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IDENTITY AND INTERESTS OF *AMICI*

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 (“*Amici*”) are organizations that represent the interests of and provide services to immigrants; lesbian, gay, bisexual, and transgender (“LGBT”) individuals; and people living with HIV/AIDS. With expertise in LGBT and HIV legal and policy issues, in the application of immigration laws, and with knowledge of the interests of LGBT and HIV-positive immigrant communities, *Amici* respectfully submit this brief to assist the Court in addressing central questions raised in this case.¹

The **Public Law Center** (“PLC”) is a non-profit pro bono law firm committed to providing access to justice for low-income residents in Orange County. PLC provides free civil legal services through private attorney volunteers and staff. Every year, PLC’s immigration unit assists hundreds of low-income immigrants in obtaining legal status, including those seeking asylum as victims of persecution based on sexual orientation, gender identity, and HIV status, as well as victims of

¹ Under Federal Rule of Appellate Procedure 29(c)(5), *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, made a monetary contribution to the preparation or submission of the brief.

domestic violence, human trafficking, and other serious crimes. PLC’s clients will be negatively affected by the decision that is the subject of this amicus.

Lambda Legal Defense and Education Fund (“Lambda Legal”) is the oldest and largest national legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender (“LGBT”) people and people living with HIV through impact litigation, education, and public policy work. Through its Proyecto Igualdad, Lambda Legal serves Latino and Spanish-speaking communities across the U.S. Lambda Legal actively litigates and advocates for the rights of LGBT immigrants and asylum seekers, and its work helped establish important Ninth Circuit asylum jurisprudence in this area. *Hernandez-Montiel v. INS*, 225 F.3d 1084 (2000); *Soto-Vega v. Gonzales*, 183 Fed. Appx. 627 (9th Cir. 2006). Through its HIV Project, Lambda Legal also combats HIV stigma and bias. In 1983, Lambda Legal won the first HIV discrimination lawsuit in the country; it has since helped maintain or expand protections for people living with HIV nationwide. Lambda Legal’s expertise on HIV is particularly relevant and will assist the Court as it considers the complex issues presented in this case.

The **National Immigrant Justice Center** (“NIJC”) is a Chicago-based non-profit organization that provides legal services to immigrants and asylum seekers. With collaboration from more than 1,000 pro bono attorneys, NIJC represents

more than 200 asylum seekers at any given time. NIJC also responds to requests for information and representation from more than 200 LGBT immigrants who are detained nationwide. Of these requests, many are individuals asking for assistance with appellate representation. Through this work, NIJC has identified numerous systemic problems in the handling of immigration cases involving sexual minorities, particularly from Latin America. Because some of these problems are at issue in Petitioner’s case, NIJC is well positioned to assist the Court in its assessment of the petition for review.

The **Center for HIV Law and Policy** (“CHLP”) is a national legal and policy resource and strategy center for people with HIV and their advocates. CHLP is a national leader in HIV policy development. It works to reduce the impact of HIV on vulnerable and marginalized communities, including immigrants, and to secure the human rights of people living with by HIV. Through its advocacy work, CHLP knows firsthand that exaggerated fears about HIV and ignorance about the routes and relative risks of HIV transmission perpetuate stigma, discrimination, and unfair treatment. Inconsistent and unbalanced interpretation and application of criminal law to individuals with HIV reinforces prejudice and undermines important government-funded HIV prevention and treatment efforts.

HIV Law Project was the first, and remains one of the leading legal agencies providing direct services to low-income people living with HIV/AIDS in

New York City and advocacy on issues affecting people living with HIV/AIDS throughout the world. HIV Law Project provides legal and advocacy services for underserved, low-income people living with HIV/AIDS, particularly women and their families; people of color; undocumented and recent immigrants; LGBT individuals; and the homeless.

Immigration Equality is the only national organization focused entirely on representing LGBT and HIV-affected immigrants and their families. Immigration Equality coordinates a pro-bono asylum project, provides technical assistance to attorneys, maintains an informational website, and fields questions from LGBT and HIV-affected individuals from around the world. Immigration Equality has provided trainings to asylum officers on asylum claims based on sexual orientation and gender identity and co-authored the leading manual on the subject. The organization currently has nearly 400 open LGBT/HIV asylum cases.

Disability Rights Legal Center (“DRLC”) is the oldest cross-disability organization with a mission to “advance the rights of people with disabilities through education, advocacy, and litigation.” DRLC is a member of the Los Angeles HIV Law and Policy Project, a legal services collaboration designed to meet varied legal needs for people living with HIV/AIDS, including those related to immigration.

Asian & Pacific Islander Wellness Center (“A&PI Wellness Center”) is a San Francisco-based health services, education, training, research, and policy advocacy organization with local, regional, and national programming. A&PI Wellness Center transforms lives by advancing health, wellness, and equality for people of color and the LGBT community. A&PI Wellness Center is an anchor institution in one of the most densely populated and impoverished areas of the country, where over 40% of local residents are immigrants and 23% are not U.S. citizens. With over 27 years of experience providing culturally and linguistically competent services to people living with HIV, including immigrants, A&PI Wellness Center understands the unique and often life-threatening situations facing LGBT immigrants and asylum seekers living with HIV in their home countries. This knowledge and expertise is relevant to the subject of this appeal. Further, A&PI Wellness Center’s clients will be adversely affected by the decision that prompted this amicus.

