IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Pro Bono Case No. 13-72682

CARLOS ALBERTO BRINGAS-RODRIGUEZ
AKA PATRICIO IRON RODRIGUEZ,
Petitioner,
vs.

LORETTA E. LYNCH, ATTORNEY GENERAL,
Respondent

ON PETITION FOR REVIEW OF A DECISION FROM THE
BOARD OF IMMIGRATION APPEALS
Agency No. 200-821-303

PETITIONER'S PETITION FOR REHEARING OR REHEARING EN BANC

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INTRODUCTION AND RULE 35 STATEMENT

This Court has repeatedly held that victims, especially child victims, of private persecution need not report their abuse to obtain asylum. But that is precisely what this case requires. Expanding on *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011), the panel imposes a heightened evidentiary burden on victims of childhood persecution—a burden few victims are able to meet. In so doing, the panel profoundly limits the ability of countless asylum seekers to obtain relief from horrific acts of persecution at the hands of private actors.

From age four, and for ten years, Carlos Rodriguez-Bringas ("Bringas") was repeatedly raped by multiple individuals because he was gay. Bringas sought asylum based on his sexual orientation. He testified credibly about his inability to seek police protection. Despite uncontested evidence showing violence against gay men in Mexico at the hands of governmental and private actors, the Agency required proof that the government would not protect children; the panel affirmed.

Judge Fletcher both from the bench at oral argument and in dissenting, stated his belief that *Castro-Martinez*, a decision he supported when issued, may have been wrongly decided. Judge Fletcher is correct.

By ignoring country reports that describe violence against gay people and instead requiring reports specifically addressing gay children, *Castro-Martinez* effectively requires abused children to report to the police—either to provide

evidence in country reports or to establish their own claims. In so doing, *Castro-Martinez* eliminates country reports as a way to show government unwillingness or inability to control private persecution. The panel doubles down on *Castro-Martinez*, eliminating the other primary avenue for proving unwillingness or inability to control by rejecting credible, uncontroverted hearsay testimony—the only evidence a child is likely to have—demonstrating that reporting would have been futile. The panel opinion combined with *Castro-Martinez* makes it virtually impossible for childhood victims of private persecution to obtain asylum.

In this regard, this case must be revisited because it conflicts with *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052 (9th Cir. 2006), *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042 (9th Cir. 2007), and *Afriyie v. Holder*, 613 F.3d 924 (9th Cir. 2010).

The panel compounded these errors by making factual findings, weighing evidence and affirming on grounds the Agency never considered. Rehearing is necessary to preserve the proper limits on judicial review and because the opinion conflicts with *Gu v. Gonzales*, 454 F.3d 1014 (9th Cir. 2006), *Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004), and *Navas v. INS*, 217 F.3d 646 (9th Cir. 2000).

This case raises questions of exceptional importance because it effectively forecloses asylum for survivors of private persecution—especially gay children, and because the continuing viability of *Castro-Martinez* has been questioned. It also conflicts with *Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Cir. 2015).

FACTUAL AND PROCEDURAL BACKGROUND

Bringas was born and raised in Tres Valles, a small town in Mexico. AR262. He knew from an early age that he was gay, and he was tormented for it. AR217. Bringas' father singled him out for physical abuse, saying "Act like a boy, you're not a woman!" and "Do things a man does." AR262.

Bringas' uncle regularly beat and raped Bringas beginning when he was just four; his cousins and a neighbor engaged in similar abuse. AR263. Bringas was raped in his uncle's home, at his own home when his mother was gone, and outside in the bushes. AR307. Bringas' abusers targeted him for being gay. Bringas' uncle said so explicitly, AR217; his other abusers only ever referred to him as "fag, fucking faggot, queer and laughed about it" during and after the abuse, AR307.

The abuse continued until Bringas was twelve, when he moved to Kansas with his mother. AR188. Five months later, Bringas returned to Mexico to live with his grandmother. AR190. Upon his return, the abuse resumed unabated and became worse, forcing Bringas to flee for good in 2004, at age fourteen. AR188.

Bringas never reported his abuse to the Mexican authorities: his abusers threatened to hurt him and his grandmother if he did, and be believed that reporting would be futile. AR191. When Bringas resisted his abusers' attempts to rape him, they beat him. AR194. Bringas testified that his gay friends from Veracruz "told

me that they got raped, they got beat up, like abuse, and they went to the police and they didn't do anything. They even laugh[ed] [in] their faces." AR200, 264.

In removal proceedings, Bringas applied for asylum, withholding of removal, and Convention Against Torture protection, stemming from his identity as a gay man. AR251-60. Bringas supported his application with testimony about his past abuse and his reasons for never seeking the aid of Mexican authorities. AR262-64. This included hearsay testimony about his abusers' homophobic comments and his gay friends' experiences with the police. AR200, 217, 307.

In addition to his testimony and sworn declaration, Bringas submitted 2009 and 2010 State Department country reports and several news articles. AR279-300, 335-61. The reports show widespread sexual exploitation of children, that rape victims rarely file complaints because police are ineffective, and that gay men are victims of violence by private and governmental actors, including police. AR284, 291-293, 295, 348, 352, 360. The articles detailed violence against LGBT people in Mexico, including a violent attack by police, and sharply increased killings of gay people despite laws legalizing same-sex marriage. AR300, 357-61.

The IJ credited Bringas' testimony and did not request corroboration. AR44-50. The IJ found that although Bringas suffered "horrendous" sexual abuse as a child, he failed to show the Mexican government was unwilling or unable to control his abusers because he never reported his abuse to the police. AR44, 46.

The IJ acknowledged that children worldwide don't report because their abusers "usually manipulate their victims in such a way as to terrify them, and prevent them from going to an adult and reporting the abuse" and that Bringas' abusers "threatened [him] and made him afraid," but found this insufficient to explain why he did not report to the police. AR46.

The IJ found the evidence showed "acts of violence, not only by individuals in Mexico, but by the police upon homosexuals," AR46, 47-49, but that there was no evidence the Mexican authorities do not "offer some type of protection against the abuse of children." AR47. The BIA affirmed, citing *Castro-Martinez*. AR4.

Bringas contracted HIV and requested remand; it was denied. AR25, 27, 45. The strain is rare and medication-resistant. Pet'r Open. Br. 15.

A divided panel denied Bringas' petition for review. Op. 26.

REASONS FOR GRANTING REHEARING

I. Rehearing is Necessary Because the Panel's Conclusion that Bringas Failed to Show Past Persecution Contradicts Circuit Law and Creates a Higher Standard for Cases Involving Persecution by a Private Actor.

The question here is not whether Bringas was abused because he was gay. It is whether the panel applied the appropriate test to determine whether the government was unable or unwilling to control Bringas' abusers. The panel's decision departs from Circuit precedent, creating an impossible standard for asylum seekers—particularly, victims of childhood persecution.

A. The Panel Imposes a *De Facto* Reporting Requirement on Child Victims of Persecution Which is Contrary to Longstanding Circuit Law and Which Warrants Reconsideration of *Castro-Martinez*.

Despite undisputed evidence of violence against gay men in Mexico—both by private actors and the police—and credible testimony concerning futile attempts by Bringas' gay friends to seek police protection, the panel found Bringas failed to prove past persecution because he could not prove that the government was unable or unwilling to protect children. Op. 11. It was not enough that Bringas provided evidence of others who were similarly situated and who reported the abuse to Mexican authorities but to no avail. It was not enough that Bringas provided country reports and news articles describing anti-gay sentiments and persecution by Mexican authorities. Rather, Bringas was required to prove that police would not have responded to "*the abuse of children*." Op. 18.

The same thing happened in *Castro-Martinez*, where relief was denied despite evidence of violence against gay men because there was no evidence that "the police would have disregarded or harmed a male child who reported being the victim of homosexual rape by another male." *Castro-Martinez*, 674 F.3d at 1081.

But imposing this burden of proof creates a heightened, practically impossible standard for victims of childhood abuse, contrary to Circuit law; and, as Judge Fletcher's dissent illustrates, warrants reconsideration of *Castro-Martinez*. Rehearing is warranted for three reasons.

First, the panel ignores that Bringas claimed persecution based on sexual orientation; not for being an abused child. The panel, as did *Castro-Martinez*, makes children a subset of asylum seekers within a particular group and imposes an additional element not required by law. Such a rule, which effectively requires victims of childhood persecution to proffer evidence of government control concerning both the persecution they claim *and* their status as children, imposes a heightened, extra-legal burden of proof on children. Under this rule, a victim who establishes private persecution on account of a protected ground as a child cannot obtain relief without also showing that his government fails to protect children.

Second, as Judge Fletcher points out, despite its assertion that reporting is not required, the panel creates a *de facto* reporting requirement for children. This Court has repeatedly recognized that victims, especially victims of childhood persecution, need not report private persecution to obtain asylum. *Afriyie*, 613 F.3d at 931; *Rahimzadeh v. Holder*, 613 F.3d 916, 921-22 (9th Cir. 2010); *Ornelas-Chavez*, 458 F.3d at 1057; *see also In re S-A-*, 22 I. & N. Dec. 1328, 1335 (BIA 2000). *Castro-Martinez* was amended on rehearing to make this unequivocally clear. 674 F.2d at 1080-81 ("We have never held that any victim, let alone a child, is obligated to report a sexual assault to the authorities, and we do not do so now.")

In cases involving private harm but no reporting, *Castro-Martinez* provided numerous avenues by which an applicant could "fill the gap" in evidence left by the failure to report, including by "establishing that private persecution of a particular sort is widespread and well-known but not controlled by the government"; "showing that others have made reports of similar incidents to no avail"; and "convincingly establish[ing] that going to the authorities would have been futile or would have subjected the individual to further abuse." 674 F.3d at 1081 (alterations omitted) (quoting *Rahimzadeh*, 613 F.3d at 921-22).

By discounting country reports that describe violence against gay people generally and instead requiring reports addressing gay children, the panel effectively requires children to report their abuse. As Judge Fletcher observes—and as the IJ found—given the nature of sexual violence against children and the inherent difficulty children have in reporting it, many children will not report these crimes for exactly the same reasons Bringas did not. Op. 41. Abusers threaten and terrorize their victims. Children, who are necessarily dependent upon adults, are less able to get information to the police—especially, if their abusers are family or neighbors. The panel ignores reality, and the record, and demands unrealistic specificity in evidence few victims, particularly, children, can supply.

Third, the panel undermines the principle recognized by this Circuit and others that asylum cases must be evaluated from the perspective of the child at the

time the persecution occurred and that relatively less serious harm can constitute persecution if inflicted upon a child. *Hernandez-Ortiz*, 496 F.3d at 1045-46; *see also Kholyavskiy v. Mukasey*, 540 F.3d 555, 579-70 (7th Cir. 2008); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006); *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004). This principle must apply to the question of whether a child could reasonably be expected to report persecution to the police. The panel violates this principle by ignoring the vulnerability of sexually abused children, particularly, those abused by family, and ignoring evidence that Bringas' abusers threatened him if he should report.

Rather than further entrench a rule that effectively requires evidence of reported child abuse, the panel should have evaluated the nature and character of Bringas' abuse and his reasons for not reporting. *See Ornelas-Chavez*, 458 F.3d at 1058 (courts should consider whether reason for failure to report was reasonable); *Afriyie*, 613 F.3d at 931 (even police who take reports may be "powerless to stop" the persecution; inability to provide protection may arise because of lack of resources or character of the persecution).

Here, again, as in *Castro-Martinez*, children are informed after-the-fact what will *not* suffice to prove past persecution. They have yet to be told what *will*. Rehearing is warranted to clarify the standards applicable to cases involving childhood persecution at the hands of private actors.

B. The Panel Exceeds the Scope of Judicial Review by Assuming the Role of Fact-Finder and Affirming on Grounds the Agency did not Rely on and, in So Doing, Extends the Reach of *Gu v. Gonzales*.

That the panel has created a *de facto* reporting requirement is made all the more apparent by its treatment of Bringas' testimony about the experiences of his friends. It is beyond dispute that this testimony counts as evidence, and that it should not have been "rejected out-of-hand." *Gu v. Gonzales*, 454 F.3d at 1021. Yet, neither the BIA nor the IJ mentioned it in their decisions. AR3-5, 43-70. The IJ ignored it and, when addressing the question of government control, held, "we certainly do not have any evidence whatsoever" that the Mexican government was unwilling or unable to protect a child, like Bringas, from abuse. AR46; Op. 34-35. Despite the panel's account, the Agency did not assess the sufficiency of this testimony; nor did it weigh its relative probative value. The Agency was required to accept as true all of Bringas' testimony. *Shoafera v. INS*, 228 F.3d 1070, 1074-75 (9th Cir. 2000). But the hearsay testimony was ignored.

Rather than address the Agency's error in ignoring this evidence—which would have required a remand for failure to consider probative evidence, *see Cole v. Holder*, 659 F.3d 762, 771-72 (9th Cir. 2011)—the panel treats Bringas' case as if it presents an entirely different question. That question, about the relative weight to give to Bringas' evidence, did not inform the Agency's decision. In making this leap, the panel commits two errors that require rehearing.

First, the panel improperly affirms on grounds not relied on by the Agency. It is a fundamental canon of administrative law that a decision upholding an Agency action must be based on the reasoning employed by the Agency itself. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *see Recinos De Leon v. Gonzales*, 400 F.3d 1185, 1189 (9th Cir. 2005) ("We may affirm the IJ only on grounds set forth in the opinion under review.") The panel was absolutely precluded from affirming the BIA's decision "by concluding that [Bringas'] testimony is too sparse when there is no suggestion of any such findings in the agency's decision." *Navas*, 217 F.3d at 658 n.16. In so doing, the panel exceeded the limits of judicial review. *Azanor*, 364 F.3d at 1021; *see also Cole*, 659 F.3d at 770; *Ornelas-Chavez*, 458 F.3d at 1056.

The injustice of the panel's error is apparent here: Bringas' application for asylum was denied for reasons made known to him for the first time in the panel's opinion. *Cf. Ren v. Holder*, 648 F.3d 1079, 1091-93 (9th Cir. 2011) ("An applicant must be given notice of the corroboration required, and an opportunity to either provide that corroboration or explain why he cannot do so.")

More fundamentally, this error led to a second problem, which has significant implications for future immigration cases: the panel impermissibly extends *Gu*, effectively eviscerating the role of hearsay evidence in immigration

proceedings. 454 F.3d at 1021. *Gu* should be read to stand for the narrow proposition that hearsay testimony "may be accorded less weight by the trier of fact when weighed against non-hearsay evidence." 454 F. 3d at 1021. While the Agency is permitted to weigh contradictory evidence, *Singh v. Holder*, 753 F.3d 826, 835-37 (9th Cir. 2014) (en banc), a reviewing court, when it does so, "contravenes the well-established law of this Circuit and usurps the role of the fact finder in immigration proceedings." *Gu*, 454 F.3d at 1024 (Pregerson, J. dissenting).

The panel extends *Gu* in two problematic says. First, it disregards the principle that evidence may be afforded less weight "*by the trier of fact*." 454 F.3d at 1021(emphasis added). The trier of fact here—the IJ—did not afford Bringas' testimony regarding government control less weight; the IJ disregarded it. AR46. The panel, nevertheless, takes to task all the ways in which Bringas' hearsay testimony is deficient, challenging its supposed lack of specificity and contemporaneity with Bringas' own experience. Op. 15-17. The panel makes these factual findings and attempts to downplay them as mere "common sense observations" to conclude that substantial evidence supports the Agency's decision. Op. 17. The panel's approach exceeds the scope of judicial review by independently weighing evidence to support findings the Agency never made.

Next, the panel reads *Gu* as allowing a reviewing court to discount hearsay evidence that is uncontroverted, unrefuted, and given in an applicant's credible testimony. Where the panel should have accepted as true Bringas' factual assertions and their reasonable inferences (including that his gay friends were his contemporaries), the panel rejects this evidence as hearsay. *Gu* applies when the trier of fact weights direct evidence more heavily than conflicting hearsay accounts; extending it to allow a reviewing court to "reject out of hand" undisputed testimony because better evidence *could* have been produced is improper.

This expansion of *Gu* has profound implications for future cases. Asylum seekers do not necessarily have access to direct evidence—beside their testimony and hearsay evidence—to corroborate their claim. *Ladha v. INS*, 215 F.3d 889, 899 (9th Cir. 2000), *overruled on other grounds by Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (en banc). That is why credible testimony *alone* can be sufficient to warrant asylum. *See id.*; *Cole*, 215 F.3d at 769-70. The panel eliminates hearsay—the only form of evidence likely to be available to a child in Bringas' position—as a way to fill the gap left by the failure or inability to report. In so doing, the panel profoundly limits future victims' ability to obtain asylum.

C. The Panel Misuses Country Reports to Disprove Whether Persecution Occurred, Impermissibly Discounts Their Evidentiary Value, and Requires Undue Specificity to Prove Past Persecution.

The panel found the State Department reports failed to make a "persuasive case that the Mexican government was unwilling or unable to protect Bringas" because they described (1) one example of government abuse based on sexual orientation in 2008, far from Bringas' hometown, and (2) gay-pride marches in Mexico and marriage equality in Mexico City. Op. 13. In relying on these excerpts, the panel contravened Circuit law in several ways.

First, again, the panel assumes the role of factfinder by assessing the "persuasiveness" of the reports, and exceeds the scope of judicial review by affirming on grounds the Agency did not rely on. This is serious legal error. *See*, *supra*, Section I.B. Despite the panel calling this a sufficiency-of-the-evidence case, the Agency did not mention the adequacy of the State Department reports nor did it cite Mexico City's civil rights laws to suggest that the government was willing or able to protect Bringas. The Agency relied on these facts solely in connection with future persecution. And in *that* context, the IJ credited the reports and news articles to find that violence against gay men both by private and governmental actors *did* exist. AR 91-92. The panel's *sua sponte* factual findings should not be permitted.

Where an asylum claim relies on personal experiences, country conditions can provide context so "the factfinder may intelligently evaluate the petitioner's credibility." *Duarte de Guinac v. INS*, 179 F.3d 1156, 1162 (9th Cir. 1999). That is not how the panel, or the Agency, used them.

Had the IJ (and not the panel) questioned the reliability of Bringas' evidence and sought corroboration, Bringas could have provided the 2003 State Department report (the last year Bringas lived in Mexico) describing horrific acts of violence against gay children, uncontrolled by the police:

> [T]he press reported that unknown persons attacked 12 gay children who congregated at Bosque de Aragon in Mexico City. One of the children was thrown from a height of 18 feet and sustained serious injuries. Local authorities said they could not intervene because the park is federal property.[1]

Second, the panel's use of generalized conditions in the 2009 and 2010 reports to diminish the value of Bringas' testimony concerning his personal experiences from 1994-2004 contravenes circuit law. *Afriyie*, 613 F.3d at 933-34 (credible individualized testimony cannot be disregarded on the basis of generalized country conditions reports). Neither the absence of a factually

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[1] 2003 U.S. State Dep't Human Rights Report for Mexico, http://www.state.gov/j/drl/rls/hrrpt/2003/27905.htm; 2000 U.S. State Dep't Human Rights Report for Mexico, http://www.state.gov/j/drl/rls/hrrpt/2000/wha/810.htm (describing violence against gay people in Veracruz, noting "that the police fail to investigate these crimes seriously"); *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1089-90 (9th Cir. 2005) (describing violence against gay people from 1997- 2000).

identical example of failure to protect nor the enactment of civil rights laws years after persecution occurred, is sufficient to prove the government would and could protect Bringas; nor can it overcome his credible contrary testimony. *See id.*

Third, the panel demands an unwarranted level of specificity from country conditions evidence to support its conclusion that the government was able to protect Bringas. Op. 34-39. Such a requirement will detrimentally impact future litigants, most especially women, children, and gay people—whose persecution often goes undocumented. Because the country conditions evidence fails to mention any instances of discrimination or abuse in Veracruz, the panel rejects any of the reasonable inferences that could be drawn from the reports. Instead, the panel assumes that the *absence* of evidence in 2009/2010 means the government *was* able to protect Bringas in 1994. That is contrary to Circuit law. *Cf. Afriyie*, 613 F.3d at 933-34 (absence of evidence that applicant is not able to seek or receive protection does show that protection is available).

Further, as Judge Fletcher notes, applicants are not required to provide evidence of hometown practices when they submit countrywide reports. *Yan Rong Zhao v. Holder*, 728 F.3d 1144, 1147 (9th Cir. 2013). Requiring hyper-geographic specificity contradicts this Circuit's recognition that country conditions evidence is general and will never be tailored to individuals, *Molina-Estrada v. INS*, 293 F.3d 1089, 1096 (9th Cir.2002), and it creates an impossible standard to meet.

The panel undermines long-standing principles governing private persecution. *Castro-Martinez* acknowledged that reporting was not required, but then made it extremely difficult to rely on country conditions evidence to fill the gap. The panel takes this already flawed result to the breaking point by requiring location-specific evidence and rejecting uncontroverted testimony explaining the futility of going to the police. The result is a situation in which survivors of private persecution—especially as children—cannot be granted asylum. The Court should revisit this result.

II. The Panel Erroneously Interprets *Castro-Martinez* as Foreclosing All Future Persecution Claims for Gay Men in Mexico.

The panel interprets *Castro-Martinez* as holding that systematic persecution does not exist against gay men in Mexico, without considering that Bringas' country conditions evidence was different. This Court has never held, nor should it hold, that country reports used in one case dictate the same result in another case.

A finding regarding future persecution is factual, based on the evidence presented by an applicant. 8 C.F.R. § 108.13(b)(2)(iii)(A); *see, e.g.*, *Lolong v. Gonzales*, 484 F.3d 1173, 1178 (9th Cir. 2007) (en banc). While courts may foreclose applicants from relief based on precedent or by statute, courts may not foreclose an individual's claim based on the record in a different case. *See, e.g.*, 8 U.S.C. § 1158 (b)(2)(A)(ii)); *Castillo-Villagra v. INS*, 972 F.2d 1017, 1029 (9th Cir. 1992).

Unlike petitioner in *Castro-Martinez*, Bringas showed persistent mistreatment by private and government actors against LGBT people. The panel ignores the differences in evidence, and the reality of conditions in Mexico. In *Avendano-Hernandez*, this Court recognized that despite "some advances in [Mexico's] treatment of homosexuals, there has actually been 'an *increase* in violence against gay, lesbian, and transgender individuals' and that 'there is continued failure to prosecute the perpetrators of homophobic hate crimes throughout Mexico.'" 800 F.3d at 1081-82; *see also Vitug v. Holder*, 723 F.3d 1056, 1066 (9th Cir. 2013). Other cases have recognized that Mexican authorities are corrupt and unable to prevent harm by private actors. *See Madrigal v. Holder*, 716 F.3d 499, 509-10 (9th Cir. 2013)*; Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1138-40 (7th Cir. 2015).

These decisions illustrate the panel's error in *assuming* based on the record in *Castro-Martinez* that Bringas could not state a fear of persecution, and the importance of ensuring that applicants receive individualized consideration of their claims. *See, e.g.*, *Colemnar v. INS*, 210 F.3d 967, 971-72 (9th Cir. 2000).

CONCLUSION

Bringas respectfully requests rehearing or rehearing en banc.

Respectfully submitted,

Dated: February 10, 2016

By: /s/ Erwin Chemerinsky
Erwin Chemerinsky
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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 40-1

I hereby certify this Petition for Rehearing or Rehearing En Banc proportionally spaced typeface, consists of 4196 words, and complies in all respects with Fed. R. App. P. 32(c)(2) and Ninth Circuit Rule 40-1. This word count does not include the Table of Contents, the Table of Authorities, this Certificate of Compliance, or the Certificate of Service.

Dated: February 10, 2016

By: /s/ Erwin Chemerinsky
Erwin Chemerinsky
Mary-Christine Sungaila
Kathryn M. Davis
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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2016, I electronically filed the forgoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. Non-participants will be served by U.S. mail.

Dated: February 10, 2016

By: /s/ Erwin Chemerinsky
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ADDENDUM

ADDENDUM TO PETIONER FOR REHEARING OR REHEARING EN BANC

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARLOS ALBERTO BRINGAS-RODRIGUEZ, AKA Patricio Iron-Rodriguez, *Petitioner*, v. LORETTA E. LYNCH, Attorney General, *Respondent.*	No. 13-72682 Agency No. A200-821-303 OPINION

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

Argued and Submitted
November 18, 2014—Pasadena, California

Filed November 19, 2015

Before: William A. Fletcher and Jay S. Bybee, Circuit Judges and Benjamin H. Settle,* District Judge.

Opinion by Judge Bybee;
Dissent by Judge W. Fletcher

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* The Honorable Benjamin H. Settle, District Judge for the U.S. District Court for the Western District of Washington, sitting by designation.

SUMMARY**

Immigration

The panel denied a petition for review of the Board of Immigration Appeals' denial of asylum, withholding of removal, and protection under the Convention Against Torture to a citizen of Mexico who sought relief based on his sexual orientation and HIV-positive status.

