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[REDACTED]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
SAN FRANCISCO, CALIFORNIA

In the Matter of:

[REDACTED]

Respondent,

In Removal Proceedings.

Number: [REDACTED]

Hearing Date: June 11, 2014

Hearing Time: 1:00 p.m.

Before Hon. Michael J. Yamaguchi

**RESPONDENT'S PREHEARING BRIEF IN SUPPORT OF HIS APPLICATION FOR
WITHHOLDING OF REMOVAL AND PROTECTION UNDER THE CONVENTION
AGAINST TORTURE**

I. INTRODUCTION

Respondent, [REDACTED] hereby respectfully submits a pre-hearing brief regarding his eligibility for withholding of removal and protection under the Convention Against Torture (“CAT”) based on the torture and threat to his life and freedom he will face in Mexico on account of his membership in a particular social group – Mexican homosexual males.

First, [REDACTED] is eligible for withholding despite his criminal convictions. Under Immigration and Nationality Act (“INA”) § 241(b)(3)(B)(ii), [REDACTED] convictions are not per se particularly serious crimes. Moreover, considering the factors set forth by the Board of Immigration Appeals (“BIA” or “the Board”) in Matter of Frentescu, 18 I. & N. De. 244 (BIA 1982), [REDACTED] convictions do not constitute a particularly serious crime.

Second, it is more likely than not that [REDACTED] life or freedom will be threatened on account of his particular social group – Mexican homosexual males. As demonstrated below, [REDACTED] faces beatings, torture, rape, and even death on account of the fact that he is a Mexican homosexual male. [REDACTED] has already suffered severe abuse due to him not “acting like a man.” While [REDACTED] has been in the United States since he was approximately three years old, he knows that homosexual males suffer extreme harm and are not protected by the police in Mexico. In fact, his own cousin was beaten in Mexico because he was gay. Country conditions confirm [REDACTED] fears.

Third, it is more likely than not that [REDACTED] will suffer torture at the hands of Mexican government officials or that the Mexican government will acquiesce to the torture by a non-government actor. Country conditions evidence that members to the Lesbian, Gay, Bisexual, and Transsexual (“LGBT”) community are frequently targeted for severe harm, such as

beatings and murder, and that government actors such as the police are often the perpetrators. The U.S. State Department has found that the Mexican government often does not investigate and punish those who commit crimes against members of the LGBT community.

As shown by the evidence and the Ninth Circuit Court of Appeals and BIA case law, it is more likely than not that [REDACTED] life or freedom will be threatened in Mexico on account of his membership in a particular social group. He will demonstrate that he warrants protection under CAT. Thus, this Court should find that [REDACTED] has adequately shown that he warrants relief from removal.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

[REDACTED] was born on [REDACTED] in [REDACTED]. Exh. A1 (Declaration of [REDACTED]) at ¶ 3. He never knew his mother, and his father brought him and his siblings to the United States just before [REDACTED] fourth birthday. *Id.* [REDACTED] family settled in San Jose, California. *Id.*

[REDACTED] father was an alcoholic. Exh. A1 at ¶ 4. He began abusing [REDACTED] when he was approximately 11 years old. *Id.* He would beat [REDACTED] with belts, cords, and his hands. *Id.* He would beat [REDACTED] approximately two or three times a week, often leaving bruises. *Id.* The abuse continued through [REDACTED] teenage years. *Id.* [REDACTED] father often told [REDACTED] that he was not masculine enough, and he would tell [REDACTED] that he was hitting him because he was not a man. *Id.* See also Exh. B5 (Declaration of [REDACTED]). [REDACTED] felt sad, hurt, and alone. Exh. A1 at ¶ 4. Sometimes [REDACTED] father would not let [REDACTED] go to school and made him do physical labor. *Id.*

When [REDACTED] was in third grade, his cousin [REDACTED] started raping him. Exh. A1 at ¶ 5; Exh. B1 (Mental Health Evaluation) at 4. [REDACTED] would take [REDACTED] into his

room and put his penis in [REDACTED] anus. Exh. A1 at ¶ 5. [REDACTED] would ask [REDACTED] to stop, but he would not. Id. [REDACTED] raped [REDACTED] for about a year. Id. [REDACTED] threatened [REDACTED] and told him that he would beat [REDACTED] if he told anyone about the abuse. Id. [REDACTED] called [REDACTED] gay slurs. Id. [REDACTED] felt scared, ashamed, and powerless. Id. During this time, [REDACTED] was living with his aunt as his father did not have a place for the children to stay. Id.

When [REDACTED] was approximately in the fourth grade, he moved back in with his father. Exh. A1 at ¶ 6. However, he would frequently sleep at his aunt's house in San Jose as his father was abusive and his aunt was the mother figure in his life. Id. It was at this time that [REDACTED] cousin [REDACTED] sexually abused him. Id. [REDACTED] would touch [REDACTED] penis with his hands and mouth. Id. He then made [REDACTED] use his hand to stroke [REDACTED] penis until he ejaculated. Id. [REDACTED] felt dirty and like he was a bad person. Id. He felt alone and believed that he could not tell anyone about what he was suffering. Id.

A few years later, [REDACTED] cousin [REDACTED] began sexually abusing him. Exh. A1 at ¶ 7. One night [REDACTED] woke up to find [REDACTED] taking off his pants. Id. [REDACTED] put [REDACTED] penis in his mouth. Id. [REDACTED] told him to stop but he did not. Id. [REDACTED] felt dirty, mad, and sad. Id. [REDACTED] told his godfather about this incident of abuse; however, his godfather told [REDACTED] that he should not tell anyone about this or he would cause problems for the family. Id.

All during this time, [REDACTED] father abused him physically, verbally, and emotionally. Exh. A1 at ¶ 8; Exh. B5; Exh. B1 at 4. [REDACTED] felt sad and angry. Exh. A1 at ¶ 8. He felt like he could not smile, and sometimes he felt like he could not go on

living. Id. See also, Exh. B1 at 4. [REDACTED] often ran away from home because of the abuse he suffered. Exh. A1 at ¶ 8. The police would find him and return him to his father, even though [REDACTED] told them that he ran away because his father was an abusive alcoholic. Id. [REDACTED] father would beat him after he was sent back from running away. Id.

In September of 2004, when [REDACTED] was 12 years old, he was sexually molested by a man in his neighborhood. Exh. A1 at ¶ 9; Exh. B1. The man approached [REDACTED] and told him that he had to do a “test” or he would have gang members beat him up. Exh. A1 at ¶ 9. He said that the test was to see if [REDACTED] was gay and that there were two options. Id. He said he would touch [REDACTED] penis and if he became erect, he was gay. Id. The other option was for the man to put his penis in [REDACTED] anus. Id. [REDACTED] told him that he did not want to do the test, but the man threatened that he would have local gang members beat him up. Id. [REDACTED] was very scared. Id. The man touched [REDACTED] penis several times. Id. The man then tried to put his penis in [REDACTED] anus. Id. [REDACTED] managed to get away and run to his friend’s house. Id. The friend’s parents called the police. Id. [REDACTED] cooperated with the police in the investigation and prosecution of the crime. Id. at ¶ 10.

Due to all of the abuse [REDACTED] suffered, he frequently ran away from home and had nowhere to live. Exh. A1 at ¶ 12; Exh. B3. One time he was placed in a group home. Exh. A1 at ¶ 12. [REDACTED] liked the group home as there was no abuse and he had food to eat. Id. [REDACTED] was able to participate in sports and talk to a counselor. Id. After about four or five months, he had to return to his father and a life of abuse and not having enough food. Id. As [REDACTED] became a teenager, he grew increasingly angry and had

trouble controlling his anger. Id. He got in fights and hung around with the “wrong” people. Id. [REDACTED] “would hang out with the ‘tough’ guys, because [he] felt it would hide the fact that [he] was gay.” Id.

[REDACTED] started discovering that he was gay when he was approximately 14 years old. Exh. A1 at ¶ 13. At first, he thought he was bisexual. Id. He had girlfriends at this time, because he “thought that was what was normal.” Id. Over time, [REDACTED] realized that he did not really like being with girls and preferred being with boys. When [REDACTED] was 14 years old, he had a relationship with a man who was in his 20’s. Id. They would go on dates and have sex. Id. [REDACTED] felt safe with this man. Id. It was through this relationship that [REDACTED] felt okay with the fact that he preferred being with men. Id. In Junior High School, [REDACTED] dated a boy around his age named [REDACTED]. Id.

