

98-70582

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEOVANNI HERNANDEZ-MONTIEL,

Petitioner,

vs.

ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,
DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW, IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of a Final Order of the Board of Immigration Appeals

BRIEF OF *AMICI CURIAE*

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iv
SUMMARY OF ARGUMENT	1
I. Effeminate Gay Men in Mexico are Members of a “Particular Social Group” Because They Share a Common Characteristic that is Fundamental to their Identity	3
A. The “Particular Social Group” Category Requires That Group Members Have a Common Characteristic That Is Fundamental to Their Identity	4
1. This Court requires that, to constitute a “particular social group,” group members must share a common characteristic that is fundamental to their identity	4
2. Other Circuits likewise require that, to constitute a “particular social group,” members must share a common characteristic that is fundamental to their identity	7
3. The Board also requires that, to constitute a “particular social group,” members must share a common characteristic that is fundamental to their identity	9
B. Effeminate Gay Men in Mexico, like Geovanni Hernandez-Montiel, Are Linked by a Characteristic that is Fundamental to Their Identities and Are Persecuted Based on this “Particular Social Group” Membership	11
1. The Board and an Immigration Court Have Already Concluded That Lesbians and Gay Men Constitute a “Particular Social Group”	11

2.	General Social Science Data Shows the Fundamental Nature of Sexual Orientation, Including the Fundamental Nature of Effeminacy among Some Gay Men	13
3.	Geovanni Hernandez-Montiel’s Identity as an Effeminate Gay Man is Fundamental to Him, and He Cannot or Should Not Be Required to Change that Identity	16
4.	Effeminate Gay Men in Mexico, like Geovanni Hernandez-Montiel, Share Voluntary Associational Relationships and Face a Distinct, Brutal Type of Persecution Because of their Identities and Relationships	19
II.	GEOVANNI HERNANDEZ-MONTIEL WAS PERSECUTED ON ACCOUNT OF HIS STATUS AS AN EFFEMINATE GAY MAN	25
A.	The Board’s Purported Distinction Between Geovanni Hernandez-Montiel’s Sexual Orientation And His Effeminate “Conduct” Has No Basis In the Record Or In The Law	25
1.	Both the IJ and the Board found that the violence directed at Geovanni Hernandez-Montiel was motivated by his sexual orientation	25
2.	Membership in a particular social group typically involves characteristics and behaviors that trigger the persecutor’s awareness of an individual’s social group membership; thus, pointing to triggering behavior will not defeat an asylum claim	28
3.	The Board’s reliance on <u>Bowers v. Hardwick</u> has no basis in the record and no relevance as a matter of law	30

B.	The Board Erred And Abused Its Discretion In Holding That Rape And Physical Violence Do Not Rise To The Level Of Persecution	33
1.	Rape is a serious human rights violation and constitutes persecution where it is inflicted by government officials on account of a protected status	34
2.	Anti-gay violence constitutes persecution when perpetrated by non-governmental actors whom the government is unable or unwilling to control.	37
III.	GEOVANNI HERNANEZ-MONTIEL HAS A WELL FOUNDED FEAR OF PERSECUTION ON ACCOUNT OF HIS STATUS AS AN EFFEMINATE GAY MAN	38
	CONCLUSION	41
	STATEMENT OF RELATED CASES	43
	CERTIFICATE OF COMPLIANCE	43

TABLE OF AUTHORITIES

CASES	PAGE(S)
Acewizc v. INS, 984 F.2d 1056 (9th Cir. 1993)	38
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Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986)	3, 4, 11, 12, 17, 19, 24
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Singh v. Ilchert, 63 F.3d 1501 (9th Cir. 1995)	27, 29, 32, 33
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STATUTES	PAGE(S)
8 C.F.R. § 208.13(b)(1)(i)	40
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SUMMARY OF ARGUMENT¹

Geovanni Hernandez-Montiel is an effeminate gay man. He testified that he has been persecuted on that basis from the time he was a child, when he was expelled from school and abandoned by his parents because of his effeminate gay identity. He fled Mexico at the age of sixteen, after repeated incidents of physical and sexual violence, including two occasions on which he was abducted and raped by a police officer. The Immigration Judge (“IJ”) found that Geovanni’s testimony was credible and that he had suffered “degrading, humiliating and offensive violations of [his] right to personal integrity and autonomy.” Petitioner’s Excerpts of Record (“PER”), Tab 4 at 9. The Board of Immigration Appeals (“the Board”) also found Geovanni’s testimony to be credible. PER, Tab 5 at 5.

As the expert witness who appeared before the Immigration Court testified, effeminate gay men in Mexico comprise a distinct and particularly persecuted social group in Mexico and in many other Latin American cultures. The State Department has identified Mexico “as one of the countries in which homosexual men and women are most likely to be victims of abuse and violence.” Department of State, Mexico Country Report on Human Rights Practices for 1996 (February 1997). The State Department

¹For brevity, *Amici* adopt Petitioner’s Statement of Subject Matter and Appellate Jurisdiction and Procedural Background, as well as Petitioner’s Statement of the Case.

and human rights organizations also have documented a pervasive pattern of government indifference to and complicity in that violence. Id. See also Citizen's Commission Against Homophobic Hate Crimes (May 6, 1998) (stating that from 1995-98, 125 people — approximately 2 per month — were murdered in Mexico because they were gay). Geovanni is afraid for his physical safety and for his life. If forced to return to Mexico, he will be at risk of further violence on account of his identity as an effeminate gay man.

The Board's decision is a gross departure from established law relating to membership in a particular social group and to the meaning of persecution "on account of" a protected status. As explained below, the Board erred in denying Geovanni's social group claim by purporting to distinguish between his identity as a gay man, which the Board already has determined to establish membership in a particular social group, and the effeminate characteristics that revealed his sexual orientation to his persecutors. The Board also erred in holding that Geovanni failed to show that he was persecuted "on account of" his sexual orientation, because, the Board erroneously concluded, he should have attempted to alter or conceal his effeminate characteristics. In addition, the Board erred in holding that repeated acts of intimidation, humiliation, harassment and sexual violence at the hands of government officials and anti-gay

vigilantes do not rise to the level of persecution. Under the legal standards and analysis that properly govern this case, the decision below should be reversed.

I. Effeminate Gay Men in Mexico are Members of a “Particular Social Group” Because They Share a Common Characteristic that is Fundamental to their Identity.

To establish eligibility for asylum, an applicant must demonstrate that he is a “refugee” as defined by the Immigration and Naturalization Act (“INA”) § 101(a)(42)(A) [8 U.S.C. § 1101(a)(42)(A)]. To qualify as a refugee, he must show that he is unable or unwilling to return to his country “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion.” INA §§ 101(a)(42)(A) [8 U.S.C. § 1101(a)(42)(A)] and 208(a) [8 U.S.C. § 1158(a)].

As this Court has recognized, the “particular social group” category includes people who associate with others based on “a common characteristic that is fundamental to their identity as a social group.” Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986). It is undisputed by the Board and the Immigration and Naturalization Service (“the Service”) that gay men and lesbians meet this definition. Nonetheless, the Board refused to evaluate the claim of the applicant in this case, an effeminate gay man from Mexico, as a member of this social group. Instead, it mischaracterized Geovanni’s claim as being based on the social group of “homosexual

males who dress as females” and rejected it. PER, Tab 5 at 5. But as the uncontested record shows, effeminate gay men are a discrete and especially despised subgroup of gay men within Mexico. The case law, scholarly commentary, social science research, and the voluminous record in this case together show — contrary to the Board’s ruling — that effeminate gay men constitute a particular social group eligible to seek asylum under the INA.

