UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 04-72975
Agency No. 070-217-803

SAUL GREGORIO MARTINEZ,
Petitioner,

v.

ERIC H. HOLDER, JR., U.S. Attorney General,

Respondent.

On Petition for Review of Board of Immigration Appeals Order

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER'S REQUEST FOR PANEL REHEARING OR HEARING EN BANC

Victoria F. Neilson (application for admission pending)
Legal Director
Immigration Equality
40 Exchange Place, Suite 1705
New York, NY 10005
(212) 714-2904 x 25

Shannon P. Minter
Legal Director
National Center for Lesbian Rights
870 Market Street, Suite 370
San Francisco, CA 94102
(415) 392-6257

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STATEMENT OF INTEREST AND AUTHORITY TO FILE

Immigration Equality is a national organization that works to end discrimination in U.S. immigration law, to reduce the negative impact of that law on the lives of lesbian, gay, bisexual, transgender (LGBT) and HIV-positive people, and to help obtain asylum for those persecuted in their home country based on their sexual orientation, transgender identity or HIV-status. Immigration Equality also runs a pro bono asylum program and provides technical assistance and advice to hundreds of attorneys nation-wide on sexual orientation, transgender and HIV-based asylum matters. Immigration Equality has provided trainings to asylum officers on asylum cases based on sexual minority and HIV status and has authored the leading manual on preparing sexual orientation-based asylum claims.

The National Center for Lesbian Rights (NCLR) is a national legal organization committed to advancing the civil and human rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. In 1994, NCLR became the first national LGBT legal organization to establish a project dedicated to immigration issues. Since that time, NCLR's Immigration Project has made significant legal and policy gains for LGBT immigrants and has provided free legal assistance to thousands of LGBT immigrants nationwide. As part of its asylum work, NCLR has argued on behalf of numerous LGBT applicants for asylum and has published a comprehensive study on

the outcomes of lesbian asylum claims. *Amici* submit this *amicus* brief pursuant to Federal Rule of Appellate Procedure 29 and are filing a motion for leave to file herewith.

STATEMENT OF FACTS

The facts are fully set forth in the Petitioner's brief and are briefly summarized here as relevant to the specific issues addressed in this brief.

Saul Martinez fled Guatemala in 1992 after being raped and threatened by a Guatemalan Congressman, Roberto Diaz. (Administrative Record ("A.R.") 252.) Martinez could not seek protection from the Guatemalan government when a high-ranking government official had brutalized him. Moreover, although his relationship with Diaz had initially been consensual (A.R. 128), it is clear that Martinez was later subjected to violence because Diaz did not want anyone to learn that he had had a consensual relationship with a man – that is, it is clear that Diaz harmed Martinez because Martinez is gay. (A.R. 132.) Given the conditions described in the record, it would have been futile for Martinez to contact the police and tell them that he is a gay man and that a prominent, married Congressman had raped him. (A.R. 55.) It was virtually certain that the police would have done nothing to investigate, or, worse, would have abused Martinez themselves for admitting that he is gay and for attempting to tarnish the reputation of a Congressman.

Indeed, Martinez had already been targeted by airport policemen at his job at the airport on three occasions. In 1988, three airport policemen asked him questions about his sexuality, and then hit and kicked Martinez. (A.R. 124-125.) Then again, in June 1989, two policemen entered the bathroom while Martinez was there, called him "sissy," and pushed him, but when another person came into the restroom, Martinez was able to escape. (A.R. 126.) Again, in March 1990, three police officers approached Martinez at a bus stop, called him a homophobic name, pushed him to the ground and kicked him. (A.R. 126-127.)

Having experienced serious mistreatment by government officials in Guatemala, with the very real fear that the harm would only escalate, Martinez fled his country. (A.R. 136.) Knowing that he could not safely return to Guatemala, Martinez filed for asylum in the U.S.

SCOPE OF BRIEF

Without addressing the other errors identified in Petitioner's Brief for Rehearing *en banc*, this *amicus* brief will focus narrowly on two issues: (1) at the time Martinez filed for asylum in 1992 sexual orientation had not yet been established as a ground for asylum in the U.S.; and (2) Petitioner's explanation of fearing to disclose his sexual orientation to a government official when he arrived in the U.S. is consistent with psychological literature on the coming out process and

consistent with the experiences of Immigration Equality and NCLR in LGBT asylum cases.

ARGUMENT

I. AT THE TIME PETITIONER INITIALLY FILED FOR ASYLUM IN 1992, THERE WAS NO PRECEDENT ESTABLISHING SEXUAL ORIENTATION AS A BASIS FOR ASYLUM.

