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**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS**

_____)	
In the Matter of:)	
)	File No.: _____
_____)	
Respondent)	
)	
In removal proceedings.)	July 11, 2014
_____)	

REQUEST TO APPEAR AS *AMICI CURIAE*

AND

**BRIEF OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.,
IMMIGRATION EQUALITY, AND THE CENTER FOR HIV LAW AND POLICY
AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT**

**REQUEST TO APPEAR AS *AMICI CURIAE*
AND STATEMENTS OF INTEREST**

Under Rules 2.10 and 4.6(i) of the Practice Manual of the Board of Immigration Appeals (the “Board”), Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”), Immigration Equality, and The Center for HIV Law and Policy (“CHLP”) respectfully request leave to appear and file a brief as *amici curiae* in these proceedings in support of Respondent [REDACTED].¹ Counsel for Respondent consents to this motion. Counsel for proposed *amici* contacted counsel for the Department of Homeland Security (“DHS”) on June 27, 2014 to inquire whether they would consent to this motion. At the time of this filing, DHS had not responded to counsel for proposed *amici* regarding whether it takes a position on the filing of this brief.

Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, and transgender people and people living with HIV through impact litigation, education, and public policy work. Its work and experience in legal and policy issues involving sexual orientation provide Lambda Legal with unique information and perspective that will assist the Board in understanding that requiring people who are lesbian, gay, or bisexual (“LGB”) to try to avoid torture by misrepresenting their sexual orientation improperly demands that they alter aspects of that fundamental characteristic. Lambda Legal advocates for the rights of LGB immigrants, and its work has helped establish important LGB immigration jurisprudence, including *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000) (recognizing that individuals may be protected against removal to countries in which they would

¹ Lambda Legal and CHLP have previously appeared as *amici curiae* in this matter and submitted an *amici curiae* brief on August 15, 2013 with the International Gay and Lesbian Human Rights Commission, the National Association of Social Workers, the National Association of Social Workers Connecticut Chapter, the Fellowship of Affirming Ministries, the National Black Justice Coalition, the National Black Leadership Commission on AIDS, the American Civil Liberties Union, and the American Civil Liberties Union of Connecticut.

face persecution based on their sexual orientation), *Soto Vega v. Gonzales*, 183 F. App'x 627 (9th Cir. 2006) (same), and *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997) (same). Lambda Legal's expertise on LGB immigration issues is particularly relevant and will assist the Board as it considers the sexual orientation issues presented in this appeal.

Immigration Equality is a national organization that works to end discrimination in immigration law against those in the lesbian, gay, bisexual, and transgender community and immigrants who are living with HIV or AIDS. Incorporated in 1994, Immigration Equality helps those affected by discriminatory practices through education, outreach, advocacy, and the maintenance of a nationwide resource network and a heavily-trafficked website. Immigration Equality also runs a pro bono asylum program and provides assistance and advice to hundreds of attorneys nationwide on sexual orientation, transgender, and HIV-based asylum matters.

CHLP is a national legal and policy resource and strategy center for people living with HIV and their advocates. CHLP works to reduce the impact of HIV on vulnerable and marginalized communities and to secure the human rights of people affected by HIV. As the only national legal organization dedicated exclusively to HIV advocacy and education, CHLP knows firsthand that unfounded fears about HIV perpetuate stigma, discrimination, and homophobia. In turn, uninformed assumptions, misconceptions, and stereotypes concerning gay men reinforce HIV stigma and homophobia. In Jamaica in particular, the perceived relationship between LGB sexual orientation and HIV has been used to justify the continued criminalization of same-sex sexual conduct.

The communities served by *amici* are directly affected by the Board's interpretation and application of immigration law to LGB immigrants. Individuals at imminent risk of persecution and torture based on their actual or perceived sexual orientation should not be denied

immigration relief simply based on an expectation that they might or even would, if forcibly removed to their country of origin, attempt to protect themselves from persecution and torture by trying to prevent those who would attack them from identifying them as LGB.

Amici are familiar with the parties' presentations below, and with Respondent's presentation on appeal, and believe that the public interest will be served by additional argument and information concerning immigrants who face torture, by their country of origin's government or with government acquiescence, because of their closely held personal characteristics. *Amici* have an interest in ensuring that LGB immigrants – like other immigrants who, as a matter of conscience, yearn to live in accordance with aspects of their core identity – will not be denied immigration protection simply because, if forced to return to their country of origin, they may try to avoid torture by preventing anti-LGB torturers from discovering their sexual orientation.