A. The “Particular Social Group” Category Requires That Group Members Have a Common Characteristic That Is Fundamental to Their Identity.

Courts, international authorities, the Board, and legal scholars all have offered somewhat differing interpretations of the “particular social group” category. Yet despite the absence of a statutory definition or definitive legislative history, Sanchez-Trujillo, 801 F.2d at 1575, all have identified the same essential element: group members must share a common characteristic that is fundamental to their identities.

1. This Court requires that, to constitute a “particular social group,” group members must share a common characteristic that is fundamental to their identity.

This Court’s only extensive discussion of the “particular social group” category arose in Sanchez-Trujillo, a case involving a Salvadoran man seeking asylum based on his membership in the particular social group of “young, working class males who have not served in the military of El Salvador.” Id. at 1572. Observing that the proposed

group covered a “major segment[] of an embattled nation” and that the applicant did not adequately demonstrate the targeting of group members, the Court held that the group was insufficiently “distinct.”

At the same time, this Court emphasized “that the ‘social group’ category is a flexible one which extends broadly to encompass many groups” that do not fall within the other categories specified in the asylum statute. *Id.* at 1576. The goal of limiting claims based on general demographic categories led the Court to offer this definition:

“*[P]articular social group*” implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.

Id. (emphasis in original).² The Court also acknowledged that, although not con-

²No other circuit has imposed a “voluntary associational relationship” requirement. Indeed, the Seventh Circuit has criticized the imposition of this requirement as conflicting with the Board’s interpretation of “particular social group,” discussed *infra*. *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir.1998). See also *Fatin v. INS*, 12 F.3d 1233, 1239-40 (3rd Cir. 1993) (deferring to Board’s interpretation of “particular social group.”). Commentators also have noted that an exclusive emphasis on close affiliations and “voluntary associational relationship[s]” does not capture the full meaning of the term “particular social group” and potentially excludes from protection those who cannot form “voluntary associational relationships” with others of the same group due to the very persecution they are fleeing. See, e.g., Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 *Cornell Int’l L. J.* 505, 555 (1994); M. (continued...)

clusive, “a persecutor’s perception of a segment of a society as a ‘social group’” is relevant to the analysis. Id. at 1576 n.7.

Importantly, the Ninth Circuit has never said that the shared characteristic must be something that must be unchangeable. Instead, the Court’s definition of “particular social group” focuses on whether the characteristic is fundamental to identity. Courts, both in and outside the asylum context, likewise have understood “immutability” to encompass both traits that cannot be changed and traits so fundamental that the government and others should be barred from requiring their change.³ While a person

²(...continued)

Graves, From Definition to Exploration: Social Groups and Political Asylum Eligibility, 26 San Diego L. Rev. 740, 771 (1989); Daniel Compton, Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar, 62 Wash. L. Rev. 913 (1989). The record below provides more than ample evidence that Geovanni had a voluntary associational relationship with other gay men in Mexico, including effeminate gay men. This Court, however, may wish to consider taking the opportunity presented here to clarify that the quality of association between group members is a helpful but not essential factor for assessing particular social group membership in every case.

³See, e.g., Watkins v. U.S. Army, 875 F.2d 699, 711, 726 (9th Cir. 1989) (en banc) (Norris, J., concurring) (for purposes of equal protection analysis, immutability “has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class.... At a minimum, ... the Supreme Court [has been] willing to treat a trait as effectively immutable if changing it would involve great difficulty ‘[I]mmutability’ may describe those traits that are so central to a person’s identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically.... With these principles in mind, I have no trouble concluding that sexual orientation is immutable.... Scientific proof aside, it seems appropriate to ask (continued...)

may change her religion or political convictions, for example, it is accepted in asylum law that both are fundamental characteristics that one should not be required to change.⁴

2. Other Circuits likewise require that “particular social group” members share a common characteristic that is fundamental to their identity.

Other Circuits, as well as and the United Nations High Commission for Refugees, in its Handbook on Procedures and Criteria for Determining Refugee Status (“Handbook”), have also interpreted the “particular social group” category with a focus on the fundamental nature of the shared characteristic.

The First Circuit, for instance, relied on the Handbook in defining “particular social group” in a case involving a Ghanaian woman who feared persecution because of her family ties and her political activities. Ananeh-Firempong, 766 F.2d at 626. The court quoted the Handbook extensively, stating, in part, that “a ‘particular social group’ normally comprises persons of similar background, habits or social status.” Id. (quoting Handbook at ¶77). Cf. Zavalla-Bonilla v. INS, 730 F.2d 562, 567 (9th Cir.

³(...continued)
whether heterosexuals feel capable of changing their sexual orientation.”).

⁴See, e.g., Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985) (political beliefs); Meguenine v. INS, 139 F.3d 25, 28 n.2 (1st Cir. 1998) (noting religious beliefs as meeting social group definition).

1984)(Handbook is “significant source of guidance with respect to the United Nations Protocol” on which U.S. asylum law is based). And, just recently, in Meguenine v. INS, 139 F.3d 25, 27 n.2 (1st Cir. 1998), the First Circuit again approved a social group definition requiring “some immutable trait ... or a mutable trait which a member of that group should not, in good conscience, be required to change (such as a religious adherent’s beliefs).”

The Third Circuit has also focused on the fundamental nature of the shared characteristic. In a case involving an Iranian feminist woman, the court first reviewed the historical derivation of the “particular social group” category and, like this Court, found little guidance as to the term’s meaning. Fatin v. INS, 12 F.3d 1233, 1238-39 (3rd Cir. 1993). The Third Circuit then adopted the Board’s analysis in Matter of Acosta, 19 I. & N. 211, 233 (BIA 1985), see infra, reasoning that Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), required it to defer to the agency (in this case, the Board) so long as the Board’s interpretation was permissible. Fatin, 12 F.3d at 1239-40. The court concluded that the petitioner’s claimed status as a member of ““a very visible and specific subgroup: Iranian women who refuse to conform to the government’s gender-specific laws and social norms”” would establish membership in a particular social group. Id. at 1241(emphasis in original). It explained that “if a woman’s opposition to the Iranian laws in question is

so profound that she would choose to suffer the severe consequences of noncompliance, her beliefs may well be characterized, under the Acosta standard, as ‘so fundamental to [her] identity or conscience that [they] ought not be required to be changed.’” Fatin, 12 F.3d at 1241.⁵ The Court found, however, that the applicant had failed to show that she was in fact a member of this “tightly defined group.” Id.

3. The Board also requires that, “particular social group,” members share a common characteristic that is fundamental to their identity.

The Board’s own interpretation of the “particular social group” category also focuses on the fundamental nature of the shared characteristic. In Matter of Acosta, the Board considered whether taxi drivers in El Salvador constituted a particular social group. 19 I. & N. Dec. 211 (BIA 1985). The Board’s definition captured the elements critical to all of the above analyses:

The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience, such as former military leadership or land ownership. The

⁵This “very specific” subgroup is in contrast to the broadly defined demographic characteristics rejected by the Second Circuit as insufficient to establish a social group claim in Gomez v. INS, 947 F.2d 660 (2d Cir. 1991)(holding that young Salvadoran women who had been abused by Salvadoran guerillas did not constitute a particular social group). Gomez v. INS, 947 F.2d 660 (2d Cir. 1991). As that court explained — and contrary to the instant case — there, nothing other than the generic characteristics of youth and gender would provide would-be persecutors with a way of identifying the applicant for further brutalization. Id. at 664.

particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis.

