

No. 19-71265

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOCELYN FERNANDEZ ALVARADO,

Petitioner,

v.

WILLIAM BARR,

Respondent.

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

**BRIEF OF *AMICUS CURIAE* IMMIGRATION EQUALITY IN SUPPORT
OF PETITIONER AND IN SUPPORT OF REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(a)(4)(A) of the Federal Rules of Appellate Procedure, *amicus curiae* Immigration Equality makes the following disclosures:

- 1) For non-governmental corporate parties please list all parent corporations: None
- 2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None

September 9, 2020

Respectfully submitted,

/s/ Argie L. Mina

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INTEREST OF AMICUS CURIAE¹

Immigration Equality is a leading national nonprofit organization providing free legal services and advocacy for indigent lesbian, gay, bisexual, transgender, queer (“LGBTQ”) and HIV-positive immigrants. Through its in-house attorneys and nationwide network of pro bono partners, Immigration Equality presently represents approximately 650 LGBTQ and HIV-positive individuals in affirmative and defensive asylum, withholding of removal and Convention Against Torture proceedings, as well as related applications and claims. Clients in Immigration Equality’s pro bono program are generally successful in obtaining immigration relief, winning their cases approximately ninety-nine percent of the time. Most pertinent here, during its twenty-five history, Immigration Equality has represented at least 110 LGBTQ and HIV-positive clients from El Salvador.

In addition to providing representation to LGBTQ and HIV-positive asylum seekers, Immigration Equality offers assistance, support and training to other attorneys, publishes a comprehensive manual on the preparation of asylum claims related to sexual orientation and gender identity, and provides training on the

¹ Counsel for the parties have not authored this brief. The parties and counsel for the parties have not contributed money intended to fund preparing or submitting the brief. No person other than the amicus curiae contributed money intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

adjudication of LGBTQ asylum cases to Asylum Officers within the Department of Homeland Security. For these reasons, Immigration Equality has an urgent and direct interest in the outcome of this case. Immigration Equality also seeks to offer its unique perspective—as an LGBTQ immigrants’ advocacy organization—on the persecution of lesbians. Immigration Equality believes its experience in this arena will help the Court in considering this case.

SUMMARY OF THE ARGUMENT

Amicus submits this brief to assist the Court in evaluating country conditions related to the persecution of lesbian women in El Salvador and the detrimental impact of suppressing one’s sexual orientation in an attempt to avoid further persecution. Jocelyn Fernandez Alvarado is a lesbian from El Salvador. Lesbian women are physically and sexually abused by police officers, military soldiers, gang members, and family members. For most of her life, Ms. Fernandez Alvarado affirmatively hid her sexual orientation. Once her sexual orientation was revealed due to her relationship with another woman, Ms. Fernandez Alvarado was stalked, ridiculed, beaten, insulted, and threatened for being a lesbian.

There is a pattern and practice of persecuting lesbians in El Salvador. Because homophobia is deeply rooted in Salvadoran society and prevalent throughout the country, lesbians suffer severe beatings, sexual abuse, rape, and brutal, hate-induced murders with the main perpetrators being Salvadoran police

officers, military soldiers, gang members and family members. Lesbian women are targeted for sexual violence, often suffering rape at the hands of police officers and family members who believe lesbians must be “corrected” or “punished.”

Not only do Salvadoran officials perpetrate violence against lesbians, but they also are unwilling and unable to control violence committed by private actors. Oftentimes, lesbian women who report crimes to law enforcement are ridiculed, ignored, discouraged from filing reports, and subjected to further violence—including rape—by the officers from whom they seek protection. Further, although El Salvador has passed anti-discrimination laws, the government has failed to enforce those hollow laws, which have resulted in few, if any, convictions.

Ms. Fernandez Alvarado cannot safely return to El Salvador, especially now that she has been outed. Given the dangerous country conditions for Salvadoran lesbians, unless Ms. Fernandez Alvarado can successfully suppress and hide her sexual orientation she will very likely suffer further persecution on account of her sexual orientation. As this Court has recognized, sexual orientation is an immutable characteristic that one should not be forced to hide nor change. Forcing Ms. Fernandez Alvarado to conceal her sexual orientation to survive is, itself, a form of persecution. Both legal precedent and social science confirm that concealing one’s sexual orientation is psychologically harmful and morally and legally wrong. Thus, sending Ms. Fernandez Alvarado back to El Salvador and

forcing her to suppress her sexual orientation in an effort to avoid persecution would be refoulement.

This Court should grant Ms. Fernandez Alvarado's petition, and the decisions below should be reversed and remanded.