Though concurring in Respondent's legal analysis, *amici*'s arguments do not duplicate that briefing. Rather, *amici* draw on their knowledge of, and experience with, LGB individuals – including immigrants – and seek to provide insight into why the Board should reverse the decision of the Immigration Judge (“IJ”). *Amici* urge the Board to remand for further proceedings because a decision on whether it is more likely than not that Respondent will suffer torture if he is forcibly returned to Jamaica should not be premised on an expectation or requirement that Respondent try to prevent potential torturers from identifying him as gay.

For all of the foregoing reasons, permitting *amici* to appear in this matter will serve the public interest, and they respectfully request permission to appear as *amici curiae* and to file the accompanying brief.

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SUMMARY OF ARGUMENT

In denying Mr. ██████'s request for protection under the Convention Against Torture ("CAT"), the IJ based his decision on the conclusion that Mr. ██████ can and should hide his sexual orientation if he is forcibly returned to Jamaica. That was error. It is improper to require LGB people to attempt to prevent their torturers from discovering their sexual orientation, even if some LGB people may try to do so as a means of survival out of fear of anti-gay violence. Indeed, the U.S. government becomes complicit in a gay man's torture when it denies him CAT relief on the ground that he should try to avoid torture by hiding his sexual orientation. Courts in the United States and other CAT signatory countries have recognized that forced concealment of sexual orientation and analogous characteristics is an impermissible demand because it compels victims to endure further state-imposed persecution and torture.

Amici concur with Mr. ██████'s counsel that the IJ's decision contradicts the voluminous record evidence, including Mr. ██████'s credible testimony, establishing that Mr. ██████ would be identified as gay in Jamaica. However, *amici* write to underscore that, even if Mr. ██████ could or would try to hide his sexual orientation from most people in Jamaica, that does not justify denying Mr. ██████ CAT protection and relief. Returning Mr. ██████ to a country in which his survival will rest on his ability to permanently and universally closet himself is a violation not only of his right to live in accordance with his conscience, but also of well-established principles of U.S. immigration law. Denying him CAT relief on the assumption that he can or should closet himself imposes on Mr. ██████ an obligation to deny a fundamental part of his identity to avoid torture. This obligation has not been imposed on people who have sought protection based on other fundamental characteristics such as religion or political belief.

Moreover, it is improper to require that LGB applicants prove that they will engage in same-sex sexual conduct, or that they, as individuals, personally will be readily identifiable as lesbian, gay, or bisexual in order to obtain CAT relief. In the present case, Mr. [REDACTED] credibly testified that he would in fact seek out same-sex intimate relationships if returned to Jamaica. However, even if this were not the case, the fact that an applicant is LGB, and that LGB people are an identifiable social group likely to be tortured in the applicant's country of origin, is sufficient to establish a claim for CAT relief.

ARGUMENT

I. CAT Relief Cannot Be Denied Based on the Expectation that a Gay Applicant Can and Will Prevent Anti-Gay Torturers in his Country of Origin from Identifying Him as Gay

Even though Mr. ██████ is gay and gay men are tortured in Jamaica, the IJ denied Mr. ██████'s CAT claim on the basis that Mr. ██████ might escape torture because people in Jamaica may not realize that he is gay. IJ at 15. On appeal, DHS urges the Board to affirm the IJ's decision on the ground that Mr. ██████ may not be "readily identifiable as gay" because, if forced to return to Jamaica, Mr. ██████ will try to prevent perpetrators from discovering that he is gay. DHS Br. at 7. First, it is wrong as a matter of fact that people in Jamaica will not identify Mr. ██████ as gay. Respondent Br. at 17-25. Second, and of equal importance, it is wrong as a matter of law to deny CAT protection based on an expectation that a person's sexual orientation – or any other fundamental characteristic of a person's identity or conscience – may not be "readily identifiable" because the person theoretically could try to avoid torture by keeping that characteristic hidden.