Amici are familiar with petitioner’s presentation on the issues; though concurring in petitioner’s legal analysis, *Amici*’s discussion of the issues does not duplicate that briefing. Rather, *Amici* draw on their knowledge of, and experience with, the rights of LGBT immigrants and persons with HIV, to further show why the Court should reverse the ruling below and remand for further proceedings.

I. INTRODUCTION

Amici respectfully submit this brief to assist the Court in evaluating complex issues related to conditions for LGBT individuals, particularly those living with HIV, in Mexico. Petitioner here, ██████████, is a gay man living with HIV. He suffered extreme sexual violence throughout his life in Mexico because of his sexual orientation and perceived effeminacy. Moreover, given the widespread persecution of LGBT individuals in Mexico—persecution that the Immigration Judge acknowledged is often ignored by or committed by government actors—he faces a high likelihood of experiencing future persecution if he were removed there. The Board of Immigration Appeals (“Board”) erroneously glossed over the evidence demonstrating the scope and extent of LGBT persecution in Mexico, focusing instead on policy changes that, according to the Board, improved conditions for LGBT individuals in Mexico. But in reality, these top-level reforms have not materially improved the overall situation for the vast number of LGBT Mexicans and in fact have contributed to an increase in violence and abuse against them.

What’s more, the Board gave no consideration at all to how ██████████’s HIV status affected the asylum analysis. But it does, considerably: the diagnosis raises the risk that ██████████ will face further increased violence and persecution in Mexico, and gives rise to the clear possibility that, as a gay man with HIV, he

will be denied HIV-related healthcare because of selective bias against him, a reality of which the government is aware and knowingly permits to continue.

In this brief, *Amici* show that the Board's ruling, if allowed to stand, would be devastating for ██████████, who needs the protections of this country's asylum laws to avoid life-threatening violence because of his sexual orientation and HIV status, as well as denial of urgently needed medical care solely because he is gay. Based on their expertise concerning the systematic persecution of LGBT people and individuals living with HIV, and victimization of them in Mexico in particular, *Amici* urge this Court to remand the matter to the Board to ensure that ██████████ is not wrongfully removed to Mexico to face the dangerous reality that awaits him because he is a gay man with HIV.

II. SUMMARY OF ARGUMENT

A gay, HIV-positive Mexican man was found dead Feb. 21 [2008] with his hands tied behind his back and a cardboard sign on his body reading in Spanish, "This is what happens to me for going around infecting people with AIDS."²

The scientific research, newspapers, popular press, and country-condition reports from Mexico are full of accounts of often lethal violence such as this one, each growing out of the deeply rooted bias against LGBT individuals, particularly

² Kilian Melloy, *Gay Mexican Tortured, Stoned*, EDGE Boston (Feb. 29, 2008), available at <http://www.edgeboston.com/index.php?ch=news&sc=&sc3=&id=71031&pf=1>.

those living with HIV. Nevertheless, the Board rejected ██████████'s requests for asylum, withholding of removal, and protection under the Convention Against Torture. This result should be reversed.

Conditions in Mexico are unsafe for LGBT individuals. They are subject to persecution, life-threatening violence, and brutality, in which governmental officials actively participate and against which governmental entities fail to protect them. These social and cultural conditions make living in Mexico difficult and extremely dangerous for LGBT individuals. And this abuse is in spite of—and in a sense because of—pro-LGBT legislative advancements such as, in some Mexican states, the approval of marriage for and adoption by same-sex couples. *See infra* Section IV.A.

Moreover, an HIV diagnosis—which ██████████ received while his case was before the Board—heightens the vulnerability to persecution for LGBT individuals. *See, e.g., Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1091 (9th Cir. 2005) (concluding that people living with HIV are actively persecuted in Mexico). In fact, ██████████'s HIV diagnosis materially affected his asylum eligibility, such that remand to the IJ was appropriate for consideration of this new evidence in the first instance. People—and in particular LGBT people—with HIV are subject to persecution and life-threatening violence. Social exclusion and discrimination manifest themselves in healthcare delivery, where treatment is

withheld from LGBT people with HIV because of their sexual orientation or gender identity and expression. These social and cultural conditions make mere survival difficult for LGBT people with HIV in Mexico, and increases the risk of future persecution. *See infra* Section IV.B.

**III.
BACKGROUND**

A. Petitioner’s Background

██████████ is a gay man from Mexico. He has been aware of his sexual orientation since the age of six, when he “knew that [he] didn’t like girls” and had feelings “that [he] thought that boys were more attractive than girls.” (AR217.) From an early age, people could tell he was different. As a child, his father would tell ██████████ to “Act like a boy, you’re not a woman,” and “Do things a man does.” (AR262.) If ██████████ did not obey, his father would beat him. (AR262.)

When ██████████ was between four and fourteen, he was repeatedly subjected to sexual abuse including rape by adult men who were family members and neighbors. The abuse began at age four at the hand of an uncle, who abused ██████████ four to six times a year until he was twelve. (AR262.) Later, the uncle confirmed that the sexually assaults were because ██████████ is gay. (AR217.) Two cousins also began sexually abusing ██████████ monthly, beginning when he was seven and continuing until he was twelve. (AR262.)

