

No. 13-11683

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

YASMICK JEUNE,
Petitioner,

v.

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,
Respondent

ON PETITION FOR REVIEW
FROM THE BOARD OF IMMIGRATION APPEALS

**BRIEF OF *AMICUS CURIAE*
AMERICAN IMMIGRATION LAWYERS ASSOCIATION
IN SUPPORT OF PETITIONER**

Benjamin R. Casper, Attorney of Record
MN#0276145
Julia Decker, Law Student
University of Minnesota Law School
Center for New Americans
Federal Immigration Litigation Clinic
190 Mondale Hall
229 19th Avenue South
Minneapolis, MN 55455
(612) 625-5515
(612) 624-5771
caspe010@umn.edu

Counsel for Amicus Curiae

YASMICK JEUNE v. ERIC HOLDER, U.S. ATTORNEY GENERAL

Case No. 13-11683

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
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Pursuant to Fed. R. App. P. 26.1, 11th Cir. Rules 26.1 through 26.1-3, and 11th Cir. Rules 27-1(9) and 29-1, undersigned counsel hereby certifies that *amicus* has no parent corporation, and no publicly held corporation owns 10% or more of the stock of *amicus*. Moreover, and pursuant to the aforementioned appellate rules, undersigned counsel also certifies that below is a list of persons and entities who may be interested in the outcome of this case:

1. Adkin, Lindsay, Law Student, Immigration Clinic, University of Miami
School of Law
2. Candemeres, Paul, Assistant Field Office Director, U.S. Immigration and
Customs Enforcement, Krome Service Processing Center;
3. Casper, Benjamin R., Attorney for *Amicus Curiae* AILA, Federal
Immigration Litigation Clinic, Center for New Americans, University of
Minnesota Law School;
4. Decker, Julia, Law Student, Federal Immigration Litigation Clinic, Center
for New Americans, University of Minnesota Law School;
5. Gomez, Juan Carlos, Former Attorney for Petitioner, Florida International
University College of Law;

6. Guendelsberger, John, Board Member, Board of Immigration Appeals, Falls Church, Virginia;
7. Holder, Jr., Eric H., Respondent, Attorney General of the United States, U.S. Department of Justice, Washington, D.C.;
8. Jeune, Yasmick, Petitioner, Baker County Detention Center, MacClenny, Florida;
9. Lerner, Romy, Attorney for Petitioner, Immigration Clinic, University of Miami School of Law;
10. Militello, Ross, Law Student, Immigration Clinic, University of Miami School of Law;
11. Molina, Jr., Horacio Molina, Office of Immigration Litigation, U.S. Department of Justice, Counsel for Respondent;
12. Moore, Marc, Field Office Director, Miami Field Office, United States Immigration and Customs Enforcement;
13. Opaciuch, John, Immigration Judge, United States Department of Justice, Executive Office for Immigration Review, United States Immigration Court, Miami, Florida;
14. Picos, Georgina M., Assistant Chief Counsel for Department of Homeland Security/Immigration and Customs Enforcement Office of Chief Counsel;

15. Sharpless, Rebecca, Attorney for Petitioner, Immigration Clinic, University
of Miami School of Law;

16. Samuels, Krystal, Office of Immigration Litigation, U.S. Department of
Justice, Counsel for Respondent;

17. Watson, Joanna, Office of Immigration Litigation, U.S. Department of
Justice, Counsel for Respondent

s/ Benjamin R. Casper

BENJAMIN R. CASPER

Attorney for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	ii
INTEREST OF AMICUS CURIAE.....	1
STATEMENT OF ISSUES AND SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	3
I. “Persecution” encompasses physical and non-physical harms that must be measured cumulatively.	3
II. This Court should join the Second, Seventh, and Ninth Circuits, as well as the DHS, and require an age-specific analysis of “persecution.”	7
III. The particular vulnerabilities of LGBT children must be also factored in the analysis of persecution.	10
CONCLUSION.....	13
CERTIFICATE OF COMPLIANCE WITH RULE 32(a)	
CERTIFICATE OF FILING AND SERVICE	
CERTIFICATE OF FILING AND SERVICE	

