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# Guatemalan Petitioner Wins Remand of Asylum Claim on Several Grounds by 9th Circuit Panel

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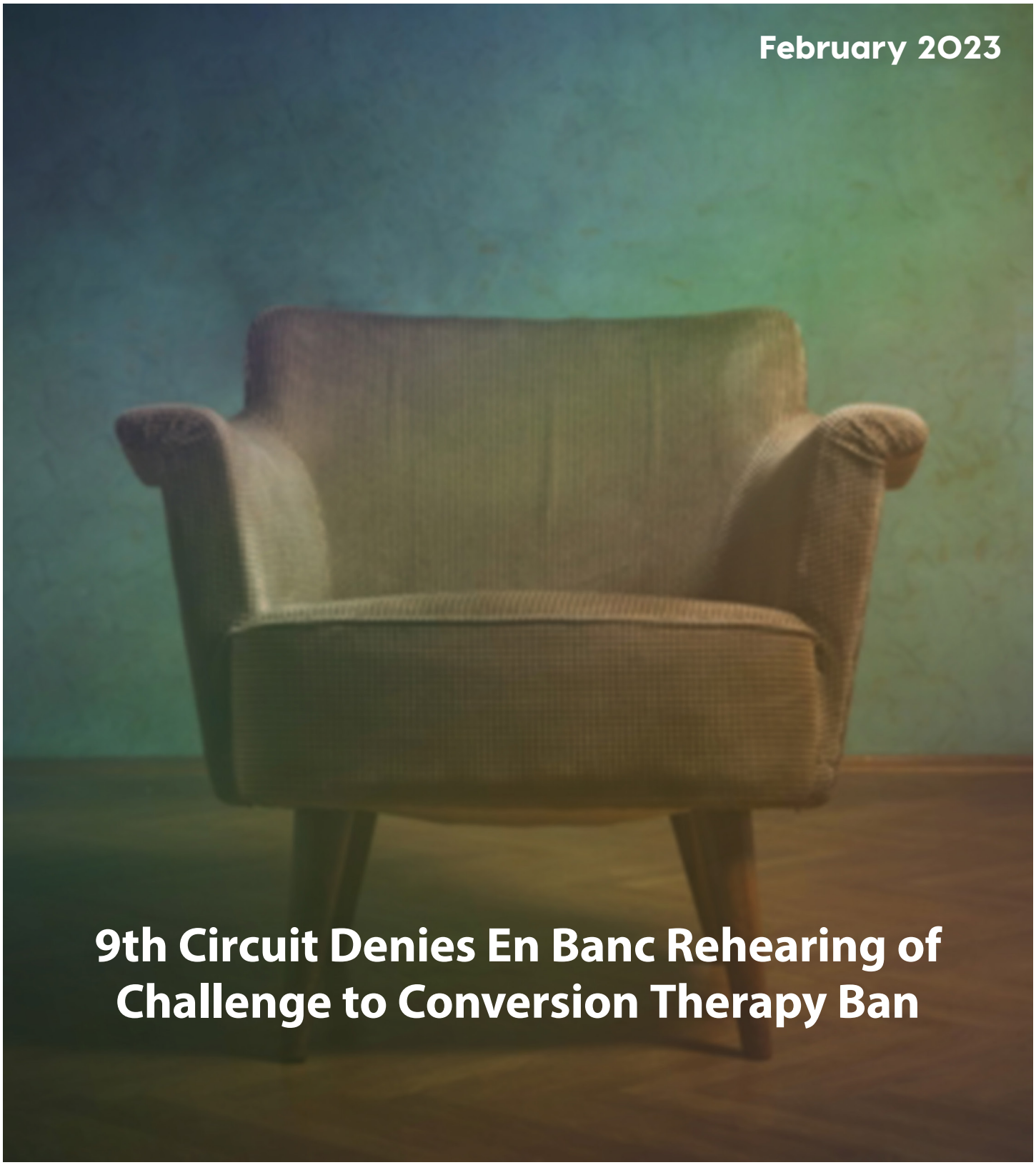

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## 9th Circuit Denies En Banc Rehearing of Challenge to Conversion Therapy Ban

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# LAW NOTES

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## EXECUTIVE SUMMARY



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Constitution tolerates . . . depends in part on the nature of the enactment." *Hoffman Estates v. Flipside*, 455 U.S. 489 (1982). Notably, greater clarity is required when a statute either restricts speech, imposes a particularly severe penalty, or lacks a scienter requirement. "The amendments at issue in this case are explicit viewpoint-based speech limitations that, as discussed above, arguably affect both the curricular and extracurricular speech of public primary and secondary school teachers. Because their extracurricular speech is plausibly entitled to First Amendment protection, a rigorous vagueness review is required."