The sexual assaults stopped briefly when, when he was twelve, ██████████ went to the United States to be with his mother. (AR262.) The abuse resumed when he returned to Mexico just a few months later. (AR263.) For over two more years, ██████████ again endured sexual assaults from his uncle and cousins, who even bragged about it to friends. (AR263.) The rapes were often accompanied by other forms of physical abuse as well: sometimes ██████████'s tormentors would punch him (AR193), and the attacks would result in “black eyes, bruises all over [his] body” (AR215). Once, one of his neighbors punched ██████████ in the face, took off his clothes, and raped him. (AR263.) Again, the abuse stopped only when ██████████ fled to the United States at the age of fourteen. (AR263.)

██████████ was diagnosed with HIV in March 2012, while his appeal was before the Board. (AR27.) According to his doctor, ██████████ has a strain of HIV that is resistant to two standard HIV antiretroviral medications. *See* Petition for Review [Docket ECF 1], Attachment A [Letter from ██████████] (filed July 30, 2013) (“██████████”). He was placed on alternative therapy, adheres to his treatment, and fortunately has responded well to it. (*Id.*)

B. HIV and the Importance of Treatment

The use of multiple drugs to treat HIV is known generally as highly active antiretroviral therapy (“HAART”). The drugs interfere with HIV’s replication process, thereby reducing the amount of virus in the blood, enhancing immune

function, and dramatically reducing the chances of HIV/AIDS-related complications.³ Treatment also improves general health and quality of life. Because of the nature of [REDACTED]'s condition, continuity of care is critical; he needs to take his medication consistently and on time.⁴ *See Aguilar-Mejia v. Holder*, 616 F.3d 699, 705 (7th Cir. 2010) (“[m]issing [HIV] medication for even a brief period could be a literal death sentence). HAART significantly increases life-expectancy—in fact, people with HIV who adhere to recommended antiretroviral treatment can expect near-normal life expectancy. U.S. Dept. of Health & Human Services, AIDS.gov, <http://aids.gov/hiv-aids-basics/just-diagnosed-with-hiv-aids/hiv-in-your-body/stages-of-hiv/>. If HAART treatment is stopped—or never begun—progression from HIV to AIDS generally occurs in a few years, and the median survival time after developing AIDS is only 9.2 months. *See D. Morgan et al., HIV-1 Infection in Rural Africa: Is There A Difference In Median Time to AIDS and Survival Compared With That In Industrialized Countries?*, 16(4) AIDS 597-632 (2002).

³ *E.g.*, NYU Center for AIDS Research, *HIV Treatment Options*.

⁴ *See* U.S. Dept. of Health and Human Services, *Guidelines for the Use of Antiretroviral Agents in HIV-1-infected Adults and Adolescents*, at 122 (Jan. 10, 2011) (treatment adherence is highly correlated to viral suppression, reduced levels of resistance, increased survival, and improved quality of life), available at <http://www.aidsinfo.nih.gov/ContentFiles/AdultandAdolescentGL.pdf>.

In Mexico, however, there are documented shortages of life-saving HIV medicines. *See* ██████████ Letter, at 1. Without consistent, dependable access, the resulting intermittent access would lead to viral resistance, and ██████████ would develop AIDS and ultimately die. *Id.*

IV. ARGUMENT

The Board erred in upholding the IJ’s denial of relief. As detailed below, the denial is at odds with the treatment of LGBT individuals in Mexico—particularly those living with HIV—who face daily the risk of severe violence and the selective denial of medical care on account of their membership in that social group.

A. There Is a Systematic Pattern and Practice of Widespread Violence Against LGBT People in Mexico.

The Board erred in concluding that the country conditions evidence did not support a conclusion that a gay man like ██████████ faces persecution. As described below, the evidence paints a dismal and appalling picture of human rights abuses that can be described in no other way than as a targeted pattern or practice of persecution.

1. Pervasive cultural biases normalize violence against and other mistreatment of LGBT individuals in Mexico.

Societal norms provide crucial background information for any determination of whether there is a pattern or practice of persecution against LGBT individuals, including gay men, in Mexico. Mexico’s social mores are deeply

conservative, with entrenched notions of gender that permit, and even encourage, violence against LGBT individuals.

Mexican culture embraces “a concept of masculinity (machismo) [that] requires that the division between male and female be clearly defined culturally as the division [between] those things active and male and those things passive and female.” Joseph Carrier, *De Los Otros, Intimacy and Homosexuality Among Mexican Men* 21 (1995); see also Andrew Reding, *Sexual Orientation and Human Rights in the Americas*, World Policy Institute, World Policy Reports 10 (Dec. 2003).⁵ For a culture steeped in machismo, the sort of transgression expressed by a man identifying as LGBT, like ██████████, has significant and deeply negative cultural implications. Thus, in Mexico, society has long targeted individuals whose identities transgress social norms. Reding, at 10; Carrier, at 15-16.