A. CAT Does Not Require a Claimant to Choose Between His Conscience and Torture

Mr. ██████ cannot be denied CAT relief on the ground that it is theoretically possible he may avoid torture by concealing his sexual orientation because a CAT claimant "cannot be forced to choose between [his or] her conscience and torture." *Edu v. Holder*, 624 F.3d 1137, 1147 (9th Cir. 2010).² In *Edu*, the court reversed a decision of the Board that had denied CAT relief on the ground that the claimant could avoid torture by refraining from her political activities. *Id.* at 1141. In directing that the claimant be accorded CAT relief upon remand, the court explicitly rejected "the notion that CAT's precepts mean that an alien can be required to

² *Amici* agree with ██████'s counsel that ██████ would not be able to conceal his sexual orientation and this brief assumes, solely for the purposes of argument, that such concealment is possible.

give up [his] . . . political beliefs in order to avoid torture, and, therefore, cannot claim that it is more likely than not that he will be tortured.” *Id.* at 1146. The court held that such a reading of CAT “is so antithetical to the intent of the law that it cannot stand.” *Id.*

As in *Edu*, in which the claimant testified that she would continue to engage in political demonstrations if she were returned to Nigeria, Mr. ██████████ has expressed his intention to continue to pursue romantic relationships with men even if forced to return to Jamaica. IJ at 6-7. However, it is the threat of torture that will compel him and his partners to pursue their relationships in secrecy. Mr. ██████████ should not be denied CAT relief simply because he may, when forced to choose between torture and living in accordance with his fundamental identity, try to hide or deny aspects of his sexual orientation in an effort to avoid torture. To deny CAT relief on that ground would be “contrary to our basic principles.” *Edu*, 624 F.3d at 1146.

In the analogous contexts of asylum and withholding of removal, numerous courts have held that “asylum seekers are not required to change immutable characteristics or to abandon their beliefs simply to avoid future persecution.” *Ahmed v. Keisler*, 504 F.3d 1183, 1199 (9th Cir. 2007) (political dissident seeking asylum could not be required to change or abandon his political beliefs to avoid persecution); *see also Giday v. Gonzales*, 434 F.3d 543, 555 (7th Cir. 2006) (“It is an error of law to assume that an applicant cannot be entitled to asylum if she has demonstrated the ability to escape persecution only by chance or by trying to remain undetected.”); *Muhur v. Ashcroft*, 355 F.3d 958, 960 (7th Cir. 2004) (immigrant cannot be denied immigration relief on the basis that he “can escape the notice of the persecutors by concealing [his] religion”). Likewise, the “regulations governing withholding of removal do not require applicants who have faced persecution on account of race, religion, nationality, membership in a particular social group, or political opinion to avoid signaling to others that they are indeed



members of a particular race, or adherents of a certain religion, etc.” *Antipova v. United States Atty. Gen.*, 392 F.3d 1259, 1264-65 (11th Cir. 2004) (internal quotations omitted). Indeed, a primary purpose of immigration relief is to protect immigrants from having to abandon or conceal fundamental aspects of their identity and conscience. *See, e.g., Shan Zhu Qiu v. Holder*, 611 F.3d 403, 408 (7th Cir. 2010) (“Asylum exists to protect people from having to return to a country and conceal their beliefs.”).

It is clear from these court of appeal decisions in the analogous asylum and withholding of removal contexts that the government should not deny CAT relief to a gay man because he could theoretically reduce the risk of torture by changing how he expresses his sexual orientation and avoiding activities that might reveal his sexual orientation. In *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005), the court rejected the argument that a gay man can or should avoid persecution by trying to deny or change his sexual orientation. The court found that immigration law does not require a gay man to “forsake the intimate contact and enduring personal bond that the Due Process Clause of the Fourteenth Amendment protects from impingement in this country and that [has] been accepted as an integral part of human freedom” *Karouni*, 399 F.3d at 1173 (citing *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)) (internal punctuation omitted). Because sexual orientation is a fundamental matter of identity and conscience, the court held that it could not “saddl[e]” a gay immigrant “with the Hobson’s choice of returning to [his country of origin] and either (1) facing persecution for engaging in future homosexual acts or (2) living a life of celibacy” because “neither option is acceptable.” *Karouni*, 399 F.3d at 1173. *See also Razkane v. Holder*, 562 F.3d 1283, 1287 n.3 (10th Cir. 2009) (the notion that a gay man will not be persecuted because he can avoid being identified as gay by “suppress[ing] indicia of homosexuality . . . has been severely criticized”); *Maldonado v. Attorney Gen. of U.S.*, 188 F.