TABLE OF AUTHORITIES

Cases

<i>Bellotti v. Baird</i> , 433 U.S. 622 (1982)	7
<i>De Santamaria v. U.S. Atty. Gen.</i> , 525 U.S. 999 (11th Cir. 2008)	passim
<i>Delgado v. U.S. Atty. Gen.</i> , 487 F.3d 855 (11th Cir. 2007)	5
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982)	7
<i>Hispanic Interest Coalition of Alabama, et al. v. Governor of Alabama, et al.</i> , 691 F. 3d 1269 (11th Cir. 2012)	1
<i>Jorge-Tzoc v. Gonzales</i> , 435 F.3d 146 (2d Cir. 2006)	2, 8
<i>Kazemzadeh v. U.S. Atty. Gen.</i> , 577 F.3d 1341 (11th Cir. 2009)	7
<i>Kholyavskiy v. Mukasey</i> , 540 F.3d 555 (7th Cir. 2008)	2, 8
<i>Liu v. Ashcroft</i> , 380 F.3d 307 (7th Cir. 2004)	8
<i>Mankengtengkeng v. Gonzales</i> , 495 F.3d 876 (8th Cir. 2007)	5
<i>Matter of L-S-</i> , 25 I. & N. Dec. 705 (B.I.A. 2012)	5
<i>Matter of O-Z- & I-Z-</i> , 22 I. & N. Dec. 23 (B.I.A. 1998)	6
<i>Matter of T-Z-</i> , 24 I. & N. Dec. 163 (B.I.A. 2007)	2, 5
<i>Mejia v. U.S. Atty. Gen.</i> , 498 F.3d 1253 (11th Cir. 2007)	4
<i>Mendoza-Pablo v. Holder</i> , 667 F.3d 1308 (9th Cir. 2012)	2, 9
<i>Niftaliev v. U.S. Atty. Gen.</i> , 504 F.3d 1211 (11th Cir. 2007)	4
<i>Ouk v. Gonzales</i> , 464 F.3d 108 (1st Cir. 2006)	5
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005)	7
<i>Ruiz v. Gonzales</i> , 479 F.3d 762 (11th Cir. 2007)	4
<i>Sanchez Jimenez v. U.S. Atty. Gen.</i> , 492 F.3d 1223 (11th Cir. 2007)	4
<i>Sandoval v. Holder</i> , 641 F.3d 982 (8th Cir. 2011)	8
<i>Sepulveda v. U.S. Atty. Gen.</i> , 401 F.3d 1226 (11th Cir. 2005)	4