[REDACTED] has had sex with two women, one of which he had a relationship. Exh. A1 at ¶ 14. [REDACTED] paid attention to [REDACTED] and did kind things for him. Id. This meant a lot to him, because throughout his life, most people had abused him. Id. [REDACTED] became pregnant and gave birth to their daughter [REDACTED] on [REDACTED]. While [REDACTED] and [REDACTED] are no longer together, [REDACTED] loves his daughter. Id. [REDACTED] knows how it is to grow up without a parent and how it affected him. Id. He does not want his daughter to go through what he went through emotionally. Id.

On [REDACTED], [REDACTED] visited a neighborhood acquaintance at the hotel room where he was living. Exh. A1 at ¶ 15. The man had previously told [REDACTED] that he would give him some money; however, when [REDACTED] asked him for money, the man told him no. Id. They got into a heated argument, and they pushed each other. Id. The

money fell onto the bed, and ██████████ took some of the money. Id. ██████████ needed this money for food. Id. He was convicted of California Penal Code (“Cal. P.C.”) section 484/487(c) Grand Theft Person and sentenced to two years in prison. Id. ██████████ is sorry for his behavior and recognizes that he has anger management issues due to the years of abuse he suffered. Id. He now knows this is not how he should handle disagreements. Id.

On ██████████, ██████████ was in a fight with two men. Exh. A1 at ¶ 16. The men and ██████████ had previously had a financial disagreement over a puppy that the men had bought from ██████████. Id. ██████████ encountered the men outside a liquor store. Id. Words were exchanged, and a fight ensued. Id. ██████████ punched one of the men in the face. Id. The man grabbed ██████████ and they both fell to the ground. Id. ██████████ was convicted of Cal. P.C. section 245(a)(4) and section 12022.7(a), Assault causing great bodily injury, and sentenced to 2 years in prison. Id. His sentences were to run consecutively. Id. ██████████ is remorseful that he got into a fight and recognizes that fighting is not the way to settle disputes. Id.

Since he has been in jail, ██████████ has thought a lot about his life. Exh. A1 at ¶ 18; Exh. B5. He has finally fully accepted that he is gay. Exh. A1 at ¶ 18. He has met other gay people, and this has helped him feel more comfortable with being gay. Id. He has been called gay slurs in prison. Id. ██████████ is afraid to return to Mexico because he is gay. Id. at ¶ 19. He does not believe that the police protect gay people in Mexico. Id. His cousin was severely beaten in Mexico because he is gay. Id.; Exh. B5.

On ██████████, ██████████ was issued a removal order pursuant to INA § 238(b). On ██████████, ██████████ was found to have a reasonable fear of

persecution of returning to Mexico because he is gay. He had a Master Calendar hearing on [REDACTED] and was scheduled for an Individual Calendar on [REDACTED]. On [REDACTED], he retained the office of undersigned counsel. On [REDACTED], undersigned counsel filed a Motion to Continue, which this Court granted on [REDACTED] and scheduled a Master Calendar hearing on [REDACTED]. At the Master Calendar hearing, [REDACTED] submitted his Form I-589, Application for Withholding of Removal and protection under CAT, to the Court. This Court set an Individual hearing for [REDACTED] and requested that all documents be submitted at least two weeks prior to the hearing.

III. ARGUMENT

[REDACTED] will be able to demonstrate that he warrants withholding of removal and protection under CAT as he is more likely than not to suffer torture and even death in Mexico because he is a Mexican homosexual male.

A. [REDACTED] IS ELIGIBLE FOR WITHHOLDING OF REMOVAL

To qualify for withholding of removal, an applicant must demonstrate that his or her “life or freedom would be threatened in that country because of the [petitioner's] race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1231(b)(3); INA § 241(b)(3). An applicant may establish eligibility for withholding of removal by establishing an independent showing of a clear probability of future persecution. 8 C.F.R. § 1208.16(b)(2). See also, Tamang v. Holder, 598 F.3d 1083, 1091 (9th Cir. 2010). In addition, the applicant must demonstrate “that it is more likely than not that he would be subject to persecution on one of the specified grounds.” Al-Harbi v. INS, 242 F.3d 882, 888 (9th Cir. 2001) (internal quotation marks omitted). Withholding of removal is not discretionary: “[t]he

Attorney General is not permitted to deport an alien to a country where his life or freedom would be threatened on account of one of the [] protected grounds.” Id. See also Delgado v. Holder, 648 F.3d 1095, 1101 (9th Cir. 2011). Moreover, an applicant must demonstrate that he could not reasonably relocate within his country of origin to avoid persecution. 8 C.F.R. § 1208.16(b)(2). [REDACTED] meets this standard.

1. [REDACTED] Is Eligible To Apply for Withholding of Removal as His Criminal Convictions Do Not Constitute Particularly Serious Crimes

INA § 241(b)(3)(B)(ii) states that deportation of an individual whose life or freedom would be threatened will not be withheld if the applicant has been convicted by a final judgment of a particularly serious crime. The determination of whether a conviction qualifies as a “particularly serious crime” is a two-tiered approach. See Blandino-Medina v. Holder, 712 F.3d 1338 (9th Cir. 2013). First, an adjudicator must determine if a conviction constitutes a per se particularly serious crime. An individual who has been convicted of an aggravated felony (or felonies) for which the individual has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have per se committed a particularly serious crime. INA § 241(b)(3)(B). In the instant case, while [REDACTED] has been found to have been convicted of an aggravated felony, he was sentenced to an aggregate term of imprisonment of only two years. Therefore, [REDACTED] convictions are not per se particularly serious crimes. INA § 241(b)(3)(B).

If the conviction does not constitute a per se particularly serious crime, then the adjudicator moves to the second inquiry and must make a fact-specific determination as to whether the conviction constitutes a particularly serious crime. Delgado v. Holder, 648 F.3d 1095, 1107 (9th Cir. 2011). (“[A] crime is particularly serious if the nature of the conviction, the

underlying facts and circumstances and the sentence imposed justify the presumption that the convicted immigrant is a danger to the community.”); Alphonsus v. Holder, 705 F.3d 1031, 1041 (9th Cir. 2013).

In Matter of Frentescu, the BIA set out four factors it uses in order to determine what constitutes a “particularly serious crime”: “the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community.” 18 I. & N. Dec. 244, 247 (BIA 1982). A full consideration of the above factors is required. See e.g., Afridi v. Gonzalez, 442 F.3d 1212, 128-20 (9th Cir. 2006)(remanding alien’s withholding of removal claim because the BIA did not fully engage the Frentescu factors when deciding the alien’s crime was particularly serious); Afzal v. Holder, 454 Fed.Appx. 640 (9th Cir. 2011)(remanding the case for considering only two of the Frentescu factors); Matter of Carballe, 19 I. & N. Dec. 357, 360 (“It must be determined that an applicant for relief constitutes a danger to the community of the United States to come within the purview of the particularly serious crime bar.”).

- a. [REDACTED] Conviction Under California Penal Code Section 245(a)(4) and 12022.7a Does Not Constitute A Particularly Serious Crime

Applying the Frentescu factors, [REDACTED] conviction under Cal. P.C. section 245(a)(4) and 12022.7(a) does not constitute a particularly serious crime. [REDACTED] did not use a firearm or weapon. Exh. A1. [REDACTED] only punched the man once and mutual fighting occurred. Id. In the Ninth Circuit and BIA, assault crimes that have been held to constitute “particularly serious crimes” have overwhelmingly involved the use of either a firearm or other deadly weapon or convictions under Cal. P.C. sections 245(a)(1) or 245(a)(2).

See e.g., Matter of L-S-J-, 21 I. & N. Dec. 973 (BIA 1997)(robbery with a handgun is a particularly serious crime); Pechenkov v. Holder, 705 F.3d 444 (9th Cir. 2012); Aguilar-Zamora v. Holder, 508 Fed.Appx. 627 (9th Cir. 2013). [REDACTED] did not use a firearm or deadly weapon. Exh. A1.

Moreover, as evidenced by [REDACTED] declaration, mental health evaluation, and his sister's declaration, at the time of the assault, [REDACTED] who was only 20 years old, had suffered from years of sexual, physical, and verbal abuse resulting in anger management issues. Exh. A1; Exh. B1; Exh. B5. Since the time of the assault, [REDACTED] has become aware of the reasons for his anger and his need to control those feelings in a constructive manner. Id. He has spoken to a therapist about these issues, and he is committed to continuing with therapy. Exh. A1; Exh. B5.