ARGUMENT

I. THERE IS A PATTERN AND PRACTICE OF PERSECUTING LESBIAN WOMEN IN EL SALVADOR

El Salvador is extremely dangerous for lesbian women. For decades, countless reports from news outlets, governmental organizations, and human rights groups have documented the routine, savage violence against lesbians. Recently, these atrocities have only increased. The rate of homicides against Salvadoran LGBTQ individuals increased by 467% between 2003 and 2009.² From 1993 to 2017, over 600 LGBTQ people were murdered in El Salvador, and the main perpetrators have been police officers, military soldiers, and gang members.³

² See ALIANZA POR LA DIVERSIDAD SEXUAL LGBT, *Sistematización de Hechos de agresión a la comunidad de Lesbianas, Gays, Bisexuales y Trans de El Salvador (Acts of Systematization of Aggression to the Lesbian, Gay, Bisexual, and Transgender Community of El Salvador)*, AMATE 14 (2009), <http://www.amate.org.sv/doc/Sistematizaci%F3n%20hechos%20de%20agresi%F3n%20LGBTdoc%20final.pdf>.

³ GEORGETOWN LAW HUMAN RIGHTS INSTITUTE, *Uniformed Injustice: State Violence Against LGBT People in El Salvador*, 65 (April 21, 2017), <https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2017/07/2017-HRI-Report-Uniformed-Injustice.pdf>.

Between December 2014 and March 2017 alone, there were at least 109 LGBTQ murders recorded in El Salvador; only 12 of which went to trial, and none of which resulted in a conviction.⁴ The most recent State Department Country Report of Human Rights Practices for El Salvador details egregious abuses against LGBTQ people, including security force violence against LGBTQ individuals and several brutal murders, namely:

On October 27, Anahy Rivas, a 27-year-old transwoman, was killed after being assaulted and dragged behind a car. Jade Diaz, a transwoman who disappeared on November 6, was assaulted prior to her killing. Her body was found submerged in a river. On November 16, Manuel Pineda, known as Victoria, was beaten to death and her body left naked in the street in Francisco Menendez, Ahuachapan Department.⁵

In 2014, former human rights ombudsman David Morales and former U.N. resident coordinator for El Salvador, Roberto Valent denounced a string of killings

⁴ Oscar Lopez, *Pressure Mounts for El Salvador to Investigate Wave of LGBT Killings*, REUTERS (Nov. 21, 2019), <https://www.reuters.com/article/us-el-salvador-lgbt-murder-trfn/pressure-mounts-for-el-salvador-to-investigate-wave-of-lgbt-killings-idUSKBN1XW01G>.

⁵ U.S. Dep't of State, *El Salvador 2019 Human Rights Report* at 22–23, <https://www.state.gov/wp-content/uploads/2020/02/EL-SALVADOR-2019-HUMAN-RIGHTS-REPORT.pdf>.

of LGBTQ people in the country, noting a 400% increase in hate crimes in the previous decade and highlighting the evidence of torture of LGBTQ people.⁶

Salvadoran lesbians live in constant fear because they are targeted for abuse, intimidation, and violence based on their sexual orientation.⁷ Murders of lesbian women often reveal hate and dehumanization motivating these crimes, which include torture, dismemberment, stab wounds, and gunshots.⁸

Salvadoran lesbians also are often targets of sexual violence. “Sexual harassment and abuse is used as a tool to force lesbian and bisexual women to ‘be cured’ or as ‘conversion therapy,’ which in most cases comes as ‘corrective rape. . . .’”⁹ Lesbian women are “correctively raped” by their own fathers, uncles, and cousins.¹⁰

⁶ HUMAN RIGHTS FIRST, *Bias-Motivated Violence Against LGBT People in El Salvador*, Issue Brief, 2–3, https://www.humanrightsfirst.org/sites/default/files/El-Salvador-Brief-ENG_0.pdf (last visited Sept. 9, 2020).

⁷ Uniformed Injustice, *supra* note 3, at 29.

⁸ *Id.*

⁹ ESMULES (Espacio de Mujeres Lesbianas Salvadoreñas por la Diversidad), *Human Rights Situation for Lesbian, Bisexual and Trans women in El Salvador*, 5 (Feb. 9, 2018), https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/SLV/INT_CPR_CSS_SLV_30261_E.pdf.

¹⁰ *Id.* at 5.

Lesbian women are particularly vulnerable to powerful gangs who control entire city neighborhoods.¹¹ Gang members target lesbian women on account of their sexual orientation and beat them so severely that they require medical attention.¹² At hospitals and healthcare facilities where lesbian women seek help, they are mistreated, discriminated against, and denied service because of their sexual orientation.¹³ Even in health facilities devoted to women, doctors and nurses have described lesbians as abnormal and have blamed them for their illnesses.¹⁴ This widespread culture of discrimination against LGBTQ individuals results in violence, isolation, and rejection imposed upon lesbian women, perpetuated by both public and private actors.¹⁵

¹¹ Anastasia Moloney, *'Terrorized at home', Central America's LGBT people to flee for their lives: report*, REUTERS, (Nov. 27, 2017), <https://www.reuters.com/article/us-latam-lgbt-rights/terrorized-at-home-central-americas-lgbt-people-to-flee-for-their-lives-report-idUSKBN1DR28O>.