Id. at 233. Although the Board rejected the applicant’s argument in that case, it provided a useful description of the characteristic: “whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.” Id.

Since its landmark Acosta decision, the Board has identified a variety of groups that meet the “fundamental” characteristic standard. For example, in Matter of Kasinga, Int. Decis. 3278 (1996)(en banc), the Board en banc found that a young woman fleeing genital mutilation fit the standard:

[T]he characteristics of being a “young woman” and a “member of the Tchamba-Kunsuntu Tribe” cannot be changed. The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.

Matter of Kasinga, Int. Decis. 3278, at 13-14. Likewise, in Matter of Fuentes, 19 I&N Dec. 658, 662 (BIA 1988), the Board found that an applicant’s status as a former member of El Salvador’s police force could fit within the “particular social group” category.⁶

⁶The Acosta standard is in keeping with the analysis of leading scholars of (continued...)

B. Effeminate Gay Men in Mexico, like Geovanni Hernandez-Montiel, Are Linked by a Characteristic that is Fundamental to Their Identities and Are Persecuted Based on this “Particular Social Group” Membership.

Immigration authorities, social science data, the record in this case, and scholarly literature all demonstrate that gay people comprise a particular social group. Further, the record and related scholarship also show that, in Mexican society, effeminate gay men not only fit within the broader gay and lesbian social group but also comprise an even more specific subgroup that satisfies both the Sanchez-Trujillo and Acosta inquiries.

1. The Board and an Immigration Court Have Already Concluded That Lesbians and Gay Men Constitute a “Particular Social Group.”

The Board concluded that lesbians and gay men satisfy the definition of “particular social group” in Matter of Toboso-Alfonso, 20 I. & N. Dec. 819 (BIA 1990), and affirmed that holding in the instant case. PER, Tab 5, at 6. In Toboso-

⁶(...continued)
refugee law. Both A. Grahl-Madsen and Guy Goodwin-Gill have concluded, based on extensive analysis of U.N. documents and cases decided around the world, that persecution of particular social group members must be targeted at a characteristic that the individual cannot change or that is so fundamental to identity or conscience that the individual should not be required to change it. See id. (citing, inter alia, 1 A. Grahl-Madsen, The Status of Refugees in International Law 217 (1966); G. Goodwin-Gill, The Refugee in International Law 30 (1983)).

Alfonso, which involved a gay Cuban applicant, the Board found that the government persecuted the applicant because of his status as a gay man. 20 I. & N. Dec. at 822. Moreover, the Board noted that the Service had not challenged the immigration judge’s finding that homosexuality is an “immutable” characteristic. Id. In granting withholding of deportation to Toboso-Alfonso, the Board also found that gay people were treated as a distinct and condemned group in the eyes of the persecutor. Id.

In 1994, the Attorney General designated Matter of Toboso-Alfonso as “precedent in all proceedings involving the same issue or issues,” id. at 819 n.1, thus ratifying the Board’s conclusion that sexual orientation can be the basis for particular social group membership.

In addition, in Matter of Tenorio, A72 093 558 (IJ 1993), INS appeal pending, a case involving a gay Brazilian man seeking asylum from sexual orientation-based persecution, an Immigration Judge specifically applied this Court’s Sanchez-Trujillo test to find that gay people constitute a particular social group. After reviewing this Court’s ruling and other rulings and commentary on the subject, the Immigration Judge concluded:

[T]here exists a voluntary associational relationship among the members [of the group], and a common characteristic that is fundamental to their identity as members of the social group. Sexual orientation is arguably an immutable characteristic, and one which an asylum applicant should not be compelled to change.

PER, Tab 4 at 14. Thus, the court concluded, “homosexuals are considered to be members of a particular social group.” Id.⁷

2. General Social Science Data Shows the Fundamental Nature of Sexual Orientation, Including the Fundamental Nature of Effeminacy among Some Gay Men.

Social science data likewise shows that gay people, including effeminate gay men, fit well within the particular social group definitions set forth above. Experts define “sexual orientation” to include several fundamental aspects of human identity and activity, including: 1) sexual conduct with partners of a particular gender; 2) enduring psychological attraction to partners of a particular gender; and 3) private identity based on sexual orientation (thinking of oneself as lesbian, gay, bisexual or heterosexual).⁸ Others’ perceptions of an individual as gay — which, for some gay men, may be based on having an effeminate manner — are also illustrative of this core identity. See, e.g., Joseph Carrier, De Los Otros: Intimacy and Homosexuality Among Mexican Men 15, 16, 21 (1995) (discussing equation of gay and effeminate men in

⁷See also Mitchell Landsberg, “U.S. Opening Some Doors to Victimized Gays, Lesbians,” Austin American-Statesman, January 4, 1997 (describing other cases, similar to Geovanni’s, in which a gay Mexican man, a gay Brazilian man, and a gay Salvadoran man who had been raped by police have been granted asylum).

⁸Gregory Herek, Myths About Sexual Orientation in 1 Law and Sexuality 133, 134-35 (1991).

Mexico and the Mexican police's targeting of effeminate gay men for harassment and abuse).

Research also shows that sexual orientation is set in place at an early age.⁹ In addition, research demonstrates that sexual orientation is highly resistant to change, so much so that the American Psychological Association condemns as unethical efforts to change the sexual orientation of lesbians and gay men.¹⁰ In short, as a fundamental aspect of personhood, sexual orientation is precisely the type of characteristic that cannot be altered or should not have to be renounced to escape persecution.¹¹

Within their research on homosexuality, some researchers have conducted extensive studies of effeminacy, which is sometimes described in the professional

⁹Research overwhelmingly indicates that homosexual or heterosexual feelings are a basic part of an individual's psyche and are established much earlier than conscious choice capacity is developed. J. Gonsiorek & J. Weinrich, The Definition and Scope of Sexual Orientation, in Gonsiorek and Weinrich, eds., Homosexuality, at 1-2 (1991). See also A. Bell, M. Weinberg & S. Hammersmith, Sexual Preference: Its Development in Men and Women 186-87 (1981).

¹⁰See American Psychological Association, Fact Sheet on Reparative Therapy, cited by Douglas Haldeman, Sexual Orientation Conversion Therapy for Gay Men and Lesbians: A Scientific Examination, in Gonsiorek & Weinrich, Homosexuality, at 160.

¹¹See Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997) (reversing and remanding Board's denial of asylum to Russian lesbian, whose fear of persecution included, inter alia, fear of forced psychiatric treatment to "change" her sexual orientation).

literature as “atypical gender behavior.”¹² For decades, these scientists have undertaken psychological studies, clinical observation, anatomical analysis, and hormonal studies aimed at tracking effeminacy among some gay men.¹³ Despite differences in technique and population sampling, studies consistently have identified atypical gender behavior in a disproportionate percentage of gay youth and adults.¹⁴ In particular, they have demonstrated a core psychological, and possibly biological, component to effeminacy in some gay men. Id. Researchers also note that effeminate men are typically perceived by heterosexuals as being gay and, as a result, are viewed negatively.¹⁵

¹²The dictionary defines “effeminate” as “having feminine qualities untypical of a man: not manly in appearance or manner.” Webster’s Ninth New Collegiate Dictionary 397 (1988).

¹³See generally Richard C. Pillard, Masculinity and Femininity in Homosexuality: “Inversion” Revisited, in Gonsiorek and Weinrich, eds., Homosexuality: Research Implications for Public Policy, 32-43 (1991) (reviewing numerous studies).