Relying on *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011), the panel held that substantial evidence supported the Board's determination that Bringas-Rodriguez failed to establish that the Mexican government was unwilling or unable to protect him, where he did not report the abuse he suffered to authorities, and his evidence, including hearsay testimony and country reports, was insufficient to establish that doing so would have been futile.

The panel held that Bringas-Rodriguez failed to establish a pattern or practice of persecution of gay men in Mexico. The panel also held that Bringas-Rodriguez's CAT claim failed because he did not show that he would more likely than not be tortured by or with the acquiescence of the Mexican government if he is removed to Mexico.

The panel held that the Board did not abuse its discretion in denying Bringas-Rodriguez's motion to remand based on his recent HIV diagnosis.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Dissenting, Judge W. Fletcher wrote that he has growing doubts about this court's decision in *Castro-Martinez*, but even applying *Castro-Martinez* to the facts of this case, Bringas-Rodriguez submitted evidence sufficient to show that the Mexican government was unwilling or unable to protect him from abuse.

COUNSEL

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OPINION

BYBEE, Circuit Judge:

Petitioner Carlos Bringas-Rodriguez is a citizen of Mexico and a gay man who was sexually abused by family members and a neighbor in Mexico. He challenges the BIA's decision denying his applications for asylum, withholding of removal, and Convention Against Torture (CAT) protection, and denying his motion to remand to the IJ in light of his recent HIV diagnosis. Relying on our decision in *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011), the BIA found that Bringas failed to show that the Mexican government was unwilling or unable to control those who perpetrated such acts. We have jurisdiction under 8 U.S.C. § 1252(a), and we deny the petition.

I

Petitioner, Bringas-Rodriguez (Bringas), was born and raised in Tres Valles, Veracruz, Mexico. He began to realize that he was attracted to men at age six, and by age ten he considered himself gay. He is now openly gay and is HIV-positive. As a child, he suffered physical abuse at the hands of his father, who would tell him to "Act like a boy, you're not a woman!" and to "Do things a man does." His father also abused Bringas's mother and siblings, but he says he was abused "most of all . . . because [he] was different."

Bringas was later sexually abused by his uncle, cousins, and a neighbor. His uncle began the abuse when Bringas was four and continued the abuse every two or three months until he turned twelve. When Bringas turned seven, his cousins began to abuse him on a monthly basis as well. Bringas

testified that when he turned eight, his uncle admitted to him that he was sexually abusing him because Bringas was gay. He further recalled that his abusers "never called [him] by [his] name but called [him] fag, f_____g faggot, queer and laughed about it."

Bringas first came to the United States with his mother and stepfather in 2002 when he was twelve, and he lived with them in Kansas for five months. Bringas was undocumented. He then moved back to Mexico because he was "troubled" over hiding his sexuality and history of abuse, and he wanted to live with his grandmother. Once back in Mexico, however, the abuse continued. His uncle, cousins, and a neighbor raped him in his early teens. He never reported the abuse to the police, believing such a complaint would be frivolous, and he did not tell his family until years later, fearing that his abusers would harm his mother or grandmother.

In 2004, at age fourteen, Bringas returned to the United States to live with his mother and stepfather in Kansas and "to escape [his] abusers." In August 2010, Bringas was convicted of "Contributing to the Delinquency of a Minor" in Colorado; essentially, he was drinking at his house and a friend brought over a minor. Bringas spent ninety days in jail, where he attempted suicide. DHS filed a Notice to Appear in September 2010.

In February 2012, Bringas filed an application for asylum, withholding of removal, and relief under the CAT, alleging that he was raped by his uncle, cousins, and neighbor while living in Mexico. He explained that he feared returning to Mexico because he would be persecuted for being gay and the police would ignore his complaints. The IJ denied all applications for relief. He denied Bringas's asylum claim

because it was untimely.[1] With respect to withholding, the IJ found that Bringas had suffered sexual abuse at the hands of his uncle, cousins, and neighbor, but concluded that the abuse, while "horrendous," did not constitute past persecution "on account of" a protected status. The IJ found that "perverse sexual urges" motivated the abusers, and not Bringas's sexual orientation. The IJ also observed that Bringas never reported his abuse to an adult or to the Mexican police and that there was no evidence that Mexican authorities were unwilling to offer protection.

Turning to the risk of future persecution, the IJ looked at Country Reports for Mexico for 2009 and 2010 and found that, despite a few specific accounts of persecution of homosexuals in Mexico, the country as a whole—and especially in Mexico City—has made significant advances with respect to gay people. Accordingly, Bringas could relocate to a place like Mexico City without risking possible future abuse. So, the IJ found, Bringas did not show a "more likely than not possibility of persecution on account . . . of his membership in a particular social group of male homosexuals."

[1] Bringas entered the United States in November 2004 but did not file an asylum application until April 2011, well beyond the one-year deadline. The IJ acknowledged that being an unaccompanied minor entering the country may qualify as an "exceptional circumstance" that excuses late filing, but even assuming that Bringas was an unaccompanied minor upon entering the United States, his application was still untimely because he waited years after turning eighteen to file it. Bringas had argued, however, that in this case the age of adulthood was twenty-one, not eighteen, which would make his asylum application timely because it was filed before his twenty-first birthday. But the IJ rejected this reasoning, finding no evidence to suggest that asylum officers use twenty-one and not eighteen to determine the legal disability excuse.

The IJ also denied relief under the CAT on the grounds that Bringas offered insufficient evidence that the government routinely turns a blind eye to allegations of sexual abuse of children. As a result, Bringas could not prove that "torture in the future by the government, or with the acquiescence of the government" was likely.

The BIA affirmed. It denied Bringas's asylum claim on the merits, assuming the application was timely filed. The BIA concluded that Bringas failed to establish past persecution because (1) he could not show that he was abused on account of a protected ground, and (2) he had not demonstrated that the government was unwilling or unable to control his abusers. Bringas was thus not entitled to a presumption of future persecution. The BIA also found that Bringas did not have a well-founded fear of future persecution because he failed to show a "pattern or practice" of persecution against gays in Mexico. Citing our opinion in *Castro-Martinez v. Holder*, 674 F.3d 1073, 1082 (9th Cir. 2011), the BIA explained that no "widespread brutality against homosexuals or . . . criminalization of homosexual conduct [exists] in Mexico." Additionally, the BIA discussed Mexico's improved treatment of homosexuals over the years: "Mexico has taken numerous positive steps to address the rights of homosexuals, including legalizing gay marriage in Mexico City and prosecuting human rights violations against homosexuals."

The BIA also rejected Bringas's withholding of removal and CAT claims. With respect to withholding, it noted that because Bringas "failed to satisfy the lower burden of proof required for asylum, it follows that he has also failed to satisfy the higher standard of eligibility required for withholding of removal." With respect to CAT, the BIA

found no clear error in the IJ's determination that Bringas failed to show that he will more likely than not be tortured in Mexico "by or with the acquiescence" of the Mexican government.

Finally, the BIA rejected Bringas's argument that his case be remanded to the IJ in light of Bringas's recent HIV diagnosis. Bringas's brief to the BIA explained that, since his hearing before the IJ, he had been diagnosed with HIV. He argued that "this fact is significant because it now places [him] in a more vulnerable position should he be returned to Mexico." The BIA declined to remand Bringas's case to the IJ for further consideration because Bringas had "not provided any additional country conditions evidence or specific arguments regarding how his status as an HIV positive homosexual changes the outcome of his case." He filed a timely Petition for Review of the BIA's dismissal and sought a stay pending review. We granted the stay and now deny the petition for review.[2]

II

Bringas argues that the BIA erred in denying his asylum and withholding of removal claims. "To be eligible for asylum, an alien must demonstrate that he is unable or unwilling to return to his home country because of [past] persecution or a well-founded fear of [future] persecution on account of race, religion, nationality, membership in a

[2] "We review questions of law in immigration proceedings *de novo*." *Romero-Mendoza v. Holder*, 665 F.3d 1105, 1107 (9th Cir. 2011). We review the denials of asylum, withholding of removal, and CAT relief for substantial evidence. *Garcia-Milian v. Holder*, 755 F.3d 1026, 1031 (9th Cir. 2014).

particular social group, or a political opinion." *Castro-Martinez v. Holder*, 674 F.3d 1073, 1080 (9th Cir. 2011) (citing 8 U.S.C. § 1101(a)(42)(A)). The requirements for a withholding claim are similar, except that the alien must prove a "clear probability" of persecution on account of a protected characteristic. 8 U.S.C. § 1231(b)(3)(A). If a petitioner cannot establish his eligibility for asylum, his withholding claim necessarily also fails. *Zehatye v. Gonzales*, 453 F.3d 1182, 1190 (9th Cir. 2006).

Substantial evidence supports the BIA's determinations that Bringas failed to establish past persecution or a well-founded fear of future persecution, and he is thus ineligible for asylum. *See Castro-Martinez*, 674 F.3d at 1080 (9th Cir. 2011); *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 481 (1992) (quoting 8 U.S.C. § 1105a(a)(4)) (noting that we must uphold the BIA's factual findings if "supported by reasonable, substantial, and probative evidence on the record considered as a whole").[3] Because Bringas failed to meet his burden to establish eligibility for asylum, he also fails the higher burden required to obtain withholding of removal. *Castro-Martinez*, 674 F.3d at 1082 (citing *Gomes v. Gonzales*, 429 F.3d 1264, 1266 (9th Cir. 2005)).

[3] We cannot resolve Bringas's asylum claim on untimeliness grounds because the BIA ignored this procedural defect when it "assume[d] arguendo that the respondent filed a timely asylum application." *See Abebe v. Gonzales*, 432 F.3d 1037, 1041 (9th Cir. 2005) (en banc) ("When the BIA has ignored a procedural defect and elected to consider an issue on its substantive merits, we cannot then decline to consider the issue based upon this procedural defect.").

A. Past Persecution

Asylum petitioners may produce evidence of their past persecution, which "creates a presumption of a fear of future persecution." *Hanna v. Keisler*, 506 F.3d 933, 937 (9th Cir. 2007); *see* 8 C.F.R. § 1208.13(b)(1). To establish past persecution, Bringas must show (1) that he has suffered harm "on the basis of [a] protected ground[]" and (2) that the harm was "inflicted either by the government or by individuals or groups the government is unable or unwilling to control." *Castro-Martinez*, 674 F.3d at 1080. The BIA concluded that Bringas failed to satisfy both prongs. We will only address the second of these prongs. Even if we thought that the record compelled the conclusion that Bringas was abused on account of his sexual orientation, Bringas provided insufficient evidence that the government was unwilling or unable to prevent that abuse.

Because the sexual abuse Bringas suffered was not inflicted by government actors, he must "show that the government was unable or unwilling to control his attackers." *Id.* at 1078. "In determining whether the government was unable or unwilling to control violence committed by private parties, the BIA may consider whether the victim reported the attacks to the police." *Id.* at 1080 (citing *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004)); *see id.* ("[W]here the persecutor is not a state actor, we consider whether an applicant reported the incident to police, because in such cases a report of this nature may show governmental inability to control the actors.") (quoting *Rahimzadeh v. Holder*, 613 F.3d 916, 921 (9th Cir. 2010) (internal quotation marks omitted)). Nevertheless, petitioners are not required to report persecution to the police in order to show that the government is unable or unwilling to control their abusers.

Id. at 1080–81 ("We have never held that any victim, let alone a child, is obligated to report a sexual assault to the authorities, and we do not do so now.").

Where a petitioner does not report the abuse to the authorities, however, there is a "gap in proof about how the government would have responded," and the petitioner bears the burden to "fill in the gaps" by showing how the government would have responded had he reported the abuse. *Id.* at 1081 (internal quotation marks and alterations omitted). It is insufficient for a petitioner to state his belief that the government would do nothing about a report of abuse. Rather, a petitioner may show, "[a]mong other avenues," that "private persecution of a particular sort is widespread and well-known but not controlled by the government or . . . that others have made reports of similar incidents to no avail." *Id.* (quoting *Rahimzadeh*, 613 F.3d at 922) (internal quotation marks omitted).

We agree with the BIA that Bringas has not met his burden to prove the government's unwillingness to respond. The BIA relied on our decision in *Castro-Martinez v. Holder*, 674 F.3d 1073, 1080–81 (9th Cir. 2011), in determining that Bringas had not met his burden here. The facts in Bringas's case are very similar to those in *Castro-Martinez*. In *Castro-Martinez*, Castro, a gay, HIV-positive Mexican man, sought asylum on account of a credible history of sexual abuse suffered because of his sexual orientation. *Id.* at 1078–79. Castro also had failed to report the abuse to Mexican officials, and the BIA ultimately concluded that he had failed to demonstrate that "Mexican authorities would have ignored the rape of a young child or that authorities were unable to provide a child protection against rape." *Id.* at 1081; *see also id.* at 1079. We denied Castro's petition for review.

Bringas attempts to distinguish *Castro-Martinez*. He argues that while Castro offered nothing more than a conclusory statement "that he believed the police would not have helped him," *id.* at 1081, Bringas "provided such gap-filling evidence" by giving a reason why he never reported his abuse to the Mexican police: He testified that "a couple" of his gay friends told him "that they got raped, they got beat up, like abuse, and they went to the police [in Veracruz, Mexico] and they didn't do anything" except "laugh [in] their faces."[4]

We agree with the dissent that *Castro-Martinez* left open the possibility that Bringas could meet his burden of proving that the government was unable or unwilling to control their abusers by "showing that others have made reports of similar incidents to no avail." *Id.* (citation and internal quotation marks omitted). But we part ways with the dissent's assertion that *Castro-Martinez* "qualifies" a "gay petitioner . . . for asylum" as a matter of course, provided that he submits "country reports documenting official persecution on account of sexual orientation" and "evidence"—unsubstantiated hearsay or otherwise—that "others have made reports of similar incidents to no avail." Dissenting Op. at 38 (quoting *Castro-Martinez*, 674 F.3d at 1081). *Castro-Martinez* sets forth no such mechanical formula for obtaining asylum, nor

[4] Bringas did not provide a clear picture of when he spoke with these friends. We know it was at some point "when [he] was living in Kansas," but he lived in Kansas twice. His uncle and cousins abused him from age four to twelve. Then, he moved to Kansas with his mother and stepfather at age twelve, but five months later, he moved back to Mexico, where the abuse continued. At age fourteen, Bringas moved back to Kansas again. Thus, Bringas would have heard his friends' accounts of their abuse in Veracruz after at least some (if not all) of Bringas's own abuse had already occurred.

does our holding there support the proposition that any evidence of other reports of similar incidents, no matter how unreliable, is sufficient to satisfy this "other avenue" of establishing that a government is unable or unwilling to prevent persecution. Implicit in *Castro-Martinez*'s holding is that, in order for this method of proof to be successful, the evidence must be sufficient.

Here, we agree with the IJ and the BIA that Bringas's evidence was not sufficient. Looking first to the country reports Bringas submitted, neither the 2009 nor the 2010 report mentions any instances of discrimination or persecution in his home state of Veracruz, Mexico. Indeed, the two reports, produced by the U.S. State Department to survey the state of sexual orientation discrimination across a country of 122 million people, note *only one* specific example of government persecution on the basis of sexual orientation in Mexico. The dissent highlights this incident in detail, but does not explain why the IJ reviewing this documentation should have concluded that a single example "establish[es] that government discrimination . . . persist[s]." Dissenting Op. at 34. Nor does the dissent seek to draw any connections from this incident, which occurred in 2008, to circumstances in Tres Valles, a town nearly 300 miles away.

Rather, the country reports Bringas provided to the IJ highlighted "gay pride marches in cities across the country," the largest drawing 400,000 participants. Additionally, the report described the expansion of marriage equality in Mexico City, and detailed a ruling from the Mexican Supreme Court requiring Mexico's states to recognize legally performed marriages performed elsewhere, a ruling, we note, that was made five years before the United States Supreme Court reached a similar conclusion. In sum, the country

reports submitted to the IJ simply do not make a persuasive case that the Mexican government was unwilling or unable to protect Bringas.[5]

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[5] Seemingly aware that Bringas's evidence demonstrating government discrimination or persecution on the basis of sexual orientation was somewhat thin, the dissent instead highlights the ongoing "societal discrimination" referenced in the country reports. Dissenting Op. at 33 (quoting the 2010 country report). While certainly troubling, negative social attitudes in one's home country cannot form the basis for an asylum claim. *See Ghaly v. I.N.S.*, 58 F.3d 1425, 1431 (9th Cir. 1995) ("Discrimination . . . as morally reprehensible as it may be, does not ordinarily amount to 'persecution.'"). If that was the case, LGBT Americans in many parts of this country, unfortunately, would have a valid claim to seek asylum in other parts of the world, including Mexico.

Indeed, the United Nations recognizes Mexico's "history of protecting asylum-seekers" and notes that it has "long been a signatory of the 1951 Refugee Convention and its 1967 Protocol." *UNHCR Hails Mexico as New Refugee Law Comes Into Force*, U.N. HIGH COMM'N FOR REFUGEES (Jan. 28, 2011), http://www.unhcr.org/4d42e6ad6.html. In 2011, President Felipe Calderón signed new legislation to ensure that Mexico's asylum system conformed to international standards. *Id.* Three years later, Mexico adopted the "Brazil Declaration and Plan of Action," an international agreement committed to "the protection of refugees," including "particularly vulnerable groups" like "lesbian, gay, bisexual, transgender, and intersex people." *See Brazil Declaration and Plan of Action*, Dec. 3, 2014, at 8, http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/BDL/2014/9865. And this year, a United Nations report noted that Mexico had established a "specialized hate crime prosecution unit[]," developed a "new judicial protocol to guide adjudication of cases involving human rights violations on grounds of sexual orientation," implemented specialized training for police officers, and officially designated May 17 as "National Day Against Homophobia." *See* U.N. High Commissioner for Human Rights, *Discrimination & Violence Against Individuals Based on Their Sexual Orientation & Gender Identity*, ¶¶ 40, 74, U.N. Doc. A/HRC/29/23 (May 4, 2015), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/29/23&referer=/english/&?Lang=E.

Turning next to Bringas's testimony, Bringas provided very few details about his friends' negative experiences with police in Veracruz. He offered no details about his friends' accounts—no names, ages, indication of the nature of their relationship to Bringas, information on how or to whom they reported their abuse, or any evidence showing that these nameless friends actually reported any abuse to the Mexican authorities. Even if we could fully credit Bringas's friends' statements, there is no evidence connecting general police practices in the state or city of Veracruz with the specific police practices in Bringas's town of Tres Valles.[6] Without something to suggest that the police in Tres Valles would respond in the same way as the police described in Bringas's friends' reports, we decline his invitation to compel the BIA to paint all the police in Veracruz with the same broad brush.

The dissent resists this conclusion by stating that because Bringas's friends reported discrimination by police in Veracruz and "Tres Valles is in the state of Veracruz," any "geographic objection[s]" to Bringas's evidence must fail. Dissenting Op. at 37–38. To draw a parallel, the dissent's argument is that if someone reports discrimination at the hands of police in "California," it would be fair to assume that police in San Diego, Eureka, or Santa Barbara would act in accordance with that report. We refuse to make this

[6] We note that the Mexican state of Veracruz supports a population of nearly eight million residents divided into more than two hundred distinct municipalities. *See Perspectiva Estadística Veracruz de Ignacio de la Llave*, INSTITUTO NACIONAL DE ESTADÍSTICA Y GEOGRAFÍA, Dec. 2011, at 9–10, 14, http://www.inegi.org.mx/est/contenidos/espanol/sistemas/perspectivas/perspectiva-ver.pdf. The city of Veracruz is roughly eighty miles away from Bringas's town of Tres Valles. *See* MAPQUEST, http://www.mapquest.com/maps?1c=Veracruz&1y=MX&2c=Tres%20Valles&2y=MX (last visited Nov. 3, 2015).

unfounded logical leap. The dissent is correct that in light of the difficulty of gathering evidence of persecution, we "adjust[] the evidentiary requirements" for asylum seekers, *id.* at 14 (quotation marks omitted); we do not, however, forego them completely, and reference to vague reports from anonymous friends cannot overcome the lack of any corroborating evidence.[7]

By highlighting the factual gaps in Bringas's description of his friends' reports, the dissent suggests that we inappropriately discount his testimony despite the fact that the IJ found his testimony "credible." *See* Dissenting Op. at 36. Not so. We agree that as "a general rule, because the Immigration Judge did not render an adverse credibility finding, we must accept [Bringas's] factual testimony as true" and that Bringas's "testimony includes hearsay evidence from . . . anonymous friend[s]" that "may not be rejected out-of-hand." *Gu v. Gonzales*, 454 F.3d 1014, 1021 (9th Cir. 2006). Similarly, we do not challenge the "well established" principle, Dissenting Op. at 36, that "hearsay [evidence] is admissible in immigration proceedings," *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823 (9th Cir. 2003).

[7] The dissent's citation to *Yan Rong Zhao v. Holder*, 728 F.3d 1144 (9th Cir. 2013), to support its position is inapposite. There, we observed that "evidence from the local province, municipality, *or* other locally defined area may be sufficient to show a well-founded fear of persecution; respondents are not required to present evidence from their town or city." *Id.* at 1147–48 (emphasis in original). But at issue in *Zhao* were family planning policies memorialized in a written notice from the "Family Planning Office." *Id.* at 1146. Had Bringas produced roughly comparable evidence of Mexico's, Veracruz's, or Tres Valles's policy or practice, we would not be having this exchange.

However, these two propositions do not compel the result pressed for by the dissent. As we have repeatedly held "the absence of an adverse credibility finding does not prevent us from considering the relative probative value of hearsay." *Gu*, 454 F.3d at 1021; *see also Singh v. Holder*, 753 F.3d 826, 835 (9th Cir. 2014); *Sharma v. Holder*, 633 F.3d 865, 870–71 (9th Cir. 2011). Indeed, in *Gu*, we explained that "statements by the out-of-court declarant may be accorded less weight by the trier of fact when weighed against non-hearsay evidence." 454 F.3d at 1021. Here, without many details to flesh out the context of Bringas's friends' hearsay statements, their relative probative value is rather low.

To be clear, we are not, as the dissent charges, "discount[ing]" Bringas's hearsay testimony. Dissenting Op. at 36. Nor are we requiring a certain level of "specificity" in Bringas's description of his friends' out-of-court reports. *Id.* at 11. Instead, we are making what, we think, are common-sense observations: A more detailed description should be afforded greater weight than a less detailed description, and hearsay statements with details that can be corroborated are more probative than hearsay statements that do not include any verifiable details.

The dissent's response to these conclusions brings the very problem this hearsay evidence poses into sharp relief. In light of Bringas's hearsay testimony and submitted country reports, the dissent chastises the IJ's statement that "'we certainly do not have any evidence whatsoever' that Mexican authorities were unwilling to protect" Bringas as plainly "wrong." Dissenting Op. at 35. The dissent only quoted the IJ in part. Here is the full statement:

> [W]e certainly do not have any evidence whatsoever that the police in Mexico or the authorities do not take any action whatsoever to offer some type of protection against *the abuse of children,* sexually, whether the sexually abused child is a male or female, or whether the abuser is a male or a female.

(emphasis added).

The IJ's finding is quite correct. There is no doubt that Bringas did not offer any evidence suggesting that Mexican police refused to protect abused children. The submitted country reports make no reference to it, and because Bringas's hearsay statement was so lacking in detail, we have no idea how old his "friends" were who reported abuse to the police in Veracruz. Because Bringas's testimony was so vague, even the dissent's attempts to bolster its veracity get tangled up in its factual shortcomings. Rather, the full statement of the IJ only demonstrates how firmly in line the IJ and BIA were with this court's precedent. *See Castro-Martinez*, 674 F.3d at 1081 (affirming the BIA's reliance on the lack of "evidence in the record that Mexican authorities would have ignored the rape of a young child or that authorities were unable to provide a child protection against rape").[8]

[8] The dissent also argues that "[n]either the BIA nor the IJ mentioned Bringas-Rodriguez's testimony about what his friends had told him." Dissenting Op. at 35. True enough. But that does not mean the IJ and the BIA did not consider or weigh that evidence. This court has repeatedly found that an IJ's decision is not required "to discuss every piece of evidence" presented by a petitioner. *Almaghzar v. Gonzales*, 457 F.3d 915, 922 (9th Cir. 2006); *see also Cole v. Holder*, 659 F.3d 762, 771 (9th Cir. 2011) ("That is not to say that the BIA must discuss each piece of

As the IJ recognized, Bringas's allegations are not just about discrimination against gay and lesbian Mexicans—they are about child molestation. Bringas has put forward no evidence that Mexico tolerates the sexual abuse of children, or that Mexican officials would refuse to protect an abused child based on the gender of his or her abusers. Instead, substantial evidence supports the BIA's finding that Bringas failed to prove that the government would be unwilling or unable to control his abusers, and Bringas's bare hearsay assertions from friends of unknown ages are insufficient to overturn the BIA's contrary conclusion, which was based on other evidence in the record. Accordingly, we hold that Bringas failed to establish his past persecution and is therefore not entitled to a presumption of a well-founded fear of future persecution. *See* 8 C.F.R. § 1208.13(b)(1).