Statutes

8 U.S.C. § 1101(a)(42)	3
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Other Authorities

AOBTC: <i>Guidelines for Children's Asylum Claims</i> (Sept. 1, 2009).....	10
Asylum Officer Basic Training Course <i>Asylum Eligibility Part I, Eligibility Based on Past Persecution</i> (Mar. 6, 2009).....	6
Asylum Officer Basic Training Course <i>Guidelines for Children's Asylum Claims</i> (Sept. 1, 2009)	6
Bruce Bongar et al., <i>Effects of Violence on Transgender People</i> , Professional Psychology: Research and Practice (2012)	11
Centers for Disease Control & Prevention, <i>Lesbian, Gay, Bisexual and Transgender Health</i>	12
Child Welfare Information Gateway, <i>Supporting Your LGBTQ Youth: A Guide for Foster Parents</i> (2013).....	13
Child Welfare League of America, <i>Recommended Practices To Promote the Safety and Well-Being of Lesbian, Gay, Bisexual, Transgender and Questioning (LGBTQ) Youth and Youth at Risk of or Living with HIV in Child Welfare Settings</i> (2012).....	11
Deborah Anker, <i>Mental Harm and Suffering as Persecution</i> , 2 Bender's Immigr. Bull. (1997).....	5
Deborah Anker, <i>The Law of Asylum in the United States</i> (West 2011)	3
Gregory M. Herek et al., <i>Psychological Sequelae of Hate-Crime Victimization Among Lesbian, Gay and Bisexual Adults</i> , J. of Consulting & Clinical Psychol. (1999).....	11
<i>Guidelines for Children's Asylum Claims</i> , INS Policy and Procedural Memorandum from Jeffrey Weiss, Acting Director, Office of Int'l Affairs, to Asylum Officers, Immigration Officers, and Headquarters Coordinators (Asylum and Refugees) (Dec. 10, 1998)	9
Judit Takács, Int'l Gay & Lesbian Ass'n Europe & Int'l Lesbian, Gay, Bisexual, Transgender, Queer Youth and Student Org., <i>Social Exclusion of Young Lesbian, Gay, Bisexual and Transgender (LGBT) People in Europe</i> (2006).....	11
National Alliance on Mental Health, <i>Mental Health Risk Factors among GLBT Youth 1</i> (2007); see Just the Facts Coalition, <i>Just the facts about sexual orientation and youth: A primer for principals, educators, and school personnel</i> (2006).....	12

UNHCR, <i>Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity</i> , U.N. Doc. A/HRC/19/41 (Nov. 17, 2011)	12
UNHCR, <i>Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees</i> , U.N. Doc. HCR/GIP/09/08 (Dec. 22, 2009) ...	9
UNHCR, <i>Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity</i> , U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012).....	12

INTEREST OF AMICUS CURIAE

Amicus Curiae, the American Immigration Lawyers Association (“AILA”), is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA’s members practice regularly before the Department of Homeland Security (“DHS”), immigration courts, and the Board of Immigration Appeals (“BIA”), as well as before the United States District Courts, Courts of Appeal,¹ and the Supreme Court of the United States. AILA has a strong ongoing interest in the proper application and development of U.S. asylum law, the legal standards defining “persecution,” and the treatment of children seeking asylum and withholding relief, including Lesbian, Gay, Bisexual or Transgender (LGBT) children. AILA respectfully

¹ This Court most recently accepted and considered AILA's amicus brief in *Hispanic Interest Coalition of Alabama, et al. v. Governor of Alabama, et al.*, 691 F. 3d 1269 (11th Cir. 2012).

submits this brief in support of the Petitioner, Yasmick Jeune, under Fed. R. App. P. 29.²

STATEMENT OF ISSUES AND SUMMARY OF ARGUMENT

The BIA commits legal error where it fails to assess the cumulative impact of all mistreatments that can contribute to persecution. This Court has at times described persecution as an “extreme concept,” *De Santamaria v. U.S. Atty. Gen.*, 525 U.S. 999, 1008 (11th Cir. 2008), and in some cases immigration judges and the BIA have misconstrued this language to impose an exceptionally high threshold. Eleventh Circuit decisions, BIA decisions, and other authorities show that persecution in fact encompasses a range of both physical and non-physical harms that must be measured cumulatively. *Id.*; *Matter of T-Z-*, 24 I. & N. Dec. 163 (B.I.A. 2007). The BIA also errs if it fails to factor age when assessing whether mistreatment inflicted upon a child rises in severity to persecution. This Court should join the three other circuits that already require a particularized, age-sensitive analysis of persecution. *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 147 – 48 (2d Cir. 2006); *Kholyavskiy v. Mukasey*, 540 F.3d 555, 571 (7th Cir. 2008); *Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1313 (9th Cir. 2012). DHS has long

² *Amicus* represents that Petitioner consents to the filing of this brief, while Respondent has taken no position on its filing, and that no person or entity other than *amicus* authored or provided any funding related to its preparing or filing.

embraced this approach, as has the United Nations High Commissioner for Refugees (UNHCR). Finally, this Court should require the BIA to account for particular vulnerabilities that make many LGBT children especially susceptible to harm that equal persecution. The Court should not hesitate to find persecution where a vulnerable LGBT child without state protection has been subjected to prolonged and severe discrimination and harassment, as well as physical violence.