¹⁴Id. See also Richard Green, The “Sissy Boy Syndrome” and the Development of Homosexuality (1987).

¹⁵Mary E. Kite, Bernard E. Whitely, Jr., Do Heterosexual Women and Men Differ in Their Attitudes Toward Homosexuality, in Gregory Herek, Stigma and Sexual Orientation: Understanding Prejudice Against Lesbians, Gay Men, and Bisexuals, 39, 40 (1998) (citing numerous studies).

3. Geovanni Hernandez-Montiel’s Identity as an Effeminate Gay Man is Fundamental to Him, and He Cannot or Should Not Be Required to Change that Identity.

As shown above, lesbians and gay men satisfy the definition of “particular social group,” a point that neither the Board nor the Service contests. Because they are a subset of gay people, effeminate gay men already fit within the agreed-upon social grouping of lesbians and gay men.

Yet the Board treated Geovanni’s claim as though it were based on an entirely different category. See PER, Tab 5, at 5-6. Neither the Board nor the government has offered a plausible explanation for requiring his asylum application to be assessed differently than the claims of other gay men. Effeminate gay men should not be required to undergo a new, separate, and extraordinary legal inquiry to determine whether they satisfy the particular social group standard when the overarching group to which they belong already meets that test. This would be akin to requiring that — while Christians constitute a particular social group subject to persecution in a certain country — a Catholic national of that country must separately demonstrate that she is a member of the particular social group of Christians who are Catholic. Instead, effeminate gay men, like all asylum applicants, should bear the ordinary burden of providing factual support for their persecution based on their social group membership.

Even were this subgroup of effeminate gay men to be required to undertake an additional or a separate effort to prove eligibility for relief as members of a particular social group, they satisfy the Sanchez-Trujillo definition as well as the Board's Acosta test. The record in this case indisputably shows that Geovanni's identity as an effeminate gay man is deep-seated, ineluctable, and fundamental. He has known he was gay since the age of 8, PER, Tab 3 at 29, and he has also been effeminate since he was a child. Id. at 68. Because of his sexual orientation and effeminacy, Geovanni was deprived of an education, enduring repeated humiliation and ultimately expulsion from school. Id. at 30-32. His parents "always said that I look like a woman and that if I continue this way they were going to kick me out of the house," which they did at the time he was expelled from school. Id. at 32. Yet he did not change his identity as an effeminate gay youth, nor is there any indication that such change was even possible. PER, Tab 1 at ¶¶7-8, 10. Geovanni continued to be vilified and abused because of his status as an effeminate gay man until he fled Mexico at the age of 16, including two instances in which he was raped by a police officer and another in which he was savagely beaten by an anti-gay mob. PER, Tab 3 at 38.

It defies the record below as well as common-sense to suggest that Geovanni's effeminate gay identity is either limited to wearing dresses, as the Board did, PER, Tab 5 at 5, or that it is not "fundamental." Anyone for whom it was less than fundamental

would certainly change to avoid this overwhelming abuse. See, e.g., Fatin, 12 F.3d at 1241 (holding that applicant’s opposition to Iranian laws would be fundamental to her identity if she chose to suffer the severe consequences of noncompliance rather than change). Yet, even when Geovanni’s sister forced him to attend a program to change his “way of being,” — which this Court has recognized as a form of persecution, Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997) — Geovanni did not change. He continued to be an effeminate gay man even though the program staff clipped his nails and hair and prevented him from taking the hormones that enhanced his feminine appearance. PER, Tab 5 at 39-40, 63-64, 67-68. In fact, his sister eventually released him from the program after two months when she saw that his fundamental identity would not change. Id. at 67-68. Geovanni testified that, prior to his release, his sister visited him at the program and “realized that I was the same and the only thing that had changed was the fact that they had cut my hair and my nails.” Id.

In sum, beatings, condemnation, forced “counseling,” and rape have not changed Geovanni’s effeminate gay identity. His testimony shows that his identity is so essential to his personhood that it is one he “either cannot change, or should not be required to change.” See Acosta, supra. His sexual orientation, his comportment, his dress, his grooming, his behavior — all of which comprise and express his identity — define Geovanni to himself and to others as a member of a discrete social group of

effeminate gay men.¹⁶ This self-identity mirrors the social science literature regarding effeminate gay men, as well as scholarship confirming the grouping of Mexican gay men into effeminate and “masculine” gay men, with effeminate men suffering even more extensive abuse and persecution than those who are masculine. See infra. Thus, Geovanni, as an effeminate gay man, fits well-within both the Sanchez-Trujillo and Matter of Acosta inquiries.

4. Effeminate Gay Men in Mexico, like Geovanni Hernandez-Montiel, Share Voluntary Associational Relationships and Face a Distinct, Brutal Type of Persecution Because of their Identities and Relationships.

Effeminate gay men in Mexico also satisfy the Sanchez-Trujillo test because they share “voluntary associational relationships” with other men who are likewise actuated by a “common impulse.” See Sanchez-Trujillo, 801 F.2d at 1576. As Geovanni testified, the Mexican police arrested him twice when he was walking on a public street with another effeminate male friend. PER, Tab 3 at 33-34. On another occasion, the police threw Geovanni and a male friend into their police car, brought them to an abandoned area, forced them to undress, separated them, and raped Geovanni. Id. at

¹⁶See, e.g., Suzanne B. Goldberg, Give Me Liberty or Given Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men, 26 Cornell Int’l L. J. 605, 613-14 (1993) (discussing studies which demonstrate that sexual orientation is a complex mix of psychological attraction, self-identification, sexual behavior, and, at times, public identity).

35-36, 70-71.¹⁷ And when Geovanni was severely beaten by non-governmental actors, he suffered the attack after leaving a dance where he likely was associating with other gay men. Id. at 37-38.

Such attacks by vigilantes are commonplace in Mexico, and they continue unabated, significantly because Mexican authorities who are unable or unwilling to stop the abuse. For instance, six gay men were found beaten, stabbed and strangled in Mexico City in one month alone in 1992. Police publicly referred to the victims as “people with strange habits ... sado masochists” and theorized about “homosexual vendettas.”¹⁸ Likewise, as the U.S. Department of State reported in its Mexico Country Report on Human Rights Practices for 1996, at least a dozen gay persons were killed in Tuxtla Gutierrez in a two-year period, yet the prosecutor had made no progress in solving the murders nearly five years later.¹⁹

¹⁷The testimony regarding the friend’s identity is incorrect at one point in the transcript where Geovanni identifies his friend as female. PER, Tab 3 at 35. In his declaration and through the remainder of his testimony, Geovanni identifies his friend as a man. Id. at 35-36, 70-71; see also PER, Tab 1 at ¶13.

¹⁸Linda Diebel, Being Gay in Macho Mexico, Toronto Star, March 29, 1998. In Chiapas alone, 16 gay men were murdered between 1992 and 1994, and no one has ever been convicted for any of these murders. Id.

¹⁹Department of State, Mexico Country Report, supra.

Geovanni's voluntary association with other gay men, and with effeminate gay men in particular, is reinforced by and reflected in established social groupings among gay men in Mexico. Expert testimony and documentary evidence confirm that, in Mexico, gay men generally divide into two groups — those who are “masculine” and those who are “feminine.” While both subgroups are subject to persecution, effeminate gay men are particularly subject to abuse.

