quoting *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985)) (explaining that the standard set forth in *Acosta* is the "best ap-

Despite pressure to defer to BIA decisions, the Seventh Circuit has rejected the three-part test and maintains that the scope of a group or its recognition in society should not bar protection from asylum or removal.⁶⁶

Additionally, the Ninth Circuit Court of Appeals initially adopted an entirely different test for determining PSGs.⁶⁷ The Ninth Circuit substituted the immutable characteristic test set forth in *Acosta* with a test requiring demonstration of a “voluntary associational relationship” that creates a shared characteristic among the group.⁶⁸ Once the BIA added the two requirements of social distinction and particularity, the Ninth Circuit acknowledged that the new requirements did not directly conflict with BIA’s precedent decisions, but did not decide whether it should outright reject the requirements or add them to their “voluntary associational relationship” test.⁶⁹ Moreover, the Second Circuit incorporated the Ninth Circuit’s PSG test in its analysis to deny a proposed PSG asylum protection, and added that PSGs should share a core characteristic that differentiates the group from others in society or from others attempting to persecute the group.⁷⁰

proach” for assessing PSGs); *Acosta*, 19 I. & N. Dec. at 233 (holding that a PSG can be established by way of a shared characteristic that is either immutable in nature, or is so integral to one’s identity that it should not have to be changed); NAT’L IMMIGR. JUST. CTR., *supra* note 63, at 12 (outlining the Seventh Circuit’s extensive precedent applying the *Acosta* test).

⁶⁶ See NAT’L IMMIGR. JUST. CTR., *supra* note 63, at 12 (explaining that the Seventh Circuit found the social distinction requirement to be nonsensical because there are many factors recognized in societies that are not necessarily public in nature (first citing *Gatimi*, 578 F.3d at 615–16; and then citing *Benitez Ramos v. Holder*, 589 F.3d 426, 429–31 (7th Cir. 2009)). The Seventh Circuit also found the particularity requirement to be unnecessary because the scope of a group does not always bar protection under deportation proceedings. *Id.* (citing *Cece v. Holder*, 733 F.3d 662, 674, 66 (7th Cir. 2013)).

⁶⁷ See Nanasi, *supra* note 7, at 291–92 (discussing the Ninth Circuit’s initially novel voluntary association approach to PSG requirements and ultimate reluctance to clarify how the BIA’s three-part test would affect its own approach to PSGs).

⁶⁸ *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1576–77 (9th Cir. 1986) (establishing the “voluntary associational relationship” test as the only requirement for determining a PSG). The court in *Sanchez-Trujillo* explained that a voluntary associational relationship can be established by proposing a PSG that “imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.” *Id.* at 1576. The court illustrated the test by reasoning that a PSG based on nuclear family membership would consist of a voluntary associational relationship, but a PSG defined by younger men living in city areas and of working-class identity would not. *Id.* at 1576–77; see, e.g., *Hernandez-Montiel v. Holder*, 225 F.3d 1084, 1092 (9th Cir. 2000) (explaining that the voluntary associational relationship test is an alternative to the immutable characteristic test to establish a PSG), *overruled in part by Estrada-Posas v. I.N.S.* 924 F.2d 916, 919 (9th Cir. 1990).

⁶⁹ See Nanasi, *supra* note 7, at 291 (referring to the Ninth Circuit’s unique approach to PSG requirements and lack of resolution concerning deference to the BIA’s added particularity and social distinction requirements). Eventually, in 2016, in *Reyes v. Lynch*, the Ninth Circuit deferred to the BIA’s particularity and social distinction elements. See 842 F.3d 1125, 1133 (9th Cir. 2016); Nanasi, *supra* note 7, at 291 n.206 (stating the *Reyes* holding).