¹² ASOCIACIÓN SALVADOREÑA DE DERECHOS HUMANOS "ENTRE AMIGOS" ET AL., *The Violation of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in El Salvador*, 11 (Oct. 2010), <https://outrightinternational.org/sites/default/files/439-1.pdf>.

¹³ *Uniformed Injustice*, *supra* note 3, at 30.

¹⁴ *Entre Amigos*, *supra* note 12, at 7.

¹⁵ *See, e.g.*, Alexandra Bolles, *"Solidarity & Actions": Exclusive Interview With Young Lesbian Activists In El Salvador Part 1*, GLAAD (Aug. 17, 2012, 12:49 PM), <http://www.glaad.org/blog/solidarity-actions-exclusive-interview-young-lesbian-activists-el-salvador-part-1>.

Consistent with these country conditions, Immigration Equality has observed from its clients the horrific nature of the abuse and violence against lesbians in El Salvador. Many of Immigration Equality's clients have suffered physical, emotional, and sexual violence because of their sexual orientation.

For example, Diana¹⁶ is a lesbian from El Salvador. Despite trying to hide her sexual orientation, her family and community perceived her as a lesbian. As a result, they beat, abused, raped, and threatened her. Growing up, her father physically abused her and called her "lesbian garbage." Later, homophobic gang members raped her at knifepoint because of her perceived sexual orientation. In another incident, a violently homophobic community member stuck a gun to her stomach and threatened to rape and kill her to see if she was a "real woman." Because of the abuse, Diana desperately tried to hide her lesbian identity by having a relationship with a man before fleeing to the U.S.

Rosibel is a lesbian from El Salvador who fled homophobic abuse. Rosibel was harassed, threatened, bullied, and beaten by family members, students, and teachers in El Salvador because of her sexual orientation. She survived an attempted rape by her uncle who wanted to teach her what it was like to "be with a man." She was afraid to report the incident to the police because she believed that

¹⁶ All client names in this brief are pseudonyms; details of each case are on file with *amicus*.

they would not help her and might harm her further because they are notoriously homophobic. Her uncle then tried to force her into prostitution to cure her of her sexual orientation. Rosibel fled to the U.S. for safety.

Yesenia was abused and mistreated in El Salvador because she is a lesbian. Her family began to suspect she was attracted to girls when she was around eleven years old. As a result, a family member sexually abused her to teach her a lesson. She was kicked out of the family house when she was thirteen, when her father discovered she had a girlfriend. He beat her with a wire and pled never to see her again. She went to a girls' shelter, but was expelled when the administrator learned she was a lesbian. She continued to experience homophobic abuse, and in one incident, she was beaten by the police who called her homophobic slurs. She later ran into one of the police officers who had abused her, and he threatened to kill Yesenia. She fled to the U.S. fearing for her life.

A. The Pattern And Practice Of Persecuting Lesbian Women In El Salvador Includes Persecution By Government Officials

As the United States government has recognized, Salvadoran government actors actively perpetuate the torture and abuse of lesbians.¹⁷ Salvadoran police

¹⁷ *E.g.*, U.S. Dep't of State, *El Salvador 2018 Human Rights Report*, 20 (2018), <https://www.state.gov/wp-content/uploads/2019/03/EL-SALVADOR-2018.pdf> (human rights abuses include “security force violence against lesbian, gay, bisexual, transgender, and intersex individuals”).

officers and military soldiers have raped, beaten, stalked, arbitrarily detained, extorted, intimidated, and threatened lesbian women.¹⁸

LGBTQ individuals are also targeted by government authorities in violent attacks and beatings. “Interviews with over 50 [LGBTQ] victims, NGO leaders and government officials revealed that violence from the police and military follow general patterns.”¹⁹ When a lesbian’s sexual orientation is readily apparent, police officers and soldiers initiate violence against them.²⁰ For others, officers and soldiers escalate routine encounters, such as identification checks, into violent ones once they learn a woman is lesbian.²¹

In one such violent attack, Alex Peña, a transgender man who police believed to be a lesbian, was beaten brutally by Salvadoran police after an LGBTQ

¹⁸ Uniformed Injustice, *supra* note 3, at 10.

¹⁹ Mary Kenah & Caitlin Anderson, *Uniformed Injustice: Police and Military Target LGBT Salvadorans*, WASHINGTON BLADE (Apr. 20, 2017), <https://www.washingtonblade.com/2017/04/20/uniformed-injustice-police-military-target-lgbt-salvadorans>.

²⁰ Uniformed Injustice, *supra* note 3, at 10.

²¹ *Id.* at 10.

Pride Parade.²² More than seven officers beat and kicked Mr. Peña unconscious.²³ While they beat him, the officers called him a lesbian, and put him in a headlock.²⁴ Mr. Peña suffered a fractured eye-socket and jaw and struggled to eat solid foods for more than a month.²⁵

Similarly, Camila Diaz, an LGBTQ asylum-seeker who was deported from the United States was detained on January 31, 2019, by three police officers who “beat [her] for forty minutes.”²⁶ She died three days later from her injuries.