As expert witness Professor Thomas M. Davies, Jr., testified, “the division between male homosexuals who act out the male role and male homosexuals who act out the feminine role” is firmly established in Mexico. PER, Tab 3 at 26 (Davies). “The first,” he said, “is not as persecuted as the second. The second is ... heavily persecuted by police and by other groups within the society.” *Id.* Moreover, those gay men who “take on a primarily ‘female’ sexual role” face a distinct type of abuse, including sexual abuse and ostracization. PER, Tab 2 at ¶¶4-5.

Effeminate gay men (who are easily identifiable, as they transgress gender norms) are particularly at risk of abuse by the police as well.²⁰ Researcher Joseph Carrier described witnessing three separate occasions in the month prior to a presidential election in Guadalajara in which the police detained effeminate gay men,

²⁰Linda Diebel, Being Gay in Macho Mexico, *supra*.

threatened them with imprisonment for being gay, and released them only after they paid a bribe and agreed to point out other gay men to the authorities.²¹ See also Linda Diebel, *Being Gay in Macho Mexico* (describing “massive police sweeps” of gay men in Chihuahua).

Davies’ testimony makes clear that persecutors identify these men for abuse not because of their sexual “conduct,” as the Board erroneously concluded, PER, Tab 5 at 6, but because of their consistently effeminate identity and social role. Indeed, in testifying regarding the abuse perpetrated particularly against effeminate gay men, Davies used the term “role” interchangeably to describe an effeminate gay man’s social identity and the “role” of a participant in a sexual interaction:

[A] man adopting the role of] the female is ostracized from the very beginning and is the subject [of] persecution, gay bashing we would call it, and certainly police abuse. [I]t’s commonplace [in Latin American countries] for police to just sort of hit the gay street as it were and not only brutalize but actually rape ... homosexual males that are dressed or acting out the feminine role.

PER, Tab 3 at 18. See also PER, Tab 2 at ¶3 (describing rape and other sexual crimes against effeminate gay men as “commonplace”).

Other undisputed record evidence confirms that the government regards effeminate gay men as a distinct group — and one that is deserving of death. A co-

²¹Joseph Carrier, *De Los Otros*, *supra*, at 15-16.

founder and general coordinator of a Mexican human rights organization stated, “The government has said it will not protect transvestites unless they are dressed like men, insinuating that it is okay to kill homosexuals if we are visible.”²² Numerous reports of murders in Mexico of effeminate gay men have surfaced, with little or no response from Mexican law enforcement authorities.²³

Other commentators confirm that effeminate gay men in Latin America generally and in Mexico in particular identify themselves and are treated by others as a distinct social group. One scholar who has studied sexuality cross-culturally reiterates that, in Mexico, a man who takes the “passive” or “feminine” role commits “the supreme transgression.”²⁴ It is the effeminacy of those who take the passive or feminine role that enables others to stigmatize them and brutalize them as “transgressors.” As Joseph Carrier explains, in societies with strong negative reactions to cross-gender behavior,

²²Anti-Queer Violence Continues in Mexico, San Francisco Bay Times, Feb. 25, 1993 (introduced as Exhibit K at hearing).

²³See e.g., Gay Man Who Cited Abuse in Mexico is Granted Asylum, N.Y. Times, Mar. 26, 1994, at A5 (introduced as Exhibit B at hearing); Amnesty Condemns Gay Murders in Mexico, Gay Times, Jan. 1995 (Exhibit F); J. Garcia, Anti-Gay Violence on Rise in Mexico, The Austin-American Statesman, Sept. 6, 1992, at A1 (Exhibit G); Letter from Human Rights Department of the Archdiocese of Mexico to Julie Dorf, Feb. 1993 (Exhibit J).

²⁴Gilbert Herdt, Same Sex Different Cultures: Gays and Lesbians Across Cultures 141 (1997).

“a general belief exists that anyone demonstrating cross-gender behavior is homosexual.”²⁵ In Mexico, he states, there is a “cultural equivalence of effeminacy with homosexuality.”²⁶ Thus, contrary to the Board’s mischaracterization of Geovanni’s asylum application and testimony, the particular social group membership at issue involves a social category far more significant and deeply rooted in Mexican society than the Board’s conclusory dismissal of “homosexual males who dress as females.” See PER, Tab 5 at 5.²⁷ Instead, it involves men who share the fundamental characteristics of being gay and effeminate and who form voluntary associations based on those characteristics. As Geovanni has shown, he fits squarely within this group and therefore satisfies both the Sanchez-Trujillo and Acosta inquiries.

²⁵J.M. Carrier, Homosexual Behavior in Cross-Cultural Perspective, in Marmor, J., Homosexual Behavior: A Modern Reappraisal, 100, 108 (1980).

²⁶Id. at 110.

²⁷The Board’s characterization of Geovanni’s claims as being based on “the way he dressed (as a male prostitute),” PER, Tab 3 at 5, is likewise in error. Not one piece of record evidence indicates that Geovanni dressed or worked as a prostitute.

II. GEOVANNI HERNANDEZ-MONTIEL WAS PERSECUTED ON ACCOUNT OF HIS STATUS AS AN EFFEMINATE GAY MAN.

An applicant for asylum must demonstrate that he has a well-founded fear of persecution “on account of” a protected status. 8 U.S.C. §§ 1101(a)(42)(A) & 1158(a). To satisfy the “on account of” requirement, the applicant “must present some evidence, direct or circumstantial, of the persecutor’s motive.” INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992); Sangha v. INS, 103 F.3d 1482, 1490 (9th Cir. 1997); Borja v. INS, 139 F.3d 1251, 1253-54 (9th Cir. 1998).

A. The Board’s Purported Distinction Between Geovanni Hernandez-Montiel’s Sexual Orientation And His Effeminate “Conduct” Has No Basis In the Record Or In The Law.

1. Both the IJ and the Board found that the violence directed at Geovanni Hernandez-Montiel was motivated by his sexual orientation.

Both the IJ and the Board readily acknowledged that Geovanni was targeted for abuse because of his sexual orientation. The IJ found that Geovanni was: detained by the police “for walking in the street and socializing with other young homosexual men”; assaulted by men who shouted “disparaging remarks ... concerning his sexual orientation and manner of dress”; and forced by his sister into “an ‘alcoholics anonymous’ type program ... intended to force him to convert into a heterosexual male.” PER, Tab 4 at 4-5. Similarly, the Board found that Geovanni was: “taken into

custody because he appeared to be a ‘female-looking homosexual’”; told by the police that “it was illegal for homosexuals to walk down the street”; and attacked by “a mob of gay bashers” who “call[ed] him names relating to his homosexuality and female appearance.” Slip Op. at 2, 6.

In light of these findings, the Board’s conclusion that Geovanni “was mistreated because of the way he dressed ... and not because he is homosexual,” *id.* at 5, is contradicted by the Board’s own recounting of the evidence, detailed above. It is also contrary to the expert testimony of Professor Davies, who testified that there is a longstanding and deeply rooted association between effeminacy and homosexuality in Mexican culture. See, supra, Professor Davies also testified that effeminate gay men are recognized in Mexico as a distinct and readily identifiable group and that, as such, they are a target for pervasive animosity and violence. PER, Tab 2 at ¶¶4-5; PER, Tab 3 at 26. In sum, the Board’s purported distinction between Geovanni’s sexual orientation and his effeminacy has no basis in the record or in the everyday social reality of Mexican life; it certainly had no meaning to those who readily identified Geovanni as a gay man and who sought to harm him for that reason.