App'x 101, 104 (3d Cir. 2006) (rejecting the government's proposition that persecution of the applicant was not on account of his membership in a particular social group but "occurred instead because he engaged in an activity (leaving gay discos late at night) that he was free to modify"). This principle holds true regardless of whether it is persecution or torture that the gay immigrant is facing – in neither circumstance should he be forced to choose between facing harm and living in accordance with his identity.

B. Because Sexual Orientation Is Fundamental to Individual Identity, Expecting and Requiring an Individual to Conceal His Sexual Orientation to Avoid Torture Is Itself a Human Rights Violation

An immutable characteristic is one that people "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). Courts have found that sexual orientation is "immutable" and "so fundamental to one's identity that a person should not be required to abandon" it. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005). Every person has a sexual orientation and the right to develop and manifest the sexual activities, relationships, and identity that reflect that orientation. Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61, 86 (1996). Requiring a gay man to conceal his sexuality or deny inherent aspects of his gay identity is to deprive him of his human right to manifest, and live in accordance with, his sexual orientation. *Lawrence*, 539 U.S. at 567 (the "liberty protected by the Constitution allows homosexual persons the right" to "enter upon [a same-sex] relationship" and to express their "sexuality . . . in intimate conduct with another person"); *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 610-11 (Cal. 1979) (recognizing the right of LGB people to "come out of the closet" and "acknowledge their sexual

preferences” because the “struggle of the homosexual community for equal rights . . . [is] a political activity”). Thus, the affirmance and implementation of the IJ’s decision would itself constitute a human rights violation because it forces Mr. ██████ to try to avoid torture in Jamaica by denying aspects of his sexual orientation.

Courts around the world, including those of other CAT signatory countries, have found that forcing LGB people to live in the closet out of fear for their safety in the face of anti-gay laws and violence is a human rights violation. As the South African Constitutional Court observed, the government cannot compel gay men to “deny a closely held personal characteristic” and try to render themselves invisible to protect themselves from prosecution or other harms. *National Coalition for Gay & Lesbian Equality v. Minister of Justice* (CCT11/98), 1999 (1) SA 6 (CC) ¶ 129 (S. Afr.). To the contrary, “respect for human rights requires the affirmation of self, not the denial of self.” *Id.* at ¶132.

Courts in Canada, New Zealand, and Australia have found that forced concealment of an LGB person’s sexual orientation not only denies a basic human right, but also constitutes persecution that can warrant a grant of immigration relief. The Federal Court of Canada has repeatedly condemned such concealment demands because they require an individual to “repress an immutable characteristic.” *Okoli v. Canada (M.C.I)*, 2009 F.C. 332 (Can.). *See also Sadeghi-Pari v. Canada (M.C.I)*, 2004 F.C. 282 (Can.) (expecting LGB people to hide their same-sex relationships is a serious interference with a basic human right and is therefore persecution). Similarly, the New Zealand Refugee Status Appeals Authority has rejected the proposition that a government can “require the refugee claimant to forfeit or forego” his fundamental human right to live in accordance with his LGB identity or “den[y] refugee status on the basis that he . . . could engage in self-denial.” *Refugee Appeal No. 74665/03*, 7 July 2004 (New Zealand Refugee

Status Appeals Authority (RSAA)), ¶ 114. Likewise, in reversing a lower court denial of an asylum claim on the ground that a gay man could hide his sexual orientation to avoid persecution, the High Court of Australia held that “persecution does not cease to be persecution . . . because those persecuted can eliminate the harm by taking avoiding action within the country of nationality.” *Appellant S395/2002 v. Minister for Immigration & Multicultural Affairs*, (2003) 216 CLR 473, ¶ 40 (Austl.).³

C. The IJ’s Decision Renders the United States Complicit in Anti-LGB Torture

The U.S. government must not be complicit in the torture of LGB people by imposing upon them the burden of fully or partially concealing their sexual orientation to stay safe. LGB people who try to prevent potential assailants from discovering their sexual orientation do so out of fear of life-threatening violence. These efforts are an understandable response to the threat of persecution and torture. As the High Court of Australia has explained, the fallacy underlying the conclusion that a person will avoid persecution or torture because he has hidden or will hide his membership in a particular social group “is the assumption that the conduct of the [person] is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the *harm* that will be inflicted.” *Appellant S395/2002* at ¶ 43. But in fact, the person concealed his membership in the social group only because of the “*threat* of serious harm” – which itself “constitutes the persecutory conduct.” *Id.* See also *Refugee Appeal No. 74665/03* at ¶ 113 (explaining that it is anti-gay “domestic law provisions in the country of origin coupled with