⁷⁰ See *Gomez v. I.N.S.*, 947 F.2d 660, 664 (2d Cir. 1991) (incorporating and adding to the Ninth Circuit’s relationship test in order to reject a PSG based on women who experienced abuse from and

III. PROBLEMS WITH THE BIA'S TEST AND LOOKING TO INTERNATIONAL LAW FOR PSG GUIDANCE

The BIA's addition of particularity and social distinction to its PSG requirements unnecessarily muddled the PSG analysis by attaching requirements to PSGs not required for the other protected groups named in § 1231.⁷¹ Further, these added requirements opened the door for consideration of more normative values, i.e., asking what groups should be protected, rather than encouraging the consistent application of PSG requirements.⁷² Moreover, these strictly defined requirements effectively limit noncitizens' eligibility for withholding of removal in an already complex immigration process.⁷³ Indeed, since the BIA added particularity and social distinction to its PSG requirements over 15 years ago, the BIA has only approved of two new PSGs: one that protects those who survived violence within domestic partnerships, and another based on family relationships.⁷⁴ The drastic reduction in approved PSGs is a result of both the stringent burden noncitizens face in demonstrating all three parts of the BIA's

assault by a group of Salvadoran citizens); Carney, *supra* note 44, at 593 (noting the Second Circuit's reference to the Ninth Circuit's test and PSG analysis).

⁷¹ See Carney, *supra* note 44, at 601 (explaining that the UNHCR has openly disagreed with the BIA's three-part test and expressed preference for the immutable characteristic test set forth in *Acosta*); U.N. High Comm'r for Refugees, *supra* note 50, ¶¶ 3–4 (outlining the UNHCR's definition of PSGs as only requiring that the group have a characteristic in common or recognition by society as a distinct group).

⁷² See NAT'L IMMIGR. JUST. CTR., *supra* note 63, at 10–11 (arguing that the BIA in *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014), diverged from its precedent by finding that Guatemalan women incapable of leaving their marriages satisfied the particularity requirement to advance a policy decision that women who survive domestic abuse deserve more protection from deportation).

⁷³ See *Quintero v. Garland*, 998 F.3d 612, 632 (4th Cir. 2021) (explaining that the BIA three-part test for PSGs complicates an asylum process already filled with obscurely technical legal issues, making it unfair not only to noncitizens represented by immigration attorneys, but also, and especially, for pro se applicants likely struggling with language proficiency and prior trauma); NAT'L IMMIGR. JUST. CTR., *supra* note 63, at 7 n.4 (discussing the decision in *Quintero* (citing *Quintero*, 998 F.3d at 632)). Pro se applicants are individuals without legal representation to help navigate the asylum process, and thus are at a significant disadvantage in receiving asylum grants. See Jason Dzubow, *Asylum Seekers Need Pro Bono Lawyers Now More Than Ever*, ABA (July 30, 2020), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2020/july-2020/asylum-seekers-need-pro-bono-lawyers-now-more-than-ever/?login [<https://perma.cc/3YEH-T8VW>] (noting that data from 2019 and 2020 indicated an over 130% increase in success rates for asylum seekers that had legal representation compared to those that applied pro se); see also *Pro se*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "pro se").

⁷⁴ Nanasi, *supra* note 7, at 280 (discussing the landmark cases that held various categories of domestic violence survivors as eligible PSGs and the significant BIA jurisprudence of PSGs based on kinship or family ties). But see Cohen, *supra* note 48, at 1872–79 (discussing the ongoing inconsistency of domestic violence and gender-based asylum claims and the difficulty for victims to meet the BIA's limiting requirements).

test, and the BIA's inconsistent applications of its own requirements to any proposed PSGs.⁷⁵

The *Acosta* test, on the other hand, has garnered support from circuit courts as an appropriate interpretation of § 1231 for recognizing PSGs.⁷⁶ This test is not so restricted so as to exclude most noncitizen applicants from withholding of removal and parallels the burden of proof required for the other protected grounds under § 1231.⁷⁷ Critics of the *Acosta* test argue, nevertheless, that it is overly encompassing and would trigger a flood of PSG claims for asylum and withholding of removal.⁷⁸ Although several circuit courts adopted slightly narrowed versions of the test to address such criticism, variation cre-