It is also irrelevant as a matter of law. It is well-settled that an applicant is not required to show that the persecutor is motivated solely by his protected status. As this Court has recognized, “persecutory conduct may have more than one motive, and so

long as one motive is one of the statutorily enumerated grounds, the requirements [for asylum] have been satisfied.” Singh v. Ilchert, 63 F.3d 1501, 1509-10 (9th Cir. 1995).

In In re S- P-, Int. Dec. 3287, at 5 (BIA June 18, 1996), the Board explained:

Persecutors may have differing motives for engaging in acts of persecution, some tied to reasons protected under the Act and others not. Proving the actual, exact reason for persecution or fear of persecution may be impossible An asylum applicant is not obliged to show conclusively why persecution has occurred ... [¶] ... Rather, an asylum applicant ‘bear[s] the burden of establishing facts on which a reasonable person would fear the danger arises on account of his ... membership in a particular social group. Thus, ... the standard for review is whether the applicant has produced evidence from which it is reasonable to believe that the harm was motivated by a protected ground.

Id. at 5 (citations omitted). See also Osorio v. INS, 18 F.3d 1017, 1028 (2d Cir. 1994) (“The plain meaning of the phrase ‘persecution on account of the victims’ political opinion’ does not mean persecution **solely** on account of the victim’s political opinion.”) (emphasis added).

To satisfy the “on account of” requirement, Geovanni is required to show the reasonableness of his belief that his sexual orientation was a significant motivation for the violence and abuse he endured. Singh v. Ilchert, 63 F.3d at 1510. He is not required to prove that his persecutors were motivated by his sexual orientation to the exclusion of all other possible motivations. Id. Under this standard, as the Board’s own

findings in this case make clear, there can be no dispute that Geovanni was persecuted “on account of” his sexual orientation.

2. Membership in a particular social group typically involves characteristics and behaviors that trigger the persecutor’s awareness of an individual’s social group membership; thus, pointing to triggering behavior will not defeat an asylum claim.

The Board’s purported distinction between Geovanni’s sexual orientation and his effeminate “behavior” is fatally flawed in another respect as well. The Board concluded that while “homosexuality is a basis for asylum,” Geovanni failed to establish that he was persecuted on account of his sexual orientation, because he did not show that “his decision to dress as a female was beyond his power to change or so fundamental to his identity that he should not be required to change.” PER, Tab 5 at 5. If adopted as a general rule, the Board’s analysis would effectively eliminate “membership in a particular social group” as a protected category.

Persecutors typically identify an individual as being a member of a particular social group by some characteristic or behavior of the applicant. See, e.g., Cordero-Trejo v. INS, 40 F.3d 482, 485 (1st Cir. 1994) (applicant became known to persecutors as a member of the social group of religious layworkers through his travels on religious missions). This is no different than the persecutor becoming aware of an individual’s religion through his attendance at a religious service or wearing of a certain

religious garb. Singh v. Ilchert, 63 F.3d at 1511 (applicant identifiable as a Sikh by “his manner of religious dress”); Surita v. INS, 95 F.3d 814, 818 (9th Cir. 1996) (applicant identifiable as a Hindu in part by her attempt to enter Hindu temple). Nor is it any different than a persecutor becoming aware of an individual’s political opinion through the individual’s political expressions or activities. Rivas v. INS, 899 F.2d 864, 869 (9th Cir. 1990) (applicant likely to be targeted for persecution because she visited “dissidents” in prison); Zavala-Bonilla v. INS, 730 F.2d 562, 563 (9th Cir. 1984) (applicant targeted for persecution because she “actively participated in union activities, including a nationwide strike”); In re D-V-, Int. Dec. 3252 (BIA 1993) (applicant was known to persecutors as a result of her “activities on behalf of Aristide”).

In general, bases for asylum are intertwined with behavior, such as the practice of one’s religion, association with other members of one’s race or nationality, or the advocacy of particular political beliefs. Kotasz v. INS, 31 F.3d 847, 854 (9th Cir. 1994) (applicant “became known to government authorities” through “his political participation”); Singh v. INS, 94 F.3d 1353, 1357 (9th Cir. 1996) (Indo-Fijian applicant targeted for persecution after he “advocated opening up dock worker positions to all races rather than just ethnic Fijians”). In short, if the Board’s analysis was correct, not

only would most, if not all, social group claims be denied, erroneously; persecution based on **any** of the statutory bases would be all but impossible to establish.

That Geovanni's persecutors recognized and targeted him for persecution as a gay man because of his effeminate characteristics does not detract from his social group claim. On the contrary, it is precisely because his effeminate characteristics have made him a visible target for anti-gay violence in the past and place him at a high risk of further anti-gay violence in the future that he has a well-founded fear of persecution "on account of" his sexual orientation. *Cf. Rivas v. INS*, 899 F.2d 864 (9th Cir. 1990) (applicant granted withholding of deportation based on finding that "she is ... an easily identifiable target"); *Damaize-Job v. INS*, 787 F.2d 1332, 1336 (9th Cir. 1986) (applicant held to be eligible for asylum where "he would be readily identifiable as a Miskito wherever he goes").

3. The Board's reliance on Bowers v. Hardwick has no basis in the record and no relevance as a matter of law.

In holding that Geovanni is not eligible for asylum, the Board concluded that:

While Toboso-Alfonso ... provides a basis for finding that homosexuality is a basis for asylum, anti-sodomy laws are not persecution. Bowers v. Hardwick, 478 U.S. 186 (1986). Here, the respondent's mistreatment arose from his conduct ..., thus the rape by the policemen, and the attack by a mob of gay bashers are not necessarily persecution, even if the Mexican police give low priority to the protection of gays.

PER, Tab 5 at 6. The Board's reliance on Bowers to support its conclusion that Geovanni is precluded from establishing a well-founded fear of persecution is wholly misplaced.

As the IJ explicitly noted, Geovanni was never charged with or prosecuted for violating "anti-sodomy laws" or for any other criminal activity in Mexico. PER, Tab 4 at 4. In fact, the Board's suggestion that Geovanni's "mistreatment" at the hands of the police was provoked by his criminal "conduct" is so wholly unsupported by the record as to create the appearance of bias.²⁸ As the Board's own recounting of the evidence makes clear, Geovanni was repeatedly "taken into custody because he appeared to be a 'female-looking' homosexual," on the pretext that "it was illegal for homosexuals to walk down the street and ... for a man to dress like a woman." PER, Tab 5 at 2. Geovanni was never charged with either of these putative "crimes."²⁹ As

²⁸As previously noted, the Board's claim that Geovanni dressed "as a male prostitute," Slip Op. at 5, has no basis in the record. Apart from the Board's gratuitous and unfounded use of the term in its decision, the only reference to prostitution in the entire record of this case occurred when the attorney for the state asked Geovanni if he had ever worked as "a homosexual prostitute in the United States." Geovanni testified that he had not. (Tr at 57.)

²⁹There is no evidence in the record that Mexico prohibits lesbians and gay men from walking down the street wearing gender atypical clothing. Cf. Rivas v. INS, 899 F.2d 864, 868 (9th Cir. 1990) ("Giving food to the guerillas may or may not be a criminal act in El Salvador; there is no evidence in the record that it is a crime and in any event, the BIA did not reach its conclusions on this assumption."). Moreover, even
(continued...)

this Court long ago made clear, “when a government harms or punishes someone without undertaking any formal prosecutorial measures, it engages in persecution and not legitimate prosecution.” Rivas v. INS, 899 F.2d at 868 (citing Blanco v. Lopez, 858 F.2d 531, 534 (9th Cir. 1988)(internal quotation marks omitted). See also Singh v. Ilchert, 69 F.3d 375 (9th Cir. 1995); Singh v. Ilchert, 63 F.3d 1509.