B. Well-Founded Fear of Future Persecution

Alternatively, in the absence of evidence of past persecution, a petitioner may simply provide evidence of a well-founded fear of future persecution. "To establish a well-founded fear," Bringas must show "that his fear of persecution is subjectively genuine and objectively reasonable." *Castro-Martinez*, 674 F.3d at 1082 (citing *Ahmed v. Keisler*, 504 F.3d 1183, 1191 (9th Cir. 2007)). "As there was no adverse credibility determination, we accept that [Bringas's] fear of future persecution was genuine." *Id.* (citing *Li v. Holder*, 559 F.3d 1096, 1107 (9th Cir. 2009)). In order to show that his fear of future persecution was "objectively reasonable," Bringas has two avenues. He may demonstrate: (1) "that he was a member of a disfavored

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evidence submitted."). Here, Bringas's evidence is not sufficient to compel a contrary result.

group against which there was a systematic pattern or practice of persecution," or (2) that he belongs to a "disfavored group" and has an individualized risk of being "singled out for persecution." *Id.*; *Sael v. Ashcroft*, 386 F.3d 922, 925 (9th Cir. 2004); *see* 8 C.F.R. § 1208.13(b)(2)(iii).

Bringas's "pattern or practice of persecution" argument lacks merit, and he forfeited his argument that he will be "singled out" as a member of a "disfavored group" when he failed to raise it before the BIA.

1. Pattern or Practice of Persecution

Bringas argues that there is a pattern or practice of persecution of gay men in Mexico. Despite some evidence of violence against gays in Mexico, *Castro-Martinez* forecloses this argument. In *Castro-Martinez*, we rejected the claim that "the Mexican government systematically harmed gay men and failed to protect them from violence." 674 F.3d at 1082. Although we acknowledged evidence of discrimination and attacks, we explained that country conditions reports showed that "the Mexican government's efforts to prevent violence and discrimination against homosexuals. . . . ha[d] increased in recent years," and, we noted, "Mexican law prohibits several types of discrimination, including bias based on sexuality, and it requires federal agencies to promote tolerance." *Id.* (recognizing the Mexican government's 2005 "radio campaign to fight homophobia" and noting the various country reports' reflections of the "ongoing improvement of police treatment of gay men and efforts to prosecute homophobic crimes").

Here, the BIA made findings similar to those in *Castro-Martinez* and found that the situation for gay men in Mexico

is improving. It first cited *Bromfield v. Mukasey*, 543 F.3d 1071, 1078 (9th Cir. 2008), a case where we held that there was a pattern or practice of persecution against gay men in Jamaica—a country which criminalized homosexual conduct and prosecuted individuals under the law; the evidence there also showed numerous cases of violence and widespread brutality against persons based on sexual orientation. Then the BIA turned to Bringas's case and stated that unlike *Bromfield*:

> [T]he record here does not demonstrate widespread brutality against homosexuals or that there is any criminalization of homosexual conduct in Mexico. . . . To the contrary, the record shows that Mexico has taken numerous positive steps to address the rights of homosexuals, including legalizing gay marriage in Mexico City and prosecuting human rights violations against homosexuals.

Bringas offers no evidence showing that there has been a change in conditions in Mexico since we decided *Castro-Martinez*. Accordingly, we are bound by our holding in *Castro-Martinez*, and the BIA's determination that no pattern or practice of persecution exists is supported by substantial evidence.[9]

[9] Bringas argues that the BIA applied the wrong standard to his pattern-or-practice claim because it cited to withholding cases in discussing the asylum claim. But, as the government noted and as Bringas acknowledges in his reply, the withholding and asylum standards do not differ in any relevant respect as to his pattern-or-practice claim.

2. Singled Out for Persecution as a Member of a Disfavored Group

Even without evidence of a pattern or practice of persecution, Bringas could still establish a well-founded fear if he could demonstrate a particularized risk that he will be singled out for persecution if returned to Mexico. Bringas argues that he has been singled out in the past for mistreatment for his membership in the disfavored group of homosexual men, so he "has a 'strong' individualized risk of future harm." The government argues that Bringas forfeited this claim when he failed to raise it before the BIA. We agree that Bringas failed to exhaust this argument before the BIA.

Bringas failed to argue that he would be singled out for persecution as a member of a disfavored group in his brief to the BIA.[10] He consequently has forfeited this claim. *See Abebe v. Mukasey*, 554 F.3d 1203, 1208 (9th Cir. 2009) (en banc) (per curiam) (holding that an alien is "deemed to have exhausted only those issues he raised and argued in his brief before the BIA"); *see also Alvarado v. Holder*, 759 F.3d 1121, 1126 n.4, 1128 (9th Cir. 2014) ("Although [a] petitioner need not . . . raise [his] *precise* argument in

[10] In his brief to the BIA, Bringas argued that the IJ erred in failing to find that Bringas had a well-founded fear of persecution, stating that a well-founded fear can be shown by a pattern or practice of persecution. The sections of our cases that he cited concerned only pattern-or-practice evidence. One of the cases he cited, *Wakkary v. Holder*, 558 F.3d 1049, 1061 (9th Cir. 2009), discussed the singled out/disfavored group analysis at length, but not on the page that Bringas cited. He never argued that he would be singled out in the future as a member of a disfavored group. The BIA expressly recognized that Bringas failed to make this argument, observing in a footnote that Bringas "does not argue that his claim falls within the 'disfavored group' analysis espoused by the Ninth Circuit."

administrative proceedings, . . . [he] must specify which issues form the basis of the appeal.") (alterations and emphasis in original) (citations and internal quotation marks omitted). He argues that by raising his similar claim of a pattern or practice of anti-gay persecution, he necessarily exhausted his argument before the BIA. Not so. The pattern or practice argument is separate and distinct from the singled out/disfavored group argument, and we analyze them separately. *E.g.*, *Wakkary v. Holder*, 558 F.3d 1049, 1061–62 (9th Cir. 2009). Unlike the pattern or practice analysis, the singled out/disfavored group analysis requires proof of an individualized risk of harm. *See* 8 C.F.R. § 1208.13(b)(2)(iii); *see also Castro-Martinez*, 674 F.3d at 1082; *Wakkary*, 558 F.3d at 1060–62; *Sael*, 386 F.3d at 925.

Our holding in *Castro-Martinez* forecloses Bringas's "pattern or practice of persecution" argument, and he failed to exhaust his argument that he will be "singled out" as a member of a "disfavored group." Bringas has not demonstrated a well-founded fear of future persecution, and, accordingly, we deny the petition with respect to asylum and withholding of removal.

III

Bringas's claim under the CAT fails because he did not show that he would more likely than not be tortured by or with the acquiescence of the Mexican government if he is removed to Mexico. *See Garcia-Milian v. Holder*, 755 F.3d 1026, 1031 (9th Cir. 2014). "To qualify for CAT relief, an alien must establish that 'it is more likely than not that he . . . would be tortured if removed to the proposed country of removal.'" *Id.* at 1033 (quoting 8 C.F.R. § 208.16(c)(2)). The BIA found "no clear error in the [IJ's] determination that

[Bringas] did not demonstrate that he will more likely than not be tortured in Mexico by or with the acquiescence . . . of an official of the Mexican government."

Even if Bringas's past experiences constituted torture, the BIA is not required "to presume that [he] would be tortured again because of his own credible testimony that he had been subjected to torture as a . . . child." *Konou v. Holder*, 750 F.3d 1120, 1125 (9th Cir. 2014). This is especially true where "the factors that precipitated [Bringas's] mistreatment as a child would be less relevant to a 'selfsufficient homosexual adult.'" *Id.* at 1126. Here, the IJ determined that Bringas could likely relocate to a different part of Mexico, such as Mexico City, where the population appears more accepting of gays, and the IJ noted the complete lack of evidence indicating that the Mexican government was aware of any torture taking place. The IJ concluded that Bringas's reports showing "instances of mistreatment of homosexuals in Mexico" were not "sufficient to establish the burden of proof requirement of a more likely than not possibility of torture." The same evidence that supported the BIA's dismissal of the pattern-or-practice claim also supports the IJ's and BIA's conclusions that Bringas failed to establish a likelihood of torture: Conditions in Mexico are insufficiently dangerous for gay people to constitute a likelihood of government-initiated or -sanctioned torture. *See Castro-Martinez*, 674 F.3d at 1082. And because substantial evidence supported the BIA's denial of CAT relief, we deny Bringas's petition with respect to his claim under the CAT.

IV

Finally, the BIA did not abuse its discretion in finding that Bringas's HIV diagnosis, standing alone, does not require

a remand to the IJ. In Bringas's brief to the BIA, he moved to remand the case because, not long after the IJ's decision issued, he discovered that he is HIV positive. The BIA denied his motion to remand.

Denials of motions to remand are reviewed for abuse of discretion. *Malhi v. I.N.S.*, 336 F.3d 989, 993 (9th Cir. 2003). "The BIA abuses its discretion if its decision is 'arbitrary, irrational, or contrary to law.'" *Romero-Ruiz v. Mukasey*, 538 F.3d 1057, 1062 (9th Cir. 2008) (quoting *Lopez–Galarza v. I.N.S.*, 99 F.3d 954, 960 (9th Cir. 1996)); *Konstantinova v. I.N.S.*, 195 F.3d 528, 529 (9th Cir. 1999) ("The BIA abuses its discretion when it fails to offer a reasoned explanation for its decision, distorts or disregards important aspects of the alien's claim.").

The BIA gave a rational explanation for its denial of Bringas's motion to remand based on his HIV diagnosis. In requesting a remand, Bringas merely noted in one short paragraph at the end of his brief to the BIA that his diagnosis is a "significant [fact] because it now places [him] in a more vulnerable position should he be returned to Mexico." The BIA rejected this argument because Bringas did not provide "any additional country conditions evidence or specific arguments regarding how his status as an HIV positive homosexual changes the outcome of his case." The BIA also noted that the lack of access to HIV drugs is a problem suffered not only by homosexuals but by the Mexican population as a whole. *See Castro-Martinez*, 674 F.3d at 1082. Because the BIA offered a reasoned explanation and its decision was neither arbitrary nor irrational, we hold that the BIA did not abuse its discretion in denying Bringas's motion to remand.

V

In sum, we hold that substantial evidence supported the BIA's denial of Bringas's claims for asylum, withholding of removal, and relief under the CAT. We also conclude that the BIA did not abuse its discretion in denying Bringas's motion to remand.

Concurrently, we grant the motion of the Public Law Center, Lambda Legal Defense and Education Fund, the National Immigrant Justice Center, the Center for HIV Law and Policy, HIV Law Project, Immigration Equality, Disability Rights Legal Center, and the Asian & Pacific Islander Wellness Center to file a brief as *Amici Curiae* in support of Bringas. We deny Bringas's motion to take judicial notice of facts beyond the administrative record. *See* 8 U.S.C. § 1252(b)(4)(A); *Singh v. Ashcroft*, 393 F.3d 903, 905–06 (9th Cir. 2004).

PETITION DENIED.

W. FLETCHER, Circuit Judge, dissenting:

Carlos Bringas-Rodriguez, a Mexican national, testified credibly that throughout his childhood in the town of Tres Valles in the state of Veracruz he was sexually abused by his uncle, his cousins, and a neighbor. His abusers told him they were abusing him because he was gay, and they referred to him using homophobic slurs. His abusers also punched him and beat him, and they threatened to hurt him and his grandmother if he told anyone about the abuse.

Bringas-Rodriguez left Mexico twice. The first time, he came to the United States at age twelve and lived briefly with his mother and step-father in Kansas. While he was in Kansas, some of his gay Mexican friends told him that they had reported similar abuse to Mexican police officers but that the officers had laughed at them, refused to provide help, and told them they deserved the abuse they received. The second time, he came to the United States at age fourteen. He has not returned to Mexico.

Bringas-Rodriguez never reported to Mexican police the abuse he suffered. He testified credibly before the Immigration Judge ("IJ") that he did not do so because he believed a report would be pointless.

The panel majority denies Bringas-Rodriguez's asylum claim. The majority relies primarily on *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011), a decision in which we denied a similar asylum claim. But *Castro-Martinez* was a carefully circumscribed decision. In *Castro-Martinez* we stated that, even if a petitioner himself had not reported abuse, asylum could be warranted if the petitioner showed that Mexican officials were unwilling to help other gay victims of abuse.

I have growing doubts about the correctness of *Castro-Martinez*, an opinion with which I agreed when it was issued. However, even to the extent *Castro-Martinez* should remain the law of this circuit, I respectfully dissent from the panel's conclusion that it forecloses relief in this case.

I. Past Persecution in Mexico

Carlos Bringas-Rodriguez began to realize his same-sex attractions when he was six. As early as ten years old, he considered himself gay. As a child, Bringas-Rodriguez was physically abused by his father, who told him, "Act like a boy, you're not a woman." His father abused Bringas-Rodriguez's mother and siblings as well, but he abused Bringas-Rodriguez the most because he was "different."

Bringas-Rodriguez was also abused and raped by an uncle, his cousins, and a neighbor. Bringas-Rodriguez's uncle began to sexually abuse him when he was just four years old, and his uncle abused him every two or three months thereafter. After Bringas-Rodriguez turned seven, his cousins sexually abused him on a monthly basis. Bringas-Rodriguez's uncle, cousins, and a neighbor raped him at home when his mother was not there, and sometimes dragged him into nearby bushes in the neighborhood. Bringas-Rodriguez's abusers told him that they would hurt him and his grandmother if he told anyone, and, on a few occasions, they punched him. On one occasion, when Bringas-Rodriguez resisted one cousin's attempt to rape him, the cousin beat him severely.

When Bringas-Rodriguez was eight, his uncle told him that the reason for the ongoing abuse was Bringas-Rodriguez's sexuality. His uncle was not alone in his anti-gay views. Bringas-Rodriguez testified, "[my abusers] never called me by my name but called me fag, fucking faggot, queer and laughed about it."

Bringas-Rodriguez first came to the United States in 2002, when he was twelve. He lived in Kansas with his

mother and step-father for five months, and continued to hide his sexuality and history of sexual abuse. When Bringas-Rodriguez returned to Mexico to live with his grandmother after his stay in Kansas, the abuse resumed unabated. Bringas-Rodriguez's uncle sexually abused him again. Bringas-Rodriguez's cousins referred to him as their "sex toy" and resumed their abuse. A neighbor raped him. The neighbor's assault left Bringas-Rodriguez with bruises all over his body. Because of the continuing abuse and rape, Bringas-Rodriguez fled Mexico, returning to the United States in 2004 at age fourteen.

Bringas-Rodriguez never told the Mexican police about the abuse he had suffered. Even though he wanted protection from his abusers, Bringas-Rodriguez believed any complaints to the police would have been futile. He testified before the IJ that, while he was living in Kansas, two Mexican gay friends "told me that they got raped, they got beat up, like abuse, and they went to the police and they didn't do anything. They even laugh [in] their faces." In a declaration submitted to the Immigration Court, Bringas-Rodriguez wrote that he feared that the Mexican police "would laugh at me and tell me I deserved what I got because I was gay. This happened to friends of mine in Veracruz."

II. Persecution the Government is Unable or Unwilling to Control

To establish his eligibility for asylum, Bringas-Rodriguez "must demonstrate that he is unable or unwilling to return to his home country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or a political opinion." *Castro-Martinez*, 674 F.3d at 1080 (citing 8 U.S.C.

§ 1101(a)(42)(A)). Bringas-Rodriguez must also show the harm was "inflicted either by the government or by individuals or groups the government is unable or unwilling to control." *Id.*

A. Persecution on the Basis of a Protected Ground

We have held that gay men in Mexico "can constitute a social group for the purpose of an asylum claim." *Id.*; *see also Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1087–89 (9th Cir. 2005). Undisputed evidence in the record shows that Bringas-Rodriguez was abused, over a sustained period, for being gay. Bringas-Rodriguez testified that his uncle told him he was being abused because he was gay. Bringas-Rodriguez also testified that his uncle, cousins, and neighbor "never called me by my name but called me fag, fucking faggot, queer and laughed about it." Every person who abused Bringas-Rodriguez throughout his childhood either told him that he was being abused for being gay or referred to him using homophobic slurs.

B. Government Unable or Unwilling to Control the Harm

The question at the heart of this case is thus not whether Bringas-Rodriguez was abused because he was gay. Rather, it is whether Bringas-Rodriguez can show that the Mexican government was unable or unwilling to control his abusers. I agree with the panel majority that this question is currently controlled by *Castro-Martinez*, an opinion I joined four years ago. But I part ways with the majority as to the meaning and application of *Castro-Martinez*.

In *Castro-Martinez*, we discussed different methods by which an asylum seeker could demonstrate a government's

inability or unwillingness to control harm inflicted by private parties. For example, we stated that "the BIA may consider whether the victim reported the attacks to the police." *Castro-Martinez*, 674 F.3d at 1080. While such a report can suffice to demonstrate a government's unwillingness to control the persecution, a report is not necessary. "We have never held that any victim, let alone a child, is obligated to report a sexual assault to the authorities, and we do not do so now." *Id.* at 1081. But if the victim does not report to the police, there is a "gap in proof about how the government would have responded." *Id.* (alterations omitted) (quoting *Rahimzadeh v. Holder*, 613 F.3d 916, 922 (9th Cir. 2010)). In such cases, the petitioner bears the burden of filling that gap. *Id.*

We were careful in *Castro-Martinez* to list "other avenues" through which a petitioner could carry this burden. *Id.* Specifically, we identified four additional ways in which an asylum seeker like Bringas-Rodriguez could show that his government was unwilling or unable to prevent persecution by non-governmental parties. He could:

1. "establish[] that private persecution of a particular sort is widespread and well-known but not controlled by the government";

2. "show[] that others have made reports of similar incidents to no avail";

3. "demonstrat[e] that a country's laws or customs effectively deprive the petitioner of any meaningful recourse to governmental protection"; or

> 4. "convincingly establish that going to the authorities would have been futile or would have subjected the individual to further abuse."

Id. at 1081 (alterations omitted) (quoting *Rahimzadeh*, 613 F.3d at 921–22). After reviewing the facts in *Castro-Martinez*, we concluded that the petitioner did not present sufficient evidence to show that Mexican officials would have been unable or unwilling to prevent his abuse. *Id.*

The panel majority here concludes that *Castro-Martinez* compels denial of Bringas-Rodriguez's petition because "[t]he facts in Bringas's case are very similar to those in *Castro-Martinez*." Op. at 11. The facts are similar in one respect. In both cases, petitioners introduced United States State Department country reports describing police violence against homosexuals. In *Castro-Martinez*, the petitioner "submitted country reports documenting societal discrimination against homosexuals in Mexico and attacks on gay men committed by private parties." 674 F.3d at 1079. "He also presented evidence of widespread police corruption in Mexico and incidents of police violence against homosexuals." *Id.* We concluded that these reports, without more, did not "compel the conclusion that the police would have disregarded or harmed a male child who reported being the victim of homosexual rape by another male." *Id.* at 1081.

In the case now before us, Bringas-Rodriguez submitted similar country reports. Because Bringas-Rodriguez left Mexico in 2004 and has not returned since, the relevant period for purposes of our analysis is the years before 2004. Bringas-Rodriguez submitted country reports from 2009 and 2010. Although the 2009 and 2010 reports post-date the

period at issue in this case, they provide probative information. Both country reports state that in Mexico discrimination and persecution based on sexual orientation — including discrimination and persecution by governmental officials — had lessened over time. But they also state that discrimination and persecution remained serious problems, five and six years after Bringas-Rodriguez left the country.

The 2009 country report states, "While homosexual conduct experienced growing social acceptance, the National Center to Prevent and Control HIV/AIDS stated that discrimination persisted." The 2010 country report similarly notes that, according to a governmental agency and a nonprofit organization, "societal discrimination based on sexual orientation" remained "common." The 2009 report continues:

> One of the most prominent cases of discrimination and violence against gay men was that of Agustin Humberto Estrada Negrete, a teacher and gay activist from Ecatepec, Mexico State. In 2007 he participated in a gay rights march wearing a dress and high heels. According to the NGO Asilegal, soon after the march, Estrada began receiving threatening telephone calls and verbal and physical attacks. In 2008 he was fired from the school for children with disabilities where he worked. After his dismissal, he and a group of supporters began lobbying the government to reinstate him; *when they went to the governor's palace to attend a meeting with state officials in May, police beat him and his supporters. The next*

> *day he was taken to prison, threatened, and raped. Although he was released, Estrada continued to face harassment by state authorities.*

(Emphasis added.) Through these reports, Bringas-Rodriguez established that government discrimination on the basis of sexuality in Mexico persisted, even years after he fled the country.

While Castro-Martinez and Bringas-Rodriguez both produced relevant country reports detailing the Mexican government's continued discrimination against homosexuals, the facts of their cases are dissimilar in a critical respect. Unlike Castro-Martinez, Bringas-Rodriguez provided evidence that "others have made reports of similar incidents to no avail." *Castro-Martinez*, 674 F.3d at 1081. Specifically, Bringas-Rodriguez presented evidence that while living in Kansas, gay Mexican friends told him they had reported similar sexual abuse and that the Mexican police in Veracruz had refused to take action. Bringas-Rodriguez's oral testimony was brief, but quite clear:

> Q: You can go tell police if you return to Mexico and suffer abuse, you could tell the police. . . . Couldn't you do that?
>
> A: They will do nothing.
>
> Q: How do you know that?
>
> A: I know that because when I was living in Kansas, couple of my friends told me that they got raped, they got beat up, like abuse,

> and they went to the police and they didn't do anything. They even laugh [in] their faces.

Bringas-Rodriguez provided similar testimony in his written declaration, explaining that, if he reported his abuse, the police "would laugh at me and tell me I deserved what I got because I was gay. This happened to friends of mine in Veracruz."

Neither the BIA nor the IJ mentioned Bringas-Rodriguez's testimony about what his friends had told him. In fact, the IJ, whose decision the BIA affirmed, stated in denying asylum that "we certainly do not have any evidence whatsoever" that Mexican authorities were unwilling to protect a child like Bringas-Rodriguez. The IJ's statement is wrong. It is undisputed that Bringas-Rodriguez submitted probative country reports, and that he provided both oral and written testimony that his friends had reported similar sexual abuse to police in Veracruz, and the police refused to take action.

Despite this evidence, the panel majority rejects Bringas-Rodriguez's asylum claim. To rebut Bringas-Rodriguez's country reports, the majority asserts that governmental discrimination on the basis of sexual orientation in Mexico has lessened in recent years. Op. at 13. Although the relevant time period for purposes of Bringas-Rodriguez's claim is before 2004, the majority cites evidence from the past few years, even citing a report published only this year. Op. at 14 n.5. This evidence has limited utility. We recognized in a recently published opinion that while Mexico has made some advances in its treatment of homosexuals, there has actually been "an *increase* in violence against gay, lesbian, and transgender individuals during the years in which

greater legal protections have been extended to these communities" and that "there is a continued failure to prosecute the perpetrators of homophobic hate crimes throughout Mexico." *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1081–82 (9th Cir. 2015) (emphasis in original).

The panel majority then concludes that Bringas-Rodriguez's additional evidence — the statements of his friends — is also not sufficient. The majority's primary complaint is that the evidence lacks specificity. Op. at 15. To support this conclusion, the majority lists a number of details that, in its view, are crucially absent from Bringas-Rodriguez's testimony. These details include the names of his two friends, their ages, "the nature of their relationship to Bringas," "how or to whom they reported their abuse," or "any evidence showing that these nameless friends actually reported any abuse to the Mexican authorities." Op. at 15. But Bringas-Rodriguez did provide a number of these details. Bringas-Rodriguez explained the nature of the relationship: they were his Mexican friends who had recounted to him in Kansas their experience in Veracruz. While he did not state their exact ages, a reasonable inference, given that they were his friends, is that they were his age contemporaries. He also testified as to whom the friends had reported their abuse: Mexican police in Veracruz. Finally, he provided evidence that the friends had made the reports: his credible testimony about what they had told him.

The panel majority also partially discounts the statements of Bringas-Rodriguez's friends because they are hearsay. Op. at 12, 16–17. However, it is well established in our case law that hearsay — even hearsay upon hearsay — is proper evidence in asylum proceedings. *Ramirez-Alejandre v.*

Ashcroft, 319 F.3d 365, 370 (9th Cir. 2003) (en banc). Hearsay is sometimes (though only sometimes) less probative and reliable than direct evidence. But because of the particular difficulties asylum seekers have in obtaining direct evidence, we are more willing to credit hearsay in asylum cases than in conventional litigation. *See, e.g.*, *Cordon-Garcia v. I.N.S.*, 204 F.3d 985, 992–93 (9th Cir. 2000) (holding "Petitioner's testimonial evidence," which consisted of "hearsay, and, at times, hearsay upon hearsay," sufficient to support the presumption that petitioner had a well-founded fear of future persecution).