Lesbian women are especially targeted for sexual violence by law enforcement and authorities.²⁷ For example, one LGBTQ individual reported being raped four times by four different soldiers, one of whom held her at gunpoint.²⁸ Lesbians are often further persecuted by those from whom they seek protection.

²² *Id.* at 32.

²³ *Id.*; Nina Lakhani, *LGBT in El Salvador: Beatings, intolerance, death*, ALJAZEERA (Aug. 12, 2015), <https://www.aljazeera.com/indepth/features/2015/08/lgbt-el-salvador-beatings-intolerance-death-150805075132892.html>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ K. Busey, *Camila Díaz Córdova murdered by police after being denied asylum*, PLANET TRANSGENDER (July 4, 2019), <https://planettransgender.com/camila-diaz-cordova-murdered-by-police-after-being-denied-asylum>.

²⁷ Uniformed Injustice, *supra* note 3, at 51.

²⁸ Kenah & Anderson, *supra* note 19.

For instance, police often force lesbian women to undress and rape them as a form of corrective or punitive pressure.²⁹

B. The El Salvador Government Is Unable and Unwilling To Control Persecution Against Lesbian Women

Salvadoran law enforcement officials are unable and unwilling to protect lesbian women from persecution. *See Abass v. Sessions*, 731 F. App'x 646, 648–49 (9th Cir. 2018), *reh'g denied* (July 5, 2018) (government officials are unwilling to protect LGBTQ individuals where “police often partake in extortions targeting gay persons and are reluctant to investigate claims of homophobic attacks.”). When Salvadoran lesbian women report violence and abuse and seek protection from law enforcement, they face significant obstacles, including further violations of their rights.³⁰ For example, Ambar Alfaro, an LGBTQ activist, reported a crime to a police officer, and the “police officer locked himself in a room with her, demanded oral sex, and, upon her refusal, proceeded to masturbate in front of her.”³¹

Police officers use coercive mechanisms to discourage lesbian women from filing complaints, and even when they file complaints, police officers refuse to

²⁹ *Entre Amigos*, *supra* note 12, at 11.

³⁰ *Uniformed Injustice*, *supra* note 3, at 57.

³¹ *Kenah & Anderson*, *supra* note 19.

accept them.³² Police officers often bribe, threaten, ridicule, and commit violence against lesbian women who report violations of their rights.³³ Perhaps not surprisingly, a majority of Salvadoran police officers polled believe that “[LGBTQ] people d[o] not have the same rights as others.”³⁴

The Salvadoran government is willfully blind to violence and other crimes against lesbian women, including murder.³⁵ Impunity is such a problem that the U.N. Human Rights Committee, in its most recent universal review of El Salvador, expressed that it is “alarmed by the high number of threats, attacks and killings, including by State agents, aimed at [LGBTQ] persons . . . as well as by the high level of impunity for such crimes.”³⁶

³² Uniformed Injustice, *supra* note 3, at 57.

³³ *Id.* at 57–58.

³⁴ AMNESTY INTERNATIONAL, *No Safe Place: Salvadorans, Guatemalans and Hondurans seeking asylum in Mexico based on their sexual orientation and/or gender identity*, 15 (November 2017), <https://www.amnesty.org/download/Documents/AMR0172582017ENGLISH.PDF>.

³⁵ *Id.*

³⁶ See UNITED NATIONS, HUMAN RIGHTS COMMITTEE, *Concluding Observations on the seventh periodic report of El Salvador*, ¶ 9 (May 9, 2018), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPP RiCAqhKb7yhsrNEHisprpIVrkwn%2B9ifTOn66tnHrMbPX2BHHsl8X8wU8 QgP6Kv90FUKEVd8cFf8mJOIhgTM%2FEAJPsikEi9Wc3hsA%2FndMl5RqK TglioZJhH>.

Ms. Fernandez Alvarado’s personal experience demonstrates the unwillingness of Salvadoran law enforcement to protect the rights of lesbian women against their persecutors. When Ms. Fernandez Alvarado attempted to report the assault, police officers “treated [her] sarcastically and told [her] she should change her sexual orientation if she wanted to live.” (BIA at 1). They “smiled, became sarcastic, and stated that she needed to change her sexual orientation because it was ‘a waste for the youth because she is a woman that is wasted’” (IJ at 3), a statement that the IJ rightfully acknowledged was “abhorrent and unacceptable.” (IJ at 12). Law enforcement officials were more interested in denouncing Ms. Fernandez Alvarado’s lesbian identity than protecting her from harm.