In 1992, when Saul Martinez filed for asylum with the assistance of a *notario*, he was terrified of returning to Guatemala because of the persecution he had faced there as a gay man. (A.R. 154-55.) As Judge Pregerson pointed out in his dissenting opinion, at the time Martinez initially filed for asylum in the United States, there had not yet been a precedential decision which recognized that sexual orientation could be a ground upon which to seek asylum. "If Martinez had filed his asylum application in 1992 alleging persecution on account of his sexual orientation, he would likely have been deported." *Martinez v. Holder*, 557 F.3d 1059, 1066 (9th Cir. 2009) (Pregerson, J., dissenting).

Fearing for his life, fearing to reveal his sexual orientation, and seeing no other option, Martinez fabricated a political opinion case. (A.R. 156, 161, 271.) He submitted this false claim and, again without counsel, testified to these false facts before an asylum officer. (A.R. 161.) When the case was referred to immigration court, Martinez finally retained counsel and learned that his true reason for fearing return to Guatemala – his homosexuality – was now legally recognized as a ground

for asylum. He then amended his application for asylum and detailed the persecution he had suffered on account of his sexual orientation. (A.R. 4.)

This brief does not seek to excuse Martinez's untruthfulness in his initial application. Rather, it explains why, given the state of the law in 1992, Martinez did not disclose his sexual orientation in his initial asylum application. The rule apparently formulated by the panel – that failure to mention one's sexual orientation in an initial asylum application is *per se* fatal to the applicant's credibility in an amended application – should not be allowed to stand.

In 1992, when Martinez filed for asylum, U.S. law was often openly hostile to gay people, both in the immigration context and elsewhere. The U.S. Supreme Court had recently determined that gay people had no constitutional right to engage in consensual same-sex relationships and that states could permissibly criminalize such behavior. In *Bowers v. Harwick*, 478 U.S. 186, 194 (1986), the nation's highest court had declared that "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." Thus, in one of the darker moments in our nation's constitutional history, the Supreme Court not only rejected any constitutional right to engage in consensual, same-sex intimate conduct, it mocked the very notion that such a right might exist.

Additionally, in the 1980s, the Ninth Circuit affirmed the denial of a marriage-based petition for a gay male couple that had obtained a Colorado marriage license. *Adams v. Howerton,* 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982). In that case, an Australian man in a long-term committed relationship with an American man applied for lawful permanent residence, claiming status as a "spouse" under the Immigration and Nationality Act. *Id.* The Immigration and Naturalization Service ("INS") rejected the application with a letter that stated, "You have failed to establish a bona fide marital relationship can exist between two faggots." Evan Wolfson and Michael F. Melcher, *Constitutional and Legal Defects in the "Defense of Marriage" Act,* 16 Quinnipiac L. Rev. 221, 239, n.54 (1996).

Within immigration law, homosexuality was a ground for exclusion under the Immigration and Nationality Act until 1990. Labeled a "psychopathic personality," gay men and lesbians who were otherwise eligible for lawful permanent residence were denied status simply because of their sexual orientation. *See Boutlieier v. INS*, 387 U.S. 118, 121 (1967); *Hill v. INS*, 714 F.2d 1470, 1477 (9th Cir. 1983); *Matter of Longstaff,* 716 F.2d 1439, 1350-51 (5th Cir. 1983); *Rosenberg v. Fleuti*, 374 U.S. 449, 451 (1963).

It was not until 1990 that any asylum seeker was given protection in the U.S. based on his sexual orientation. In 1990, the Board of Immigration Appeals

("BIA") upheld the grant of withholding of deportation to a gay Cuban man. *Matter of Toboso-Alfonso*, 20 I.&N. Dec. 819 (BIA 1990). Toboso-Alfonso suffered substantial harm at the hands of the Cuban government simply because he was gay. He had to report to a government office for a physical examination every two to three months for 13 years. *Id.* at 820. He would occasionally be detained for three to four days and was once sent to a labor camp for 60 days. *Id.* at 821.

Even with this egregious mistreatment by the Cuban government, the BIA appeared to limit its holding by noting that "the government's actions against him were not in response to specific conduct on his part (e.g., for engaging in homosexual acts); rather they resulted from his status as a homosexual." *Id.* Throughout the case, the INS vigorously opposed recognizing gay men as a particular social group under U.S. asylum law. For example, in appealing the grant of withholding, the INS argued that:

> 'socially deviated behavior, i.e. homosexual activity is not a basis for finding a social group within the contemplation of the Act' and that such a conclusion 'would be tantamount to awarding discretionary relief to those involved in behavior that is not only socially deviant in nature, but in violation of the laws or regulations of the country as well.'