The same is true today, as these deeply rooted aspects of Mexican culture, including the widespread view that men should live up to a machismo standard of masculinity, continues to result in stigmatization of, and violence toward, non-conforming sexual and gender identities. Children in Mexico are indoctrinated into the machismo culture “in early childhood, making it very difficult to change later in life.” Reding, at 12. These machismo ideals are carried into adulthood, resulting

⁵ Available at <http://www.worldpolicy.org/sites/default/files/uploaded/image/WPR-2003-Sexual%20Orientation%20and%20Human%20Rights%20in%20the%20Americas.pdf>.

in apathy toward discrimination and anti-LGBT violence as well as antipathy—or worse, brutality—toward LGBT individuals, including active participation by machismo-indoctrinated governmental authorities in such abuses. *See generally Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000) (recognizing persecution in Mexico of members of the social group of gay men who identify as feminine).

For LGBT persons, “[t]he overall culture in Mexico remains highly oppressive in its attitudes” and as a result they face a serious risk of violence and discrimination. Global Rights, *The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in Mexico: A Shadow Report* 4 (2010) (“*Shadow Report*”).⁶ More than 75% of the LGBT community report having been victims of physical violence, and more than half report having been assaulted in public. *Id.* The numbers are staggering: from 1995 to 2007, nearly 500 people were killed in Mexico because of their sexual orientation, gender identity or gender expression. *Id.* From 1995 to 2008, the number was 627. Jenaro Villamil, Medios, politica y diversidad sexual, <http://jenarovillamil.wordpress.com>, *Hate Crimes Due to Homophobia, A Conspiracy of Silence* 1 (May 17, 2010) (“*Conspiracy of Silence*”).⁷ These numbers are increasing quickly, doubling from a total of 290 murders between 1997 and 2003, to a total of 627 just five years later, in 2008.

⁶ Available in PDF at <https://iglhrc.org/sites/default/files/556-1.pdf>.

⁷ Original and translation available in PDF at http://www.asylumlaw.org/docs/sexualminorities/Mexico_Jenaro_051710.pdf.

Conspiracy of Silence, at 1. Likewise, in the first eight months of 2009, there were 40 murders linked to the victim's sexual orientation, gender identity or gender expression in Michoacán alone, and 15 LGBT murders in Guerrero State. *Shadow Report*, at 9. And these are only reported cases; the true number is likely much higher. *See generally Conspiracy of Silence*.

The statistics tell an incomplete story, failing to capture the crimes' violent and brutal nature. Victims are most often stabbed, beaten, or strangled. *Conspiracy of Silence*, at 1. Some have been found decapitated and disemboweled while others have been subject to torture, genital mutilation (including castration), and rape.⁸ In many cases, the efforts to humiliate continue even after the victim has died. *See generally Conspiracy of Silence*. And oftentimes, the perpetrators leave demeaning notes on the bodies, such as "I'm a faggot." *Id.* at 2.

In addition, countless cases of rape, violence, and murder against LGBT individuals go unreported out of fear of reprisal from the police, or lack of confidence that the cases will be taken seriously. *See generally Shadow Report*. Studies have shown that, for every homophobic crime reported in the media, three more cases are likely hidden or not pursued by the victims' families because of social stigmatization. *See generally Conspiracy of Silence*.

⁸ *E.g.*, Melloy, *supra* n.2.

2. Mexican authorities often commit, or acquiesce in, acts of physical or sexual violence against LGBT individuals.

The evidence also shows that Mexican police officers and other governmental authorities participate in violence against LGBT individuals. As the IJ noted, one specific example is recounted in the U.S. State Department’s Human Rights Report for Mexico: a “prominent” case of violence against a teacher and gay-rights activist named Agustin Humberto Estrada Negrete. (AR295.) In 2007, Estrada participated in a gay-rights march wearing a dress and high heels; subsequently, he was threatened, verbally harassed, and physically attacked. He was also fired from his job at a school. The report describes what happened when Estrada and his supporters lobbied for his job back:

[W]hen 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. (AR295.)

The IJ acknowledged that this prominent example was not unique in the record, stating “there are other instances of mistreatment reported by individuals and the police against gay individuals.” (AR48.)

Similarly, the Immigration and Refugee Board of Canada (“IRBC”) has produced detailed reports of abuses against LGBT people by police in Mexico as recently as September 2012. *See* IRBC, *Mexico: Reports of Sexual Abuse*

Committed by Police Officers Against Sexual Minorities (Sept. 13, 2012).⁹ For example, the IRBC reports that LGBT people in Durango City “are routinely stopped by police, detained, and subjected to verbal and physical assault.” *Id.* This included sixty cases in 2010, and twenty cases in the first two months of 2011 alone. *Id.* The agency also noted that LGBT people rarely report such abuse by police out of fear—thus, the actual number of assaults nationwide is undoubtedly much higher. *Id.*; *see also Shadow Report*, at 10-13 (detailing experiences of police harassment of and brutality against LGBT individuals).