ARGUMENT

I. “Persecution” encompasses physical and non-physical harms that must be measured cumulatively.

Amicus agrees with Petitioner that immigration judges and the BIA must consider the cumulative impact of all harms when assessing persecution. See Petitioner’s Brief, 27 – 28. Where, as here, the agency fails to evaluate the aggregate impact of the physical and non-physical harms suffered over a sustained period of years, it errs as a matter of law.

The Immigration and Nationality Act contains no definition of “persecution,” *De Santamaria v. U.S. Atty. Gen.*, 525 F.3d. at 1008 (11th Cir. 2008), but it is widely understood to comprise two elements: serious harm and a failure of state protection. See 8 U.S.C. § 1101(a)(42); Deborah Anker, *The Law of Asylum in the United States* §4.1, 158 – 59 (West 2011). In addressing the element of harm, this Court has sometimes referred to persecution as “an extreme concept.”

De Santamaria, 525 F.3d. at 1008 (quoting *Sanchez Jimenez v. U.S. Atty. Gen.*, 492 F.3d 1223, 1232 (11th Cir. 2007) (quoting *Sepulveda v. U.S. Atty. Gen.*, 401 F.3d 1226, 1231 (11th Cir. 2005))). Unfortunately, as in this case, immigration judges and the BIA sometimes take this language out of context, interpreting it as imposing an exceedingly high bar. As a result, the thorough analysis required by this Court and others is short-circuited. See Petitioner’s Brief, 17 – 28.

This Court has qualified its characterization of persecution as an “extreme concept” by explaining that persecution “requir[es] more than a few isolated incidents of verbal harassment or intimidation, and that mere harassment does not amount to persecution.” *De Santamaria* 525 F.3d at 1231. There is no requirement of physical injury, and in every case the IJ and BIA must consider the *cumulative* impact of all mistreatment suffered. *De Santamaria*, 525 F.3d at 1008 (“even though each instance of mistreatment, when considered alone, may not amount to persecution, the record may still compel a finding of past persecution when considered as a whole.”); *Mejia v. U.S. Atty. Gen.*, 498 F.3d 1253, 1258 (11th Cir. 2007) (citing *Ruiz v. Gonzales*, 479 F.3d 762, 766 (11th Cir. 2007)).

Harms that may constitute or contribute to persecution include actual or threatened physical violence or severe deprivations of physical liberty. *E.g.* (*Niftaliev v. U.S. Atty. Gen.*, 504 F.3d 1211, 127 (11th Cir. 2007) (numerous

beatings and detention lasting fifteen days constituted persecution); *Delgado v. U.S. Atty. Gen.*, 487 F.3d 855, 861 (11th Cir. 2007) (petitioner threatened by masked men with unloaded weapons and severely beaten several months later established persecution).

Persecution also encompasses a variety of other harms. For example, the BIA has recognized that persecution may be economic. *Matter of T-Z-*, 24 I. & N. Dec. 163 (B.I.A. 2007) (severe economic disadvantage or the deprivation of food, housing, employment, or other essentials of life, may amount to persecution). Mental or psychological harm can also be important elements of persecution. *See*, e.g. *Mankengtengkeng v. Gonzales*, 495 F.3d 876, 882 (8th Cir. 2007) (“mental or emotional injury can support a claim for persecution.”); *see also* Deborah Anker, *Mental Harm and Suffering as Persecution*, 2 Bender’s Immigr. Bull. 707 (1997). If severe enough, mental or psychological harm alone may constitute persecution. *Ouk v. Gonzales*, 464 F.3d 108, 111 (1st Cir. 2006) (“[U]nder the right set of circumstances, a finding of past persecution might rest on a showing of psychological harm.”); *Matter of L-S-*, 25 I. & N. Dec. 705 (B.I.A. 2012) (indicating that “severe mental or emotional harm” may, in the totality of the circumstances of a particular case, be equal in severity to “persecution.”).