The majority also suggests that Bringas-Rodriguez's testimony is suspect because much, perhaps all, of the abuse Bringas-Rodriguez suffered had already taken place by the time he talked to his friends in Kansas. *See* Op. at 12 n.4. But this is irrelevant. The question at issue is not what Bringas-Rodriguez knew about the police when he was a child. Rather, the question is whether the Mexican police would have helped Bringas-Rodriguez if he had reported his abuse to them. An asylum seeker can present probative evidence that he or she obtained only after escaping from persecution. *See, e.g.*, *Cordon-Garcia*, 204 F.3d at 992–93 (relying upon petitioner's evidence, obtained only after the petitioner departed her home country, to find that petitioner established a well-founded fear of future persecution); *Gjerazi v. Gonzales*, 435 F.3d 800, 809 (7th Cir. 2006) (holding the IJ erred in excluding documentary evidence of persecution solely because the evidence was only acquired after the petitioner arrived in the United States).

Finally, the majority makes geographic objections to Bringas-Rodriguez's evidence. For example, it discounts Bringas-Rodriguez's country reports because neither report

"mentions any instances of discrimination or persecution in his home state of Veracruz." Op. at 13. This objection ignores the fact that Bringas-Rodriguez's additional evidence — the statements of his friends about their experiences in Veracruz — corroborates the country reports and demonstrates that discrimination against homosexuals extends to Bringas-Rodriguez's home state. Similarly, the majority objects that Bringas-Rodriguez's evidence does not discuss "the specific police practices in Bringas's town of Tres Valles." Op. at 15. But Tres Valles is in the state of Veracruz. Our Court has "adjusted the evidentiary requirements" for asylum seekers in light of "the serious difficulty with which asylum applicants are faced in their attempts to prove persecution." *Malty v. Ashcroft*, 381 F.3d 942, 947 (9th Cir. 2004) (quoting *Cordon-Garcia*, 204 F.3d at 993). Accordingly, we do not require a petitioner to provide evidence of the specific practices of his hometown when he presents evidence of statewide or even countrywide persecution. *See, e.g.*, *Yan Rong Zhao v. Holder*, 728 F.3d 1144, 1147–48 (9th Cir. 2013) (finding the BIA erred in requiring a Chinese petitioner to provide evidence of the government policy in her town and noting that "[n]either the BIA nor this court has previously required municipal-level proof when the petitioner presents province-level proof").

In sum, we wrote in *Castro-Martinez* that a gay petitioner qualifies for asylum when he provides country reports documenting official persecution on account of sexual orientation, supplemented by evidence that "others have made reports of similar incidents to no avail." 674 F.3d at 1081. We denied relief in *Castro-Martinez* because the petitioner had not, in the view of the panel, provided such supplemental evidence. In this case, Bringas-Rodriguez has provided the additional evidence that was lacking in *Castro-Martinez*. He

testified that his Mexican friends ("others") had told police in his home state of Veracruz that they were abused because of their sexuality ("had made reports of similar incidents") and that the police did nothing ("to no avail").

III. Revisiting *Castro-Martinez*

As noted above, I have growing doubts about our decision in *Castro-Martinez*. As the panel majority writes, the facts of *Castro-Martinez* resemble this case. In both cases, a gay, HIV-positive man sought asylum based on a long history of childhood abuse suffered in Mexico because of his sexuality. *Id.* at 1078–79. Both victims failed to report their abuse to Mexican officials. *Id.* at 1080. And both victims provided country reports describing anti-gay sentiments and persecution by Mexican authorities. The BIA denied asylum in both cases, on the ground that the victims failed to show that the Mexican government was unable or unwilling to control the abusers. *Id.* at 1081.

We denied Castro-Martinez's petition for review. We concluded that there was "no evidence in the record that Mexican authorities would have ignored the rape of a young child or that authorities were unable to provide a child protection against rape." *Id.* We wrote that Castro-Martinez offered nothing more than his belief that "the police would not have helped him." *Id.* "[S]uch a statement, without more, is not sufficient to fill the gaps in the record regarding how the Mexican government would have responded had Castro reported his attacks." *Id.*

If the only evidence Castro-Martinez offered had been his unsupported belief, I would continue to think our decision in that case was correct. Asylum seekers must show that "the

government concerned was either unwilling or unable to control the persecuting individual or group." *Matter of Pierre*, 15 I. & N. Dec. 461, 462 (BIA 1975). Unsubstantiated assertions that the government is unwilling or unable to control a persecutor do not suffice to carry that burden.

Castro-Martinez, however, did offer evidence to show Mexican officials would not have helped him. As we wrote in our opinion, "Castro also stated that he was afraid of contacting the police because they would likely abuse him on account of his homosexuality. Castro presented country reports documenting police corruption and participation in torture, abuse, and trafficking, as well as incidents of police harassment of gay men." *Castro-Martinez*, 674 F.3d at 1081. Despite this, we held that Castro-Martinez still had not carried his burden because "none of these reports compel the conclusion that the police would have disregarded or harmed a male child who reported being the victim of homosexual rape by another male." *Id.*

I have come to believe that *Castro-Martinez* demands an unwarranted level of specificity from country reports. In rejecting Castro-Martinez's claim, we held that statements in country reports that Mexican police harassed homosexuals and ignored their claims of abuse was not enough. We required, instead, a statement in the report focusing specifically on gay children — a statement that Mexican police ignored reports by gay male children who were abused by other males. The panel majority here does the same. It discounts Bringas-Rodriguez's evidence of governmental discrimination against homosexuals generally, and instead affirms the IJ's conclusion that Bringas-Rodriguez failed to provide evidence showing that the Mexican government

would not have responded to "*the abuse of children*." Op. at 13–14, 18 (emphasis in original).

Given the nature of crimes of sexual violence against children and the difficulty children face in reporting them, *Castro-Martinez* and the panel majority require evidence that few victims can supply. Many children will not report these crimes for some of the same reasons Bringas-Rodriguez did not. Abusers often threaten their victims with harm if they tell anyone, and they sometimes make good on those threats. Children also have difficulty getting information to the police, especially if family members or neighbors — the people who might report the abuse — are the abusers. By discounting country reports that describe discrimination against homosexuals generally and instead requiring reports specifically addressing gay children, *Castro-Martinez* effectively requires abused children to report to the police, either to provide relevant evidence for the country reports or to establish the requisites for asylum in their own cases.

Conclusion

We have repeatedly held that victims, especially child victims, of private persecution need not report their abuse to obtain asylum. *Castro-Martinez*, 674 F.3d at 1081 ("We have never held that any victim, let alone a child, is obligated to report a sexual assault to the authorities, and we do not do so now."); *Rahimzadeh*, 613 F.3d at 921 ("The reporting of private persecution to the authorities is not . . . an essential requirement for establishing government unwillingness or inability to control attackers."); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1057 (9th Cir. 2006). Yet, *Castro-Martinez* and today's decision effectively require just that. In *Castro-Martinez*, by demanding unrealistic specificity from country

reports, we effectively eliminated those reports as a method of showing a foreign government's inability or unwillingness to prevent sexual abuse of gay children. In today's opinion, we effectively eliminate another avenue for obtaining relief. In *Castro-Martinez*, we wrote that evidence that "others have made reports of similar incidents to no avail" could be used to show a government's inability or unwillingness to prevent private harm. Bringas-Rodriguez presented precisely such evidence, and he presented it in the only form — hearsay — likely to be available to someone in his position.

Bringas-Rodriguez, like most abused children, did not report to the police the sexual abuse he suffered. Thus, when seeking aslyum, Bringas-Rodriguez had to rely on other evidence of the Mexican government's inability or unwillingness to protect him. He provided 2009 and 2010 country reports describing police indifference to, and participation in, discrimination and violence against homosexuals. He also testified that his gay friends told him that when they reported to the Mexican police in his home state of Veracruz similar abuse they had suffered, the police laughed in their faces and told them that they deserved the abuse they were receiving. That should be enough.

I respectfully dissent.

File: A200 821 303 – San Diego, CA Date: JUL - 2 2013

In re: CARLOS ALBERTO BRINGAS-RODRIGUEZ a.k.a. Patricio Iron-Rodriguez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lenore A. Ceithaml, Esquire

ON BEHALF OF DHS: Kathryn E. Stuever
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Asylum; withholding of removal; Convention Against Torture; voluntary departure

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's February 3, 2012, decision denying his application for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3), as well as his request for protection under the Convention Against Torture ("CAT"), but granting him the privilege of voluntary departure. The respondent's appeal will be dismissed.

The respondent argues that he suffered past persecution in Mexico, and has a well-founded fear of future persecution in Mexico, based on his homosexuality. He describes horrible sexual abuse by his uncle, cousins, and neighbor during his childhood (I.J. at 2-3). He last arrived in the United States when he was 14 years old (I.J. at 3). He lived with his mother in Kansas for a period of time before eventually moving to California with his then-boyfriend (I.J. at 3). The respondent argues that there is a pattern or practice of persecution against homosexuals in Mexico by private individuals with the consent of the police and by the police (I.J. at 6).

This Board must defer to the Immigration Judge's factual findings, including findings as to the credibility of testimony, unless they are clearly erroneous. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002); *Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012). We review questions of law, discretion, and judgment de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii). We note that the respondent's asylum claim is governed by the amendments to the Act brought about by the passage of the REAL ID Act, as he filed his application after May 11, 2005 (Exh. 2). *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006). For purposes of this decision, we will assume arguendo that the respondent filed a timely asylum application.

Pursuant to our de novo review, we agree with the Immigration Judge that the respondent did not establish that he suffered past persecution on account of a statutorily enumerated ground. We do not discount the serious abuse that the respondent endured as a child. However, as was the case in *Castro-Martinez v. Holder,* 674 F.3d 1073, 1080-81 (9th Cir. 2011), where the petitioner similarly suffered abuse as a child, the respondent here has not demonstrated that the abuse was inflicted by government actors or that the government was unwilling or unable to control his abusers. Accordingly, we conclude that the respondent is not entitled to the presumption of a well-founded fear of future persecution. *See* 8 C.F.R. § 1208.13(b)(1); *Matter of D-I-M-*, 24 I&N Dec. 448, 450 (BIA 2008).

Sexual orientation and sexual identity can be the basis for establishing a particular social group. *See Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (holding that all alien homosexuals are members of a particular social group); *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088-89 (9th Cir. 2005) (holding that Mexican homosexual man forced to perform nine sex acts on a police officer and threatened with death persecuted on account of sexual orientation); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094-95 (9th Cir. 2000) (holding that Mexican gay men with female sexual identities constitute a particular social group). An asylum applicant is not required to show that he would be singled out individually for persecution if there is a "pattern or practice" of persecution of groups of persons similarly situated and he can establish his own inclusion in the group such that his fear of persecution on return is reasonable. *See* 8 C.F.R. §§ 1208.13(b)(2)(iii)(A), (B); *see also Halim v. Holder*, 590 F.3d 971 (9th Cir. 2009). The United States Court of Appeals for the Ninth Circuit has found a pattern or practice of persecution of gay men in Jamaica, where the evidence demonstrated a culture of severe discrimination against homosexuals existed, there were numerous cases of violence against persons based on sexual orientation including by police and vigilante groups, brutality against homosexuals was described as widespread, Jamaican law criminalized homosexual conduct, and individuals were prosecuted under the law. *See Bromfield v. Mukasey*, 543 F.3d 1071, 1078 (9th Cir. 2008).

Here, the Immigration Judge noted that there is evidence in the record that homosexuals may suffer some harassment, attacks, and discrimination in Mexico (I.J. at 16-17). However, unlike *Bromfield v. Mukasey*, *supra*, the record here does not demonstrate widespread brutality against homosexuals or that there is any criminalization of homosexual conduct in Mexico. *See also Castro-Martinez v. Holder*, *supra*, at 1082. Moreover, the evidence does not establish that the Mexican government itself persecutes individuals on account of their sexual orientation or is unwilling or unable to control private individuals who perpetrate violence against homosexuals (I.J. at 18-19). To the contrary, the record shows that Mexico has taken numerous positive steps to address the rights of homosexuals, including legalizing gay marriage in Mexico City and prosecuting human rights violations against homosexuals (I.J. at 17-18). In sum, we conclude the evidence presented by the respondent does not meet this evidentiary burden, as it did in *Bromfield v. Mukasey*, *supra*. *See generally Matter of A-M-*, 23 I&N Dec. 737 (BIA 2005) (claim of pattern or practice of persecution not established).[1]

[1] The respondent does not argue that his claim falls within the "disfavored group" analysis espoused by the Ninth Circuit. *See Halim v. Holder*, *supra*, 978-79; *see also Wakkary v. Holder*, 558 F.3d 1049 (9th Cir. 2009).

On appeal, the respondent submits new evidence that after he filed his Notice of Appeal, he was diagnosed with HIV (Respondent's Br. at 10). The respondent, through counsel, states that "this fact is significant because it now places [him] in a more vulnerable position should he be returned to Mexico" (Respondent's Br. at 10). We decline to remand for further consideration of the respondent's well-founded fear claim as he has not provided any additional country conditions evidence or specific arguments regarding how his status as an HIV positive homosexual changes the outcome of his case. *See* 8 C.F.R. §§ 1003.2(c)(1), (4); *Matter of Coelho*, 20 I&N Dec. 464, 471 (BIA 1992); *see also Castro-Martinez v. Holder*, *supra*, at 1082 (holding that substantial evidence supported our conclusion that, based on the documentary evidence provided by the petitioner, lack of access to HIV drugs is a problem suffered not only by homosexuals but by the Mexican population as a whole).

Inasmuch as the respondent has failed to satisfy the lower burden of proof required for asylum, it follows that he has also failed to satisfy the higher standard of eligibility required for withholding of removal under section 241(b)(3) of the Act. *See Zehatye v. Gonzales*, 453 F.3d 1182, 1190 (9th Cir. 2006). We also find no clear error in the Immigration Judge's determination that the respondent did not demonstrate that he will more likely than not be tortured in Mexico by or with the acquiescence (to include the concept of willful blindness) of an official of the Mexican government. *See* 8 C.F.R. §§ 1208.16(c)(2), 1208.18(a)(1); *Ridore v. Holder*, *supra*.

The Immigration Judge granted the respondent a 60-day voluntary departure period, conditioned upon the posting of a voluntary departure bond in the amount of $500.00 to the Department of Homeland Security within five business days from the date of the order (I.J. at 23-24). Effective January 20, 2009, pursuant to 8 C.F.R. § 1240.26(c)(3)(ii), an alien granted voluntary departure shall, within 30 days of filing an appeal with the Board, submit sufficient proof that the required voluntary departure bond was posted with the Department of Homeland Security, and if the alien does not provide timely proof to the Board, the Board will not reinstate the period of voluntary departure in its final order.

The record does not reflect that the respondent submitted timely proof of having paid the voluntary departure bond. The Immigration Judge properly advised the respondent of the need to inform the Board, within 30 days of filing an appeal, that the bond has been paid ("Notice to Respondents Granted Voluntary Departure"). Therefore, the voluntary departure period granted by the Immigration Judge will not be reinstated, and the respondent shall be removed from the United States pursuant to the Immigration Judge's alternate order. *See* 8 C.F.R. § 1240.26(c)(3); *Matter of Gamero*, 25 I&N Dec. 164 (BIA 2010). Accordingly, the following orders are entered.

ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: The respondent is ordered removed from the United States to Mexico.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
SAN DIEGO, CALIFORNIA

File: A200-821-303 February 3, 2012

In the Matter of

CARLOS ALBERTO BRINGAS-RODRIGUEZ a.k.a. PATRICIO IRON RODRIGUEZ RESPONDENT	)	IN REMOVAL PROCEEDINGS

CHARGES: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (Act), an Alien who is present in the United States without being admitted or paroled after inspection

APPLICATIONS: Asylum, withholding and protection under the Convention Against Torture, alternatively, voluntary departure at conclusion of proceedings under Section 240B(b) of the Act

ON BEHALF OF RESPONDENT: LYNN CEITHAML, ESQUIRE

ON BEHALF OF DHS: KATHRYN E. STUEVER, ESQUIRE

ORAL DECISION OF THE IMMIGRATION JUDGE

This oral decision is being rendered live in the presence of the parties at 10:25 Pacific Time in San Diego, California, on February the 3rd, 2012. The oral decision being rendered live at this time will later on be transcribed and will look like a written product, but the reader should bear in mind

that it is an oral decision, and is, therefore, subject to the inherent limitations of the making of ~~the~~ a decision under those conditions.

The Respondent is charged as a native and citizen of Mexico, who arrived in the United States on or about November 2004, without being admitted or paroled for inspection by an immigration officer. The Respondent, through counsel, admits and concedes that he is removable as charged, and the Court so finds.

The Respondent is applying for the relief of asylum, withholding and protection under the Convention Against Torture, based on a fear that he has of being persecuted, mistreated or killed because of his sexual orientation as a male homosexual.

The Respondent testified about repeated sexual abuse that he suffered as a child in Mexico, starting at the age of four, and ongoing through the years until he was 14 and came to the United States. The abuses were perpetrated mainly by an uncle and by two cousins, and also a neighbor. The Respondent did not disclose to anyone in his family or friends, ~~and~~ OR TO the government, that he was being sexually molested by the uncle, the relatives and the neighbor because the abusers had threatened with harming him or his family, particularly his grandmother who he loves very much, if he ever told anybody about these acts of sexual abuse that they were perpetrating upon him as a child. The Respondent explained that at the age

of 12, he left Mexico to come to the United States and be with his mother who had relocated to Kansas in the United States. After a few months there, however, he did not like the situation in Kansas and decided to go back to Mexico. He also missed his grandmother. He went back to Mexico and the sexual abuse and molestation continued, however, at the hands of mainly the uncle, the two cousins and the neighbor. During that time, he also felt threatened and that is why he did not tell anybody about what was happening. At the age of 14, he again left Mexico to be with his mother in Kansas, and he has not returned to Mexico since then.

The Respondent testified that he lived with his mother in Kansas and went to school there until the age of about 17, where, because he was having difficulties with his mother's boyfriend and the way that the boyfriend was treating him and his siblings, as well as with an aunt whom he stated also mistreated him, he decided to run away from the family, against his mother's wishes, and moved to Colorado to live with a cousin who was an adult at that time. The Respondent testified that he lived with the cousin in Colorado, and then eventually moved to San Diego with his then-domestic partner, a boyfriend, a United States citizen.

The record reflects that the Respondent was convicted in Colorado for Contributing to the Delinquency of a Minor on August 26, 2010. The Respondent explained that this was an

incident where he was drinking alcoholic beverages in his home in Colorado with some friends, and one of his friends apparently brought an underage minor who was also drinking. The minor became very inebriated, and the Respondent and his friends decided to take him to his parents' home. Apparently, there was some type of argument with the minor's mother when they returned the minor, and a few days later the Respondent received a call from the police that they were going to arrest him, and charge him with Contributing to the Delinquency of a Minor. The Respondent also testified that the minor accused the Respondent of sexual abuse, however, he was not convicted of that and he denies that any such abuse happened. The result of the conviction was that the Respondent had to serve a term in jail and was fined and placed on probation. He decided to leave Colorado with his then boyfriend, because his boyfriend apparently lived in San Diego, and moved to San Diego after that proceeding.

He was apparently placed in proceedings in Colorado as a result of that conviction. Apparently DHS authorities there, ICE, were contacted, as it usually happens in these types of situations, by the state authorities, and they placed him in proceedings by filing the NTA with the court in Denver, Colorado, in September of 2010. The Respondent posted a bond of $10,000 on September 8, 2010, and I see here that the Immigration Judge in Colorado signed an Order granting a Motion

to Change Venue to San Diego, California, on January 6, 2011.

While proceedings were pending, the Respondent suffered another conviction for violating California Vehicle Code Section 23152(b). This conviction was on September 7, 2011. He explained that he was driving a vehicle because his friend was too inebriated, and he was stopped and apparently failed the breathalyzer test by showing that he had a measurable content of alcohol.

The Respondent has submitted a psychological report and assessment which discusses the abuse that he experienced as a child, the effects of that abuse, showing, in the view of the psychologist, that the Respondent, because of those traumatic events, suffers from post-traumatic stress disorder and also suffers depression. The report talks also about the Respondent's problems with the law, and his alcohol abuse, and provides some suggestions to the Respondent to deal with his situation.

The Respondent has provided also some background information about the situation with homosexuals in Mexico, including the 2010 Human Rights report prepared by the State Department, and some articles that were apparently taken from the internet as a result of an internet search, showing incidents of violence against homosexuals in Mexico.

The Respondent argues that he suffered past persecution, and that the evidence does not show that that

presumption of future persecution has been rebutted. The Respondent also argues that the evidence presented shows a pattern and practice of persecution against homosexuals in Mexico by private individuals, and by the police itself, or with the consent of the police. The Respondent argues that the police are unwilling or unable to offer him protection, and that he cannot relocate to anywhere in Mexico because of that.

The first issue in the case is whether the Respondent has been able to show a satisfactory explanation for his delay in filing the application. The Respondent entered the United States for the last time in November of 2004, and he filed his application on April the 5th, 2011.

In the Respondent's Brief, he argues that he filed his application after more than a year of being in this country because he was a minor, and Respondent argued then that he was under 21 when he filed the application, and, therefore, because of his minority (using 21 as a standard for when is he to be considered a minor or not), the delay should be excused. The Respondent cited to a case in the Brief as precedent for that proposition. The Respondent cited to the case of Al-Mousa v. Mukasey, 518 F.3d 738, a Ninth Circuit published decision dated March 5, 2008. However, as the Court pointed out on the record, a review of that case reveals that that published opinion was withdrawn by the Circuit on September 22, 2008, and substituted by a decision on September 22, 2008, with the same name, which,

however, was not selected for publication in the federal reporting. Therefore, the cited precedent is not a precedent, and counsel should have checked the history of the case before citing it as a precedent in her Brief, as that is not an appropriate practice for the Immigration Court, or any court for that matter.

It is required by the statute at Section 208 that the Alien demonstrate by clear and convincing evidence that the application for asylum has been filed within one year after the date of the Alien's arrival in the United States, unless there are certain exceptions such as changed circumstances, or the Alien has previously applied. The regulations indicate at 8 C.F.R. Section 1208.4 that the Alien has the burden of proving to the satisfaction of the Immigration Judge that he or she qualifies for an exception to the one-year deadline. The categories of exceptions are changed circumstances or extraordinary circumstances. The regulations state that extraordinary circumstances shall refer to events or factors directly related to the failure to meet the one-year deadline. Such circumstances may excuse a failure to file within the one-year period as long as the Alien filed the application within a reasonable period, given those circumstances. The regulations further state that the burden of proof is on the applicant to establish to the satisfaction of the Immigration Judge that the circumstances were not intentionally created by the Alien

through his or her own action or inaction, that those circumstances were directly related to the Alien's failure to file the application within a one-year period, and the delay was reasonable under the circumstances. The regulations point to examples of what may be exceptional circumstances. One of those examples is legal disability. The regulations give as an example of legal disability that the applicant was an unaccompanied minor, or suffered from a mental impairment during the one-year period after arrival.

The Court has not found any specific authority to support the view that, when the regulation talks about an unaccompanied minor as an example of a legal disability which would be an exceptional circumstance excuse to the filing within one year of arrival, that the regulation is referring to the age of 21 as opposed to 18. The reading of the regulation would suggest to the Court that, since they are talking about a legal disability, that the age to be considered is 18 rather than 21. It would make more sense with the purposes of the regulation to excuse, when there is a legal disability, particularly when it is a minor under 18 that is unaccompanied. However, I do recognize that the age of 21 is considered as the age of defining an adult in other parts of the Act. So I examined the materials used by the asylum officers for guidance, and I did not find there anything that would suggest that they use the age of 21 to determine the legal disability excuse under the

exceptional circumstances. On the contrary, that material suggests that the age is 18, rather than 21. Now, Respondent's counsel argues that the matter is up in the air with the Circuit and the Board. Well, that may be, but until they provide some precedent saying clearly that the age that this exceptional or extraordinary circumstance excuse is 21 or under 21, I am going to interpret the regulation in what I believe is the more sensible and reasonable interpretation.