⁷⁵ See NAT'L IMMIGR. JUST. CTR., *supra* note 63, at 5–8 (examining the discrepancy in BIA holdings, in which the BIA uses similar analyses but reaches opposite outcomes). Specifically, in *Matter of W-G-R-*, the BIA held that the PSG of former El Salvadoran gang members was not sufficiently particular because the group's breadth might include members of varying backgrounds. *Matter of W-G-R-*, 26 I. & N. Dec. 208, 221–22 (B.I.A. 2014), *vacated in part* by *Reyes v. Lynch* 842 F.3d 1125, 1133 (9th Cir. 2016). The BIA came to this conclusion despite their decision in *Matter of A-R-C-G-*, which held that Guatemalan women who had been married and restricted from leaving their marriages satisfied particularity requirements even though women in such a group might vary in other respects. *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 392–93 (B.I.A. 2014), *overruled by* *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018); see NAT'L IMMIGR. JUST. CTR., *supra* note 63, at 7 (explaining that the PSG in *Matter of A-R-C-G-* encompasses women of “any age or background” and who have been married for varying amounts of time); see also Schmalz Fullam, *supra* note 22, at 167–69 (noting that although the BIA introduced the additional requirements due to inconsistent rulings from immigration courts and federal courts struggling to apply the immutability requirement, the added requirements—particularly when applied together—only added to the confusion and inconsistency). The BIA initially insisted its additional requirements aligned with the guidelines set forth by the UNHCR, and that a group's social distinction had always been implied as a factor in the PSG analysis. Schmalz Fullam, *supra* note 22, at 167.

⁷⁶ NAT'L IMMIGR. JUST. CTR., *supra* note 63, at 2 (collecting cases utilizing the *Acosta* test in some form); see, e.g., *Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190, 1196–97 (11th Cir. 2006) (granting deference to the BIA's *Acosta* standard as an appropriately stringent test aligned with international guidance); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005) (deferring to the *Acosta* standard as a “permissible construction” of PSG requirements); *Lwin v. I.N.S.*, 144 F.3d 505, 512 (7th Cir. 1998) (noting that the *Acosta* test is the “best approach” to assess PSGs); *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (explaining that PSGs need only share an immutable characteristic to qualify under § 1231).

⁷⁷ See Carney, *supra* note 44, at 583 (noting advocacy for the immutability characteristic test by various practitioners and immigration law experts due to its appropriately restrictive nature and approval by the UNHCR as the appropriate interpretation of PSGs); 8 U.S.C. § 1231(c)(3)(C).

⁷⁸ See Carney, *supra* note 44, at 583 (explaining that many critics note that the *Acosta* test does not specify whether noncitizens must solely demonstrate that the proposed social group shares an immutable characteristic, or whether such a requirement is merely a way to qualify a PSG); *Acosta*, 19 I. & N. Dec. at 233–34 (defining its immutability standard without clarifying its operation in removal proceedings); see also Carney, *supra* note 44, at 593 nn.86–87 (noting that in *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1572–73 (9th Cir. 1986), the Ninth Circuit interpreted particularity to mean a group of members who shared a close and voluntary affiliation with each other).

ates unnecessary variability among circuits and inconsistent interpretations of § 1231 PSGs.⁷⁹

One approach that would allow for a compromise between the simplicity of the *Acosta* test and the BIA's efforts to circumscribe asylum applications would be a PSG analysis that allows for some of the BIA's requirements to be optional, rather than requiring all three.⁸⁰ Australia, for example, has a tiered approach to its PSG analysis.⁸¹ A noncitizen is a member of a PSG if the group and the applicant all share a characteristic that is either immutable, core to a person's identity, or socially distinct.⁸² Australian law further clarifies that its social distinction element only requires that proposed group members at least be recognized by the persecutor(s) as sharing a common characteristic.⁸³ The UNHCR also encourages a single PSG definition that incorporates both social distinction and immutability without requiring both to be met.⁸⁴ A tiered PSG requirement would incorporate the BIA's three requirements while providing

⁷⁹ See Carney, *supra* note 44, at 593 (noting that the unique approaches to implementing the *Acosta* standard by the Second and Ninth Circuits would promote unpredictability in PSG analysis).