As noted, the Eleventh Circuit has held that “isolated” or “mere” harassment is not persecution, *De Santamaria*, 525 F.3d at 1008, indicating that it may be an ingredient in persecution when coupled with other harms. The BIA has held that discrimination and harassment can be important aspects of persecution. *Matter of O-Z- & I-Z-*, 22 I. & N. Dec. 23 (B.I.A. 1998) (sustained discriminatory harassment directed at asylum applicant’s son because of his religion, causing extreme humiliation, together with threats and physical violence against applicant himself, was persecution). DHS trains asylum officers that discrimination and harassment may amount to persecution in their own right in some cases if the mistreatment “accumulates or increases to the extent it leads to consequences of a substantially prejudicial nature[,]” and that among the key factors to weigh cumulatively are “[h]ow long has the discrimination lasted[,]” and “[w]hich human rights were affected[.]” Asylum Officer Basic Training Course (“AOBTC”) *Asylum Eligibility Part I, Eligibility Based on Past Persecution* 24 – 25 (Mar. 6, 2009).

Also, this Court has recognized that being forced to hide a fundamental aspect of one’s life to avoid discriminatory punishment can qualify as persecution even in the absence of *any* physical or other kind harm. *Kazemzadeh v. U.S. Atty.*

Gen., 577 F.3d 1341 (11th Cir. 2009) (finding that being forced to hide one's religion can constitute persecution).

In sum, immigration judges and the BIA must evaluate the cumulative total of all harms when assessing persecution. If the agency fails to do so it commits legal error.

II. This Court should join the Second, Seventh, and Ninth Circuits, as well as the DHS, and require an age-specific analysis of “persecution.”

This Court should adopt the noncontroversial proposition that the BIA must consider age when assessing whether the totality of harms inflicted upon a child amount to persecution. *See* Petitioner's Brief, 19 – 24. Our nation has long recognized that children are more vulnerable to harm than adults because they lack both maturity and control over their environments. “Youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and psychological damage.” *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). Because children are fundamentally different than adults, it is error to “uncritically transfer[] legal principles developed with respect to adults when determining [the government's] duty towards children.” *Bellotti v. Baird*, 433 U.S. 622, 633 – 34 (1982). Congress accounts for the vulnerability of children throughout the

Immigration and Nationality Act, going out of its way to provide child asylum applicants with age appropriate treatment and protections. *See e.g., Sandoval v. Holder*, 641 F.3d 982, 986 – 88 (8th Cir. 2011) (noting various immigration provisions tailored to children, including special asylum laws protecting minors). The vulnerability of children must also factor into the analysis of “persecution.”

Three sister circuits have adopted this rule. The Second Circuit has held that traumas related to witnessing extreme violence “could well constitute persecution to a small child [of seven] totally dependent on his family and community[,]” and that the asylum statute requires the BIA to evaluate such harms “from the perspective of a small child.” *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 147 – 48, 150 (2d Cir. 2006). The Seventh Circuit has affirmed that “[t]here may be situations where children should be considered victims of persecution though they have suffered less harm than would be required for an adult.” *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004). Applying this principle, the Seventh Circuit declared that “childhood sexual abuse and mistreatment may have harmful, long-term effects” and remanded where the BIA evaded its “obligation to evaluate the impact of these actions on a child between the ages of eight and thirteen.” *Kholyavskiy v. Mukasey*, 540 F.3d 555, 571 (7th Cir. 2008). The Ninth Circuit also agrees: “the quantum of harm suffered by a child may be relatively less than that of an adult

and still qualify as persecution.” *Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1313 (9th Cir. 2012) (citation and internal quotation omitted).