Id. at 822.

Although the *Toboso-Alfonso* case was decided in 1990, the case was not declared precedential until 1994, two years after Martinez filed his initial asylum application. 1895 Op. Att'y Gen. 94 (June 19, 1994). Since asylum cases are

confidential, there would have been no way, prior to 1994, for immigration attorneys, much less unrepresented asylum applicants, to have any idea that asylum based on sexual orientation was a possibility. To date, *Toboso-Alfonso* remains the only precedential BIA decision addressing a sexual orientation based claim.

Even after *Toboso-Alfonso* was established as a precedent, INS General Counsel David Martin found it necessary to write a memorandum to all regional and district counsel (that is, immigration court trial attorneys) instructing them that "our briefs should not pursue arguments that homosexuality fails to define a particular social group because it is not an immutable characteristic. Nor should the INS argue that homosexuals are too diverse and non-cohesive a group to qualify as a particular social group." Memorandum from David A. Martin, INS General Counsel, to All Regional and District Counsel (Apr. 4, 1996) [hereinafter Martin Memo] (attached hereto as Exhibit 1). *See also Karouni v. Gonzales*, 399 F.3d 1163, 1171 (9th Cir. 2005) (citing Martin Memo, exh. 1).

The Martin Memo was issued in response to a complaint made by Congressman Barney Frank concerning the arguments INS was making against granting asylum in the first federal court case to deal with a sexual orientation based asylum claim, *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997). (*See* Martin Memo, exh. 1.) In responding by letter to Representative Frank's complaint, Martin wrote that he would be issuing guidance to trial attorneys and that "under this

guidance, arguments of the kind found on pages 22-23 of the [INS] Pitcherskaia brief [to the BIA] are not appropriate." (Martin Memo, exh. 1.) Thus, in 1996, two years after *Toboso-Alfonso* became precedent – six years after the decision was issued, and four years after Martinez initially filed for asylum – the INS was still taking the position in litigation that sexual orientation should not be grounds for asylum.

Even after the Martin Memo was issued, the INS continued to argue in *Pitcherskaia* that the harm suffered by a Russian lesbian, which included forced psychiatric "treatment," did not amount to persecution because the intent of the Russian government was to "cure" her of her lesbianism, not to punish her. *Pitcherskaia*, 118 F.3d at 645. The Ninth Circuit rejected the Board's reasoning, finding that "[h]uman rights laws cannot be sidestepped by simply couching actions that torture mentally or physically in benevolent terms such as 'curing' or 'treating' the victims." *Id.* at 648. But that decisions was not issued until 1997, five years after Martinez filed his initial application.

It is also important to note that like Martinez, Alla Pitcherskaia initially did not include a sexual orientation based claim in her application. *Id.* at 643. Her initial application claimed fear of persecution because of her political opinion, and only subsequently did she raise a sexual orientation based claim. *Id.* The Court noted "that she did not include a claim for persecution on account of her lesbianism

and her political activism for lesbian and gay rights in her original application because she did not know that it was a possible ground for an asylum claim." *Id.* at 643 n.1. In *Pitcherskaia*, the applicant's failure to disclose her sexual orientation-based claim in her initial application had no effect on the immigration court's finding that her later disclosure was credible, and this Court agreed with that assessment. *Pitcherskaia* reflects the reality that in the early 1990s, there was simply no reason to expect that an asylum seeker would know that his or her sexual orientation potentially could be a ground for asylum.

Amici work with LGBT asylum seekers on a daily basis. Even today, 15 years after *Toboso-Alfonso* was declared precedential, we hear from would-be asylum seekers every week who had no idea it was possible to seek asylum based on their sexual orientation. We have also worked with numerous asylum seekers who initially filed relatively weak asylum claims based on political opinion, religion, or other grounds before they became aware that the true reason they feared returning to their countries – their sexual orientation – could also form the basis of a claim for asylum.

In the instant case, even if Martinez had had legal counsel, it would have been unreasonable to expect him to assert a claim for asylum based on sexual orientation when that was not yet a recognized ground for asylum. Denying his

application for asylum, and determining him incredible on this basis alone was error. The holding in this case should be set aside.

II. "COMING OUT" AS GAY IS A LIFE-LONG PROCESS AND IT IS REASONABLE THAT PETITIONER WAS NOT ABLE TO DISCLOSE HIS SEXUAL ORIENTATION TO THE U.S. GOVERNMENT UNTIL HE HAD BEEN LIVING IN THE UNITED STATES FOR SEVERAL YEARS.