Even in cases where public officials are not the perpetrators, Mexican authorities are well aware that violence is frequently directed at LGBT individuals and are turning a blind eye to it. Again, reports show that 74% of LGBT individuals in Mexico are physically assaulted because of their sexuality. According to the United States Agency for International Development (“USAID”), at least half of gay men who participated in the study reported experiencing physical or sexual violence in Mexico. *See USAID, Screening for Violence Against MSM and Transgenders: Report on a Pilot Project in Mexico and Thailand* vii (Oct. 2009).¹⁰ Given the scale of abuses, Mexican authorities must be “aware that

⁹ Available at <http://www.refworld.org/docid/50753cfe2.html>.

¹⁰ Available in PDF at http://pdf.usaid.gov/pdf_docs/Pnadu587.pdf.

torture of the sort feared by [REDACTED] occurs” and yet they “remain willfully blind to it.” *Madrigal v. Holder*, 716 F.3d 499, 509 (9th Cir. 2013).

In fact, authorities deliberately fail to investigate or prosecute crimes of violence against LGBT individuals. *E.g.*, *Conspiracy of Silence*, at 1 (80% of homophobic homicide investigations end without an arrest). The U.S. government acknowledges this fact: the 2013 State Department’s Human Rights Report for Mexico states that even though Mexican law in some states prohibits LGBT discrimination, “the government did not always investigate and punish those complicit in abuses.” U.S. Dep’t of State, *Country Reports on Human Rights Practices for 2013—Mexico*, at 40.¹¹ In the rare case where homophobic murders are investigated and prosecuted, they are not prosecuted as murder (carrying a 20-40 year sentence) but as “crimes of passion” (carrying a 2-8 year sentence). *Conspiracy of Silence*, at 1.

The Mexican government’s own discrimination survey confirmed the widespread, persistent view that some of the most homophobic attitudes exist among law enforcement. Forty-three percent of respondents said they perceive the police as intolerant of gay and bisexual people, meaning law enforcement is seen as the most homophobic of all the sectors of society about which respondents were questioned; one-in-five respondents identified fear of the police as an even greater

¹¹ Available in PDF at <http://www.state.gov/documents/organization/220667.pdf>.

concern than fear of drug-dealer violence or other violent assault. *See* National Council to Prevent Discrimination (“Conapred”), *National Survey on Discrimination in Mexico (“Enadis”)*, “Overall Results” 31, 48 (April 2011) (nationwide survey of more than 50,000 individuals) (“*2011 Enadis Overall Results*”).¹²

Recent legislative progress for some gay and lesbian people in Mexico has not significantly improved the long-standing, deep-seated cultural realities that subject LGBT people to widespread violence. General developments—the passage of laws allowing same-sex couples to marry and to adopt children, and the occurrence of gay pride parades, which the IJ and Board relied on in their decisions—have not materially reduced or eliminated the risk to these marginalized groups. Indeed, the legal reforms appear to have inspired a response of increased hostility and violence:

It’s likely that the legislative achievements of the gay-lesbian-transsexual [sic] community, especially on the subject of marriage, adoption and recognition of their rights, have increased the number of hate crimes due to homophobia. It’s the reaction of those who oppose the normalization of differences and minority rights.

Conspiracy of Silence, at 1. Despite legislative advances, and the creation of councils and commissions to prevent discrimination and protect human rights—

¹² Available in PDF at <http://www.conapred.org.mx/userfiles/files/ENADIS-2010-Eng-OverallResults-NoAccss.pdf>.

which the Board and IJ also relied on for their decision—“LGBT persons continue to face discrimination and human rights violations based on gender identity and sexual orientation” because of established cultural biases and “highly repressive ... attitudes toward” LGBT people. *Shadow Report*, at 4. Thus, anti-LGBT violence, including killings, increased *after* the pro-LGBT legislation, and even in the face of a governmental campaign for tolerance of LGBT individuals. (AR300.)

Moreover, increased visibility of LGBT people, such as in pride parades, have exposed them to even more abuse. (*Id.*) See *Vitug v. Holder*, 723 F.3d 1056, 1066 (9th Cir. 2013) (evidence of positive legislative action protecting the LGBT community “does not indicate that there is any less violence against gay men or that police have become more responsive to reports of antigay hate crimes”); accord *Rojo v. Holder*, 408 Fed. Appx. 73, 75-76 (9th Cir. 2011) (Chile’s repeal of anti-sodomy laws was “of little or no relevance to [petitioner’s] fear of persecution”). As ██████████ himself testified, these developments—while positive and certainly welcome as official policies—are simply not responsive to his concerns as a gay man living with HIV: fear of intentional mistreatment, violence, and other abuse:

it seems like people talk about like, yes, they have big parades, they have like some resorts, but still what’s—and they even have gay marriage. What’s the point of going down there and get married, and then my husband’s going to get killed the next day?” (AR218.)

The government's own survey has confirmed this harsh reality. To the question "how much are the rights of gay people respected?", 42.4% of respondents answered "not at all" and another 33.3% said only "scarcely." *2011 Enadis Overall Results*, at 35.¹³ The Enadis report quoted one respondent, a gay man, who explained: "Unfortunately, in Mexico we have not been able to create or found a real community. We all are hiding. Distances and lack of communication in this city make the existence of a community, contrary to other countries, too complicated." *Id.* at 45.