[REDACTED] explains,

As a younger man, [REDACTED] was often in fights because it took almost nothing to make him angry. While irritability and even anger is common in cases of trauma where the world is perceived as inherently threatening, it is obviously not a behavior that serves him well in society. Recently [REDACTED] has become aware of this furry and the need to address it – for so many years he was so caught in his fear that he did not even realize how much rage he felt...PTSD and depression are treatable conditions with therapy and/or medication. We believe the client would benefit greatly from such treatment and referred him to a low-cost clinic in the area where he hopes to live if...released.

Exh. B1 at 3, 5.

[REDACTED] sister discusses how [REDACTED] has changed.

[REDACTED] also had a lot of anger when he was a teenager because of the abuse he suffered. He would get into trouble trying to get food. When he was 18 years old, [REDACTED] became homeless. Our dad kicked him out of the house...He acted tough because he did not want people to take advantage of him. I believe he acted

that was because he was afraid of people finding out he was gay. I knew that this point of his life was the lowest point in his life. I knew that he was filled with so many emotions from what he suffered and from dealing with the realization that he is gay.

Since my brother was put in jail two and a half years ago, we have become really close. While he was in prison, I would try to visit him once or twice a month. We talked a lot about what we went through. I have seen a big change in him. He told me that he realized that he needs to see a therapist. He told me he wants to get a job and go back to school. He is not the same person that he was before he went to prison. I know that he can accomplish many things in his life if he has the opportunity to stay in the United States. I do not believe [REDACTED] will hurt anyone in the future. He has told me that in jail people have tried to pick fights with him, and that he never fought back, even when the men called him bad names. He told me that he does not want to fight anymore. He wants to go to church with me. He thinks differently now and views life differently. He has matured a lot.

Exh. B5 at ¶ 9, 10.

Therefore, although [REDACTED] was convicted of an assault, he is not a danger to the community and his conviction should not constitute a particularly serious crime. See Alphonsus v. Holder, 705 F.3d 1031, 1047 (9th Cir. 2013) (“As the Board recognized in *Carballe*, this phrase demonstrates that ‘the essential key’ to determining whether a given crime is particularly serious ‘is whether the nature of the crime is one which indicates that the alien poses a danger to the community.’”)(emphasis added).

b. [REDACTED] Conviction Under California Penal Code Section 484/487 Does Not Constitute A Particularly Serious Crime

Applying the Frentescu factors, [REDACTED] conviction under Cal. P.C. section 484/487 does not constitute a particularly serious crime. The underlying facts of [REDACTED] conviction demonstrate that he took the money from the man’s bed after an argument ensued. Exh. A1. [REDACTED] did not use a weapon. Id. Also, as discussed supra, at the time, [REDACTED] has suffered severely trauma as a child, leading to his anger

management issues. Exh. A1; Exh. B1; Exh. B5. Since that time, [REDACTED] has found the tools he needs to heal from the rapes and abuse he suffered and deal with his anger issues.

Id. Therefore, [REDACTED] does not pose a danger to the community, and his conviction for Cal. P.C. section 484/487 does not constitute a particularly serious crime. See Alphonsus v. Holder, 705 F.3d 1031, 1047 (9th Cir. 2013).

2. It is “More Likely Than Not” that [REDACTED] Will Suffer Harm If He Returns to Mexico

An applicant must show a “clear probability” of the threat to life or freedom if removed to his or her country of nationality. INS v. Stevic, 467 U.S. 407, 429-30, 104 S.Ct. 2489, 81 L.Ed.2d 321 (1984). The Supreme Court has defined “clear probability” to mean it is “more likely than not” that the applicant would be subject to persecution “on account of” one of the protected grounds. INS v. Cardoza-Fonseca, 480 U.S. 421, 429, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987). The clear probability standard is more stringent than the well-founded fear standard for asylum. Khunaverdians v. Mukasey, 548 F.3d 760, 767 (9th Cir. 2008).

As discussed in detail infra in section III.B.1., the evidence in the instant case establishes that homosexual males in Mexico are frequently targeted and suffer life-threatening harm. See, i.e., Exh. C1 (2013 U.S. Department of State Report, Human Rights Practices in Mexico)(threats and violence against LGBT persons); Exh. C3 (Report of the Situation of Human Rights of LGBT Community in Mexico, Legal Assistance for Human Rights, 2014)(“Mexico is the second country with the biggest number of hate crimes caused by homophobia in Latin America.”); Exh. C5 (Challenges to LGBT Rights in Latin America, 2014)(reporting on recent upsurge in violence against LGBT individuals and organizations); Exh. C7 (Increased Violence Against Homosexuals Reported Across Mexico, Prensa Latina, 2013)(reporting on increase of assaults on same sex couples who display affection in public); Exh. C9 (Gay rights activists in Mexico City

accuse police of abuses, Los Angeles Times, 2013)(reporting on the “ugly, persistent problem: unchecked discrimination and violence” in Mexico City); Exh. C11 (Mexican National Escapes Attack; Applies for Asylum in Reno, Examiner, 2013)(reporting on murders of homosexual males in Mexico); Exh. C13 (Violence Still Prevalent Despite Progress on LGBTI Rights in Latin America, 2013)(reporting on violence against openly gay individuals); Exh. C22 (Immigration and Refugee board of Canada, 2012)(reporting on the frequent discrimination and violence against homosexuals in Mexico); Exh. C24 (Amnesty International, 2011)(reporting on violence against LGBT people in Mexico); Exh. C25 (Organization of American States: Inter-American Commission on Human Rights, Violence Against LGBTI Persons)(reporting on violence against LGBT persons in Mexico); Exh. C26 (Houston Chronicle article, 2010)(reporting that killings of gays and lesbians in Mexico have risen).

██████████ is an openly homosexual male. Exh. A1; Exh. B1; Exh. B5. His family recognized that he was gay even before ██████████ admitted he was gay. Exh. B5. ██████████ will not hide the fact he is gay if he is returned to Mexico and will have a public relationship with a man. Exh. A1. Dr. Almaguer explains,

No one is more prone to this type of victimization than a man like ██████████ who is not culturally Mexican in ways that are immediately recognizable to Mexican nationals and who has openly claimed a gay identity. While comporting himself in a more masculine way may insulate him from the more flagrant vitriol and stigma that adheres to effeminate gay men, nonetheless, any public display of being homosexual by simply holding hands or kissing a partner would have catastrophic consequences.

Exh. B3 at 5 (Expert Report by Dr. Tomas Almaguer).

Therefore, ██████████ it is more likely than will suffer harm and will be threatened if he is returned to Mexico. Mgoian v. I.N.S., 184 F.3d 1029, 1035 (9th Cir. 1999).

See also, Avetova-Elisseva v. I.N.S., 213 F.3d 1192, 1201 (9th Cir. 2000) (finding that the

evidence in the record of Armenian harassment in Russia creates “a strong likelihood of persecution, possibly resulting in physical harm or death.”)(internal quotations omitted).

3. The Harm [REDACTED] Faces Rises to the Level of Threat to Life or Freedom

The Ninth Circuit has defined persecution as “the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive.” Li v. Holder, 559 F.3d 1096, 1107 (9th Cir. 2009) *citing* Gormley v. Ashcroft, 364 F.3d 1172, 1176 (9th Cir. 2004) (internal quotation marks omitted). It is well established that physical violence is persecution under 8 U.S.C. § 1101(a)(42)(A). *See* Li, 559 F.3d at 1107; Guo v. Ashcroft, 361 F.3d 1194, 1197-98, 1202-03 (9th Cir.2004) (finding beatings of a Chinese detainee to rise to the level of persecution); Chand v. INS, 222 F.3d 1066, 1073 (9th Cir.2000) (“Physical harm has consistently been treated as persecution.”); Smolniakova v. Gonzales, 422 F.3d 1037, 1048-49 (9th Cir. 2005) (physical attacks and death threats are sufficient to establish past persecution); Matter of O-Z- & I-Z, 22 I. & N. Dec. 23, 25 (BIA 1998) (holding that persecution “encompasses a variety of forms of adverse treatment, including non-life threatening violence and physical abuse or non-physical abuse forms of harm”). Detention coupled with physical violence has also been found to constitute persecution. *See* Guo v. Ashcroft, 361 F.3d 1194, 1203 (9th Cir. 2004) (finding that fifteen day detention and a beating rose to the level of persecution.); Mamouzian v. Ashcroft, 390 F.3d 1129, 1134 (9th Cir. 2004) (finding physical abuse combined with other incidents, such as detention and threats constituted persecution).