Amici are among the country's leading experts on sexual orientation based asylum claims. Every year, *amici* answer inquiries from attorneys, asylum seekers, and potential asylum seekers from all over the country. Both Immigration Equality and NCLR also run successful, national pro bono assistance projects for LGBT asylum seekers. We have won asylum in hundreds of cases from dozens of countries from the Americas, Africa, Asia, and Eastern Europe. It is completely consistent with the cases that *amici* have worked on that an individual who has arrived recently in the U.S. would be afraid to reveal his sexual orientation to a government official, especially where, as here, the individual has suffered harm at the hands of officials of his own government.

"Coming out" as a gay man or lesbian is often a lengthy, difficult process. For many individuals it can take years to accept themselves as gay and then to reveal that identity to others because of continuing negative social attitudes about homosexuality. *See* Jack Drescher, *The Psychology of the Closeted Individual and Coming Out,* Paradigm, Fall 2007, at 16; Gregory M. Herek, *Psychological*

Heterosexism in the United States, in Lesbian, Gay, and Bisexual Identities Over the Lifespan 321, 335-36 (Anthony R. D'Augelli and Charlotte J. Patterson, eds., 1995). The fear of revealing one's sexual orientation is naturally exacerbated for individuals who, like Martinez, have previously experienced violence and persecution on account of their sexual orientation. *See* Herek, supra, at 336-37.

The pressure to hide one's homosexuality can be particularly strong for immigrants who are dependent upon the social support provided by the other members of their national or ethnic group in the United States. *See* Miriam Potocky-Tripodi, *Best Practices for Social Work with Refugees and Immigrants* 207-08 (2002); John F. Longres and Davis G. Patterson, *Social Work Practice with Latino American Immigrants*, in Social Work Practice with Immigrants and Refugees 65, 105-07 (Pallassana R. Balgopal, ed., 2000). *Amici* have seen many similar situations where an LGBT asylum seeker who initially seeks counsel from members of his own ethnic community fails to assert a potentially valid claim based on sexual orientation because the applicant fears that revealing his sexual orientation will cause him to be rejected by his community and possibly even place him in physical danger.

In this case, Martinez's initial application was filled out by a *notario.* (A.R. 153.) It is reasonable to assume that Martinez would not have been comfortable revealing his sexual orientation to a *notario* who was active in the Guatemalan

community for fear that news of his sexual orientation would spread. Given the totality of the circumstances of this case – the state of the law when Martinez arrived; the fact that Martinez was not represented by counsel; and the difficulties faced by Martinez and other similarly situated immigrants in revealing their sexual orientation – it was error to discredit Martinez's amended application based on the content of his first application.

CONCLUSION

For the reasons set forth above, the Court should grant the Petition for Panel Rehearing and Petition for Rehearing *En Banc*.

Dated: April 24, 2009

Respectfully submitted,

/s

Victoria F. Neilson (application for admission pending)
Immigration Equality
40 Exchange Place, Suite 1705
New York, NY 10005

Shannon P. Minter
National Center for Lesbian Rights
870 Market Street, Suite 370
San Francisco, CA 94102

CERTIFICATE OF COMPLIANCE

I certify that: Pursuant to Federal Rules of Appellate Procedure 29(c) and 32(a), the attached brief is proportionally spaced, has a typeface of 14 points, and contains 2,925 words and 13 pages, exclusive of table of contents, table of authorities, and certificates of counsel, which does not exceed the applicable page-length and word-length limits.

Dated: April 24, 2009

Respectfully submitted,

/s

Shannon P. Minter

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2009, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

Helen A. Sklar Law Offices of Helen A. Sklar Main Street Law Building 2115 Main Street Santa Monica, CA 90405 hsklaw@ca.rr.com	Kari Elisabeth Hong Law Offices of Kari E. Hong 320 South West Stark Street Suite 518 Portland, OR 97204 kari@honglawfirm.com
Arthur L. Rabin Mark Christopher Walters DOJ – U.S. Department of Justice Civil Division/Office of Immigration Litigation P.O. Box 878, Benjamin Franklin Station Washington, D.C. 20044 Arthur.rabin@usdoj.gov Mark.walters@usdoj.gov	Ronald E. LeFevre Office of the District Counsel Department of Homeland Security P.O. Box 26449 San Francisco, CA 94126-6449

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

CAC-District Counsel Office of the District Counsel Department of Homeland Security 606 S. Olive Street Los Angeles, CA 90014-1551	

Dated: April 24, 2009

/s
Shannon P. Minter