The law provides that if teachers are found to have violated its provisions, they may be stripped of their teaching credentials, employment, and livelihoods. This requires that the strictest review of vagueness be applied. The same standard should apply as in a criminal statute based on the extreme repercussions. That standard is that "the law must give 'a person of ordinary intelligence fair notice of what is prohibited' and must not be 'so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *U.S. v. Williams*, 553 U.S. 285, 304 (2008). The judge found that the amendments do not provide clarity on what is permitted and what is not permitted to be taught in the classroom and that the violator can be sanctioned for teaching a concept by implication. As such, the plaintiffs have pleaded a plausible claim that the law is unconstitutionally vague.

The plaintiffs are represented by David A. Vicinanzo, Nixon Peabody LLP, Manchester, NH; Chris Erchull, GLBTQ Legal Advocates & Defenders (GLAD), Boston, MA; Emerson J. Sykes, American Civil Liberties Union Foundation, New York, NY; Henry Klementowicz, American Civil Liberties Union of New Hampshire, Concord, NH; Jennifer Aimee Eber, Disability Rights Center-NH, Concord, NH; Leah Watson, American Civil Liberties Union Foundation, New York, NY; Morgan C. Nighan, Nixon Peabody LLP, Boston, MA; Peter J. Perroni, Peter J. Perroni, ESQ., Chelmsford, MA; SangYeob Kim, American Civil Liberties Union of New Hampshire, Concord, NH; Sarah Hinger, American Civil Liberties Union Foundation, New York, NY; Suzanne Amy Spencer, Shaheen & Gordon, Concord, NH; William E. Christie, Shaheen & Gordon, Concord, NH; Gilles R. Bissonnette, American Civil Liberties Union of New Hampshire, Concord, NH; Charles Moerdler, Stroock Stroock & Lavan LLP, New York, NY; David Kahne, Stroock Stroock & Lavan LLP, New York, NY; Elizabeth Clarke Milburn, Stroock Stroock & Lavan LLP, New York, NY; David Kahne, Stroock Stroock & Lavan LLP, New York, NY.

District Judge Paul J. Barbadoro was appointed by President George W. Bush. ■

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*Brian M. Brantley is a member of the New York Bar.*

# Guatemalan Petitioner Wins Remand of Asylum Claim on Several Grounds by 9th Circuit Panel

*By Arthur S. Leonard*

On January 26, a three-judge panel of the U.S. Court of Appeals for the 9th Circuit granted a petition by a native and citizen of Guatemala to have the Board of Immigration Appeals (BIA) reconsider her claims for asylum, withholding of removal, or protection under the Convention against Torture (CAT). Circuit Judge Mark J. Bennett wrote for the panel, with a concurring opinion by Circuit Judge Gabriel P. Sanchez. *Antonio v. Garland*, 2023 WL 411361, 2023 U.S. App. LEXIS 2036.

Summarizing the record, Judge Bennett wrote, "Antonio was verbally and physically harassed and received death threats because her community in Guatemala perceived her to be a lesbian, including because she wore men's clothing to work. In her petition, Antonio challenges the IJ's findings that: (1) this treatment did not amount to persecution, (2) the relevant social group for asylum purposes is based on 'manner of dress,' and (3) no persecution was committed by the Guatemalan government or by forces that the government was unwilling or unable to control."

The court found that the first finding was not supported by substantial evidence in the record, that the second finding suffered from "several errors" and that in making the third finding, "the agency did not consider all highly probative evidence in the record."