The evidence in the instant case clearly demonstrates that Mexican homosexual males suffer beatings, rapes, arbitrary detention, and murder. *See* Exh. B3; Exh. C1; Exh. C3; Exh. C11; Exh. C12 (They Killed Him Just Because he Hugged His Boyfriend and Held His Hand, La

Policia, 2013)(reporting on the murder of homosexual males); Exh. C14 (The CIDH denounces 10 murders of homosexuals in Mexico, Animal Politico, 2012)(reporting that Mexico has the second highest number of murders against LGBTI persons in the Americas); Exh. C18 (Mexico City: Gay journalist found dead in elevator shaft, Pink News, 2012); Exh. C20 (Michoacan, Second in Homophobic Crimes, Diario ABC de Michoacan, 2012)(reporting on the high rates of lethal violence against LGBT Mexicans); Exh. C27 (Shadow Report submitted to the Human Rights Committee, by Harvard Law School, 2010)(reporting that LGBT persons in Mexico face a serious threat of violence). Therefore, the harm ██████████ fears rises to the level of persecution and constitutes a threat to his life or freedom.

4. ██████████ Life or Freedom Will Be Threatened On Account of His Membership in a Particular Social Group of Mexican Homosexual Males.

a. Mexican Homosexual Males Constitute a Cognizable Social Group.

The Board and the Ninth Circuit have provided a framework for determining what constitutes a particular social group. In Matter of Acosta, the Board held that a particular social group referred to individuals who hold a “common, immutable characteristic,” which may be “an innate one such as sex, color, kinship ties, or in some circumstances.... a shared past experience....” Matter of Acosta, 19 I. & N. Dec. 211, 233-234 (BIA 1985)¹. The Board specified that the immutable characteristic must be one “that the group either cannot change, or should not be required to change because it is fundamental to their individual identities or

¹ In its recent decision, the Board reaffirmed that “the common immutable characteristic requirement set forth [in Acosta] has been, and continues to be, an essential component of the [particular social group] analysis.” Matter of M-E-V-G-, 26 I. & N. Dec. 232 (BIA 2014).

consciences.” Id. Since the issuance of the decision in Acosta, this Board has further clarified its definition, indicating that a particular social group must possess social distinction and particularity. See e.g., Matter of M-E-V-G-, 26 I. & N. Dec. 232 (BIA 2014); Matter of W-G-R-, 26 I. & N. Dec. 208 (BIA 2014); Matter of S-E-G, 24 I. & N. Dec. 579, 588 (BIA 2008); Matter of C-A, 23 I. & N. Dec. 951, 959-961 (BIA 2006). However, the particular social group does not “generally require a ‘voluntary relationship,’ ‘cohesiveness,’ or strict ‘homogeneity among group members.’” In re A-M-E & J-G-U-, 24 I. & N. Dec. 69, 75-76 (BIA 2007).

The Ninth Circuit has clarified that a particular social group is one in which the members are united by a voluntary association or an innate characteristic that is so fundamental to the identities or consciences of its members, that the members of the particular group either can not or should not be required to change it. Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000). In the instant case, [REDACTED] belongs to the particular social group of Mexican homosexual males.

(1) Mexican Homosexual Males Share an Immutable Characteristic

Mexican homosexual males are united by their nationality, gender, and sexual orientation. These shared characteristics are immutable, as a person cannot change his or her nationality, gender, or sexual orientation. Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000); Karouni v. Gonzales, 399 F.3d 1163, 1172 (9th Cir. 2005). The Ninth Circuit and the Board have recognized similar groups as possessing an immutable characteristic. See Karouni v. Gonzales, 399 F.3d 1163, 1172 (9th Cir. 2005) (holding that “all alien homosexuals are members of a ‘particular social group’ ”); Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990) (finding that a Cuban homosexual had established membership in a particular social group); see also Att’y Gen. Order No. 1895-94 (June 19, 1994) (designating Toboso-Alfonso as precedent

for all cases dealing with the same or similar issues). See also Perdomo v. Holder, 611 F.3d 662, 668 (9th Cir. 2010) (“Under Hernandez-Montiel, which is based in large part on the BIA's Acosta decision, an innate characteristic may be the basis for a protected social group. Indeed, we have focused on the innate characteristics of such broad and internally diverse social groups as homosexuals and Gypsies to conclude that they constituted particular social groups for purposes of asylum.”).

Therefore, [REDACTED] social group is an identifiable social group and possesses immutable characteristics.

(2) The Social Group of Mexican Homosexual Males Has Social Distinction and Particularity

The Board has recently reaffirmed the importance of social distinction (previously called social visibility) and particularity as a factor in the particular social group determination². See Matter of M-E-V-G-, 26 I. & N. Dec. 227 (BIA 2014); Matter of W-G-R-, 26 I. & N. Dec. 208 (BIA 2014). See, also, In Re A-M-E & J-G-U-, 24 I. & N. Dec. 69 (BIA 2007); Matter of C-A-, 23 I&N Dec. 951, 957 (BIA 2006). In addition to possessing the requisite immutable and fundamental characteristics, Mexican homosexual males display social distinction and particularity.

In Matter of M-E-V-G-, the Board reaffirmed that the “social visibility” element is

² While the Respondent believes his social group satisfies the BIA’s requirements of “social distinction” and “particularity”, he does not believe that the BIA’s requirements of “social distinction” and “particularity” constitute a reasonable interpretation of “particular social group.” In Henriquez-Rivas, the Ninth Circuit held that the term “particular social group” is ambiguous. 707 F.3d at 1087, 1091. Respondent asserts that the Board’s interpretation is not reasonable and thus is not owed deference.

required to establish a cognizable “particular social group” and upheld the progeny of cases laying out this requirement. See, i.e., Matter of S-E-G, 24 I. & N. Dec. 579 (BIA 2008); In Re A-M-E & J-G-U-, 24 I. & N. Dec. 69 (BIA 2007); Matter of C-A-, 23 I&N Dec. 951, 957 (BIA 2006). However, the Board clarified that “social visibility” does not mean literal or “ocular” visibility and renamed the element as “social distinction”. Id. at 236. The Board held that the social distinction is determined by the perception of the society in question. Id. The Board explained,

The particular social group analysis does not occur in isolation, but rather in the context of the society out of which the claim for asylum arises. Thus, the ‘social distinction’ requirement considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it. A viable particular social group should be perceived within the given society as a sufficiently distinct group. The members of a particular social group will generally understand their own affiliation with the grouping, as will other people in the particular society.

Matter of M-E-V-G-, 26 I. & N. Dec at 238.

In Matter of M-E-V-G-, the Board declined to make a ruling on whether the group of “Honduran youths who were actively recruited by gangs but who refused to join” constituted a cognizable social group and remanded the case for further fact-finding. 26 I. & N. Dec at 251. However, the Board stated that there is no “blanket rejection of all factual scenarios involving gangs.” Id. See also, Matter of W-G-R-, 26 I. & N. Dec at 221 (BIA 2014); Matter of A-M-E & J-G-U, 24 I. & N. Dec. 69, 74 (BIA 2007) (holding that a determination of social visibility must be considered in the context of the country of concern and the persecution feared).

In Pirir-Boc v. Holder, the Ninth Circuit held that the Board’s decisions in Matter of M-E-V-G- and Matter of W-G-R- are consistent with its decision in Henriquez-Rivas v. Holder,

707 F.3d 1081 (9th Cir. 2013).³ No. 09-73671 (9th 2014). In Henriquez-Rivas, the Ninth Circuit, applying Board precedent regarding “social visibility” and “particularity”, held that witnesses who testify against gang members could constitute a cognizable particular social group. 707 F.3d 1081 (9th Cir. 2013). The Ninth Circuit held that the determination as to whether a particular group is a cognizable social group is a case-by-case analysis based on the recognition of the particular society in question. Pirir-Boc, No. 09-73671, at 13. In Henriquez-Rivas, the Ninth Circuit in determining the cognizability of the social group took particular note of the fact that the Salvadoran legislature enacted a special witness protection law to protect individuals who testify against gangs in Salvadoran court. 707 F.3d at 1092.

In addition, the Board in In Re A-M-E & J-G-U-, held that “[a]lthough a social group cannot be defined exclusively by the fact that its members have been subjected to harm, we noted that this may be a relevant factor in considering the group's visibility in society.” 24 I. & N. Dec. at 74. In finding that the respondents’ proposed social group failed to possess social visibility, the Board confirmed the IJ’s finding that there was little evidence in the record to show that “wealthy Guatemalans” would be recognized as a group that was more frequently targeted than the general Guatemalan population. Id.