³ Note also that requiring LGB people to abandon or hide their sexual orientation not only violates their human rights, but also causes significant harm to their mental and physical wellbeing. For example, gay men who try to conceal their sexual orientation to avoid discrimination, harassment, and violence report more frequent mental health concerns and are at greater risk for physical health problems than individuals who do not conceal their sexual orientation. See e.g., Steven W. Cole, *Social Threat, Personal Identity, and Physical Health in Closeted Gay Men*, in *Sexual Orientation and Mental Health: Examining Identity and Development in Lesbian, Gay, and Bisexual People*, 245 (Allen M. Omoto & Howard S. Kurtzman eds., 2006).

societal hostility, discrimination and prejudice” that drive gay men to engage in “self-oppression” to avoid harm). To deny CAT relief on the ground that a gay applicant has tried to prevent persecutors from identifying him as gay is to miss the stark reality that the applicant has done so only in response to the threat of torture.

The IJ’s decision in this case would render the U.S. government complicit in anti-gay torture because, in ordering Mr. ██████ removed to Jamaica, the U.S. would thereby compel Mr. ██████ to deny his gay identity – as his Jamaican torturers would have him do – in order to avoid being tortured. As a New Zealand tribunal has explained, a decision-maker who requires a gay refugee “to abandon a core right” to avoid persecution upon removal to his country of origin “is requiring of the refugee claimant the same submissive and compliant behaviour, the same denial of a fundamental human right, which the agent of persecution in the country of origin seeks to achieve by persecutory conduct.” *Refugee Appeal No. 74665/03* at ¶ 114. Denying immigration relief on the ground that “the risk can or will be avoided” through concealment of the gay refugee’s identity renders the decision-maker “complicit[] . . . in the refugee claimant’s predicament.” *Id.* at ¶ 114.

II. An LGB Applicant Should Not Be Required To Prove Precisely How His Torturers Will Learn That He or She is LGB to Establish a Claim for CAT Relief

Gay men are more likely than not to be tortured in Jamaica. Respondent Br. at 12-16, 25-28; IJ at 10-12; *Bromfield v. Mukasey*, 543 F.3d 1071, 1079 (9th Cir. 2008) (finding that “[i]n light of the statute criminalizing homosexual conduct and the widespread, targeted violence against homosexuals, all gay men [in Jamaica] are at risk” and that “the Jamaican government not only acquiesces in the torture of gay men, but is directly involved in such torture”). Mr. ██████ is a gay man. The IJ improperly denied relief based on an apparent expectation that

Mr. ██████ should, in addition to proving that he is gay, also prove that he will engage in same-sex sexual conduct or that he will be readily identifiable as gay.

A. It is Improper to Require that an Applicant Demonstrate that He Will Engage in Same-Sex Sexual Conduct to Be Entitled to CAT Relief

DHS argues that Mr. ██████ is not eligible for CAT relief because he has not proven that he will be an “openly gay man who will actively seek other gay men for romantic relationships.”⁴ DHS Br. at 10. In doing so, DHS accepts that Mr. ██████ is gay, but faults him for not proving that he will engage in same-sex sexual conduct. Courts have repeatedly rejected such a distinction between gay identity and gay conduct. This distinction is untenable where conduct is inherently linked to status. *See, e.g., Karouni*, 399 F.3d at 1173 (there is “no appreciable difference between an individual . . . being persecuted for being a homosexual and being persecuted for engaging in homosexual acts”); *Maldonado*, 188 F. App’x at 104 (rejecting distinction between same-sex conduct and sexual orientation as “a distinction without a difference”). Mr. ██████’s sexual orientation is inseparable from his sexual conduct – by proving the former, he need not do anything further to prove the latter.