The IJ had noted as to the second issue that Antonio did not present a "sexual orientation issue because Respondent stated she was not a lesbian." The court observed that the IJ seems to have mischaracterized petitioner's argument on the issue of membership in a "particular social group," as she also stated in the hearing

that "people can think that a person is perhaps a lesbian," and her counsel noted that she was "perceived to have male tendencies." Taken together, this raised the question whether "perceived" or "imputed" sexual orientation based on how the petitioner dressed and acted could be considered a "particular social group" for this purpose.

"Failure to address a social group claim, or failure to analyze such a claim under the correct legal standard, 'constitutes error and requires remand,'" wrote Bennett, citing *Rios v. Lynch*, 807 F. 3d 1123 (9th Cir. 2015). "Antonio's manner of dress was one reason her community associated her with a relevant proposed social group, not the basis of the group itself," he continued. "Thus, the agency failed to conduct its particular social group analysis with respect to the correct group – women perceived to be lesbians."

Since there is no specific BIA or 9th Circuit precedent precisely on point, the court remanded as to this issue for the agency to determine "(1) whether women in Guatemala perceived to be lesbian constitute a particular social group; and (2) if so, whether Antonio's persecution was 'on account of' her membership in that group."

The court engaged in a close scrutiny of the record on the third issue and found that the IJ had ignored important, uncontradicted evidence in the record that could support the conclusion that the government failed to take appropriate action to protect the petitioner despite her attempts to invoke its aid.

In his concurring opinion, Judge Sanchez focused on the issue of "particular social group," observing that although the majority "correctly points out that no published authority from our court or the Board of Immigration appeals has expressly recognized imputed sexual orientation as a cognizable social group, and therefore remand is warranted to allow the BIA to pass on this question in the first instance . . . Under longstanding circuit and BIA precedent, the answer to this question seems clear."

For example, he pointed out that "the BIA has emphasized the importance of the 'perception of the persecutor' in asylum claims that involve persecution on account of imputed protected characteristics." After citing other examples involving different grounds for asylum claims, he wrote, "It is no leap to conclude that imputed homosexuality and homosexuality alike confer membership in the particular social group of homosexuals. Indeed, as the majority recognizes, prior panels have applied BIA and circuit precedent to arrive at that conclusion in unpublished dispositions." Where the IJ erred was in focusing "exclusively on Antonio, assigning no weight to the perceptions of her persecutors." It was enough that her persecutors believed her to be a lesbian, and "Faithful application of the foregoing precedent should lead the BIA to the same conclusion," he wrote.

The petitioner is represented by Marco A. Jimenez, Riverside CA. Judge Bennett was appointed by President Donald Trump. Judge Sanchez was appointed by President Joe Biden. The third member of the panel, Senior U.S. District Judge Elizabeth E. Foote (W.D. La.), sitting by designation, was appointed by President Barack Obama. ■

# Wisconsin Court of Appeals Rules Transgender Individual Must Show Possibility of Physical Harm to Shield Name Change Petition from Publication

*By Willy C. Martinez*

Wisconsin Statute Section 786.37(4) provides that an individual who files a petition for a confidential name change may be required, at the discretion of the court, to show "by a preponderance of the evidence, that publication of his or her petition could *endanger* him or her." In *In the Matter of R.I.B.*, 2023 WL 225797, 2023 Wisc. App. LEXIS 50 (Wis. Ct. App. Jan. 18, 2023), Judge Gregory B. Gill Jr., writing for the Court of Appeals of Wisconsin, affirmed the order of Circuit Court Judge Tammy Jo Hock denying a transgender individual's petition for a confidential name change, concluding the statute requires "proof that a petitioner more likely than not could be physically endangered if the name change petition is published."

Robert (a pseudonym assigned by the court, which explained that it was using a male name out of respect for R.I.B.'s dignity) was assigned female at birth and identifies as a transgender male. When Robert began to use his name and wear men's clothing at age twelve, he was subjected to copious amounts of physical and emotional abuse. His classmates, for instance, verbally abused Robert with transphobic slurs. His teacher joined the students in Robert's abuse, even threatening Robert with recording him "so that others could see that he was 'acting like a girl and not like a boy.'" Students, both at school and in his neighborhood, threatened Robert with physical abuse and violence, including threats that the other children