Furthermore, in Matter of E-A-G, 24 I. & N. Dec. 591 (BIA 2008), the Board rejected a claim that “persons resistant to gang membership,” constituted a particular social group based on a lack of social visibility. The Board held that there was not evidence to establish that “members

³ The Ninth Circuit noted that the Board in Matter of M-E-V-G- gave the persecutor’s perspective in determining “social visibility” less weight than the Court has suggested in Henriquez-Rivas. Pirir-Boc, Fn. 6. In Henriquez-Rivas, the Ninth Circuit had suggested that the perspective of the prosecutor may be *the most important* factor, while the Board held that it was *one factor* among others to be considered in determining “social visibility.” Id.

of Honduran society, or even the gang members themselves, would perceive those opposed to membership as a social group.” Id. at 591. The Board explained that the respondent could not establish that the group would be sufficiently visible, noting that “respondent does not allege that he possesses any characteristics that would cause others in Honduran society to recognize him as one who has refused gang recruitment.” Id. at 594.

In Mexican society, homosexual males are generally recognizable and viewed as a group. Laws have been passed in Mexico recognizing homosexuals as requiring special legislation. Exh. B3; Exh. C3 (“Homophobic actions are not only validated by State actors but adopted by entire institutions and recognized by some laws.”); Exh. C5; Exh. C6 (Mexico’s gay rights movement gaining ground, Aljazeera, 2014)(reporting that while the 2010 Supreme Court ruling means marriages registered in Mexico City are recognized everywhere, same-sex ceremonies remain outlawed in most of Mexico); Exh. C7; Exh. C10 (Mexico Not Safe: Activists, Canada’s Gay and Lesbian News, 2013)(reporting that laws have been passed to protect LGBT persons, but they are still targeted for violence, even by the police); Exh. C15 (Library of Congress: Mexico, 2012)(reporting “[d]espite Mexico’s efforts aimed at protecting homosexual and transgender individuals mistreatment against this group currently persists.”). Homosexuals are frequently targeted for harm because of their perceived transgression of societal norms. Exh. C3; Exh. C5; Exh. C11; Exh. C16 (Immigration and Refugee Board of Canada, Mexico, Situation of sexual minorities in Mexico City, Guadalajara (Jalisco) and Puerto Vallarta (Jalisco), Sept. 2012)(“there is a ‘culture of homophobia within the Federal District government apparatus’.”); Exh. C17 (Immigration and Refugee Board: Mexico: Reports of sexual abuse committed by police officers against sexual minorities, Sept. 2012)(reporting that the police are “intolerant” of sexual minorities and reporting of abuse of homosexual males by the police); Exh. C27. Dr. Almaguer

explains,

Like other Latin American countries, Mexico views same-sex behavior as a violation of the prerogatives of manhood and a shameful transgression of prescribed male sexuality discussed above (Murray, 1995; Lancaster, 2001; Girman, 2004; Padilla, 2007; Vidal-Ortiz, et. al. 2010; Decena, 2011). Further, homophobia in the form of hostility and derision of Mexican homosexual men is often legitimized and rooted in the teachings of the Catholic Church, which condemns same-sex sexual encounters as against God's will. This homophobia is especially virulent in targeting homosexual men who comport themselves in any way that is marked as effeminate and woman-like or display homosexuality publically.

Exh. B3 at ¶ 6.

Thus, ██████████ case can be readily contrasted to the facts presented in Matter of M-E-V-G-, Matter of W-G-R, Matter of A-M-E & J-G-U-, and Matter of E-A-G, and Mexican homosexual males are the type of “cohesive, homogeneous group” that the Board and Ninth Circuit has found to be show sufficient social visibility. See, Perdoma, 611 F.3d at 666; Matter of M-E-V-G-, 26 I. & N. Dec. at 240 (recognizing that homosexuals could be considered a group given the cultural conditions of the country).

In Matter of M-E-V-G-, Matter of W-E-G-, and Matter of S-E-G, the Board further discussed the issue of particularity. In Matter of W-G-R-, decided on the same day as Matter of M-E-V-G-, the Board considered the social group of “former members of the Mara 18 gang in El Salvador who have renounced their gang membership”. 26 I. & N. Dec at 221. The Board found that the proposed group was not a cognizable social group due to a lack of evidence in the record that demonstrated that Salvadoran society recognized former gang members who have renounced their gang membership as a distinct social group. Id. at 222. The BIA also found that the proposed social group lacked particularity because “the boundaries of a group are not sufficiently definable unless the members of society generally agree on who is included in the group, and evidence that the social group proposed...is recognized within the society is lacking in this

case.” Id at 221.

In Matter of S-E-G, the Board found that Salvadoran youth to whom gang recruitment attempts had been made did not constitute a particular social group. The Board ultimately held that, based on the specific facts of the case, the group lacked both particularity and visibility. Id. at 585-586. In dealing with particularity, the Board explained that the group lacked any unifying relationship or characteristic, which was required to “narrow this diverse and disconnected group.” Id. at 586 (citing Ochoa v. Gonzales, 406 F.3d 1166 (9th Cir. 2005)). Also important was this Board’s finding that the proposed class was not sufficiently particular because “the motivation in targeting young males could arise from motivations quite apart from any perception that the males in question were members of a class.”

In contrast, [REDACTED] social group has unifying gender, sexuality, and nationality characteristics. As discussed supra, Mexican society has prescribed notions of masculinity and sexuality. See also Exh. B3. The evidence clearly indicates that homosexual men are considered to not comport with these notions and are identified, labeled, and specifically targeted for harm. See Exh. B3 (“Mexican culture does not yet accommodate the presence of openly gay men or men who are perceived as possibly gay; in fact, the culture punishes such statuses”)(emphasis in the original); see also, Exh. C1; Exh. C5; Exh. C11; Exh. C13; Exh. C22; Exh. C24; Exh. C25. [REDACTED] as an openly homosexual male, will be readily identified as transgressing the embedded Mexican cultural norms and be considered a part of the social group of Mexican homosexual males. Exh. B3 (“No one is more prone to this type of victimization than a man like [REDACTED] who is not culturally Mexican in ways that are immediately recognizable to Mexican nationals and who has openly claimed a gay identity.”). Therefore, [REDACTED] has shown that his social group possesses the requisite social

distinction and particularity that Board precedent requires.

b. [REDACTED] Life or Freedom Will Be Threatened On Account Of His Membership in a Particular Social Group

The applicant must establish the protected ground “was or will be at least one central reason for persecuting the applicant.” 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added). However, the applicant need not demonstrate that the protected ground will be the dominant central reason. Parussimova v. Mukasey, 555 F.3d 734, 741 (9th Cir. 2009). “[A] motive is a ‘central reason’ if that motive, standing alone, would have led the persecutor to harm the applicant.” Id. To demonstrate a nexus between persecution and a statutorily protected ground, the applicant must provide “direct or circumstantial evidence.” See Sangha v. INS, 103 F.3d 1482, 1486-87 (9th Cir. 1997).

The evidence in the instant case clearly establishes that Mexican homosexual males are targeted for harm due to perceived transgression of Mexican social norms of masculinity thus on account of their membership in the social group. Exhs. C1-C28. Dr. Almaguer explains,

Both their gender and sexual transgressions fall outside of a culture’s expectations and rules and leads to their stigmatization, harassment, sexual abuse, and even extreme violence and murder. Effeminate-acting gay men are especially prone to abuse. These men are unable to disguise their sexuality and thus are easier targets for abuse by those who will not accept their homosexual identity (Prieur, 1998; Carrillo, 2001; Carrillo, 2003; Carrillo 2010; Cantu, 2009). But even gay men who comport themselves in more masculine ways are also prone to persecution if they display their homosexuality in a public way by openly kissing their partners or holding their hands.

Exh. B3 at ¶ 7.

This evidence clearly demonstrates that a person such as [REDACTED] an openly homosexual male, faces threat to his life and freedom “on account of” his nationality, gender, and sexual orientation. See also, Boer-Sedano v. Gonzalez, 418 F.3d 1082, 1085-86 (9th Cir. 2005) (reversing a BIA denial of a homosexual Mexican man’s application for asylum and

finding that the applicant had suffered past persecution and had a well-founded fear of future persecution on account of his perceived homosexuality).