Moreover, even if there was evidence that the Mexican police had a legitimate reason to suspect Geovanni of some crime, **which there is not**, Geovanni would not be precluded from a finding of persecution based on the record of extra-judicial detention, abduction, and sexual assault that has been established in this case. This Court has explicitly rejected the proposition that “if the government has some reason to believe — no matter how slight — that a person has engaged in criminal activity, then any action the government takes under that belief — no matter how harsh — is ‘legitimate’ and cannot amount to persecution.” Rivas v. INS, 899 F.2d at 868 (granting withholding of deportation to applicant who was likely to be wrongly accused

²⁹(...continued)

if Geovanni had been formally prosecuted for those alleged “crimes,” he would not be precluded from establishing persecution. As this Court has recognized, criminal prosecution can constitute persecution when the underlying law being enforced is contrary to internationally accepted principles of human rights. Ramos-Vasquez v. INS, 57 F.3d 857 (9th Cir. 1995) (holding that Honduran soldier who deserted to avoid illegal military order to execute a friend may contend he faced persecution on account of political opinion).

of anti-government acts, where “even the members of her family whom the government might have had legitimate reasons to investigate were punished extrajudicially without even the slightest pretense of due process”); Singh v. Ilchert, 63 F.3d at 1508 (“India ... treats those accused or suspected of terrorism so harshly, police ‘investigations’ of many suspected terrorists are not legitimate government functions but rather part of a pattern of political suppression.”); In re S-P-, Int. Dec. 3287 (BIA 1996) (finding persecution where “the harm inflicted upon the applicant ... went well beyond the bounds of legitimate questioning for intelligence gathering”).

B. The Board Erred And Abused Its Discretion In Holding That Rape And Physical Violence Do Not Rise To The Level Of Persecution.

Persecution encompasses “more than just restrictions or threats to life and liberty.” Desir v. Ilchert, 840 F.2d 723, 726 (9th Cir. 1988) (beatings, imprisonment, and assaults by government security forces constituted persecution). It is “the infliction of suffering or harm upon those who differ ... in a way that is regarded as offensive.” Id. at 727 (citing INS v. Cardoza Fonseca, 480 U.S. 421 (1987)). See also Hernandez-Ortiz v. INS, 777 F.2d 509, 516 (9th Cir. 1985) (stating that persecution is “oppression ... inflicted on groups or individuals because of a difference that the persecutor will not tolerate”).

1. Rape is a serious human rights violation and constitutes persecution where it is inflicted by government officials on account of a protected status.

This Court has recognized that “rape or sexual assault ... may constitute persecution.” Lopez-Galarza v. INS, 99 F.3d 954, 959 (9th Cir. 1996); Lazo-Majano v. INS, 813 F.2d 1432, 1434 (9th Cir. 1987). See also In re D-V-, Int. Dec. 3252 (BIA 1993); Immigration & Natural Service, Considerations for Asylum Officers Adjudicating Asylum Claims from Women 9 (1995) (“Severe sexual abuse does not differ analytically from beatings, torture, or other forms of physical violence that are commonly held to amount to persecution.”).

In Lopez-Galarza, this Court emphasized the seriousness of rape as a human rights violation and the severity of the harm that it typically inflicts:

The severity of the harm of rape is underscored by the numerous studies revealing the physical and psychological harms rape causes. A recent article in the Journal of the American Medical Association summarized several studies of the effects of rape, and concluded:

Rape commonly results in severe and long-lasting psychological sequelae that are complex.... Commonly reported feelings at the time of the rape include shock, a fear of injury or death that can be paralyzing, and a sense of profound loss of control over one’s life. Longer term effects can include persistent fears, avoidance of situations that trigger memories of the violation, profound feelings of shame, difficulty remembering events, intrusive thoughts of the abuse, decreased ability to respond to life generally, and difficulty in establishing intimate relationships.... ¶ ... A

recent article compared the psychological sequelae of rape survivors to the psychological distress endured by survivors of abuse constituting torture under international law, and concluded that ‘the suffering of rape survivors is strikingly similar in intensity and duration to the suffering endured by torture survivors.’

Lopez-Galarza, 99 F.3d at 962 (citations omitted).

Although women are the most common victims of rape, there is a growing awareness among physicians, human rights advocates, law enforcement personnel and others that the frequency of male sexual assault has been vastly underestimated, and that the trauma associated with sexual assault is no less severe for male than for female victims.³⁰

In the case at bar, Geovanni was raped by government officials under particularly terrifying and brutal circumstances. On the first occasion, a police officer abducted Geovanni, ordered him to remove his clothes, and forced Geovanni to perform oral sex

³⁰ See, e.g., Eric Stener Carlson, “Sexual Assault on Men in War,” The Lancet 349 (9045): 129 (1997) (criticizing widespread tendency to minimize the incidence and impact of sexual violence on male victims); Medical Center for Human Rights, “Characteristics Of Sexual Abuse Of Men During War In The Republic Of Croatia And Bosnia And Herzogovnia,” (1995); H. van Tienhoven, “Sexual Torture Of Male Victims,” 7 Torture (1993); C. Casey, “Dealing With Male Rape,” Police Rev., Jan. 29, 1993, at 17 (encouraging police officers to recognize seriousness of trauma associated with male rape); Michael Scarce, Male On Male Rape: The Hidden Toll Of Stigma And Shame (1997) (describing profound psychological impact of male rape); G.C. Mezey & M.B. King, eds., Male Victims of Sexual Assault (same); M. Hunter, ed., The Sexually Abused Male (1990) (same).

on the officer. The officer told Geovanni that he would put him in jail if Geovanni told anyone about the rape. Geovanni was 14 years old at the time of this assault. PER, Tab 3 at 34. On the second occasion, Geovanni and another gay youth were abducted by two police officers and driven to a remote area, where they were both ordered to remove their clothes. Geovanni was raped by one of the officers, who held a gun to his head and threatened to kill him if he resisted. Afterwards, the officers told Geovanni and his friend to start running or they would be shot. Id. at 43-36.

The IJ acknowledged the credibility of Geovanni's account of these incidents and concluded that he had suffered "degrading, humiliating and offensive violations of [his] right to personal integrity and autonomy." PER, Tab 4 at 9. The Board also found his testimony to be credible. PER, Tab 5 at 5. In addition, Professor Davies described the frequency and the impunity with which police officers engage in sexual violence against effeminate gay men. PER, Tab 3 at 18 (noting that "it's common place for police to ... not only brutalize but actually rape with batons...homosexual males [who are in] the feminine role"). Based on these findings and on the undisputed expert testimony in this case, the Board's conclusion that no persecution was shown wrongly underestimates the level of abuse Geovanni endured, runs counter to long-standing case law, and constitutes an abuse of the Board's discretion.

2. Anti-gay violence constitutes persecution when perpetrated by non-governmental actors whom the government is unable or unwilling to control.

Geovanni also suffered extreme violence at the hands of anti-gay vigilantes. A few months after he was raped by a police officer for the second time, Geovanni was attacked by an anti-gay mob who beat him so severely that he was hospitalized for a week and left with permanent scarring in one eye. PER, Tab 1 at ¶13. As this Court has recognized, harassment and violence by groups that the government is unable or unwilling to control can also constitute persecution. Singh v. INS, 94 F.3d 1353 (9th Cir. 1996); Arteaga v. INS, 836 F.2d 1227, 1231 (9th Cir. 1988). The Board has also adopted this analysis. See In re Kasinga, Int. Dec. 3278 at 9-10 (BIA June 13, 1996) (en banc) (designated as precedent by the BIA); Matter of Villalta, 20 I. & N. Dec. 142, 147 (BIA 1990); Matter of Acosta, 19 I. & N. Dec. 211, 222-23 (BIA 1985).