⁸⁰ See *id.* at 609–10 (exploring the Australian approach to interpreting particular social groups, as it provides several avenues to demonstrating membership in a particular social group); see also U.N. High Comm'r for Refugees, *supra* note 50, ¶ 11 (noting that the UNHCR recommends merging the two approaches to defining PSGs: immutability and social perception); AUSTL. ADMIN. APPEALS TRIBUNAL, A GUIDE TO REFUGEE LAW IN AUSTRALIA, CHAPTER 5: REFUGEE GROUNDS AND NEXUS 3, 18 (2022), https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Guide%20to%20Refugee%20Law/Chapter5_GroundsNexus.pdf [<https://perma.cc/RPN2-D3GX>] (outlining the definition of a PSG under Australian law and requirements necessary for asylum seekers to establish a PSG).

⁸¹ See *Migration Act 1958* (Cth) s 5L (Austl.) (outlining the tiered requirements for demonstrating PSGs based on family membership or other factors).

⁸² *Id.*; see AUSTL. ADMIN. APPEALS TRIBUNAL, *supra* note 80, at 18, 24 (noting that the inability to prove one of the elements of a PSG is not a conclusive bar to asylum eligibility). The Australian Administrative Appeals Tribunal guide notes that an applicant can still demonstrate belonging to a PSG even if the applicant cannot show that its PSG is perceived as distinct by its own society. AUSTL. ADMIN. APPEALS TRIBUNAL, *supra* note 80, at 24.

⁸³ See AUSTL. ADMIN. APPEALS TRIBUNAL, *supra* note 80, at 20–21 (discussing judicial opinions from Australian asylum courts that emphasize how PSGs must be discernible to, at a minimum, those attempting to persecute them). The core purpose of seeking protection through a PSG application is that the applicant is persecuted based on their membership in that PSG, implying that the membership must be identifiable to some extent. *Id.* A PSG defined by persons who are randomly murdered or assaulted by resistance soldiers, for example, is not sufficiently discernible to warrant asylum protection. *Id.*; see also Carney, *supra* note 44, at 614 (referencing data that suggests a broadening of asylum applications and grants since Australia's Migration Act amendments).

⁸⁴ See U.N. High Comm'r for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, ¶¶ 77–79, U.N. Doc. HCR/1P/4/ENG/REV (Dec. 2011) (outlining the definition of a PSG as a group that either shares a characteristic or is recognized by society in some way). The UNHCR recognized the importance of the dominant social distinction and immutable characteristic requirements across international asylum processes and thus put forth a standard that incorporated both. *Id.* This provided clearer boundaries for PSG determinations while avoiding an overly rigid dual requirement approach. See *id.* ¶ 77 (noting that a PSG contains those with “similar background[s], habits, or social status”); see also Nanasi, *supra* note 7, at 268 (discussing the significance of the word “or” in the UNHCR's PSG requirements, as the organization allows PSGs to be demonstrated by a common characteristic or by being recognized socially as a discrete group).

applicants with more flexibility to demonstrate their PSG in a way that aligns with the demonstration of other protected grounds under § 1231.⁸⁵

CONCLUSION

In 2022, in *Herrera-Martinez v. Garland*, the U.S. Court of Appeals for the Fourth Circuit upheld a decision by the Board of Immigration Appeals (BIA) asserting that prosecution witnesses are not a sufficiently particular social group protected under 8 U.S.C. § 1231. Although the court analyzed and applied the requirements to establish a particular social group set forth by the BIA, the requirements themselves have unnecessarily complicated an already convoluted withholding of removal process. A simpler framework for both courts and applicants more aligned with international law and the intent of the United Nations High Commissioner for Refugees would make some of the three requirements optional.

KAILI AKAR

⁸⁵ See *supra* notes 71–84 and accompanying text (noting the Australian and UNHCR support for more streamlined PSG requirements and that the data resulting from such an approach demonstrates many more asylum applications and grants); see also Nicholas R. Bednar & Margaret Penland, *Asylum's Interpretative Impasse: Interpreting "Persecution" and "Particular Social Group" Using International Human Rights Law*, 26 MINN. J. INT'L L. 145, 164 (2017) (arguing that the BIA's three-part test obscures UNHCR interpretations of PSG requirements because the test is overly rigid—requiring all three elements be met—rather than adhering to the original intent of UNHCR to create alternative paths for demonstrating PSGs).