The Agency erroneously faults Ms. Fernandez Alvarado for “ma[king] only one attempt to report her alleged persecutor to the police,” failing to credit the fact that she *did* report the attack to the police, and the police refused to help her, instead ridiculing her because she is a lesbian (BIA at 2). Reporting persecution to government authorities “is not essential to demonstrating that the government is unable or unwilling to protect [a petitioner] from private actors.” *Abass v. Sessions*, 731 F. App’x at 648 (9th Cir. 2018). There is no “reporting requirement” for an asylum applicant to be able to demonstrate government unwillingness or inability to protect. *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1069–72 (9th Cir. 2017)

(citations omitted). There is certainly no requirement that an applicant must report an incident *multiple* times to the police. Additionally, there are other ways in which an applicant may also establish government unwillingness or inability to protect lesbian women, such as “describing [p]rior interactions with authorities,” “showing that others have made reports of similar incidents to no avail,” and “convincingly establish[ing] that [reporting] would have been futile or [would] have subjected [the applicant] to further abuse.” *See id.* at 1066–67.

The Agency also erroneously relies on the fact that the Salvadoran government has passed laws that prohibit discrimination against the LGBTQ community. As this Court has noted, “it is well recognized that a country’s laws are not always reflective of actual country conditions. It is not unusual that a country’s ‘*de jure*’ commitments to [LGBTQ] protection do not align with the *de facto* reality of whether the State is able and willing to provide protection.” *Bringas-Rodriguez*, 850 F.3d at 1072. This is the case in El Salvador, where “many prosecutors and others in the justice sector are extremely homophobic and resistant to applying the law.”³⁷ Indeed, as the most recent U.N. Human Rights Committee has revealed, El Salvador’s laws against LGBTQ discrimination have never been enforced and have not been applied to any cases.³⁸

³⁷ Human Rights First, *supra* note 6, at 4.

³⁸ *See* U.N. Human Rights Committee (2018), *supra* note 36, ¶ 9.

C. The Pattern And Practice Of Persecuting Lesbian Women In El Salvador Is Widespread

There is nowhere safe for Ms. Fernandez Alvarado to relocate within El Salvador, especially now that she has been outed as a lesbian. As the country conditions demonstrate, violence and persecution against lesbians is not limited to regions of El Salvador; it is widespread. There is nothing to suggest that areas of El Salvador are more hospitable to lesbians. *See Abass v. Sessions*, 731 F. App'x at 649 (noting inability to relocate based on “pervasively homophobic attitudes that often manifest in violence toward gay individuals”).

The Agency conceded as much when it correctly recognized the “extensive background evidence regarding the prevalence of crimes against women and lesbians in El Salvador” and that “homophobia is deeply rooted in Salvadoran society and remain [sic] prevalent *throughout the country*.” (BIA at 3) (emphasis added).

On appeal, the Agency failed to address Ms. Fernandez Alvarado’s inability to relocate within El Salvador. The IJ incorrectly held that Ms. Fernandez Alvarado could safely relocate because Roberto and Catherine have left Soyapango. (IJ at 9). But this ignores Ms. Fernandez Alvarado’s identity as a lesbian woman and the country conditions demonstrating severe persecution faced by lesbian women in El Salvador.

There is a well-documented pattern and practice of persecuting lesbian women in El Salvador. *See Bromfield v. Mukasey*, 543 F.3d 1071, 1076–77 (9th Cir. 2008) (“The Country Report does not describe random violence. Rather, it makes clear that homosexuals are the victims of targeted violence on account of their sexual orientation.”). Indeed, the Agency acknowledged the prevalence of deeply rooted homophobia throughout El Salvador that has resulted in widespread discrimination, crimes, and homicides against lesbian women within the country. (BIA at 3). As the Agency rightfully noted, “[t]he record also details the victimization of [LGBTQ] individuals in crimes, including homicides, motivated by prejudice against [LGBTQ] individuals and against women.” (BIA at 3).

El Salvador country conditions combined with the Agency’s findings that Ms. Fernandez Alvarado is a member of the particular social group of lesbians in El Salvador, that she “testified credibly in all material aspects,” and that she genuinely feared for her life establish she has a well-founded fear of persecution. (IJ at 4, 7–8). Additionally, as a lesbian native of El Salvador, she risks persecution, including death, if forced to return.

The Agency committed reversible error in denying Ms. Fernandez Alvarado asylum and withholding of removal based on El Salvador’s pattern and practice of widespread, severe homophobic violence and abuse. *See* 8 C.F.R. § 1208.13(b) (“The applicant may qualify as a refugee . . . because [she] has a well-founded fear