Interpreting the legal disability as the age of 18, I find that the Respondent did enter the United States when he was under 18. He was not truly unaccompanied because he was going to be with his mother, but assuming that he was, for purposes of this exception, the Respondent did not show to the Court's satisfaction that, considering all the circumstances, he filed within a reasonable period of time after he became 18. The Respondent became 18 on June 4, 2008, and he did not file until April the 5th, 2011, a period of almost two years. The Respondent, as pointed out by DHS counsel, during that period of time, was able to not only leave his home without his parents' permission as a 17-year-old, but obtained employment and became a manager of a business. He said he was an assistant manager in a pizza business and also in a chocolate store, and that he actually managed two stores, showing that the Respondent had sufficient mental capacity to have been able to gather his documents and file an application for asylum. The Respondent's

additional argument today in the amendment to the application where he says that he did not apply because he was not aware of the fact that he could obtain some type of protection under asylum because of his sexual orientation, is insufficient in the Court's view to provide an adequate excuse under these circumstances. Assuming that this is the new excuse for the year, or if it is just one that is added to what is on the Brief, I don't have a situation here or individual who, for reasons related to his life circumstances, was not sufficiently capable even at 18 to file an application for asylum within a reasonable period of time. The excuse that he was not aware of the law is insufficient to support the delay in filing here.

Therefore, for those reasons, I will conclude that the Respondent's asylum application was not filed within a reasonable time after his legal disability was over, and is, therefore, insufficient to overcome the delay, and the asylum is denied on that basis.

The Court will, therefore, consider the I-589 application for withholding under Section 241(b)(3)(A) of the Act, and for withholding and deferral under the Convention Against Torture, as implemented by the regulations.

An applicant for withholding of removal, as provided under Section 241(b)(3)(A) of the Act, has the burden of proving that there is a clear probability of persecution in the country of removal on account of race, religion, nationality, membership

in a particular social group or political opinion. See INS v. Stevic, 467 U.S. 407 (1984), see 8 C.F.R. Section 1208.16(b) (2011).

An applicant for withholding under Section 241(b)(3)(A) of the Act may also establish withholding by proving that the applicant suffered past persecution on account of any of the enumerated grounds in the country in question. See Matter of H-, 21 I&N Dec. 337 (BIA 1996), 8 C.F.R. Section 1208.16(b)(1) (2011).

This application is examined under the amendments of 2005, known as the REAL ID Act. These amendments indicate that the applicant must establish that any of the protected grounds was or will be at least one central reason for the persecution of the applicant. See Matter of C-T-L-, 25 I&N Dec. 341 (BIA 2010). This "on account of" requirement, also called the nexus requirement, can be established by either direct or indirect evidence, however, if it is indirect evidence, the inferences that may be drawn from the evidence have to be inferences that are clearly to be drawn from the facts to support that there is no other logical reason for the persecution inflicted or feared. See Sangha v. INS, 103 F.3d 1482 (9th Cir. 1997). See also Molina-Morales v. INS, 237 F.3d 1048 (9th Cir. 2001), (where the Court found that the persecution suffered, which was a woman who had been raped by a local leader of a political party, was not on account of any protected ground, but was, rather, a personal

matter).

When the persecutor that has inflicted the harm, or is feared may inflict the harm in the future, is not the government directly but a private actor, the Respondent has the burden of establishing that the government of the country in question cannot control or is unwilling to control said individual or individuals. See Elnager v. INS, 930 F.2d 784 (9th Cir. 1990), Matter of Eusaph, 10 I&N Dec. 453 (BIA 1964).

An applicant for the relief of withholding or deferral under Article III of the United Nations Convention Against Torture and Other Forms of Cruel Treatment has the burden of proving a more likely than not possibility of torture, as that term is defined by the regulations, in the country proposed for removal. See Matter of J-F-F-, 23 I&N Dec. 912 (A.G. 2006), 8 C.F.R. Section 1208.16-18 (2011). Torture, according to the regulations, is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her, or a third person, information or a confession, punishing him or her for an act he or she, or a third person, has committed or is suspected of having committed, or intimidating or coercing him or her, or a third person, or for any other reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official, or other person

acting in an official capacity. See 8 C.F.R. Section 1208.18(a)(1). The regulations indicate that in determining whether it is more likely than not that the Respondent would be tortured, all evidence relevant to the possibility of future torture shall be considered, including but not limited to, evidence of past torture inflicted upon the Respondent, evidence that the Respondent could relocate to a part of the country where he or she is not likely to be tortured, evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable, and other relevant information regarding conditions in the country of removal. It is noted that the regulation's requirement of consent or acquiescence of a public official, or other person acting in an official capacity, ~~requirement~~ includes awareness as well as willful blindness. See Zheng v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003). The Respondent must show that the government would either participate in the torture, or turn a blind eye to the violence and torture. See Matter of Y-L-, 23 I&N Dec. 270 (A.G. 2002).

In the present case, I find that the evidence presented by the Respondent does not establish past persecution. I note that the sexual abuse that the Respondent suffered is, indeed, horrendous, however, I don't believe the evidence is sufficient for me to make the conclusion that that horrendous mistreatment that he suffered at the hands of his relatives and the neighbor is past persecution within the meaning of the

statute and the regulations. I say this for basically two reasons. One is that it is unclear from the evidence whether at least one central reason for the sexual abuse perpetrated upon the Respondent was on account of his membership in a particular social group of a male homosexual, which is what the Respondent is arguing. I believe that what I have as far as evidence shows much more that the central reasons for the abuse were the perverse sexual urges of the abusers who abused the Respondent while he was a child. I don't think I have enough evidence here to conclude that at least one central reason was punishment by these individuals because the Respondent was a homosexual. It appears that what the evidence mainly shows is that these persons were simply satisfying their perverse urges with the Respondent. And, basically, what we have here are horrendous acts of pedophilia on the part of the uncle and the cousins and the neighbor. As pointed out by Government counsel, it does not appear that the Respondent's sexual abuse extended beyond this limited group of individuals, and we do not have evidence that there was significant discrimination by other members of the community, and mistreatment and ridicule, for example, because of a sexual orientation or because their perception that the Respondent, at that age, was somehow homosexual. Therefore, I conclude that the evidence falls short of establishing that element.

In addition, the evidence falls short of establishing

past persecution because of the fact that the Respondent never reported this to an adult, and, therefore, the police or the authorities never got word of this sexual abuse that was happening to the Respondent by mainly his family members. Now, unfortunately, this is the case with sexual abuse of children, not just in Mexico but also in the United States, and probably everywhere else. The pedophile abusers usually manipulate their victims in such a way as to terrify them, and prevent them from going to an adult and reporting the abuse because they want to continue perpetrating their abuse on the victim. The fact that they threatened the Respondent and made him afraid is typical of these individuals, but also, in a way, shows that there was some type of fear that these individuals had that if they were caught committing these acts on a child, they would be punished or there would be serious adverse consequences against them. Although we have background material showing acts of violence, not only by individuals in Mexico, but by the police upon homosexuals, I don't believe that we have any evidence showing that the police are involved in a pattern of practice of any kind of engaging in sexual abuse of minors, whether male or female, and we certainly do not have any evidence whatsoever that the police in Mexico or the authorities do not take any action whatsoever to offer some type of protection against the abuse of children, sexually, whether the sexually abused child is a male or female, or whether the abuser is a male or a

female. There is no evidence of that, so I cannot really conclude that the government was unwilling or unable to offer the Respondent protection from the sexual abuse perpetrated upon him as a child.

Turning to the evidence to see if the Respondent has established a more likely than not possibility of persecution on account of, or at least one central reason, of his sexual orientation in Mexico in the future. Contained in the record are the Country Reports for 2009 and 2010, and there is a special section in the 2009 report on societal abuses, discrimination and acts of violence based on sexual orientation and/or identity. As noted by counsel for the Respondent, that part of the report talks about a specific incident involving a gay man named Augustine Estrada, who was a teacher and gay activist, and participated in a gay rights march in 2007, wearing a dress and high heels. After the march, the individual started receiving threats, and verbal and physical attacks. He was fired in 2008 from the school for children with disabilities where he worked. A group of friends started to lobby the government after his dismissal to reinstate him, and when they went to the governor's palace to attend a meeting with state officials, police beat him and his supporters. He was taken to prison the next day, threatened and raped. He was later released but continued to face harassment from state authorities. That is a specific instance of ~~State~~ the State mistreating

a homosexual. And there are other instances of mistreatment reported by individuals and the police against gay individuals. Also the report does say that there is much corruption in the government in Mexico, and that there is much impunity. Some of the reports I have considered have provided information about a specific incident. These were the reports that were taken from the internet. For example, five homosexuals in Puebla were arrested by the police because the family of these individuals had accused them of prostitution. There are also some statistics of increasing violence against homosexuals and murders of homosexuals. These materials also, however, indicate that there is much discrimination in society against homosexuals, and that there have been gay demonstrations which have resulted in many arrests of the demonstrators by the police of these gay activists and demonstrators. The report also states that there have been some advances in Mexican society with respect to homosexuals. The example given is that, in the area of Mexico City, which is a federal district similar to the District of Columbia in Washington, in terms of being a separate region with its own laws, same-sex marriages have been approved and are allowed, and the law in Mexico states that other states in Mexico have to recognize same-sex marriages. There have also been large demonstrations in Mexico City, and I believe one of the reports provided by the Respondent indicates that in some neighborhoods in Mexico City, there is much tolerance with

homosexual couples, even allowing homosexual couples to walk in public holding hands. There have been cases that have been brought or initiated by Mexico's National Human Rights Commission (CNDH) for human rights violation, including violations related to homosexuals, and the CNDH, the reports say, is engaged in providing training on human rights to Mexican military and police, and the government has taken steps to prevent torture, such as ~~the~~ is mention or in the report, of the acceptance of the Istanbul Protocol.

In my review of the background materials, although they do show discrimination against homosexuals and instances of abuse by the police, I don't believe that they are sufficient to show a pattern of practice of violence by the police, or by individuals with the police acquiescence or participation in some way, to establish the pattern of practice that is mentioned in the regulations. I think that the evidence does show that there is a risk for homosexuals to either be subject to mistreatment and physical attacks by members of the population in Mexico who may be intolerant of this sexual lifestyle, and there is a possibility that the police might ignore a complaint or make fun of it, and even participate in this type of mistreatment of homosexuals on account of their sexual orientation. I do think the background materials do show that that is a possibility. However, I think that they are insufficient to establish that the possibility is of the type

that I can truly consider to be a more likely than not possibility with respect to the Respondent and his situation. Now, the Respondent is not, as far as the evidence goes, a gay activist. He is not involved in any type of gay public advocate groups. He has not testified as such. There is no evidence of that. He is also not a transgender or transvestite. There is no evidence that he dresses like a woman or prefers to dress as a woman sometimes in public, or that he is a transgender, which is another subcategory in the sexual minority orientation groups. So I don't think he has shown with the evidence that he comes close to these more vulnerable populations within the homosexual or sexual orientation community in Mexico. I don't believe that he has shown enough evidence for me to conclude that there is a more likely than not possibility that he will be persecuted on account of his homosexual orientation. I also don't believe that he has shown enough evidence that he could not simply avoid any further problems from these family members by simply relocating to another part of Mexico. He is a very resourceful individual, appears to be a bright young man. He was able to leave his home before he was an adult, and obtained employment as an assistant manager at a very early age with not even a high school degree. He is very fluent in English and Spanish. I don't see why he could not go to another part of Mexico, or even Mexico City which is much more tolerant of the homosexual lifestyle than other places in Mexico, and simply

work there and earn a living there. I don't see factors here that would make me conclude that it would be unreasonable for him to go somewhere else and avoid the site of this abuse that he suffered, and any possible future attempt by these individuals to continue with their sexual abuse of the Respondent.

Therefore, I find that the Respondent has not established or met his burden of proof to show a more likely than not possibility of persecution on account, at least one central reason, of his membership in a particular social group of male homosexuals.

With respect to the Convention Against Torture, again, the background materials do show involvement to a certain degree of certain individuals in the Mexican government and the Mexican police in mistreatment and harm that is severe of homosexual individuals. However, we do not have any evidence that the Respondent's past sexual abuse by his family and neighbor, that the government was in any way complicit with that. The government did not know, and we have no evidence that they turned a blind eye because they didn't even know. Nobody knew. There is no evidence either that the government routinely turns a blind eye to complaints of sexual abuse of children in Mexico. So from the past, we don't really have anything that would give us some type of support to establish that he has a more likely than not possibility of torture in the future by the government,

or with the acquiescence of the government of Mexico. I don't believe that just without the reports showing these instances of mistreatment of homosexuals in Mexico, that that would be sufficient to establish the burden of proof requirement of a more likely than not possibility of torture by the government, or with the acquiescence of the Mexican government. He has not shown with the evidence that he would even be in a position where I can conclude that there is a more likely than not possibility of torture to then examine if the torture possibility is by individuals which, in his case, might be the higher possibility, since it was individuals, the ones who perpetrated the sexual abuse upon him, that the government will somehow turn a blind eye to take some kind of measure to prevent these people from harming the Respondent. I don't think he even gets to that point, and there is less evidence to show that the government is actually going to participate in this torture of the Respondent, or that there is a more likely than not possibility of that. There is a possibility that that could happen, in the same way that there is a possibility that a rogue police officer, homophobic or intolerant of homosexuals, could abuse the Respondent here in the United States if the Respondent gets arrested, and gets in a position that those factors all converge ~~meet together~~. That, undoubtedly, ~~there~~ is a possibility in the United States and in Mexico, perhaps to a higher degree in Mexico because of the information in the background materials.

However, I don't believe the evidence is enough to show that it is a more likely than not possibility that that would occur to the Respondent with respect to torture in Mexico. Therefore, I deny the relief for withholding and deferral under the Convention Against Torture on that basis.

The Respondent has applied also in the alternative for voluntary departure at conclusion of proceedings. Now, there are two serious adverse factors here. The more serious is his conviction for Driving Under the Influence while proceedings were pending. Now, this is very serious because, in the Court's view, it shows that the Respondent is not very concerned about being a law-abiding citizen, even when he is under proceedings to remove him to a country where he claims he is afraid of going. I would normally have denied voluntary departure, given the limited positive factors of the Respondent in this case. However, the psychologist's report does give somewhat of an insight into the Respondent's behavior, and given the fact that the DHS does not oppose a grant of voluntary departure, I am inclined to give the Respondent the benefit of the doubt and provide the limited relief of voluntary departure, which is granted for a period of 60 days, subject to the posting of a voluntary departure bond of $1,000, which shall be posted with the appropriate office of the Department of Homeland Security within five business days. The voluntary departure granted today is subject to all the terms and conditions in the statute

and the regulations. The 60-day period, if counted from today, would expire on April the 3rd, 2012. Among those conditions are, of course, if the Respondent does not leave voluntarily when and as required, the voluntary departure will be canceled, and without further hearing, an Order of Removal to Mexico will be entered against the Respondent based on the charge in the charging document.

For all the above-mentioned reasons then, the Court issues the following Orders.

ORDERS

IT IS HEREBY ORDERED that the Respondent is found to be removable as charged.

IT IS FURTHER ORDERED that the Respondent's application for asylum is DENIED.

IT IS FURTHER ORDERED that the Respondent's application for withholding of removal under Section 241(b)(3)(A) of the Act, and withholding and deferral under the Convention Against Torture, are hereby DENIED.

IT IS FURTHER ORDERED that the Respondent is GRANTED voluntary departure at conclusion of proceedings under Section 240B(b) of the Act, subject to the above terms and conditions, and to all the terms and conditions in the statute and the regulations, as well as to the advisals which will be given to the Respondent in writing regarding the amendments to the voluntary departure regulations. These written advisals which

will be given to the Respondent at the conclusion of this proceeding are incorporated by reference into this decision.

RECEIVED AND REVIEWED
ON 3-29-2012
WITHOUT BENEFIT OF
RECORD OF PROCEEDINGS

IGNACIO P. FERNANDEZ
United States Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE IGNACIO P. FERNANDEZ, in the matter of:

CARLOS ALBERTO BRINGAS-RODRIGUEZ

A200-821-303

SAN DIEGO, CALIFORNIA

is an accurate, verbatim transcript of the recording as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

NICOLA DELPH (Transcriber)

YORK STENOGRAPHIC SERVICES, Inc.

APRIL 9, 2012

(Completion Date)

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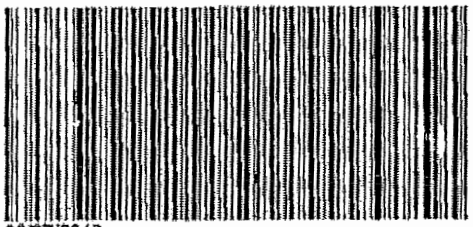

08/27/2010
Case Appeal
Transcribed Oral 1
BRINGAS-RODRIGUEZ, CARLOS ALBERTO

200-821-303

MT

No. 13-72682

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARLOS ALBERTO BRINGAS-RODRIGUEZ,
a.k.a. Patricio Iron-Rodriguez,

Petitioner,

v.

LORETTA E. LYNCH,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

Agency No. A200-821-303

OPPOSITION TO PETITION FOR REHEARING EN BANC

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OPPOSITION TO PETITION FOR REHEARING EN BANC

INTRODUCTION

In *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052 (9th Cir. 2006), this Court recognized that neither the INA, nor its implementing regulations, require asylum seekers to report past persecution to authorities to establish that the government was unable or unwilling to protect them. Rather, any failure to report merely

reveals a gap in the evidence. *Rahimzadeh v. Holder*, 613 F.3d 916, 921 (9th Cir. 2010). This Court has held that the gap in evidence may be filled by establishing:

> (1) that private persecution of a particular sort is widespread and well-known but not controlled by the government;
> (2) that others have made reports of similar incidents to no avail;
> (3) that the country's laws or customs effectively deprive the petitioner of any meaningful recourse to governmental protection; or
> (4) that going to the authorities would have been futile or would have subjected the petitioner to further abuse. *Rahimzadeh*, 613 F.3d at 921-22.

In *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011), this Court addressed an attempt to fill that gap in evidence – by providing testimony that others have reported similar incidents to no avail – and found that evidence insufficient. The case now before this Court applied the same framework to a slightly different factual scenario and reached a similar conclusion. *Bringas-Rodriguez v. Lynch*, 805 F.3d 1171 (9th Cir. 2015). Each case relies heavily on the specific factual basis for filling the gap. Nothing in either case changes the law of this circuit, conflicts with established precedent, or otherwise raises an issue of exceptional importance. Respondent, therefore, respectfully opposes Mr. Bringas-Rodriguez's petition for rehearing en banc, and urges this Court not to rehear the case.

BACKGROUND AND RELEVANT FACTS

Mr. Bringas-Rodriguez is a native and citizen of Mexico. A.R. 33. He entered the United States in 2004 without admission or parole. A.R. 389. After a

minor criminal conviction, he was placed in removal proceedings. A.R. 267, 389. Mr. Bringas-Rodriguez filed a defensive asylum application, premised on his membership in the particular social group of homosexual men. A.R. 255. He stated that his uncle, cousins, and neighbor began sexually abusing him as a four year old child because he was homosexual. A.R. 191, 217, 255, 263-63. Mr. Bringas-Rodriguez fled Mexico at age twelve to join his mother, but returned seven months later. A.R. 188, 190, 262-63. After the abuse resumed, he again left Mexico at age fourteen. A.R. 189, 263. Other than the child abuse, he encountered no other difficulties on account of his homosexuality. A.R. 230. Regarding future persecution, Mr. Bringas-Rodriguez stated that he feared discrimination and persecution from Mexican society at large, and alleged that the government would be unable or unwilling to protect him. A.R. 264.

The Immigration Judge denied Mr. Bringas-Rodriguez's requests for asylum and related remedies. A.R. 99. The Immigration Judge denied Mr. Bringas-Rodriguez's asylum application as untimely. A.R. 85. Turning to his application for withholding of removal under the INA, the Immigration Judge acknowledged the deplorable mistreatment Mr. Bringas-Rodriguez suffered as a child, but attributed that mistreatment to abusers acting on perverse sexual urges rather than on account of sexual orientation. A.R. 88-89. The Immigration Judge also found that Mr. Bringas-Rodriguez failed to establish that the government would have

been unable or unwilling to protect him from his abusers. A.R. 90. Acknowledging evidence in the record that police might overlook the mistreatment of homosexuals, the Immigration Judge explained that there was no evidence that police would overlook the sexual abuse of a young child. A.R. 90.

Regarding Mr. Bringas-Rodriguez's fear of future persecution, the Immigration Judge concluded that he failed to establish a pattern or practice of persecution against homosexuals. A.R. 93. The Immigration Judge similarly denied Mr. Bringas-Rodriguez's application for withholding of removal under the Convention Against Torture because Mr. Bringas-Rodriguez failed to provide sufficient evidence that government officials would be unwilling to protect him in the future. A.R. 95-96.

On July 2, 2013, the Board dismissed Mr. Bringas-Rodriguez's appeal. A.R. 5. The Board assumed that Mr. Bringas-Rodriguez had timely filed his asylum application, but agreed with the Immigration Judge's finding of no past persecution. A.R. 3-4. The Board further rejected Mr. Bringas-Rodriguez's argument that there was a pattern or practice of persecution against homosexuals in Mexico. A.R. 4, 23. Having failed to establish eligibility for asylum, the Board concluded that Mr. Bringas-Rodriguez necessarily failed to establish eligibility for withholding of removal under the INA, and found no error in the denial of his application for CAT protection. A.R. 5.

Mr. Bringas-Rodriguez filed a petition for review of the Board's decision, which a panel of this Court denied. *Bringas-Rodriguez*, 805 F.3d 1171. The Court found the Board's determination that Mr. Bringas-Rodriguez did not prove past persecution or a well-founded fear of future persecution was supported by substantial evidence, and that he had therefore failed to prove his eligibility for asylum, and was necessarily ineligible for withholding of removal. *Bringas-Rodriguez*, 805 F.3d at 1177. The panel acknowledged that aliens are not required to report the harm that they suffer in order to prevail, but found that Mr. Bringas-Rodriguez had failed to meet his burden to close the "gap in proof" regarding whether authorities in Mexico would have protected him from child abuse. *Bringas-Rodriguez*, 805 F.3d at 1078. Regarding the hearsay testimony that Mr. Bringas-Rodriguez offered in support of his belief that the police would not have protected him as a gay man, the panel agreed with the agency that documentary evidence offered by Mr. Bringas-Rodriguez included "*only one* specific example of government persecution on the basis of sexual orientation in Mexico," *Bringas-Rodriguez*, 805 F.3d at 1179 (emphasis in original), and that Mr. Bringas-Rodriguez's hearsay evidence, specifically claims by friends in Kansas that Mexican authorities had been unwilling to help them when they reported abuse, was unavailing, because such "reference to vague reports from anonymous friends cannot overcome the lack of any corroborating evidence." *Bringas-Rodriguez*,

805 F.3d at 1180. The panel explicitly agreed that Mr. Bringas-Rodriguez "did not offer any evidence suggesting that Mexican police refused to protect abused children," and that Bringas's hearsay statement was so lacking in detail that it was of only limited probative value. *Bringas-Rodriguez*, 805 F.3d at 1181.

Regarding Mr. Bringas-Rodriguez's fear of future persecution, the panel cited *Castro-Martinez* and agreed with the agency that, in the absence of any evidence of record appreciably distinguishing the facts of Mr. Bringas-Rodriguez's claim from those asserted by Castro-Martinez, Mr. Bringas-Rodriguez failed to establish a pattern or practice of persecution against gay men. *Bringas-Rodriguez*, 805 F.3d at 1182-83. The panel therefore agreed with the Board that Mr. Bringas-Rodriguez failed to establish a well-founded fear of future persecution. The panel also agreed that Mr. Bringas-Rodriguez failed to demonstrate eligibility for CAT protection. *Bringas-Rodriguez*, 805 F.3d at 1185.

This petition for rehearing en banc followed.

ARGUMENT

Under Fed. R. App. P. 35(a), "en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." As the Supreme Court and this Court have noted, "[e]n banc courts are the exception, not the rule. They are

convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit." *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960); *see Makaeff v. Trump University, LLC*, 736 F.3d 1180, 1180 (9th Cir. 2013) (Wardlaw, J., concurring in the denial of reh'g en banc). This case fails to rise to that extraordinary level, as the panel's decision does not conflict with the precedent of this Circuit, the Supreme Court, or any other Circuit, and does not create a question of exceptional importance.

I. MR. BRINGAS-RODRIGUEZ'S CHARACTERIZATION OF THE PANEL DECISION AS CREATING A REPORTING REQUIREMENT AND ELIMINATING THE ADMISSIBILITY OF HEARSAY EVIDENCE MERELY CONCEALS DISAGREEMENTS THAT ARE FACTUAL IN NATURE

Mr. Bringas-Rodriguez frames his challenge to the panel decision as identifying a conflict with prior precedent. Specifically, he claims that the panel decision creates a reporting requirement for minor victims of crime, and eliminates the admissibility of hearsay evidence in immigration court. Pet. For Reh'g En Banc at 2. But, as detailed below, the panel followed circuit precedent in every respect.