In sum, the mere fact that the central Mexican government now officially prohibits discrimination and grants some rights on paper does not mean that officials no longer engage in or turn a blind eye to torture of LGBT individuals. *See Ramirez-Peyro v. Holder*, 574 F.3d 893 (8th Cir. 2009) (torture by "rogue" official is still torture even if contrary to government policy). The ability to marry, adopt, or participate in a pride parade has not materially improved the day-to-day safety and security of most LGBT individuals in Mexico.

¹³ Regardless of the precise amount of support for LGBT rights among the general population, a large segment remains aggressively hostile and violent toward LGBT individual. More important, as noted above, the police are the biggest threat, and LGBT people cannot count on them for protection and safety.

B. ██████████’s Post-appeal HIV Diagnosis Materially Affects His Asylum Eligibility, and Remand Is Appropriate For Consideration of This New Fact.

The Board also erred in failing to recognize that ██████████’s post-appeal HIV diagnosis was not a change requiring remand. To the contrary, there is no doubt that ██████████’s HIV diagnosis markedly increases the likelihood of persecution in Mexico. People living with HIV are subject to persecution in Mexico in all aspects of life—from police and government officials, within families, in healthcare services and the workplace—and it comes in a variety of forms, from violence and brutality to denial of access to healthcare. The Board should have remanded for the IJ to consider this evidence.¹⁴

1. LGBT individuals with HIV, like ██████████, are at heightened risk of life-threatening violence and other abuse.

As with anti-LGBT bias, machismo culture influences Mexican societal attitudes toward people living with HIV. In Mexico, AIDS is believed by a great many to be an “illness of immorality” and is “considered dirty” because it is closely tied to pre-existing stigma against LGBT individuals, particularly gay men and transgender people. *See* USAID, *Breaking the Cycle: Stigma, Discrimination,*

¹⁴ The Board acknowledged ██████████’s HIV diagnosis, noting he had expressly argued that “‘this fact is significant because it now places [him] in a more vulnerable position should he be returned to Mexico.’” (AR5 (quoting Respondent’s Br. at 10).) Nonetheless, the Board analyzed ██████████’s claim as if he were subject to persecution based only on his “homosexuality,” refusing to remand for further consideration of the HIV-based claim. (AR3, 5.)

Internal Stigma, and HIV 5 (Jan. 2006) (“*Breaking the Cycle*”).¹⁵ This is because of the concentrated nature of the HIV epidemic in Mexico, where “HIV prevalence among men who have sex with men (MSM) is estimated to be as high as 15.2%.” Alliance Country Studies, *A Global Summary of Achievements, Progress and Challenges under Impact 2010—Mexico*, at 1.¹⁶ As a result, “[in] Mexico ... a clear equation for most of the perceptions of society in relation to ‘lifestyle and risk’ [is] evident: AIDS = homosexuality = bad = death.” *Breaking the Cycle*, at 5.

Because of this negative association, LGBT individuals are often blamed for HIV/AIDS. Among healthcare professionals, for example, 25% consider homosexuality the cause of AIDS in Mexico. USAID, *Mo Kexteya: Reduction of Stigma and Discrimination Related to HIV/AIDS in Mexico 1* (POLICY Project June 2004).¹⁷ This scapegoating inevitably leads to anti-HIV persecution and violence motivated by LGBT bias. In 2001, for example, a government official in Merida advocated for “killing” HIV-positive individuals who live among those who are HIV-negative. *Conspiracy of Silence*, at 5. In 2005, an HIV activist in

¹⁵ Available in PDF at http://pdf.usaid.gov/pdf_docs/Pnadh435.pdf.

¹⁶ Available in PDF at <http://www.aidsalliance.org/includes/Document/Uploaded/MexicoCS.pdf>.

¹⁷ Available in DOC format at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&uact=8&ved=0CCgQFjAA&url=http%3A%2F%2Fwww.policyproject.com%2Fpubs%2Fcorepackages%2FMexico%2520CP%2520%2520Final%2520Report%25201%252011%252006.doc&ei=C5FyU82KDo30oAT22IGQCQ&usg=AFQjCNGQxuAX7VPx1jUVEkTgOxFWoBL5_Q&bvm=bv.66699033,d.cGU.

Querétaro was murdered. *Shadow Report*, at 10. In the same period, government officials in two Mexican localities equated sexual orientation and gender identity with HIV status and transmission. *Id.*; *Conspiracy of Silence*, at 5. Similarly, media accounts and popular culture perpetuate the devaluation and marginalization of LGBT people, and the equivalence of “LGBT” with “HIV-infected.” Attitudes like this are not isolated, nor have they improved over time. According to the Mexican government’s recent data, four-of-ten respondents would not allow a gay person to live in their home, while three-of-ten would not allow a person living with HIV/AIDS. *2011 Enadis Overall Results*, at 23.

In short, as reported by the United Nations High Commissioner for Refugees (“UNHCR”), Mexican society is “highly prejudiced” against those living with HIV, which is commonly identified as a “gay disease.” UNHCR, *Update: Treatment of Homosexuals in Mexico* 33, 34 (May 30, 2006).¹⁸ Misconceptions about how HIV is spread “give rise to fear, which, in tandem with deeply-ingrained homophobia, [lead to] ostracism and harassment.” *Id.* at 34.