of future persecution”); 8 C.F.R. § 1208.13(b)(2)(iii) (“[T]he asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if: The applicant establishes that there is a pattern or practice in his or her country of nationality. . . .”); *Halim v. Holder*, 590 F.3d 971, 976 (9th Cir. 2009) (“In the absence of past persecution, an applicant may still be eligible for asylum based on a well-founded fear of future persecution.”); *Rusak v. Holder*, 734 F.3d 894, 896 (9th Cir. 2013) (“[An applicant] is not required to demonstrate that she individually suffered persecution if she can establish a ‘pattern or practice . . . of persecution of groups of persons similarly situated’ and that she is a member of the group ‘such that [her] fear of persecution upon return is reasonable.’”); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1184 (9th Cir. 2003) (“A well-founded fear does not require certainty of persecution or even a probability of persecution.”); *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (“[E]ven a ten percent chance of persecution may establish a well-founded fear.”); *see also* 8 C.F.R. § 1208.16(c)(3)(iii) (torture may be established through a showing of “[e]vidence of gross, flagrant or mass violations of human rights”); 8 C.F.R. § 1208.16(b)(2) (an applicant for withholding is not required “to provide evidence that [she] would be singled out individually for [] persecution” if there is a “pattern or practice of persecution” of a group of similarly situation persons on account of membership in a particular

social group); *Gomez-Sanchez v. Sessions*, 892 F.3d 985, 990 (9th Cir. 2018) (“The grant of withholding of removal is mandatory if an individual proves that his ‘life or freedom would be threatened in [the] country [to which he or she would be removed] because of [his or her] race, religion, nationality, membership in a particular social group, or political opinion.’”) (citations omitted).

Further, country conditions documentation alone establishes that it is more likely than not that a lesbian faces torture or other egregious harm in El Salvador. *Cf.* 8 C.F.R. § 1208.16(c)(2); *see also Nuru v. Gonzales*, 404 F.3d 1207, 1219 (9th Cir. 2005) (“It is well-accepted that country conditions alone can play a decisive role in granting relief under [CAT]”) (internal quotations omitted); *see also Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 894 (9th Cir. 2018) (recognizing that “[a] CAT applicant may satisfy his burden with evidence of country conditions alone”).

El Salvador’s heinous record of violence against lesbian women includes violence perpetrated by government actors and violence committed by private actors with no effective government action to prevent or punish that violence. Removing Ms. Fernandez Alvarado to El Salvador is tantamount to refoulement and a violation of the U.S.’s obligations under domestic and international law. Accordingly, the Agency decision should be reversed and remanded.

II. THE AGENCY PRESENTS MS. FERNANDEZ ALVARADO WITH AN UNCONSCIONABLE CHOICE AMOUNTING TO PERSECUTION: STAY CLOSETED OR RISK DEATH.

As a lesbian woman, the only way for Ms. Fernandez Alvarado to avoid persecution within El Salvador would be to suppress her sexual orientation and successfully hide her identity as a lesbian, which this Court has explicitly denounced. *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005) (“[T]he[] sexual identities [of homosexuals] are so fundamental to their human identities that they should not be required to change them.”) (citations omitted). Indeed, the INA does not require Ms. Fernandez Alvarado to change “‘an innate characteristic . . . so fundamental’ or to relinquish such an ‘integral part of [her] human freedom.’” *Id.* (citations omitted). This choice impermissibly imposes on Ms. Fernandez Alvarado the duty to avoid mistreatment, harm, torture, and death by concealing the very characteristic that makes her vulnerable to persecution in the first instance. The law does not impose such a duty. Further, forcing someone to suppress their sexual orientation is itself persecution.

A. The Law Does Not Require An Applicant To Suppress An Immutable Characteristic

Sexual orientation is an immutable characteristic, the free and unhindered expression of which the law protects. *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1095 (9th Cir. 2000) *overruled on other grounds by Thomas v. Gonzalez*, 409 F.3d 1177 (9th Cir. 2005). In the proceedings below, the Agency denied relief

based on an assumption that Ms. Fernandez Alvarado can avoid future persecution by hiding her sexual orientation. (IJ at 10). Even assuming Ms. Fernandez Alvarado could successfully hide her identity as a lesbian, by imposing on Ms. Fernandez Alvarado an obligation to disavow her sexual orientation to survive (an impossible task), the Agency reduces that identity to something less than immutable—a characteristic over which an individual can exert control and one which she must conceal to avoid persecution.

Although the law expects an asylum or withholding applicant to undertake certain self-help measures, it does not impose any duty to change or conceal the applicant's protected characteristic that subjects a person to persecution in the first place. *See, e.g., Antipova v. U.S. Att'y Gen.*, 392 F.3d 1259, 1264-65 (11th Cir. 2004) (explaining that while the regulations provide for internal relocation to avoid persecution, they “do not require applicants who have faced persecution . . . to avoid signaling to others that they are indeed members of a particular race, or adherents of a certain religion, etc.”). To do so would violate the basic “commitment to human rights and humanitarian concerns” that defines the protections extended by asylum and withholding of removal. *See Shan Zhu Qiu v. Holder*, 611 F.3d 403, 408 (7th Cir. 2010) (“Asylum exists to protect people from having to return to a country and conceal their beliefs.”).