5. The Mexican Government Will Be Unwilling or Unable to Protect [REDACTED]

The country condition evidence clearly demonstrates that homosexual males are not protected by Mexican government, either because they are unable or unwilling, and in fact, it is often agents of the Mexican government causing the threat to life and freedom of homosexual males. Exh C3 (“The authorities and public servers pointed as probably responsible of Human Rights Violations against LGBT people are, principally, the security corps. These violations were arbitrary detentions, injuries, threats, robbery, extortion, burglary and excessive use of police force.”); Exh. C4 (Gay couple arrested, fined for kissing in Mexico, 2014)(reporting on a gay couple who was abused by the police in Mexico after they kissed on the street); Exh. C10; Exh. C11; Exh. C15; Exh. C17; see also, infra Section III. B. 3.

Dr. Almaguer explains,

Hyper-masculine institutions, like the police force, are hotbeds for the expression of unvarnished Mexican manhood and, therefore, are often rife with homophobia. As described supra, manhood is often manifested in ways that can be observed and affirmed by others. Because of this, the close working relationship between groups of men seeking to prove their manhood to each other creates a working environment where open and blatant homophobia served as a means to uphold male dominance and heteronormativity. To seek assistance from such a group is not only fear-inducing for openly gay men like [REDACTED] but it could have other negative or even violent consequences.

Exh. B3 at ¶ 10 (emphasis added).

6. [REDACTED] Cannot Avoid the Threat to His Life and Freedom By Reasonable Internal Relocation

The applicant does not have a threat to his or her life and freedom if “the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed

country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.” 8 C.F.R. § 1208.16(b)(2). In determining whether the possibility of internal relocation is reasonable, “adjudicators should consider, but are not limited to considering, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties.” 8 C.F.R. § 1208.16(b)(3). The inquiry is an individualized consideration into the specific facts of the case. *Id.* In cases in which the persecutor is a government or government-sponsored entity, it is presumed that the relocation is not reasonable. 8 C.F.R. § 1208.16(b)(3)(ii).

In the instant case, there is no place that ██████████ could reasonably live in safety. ██████████ speaks poor English and has no connections in Mexico. Exh. A1; Exh. B5. ██████████ faces beatings, arbitrary detention, rape, and murder from government actors, such as the police. Exh. B3; Exhs. C1-C28. Moreover, evidence shows that there is widespread corruption and abuse in the Mexican government, which allows state actors to commit human rights violations with impunity. Exhs. C1-C3. Furthermore, homophobia is pervasive in Mexican culture. Exh. B3; Exh. C23; Exh. 25; Exh. C28. Incidents of brutal crimes against homosexual males are reported throughout Mexico, even in areas like Mexico City where there are progressive laws regarding the LGBT community. Exh. C3; Exh. C9; Exh. C11; Exh. C14.

Therefore, the evidence does not support a conclusion that internal relocation within Mexico is reasonable or will diminish the likelihood of persecution for ██████████

B. [REDACTED] IS ELIGIBLE FOR PROTECTION UNDER
ARTICLE 3 OF THE CONVENTION AGAINST TORTURE

[REDACTED] is eligible for protection under Article III of the Convention Against Torture because it is more likely than not that he will be tortured by, or with the acquiescence of the Mexican government on account of his homosexuality. See 8 C.F.R. § 1208.16(c)(4).

To qualify for relief under CAT, an applicant must establish that it is more likely than not that he would be tortured if removed to his country of origin. 8 C.F.R. § 1208.16(c)(2); see Khup v. Ashcroft, 376 F.3d 898, 906 (9th Cir. 2004). Under CAT, “torture” is defined as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for . . . any reason based on discrimination of any kind . . .” 8 C.F.R. § 1208.18(a)(1) (2000). Moreover, the torture must be “at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” 8 C.F.R. § 1208.18(a)(1). The Ninth Circuit explained, “relief under the Convention Against Torture requires a two part analysis—first, is it more likely than not that the alien will be tortured upon return to his homeland; and second, is there sufficient state action involved in that torture.” Garcia-Milian v. Holder, 09-71461, 2014 WL 555138 (9th Cir. Feb. 13, 2014)(quoting Tamara-Gomez v. Gonzales, 447 F.3d 343, 351 (5th Cir.2006)). If [REDACTED] establishes that it is more likely than not that he will be tortured in Mexico, relief under CAT is mandatory. 8 C.F.R. § 1208.16(c).

1. It is More Likely Than Not That [REDACTED] Will Suffer Harm Upon Returning to Mexico

As discussed supra, [REDACTED] is more likely than not to suffer severe harm on account of his homosexuality if he returns to Mexico. Factors that the IJ and the BIA must consider in a claim for relief under CAT include: “Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and . . . [o]ther relevant

information regarding conditions in the country of removal.” Konou v. Holder, 09-71454, 2014 WL 1855660 (9th Cir. May 9, 2014). Furthermore, the Ninth Circuit explained, “[i]t is well-accepted that country conditions alone can play a decisive role in granting relief under [CAT].” Id. (citing Nuru v. Gonzales, 404 F.3d 1207, 1219 (9th Cir. 2005)).

██████████ provides extensive evidence detailing the dangerous country conditions for those who live an openly gay lifestyle in Mexico. Exhs. C1-C28. Mexico has been ranked as the second highest country in Latin America for the highest rate of homophobic hate crimes. Exh. C4 at 2; see Exh. C3; Exh. C8 (Mexico, second place worldwide in homophobic crimes, MSN Noticias, 2013); Exh. C14. According to the most recent U.S. State Department report, updated in March of 2014, discrimination based on sexual orientation is still prevalent in Mexico. Exh. C1 at 40. The report cited “reports of threats and violence against human rights defenders and lesbian, gay, bisexual, and transgender (LGBT) persons.” Id. at 1. An April 2014 report by a human rights group in Mexico reported 628 murders caused by homophobia between 1995 and 2008, and estimates that “for each murder that is registered there are other two that have not been identified. According to this estimation, the actual number of murders caused by homophobia in the mentioned period is 1884.” Exh. C3 at 2. According to one study, “76.4% of LGBT persons have been subjected to physical violence because of their sexual orientation or gender identity, and that 53.3% had been assaulted in public spaces. Exh. C27. Experts conclude that “homosexual Mexicans face anywhere from nine to sixty times the danger of lethal violence as do their American counterparts.” Exh. C23 (Mexico’s LGBT Community Face Violence Despite Major Gains in Civil Rights, Latin America News Dispatch, 2011).

Because homophobic crimes are not recorded by the government, it is believed that the

incidents are much higher than what reports show. Exh. C5; Exh. C17; Exh. C23. Beyond a lack of government reporting, regional biases against homosexuals also make it difficult to document all acts of homophobic violence. Exh. C5. Additionally, “[i]n some cases, the families of homophobic homicide victims choose not to disclose the reason why they were targeted out of shame.” Id. Furthermore, victims of violent homophobic crimes themselves “do not usually report sexual abuse by police out of fear.” Exh. C17. Therefore, violent hate crimes against homosexuals are often underreported. See Exh. C22 (according to the Immigration and Refugee Board of Canada, “between January 1995 and June 2009, the press reported 640 homophobic homicides in 11 states, a figure that could be increased to 1,656 if there was national reporting.”).

While the laws in select parts of Mexico have recently begun to change in favor of protecting gay rights, the very implementation of such laws has been a catalyst in the increase of violence against LGBT individuals in Mexico. Exh. C7; see, Exh. C26. In 16 different states in Mexico, newspapers have reported increasing crimes against homosexuals. Exh. C7. See also Exh. C10 (“Despite advances, queer people continue to face social discrimination and human rights violations based on their gender identity and sexual orientation . . .”). Trauma units of hospitals in Mexico are more frequently attending to victims of assault who were attacked after demonstrating some form of affection with a same-sex partner in public. Exh. C7. It is reported that since the legalization of gay marriage in 2010, same sex couples are being assaulted much more frequently and for more minor reasons, such as holding hands with a same sex partner in public. Id. This trend of increased hostility towards homosexual individuals occurring simultaneously with the increase in LGBT rights has been seen across Latin America. Exh. C13. See also Exh. C5. (“The recent upsurge in violence against LGBT individuals and organizations

is an example of the problems that have not abated despite legal and political initiatives.”) The U.S. Library of Congress reported in November 2012 that “[d]espite Mexico’s efforts aimed at protecting homosexual and transgender individuals, mistreatment against this group currently persists.” Exh. C15. According to a March 2014 article:

Some would say that violence is rising precisely because of the successes the LGBT lobby has had in promoting equal rights policies. As new laws threaten traditionalist views, the purported beneficiaries of these laws are not just attacked for their non-traditional sexual identities and orientations, but also for what conservatives perceive as undue influence in the political process.