Contrary to DHS’s assumption, whether or not Mr. ██████ will engage in same-sex sexual conduct is not the only way that he could or would be identified as gay in Jamaica. In vacating the denial of a gay applicant’s CAT claim in *Ali v. Mukasey*, 529 F.3d 478 (2d Cir. 2008), the Second Circuit criticized the immigration judge for “suggest[ing] that no one would perceive Ali as a homosexual unless he had ‘a partner or cooperating person.’” *Id.* at 491. The court found that this suggestion “appears to derive from stereotypes about homosexuality and how it is made identifiable to others.” *Id.* at 491-92. Moreover, the court observed that the

⁴ *Amici* agree with ██████ counsel that ██████ has proven that he will pursue romantic relationships with men even if forced to return to Jamaica. Respondent Br. at 11, 20-21. However, *amici* address DHS’s argument because it imposes an additional – and improper – burden on ██████

record “suggests that ‘an unmarried adult man with no children would be suspected of being a contemptible homosexual in Guyana.’” *Id.* at 492. Similarly, in the analogous withholding of removal context, the Board found that a gay man can be persecuted for merely “having the status of being a homosexual,” and, in affirming the withholding of deportation, noted that the applicant’s persecution did not result from having engaged in “specific [homosexual] activity.” *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (BIA 1990).

Ali and *Toboso-Alfonso* make clear that DHS is wrong in its argument that Mr. ██████ must prove that he will engage in romantic conduct with other men before he can be eligible for CAT relief. These cases also show that DHS is wrong in its assumption that Mr. ██████ will not be identified as gay unless he engages in same-sex sexual conduct. As in *Ali*, the record in Mr. ██████’s case demonstrates ways aside from sexual conduct by which men can be identified as gay in Jamaica – such as if they “are not married” and “have no . . . partner.” IJ at 7; Respondent Br. at 22.

B. It is Improper to Consider the Visibility of the Individual LGB Applicant’s Sexual Orientation in Evaluating His CAT Claim

Contrary to DHS’s contention, it is not necessary for Mr. ██████ to prove that he will be “readily identifiable” as gay for it to be more likely than not that he will be tortured for being gay. DHS Br. at 7. Federal courts have routinely granted CAT relief without considering whether the claimant possesses a “readily identifiable” characteristic that will, only upon being identified, result in torture. For example, in *Muradin v. Gonzales*, 494 F.3d 1208 (9th Cir. 2007), the court overturned a Board decision denying CAT relief to a claimant who was a former soldier who had since deserted from the Armenian military. In doing so, the court did not consider whether (or how easily) anyone in Armenia would perceive that Muradin was a former soldier or a deserter if he was forced to return to Armenia. Rather, the court held that substantial evidence



supported Muradin’s eligibility for CAT relief based on a State Department report finding that in Armenia, torture of conscripts, prisoners, and deserters is likely. *Id.* at 1211. Likewise, because Mr. ██████ is gay, he should not be required to also demonstrate precisely how or why people in Jamaica will identify him as gay; it is sufficient that he has submitted country conditions reports and expert testimony demonstrating the Jamaican government’s participation and acquiescence in the torture of gay men. Respondent Br. at 12-16, 25-28.

Recognition that all gay men, not just “readily identifiable” gay men, face torture in Jamaica is consistent with the approach taken in the analogous context of asylum law, in which the Board has clarified that the requirement of “social visibility” does not mean that a particular social group is “ocularly visible” but that the group has “social distinction.” *Matter of W-G-R-*, 26 I. & N. Dec. 208, 217 (BIA 2014). Social distinction exists when “society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group.” *Id.* It is not necessary that the “society in question . . . be able to easily identify who is a member of the group.” *Id.* Because Jamaican society identifies gay men as a social group and targets them for torture, Mr. ██████’s identity would put him in danger, and he should not also be required to prove that he will be individually and literally visible as gay in order to be eligible for CAT relief.

CONCLUSION

Torture does not cease to be torture because one may try to avoid the harm by concealing his identity or abandoning his conscience. To expect Mr. ██████ to deny a fundamental part of his identity and conscience to survive requires him to choose between state-mandated self-oppression and torture. CAT neither requires nor permits a State to force an individual to make

that choice. Mr. [REDACTED] has proven that he is gay and that, on that basis, he will more likely than not be tortured in Jamaica.

For all the foregoing reasons, *amici* respectfully urge the Board to reverse the denial of Respondent [REDACTED]'s application for relief under CAT. Alternatively, *amici* respectfully urge this Board to reverse and remand for further proceedings devoid of reliance on the assumption that the Respondent can or should be expected to try to repudiate or conceal his sexual orientation to avoid torture in Jamaica.

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New York, NY

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