A. The Panel Followed Circuit Precedent Addressing Whether Authorities are Unable or Unwilling to Protect an Asylum Applicant in the Absence of Reporting

With respect to Mr. Bringas-Rodriguez's belief that the panel's decision somehow creates a reporting requirement for minor victims of crime, Mr. Bringas-Rodriguez misreads the decision. The panel acknowledged the Court's long-standing precedent that, in cases of persecution by private actors, reporting to the police is not required, and that children are not required to report abuse that they have suffered in order to prevail in an asylum claim. *Bringas-Rodriguez*, 805 F.3d at 1178 (citing *Castro-Martinez*, 674 at 1080-81). Nothing in the panel's decision changes that precedent.

Instead, the panel merely applied the asylum framework to the specific factual situation before it. In doing so, it agreed with the immigration judge's determination that Mr. Bringas-Rodriguez had not filled the gap in evidence as to how the government would respond to the harm he had suffered. *Bringas-Rodriguez*, 805 F.3d at 1178. More specifically, the panel observed that Mr. Bringas-Rodriguez offered no evidence that Mexican authorities would fail to take any action to protect children from sexual abuse, "whether the sexually abused child is a male or female, or whether the abuser is a male or a female." *Bringas-Rodriguez*, 805 F.3d at 1181 (citing A.R. 46). Examining the record in its entirety, the panel noted that the country reports make no reference to an unwillingness to

enforce laws against child abuse, and that Mr. Bringas-Rodriguez's hearsay statement was so lacking in detail that it likewise was insufficient to meet his burden of proof. *Bringas-Rodriguez*, 805 F.3d at 1181.

Looking more closely at Mr. Bringas-Rodriguez's challenge to that determination makes it clear that his true challenge is of a factual nature. Mr. Bringas-Rodriguez argues that the hearsay testimony should have been sufficient to meet his burden, Pet. For Reh'g En Banc at 13, but sufficiency involves weighing that testimony and assigning probative value. That is a mere factual dispute. Mr. Bringas-Rodriguez and amici likewise suggest that evidence concerning the authorities overlooking the mistreatment of *any* LGBT community member should be broadly applied to the sexual abuse of LGBT children, Pet. For Reh'g En Banc at 7; *see* Amicus Brief In Support of Rehearing En Banc for The National Immigrant Justice Center, Public Law Center, National Center for Lesbian Rights, LAMBDA Legal Defense And Education Fund, HIV Law Project, Immigration Equality, LGBT Center OC, Transgender Law Center, Florence Immigrant & Refugee Rights Project, and Centro Legal De La Raza at 2; Amicus Brief In Support of Rehearing En Banc for The United Nations High Commissioner for Refugees at 16, but again that challenges the probative value of that specific evidence; it does not present a legal question. To the extent that these challenges are factual disputes they are inappropriate for en banc review.

B. The Panel Followed Circuit Precedent on the Need to Weigh Hearsay Testimony in Removal Proceedings

Mr. Bringas-Rodriguez also argues that the panel created a conflict with Circuit precedent by concluding that the hearsay testimony was inadmissible and expanding the reach of *Gu v. Gonzales*, 454 F.3d 1014 (9th Cir. 2006). Pet. For Reh'g En Banc at 11-13. In *Gu*, the Ninth Circuit held that hearsay even from anonymous sources "may not be rejected out-of-hand" but must be weighed in evaluating whether an alien has met his burden of proof. *Gu*, 454 F.3d at 1021. It also stated that this "does not prevent us from considering . . . [its] probative value." *Ibid.* In *Bringas-Rodriguez*, the panel cited *Gu* and other relevant authority. *Bringas-Rodriguez*, 805 F.3d at 1181. After examining the record, the panel observed that, "without many details to flesh out the context of Bringas's friends' hearsay statements, their relative probative value is rather low." *Id.* Nothing in the panel's analysis suggests that it is broadening *Gu's* reach. Rather, the panel cited the relevant circuit authority, considered and weighed the hearsay evidence, and held that it was unhelpful in independently proving the legitimacy of Mr. Bringas-Rodriguez's stated fear of persecution. To the extent that Mr. Bringas-Rodriguez argues otherwise, he raises only a factual claim unworthy of en banc review.

II. THE ALLEGATIONS THAT THE COURT OF APPEALS, IN TREATING THE HEARSAY TESTIMONY, VIOLATED *SEC V. CHENERY CORP.* AND IMPROPERLY ACTED AS A FACT-FINDER, LACK MERIT

Mr. Bringas-Rodriguez alleges that the panel improperly affirmed the denial of his applications for relief and protection on grounds not relied on by the Board, in violation of *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). Pet. For Reh'g En Banc at 11. He also alleges that the panel exceeded the proper scope of judicial review by "independently weighing evidence to support findings the Agency never made." Pet. For Reh'g En Banc at 12-13. Essentially, Mr. Bringas-Rodriguez ascribes error to the fact that the panel explicitly referred to the hearsay testimony he proffered, whereas the Board did not. These arguments lack merit.

In dismissing his appeal, the Board stated, "we agree with the Immigration Judge that the respondent did not establish that he suffered past persecution . . . . [He] has not demonstrated that . . . the government was unwilling or unable to control his abusers." A.R. 4. The Board further stated, "[T]he evidence does not establish that the Mexican government . . . is unwilling or unable to control private individuals who perpetrate violence against homosexuals (I.J. at 18-19)." *Ibid.* It is well settled that the Board "does not have to write an exegesis on every contention. What is required is merely that it consider the issues raised, and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted." *Najmabadi v. Holder*, 597

F.3d 983, 990 (9th Cir. 2010) (quoting *Lopez v. Ashcroft*, 366 F.3d 799, 807 n.6 (9th Cir. 2004). The Board, in stating that it "agree[d] with the Immigration Judge that [Mr. Bringas-Rodriguez] did not establish that he suffered past persecution on account of a statutorily enumerated ground," and that "the evidence presented by [Mr. Bringas-Rodriguez] did not meet his evidentiary burden," makes clear that it considered the record as a whole in reaching its ultimate conclusions, including Petitioner's hearsay submissions. A.R. 4. That is all that this Court requires. *Najmabadi v. Holder*, 597 F.3d at 990.

On the past persecution issue, the panel noted the "gap in proof" Mr. Bringas-Rodriguez needed to fill in light of his non-reporting. *Bringas-Rodriguez*, 805 F.3d at 1178. The panel stated that it "agree[d] with the BIA" that he had not met his burden to close that gap. *Ibid.* The panel referred to the Immigration Judge's decision, as did the Board, in concluding "we agree with the IJ and the BIA that Bringas's evidence was not sufficient." *Bringas-Rodriguez*, 805 F.3d at 1179.

There is no reason to think that only the panel, and not the Board as well, considered the evidence in the record, particularly the insufficiencies noted by the Immigration Judge. Given the weakness of Mr. Bringas-Rodriguez's evidence regarding governmental unwillingness – only the vague hearsay – the Board evidently found it unnecessary to go into further details regarding such nonspecific

evidence. It follows that the panel did not affirm on grounds not relied on by the Board. Thus, there is no *Chenery* violation. By the same reasoning, the panel did not exceed its proper scope in agreeing with the agency's determinations. It merely referenced details in the Immigration Judge's decision – a decision which the Board also referenced – in explaining why substantial evidence supported the Board's decision.

III. THE ALLEGATIONS OF MISUSE OF THE COUNTRY REPORTS LACK MERIT

Mr. Bringas-Rodriguez alleges that the panel's reference to the 2008 Country Report was improper, for the same reasons discussed above with respect to the hearsay, namely that it was not considered by the Board.[1] Pet. For Reh'g En Banc at 14. And, for the same reasons discussed above, that allegation lacks merit.

Mr. Bringas-Rodriguez suggests that his vague testimony concerning the government's unwillingness to protect him was "disregarded" on the basis of individualized country reports. Pet. For Reh'g En Banc at 15. But the record belies this claim. As discussed *supra*, his testimony was not disregarded by the

[1] Respondent notes that to the extent amici cite to country conditions evidence outside the record of proceedings that was before the agency and the panel, such evidence is not properly a basis for rehearing en banc, and not properly considered by the panel. *See genl'y* Amicus Brief In Support of Rehearing En Banc for Center for Gender & Refugee Studies; Amicus Brief In Support of Rehearing En Banc for Kids in Need of Defense, Tahirih Justice Center, and Women's Refugee Commission.

agency; it was weighed and found to be insufficient. Mr. Bringas-Rodriguez additionally argues that the panel erred in viewing the Country Reports in terms of their relevance to the victims of child abuse rather than in terms of what adult homosexuals would face in Mexico. Pet. For Reh'g En Banc at 12. He suggests that the panel further erred in drawing inferences from the "absence of evidence" about child abuse victims in the Country Reports. Pet. For Reh'g En Banc at 16. Lastly, he implies that the absence of a particular Country Report from the record should be viewed as a demonstration of the Immigration Judge's failure to provide sufficient notice regarding the desirability of corroboration. Pet. For Reh'g En Banc at 15. These contentions also lack merit.

In asserting these arguments, Mr. Bringas-Rodriguez misapprehends the process of adjudicating asylum claims. It is his burden to prove his eligibility for asylum. 8 U.S.C. § 1158(a). He must meet that burden by providing evidence in support of his claims. *Ibid.* Mr. Bringas-Rodriguez, represented by counsel throughout his proceedings before the agency, testified credibly in immigration court, but offered only vague, anonymous hearsay assertions on the issue of the government's unwillingness to protect him as a gay man returning to Mexico. A.R. 200. He had the opportunity, with the benefit of counsel, to submit any evidence he wished into the record. He cannot at this juncture disavow his evidentiary choices by claiming that his "application for asylum was denied for

reasons made known to him for the first time in the panel's opinion," and that the panel improperly evaluated relevant country conditions evidence. Pet. For Reh'g En Banc at 11. The agency unequivocally premised its decision on Petitioner's failure to meet his burden of proof, and in affirming that finding, this Court quoted directly from the agency decisions. A.R. 4, 51; *Bringas-Rodriguez*, 805 F.3d at 1181, 1183.

Further, because the only past persecution alleged by Mr. Bringas-Rodriguez was child abuse, the Immigration Judge acted properly in viewing the evidence submitted from that perspective. The immigration judge, as affirmed by the Board and as cited by this Court, noted that nothing in the evidence of record established that the government in Mexico would turn a blind eye to child abuse. *Bringas-Rodriguez*, 805 F.3d at 1181-83. Thus, the Board acted properly in concluding there was no clear error by the Immigration Judge, and the panel rightly held that the Board's decision was supported by substantial evidence.

The essence of Mr. Bringas-Rodriguez's argument is that he disagrees with the way that the agency, and then the panel, considered the factual record. If the agency had given more weight to the hearsay testimony, he would have no grievance; if the agency had found the background documents addressing problems facing the general LGBT community sufficient to support a finding that child victims of sexual abuse were similarly situated, he would have no grievance. Mr.

Bringas-Rodriguez takes issue with the manner in which his evidentiary submissions were evaluated and weighed by the agency, and in so doing, he fails to identify an issue worthy of en banc review.

IV. NEITHER *BRINGAS-RODRIGUEZ* NOR *CASTRO-MARTINEZ* STAND FOR THE PROPOSITION THAT ALL FUTURE PERSECUTION CLAIMS ARE FORECLOSED FOR "GAY MEN IN MEXICO"

Mr. Bringas-Rodriguez also claims that the panel's decision in his case expands this Court's decision in *Castro-Martinez* to create a per se bar to any future persecution claims brought by gay men. Pet. For Reh'g En Banc at 17. Respondent agrees with Mr. Bringas-Rodriguez that it would be improper for the panel to create such a per se rule. As this Court has long held, each individual application should be adjudicated on its own merits. *Castillo v. I.N.S.*, 951 F.2d 1117, 1121 (9th Cir. 1991). Respondent disagrees, however, for the reasons stated below, that the panel decision creates such a per se rule. To the extent that certain clauses create the perception of such a per se rule, Respondent does not oppose clarifying amendments.

Rather than creating a per se rule, the panel in this case reviewed the factual record on its own merits, compared the proffered evidence to that described in prior decisions, and issued a decision that reflected the facts of this case, while respecting the uniformity of this Court's decisions. In doing so, the panel rightly acknowledged the similarities between Mr. Bringas-Rodriguez's application for

relief and protection and the application Castro-Martinez filed, and held that because "Bringas offers no evidence showing that there has been a change in conditions in Mexico since we decided *Castro-Martinez* . . . we are bound by our holding in *Castro-Martinez*, and the BIA's determination that no pattern or practice of persecution exists is supported by substantial evidence." *Bringas-Rodriguez*, 805 F.3d at 1183.

Conversely, the various cases Mr. Bringas-Rodriguez cites in his brief do not bind the court as to a weighing of the evidence in this case; rather, they guide the court and permit meaningful comparisons to the facts in those cases. *See* Pet. For Reh'g En Banc at 17, citing *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052 (9th Cir. 2006) (remanding where the agency applied the wrong legal standard), *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042 (9th Cir. 2007) (recognizing that harm suffered by a child must be evaluated from the child's perspective), *Afriyie v. Holder*, 613 F.3d 924 (9th Cir. 2010) (recognizing that reporting of persecution to government officials is not required), *Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Cir. 2015) (remanding where the agency erred in its understanding of issues faced by a transgender woman in Mexico), and *Rahimzadeh v. Holder*, 613 F.3d 916 (9th Cir. 2010) (agreeing with the immigration judge that the alien had not demonstrated the government was unwilling or unable to protect him from his attackers where he did not report the instances of mistreatment to the police).

A recent unpublished decision of this Court, *Sergio Gonzalez-Ortega v. Lynch*, --- F. App'x ---, 2016 WL 878747 (Mar. 8, 2016), illustrates that this Court is not reading *Bringas-Rodriguez* as establishing a new per se rule. In *Gonzalez-Ortega*, the Court remanded to the agency for further proceedings upon a determination that the record established that the petitioner was targeted for rape and other abuse as a child because of his homosexuality, citing *Castro-Martinez*. Thus, rehearing en banc to eliminate an inappropriate per se rule is not warranted.

Respondent nevertheless recognizes that some of the language in the panel decision could be misleading. In discussing the "pattern and practice" claim, the panel stated: "Bringas offers no evidence showing that there has been a change in conditions in Mexico since we decided *Castro-Martinez*. Accordingly, we are bound by our holding in *Castro-Martinez*, and the BIA's determination that no pattern or practice of persecution exists is supported by substantial evidence." *Bringas-Rodriguez*, 805 F.3d at 1183. After discussing Mr. Bringas-Rodriguez's failure to exhaust his "member of a disfavored group" claim, the panel stated: "Our holding in *Castro-Martinez* forecloses Bringas's 'pattern and practice of persecution' argument . . . ." *Bringas-Rodriguez*, 805 F.3d at 1184. Given the force of stating that an outcome is "foreclosed" by another decision, it might be preferable for the panel to remove these statements, and substitute statements avoiding the references to "change in conditions" and "foreclosing" and instead

conveying: "In the absence of any evidence of record appreciably distinguishing the facts of Bringas's claim from those asserted by Castro-Martinez, Bringas has failed to establish a pattern or practice of persecution against homosexuals." As each of these cases should be evaluated on its own record, perhaps amending this section of the panel's decision to encompass that individualized analysis would forestall any future effort to read into this decision a per se bar to relief for any gay man returning to Mexico. But, regardless of the panel's determination with respect to amending its decision, the phrasing of this section is not a basis for rehearing en banc.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for rehearing en banc.

Respectfully submitted,

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Dated: March 21, 2016

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rules 35-1 and 40-1, the foregoing opposition to rehearing en banc is proportionally spaced in a 14-point Times New Roman typeface, and is in compliance with Fed. R. App. P. 32(c) and Circuit Rule 40-1(a), in that it contains 4,166 words.

March 21, 2016

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Attachment

Bringas-Rodriguez v. Lynch, 805 F.3d 1171 (9th Cir. 2015)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARLOS ALBERTO BRINGAS-RODRIGUEZ, AKA Patricio Iron-Rodriguez, *Petitioner*, v. LORETTA E. LYNCH, Attorney General, *Respondent*.	No. 13-72682 Agency No. A200-821-303 OPINION

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

Argued and Submitted
November 18, 2014—Pasadena, California

Filed November 19, 2015

Before: William A. Fletcher and Jay S. Bybee, Circuit Judges and Benjamin H. Settle,* District Judge.

Opinion by Judge Bybee;
Dissent by Judge W. Fletcher

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* The Honorable Benjamin H. Settle, District Judge for the U.S. District Court for the Western District of Washington, sitting by designation.

SUMMARY[**]

Immigration

The panel denied a petition for review of the Board of Immigration Appeals' denial of asylum, withholding of removal, and protection under the Convention Against Torture to a citizen of Mexico who sought relief based on his sexual orientation and HIV-positive status.

Relying on *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011), the panel held that substantial evidence supported the Board's determination that Bringas-Rodriguez failed to establish that the Mexican government was unwilling or unable to protect him, where he did not report the abuse he suffered to authorities, and his evidence, including hearsay testimony and country reports, was insufficient to establish that doing so would have been futile.

The panel held that Bringas-Rodriguez failed to establish a pattern or practice of persecution of gay men in Mexico. The panel also held that Bringas-Rodriguez's CAT claim failed because he did not show that he would more likely than not be tortured by or with the acquiescence of the Mexican government if he is removed to Mexico.

The panel held that the Board did not abuse its discretion in denying Bringas-Rodriguez's motion to remand based on his recent HIV diagnosis.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Dissenting, Judge W. Fletcher wrote that he has growing doubts about this court's decision in *Castro-Martinez*, but even applying *Castro-Martinez* to the facts of this case, Bringas-Rodriguez submitted evidence sufficient to show that the Mexican government was unwilling or unable to protect him from abuse.

COUNSEL

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Peter E. Perkowski, Winston & Strawn LLP, Los Angeles, California, for Amici Curiae The Public Law Center, Lambda Legal Defense and Education Fund, the National Immigrant Justice Center, the Center for HIV Law and Policy; HIV Law Project; Immigration Equality; Disability Rights Legal Center; and the Asian & Pacific Islander Wellness Center.

OPINION

BYBEE, Circuit Judge:

Petitioner Carlos Bringas-Rodriguez is a citizen of Mexico and a gay man who was sexually abused by family members and a neighbor in Mexico. He challenges the BIA's decision denying his applications for asylum, withholding of removal, and Convention Against Torture (CAT) protection, and denying his motion to remand to the IJ in light of his recent HIV diagnosis. Relying on our decision in *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011), the BIA found that Bringas failed to show that the Mexican government was unwilling or unable to control those who perpetrated such acts. We have jurisdiction under 8 U.S.C. § 1252(a), and we deny the petition.

I

Petitioner, Bringas-Rodriguez (Bringas), was born and raised in Tres Valles, Veracruz, Mexico. He began to realize that he was attracted to men at age six, and by age ten he considered himself gay. He is now openly gay and is HIV-positive. As a child, he suffered physical abuse at the hands of his father, who would tell him to "Act like a boy, you're not a woman!" and to "Do things a man does." His father also abused Bringas's mother and siblings, but he says he was abused "most of all . . . because [he] was different."

Bringas was later sexually abused by his uncle, cousins, and a neighbor. His uncle began the abuse when Bringas was four and continued the abuse every two or three months until he turned twelve. When Bringas turned seven, his cousins began to abuse him on a monthly basis as well. Bringas

testified that when he turned eight, his uncle admitted to him that he was sexually abusing him because Bringas was gay. He further recalled that his abusers "never called [him] by [his] name but called [him] fag, f_____g faggot, queer and laughed about it."

Bringas first came to the United States with his mother and stepfather in 2002 when he was twelve, and he lived with them in Kansas for five months. Bringas was undocumented. He then moved back to Mexico because he was "troubled" over hiding his sexuality and history of abuse, and he wanted to live with his grandmother. Once back in Mexico, however, the abuse continued. His uncle, cousins, and a neighbor raped him in his early teens. He never reported the abuse to the police, believing such a complaint would be frivolous, and he did not tell his family until years later, fearing that his abusers would harm his mother or grandmother.

In 2004, at age fourteen, Bringas returned to the United States to live with his mother and stepfather in Kansas and "to escape [his] abusers." In August 2010, Bringas was convicted of "Contributing to the Delinquency of a Minor" in Colorado; essentially, he was drinking at his house and a friend brought over a minor. Bringas spent ninety days in jail, where he attempted suicide. DHS filed a Notice to Appear in September 2010.

In February 2012, Bringas filed an application for asylum, withholding of removal, and relief under the CAT, alleging that he was raped by his uncle, cousins, and neighbor while living in Mexico. He explained that he feared returning to Mexico because he would be persecuted for being gay and the police would ignore his complaints. The IJ denied all applications for relief. He denied Bringas's asylum claim

because it was untimely.[1] With respect to withholding, the IJ found that Bringas had suffered sexual abuse at the hands of his uncle, cousins, and neighbor, but concluded that the abuse, while "horrendous," did not constitute past persecution "on account of" a protected status. The IJ found that "perverse sexual urges" motivated the abusers, and not Bringas's sexual orientation. The IJ also observed that Bringas never reported his abuse to an adult or to the Mexican police and that there was no evidence that Mexican authorities were unwilling to offer protection.

Turning to the risk of future persecution, the IJ looked at Country Reports for Mexico for 2009 and 2010 and found that, despite a few specific accounts of persecution of homosexuals in Mexico, the country as a whole—and especially in Mexico City—has made significant advances with respect to gay people. Accordingly, Bringas could relocate to a place like Mexico City without risking possible future abuse. So, the IJ found, Bringas did not show a "more likely than not possibility of persecution on account . . . of his membership in a particular social group of male homosexuals."

[1] Bringas entered the United States in November 2004 but did not file an asylum application until April 2011, well beyond the one-year deadline. The IJ acknowledged that being an unaccompanied minor entering the country may qualify as an "exceptional circumstance" that excuses late filing, but even assuming that Bringas was an unaccompanied minor upon entering the United States, his application was still untimely because he waited years after turning eighteen to file it. Bringas had argued, however, that in this case the age of adulthood was twenty-one, not eighteen, which would make his asylum application timely because it was filed before his twenty-first birthday. But the IJ rejected this reasoning, finding no evidence to suggest that asylum officers use twenty-one and not eighteen to determine the legal disability excuse.

The IJ also denied relief under the CAT on the grounds that Bringas offered insufficient evidence that the government routinely turns a blind eye to allegations of sexual abuse of children. As a result, Bringas could not prove that "torture in the future by the government, or with the acquiescence of the government" was likely.

The BIA affirmed. It denied Bringas's asylum claim on the merits, assuming the application was timely filed. The BIA concluded that Bringas failed to establish past persecution because (1) he could not show that he was abused on account of a protected ground, and (2) he had not demonstrated that the government was unwilling or unable to control his abusers. Bringas was thus not entitled to a presumption of future persecution. The BIA also found that Bringas did not have a well-founded fear of future persecution because he failed to show a "pattern or practice" of persecution against gays in Mexico. Citing our opinion in *Castro-Martinez v. Holder*, 674 F.3d 1073, 1082 (9th Cir. 2011), the BIA explained that no "widespread brutality against homosexuals or . . . criminalization of homosexual conduct [exists] in Mexico." Additionally, the BIA discussed Mexico's improved treatment of homosexuals over the years: "Mexico has taken numerous positive steps to address the rights of homosexuals, including legalizing gay marriage in Mexico City and prosecuting human rights violations against homosexuals."

The BIA also rejected Bringas's withholding of removal and CAT claims. With respect to withholding, it noted that because Bringas "failed to satisfy the lower burden of proof required for asylum, it follows that he has also failed to satisfy the higher standard of eligibility required for withholding of removal." With respect to CAT, the BIA

found no clear error in the IJ's determination that Bringas failed to show that he will more likely than not be tortured in Mexico "by or with the acquiescence" of the Mexican government.

Finally, the BIA rejected Bringas's argument that his case be remanded to the IJ in light of Bringas's recent HIV diagnosis. Bringas's brief to the BIA explained that, since his hearing before the IJ, he had been diagnosed with HIV. He argued that "this fact is significant because it now places [him] in a more vulnerable position should he be returned to Mexico." The BIA declined to remand Bringas's case to the IJ for further consideration because Bringas had "not provided any additional country conditions evidence or specific arguments regarding how his status as an HIV positive homosexual changes the outcome of his case." He filed a timely Petition for Review of the BIA's dismissal and sought a stay pending review. We granted the stay and now deny the petition for review.[2]

II

Bringas argues that the BIA erred in denying his asylum and withholding of removal claims. "To be eligible for asylum, an alien must demonstrate that he is unable or unwilling to return to his home country because of [past] persecution or a well-founded fear of [future] persecution on account of race, religion, nationality, membership in a

[2] "We review questions of law in immigration proceedings *de novo*." *Romero-Mendoza v. Holder*, 665 F.3d 1105, 1107 (9th Cir. 2011). We review the denials of asylum, withholding of removal, and CAT relief for substantial evidence. *Garcia-Milian v. Holder*, 755 F.3d 1026, 1031 (9th Cir. 2014).

particular social group, or a political opinion." *Castro-Martinez v. Holder*, 674 F.3d 1073, 1080 (9th Cir. 2011) (citing 8 U.S.C. § 1101(a)(42)(A)). The requirements for a withholding claim are similar, except that the alien must prove a "clear probability" of persecution on account of a protected characteristic. 8 U.S.C. § 1231(b)(3)(A). If a petitioner cannot establish his eligibility for asylum, his withholding claim necessarily also fails. *Zehatye v. Gonzales*, 453 F.3d 1182, 1190 (9th Cir. 2006).