Thus, ██████████’s HIV status is an additional reason why he is vulnerable to violence and abuse. *See Eneh v. Holder*, 601 F.3d 943, 948-49 (9th Cir. 2010) (remanding to Board to consider claims that petitioner would be “single[d] ... out

¹⁸ Available in PDF at <http://www.asylumlaw.org/docs/sexualminorities/MexicoUNHCR053006.pdf>.

for mistreatment” specifically based on HIV); *Boer-Sedano*, 418 F.3d at 1091 (recognizing that “hostility towards and discrimination against HIV/AIDS patients is common in Mexico”); *Aguilar-Mejia*, 616 F.3d at 705 (“[m]issing [HIV] medication for even a brief period could be a literal death sentence”). The Board failed to recognize, much less address, this increased likelihood that [REDACTED] would suffer persecution because of his HIV status.

2. HIV-positive LGBT people are denied HIV-related healthcare because of selective bias against them.

Deliberate, selective, and punitive bias against people with HIV who are, or are perceived to be, LGBT also limits access to life-saving medication and delivery of HIV-related healthcare. That is, the same anti-LGBT bias described above as resulting in brutal violence and abuse also pervades the healthcare system.

Notably, according to USAID, “factors such as social stigma related to HIV, homophobia, and gender inequities continue to hamper the response” to the epidemic. *See* USAID, *HIV/AIDS Health Profile: Mexico* (Sept. 2010).¹⁹ “The spread of HIV/AIDS in Mexico is exacerbated by stigma and discrimination, which act as a barrier to prevention, testing, and treatment.” *Id.* The United

¹⁹ Available in PDF at http://www.usaid.gov/our_work/global_health/aids/Countries/lac/mexico_profile.pdf. *See also* UNAIDS, *HIV Prevention Hampered by Homophobia* (Jan. 13, 2009) (anti-LGBT bias and homophobia remain a serious barrier to HIV treatment and prevention), available at <http://www.unaids.org/en/Resources/PressCentre/FeatureStories/2009/January/20090113MSMLATAM/>.

Nations General Assembly Special Session on HIV/AIDS (“UNGASS”) agreed, stating that “stigma, silence, discrimination and denial, together with lack of confidentiality, weaken the prevention efforts, care and treatment.” UNGASS, *Declaration of Commitment on HIV/AIDS* 9 (June 2001).²⁰

Other reliable sources document mistreatment of patients living with HIV at the hands of health professionals based on stigma and discrimination. USAID has observed that Mexicans living with HIV reported “ill treatment of themselves and others by nurses,” including “staff disclosing their HIV status,” “placing HIV-positive patients in specific wards,” intentionally “giving the wrong medication,” or “refusing treatment altogether.” USAID, *A Closer Look: The Internalization of Stigma Related to HIV* 10 (Jan. 2006).²¹

Many complaints involved the complete denial of medical services and treatment to people with HIV. According to a report from the Immigration and Refugee Board of Canada, analyzing statistics provided by Mexico’s National Human Rights Commission, “more than 570 HIV/AIDS-related complaints were lodged with the commission between 1992 and October 2006,” most centering on such issues as the “denial of adequate health services or medication, acts of discrimination or negligence by medical personnel, and violations of

²⁰ Available at http://data.unaids.org/publications/irc-pub03/aidsdeclaration_en.pdf.

²¹ Available at http://www.policyproject.com/pubs/generalreport/Internal_Stigma.pdf.

confidentiality.” IRBC, *Mexico: Situation of Witnesses to Crime and Corruption, Women Victims of Violence and Victims of Discrimination Based on Sexual Orientation* (Feb. 2007).²² Almost 44% of complaints came from Mexico City. *Id.* AIDS patients also complained of being denied surgeries and other medical examinations because of their actual or perceived LGBT status. Marion Lloyd, *Conference targets AIDS stigma in Mexican health care*, *Houston Chronicle* (Aug. 3, 2008).²³ Such neglect often leads to death. In 2010, five people with AIDS died at a hospital because healthcare personnel refused them treatment. *HIV/AIDS Health Profile: Mexico*, at 3. As USAID observed, though there are laws to prevent discrimination based on HIV status, “in most cases the laws are not successfully implemented, and there are no sanctions when discrimination does occur.” *Id.*

In short, patients in Mexico are deliberately excluded from HIV treatment and other healthcare access based on anti-LGBT hostility.²⁴ And this punitive exclusion from lifesaving care, in addition to the constant threat of violence on account of one’s actual or perceived status as LGBT and HIV-positive, is more than sufficient to establish a reasonable fear of persecution.

²² Available at <http://www.refworld.org/docid/46d2ed512.html>.

²³ Available at <http://www.chron.com/news/nation-world/article/Conference-targets-AIDS-stigma-in-Mexican-health-1782009.php>.

²⁴ See also *Homophobia Justifies Forsaking of People Infected with HIV/AIDS in Mexico* (Aug. 15, 2009).

Nevertheless, the Board suggested that lack of access to HIV drugs “is a problem suffered not only by homosexuals but by the Mexican population as a whole.” (AR5 (citing *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011).) The evidence does not bear this out.