Exh. C5. See also Exh. C3 at 2 (“homophobic behaviors are normalized inside Mexican society. The factors that cause them are related with the culture and frequently provoke violations of the Human Rights (HR) of the LGBT community.”).

According to the National Counsel to Prevent Discrimination (Conapred) in Mexico, “[t]he statistics of complaints and claims indicate that between 2004 – when Conapred was created – and 2009, the number of cases didn’t vary, but at the beginning of 2010, began to rise.” Exh. 21 (Mexico Discriminates Against Gays and Women, El Universal, 2012).

The Mexican National Human Rights Commission reported on conditions in Mexico for LGBT individuals:

In Mexico, this population has often been marginalized by various sectors of society. But the most delicate issue is that wrongdoing against this population is often seen, in a way, as socially accepted conduct: it is ok to attack someone just because she or he has a non-heterosexual orientation or identity. What makes this a very delicate issue is that such “socially accepted conducts” go beyond mere “human rights violations” and constitute crimes such as discrimination, assault, and murder. . . . Members of the LGBTTTT population are often hindered to freely walk the streets, being harassed or arbitrarily detained just because of the way they look or the clothes they wear, for public demonstrations of affection, or for gathering in public places. When detained, they are subjected to offensive and discriminatory treatment, during interrogations, and while in custody.

Exh. C28 at 8, 9.

This widely accepted discrimination, both in society at large as well as in government

departments, increases the likelihood of violence towards LGBT individuals. See Exh. C16; see also Exh. C11; Exh. C15. According to the Immigration and Refugee Board of Canada, “human rights violations and crimes based on sexual orientation or gender identity [translation] ‘are not isolated’ events as there is a ‘serious structural problem of intolerance’ within Mexican society.” Exh. C22.

Furthermore, reports show that [REDACTED] is part of the most targeted demographic for violent hate crimes in Mexico. The Letra S report on homicides against the LGBTTTTI people between 1995-2013 indicated that homosexual men are the primary victims of homophobic murders. Exh. C8 (“homosexual men are the main victims with 640 cases, followed by trans women with 152 and lesbians with 6.”). The same report found that “majority are between 18 and 30 years of age.” Exh. C8. See also Exh. C19 (Michoacan: 87 Deaths from 1995 to Date by Hate Crimes, El Cambio de Michoacan, 2012). Similarly, another report found that “mostly men suffer from human rights violations because of their sexual orientation/identity and/or gender expression,” ranging in age from 6 to 79 with the highest concentration in the 15-34 age bracket. Exh. C28 (“gay men form the largest group of complainants (426 cases, mainly for discrimination and murder.”)). Additionally, socioeconomic status plays a role in the likelihood of being a target of homophobic violence. Exh. C21. Homosexual people who have lower socioeconomic status are more frequently targeted. Id. [REDACTED] is [REDACTED] years old, has lived in poverty the entirety of his life, and has no connections in Mexico. Exh. A1; Exh. B5. He will be in an openly gay relationship. Exh. A1. According to the statistics, [REDACTED] [REDACTED] will be among the most likely to suffer extreme violence if returned to the second most violent country in Latin America towards homosexuals.

[REDACTED] fear of being tortured upon returning to Mexico is based on his

accurate awareness of the violent treatment experienced by homosexual men in Mexico, multiplied by his abuse-ridden childhood and adolescence growing up in the pervasive Mexican culture of machismo. Exh A1. See also, Exh. C10; Exh B5. [REDACTED] was raped by multiple cousins and beaten by his father growing up who told him as he was hitting him, that he hit him because he was not manly enough. Exh. A1; Exh. B1; Exh. B5. Even holding hands in public with another man, regardless of appearance, would subject him to a high risk of violence or even death in Mexico. Exh. B3; Exh. C12; Exh. C13. As a result, it is more likely than not that [REDACTED] will suffer severe pain and suffering, which as discussed infra will rise to the level of torture, due his homosexuality upon returning to Mexico.

2. The Harm [REDACTED] Will Suffer Rises to the Level of Torture

Evidence shows that homosexual men in Mexico routinely suffer beatings, sexual assault, stabbings, and murder. Exh. C1 at 40; Exh. C12; Exh. C19; Exh. C23; Exh. C25. The Ninth Circuit has held that torture includes beatings, rape, and murder. See, i.e. Bromfield v. Mukasey, 543 F.3d 1071, 1079 (9th Cir. 2008)(“Acts constituting torture are varied, and include beatings and killings”); Al-Saher v. I.N.S., 268 F.3d 1143 (9th Cir. 2001)(applicant’s subjection to repeated beating and cigarette burns was considered torture); Lopez-Galarza v. I.N.S., 99 F.3d 954, 962 (9th Cir. 1996)(“Rape at the hands of government authorities while imprisoned on account of one’s political views can be an atrocious form of punishment indeed.”); Xiao v. Ashcroft, 98 F. App’x 632, 634 (9th Cir. 2004)(“multiple beatings and electric shock constitute past torture”); Chhokar v. Gonzales, 142 F. App’x 319 (9th Cir. 2005)(“Beatings and forcible stretching of alien’s legs to 180 degree position, a practice designed to tear the leg and groin muscles, during abuse of alien by police”).

Among the atrocities committed in Mexico against LGBT individuals, Mexican news sources and human rights groups have reported LGBT individuals being beaten to death

with rocks, dragged by motorcycles, stabbed to death, and raped. Exh. C23 (“The men who killed Quetzalcoatl Leija Herrera, 33, beat him with rocks just steps from the main square of Chilpancingo . . .”); Exh. C25 (“body was found with signs of having been raped and tortured”); Exh. C11 (a gay man was ambushed, tied up, beaten, and sexually assaulted); Exh. C9 (a gay man was arrested, sexually propositioned by the police, and then jailed and beaten). In 2013, a gay man was shot and killed after hugging his boyfriend in public. Exh. C12. According to the Immigration and Refugee Board of Canada, in 2012 two homosexual boys were arrested, detained, and forced “to kiss and engage in sexual acts with each other in front of detainees and police officers,” and were “photographed for a local media source.” Exh. C17. The most recent U.S. State Department report includes an incident in which tear gas was released on an entire auditorium during the “Miss Gay 450 Durango” pageant which resulted in several injuries among both audience members and pageant participants. Exh. C1 at 40.

Of the murders committed against homosexual individuals, one report found that the majority were done with weapons and the victims were most commonly located in their homes. Exh. C19 (“Most of the murders were committed brutally with knives (multiple knives), 90 cases. The victims of the crimes were located mostly within their households, with a total of 118”); Exh. C8 (“[t]he attacks are with non-fire arms in 37 percent of cases (302), over physical assault with 161, firearms at 98, strangling at 74, and suffocation at 58, among others.”).

Another report documenting LGBT murders in Mexico over a period of two months reported that one body that had been found “beaten with several blunts abandoned in a water tank in a house under construction;” another body was found “with signs of having been raped and tortured,” another body “was found with the knees and ankles tied,” and another body “was found with multiple stab wounds.” Exh. C25.

These types of abuses clearly rise to the level of torture. Thus, the harms most commonly suffered by homosexual men in Mexico and that [REDACTED] would more likely than not suffer, rise to the level of torture.

3. [REDACTED] Will be Subjected to Torture at the Hands of Government Officials or with the Acquiesce of Government Officials

[REDACTED] will more likely than not be subject to torture on account of his homosexuality by government officials or with the acquiescence of government officials. The Ninth Circuit has held that to constitute torture at the hands of government actors, the harm caused had to have been “specifically intended by officials to inflict severe physical pain.” Al-Saher v. I.N.S., 268 F.3d 1143, 1147 (9th Cir. 2001) (being subjected to repeated beatings and cigarette burns while in government custody was found to be torture).

Acquiescence of public officials must include an awareness of the persecution and a failure to intervene and prevent the activity that breaches a legal responsibility to do so. 8 C.F.R. § 1208.18(a)(7). According to the Ninth Circuit:

Public officials acquiesce in torture if, “prior to the activity constituting torture,” the officials: (1) have awareness of the activity (or consciously close their eyes to the fact it is going on); and (2) breach their legal responsibility to intervene to prevent the activity because they are unable or unwilling to oppose it.