As members of a particular social group, LGBTQ people—like those who face persecution on account of their religion—are “either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution” by concealing their identities. *Matter of Acosta*, 19 I&N Dec. 211, 223 (B.I.A. 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439 (B.I.A. 1987). Accordingly, United States Citizenship and Immigration Services correctly takes the position that in evaluating the likelihood of future persecution to an asylum applicant, “it is not appropriate to assume that an individual who is lesbian, gay, or bisexual could ‘go back in the closet.’”³⁹ This is because, like religious practitioners, LGBTQ people are entitled to openly express the protected characteristic that subjects them to the threat of persecution. *Velasquez-Banegas v. Lynch*, 846 F.3d 258, 262 (7th Cir. 2017) (“The law does not require people to hide characteristics like religion or sexual orientation . . .”).

Indeed, in *Karouni v. Gonzales*, this Court soundly rejected the premise that an adjudicator may deny asylum based on the expectation that the applicant avoid

³⁹ REFUGEE, ASYLUM, AND INT’L OPERATIONS DIRECTORATE, U.S. CITIZENSHIP AND IMMIGR. SERVS., U.S. Dep’t of Homeland Servs., *Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims* 26 (Dec. 28, 2011) [hereinafter USCIS LGBTI Guidance], <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf>.

future persecution by concealing her sexual orientation. 399 F.3d at 1173. This Court described the false dichotomy between hiding one’s sexual orientation and living openly but experiencing persecution as a “Hobson’s choice” in which “neither option is acceptable.” *Id.* This is so, as this Court explained, because to require an asylum applicant to conceal her sexual orientation would be to deny her a basic “human freedom” and force her to “change a fundamental aspect of his human identity.” *Id.* This Court concluded that the Act simply does not require an applicant to trade a basic piece of her humanity—her sexual orientation and all that attends it—for a measure of speculative safety in her country of origin. *Id.* The logic of these cases applies with equal force here. Ms. Fernandez Alvarado cannot be required to go back into the closet to avoid homosexual-based persecution.

B. Forcing An Applicant To Suppress Their Sexual Orientation Is Persecution

Moreover, forcing Ms. Fernandez Alvarado to live a closeted life in order to avoid torture, abuse, and murder is a form of persecution. The compulsory disavowal, abandonment, or concealment of a protected characteristic effectively overcomes that characteristic and inevitably occasions suffering. *See In re Kasinga*, 21 I&N Dec. 357, 365 (B.I.A. 1996) (defining persecution to include “the infliction of harm or suffering . . . to overcome a characteristic of the victim”). Therefore, government action that compels the applicant to conceal her sexual orientation constitutes persecution. *See Karouni*, 399 F.3d at 1173 (holding that

forcing a gay man to “liv[e] a life of celibacy . . . is [un]acceptable”); *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997) (holding that coercive measures like involuntary psychiatric treatment to “cure” a lesbian of her sexual orientation may constitute persecution); *see also Hernandez-Montiel v. INS*, 225 F.3d at 1093-95; *see also* USCIS LGBTI Guidance, at 21 (“Being compelled to abandon or conceal one’s sexual orientation . . . may amount to persecution.”).

In analogous contexts, courts have held that having to hide one’s religion to avoid retributive harm is a form of persecution. *See Zhang v. Ashcroft*, 388 F.3d 713, 719 (9th Cir. 2004) (“[T]o require Zhang to practice his beliefs in secret is contrary to our basic principles of religious freedom and the protection of religious refugees.”); *Kazemzadeh v. United States Att’y Gen.*, 577 F.3d 1341, 1353–54 (11th Cir. 2009) (remanding asylum claim because BIA and IJ did not consider applicant’s testimony that he would have to practice Christianity underground); *accord id.* at 1356 (Marcus, J., specially concurring) (requiring an asylum petitioner to “abandon his faith or practice in secret . . . amounts to religious persecution under our asylum laws.”); *Woldemichael v. Ashcroft*, 448 F.3d 1000, 1003 (8th Cir. 2006) (stating members of an unpopular faith are persecuted if they “are prevented from practicing their religion or deprived of their freedom.”).

In *Fatin v. INS*, the Third Circuit discussed the circumstances under which coercive government policies that are “abhorrent to [an] individual’s deepest

beliefs” may constitute persecution. 12 F.3d 1233, 1241–42 (3d Cir. 1993). The court concluded that a government policy compelling an individual with sincerely held religious beliefs to renounce them “could constitute torture or persecution.” *Id.* at 1242 (internal quotation marks omitted). Since the Third Circuit’s opinion in *Fatin*, “[e]very circuit court to consider the question has held that being forced to practice one’s religion underground constitutes persecution.” *Shi v. U.S. Att’y Gen.*, 665 F. App’x. 161, 166 (3d Cir. Nov. 17, 2016) (citing cases); *see also Woldemichael*, 448 F.3d at 1003 (acknowledging that persecution includes where “persons are prevented from practicing their religion or deprived of their freedom”).