Substantial evidence supports the BIA's determinations that Bringas failed to establish past persecution or a well-founded fear of future persecution, and he is thus ineligible for asylum. *See Castro-Martinez*, 674 F.3d at 1080 (9th Cir. 2011); *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 481 (1992) (quoting 8 U.S.C. § 1105a(a)(4)) (noting that we must uphold the BIA's factual findings if "supported by reasonable, substantial, and probative evidence on the record considered as a whole").[3] Because Bringas failed to meet his burden to establish eligibility for asylum, he also fails the higher burden required to obtain withholding of removal. *Castro-Martinez*, 674 F.3d at 1082 (citing *Gomes v. Gonzales*, 429 F.3d 1264, 1266 (9th Cir. 2005)).

[3] We cannot resolve Bringas's asylum claim on untimeliness grounds because the BIA ignored this procedural defect when it "assume[d] arguendo that the respondent filed a timely asylum application." *See Abebe v. Gonzales*, 432 F.3d 1037, 1041 (9th Cir. 2005) (en banc) ("When the BIA has ignored a procedural defect and elected to consider an issue on its substantive merits, we cannot then decline to consider the issue based upon this procedural defect.").

A. Past Persecution

Asylum petitioners may produce evidence of their past persecution, which "creates a presumption of a fear of future persecution." *Hanna v. Keisler*, 506 F.3d 933, 937 (9th Cir. 2007); *see* 8 C.F.R. § 1208.13(b)(1). To establish past persecution, Bringas must show (1) that he has suffered harm "on the basis of [a] protected ground[]" and (2) that the harm was "inflicted either by the government or by individuals or groups the government is unable or unwilling to control." *Castro-Martinez*, 674 F.3d at 1080. The BIA concluded that Bringas failed to satisfy both prongs. We will only address the second of these prongs. Even if we thought that the record compelled the conclusion that Bringas was abused on account of his sexual orientation, Bringas provided insufficient evidence that the government was unwilling or unable to prevent that abuse.

Because the sexual abuse Bringas suffered was not inflicted by government actors, he must "show that the government was unable or unwilling to control his attackers." *Id.* at 1078. "In determining whether the government was unable or unwilling to control violence committed by private parties, the BIA may consider whether the victim reported the attacks to the police." *Id.* at 1080 (citing *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004)); *see id.* ("[W]here the persecutor is not a state actor, we consider whether an applicant reported the incident to police, because in such cases a report of this nature may show governmental inability to control the actors.") (quoting *Rahimzadeh v. Holder*, 613 F.3d 916, 921 (9th Cir. 2010) (internal quotation marks omitted)). Nevertheless, petitioners are not required to report persecution to the police in order to show that the government is unable or unwilling to control their abusers.

Id. at 1080–81 ("We have never held that any victim, let alone a child, is obligated to report a sexual assault to the authorities, and we do not do so now.").

Where a petitioner does not report the abuse to the authorities, however, there is a "gap in proof about how the government would have responded," and the petitioner bears the burden to "fill in the gaps" by showing how the government would have responded had he reported the abuse. *Id.* at 1081 (internal quotation marks and alterations omitted). It is insufficient for a petitioner to state his belief that the government would do nothing about a report of abuse. Rather, a petitioner may show, "[a]mong other avenues," that "private persecution of a particular sort is widespread and well-known but not controlled by the government or . . . that others have made reports of similar incidents to no avail." *Id.* (quoting *Rahimzadeh*, 613 F.3d at 922) (internal quotation marks omitted).

We agree with the BIA that Bringas has not met his burden to prove the government's unwillingness to respond. The BIA relied on our decision in *Castro-Martinez v. Holder*, 674 F.3d 1073, 1080–81 (9th Cir. 2011), in determining that Bringas had not met his burden here. The facts in Bringas's case are very similar to those in *Castro-Martinez*. In *Castro-Martinez*, Castro, a gay, HIV-positive Mexican man, sought asylum on account of a credible history of sexual abuse suffered because of his sexual orientation. *Id.* at 1078–79. Castro also had failed to report the abuse to Mexican officials, and the BIA ultimately concluded that he had failed to demonstrate that "Mexican authorities would have ignored the rape of a young child or that authorities were unable to provide a child protection against rape." *Id.* at 1081; *see also id.* at 1079. We denied Castro's petition for review.

Bringas attempts to distinguish *Castro-Martinez*. He argues that while Castro offered nothing more than a conclusory statement "that he believed the police would not have helped him," *id.* at 1081, Bringas "provided such gap-filling evidence" by giving a reason why he never reported his abuse to the Mexican police: He testified that "a couple" of his gay friends told him "that they got raped, they got beat up, like abuse, and they went to the police [in Veracruz, Mexico] and they didn't do anything" except "laugh [in] their faces."[4]

We agree with the dissent that *Castro-Martinez* left open the possibility that Bringas could meet his burden of proving that the government was unable or unwilling to control their abusers by "showing that others have made reports of similar incidents to no avail." *Id.* (citation and internal quotation marks omitted). But we part ways with the dissent's assertion that *Castro-Martinez* "qualifies" a "gay petitioner . . . for asylum" as a matter of course, provided that he submits "country reports documenting official persecution on account of sexual orientation" and "evidence"—unsubstantiated hearsay or otherwise—that "others have made reports of similar incidents to no avail." Dissenting Op. at 38 (quoting *Castro-Martinez*, 674 F.3d at 1081). *Castro-Martinez* sets forth no such mechanical formula for obtaining asylum, nor

[4] Bringas did not provide a clear picture of when he spoke with these friends. We know it was at some point "when [he] was living in Kansas," but he lived in Kansas twice. His uncle and cousins abused him from age four to twelve. Then, he moved to Kansas with his mother and stepfather at age twelve, but five months later, he moved back to Mexico, where the abuse continued. At age fourteen, Bringas moved back to Kansas again. Thus, Bringas would have heard his friends' accounts of their abuse in Veracruz after at least some (if not all) of Bringas's own abuse had already occurred.

does our holding there support the proposition that any evidence of other reports of similar incidents, no matter how unreliable, is sufficient to satisfy this "other avenue" of establishing that a government is unable or unwilling to prevent persecution. Implicit in *Castro-Martinez*'s holding is that, in order for this method of proof to be successful, the evidence must be sufficient.

Here, we agree with the IJ and the BIA that Bringas's evidence was not sufficient. Looking first to the country reports Bringas submitted, neither the 2009 nor the 2010 report mentions any instances of discrimination or persecution in his home state of Veracruz, Mexico. Indeed, the two reports, produced by the U.S. State Department to survey the state of sexual orientation discrimination across a country of 122 million people, note *only one* specific example of government persecution on the basis of sexual orientation in Mexico. The dissent highlights this incident in detail, but does not explain why the IJ reviewing this documentation should have concluded that a single example "establish[es] that government discrimination . . . persist[s]." Dissenting Op. at 34. Nor does the dissent seek to draw any connections from this incident, which occurred in 2008, to circumstances in Tres Valles, a town nearly 300 miles away.

Rather, the country reports Bringas provided to the IJ highlighted "gay pride marches in cities across the country," the largest drawing 400,000 participants. Additionally, the report described the expansion of marriage equality in Mexico City, and detailed a ruling from the Mexican Supreme Court requiring Mexico's states to recognize legally performed marriages performed elsewhere, a ruling, we note, that was made five years before the United States Supreme Court reached a similar conclusion. In sum, the country

reports submitted to the IJ simply do not make a persuasive case that the Mexican government was unwilling or unable to protect Bringas.[5]

[5] Seemingly aware that Bringas's evidence demonstrating government discrimination or persecution on the basis of sexual orientation was somewhat thin, the dissent instead highlights the ongoing "societal discrimination" referenced in the country reports. Dissenting Op. at 33 (quoting the 2010 country report). While certainly troubling, negative social attitudes in one's home country cannot form the basis for an asylum claim. *See Ghaly v. I.N.S.*, 58 F.3d 1425, 1431 (9th Cir. 1995) ("Discrimination . . . as morally reprehensible as it may be, does not ordinarily amount to 'persecution.'"). If that was the case, LGBT Americans in many parts of this country, unfortunately, would have a valid claim to seek asylum in other parts of the world, including Mexico.

Indeed, the United Nations recognizes Mexico's "history of protecting asylum-seekers" and notes that it has "long been a signatory of the 1951 Refugee Convention and its 1967 Protocol." *UNHCR Hails Mexico as New Refugee Law Comes Into Force*, U.N. HIGH COMM'N FOR REFUGEES (Jan. 28, 2011), http://www.unhcr.org/4d42e6ad6.html. In 2011, President Felipe Calderón signed new legislation to ensure that Mexico's asylum system conformed to international standards. *Id.* Three years later, Mexico adopted the "Brazil Declaration and Plan of Action," an international agreement committed to "the protection of refugees," including "particularly vulnerable groups" like "lesbian, gay, bisexual, transgender, and intersex people." *See Brazil Declaration and Plan of Action*, Dec. 3, 2014, at 8, http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/BDL/2014/9865. And this year, a United Nations report noted that Mexico had established a "specialized hate crime prosecution unit[]," developed a "new judicial protocol to guide adjudication of cases involving human rights violations on grounds of sexual orientation," implemented specialized training for police officers, and officially designated May 17 as "National Day Against Homophobia." *See* U.N. High Commissioner for Human Rights, *Discrimination & Violence Against Individuals Based on Their Sexual Orientation & Gender Identity*, ¶¶ 40, 74, U.N. Doc. A/HRC/29/23 (May 4, 2015), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/29/23&referer=/english/&?Lang=E.

Turning next to Bringas's testimony, Bringas provided very few details about his friends' negative experiences with police in Veracruz. He offered no details about his friends' accounts—no names, ages, indication of the nature of their relationship to Bringas, information on how or to whom they reported their abuse, or any evidence showing that these nameless friends actually reported any abuse to the Mexican authorities. Even if we could fully credit Bringas's friends' statements, there is no evidence connecting general police practices in the state or city of Veracruz with the specific police practices in Bringas's town of Tres Valles.[6] Without something to suggest that the police in Tres Valles would respond in the same way as the police described in Bringas's friends' reports, we decline his invitation to compel the BIA to paint all the police in Veracruz with the same broad brush.

The dissent resists this conclusion by stating that because Bringas's friends reported discrimination by police in Veracruz and "Tres Valles is in the state of Veracruz," any "geographic objection[s]" to Bringas's evidence must fail. Dissenting Op. at 37–38. To draw a parallel, the dissent's argument is that if someone reports discrimination at the hands of police in "California," it would be fair to assume that police in San Diego, Eureka, or Santa Barbara would act in accordance with that report. We refuse to make this

[6] We note that the Mexican state of Veracruz supports a population of nearly eight million residents divided into more than two hundred distinct municipalities. *See Perspectiva Estadística Veracruz de Ignacio de la Llave*, INSTITUTO NACIONAL DE ESTADÍSTICA Y GEOGRAFÍA, Dec. 2011, at 9–10, 14, http://www.inegi.org.mx/est/contenidos/espanol/sistemas/perspectivas/perspectiva-ver.pdf. The city of Veracruz is roughly eighty miles away from Bringas's town of Tres Valles. *See* MAPQUEST, http://www.mapquest.com/maps?1c=Veracruz&1y=MX&2c=Tres%20Valles&2y=MX (last visited Nov. 3, 2015).

unfounded logical leap. The dissent is correct that in light of the difficulty of gathering evidence of persecution, we "adjust[] the evidentiary requirements" for asylum seekers, *id.* at 14 (quotation marks omitted); we do not, however, forego them completely, and reference to vague reports from anonymous friends cannot overcome the lack of any corroborating evidence.[7]

By highlighting the factual gaps in Bringas's description of his friends' reports, the dissent suggests that we inappropriately discount his testimony despite the fact that the IJ found his testimony "credible." *See* Dissenting Op. at 36. Not so. We agree that as "a general rule, because the Immigration Judge did not render an adverse credibility finding, we must accept [Bringas's] factual testimony as true" and that Bringas's "testimony includes hearsay evidence from . . . anonymous friend[s]" that "may not be rejected out-of-hand." *Gu v. Gonzales*, 454 F.3d 1014, 1021 (9th Cir. 2006). Similarly, we do not challenge the "well established" principle, Dissenting Op. at 36, that "hearsay [evidence] is admissible in immigration proceedings," *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823 (9th Cir. 2003).

[7] The dissent's citation to *Yan Rong Zhao v. Holder*, 728 F.3d 1144 (9th Cir. 2013), to support its position is inapposite. There, we observed that "evidence from the local province, municipality, *or* other locally defined area may be sufficient to show a well-founded fear of persecution; respondents are not required to present evidence from their town or city." *Id.* at 1147–48 (emphasis in original). But at issue in *Zhao* were family planning policies memorialized in a written notice from the "Family Planning Office." *Id.* at 1146. Had Bringas produced roughly comparable evidence of Mexico's, Veracruz's, or Tres Valles's policy or practice, we would not be having this exchange.

However, these two propositions do not compel the result pressed for by the dissent. As we have repeatedly held "the absence of an adverse credibility finding does not prevent us from considering the relative probative value of hearsay." *Gu*, 454 F.3d at 1021; *see also Singh v. Holder*, 753 F.3d 826, 835 (9th Cir. 2014); *Sharma v. Holder*, 633 F.3d 865, 870–71 (9th Cir. 2011). Indeed, in *Gu*, we explained that "statements by the out-of-court declarant may be accorded less weight by the trier of fact when weighed against non-hearsay evidence." 454 F.3d at 1021. Here, without many details to flesh out the context of Bringas's friends' hearsay statements, their relative probative value is rather low.

To be clear, we are not, as the dissent charges, "discount[ing]" Bringas's hearsay testimony. Dissenting Op. at 36. Nor are we requiring a certain level of "specificity" in Bringas's description of his friends' out-of-court reports. *Id.* at 11. Instead, we are making what, we think, are common-sense observations: A more detailed description should be afforded greater weight than a less detailed description, and hearsay statements with details that can be corroborated are more probative than hearsay statements that do not include any verifiable details.

The dissent's response to these conclusions brings the very problem this hearsay evidence poses into sharp relief. In light of Bringas's hearsay testimony and submitted country reports, the dissent chastises the IJ's statement that "'we certainly do not have any evidence whatsoever' that Mexican authorities were unwilling to protect" Bringas as plainly "wrong." Dissenting Op. at 35. The dissent only quoted the IJ in part. Here is the full statement:

> [W]e certainly do not have any evidence whatsoever that the police in Mexico or the authorities do not take any action whatsoever to offer some type of protection against *the abuse of children,* sexually, whether the sexually abused child is a male or female, or whether the abuser is a male or a female.

(emphasis added).

The IJ's finding is quite correct. There is no doubt that Bringas did not offer any evidence suggesting that Mexican police refused to protect abused children. The submitted country reports make no reference to it, and because Bringas's hearsay statement was so lacking in detail, we have no idea how old his "friends" were who reported abuse to the police in Veracruz. Because Bringas's testimony was so vague, even the dissent's attempts to bolster its veracity get tangled up in its factual shortcomings. Rather, the full statement of the IJ only demonstrates how firmly in line the IJ and BIA were with this court's precedent. *See Castro-Martinez*, 674 F.3d at 1081 (affirming the BIA's reliance on the lack of "evidence in the record that Mexican authorities would have ignored the rape of a young child or that authorities were unable to provide a child protection against rape").[8]

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[8] The dissent also argues that "[n]either the BIA nor the IJ mentioned Bringas-Rodriguez's testimony about what his friends had told him." Dissenting Op. at 35. True enough. But that does not mean the IJ and the BIA did not consider or weigh that evidence. This court has repeatedly found that an IJ's decision is not required "to discuss every piece of evidence" presented by a petitioner. *Almaghzar v. Gonzales*, 457 F.3d 915, 922 (9th Cir. 2006); *see also Cole v. Holder*, 659 F.3d 762, 771 (9th Cir. 2011) ("That is not to say that the BIA must discuss each piece of

As the IJ recognized, Bringas's allegations are not just about discrimination against gay and lesbian Mexicans—they are about child molestation. Bringas has put forward no evidence that Mexico tolerates the sexual abuse of children, or that Mexican officials would refuse to protect an abused child based on the gender of his or her abusers. Instead, substantial evidence supports the BIA's finding that Bringas failed to prove that the government would be unwilling or unable to control his abusers, and Bringas's bare hearsay assertions from friends of unknown ages are insufficient to overturn the BIA's contrary conclusion, which was based on other evidence in the record. Accordingly, we hold that Bringas failed to establish his past persecution and is therefore not entitled to a presumption of a well-founded fear of future persecution. *See* 8 C.F.R. § 1208.13(b)(1).

B. Well-Founded Fear of Future Persecution

Alternatively, in the absence of evidence of past persecution, a petitioner may simply provide evidence of a well-founded fear of future persecution. "To establish a well-founded fear," Bringas must show "that his fear of persecution is subjectively genuine and objectively reasonable." *Castro-Martinez*, 674 F.3d at 1082 (citing *Ahmed v. Keisler*, 504 F.3d 1183, 1191 (9th Cir. 2007)). "As there was no adverse credibility determination, we accept that [Bringas's] fear of future persecution was genuine." *Id.* (citing *Li v. Holder*, 559 F.3d 1096, 1107 (9th Cir. 2009)). In order to show that his fear of future persecution was "objectively reasonable," Bringas has two avenues. He may demonstrate: (1) "that he was a member of a disfavored

evidence submitted."). Here, Bringas's evidence is not sufficient to compel a contrary result.

group against which there was a systematic pattern or practice of persecution," or (2) that he belongs to a "disfavored group" and has an individualized risk of being "singled out for persecution." *Id.*; *Sael v. Ashcroft*, 386 F.3d 922, 925 (9th Cir. 2004); *see* 8 C.F.R. § 1208.13(b)(2)(iii).

Bringas's "pattern or practice of persecution" argument lacks merit, and he forfeited his argument that he will be "singled out" as a member of a "disfavored group" when he failed to raise it before the BIA.

1. Pattern or Practice of Persecution

Bringas argues that there is a pattern or practice of persecution of gay men in Mexico. Despite some evidence of violence against gays in Mexico, *Castro-Martinez* forecloses this argument. In *Castro-Martinez*, we rejected the claim that "the Mexican government systematically harmed gay men and failed to protect them from violence." 674 F.3d at 1082. Although we acknowledged evidence of discrimination and attacks, we explained that country conditions reports showed that "the Mexican government's efforts to prevent violence and discrimination against homosexuals. . . . ha[d] increased in recent years," and, we noted, "Mexican law prohibits several types of discrimination, including bias based on sexuality, and it requires federal agencies to promote tolerance." *Id.* (recognizing the Mexican government's 2005 "radio campaign to fight homophobia" and noting the various country reports' reflections of the "ongoing improvement of police treatment of gay men and efforts to prosecute homophobic crimes").

Here, the BIA made findings similar to those in *Castro-Martinez* and found that the situation for gay men in Mexico

is improving. It first cited *Bromfield v. Mukasey*, 543 F.3d 1071, 1078 (9th Cir. 2008), a case where we held that there was a pattern or practice of persecution against gay men in Jamaica—a country which criminalized homosexual conduct and prosecuted individuals under the law; the evidence there also showed numerous cases of violence and widespread brutality against persons based on sexual orientation. Then the BIA turned to Bringas's case and stated that unlike *Bromfield*:

> [T]he record here does not demonstrate widespread brutality against homosexuals or that there is any criminalization of homosexual conduct in Mexico. . . . To the contrary, the record shows that Mexico has taken numerous positive steps to address the rights of homosexuals, including legalizing gay marriage in Mexico City and prosecuting human rights violations against homosexuals.

Bringas offers no evidence showing that there has been a change in conditions in Mexico since we decided *Castro-Martinez*. Accordingly, we are bound by our holding in *Castro-Martinez*, and the BIA's determination that no pattern or practice of persecution exists is supported by substantial evidence.[9]

[9] Bringas argues that the BIA applied the wrong standard to his pattern-or-practice claim because it cited to withholding cases in discussing the asylum claim. But, as the government noted and as Bringas acknowledges in his reply, the withholding and asylum standards do not differ in any relevant respect as to his pattern-or-practice claim.

2. Singled Out for Persecution as a Member of a Disfavored Group

Even without evidence of a pattern or practice of persecution, Bringas could still establish a well-founded fear if he could demonstrate a particularized risk that he will be singled out for persecution if returned to Mexico. Bringas argues that he has been singled out in the past for mistreatment for his membership in the disfavored group of homosexual men, so he "has a 'strong' individualized risk of future harm." The government argues that Bringas forfeited this claim when he failed to raise it before the BIA. We agree that Bringas failed to exhaust this argument before the BIA.

Bringas failed to argue that he would be singled out for persecution as a member of a disfavored group in his brief to the BIA.[10] He consequently has forfeited this claim. *See Abebe v. Mukasey*, 554 F.3d 1203, 1208 (9th Cir. 2009) (en banc) (per curiam) (holding that an alien is "deemed to have exhausted only those issues he raised and argued in his brief before the BIA"); *see also Alvarado v. Holder*, 759 F.3d 1121, 1126 n.4, 1128 (9th Cir. 2014) ("Although [a] petitioner need not . . . raise [his] *precise* argument in

[10] In his brief to the BIA, Bringas argued that the IJ erred in failing to find that Bringas had a well-founded fear of persecution, stating that a well-founded fear can be shown by a pattern or practice of persecution. The sections of our cases that he cited concerned only pattern-or-practice evidence. One of the cases he cited, *Wakkary v. Holder*, 558 F.3d 1049, 1061 (9th Cir. 2009), discussed the singled out/disfavored group analysis at length, but not on the page that Bringas cited. He never argued that he would be singled out in the future as a member of a disfavored group. The BIA expressly recognized that Bringas failed to make this argument, observing in a footnote that Bringas "does not argue that his claim falls within the 'disfavored group' analysis espoused by the Ninth Circuit."

administrative proceedings, . . . [he] must specify which issues form the basis of the appeal.") (alterations and emphasis in original) (citations and internal quotation marks omitted). He argues that by raising his similar claim of a pattern or practice of anti-gay persecution, he necessarily exhausted his argument before the BIA. Not so. The pattern or practice argument is separate and distinct from the singled out/disfavored group argument, and we analyze them separately. *E.g.*, *Wakkary v. Holder*, 558 F.3d 1049, 1061–62 (9th Cir. 2009). Unlike the pattern or practice analysis, the singled out/disfavored group analysis requires proof of an individualized risk of harm. *See* 8 C.F.R. § 1208.13(b)(2)(iii); *see also Castro-Martinez*, 674 F.3d at 1082; *Wakkary*, 558 F.3d at 1060–62; *Sael*, 386 F.3d at 925.

Our holding in *Castro-Martinez* forecloses Bringas's "pattern or practice of persecution" argument, and he failed to exhaust his argument that he will be "singled out" as a member of a "disfavored group." Bringas has not demonstrated a well-founded fear of future persecution, and, accordingly, we deny the petition with respect to asylum and withholding of removal.

III

Bringas's claim under the CAT fails because he did not show that he would more likely than not be tortured by or with the acquiescence of the Mexican government if he is removed to Mexico. *See Garcia-Milian v. Holder*, 755 F.3d 1026, 1031 (9th Cir. 2014). "To qualify for CAT relief, an alien must establish that 'it is more likely than not that he . . . would be tortured if removed to the proposed country of removal.'" *Id.* at 1033 (quoting 8 C.F.R. § 208.16(c)(2)). The BIA found "no clear error in the [IJ's] determination that

[Bringas] did not demonstrate that he will more likely than not be tortured in Mexico by or with the acquiescence . . . of an official of the Mexican government."

Even if Bringas's past experiences constituted torture, the BIA is not required "to presume that [he] would be tortured again because of his own credible testimony that he had been subjected to torture as a . . . child." *Konou v. Holder*, 750 F.3d 1120, 1125 (9th Cir. 2014). This is especially true where "the factors that precipitated [Bringas's] mistreatment as a child would be less relevant to a 'selfsufficient homosexual adult.'" *Id.* at 1126. Here, the IJ determined that Bringas could likely relocate to a different part of Mexico, such as Mexico City, where the population appears more accepting of gays, and the IJ noted the complete lack of evidence indicating that the Mexican government was aware of any torture taking place. The IJ concluded that Bringas's reports showing "instances of mistreatment of homosexuals in Mexico" were not "sufficient to establish the burden of proof requirement of a more likely than not possibility of torture." The same evidence that supported the BIA's dismissal of the pattern-or-practice claim also supports the IJ's and BIA's conclusions that Bringas failed to establish a likelihood of torture: Conditions in Mexico are insufficiently dangerous for gay people to constitute a likelihood of government-initiated or -sanctioned torture. *See Castro-Martinez*, 674 F.3d at 1082. And because substantial evidence supported the BIA's denial of CAT relief, we deny Bringas's petition with respect to his claim under the CAT.