No circuit has adopted a contrary rule, and as Petitioner notes, DHS has applied this age-sensitive approach for over fifteen years. Petitioner’s Brief at 19; *Guidelines for Children’s Asylum Claims*, INS Policy and Procedural Memorandum from Jeffrey Weiss, Acting Director, Office of Int’l Affairs, to Asylum Officers, Immigration Officers, and Headquarters Coordinators (Asylum and Refugees) 14 (Dec. 10, 1998) (“Weiss Memo”) *available at* 1998 WL 34032561.³ The UNHCR follows the same rule too. Petitioner’s Brief at 19 – 20; *UNHCR*, Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, ¶¶ 15-16, U.N. Doc. HCR/GIP/09/08 (Dec. 22, 2009).

DHS trains its asylum officers to apply a lower threshold for persecution in cases involving children than for adults because children are dependent on others for care and thus are more vulnerable to trauma. AOBTC: *Guidelines for*

³The INS was reorganized when the Department of Homeland Security (DHS) was created in November 2002. The Weiss Memo is now applied by the DHS. See *Mejilla-Romero v. Holder*, 614 F.3d 572 (1st Cir. 2010).

Children's Asylum Claims 37, 43 (Sept. 1, 2009) (recognizing that children have an “inherent vulnerability” which puts them at the mercy of adults). Asylum officers are instructed to consider the cognitive and psychological differences of children and to account for the fact that age affects the way a child experiences and recollects trauma. *Id.*, 32-33; Weiss Memo, 4. Where psychological harm has occurred, officers must factor in age when determining whether that harm amounts to persecution and evaluate traumatic events from a child's point of view. AOBTC: *Guidelines for Children's Asylum Claims*, 25, 32 – 33; Weiss Memo, 12.

This Court should join its sister circuits now and hold that immigration judges and the BIA err as a matter of law when, as here, they fail to factor age in deciding whether harms inflicted upon a child amount in severity to persecution.

III. The particular vulnerabilities of LGBT children must be also factored in the analysis of persecution.

People like Petitioner who were mistreated because of their sexual orientation or identity when they were children are particularly susceptible to experiencing harm as severe, especially when it repeatedly occurs. This Court should require immigration judges and the BIA to weigh the particular vulnerability of LGBT youth when evaluating whether harm constitutes persecution.

Young people who do not conform to accepted gender roles are often victimized and experience lasting effects from this harm. See Bruce Bongar et al., *Effects of Violence on Transgender People*, Professional Psychology: Research and Practice (2012); Judit Takács, Int'l Gay & Lesbian Ass'n Europe & Int'l Lesbian, Gay, Bisexual, Transgender, Queer Youth and Student Org., *Social Exclusion of Young Lesbian, Gay, Bisexual and Transgender (LGBT) People in Europe*, 31 (2006); Child Welfare League of America, *Recommended Practices To Promote the Safety and Well-Being of Lesbian, Gay, Bisexual, Transgender and Questioning (LGBTQ) Youth and Youth at Risk of or Living with HIV in Child Welfare Settings* 1 (2012). Social marginalization during the particularly delicate and transitional stage of adolescence can pose a serious health threat. Tacács, *supra* at 32. Sexual minorities who lack sufficient support and coping mechanisms are particularly vulnerable to negative and enduring psychological consequences. Gregory M. Herek et al., *Psychological Sequelae of Hate-Crime Victimization Among Lesbian, Gay and Bisexual Adults*, J. of Consulting & Clinical Psychol. 945, 945 (1999).

LGBT individuals who experience victimization through physical or verbal abuse, or threats of such abuse, are at increased risk for depression, anxiety and post-traumatic stress disorder. National Alliance on Mental Health, *Mental Health*

Risk Factors among GLBT Youth 1 (2007); see Just the Facts Coalition, *Just the facts about sexual orientation and youth: A primer for principals, educators, and school personnel* 4 (2006).⁴ In addition, ostracism and isolation, especially over long periods of time, can have a detrimental effect on the mental health of the person being ostracized. *UNHCR Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity*, ¶ 24, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012).