Similarly, forcing someone to suppress their sexual orientation is a form of persecution. As the Agency correctly noted, “homophobia is deeply rooted in Salvadoran society and remain [sic] prevalent throughout the country.” (BIA at 3). Lesbian women in El Salvador expressed that lesbophobia causes invisibility and feeling of shame, and “the fact of silencing their sexual orientation, of hiding, of lying, is a form of violence, psychological violence.”⁴⁰ Due to this severe psychological violence, there is an “epidemic of depression and anxiety that

⁴⁰ ESMULES, *supra* note 9, at 4–5.

lesbian and bisexual women are facing in silence, alone.”⁴¹ Lesbian women have reported how their authenticity as a human being has been affected, living with the impossibility of acting with complete freedom of expression in different spaces.⁴² For many Salvadoran lesbians, this psychological violence has led to suicide.⁴³

Scientific studies also support the fact that forcing someone to remain closeted is a form of persecution. In addition to the emotional and physical distress experienced by asylum claimants, “[p]sychological issues of particular significance to lesbian, gay and bisexual claimants include: a reluctance to reveal group membership as the basis of a claim, *the experience of passing or concealment strategies*, the impact of shame and depression on memory, common experience of sexual assault, and sexualization of the identity narrative in the legal process.”⁴⁴ Further, as a study published by the Yale School of Medicine reported, “[t]he minority stress of identity concealment may contribute to subjective feelings of social isolation, while also creating an objective barrier to meeting other LGBTQ

⁴¹ *Id.* at 5.

⁴² *Id.* at 7.

⁴³ *Id.* at 5.

⁴⁴ Laurie Berg & Jenni Millbank, *Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants*, 22 J. REFUGEE STUDIES 195, 198 (2009), <https://academic.oup.com/jrs/article-abstract/22/2/195/1560647?redirectedFrom=fulltext> (emphasis added).

people.”⁴⁵ Further, “[a]dditional research has found that social connection to LGBTQ community in particular can attenuate the relationship between exposure to minority stress and mental health morbidity. This may be because LGBTQ community can provide access to a non-stigmatizing environment, improved self-esteem through comparisons to other LGBTQ individuals, as well as social and material support.”⁴⁶

Here, the Agency essentially concluded that Ms. Fernandez Alvarado was not worthy of any relief because she “is a young, seemingly healthy individual with prior work experience who was able to maintain employment in El Salvador.” (IJ at 10). But this ignores the fact that Ms. Fernandez Alvarado had to suppress her sexual orientation in order to avoid harm. The Agency’s opinion that she can return safely to El Salvador is based on the mistaken assumption that she can be required to keep her sexual orientation a secret in order to avoid future persecution. Even assuming that she could avoid homophobic *violence* by concealing her sexual orientation (and we do not concede that she can), she could not thereby escape

⁴⁵ Samara D. Fox, et al., *Minority stress, social integration, and the mental health needs of LGBTQ asylum seekers in North America*, 246 *Social Science & Medicine* 112727, 6–7, SCIENCE DIRECT (2020), <https://www.sciencedirect.com/science/article/abs/pii/S0277953619307221?via%3Dihub>.

⁴⁶ *Id.* at 2 (citations omitted).

persecution. To the contrary, Ms. Fernandez Alvarado’s concealment of her sexual orientation would itself constitute persecution. Therefore, on this additional ground, the Agency erred in finding that Ms. Fernandez Alvarado would not suffer persecution if removed to El Salvador.

Consistent with these country conditions, many of Immigration Equality’s lesbian clients have endured horrific mistreatment and abuse, including assaults, beatings, sexual abuse, and rape, on account of their sexual orientation—and many clients have been subject to sexual violence as an attempt to “cure” their sexual orientation. Immigration Equality’s clients have suffered violence and abuse at home, in public, and at school, from police, family members, peers, teachers, and gang members. Others fear such violence and abuse and believe if they return to El Salvador, it is only a matter of time before they too are beaten, raped, or killed. For lesbian women in El Salvador, there is no safe place to relocate.

As Immigration Equality has observed from serving at least 110 LGBTQ individuals from El Salvador, lesbian women grow up in societies where their families and communities tell them their very existence is wrong, unnatural, and deserving of punishment. The Agency’s decision effectively ignores the violence and abuse lesbian women in El Salvador have suffered, conveying to them that they are not worthy of protection and will not be validated by the legal system. This is a devastating message to send to someone who is a target of violence,

abuse, and hate simply because they exist, particularly in El Salvador, where they are subjected to being raped as a form of “correction.” Many, if not most, of Immigration Equality’s LGBTQ clients display signs of profound emotional trauma. Some clients display suicidal ideation. Others would rather die than be returned to a country where they cannot live safely as their authentic selves. Forcing Ms. Fernandez Alvarado to choose between two types of persecution—living as her true self and risking violence and abuse or suppressing her sexual orientation and living with the attendant mental anguish—is unconscionable, immoral, and unlawful.

CONCLUSION

For all the reasons stated above, Ms. Fernandez Alvarado’s petition should be granted, and the decisions below should be reversed and remanded.

September 9, 2020

Respectfully submitted,

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September 9, 2020

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