IV

Finally, the BIA did not abuse its discretion in finding that Bringas's HIV diagnosis, standing alone, does not require

a remand to the IJ. In Bringas's brief to the BIA, he moved to remand the case because, not long after the IJ's decision issued, he discovered that he is HIV positive. The BIA denied his motion to remand.

Denials of motions to remand are reviewed for abuse of discretion. *Malhi v. I.N.S.*, 336 F.3d 989, 993 (9th Cir. 2003). "The BIA abuses its discretion if its decision is 'arbitrary, irrational, or contrary to law.'" *Romero-Ruiz v. Mukasey*, 538 F.3d 1057, 1062 (9th Cir. 2008) (quoting *Lopez–Galarza v. I.N.S.*, 99 F.3d 954, 960 (9th Cir. 1996)); *Konstantinova v. I.N.S.*, 195 F.3d 528, 529 (9th Cir. 1999) ("The BIA abuses its discretion when it fails to offer a reasoned explanation for its decision, distorts or disregards important aspects of the alien's claim.").

The BIA gave a rational explanation for its denial of Bringas's motion to remand based on his HIV diagnosis. In requesting a remand, Bringas merely noted in one short paragraph at the end of his brief to the BIA that his diagnosis is a "significant [fact] because it now places [him] in a more vulnerable position should he be returned to Mexico." The BIA rejected this argument because Bringas did not provide "any additional country conditions evidence or specific arguments regarding how his status as an HIV positive homosexual changes the outcome of his case." The BIA also noted that the lack of access to HIV drugs is a problem suffered not only by homosexuals but by the Mexican population as a whole. *See Castro-Martinez*, 674 F.3d at 1082. Because the BIA offered a reasoned explanation and its decision was neither arbitrary nor irrational, we hold that the BIA did not abuse its discretion in denying Bringas's motion to remand.

V

In sum, we hold that substantial evidence supported the BIA's denial of Bringas's claims for asylum, withholding of removal, and relief under the CAT. We also conclude that the BIA did not abuse its discretion in denying Bringas's motion to remand.

Concurrently, we grant the motion of the Public Law Center, Lambda Legal Defense and Education Fund, the National Immigrant Justice Center, the Center for HIV Law and Policy, HIV Law Project, Immigration Equality, Disability Rights Legal Center, and the Asian & Pacific Islander Wellness Center to file a brief as *Amici Curiae* in support of Bringas. We deny Bringas's motion to take judicial notice of facts beyond the administrative record. *See* 8 U.S.C. § 1252(b)(4)(A); *Singh v. Ashcroft*, 393 F.3d 903, 905–06 (9th Cir. 2004).

PETITION DENIED.

W. FLETCHER, Circuit Judge, dissenting:

Carlos Bringas-Rodriguez, a Mexican national, testified credibly that throughout his childhood in the town of Tres Valles in the state of Veracruz he was sexually abused by his uncle, his cousins, and a neighbor. His abusers told him they were abusing him because he was gay, and they referred to him using homophobic slurs. His abusers also punched him and beat him, and they threatened to hurt him and his grandmother if he told anyone about the abuse.

Bringas-Rodriguez left Mexico twice. The first time, he came to the United States at age twelve and lived briefly with his mother and step-father in Kansas. While he was in Kansas, some of his gay Mexican friends told him that they had reported similar abuse to Mexican police officers but that the officers had laughed at them, refused to provide help, and told them they deserved the abuse they received. The second time, he came to the United States at age fourteen. He has not returned to Mexico.

Bringas-Rodriguez never reported to Mexican police the abuse he suffered. He testified credibly before the Immigration Judge ("IJ") that he did not do so because he believed a report would be pointless.

The panel majority denies Bringas-Rodriguez's asylum claim. The majority relies primarily on *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011), a decision in which we denied a similar asylum claim. But *Castro-Martinez* was a carefully circumscribed decision. In *Castro-Martinez* we stated that, even if a petitioner himself had not reported abuse, asylum could be warranted if the petitioner showed that Mexican officials were unwilling to help other gay victims of abuse.

I have growing doubts about the correctness of *Castro-Martinez*, an opinion with which I agreed when it was issued. However, even to the extent *Castro-Martinez* should remain the law of this circuit, I respectfully dissent from the panel's conclusion that it forecloses relief in this case.

I. Past Persecution in Mexico

Carlos Bringas-Rodriguez began to realize his same-sex attractions when he was six. As early as ten years old, he considered himself gay. As a child, Bringas-Rodriguez was physically abused by his father, who told him, "Act like a boy, you're not a woman." His father abused Bringas-Rodriguez's mother and siblings as well, but he abused Bringas-Rodriguez the most because he was "different."

Bringas-Rodriguez was also abused and raped by an uncle, his cousins, and a neighbor. Bringas-Rodriguez's uncle began to sexually abuse him when he was just four years old, and his uncle abused him every two or three months thereafter. After Bringas-Rodriguez turned seven, his cousins sexually abused him on a monthly basis. Bringas-Rodriguez's uncle, cousins, and a neighbor raped him at home when his mother was not there, and sometimes dragged him into nearby bushes in the neighborhood. Bringas-Rodriguez's abusers told him that they would hurt him and his grandmother if he told anyone, and, on a few occasions, they punched him. On one occasion, when Bringas-Rodriguez resisted one cousin's attempt to rape him, the cousin beat him severely.

When Bringas-Rodriguez was eight, his uncle told him that the reason for the ongoing abuse was Bringas-Rodriguez's sexuality. His uncle was not alone in his anti-gay views. Bringas-Rodriguez testified, "[my abusers] never called me by my name but called me fag, fucking faggot, queer and laughed about it."

Bringas-Rodriguez first came to the United States in 2002, when he was twelve. He lived in Kansas with his

mother and step-father for five months, and continued to hide his sexuality and history of sexual abuse. When Bringas-Rodriguez returned to Mexico to live with his grandmother after his stay in Kansas, the abuse resumed unabated. Bringas-Rodriguez's uncle sexually abused him again. Bringas-Rodriguez's cousins referred to him as their "sex toy" and resumed their abuse. A neighbor raped him. The neighbor's assault left Bringas-Rodriguez with bruises all over his body. Because of the continuing abuse and rape, Bringas-Rodriguez fled Mexico, returning to the United States in 2004 at age fourteen.

Bringas-Rodriguez never told the Mexican police about the abuse he had suffered. Even though he wanted protection from his abusers, Bringas-Rodriguez believed any complaints to the police would have been futile. He testified before the IJ that, while he was living in Kansas, two Mexican gay friends "told me that they got raped, they got beat up, like abuse, and they went to the police and they didn't do anything. They even laugh [in] their faces." In a declaration submitted to the Immigration Court, Bringas-Rodriguez wrote that he feared that the Mexican police "would laugh at me and tell me I deserved what I got because I was gay. This happened to friends of mine in Veracruz."

II. Persecution the Government is Unable or Unwilling to Control

To establish his eligibility for asylum, Bringas-Rodriguez "must demonstrate that he is unable or unwilling to return to his home country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or a political opinion." *Castro-Martinez*, 674 F.3d at 1080 (citing 8 U.S.C.

§ 1101(a)(42)(A)). Bringas-Rodriguez must also show the harm was "inflicted either by the government or by individuals or groups the government is unable or unwilling to control." *Id.*

A. Persecution on the Basis of a Protected Ground

We have held that gay men in Mexico "can constitute a social group for the purpose of an asylum claim." *Id.*; *see also Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1087–89 (9th Cir. 2005). Undisputed evidence in the record shows that Bringas-Rodriguez was abused, over a sustained period, for being gay. Bringas-Rodriguez testified that his uncle told him he was being abused because he was gay. Bringas-Rodriguez also testified that his uncle, cousins, and neighbor "never called me by my name but called me fag, fucking faggot, queer and laughed about it." Every person who abused Bringas-Rodriguez throughout his childhood either told him that he was being abused for being gay or referred to him using homophobic slurs.

B. Government Unable or Unwilling to Control the Harm

The question at the heart of this case is thus not whether Bringas-Rodriguez was abused because he was gay. Rather, it is whether Bringas-Rodriguez can show that the Mexican government was unable or unwilling to control his abusers. I agree with the panel majority that this question is currently controlled by *Castro-Martinez*, an opinion I joined four years ago. But I part ways with the majority as to the meaning and application of *Castro-Martinez*.

In *Castro-Martinez*, we discussed different methods by which an asylum seeker could demonstrate a government's

inability or unwillingness to control harm inflicted by private parties. For example, we stated that "the BIA may consider whether the victim reported the attacks to the police." *Castro-Martinez*, 674 F.3d at 1080. While such a report can suffice to demonstrate a government's unwillingness to control the persecution, a report is not necessary. "We have never held that any victim, let alone a child, is obligated to report a sexual assault to the authorities, and we do not do so now." *Id.* at 1081. But if the victim does not report to the police, there is a "gap in proof about how the government would have responded." *Id.* (alterations omitted) (quoting *Rahimzadeh v. Holder*, 613 F.3d 916, 922 (9th Cir. 2010)). In such cases, the petitioner bears the burden of filling that gap. *Id.*

We were careful in *Castro-Martinez* to list "other avenues" through which a petitioner could carry this burden. *Id.* Specifically, we identified four additional ways in which an asylum seeker like Bringas-Rodriguez could show that his government was unwilling or unable to prevent persecution by non-governmental parties. He could:

1. "establish[] that private persecution of a particular sort is widespread and well-known but not controlled by the government";

2. "show[] that others have made reports of similar incidents to no avail";

3. "demonstrat[e] that a country's laws or customs effectively deprive the petitioner of any meaningful recourse to governmental protection"; or

> 4. "convincingly establish that going to the authorities would have been futile or would have subjected the individual to further abuse."

Id. at 1081 (alterations omitted) (quoting *Rahimzadeh*, 613 F.3d at 921–22). After reviewing the facts in *Castro-Martinez*, we concluded that the petitioner did not present sufficient evidence to show that Mexican officials would have been unable or unwilling to prevent his abuse. *Id*.

The panel majority here concludes that *Castro-Martinez* compels denial of Bringas-Rodriguez's petition because "[t]he facts in Bringas's case are very similar to those in *Castro-Martinez*." Op. at 11. The facts are similar in one respect. In both cases, petitioners introduced United States State Department country reports describing police violence against homosexuals. In *Castro-Martinez*, the petitioner "submitted country reports documenting societal discrimination against homosexuals in Mexico and attacks on gay men committed by private parties." 674 F.3d at 1079. "He also presented evidence of widespread police corruption in Mexico and incidents of police violence against homosexuals." *Id.* We concluded that these reports, without more, did not "compel the conclusion that the police would have disregarded or harmed a male child who reported being the victim of homosexual rape by another male." *Id.* at 1081.

In the case now before us, Bringas-Rodriguez submitted similar country reports. Because Bringas-Rodriguez left Mexico in 2004 and has not returned since, the relevant period for purposes of our analysis is the years before 2004. Bringas-Rodriguez submitted country reports from 2009 and 2010. Although the 2009 and 2010 reports post-date the

period at issue in this case, they provide probative information. Both country reports state that in Mexico discrimination and persecution based on sexual orientation — including discrimination and persecution by governmental officials — had lessened over time. But they also state that discrimination and persecution remained serious problems, five and six years after Bringas-Rodriguez left the country.

The 2009 country report states, "While homosexual conduct experienced growing social acceptance, the National Center to Prevent and Control HIV/AIDS stated that discrimination persisted." The 2010 country report similarly notes that, according to a governmental agency and a nonprofit organization, "societal discrimination based on sexual orientation" remained "common." The 2009 report continues:

> One of the most prominent cases of discrimination and violence against gay men was that of Agustin Humberto Estrada Negrete, a teacher and gay activist from Ecatepec, Mexico State. In 2007 he participated in a gay rights march wearing a dress and high heels. According to the NGO Asilegal, soon after the march, Estrada began receiving threatening telephone calls and verbal and physical attacks. In 2008 he was fired from the school for children with disabilities where he worked. After his dismissal, he and a group of supporters began lobbying the government to reinstate him; *when they went to the governor's palace to attend a meeting with state officials in May, police beat him and his supporters. The next*

> *day he was taken to prison, threatened, and raped. Although he was released, Estrada continued to face harassment by state authorities*.

(Emphasis added.) Through these reports, Bringas-Rodriguez established that government discrimination on the basis of sexuality in Mexico persisted, even years after he fled the country.

While Castro-Martinez and Bringas-Rodriguez both produced relevant country reports detailing the Mexican government's continued discrimination against homosexuals, the facts of their cases are dissimilar in a critical respect. Unlike Castro-Martinez, Bringas-Rodriguez provided evidence that "others have made reports of similar incidents to no avail." *Castro-Martinez*, 674 F.3d at 1081. Specifically, Bringas-Rodriguez presented evidence that while living in Kansas, gay Mexican friends told him they had reported similar sexual abuse and that the Mexican police in Veracruz had refused to take action. Bringas-Rodriguez's oral testimony was brief, but quite clear:

> Q: You can go tell police if you return to Mexico and suffer abuse, you could tell the police. . . . Couldn't you do that?
>
> A: They will do nothing.
>
> Q: How do you know that?
>
> A: I know that because when I was living in Kansas, couple of my friends told me that they got raped, they got beat up, like abuse,

> and they went to the police and they didn't do anything. They even laugh [in] their faces.

Bringas-Rodriguez provided similar testimony in his written declaration, explaining that, if he reported his abuse, the police "would laugh at me and tell me I deserved what I got because I was gay. This happened to friends of mine in Veracruz."

Neither the BIA nor the IJ mentioned Bringas-Rodriguez's testimony about what his friends had told him. In fact, the IJ, whose decision the BIA affirmed, stated in denying asylum that "we certainly do not have any evidence whatsoever" that Mexican authorities were unwilling to protect a child like Bringas-Rodriguez. The IJ's statement is wrong. It is undisputed that Bringas-Rodriguez submitted probative country reports, and that he provided both oral and written testimony that his friends had reported similar sexual abuse to police in Veracruz, and the police refused to take action.

Despite this evidence, the panel majority rejects Bringas-Rodriguez's asylum claim. To rebut Bringas-Rodriguez's country reports, the majority asserts that governmental discrimination on the basis of sexual orientation in Mexico has lessened in recent years. Op. at 13. Although the relevant time period for purposes of Bringas-Rodriguez's claim is before 2004, the majority cites evidence from the past few years, even citing a report published only this year. Op. at 14 n.5. This evidence has limited utility. We recognized in a recently published opinion that while Mexico has made some advances in its treatment of homosexuals, there has actually been "an *increase* in violence against gay, lesbian, and transgender individuals during the years in which

greater legal protections have been extended to these communities" and that "there is a continued failure to prosecute the perpetrators of homophobic hate crimes throughout Mexico." *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1081–82 (9th Cir. 2015) (emphasis in original).

The panel majority then concludes that Bringas-Rodriguez's additional evidence — the statements of his friends — is also not sufficient. The majority's primary complaint is that the evidence lacks specificity. Op. at 15. To support this conclusion, the majority lists a number of details that, in its view, are crucially absent from Bringas-Rodriguez's testimony. These details include the names of his two friends, their ages, "the nature of their relationship to Bringas," "how or to whom they reported their abuse," or "any evidence showing that these nameless friends actually reported any abuse to the Mexican authorities." Op. at 15. But Bringas-Rodriguez did provide a number of these details. Bringas-Rodriguez explained the nature of the relationship: they were his Mexican friends who had recounted to him in Kansas their experience in Veracruz. While he did not state their exact ages, a reasonable inference, given that they were his friends, is that they were his age contemporaries. He also testified as to whom the friends had reported their abuse: Mexican police in Veracruz. Finally, he provided evidence that the friends had made the reports: his credible testimony about what they had told him.

The panel majority also partially discounts the statements of Bringas-Rodriguez's friends because they are hearsay. Op. at 12, 16–17. However, it is well established in our case law that hearsay — even hearsay upon hearsay — is proper evidence in asylum proceedings. *Ramirez-Alejandre v.*

Ashcroft, 319 F.3d 365, 370 (9th Cir. 2003) (en banc). Hearsay is sometimes (though only sometimes) less probative and reliable than direct evidence. But because of the particular difficulties asylum seekers have in obtaining direct evidence, we are more willing to credit hearsay in asylum cases than in conventional litigation. *See*, *e.g.*, *Cordon-Garcia v. I.N.S.*, 204 F.3d 985, 992–93 (9th Cir. 2000) (holding "Petitioner's testimonial evidence," which consisted of "hearsay, and, at times, hearsay upon hearsay," sufficient to support the presumption that petitioner had a well-founded fear of future persecution).

The majority also suggests that Bringas-Rodriguez's testimony is suspect because much, perhaps all, of the abuse Bringas-Rodriguez suffered had already taken place by the time he talked to his friends in Kansas. *See* Op. at 12 n.4. But this is irrelevant. The question at issue is not what Bringas-Rodriguez knew about the police when he was a child. Rather, the question is whether the Mexican police would have helped Bringas-Rodriguez if he had reported his abuse to them. An asylum seeker can present probative evidence that he or she obtained only after escaping from persecution. *See*, *e.g.*, *Cordon-Garcia*, 204 F.3d at 992–93 (relying upon petitioner's evidence, obtained only after the petitioner departed her home country, to find that petitioner established a well-founded fear of future persecution); *Gjerazi v. Gonzales*, 435 F.3d 800, 809 (7th Cir. 2006) (holding the IJ erred in excluding documentary evidence of persecution solely because the evidence was only acquired after the petitioner arrived in the United States).

Finally, the majority makes geographic objections to Bringas-Rodriguez's evidence. For example, it discounts Bringas-Rodriguez's country reports because neither report

"mentions any instances of discrimination or persecution in his home state of Veracruz." Op. at 13. This objection ignores the fact that Bringas-Rodriguez's additional evidence — the statements of his friends about their experiences in Veracruz — corroborates the country reports and demonstrates that discrimination against homosexuals extends to Bringas-Rodriguez's home state. Similarly, the majority objects that Bringas-Rodriguez's evidence does not discuss "the specific police practices in Bringas's town of Tres Valles." Op. at 15. But Tres Valles is in the state of Veracruz. Our Court has "adjusted the evidentiary requirements" for asylum seekers in light of "the serious difficulty with which asylum applicants are faced in their attempts to prove persecution." *Malty v. Ashcroft*, 381 F.3d 942, 947 (9th Cir. 2004) (quoting *Cordon-Garcia*, 204 F.3d at 993). Accordingly, we do not require a petitioner to provide evidence of the specific practices of his hometown when he presents evidence of statewide or even countrywide persecution. *See, e.g.*, *Yan Rong Zhao v. Holder*, 728 F.3d 1144, 1147–48 (9th Cir. 2013) (finding the BIA erred in requiring a Chinese petitioner to provide evidence of the government policy in her town and noting that "[n]either the BIA nor this court has previously required municipal-level proof when the petitioner presents province-level proof").

In sum, we wrote in *Castro-Martinez* that a gay petitioner qualifies for asylum when he provides country reports documenting official persecution on account of sexual orientation, supplemented by evidence that "others have made reports of similar incidents to no avail." 674 F.3d at 1081. We denied relief in *Castro-Martinez* because the petitioner had not, in the view of the panel, provided such supplemental evidence. In this case, Bringas-Rodriguez has provided the additional evidence that was lacking in *Castro-Martinez*. He

testified that his Mexican friends ("others") had told police in his home state of Veracruz that they were abused because of their sexuality ("had made reports of similar incidents") and that the police did nothing ("to no avail").

III. Revisiting *Castro-Martinez*

As noted above, I have growing doubts about our decision in *Castro-Martinez*. As the panel majority writes, the facts of *Castro-Martinez* resemble this case. In both cases, a gay, HIV-positive man sought asylum based on a long history of childhood abuse suffered in Mexico because of his sexuality. *Id.* at 1078–79. Both victims failed to report their abuse to Mexican officials. *Id.* at 1080. And both victims provided country reports describing anti-gay sentiments and persecution by Mexican authorities. The BIA denied asylum in both cases, on the ground that the victims failed to show that the Mexican government was unable or unwilling to control the abusers. *Id.* at 1081.

We denied Castro-Martinez's petition for review. We concluded that there was "no evidence in the record that Mexican authorities would have ignored the rape of a young child or that authorities were unable to provide a child protection against rape." *Id.* We wrote that Castro-Martinez offered nothing more than his belief that "the police would not have helped him." *Id.* "[S]uch a statement, without more, is not sufficient to fill the gaps in the record regarding how the Mexican government would have responded had Castro reported his attacks." *Id.*

If the only evidence Castro-Martinez offered had been his unsupported belief, I would continue to think our decision in that case was correct. Asylum seekers must show that "the

government concerned was either unwilling or unable to control the persecuting individual or group." *Matter of Pierre*, 15 I. & N. Dec. 461, 462 (BIA 1975). Unsubstantiated assertions that the government is unwilling or unable to control a persecutor do not suffice to carry that burden.

Castro-Martinez, however, did offer evidence to show Mexican officials would not have helped him. As we wrote in our opinion, "Castro also stated that he was afraid of contacting the police because they would likely abuse him on account of his homosexuality. Castro presented country reports documenting police corruption and participation in torture, abuse, and trafficking, as well as incidents of police harassment of gay men." *Castro-Martinez*, 674 F.3d at 1081. Despite this, we held that Castro-Martinez still had not carried his burden because "none of these reports compel the conclusion that the police would have disregarded or harmed a male child who reported being the victim of homosexual rape by another male." *Id.*

I have come to believe that *Castro-Martinez* demands an unwarranted level of specificity from country reports. In rejecting Castro-Martinez's claim, we held that statements in country reports that Mexican police harassed homosexuals and ignored their claims of abuse was not enough. We required, instead, a statement in the report focusing specifically on gay children — a statement that Mexican police ignored reports by gay male children who were abused by other males. The panel majority here does the same. It discounts Bringas-Rodriguez's evidence of governmental discrimination against homosexuals generally, and instead affirms the IJ's conclusion that Bringas-Rodriguez failed to provide evidence showing that the Mexican government

would not have responded to "*the abuse of children*." Op. at 13–14, 18 (emphasis in original).

Given the nature of crimes of sexual violence against children and the difficulty children face in reporting them, *Castro-Martinez* and the panel majority require evidence that few victims can supply. Many children will not report these crimes for some of the same reasons Bringas-Rodriguez did not. Abusers often threaten their victims with harm if they tell anyone, and they sometimes make good on those threats. Children also have difficulty getting information to the police, especially if family members or neighbors — the people who might report the abuse — are the abusers. By discounting country reports that describe discrimination against homosexuals generally and instead requiring reports specifically addressing gay children, *Castro-Martinez* effectively requires abused children to report to the police, either to provide relevant evidence for the country reports or to establish the requisites for asylum in their own cases.

Conclusion

We have repeatedly held that victims, especially child victims, of private persecution need not report their abuse to obtain asylum. *Castro-Martinez*, 674 F.3d at 1081 ("We have never held that any victim, let alone a child, is obligated to report a sexual assault to the authorities, and we do not do so now."); *Rahimzadeh*, 613 F.3d at 921 ("The reporting of private persecution to the authorities is not . . . an essential requirement for establishing government unwillingness or inability to control attackers."); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1057 (9th Cir. 2006). Yet, *Castro-Martinez* and today's decision effectively require just that. In *Castro-Martinez*, by demanding unrealistic specificity from country

reports, we effectively eliminated those reports as a method of showing a foreign government's inability or unwillingness to prevent sexual abuse of gay children. In today's opinion, we effectively eliminate another avenue for obtaining relief. In *Castro-Martinez*, we wrote that evidence that "others have made reports of similar incidents to no avail" could be used to show a government's inability or unwillingness to prevent private harm. Bringas-Rodriguez presented precisely such evidence, and he presented it in the only form — hearsay — likely to be available to someone in his position.

Bringas-Rodriguez, like most abused children, did not report to the police the sexual abuse he suffered. Thus, when seeking aslyum, Bringas-Rodriguez had to rely on other evidence of the Mexican government's inability or unwillingness to protect him. He provided 2009 and 2010 country reports describing police indifference to, and participation in, discrimination and violence against homosexuals. He also testified that his gay friends told him that when they reported to the Mexican police in his home state of Veracruz similar abuse they had suffered, the police laughed in their faces and told them that they deserved the abuse they were receiving. That should be enough.

I respectfully dissent.

CERTIFICATE OF SERVICE

I hereby certify on this 21st day of March, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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