

**Ninth Circuit Court**

**Case:** *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc) **Date:** Feb. 13, 2013

**Panel:** Kozinski, Reinhardt, Graber, McKeown, McLane Wardlaw, Fisher, Paez, Berzon, Bybee, Bea, Smith

**Opinion:** Bea **Concurrence:** McKeown **Dissents:** Kozinski

**Tags:** Immigration, asylum, particular social group,

**Question(s) Presented:** Is respondent a member of a cognizable PSG, namely, “Persons Who Testified in a Criminal Trial Against Gang Members”?

**Holdings:** Witnesses who testify against gang members may constitute a PSG.

**Rationale:** Social visibility and particularity: testified in open court, identifiable by defendants.

**Facts:** Citizen of El Salvador. 1998 her father was killed by gang members, which she witnessed when she was 12 years old. She identified two of the suspects in a live lineup and also testified against them in court. Over the next few years, the murderers and others started stalking her and her sister, who also witnessed the murder. Arrived in U.S. in 2006 and filed an application for removal.

**Procedural History:**

- **IJ:** found PSG cognizable; granted application for asylum / WH / CAT relief; Government appealed
- **BIA:** upheld government’s appeal; denied asylum & other protections. Reversed IJ’s holding that persons testifying against or otherwise opposing gang members constitutes a PSG.
- **9th Cir:** Respondent petitions for review of BIA’s decision.

**Appeals to Statute & Precedent:**

- *Matter of Acosta*: PSGs must be immutable
- *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005) (en banc): PSG united by voluntary association or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.
- *In re C-A-*, 23 I&N Dec. 951 (BIA 2006): BIA precedent holding that those who testify against cartel members are socially visible.

**Discussion:**

- PSG = Socially visible *to persecutor*
  - “evidence of perceptions in society as a whole is not the exclusive means of demonstrating social visibility.” 1090
  - *Particular* = The “particularity” requirement is separate, and it is relevant in considering whether a group's boundaries are so amorphous that, in practice, the persecutor does not consider

it a group. The ultimate question is whether a group “can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.” S–E–G–, 24 I. & N. Dec. at 584.” 1091

- Application:

- “Here, Henriquez-Rivas testified in open court against the gang members who killed her father. What is more, Chimbera and Popo were present in the courtroom while Henriquez-Rivas testified. Further, Henriquez-Rivas testified that Chimbera or other supposed MS members came to her home looking for H-R and her sister.” 1092