As discussed in Section I, supra, the undisputed expert testimony and documentary evidence below show that Mexico has allowed anti-gay violence to reach epidemic proportions. See also PER, Tab 5 at 6 (acknowledging that “Mexican authorities give low priority to protection of gays.”). The government has failed to undertake any effective investigation or prosecution of anti-gay murders, or to curb widespread police complicity in anti-gay abuse. In Geovanni’s case, any attempt to seek protection from the officials who had raped and then threatened to kill him just a

few months earlier would have been futile, and likely would have placed him at risk of further abuse. PER, Tab 1 ¶¶ 13-15.

In light of the record and the Board's findings, the Board erred in summarily concluding that "the attack by a mob of gay bashers [is] not necessarily persecution." PER, Tab 5 at 6. This conclusion disregards established case law, which permits an applicant to show persecution by a non-governmental group. It is also contradicted by the severity of the harm Geovanni suffered. This is not a claim based on "mere discrimination." Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995). Rather, it is based on the infliction of harm through acts of physical violence that are commonly held to amount to persecution. See, e.g., Singh v. INS, 94 F.3d at 1360. The Board's conclusion has no basis in the record or in the law, and it should be reversed.

III. GEOVANNI HERNANEZ-MONTIEL HAS A WELL FOUNDED FEAR OF PERSECUTION ON ACCOUNT OF HIS STATUS AS AN EFFEMINATE GAY MAN.

The well-founded fear standard includes a subjective and an objective component. INS v. Cardoza-Fonseca, 480 U.S. 421, 430-31, 440 (1987). "The subjective component requires that the applicant have a genuine concern that he will be persecuted," Aguilera-Cota v. INS, 914 F.2d 1375, 1378 (9th Cir. 1993), and may be satisfied by the applicant's testimony that he genuinely fears persecution. Acewicz v. INS, 984 F.2d 1056, 1061 (9th Cir. 1993). The objective component requires a

showing by credible, direct, and specific evidence of facts that would support a reasonable fear that the petitioner faces persecution. Lopez-Galarza, 99 F.3d at 958-59. An applicant is **not** required to present proof that persecution is more likely than not. INS v. Cardoza-Fonseca, 480 U.S. at 431. “One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.” Id.³¹ Even a 10% possibility of persecution may constitute a well-founded fear. Id. If it is known that every tenth male in the applicant’s country of origin is persecuted, it “would only be too apparent that anyone who has managed to escape from the country in question will have a ‘well-founded fear of being persecuted’ upon his eventual return.” Id. at 431.³²

³¹In Matter of Acosta, the Board established four criteria to determine whether a reasonable person would fear persecution. The applicant must show that: (1) he possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could ... become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.” 19 I. & N. Dec. 439 (BIA 1987).

³²The standard of proof for withholding of deportation is more strict than that for asylum. Cardoza-Fonseca, 480 U.S. at 449. To qualify, an applicant must show that if he is returned to this country, his “life or freedom would be threatened on account of” a protected ground. INA § 243(h) [8 U.S.C. § 1253(h)]. “Would be threatened” has been interpreted to mean that it is more likely than not that the alien would be subject to persecution. INS v. Stevic, 467 U.S. 407, 421 n.15 (1984).

Once an applicant has demonstrated that his life or freedom would be threatened on account of a protected ground, he must be granted withholding of deportation. 8
(continued...)

An applicant who establishes past persecution is presumed to have a well-founded fear of persecution. 8 C.F.R. § 208.13(b)(1)(i). This presumption may be rebutted where the conditions in the country have changed “to such an extent that the applicant no longer has a well-founded fear of persecution if he were to return.” Id. The INS bears the burden to rebut this presumption by a preponderance of the evidence. Singh v. INS, 94 F.3d at 1361. Eligibility for asylum may also be based on past persecution alone. Lopez-Galarza v. INS, 99 F.3d at 959.

In the instant case, Giovanni presented credible testimony of his genuine fear.³³ He testified that he is afraid of further violence at the hands of the police. “I don’t want to go back ... to being treated the way I used to be treated ... I don’t want to have to be raped again ... and I think that I might be killed. I don’t want to go through the same thing.” PER, Tab 3 at 46.

In addition, the evidence compels the conclusion that there is an objectively “reasonable probability” that if Geovanni is forced to return to Mexico, he will be at a high risk of further persecution. Geovanni is readily identifiable as an effeminate gay

³²(...continued)
C.F.R. § 208.16(b)(2); Cardoza-Fonseca, 480 U.S. at 429.

³³Although the Board erroneously rejected Giovanni’s claim on other grounds, the Board did not doubt the sincerity of his fear of being forced to return to Mexico. See PER, Tab 5at 6.

man. There is no evidence that violence against gay men in general or against effeminate gay men in particular has abated, or that the Mexican government has taken any effective steps to curb police abuse of gay men or to protect gay men from non-governmental violence. To the contrary, Professor Davies testified that the situation for gay men in Mexico has worsened since Geovanni left. PER, Tab 3 at 8. The INS did not dispute Professor Davies' testimony or produce any evidence in rebuttal. Based on the uncontroverted evidence in this record, it is "only too apparent" that Geovanni has a well-founded fear of persecution. Cardoza-Fonseca v. INS, 480 U.S. at 431.

CONCLUSION

As an effeminate gay man, Geovanni is a member of one of the most readily identifiable and stigmatized social groups in contemporary Mexican culture. Before he fled Mexico at the age of sixteen, Geovanni was subjected to constant harassment and to repeated instances of violence, including one incident in which he was severely injured by an anti-gay mob, and two instances in which he was abducted and raped by members of the Mexican police. In every instance, the abuse Geovanni encountered was expressly motivated by his status as an effeminate gay man. He is at risk of further violence if he is forced to return to Mexico. The evidence in this case compels the conclusion that Geovanni suffered past persecution and has a well-founded fear of

persecution on account of his sexual orientation. For the reasons set forth above, the decision of the Board should be reversed and this matter remanded to it with instructions to enter a new and different order granting Petitioner's application for asylum and withholding of deportation.

DATED: August 31, 1998

Respectfully submitted,

ACLU Foundation of Southern California
Lambda Legal Defense and Education
Fund, Inc.
National Center for Lesbian Rights
International Gay and Lesbian Human
Rights Commission

By _____
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STATEMENT OF RELATED CASES

Counsel for *Amici* are not aware of any other related cases pending before this court.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(e)(4), Counsel for *Amici* certify that the Brief of *Amici Curiae* is proportionately spaced, using Times New Roman typeface, size 14 point size, contains 10343 words, and has an average of 246 words per page.

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PROOF OF SERVICE BY MAIL

I, KAREN MIYAHARA, declare:

I am a resident of the County of Los Angeles, California; that I am over the age of eighteen (18) years of age and not a party to the within-entitled cause of action; that I am employed in the County of Los Angeles, California; and that my business address is 1616 Beverly Boulevard, Los Angeles, California 90026.

On January 25, 2001, I served a copy of the attached document(s) described as BRIEF OF *AMICI CURIAE* on the parties of record in said cause by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

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I am readily familiar with the office's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct. Executed on January 25, 2001, at Los Angeles, California.

KAREN MIYAHARA