LGBT youth are at increased risk of bullying, physical violence, and suicide due to negative attitudes towards LGBT individuals. Centers for Disease Control & Prevention, *Lesbian, Gay, Bisexual and Transgender Health*,⁵ UNHCR, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, ¶ 60 U.N. Doc. A/HRC/19/41 (Nov. 17, 2011). Youth who are rejected by their families due to their sexual orientation or gender identity face even more severe consequences. Surveys have found children in this situation are six times more likely than other LGBT youth to experience high levels of depression and eight times more likely to attempt suicide.

⁴ Available at:
http://www.nami.org/Content/ContentGroups/Multicultural_Support1/Fact_Sheets1/MH_Risk_Factors_among_GLBT_Youth_07.pdf

⁵ Available at: <http://www.cdc.gov/lgbthealth/youth.htm>

Child Welfare Information Gateway, *Supporting Your LGBTQ Youth: A Guide for Foster Parents* 5 (2013).⁶

Petitioner, who was found credible, described family members, school officials, peers, and other members of the community subjecting her to acts of physical violence, as well as severe harassment and discrimination, during a ten year period from ages 6 to 16. Petitioner's Brief, 14-15. This constellation of harms made Petitioner especially susceptible to severe and lasting psychological harm and must be factored into the cumulative assessment of past persecution. This Court should not hesitate to find past persecution where a vulnerable LGBT child who lacks state protection has been subjected to severe discrimination and harassment, as well as physical violence, at a very young age and for a prolonged period of time.

CONCLUSION

The petition for review should be granted.

Respectfully submitted,

October 7, 2013

s/Benjamin R. Casper

Benjamin R. Casper
Counsel of Record

⁶ Available at: <https://www.childwelfare.gov/pubs/LGBTQyouth>

Julia Decker
University of Minnesota Law School
Center for New Americans
Federal Immigration Litigation Clinic
190 Mondale Hall
229 19th Avenue South
Minneapolis, MN 55455
(612) 625-5515
(612) 624-5771 (fax)
caspe010@umn.edu

*Counsel for Amicus Curiae American Immigration
Lawyers Association*

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 2735 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Software 2010, in 14 point font size and Times New Roman type style.

DATE: October 7, 2013

s/ Benjamin R. Casper

Benjamin R. Casper, Supervising Attorney
University of Minnesota Law School
Center for New Americans
Federal Immigration Litigation Clinic
190 Mondale Hall
229 19th Avenue South
Minneapolis, MN 55455
(612) 625-6284

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 7, 2013, I electronically filed the foregoing BRIEF OF AMICUS CURIAE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system, which will automatically send an e-mail notification of such filing to the attorneys of record who are registered CM/ECF users. Additionally, seven (7) copies identical to the electronic filing will be mailed to the clerk via USPS priority mail and one copy to all attorneys of record via USPS Priority Mail:

Rebecca Sharpless,
Associate Clinical Professor
Lindsay Adkin, Law Student
Ross Militello, Law Student
Romy Lerner, Attorney
University of Miami School of Law
1311 Miller Drive, E257
Coral Gables, FL 33146
Counsel for Petitioner

Ernesto H. Molina, Jr.
Joanna Watson
U.S. Department of Justice
Office of Immigration Litigation
P.O. Box 898,
Ben Franklin Station
Washington, D.C. 20044
Counsel for Respondent

DATE: October 7, 2013

s/Benjamin Casper

Benjamin R. Casper, Supervising Attorney
University of Minnesota Law School
Center for New Americans
Federal Immigration Litigation Clinic
190 Mondale Hall
229 19th Avenue South
Minneapolis, MN 55455
(612) 625-6484