Garcia-Milian v. Holder, 09-71461, 2014 WL 555138 (9th Cir. Feb. 13, 2014). See also, Ornelas-Chavez v. Gonzales, 458 F.3d 1052, 1059 (9th Cir.2006); Afriyie v. Holder, 613 F.3d 924 (9th Cir. 2010)(“reversed denial of CAT and remanded where there was substantial evidence that the police were unable or unwilling to protect Baptist preacher in Muslim area in Ghana who could suffer torture”); Bromfield v. Mukasey, 543 F.3d 1071, 1078 (9th Cir. 2008)(IJ was mistaken in requiring a homosexual individual to show that government actors would inflict torture and not just acquiesce to persecution). “Importantly, an applicant for CAT relief need not

show that the entire foreign government would consent to or acquiesce in his torture. He need show only that ‘a public official’ would so acquiesce.” Madrigal v. Holder, 716 F.3d 499, 509–10 (9th Cir. 2013)(“If public officials at the state and local level in Mexico would acquiesce in any torture [applicant] is likely to suffer, this satisfies CAT's requirement that a public official acquiesce in the torture, even if the federal government in Mexico would not similarly acquiesce”). Furthermore, the preventative measure by some government actors, do not exclude the possibility of acquiescence. De La Rosa v. Holder, 598 F.3d 103 (2d Cir. 2010).

Country conditions show that government actors are more often than not the key perpetrators in the torture suffered by LGBT individuals in Mexico. See Exh. C22; Exh C2 at p. 38; Exh. C11; Exh. C15; Exh. C17. The National Human Rights Commission reported that both municipal and state authorities are the most likely to be responsible for violating the human rights of sexual minorities, as “evident in ‘arbitrary detentions, injuries, threats, theft, extortion, breaking and entering, and excessive use of law enforcement.’” Exh. C22. The Library of Congress and U.S. State Department reported hundreds of complaints of discrimination against LGBTI individuals, many of which were filed against federal officials or public servants. Exh. C15; Exh C2 at p. 38. The evidence indicates that public officials constitute a large percentage of those who are perpetrating violence against LGBT individuals in Mexico. Exh. C22; Exh. C15; Exh C2 at p. 38.

A study which surveyed over 52,000 people across Mexico indicated that 42.8% of LGBT interviewed said police were “‘intolerant’ of sexual minorities.” Exh. C17. See also, Exh. B3. “Police have been known to take advantage of the fact that the general public does not support gay people, and therefore can force them to pay money, or law enforcement will threaten to inform everyone of their sexuality.” Exh. C11. According to a 2007-2008 report referencing

the Human Rights Commission of Mexico City, “police commit the most number of discriminatory acts against the gay community in Mexico.” Id.

‘Mexican officials, including the police and military, have been accused of being involved in many hate crimes and murders committed against gay men and lesbians.’ ‘The authorities have also been accused of being indifferent when such acts have been reported thereby allowing hate crimes and murders of gay men and lesbians to take place or go un-investigated.’

Id.

One report stated that there is a “culture of homophobia within the Federal District government apparatus.” Exh. C16.

There have been numerous reports of instances in which the police have instigated and carried out torture against homosexual individuals. See Exh. C9; Exh. C4; Exh. C11; Exh. C17. In March of 2013, a 31-year-old psychologist was arrested by police one evening close to his home “for being gay.” Exh. C9. He was driven around aimlessly for an hour and told he could be released if he performed oral sex on the officers who had him in custody. Id. When he refused, he was taken to jail where he was severely beaten by four officers. Id. More than two months after this incidence no disciplinary action had been taken, though the officers involved had been identified. Id. According to an Amnesty International report, “an LGBT activist in the city of Mérida was handcuffed and blindfolded by Yucatán state judicial police who ‘repeatedly beat him in the face, chest, and back,’ and ‘questioned him using homophobic language.” Exh. C22. The police then threatened to arrest and incarcerate him if he reported the incident. Id. Furthermore, in April 2014, a gay couple was forcefully arrested by Mexican police, detained, and fined for sharing a kiss on a public street at 10:00 pm at night. Exh. C4.

Moreover, even where Mexican government officials are not inflicting torture against homosexuals, they frequently acquiesce to the torture of homosexual individuals by private

actors. U.S. State Department and Library of Congress reports indicate that government officials in Mexico have an awareness of the abuse suffered by LGBT individuals and often either participate in such abuse or breach their responsibility to intervene. Exh. C1; Exh. C15. Moreover, according to an April 2014 report, “Homophobic actions are not only validated by the State actors but adopted by entire institutions and recognized by some laws.” Exh. C3 at 2. Hence government actors are either the perpetrators of torture based on sexual orientation or they refuse to report and investigate it. See also, Exh. B3.

Mexican government officials’ refusal to report and investigate violence based on sexual orientation constitutes acquiesce because it is not a mere “powerlessness to stop it” as much as it is an “awareness” and a “breach in their legal responsibility because they are . . . unwilling to oppose it.” Garcia-Milian v. Holder, 09-71461. According to the Ninth Circuit, “[i]t is enough that public officials could have inferred the alleged torture was taking place, remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it.” Ornelas-Chavez v. Gonzales, 458 F.3d 1052.

In spite of the widespread awareness that Mexico is second only to Brazil in crimes of violence against the LGBT community, as stated above, Mexican government officials do not report hate crimes against the LGBT community. Exh. C23; Exh. C4 at 2; see Exh. C3; Exh. C8; Exh. C14; Exh. C28. In 2007, officials in Mexico City were charged to record hate crimes but as of 2011 none had been recorded. Exh. C23. The lack of official record is a strong indicator of the government’s acquiesce rather than an actual absence of hate crimes. Not only are violent hate crimes not recorded, but they often go uninvestigated, Exh. C1; Exh. C2 (U.S. Department of State, Human Rights report on Mexico, 2012); Exh. C3; Exh. C11; Exh. C22. According to the most recent Department of State report, “[t]he law prohibits discrimination against LGBT

individuals; however, LGBT persons reported that the government did not always investigate and punish those complicit in abuses.” Exh C1 at 40; see Exh. C11. Furthermore, “[t]he authorities have . . . been accused of being indifferent when such acts have been reported thereby allowing hate crimes and murders of gay men and lesbians to take place or go un-investigated.” Exh. C11. See also Exh. C27 (“80% of homophobic murders are left unpunished.”); Exh. C5 (“Violence and homicides are often underreported by police forces, either due to disinterest or even outright hostility towards those they are meant to protect.”) According to the Immigration and Refugee Board of Canada,

‘very few’ cases of sexual abuse of LGBT people by the police are reported for many reasons, including: staff at human rights commissions tend to be homophobic. . . . families of LGBT people are often threatened; the police threaten to disclose the secret of the LGBT person's sexual orientation to their families; in some states, such as Jalisco, there are no laws that penalize discrimination and abuses against sexual minorities.

Exh. C17.

Moreover, acts of violence against LGBT individuals that are investigated, are often categorized as “crimes of passion” rather than hate crimes against the LGBT community. For example, in 2011, the U.S. Department of State reported that two prominent activists for the rights of the LGBT community were assassinated in separate incidents in Mexico, and that the murders were characterized by Mexican authorities as “crimes of passion.” Exh. C15. In another example, a homosexual man was ambushed at night near his home, kidnapped, taken to a nearby house, tied up, beaten, and had a wooden stick forced into his rectum while being called homophobic slurs. Exh. C11. The police who interviewed him in the hospital following his attack taunted him for his sexual orientation and told him he “probably liked it.” Id.

Additionally, there is widespread corruption by government and military officials, which

allows officials to commit human rights violations with impunity. According to the most recent U.S. State Department report:

Significant human rights-related problems included police and military involvement in serious abuses, including unlawful killings, physical abuse, torture, and disappearances. Widespread impunity and corruption remained serious problems, particularly at the state and local levels, in the security forces, and in the judicial sector. . . . Despite some arrests for corruption, widespread impunity for human rights abuses by officials remained a problem in both civilian and military jurisdictions. . . . Security forces, acting both in and out of the line of duty, arbitrarily or unlawfully killed several persons, often with impunity.

Exh. C1 at 1-2.

The U.S. State Department also pointed out that “[c]redible reports indicated that officials frequently engaged in corrupt practices with impunity and that relatively few cases came to trial.” Exh. C1 at 26. This extensive government impunity and involvement in human rights violations compounded by the pervasive intolerance for homosexuality in Mexico makes it more likely than not that the torture [REDACTED] would suffer would be at the hands of government officials or with their acquiescence.

IV. CONCLUSION

Thus, based on the aforementioned arguments, the Court should find that [REDACTED] [REDACTED] warrants relief in the form of withholding of removal and protection under the CAT because of the persecution he will likely suffer if returned to Mexico.

Date submitted: [REDACTED]

Respectfully submitted,

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