Contrary to the Board’s view, people living with HIV in Mexico are not equally disadvantaged. In reality, LGBT people and individuals perceived as LGBT are deliberately excluded from HIV treatment and prevention efforts, and this exclusion amounts to continued persecution. As the U.S. government itself has recognized, “[f]actors such as the social stigma and marginalization attached to AIDS and to groups perceived to be at high risk”—which specifically includes individuals who are or are thought to be LGBT—“continue to hamper HIV prevention efforts in Mexico.” USAID, Mexico | HIV/AIDS, <http://www.usaid.gov/mexico/hivaids> (last visited May 7, 2014) (emphasis added). Further, while overall antiretroviral treatment in Mexico was about 51%, treatment rates were *far lower* for at-risk populations, and that “[p]ersistent homophobia, gender based violence, persecution and even killings of most-at-risk populations ... were identified as some of the main obstacles to ensuring access to HIV-related services in the region.” UNAIDS, *Addressing Stigma and Discrimination and Homophobia Key to Achieving Universal Access in Latin America* (Mar. 15, 2011)

(emphasis added).²⁵ Despite the high prevalence of HIV among gay men in Mexico, for example, the government spends only 10% of its prevention funds to reach this group. *AIDS Prevention Gives Short Shrift to Gays*, CBS News, Feb. 11, 2009.²⁶

UNAIDS has further observed that although laws and programs exist in Mexico to provide medical care to people living with HIV, Mexican public health and other government authorities have not shown that these laws and policies are “implemented at sufficient scale and of a quality to make real and sustained improvements to the lives of people living with HIV.” UNAIDS, *Global Report on the Global AIDS Epidemic* 122 (2010).²⁷ Even at the legal and programmatic level, the UN has criticized Mexico specifically for having “laws, regulations, [and] policies obstructing access to prevention, treatment, care and support for vulnerable subpopulations [such as gay men].” *Id.* at 141. This arises from the widely held belief in Mexico, including among responsible government officials, that HIV is punishment for “amoral” homosexual behavior. *See Breaking the Cycle*, at 5. Mexico itself acknowledges that selective bias against LGBT individuals prevents marginalized groups (such as LGBT individuals) from

²⁵ <http://www.unaids.org/en/resources/presscentre/featurestories/2011/march/20110315auaconsultationla/>.

²⁶ Available at http://www.cbsnews.com/2100-204_162-4335543.html.

²⁷ Available at http://www.unaids.org/documents/20101123_globalreport_em.pdf.

receiving life-saving medication. See CONASIDA, *Informe Nacional Sobre Los Progresos Realizados en la Aplicación del UNGASS* 48 (Mar. 2010)²⁸; see also *HIV/AIDS Health Profile: Mexico* 3, 4. Mexican activists describe this as “administrative homophobia”— the deliberate withholding of care, borne out of anti-LGBT bias, that prevents life-saving medication from reaching LGBT people.

In short, LGBT individuals living with HIV are particularly vulnerable to persecution in Mexico. They are deliberately excluded from and denied access to healthcare, and they experience an acute deprivation from government protection and services.²⁹ Due to the government’s overt hostility to LGBT people with HIV and prevalent pattern of selectively and punitively denying care to them, ██████████ would surely find it unreasonably difficult to access HIV treatment. The resulting conditions (for example, sores and weight loss), if not the repeated violation of confidentiality by healthcare workers, would identify him as a target for HIV-related violence. See *Boer-Sedano*, 418 F.3d at 1091. Accordingly, the Board, using dicta about healthcare access and broad generalizations about HIV

²⁸ Available (in Spanish) in PDF at http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportssubmittedbycountries/mexico_2010_country_progress_report_es.pdf.

²⁹ E.g., *Shadow Report*, *supra*; see also U.S. Dep’t of State, *Country Reports on Human Rights Practices for 2010—Mexico* [AR352] available at <http://www.state.gov/documents/organization/160469.pdf>.

issues in Mexico, erred in rejecting ██████████'s claim that his HIV status was a "significant" new fact that made him more "vulnerable" to persecution.

This Court has already concluded that "hostility towards ... HIV/AIDS patients is common in Mexico." *Boer-Sedano*, 418 F.3d at 1090-91 (citing resources); *see also Eneh*, 601 F.3d at 948-49. It should not countenance the Board's effort to rely on vague generalizations about HIV medical care to deny ██████████'s asylum claim. This case should be remanded for a full review of the merits of the asylum claim, including an individualized assessment of access to HIV-related medical care in Mexico for people who are LGBT or are perceived to be LGBT, and an analysis of the likelihood of future persecution based on his status as a gay man with HIV.

V. CONCLUSION

The Board erred in rejecting ██████████'s application. *Amici* respectfully submit this brief in his support, urging reversal, and join in the request for relief that application seeks.

Dated: May 16, 2014

Respectfully submitted,

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**COMBINED CERTIFICATION OF COMPLIANCE
AND CERTIFICATION OF SERVICE**

I, Peter E. Perkowski, counsel for *Amici*, certify:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Rule 32(a)(7)(B) because it contains 6,878 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in Microsoft Word 2007 using the proportionally spaced typeface 14 point Times New Roman.

2. I caused this brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 16, 2014, and that all current participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: May 16, 2014

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