

**UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE OF IMMIGRATION REVIEW  
BOARD OF IMMIGRATION APPEALS  
FALLS CHURCH, VIRGINIA**

IN THE MATTER OF

ALOR REYES, Miguel (aka Alejandra),

Respondent.

File No. A-201-564-828

**NON-DETAINED**

ORAL ARGUMENT REQUESTED

**PROPOSED BRIEF OF AMICI CURIAE IMMIGRATION EQUALITY, CENTER FOR GENDER & REFUGEE STUDIES, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, CENTRO LEGAL DE LA RAZA, NATIONAL CENTER FOR TRANSGENDER EQUALITY, THE NATIONAL IMMIGRANT JUSTICE CENTER, OASIS LEGAL SERVICES, TRANSGENDER LAW CENTER, TRANSGENDER LEGAL DEFENSE & EDUCATION FUND, AND THE TRANSLATIN@ COALITION IN SUPPORT OF RESPONDENT**

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## STATEMENT OF INTEREST

Immigration Equality, Center for Gender & Refugee Studies, Lambda Legal Defense and Education Fund, Inc., the American Immigration Lawyers Association, Centro Legal de la Raza, National Center for Transgender Equality, the National Immigrant Justice Center, Oasis Legal Services, Transgender Law Center, Transgender Legal Defense & Education Fund, and the TransLatin@ Coalition respectfully submit this brief as *amici curiae*.<sup>1</sup>

*Amici* are nonprofit immigration advocates and legal and social service providers that work closely with LGBTQ+ people. *Amici* provide critical legal services, including screening LGBTQ+ people for immigration relief, directly representing LGBTQ+ asylum seekers, providing resources for others who represent them, and advocating for LGBTQ+ people's civil rights.

*Amici* fear that, left standing, the Immigration Judge's decision will drastically restrict meritorious asylum and related protection claims brought by transgender women. For one, the decision establishes a too-narrow nexus requirement that permits denial of a claim whenever the immediate trigger for persecution involves a desire to commit a crime. Factfinders cannot evade the need to analyze why victims are targeted in the first place, particularly where record evidence demonstrates that transgender women are often targeted for crime *because* they are transgender. For another, the Immigration Judge's decision disregards hundreds of pages of country-conditions evidence detailing how the applicant's government works *with* criminal organizations and *preys* on transgender women and holds that the government does not acquiesce in the persecution anytime the police merely speak to the applicant—even if they never actually investigate, much less prosecute, a non-state persecutor. *Amici* are deeply troubled by the Immigration Judge's

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<sup>1</sup> No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

brazen willingness to ignore the weight of the country-conditions evidence, and respectfully urge the Board of Immigration Appeals (BIA or the Board) to reverse the Immigration Judge's decision and grant Ms. Alor-Reyes's application.

## **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

After escaping brutal violence from her father for being transgender, Ms. Alor-Reyes ended up on the streets of Mexico when she was just entering adolescence. She quickly became a target for the local cartels, who repeatedly attacked her and spewed derogatory slurs about her transgender identity. The cartels sought to profit by forcing her to sell her body and drugs. But Ms. Alor-Reyes repeatedly refused, and each time, the cartels physically assaulted her. She moved from city to city seeking safety, twelve times in all, but the threats and abuse moved with her. At 24, she said no to yet another cartel. This time, the cartel held her hand against a rock and sawed off her thumb. The beating she received landed her in the hospital. Scared for her life, Ms. Alor-Reyes presented at a port of entry in Arizona. She filed claims for asylum, withholding of removal, and protection under the Convention Against Torture (CAT).

Ms. Alor-Reyes's story is shocking and yet shockingly common for a transgender woman in Mexico, as detailed in the 400-plus pages of country-conditions evidence Ms. Alor-Reyes submitted along with her application. That record established that Mexico is the second-deadliest country in the world for transgender women. And it showed that, instead of protecting transgender women, police often *perpetrate* violence against them.

The Immigration Judge found that "the cumulative results of the assaults" Ms. Alor-Reyes suffered "r[ose] to the level of persecution." IJ Dec. at 12 (Oct. 28, 2019). But he denied her asylum and withholding of removal because he concluded that Ms. Alor-Reyes was persecuted for her refusal to work for the cartels, not for her transgender identity. That is, Ms. Alor-Reyes failed to meet the nexus requirement. The Immigration Judge also denied Ms. Alor-Reyes protection

under the CAT, faulting her for not seeking help from the police. The Immigration Judge concluded that the government did not acquiesce to Ms. Alor-Reyes's torture simply because the Mexican police interviewed her after two of the particularly brutal assaults—regardless of their failure to actually protect her.

The Board previously affirmed the Immigration Judge's decision in a three-page opinion. Relying on *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) ("*Matter of A-B- I*"), the Board declined to separately address whether the abuse Ms. Alor-Reyes endured as a transgender woman at the hands of her father "because of her sexual identity," IJ Dec. at 11, independently entitled her to asylum, *see* BIA Dec. at 2 (May 26, 2020). On top of these errors, the Board—like the Immigration Judge—misgendered Ms. Alor-Reyes.

Ms. Alor-Reyes appealed to the Ninth Circuit. While her appeal was pending, the Attorney General vacated *Matter of A-B- I. Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021) ("*Matter of A-B- IIP*"). In so doing, the Attorney General affirmed that Immigration Judges and the Board must follow pre-*Matter of A-B- I* precedent in analyzing asylum claims. *See id.* at 307. In light of that decision, the Government moved for voluntary remand to the Board, which the Ninth Circuit granted.

On remand, the Board should reverse the Immigration Judge's decision and, in the process, correct three serious flaws in its prior opinion. First, the Board should apply the proper interpretation of the nexus requirement and ask why Ms. Alor-Reyes, "and not another person, was threatened." *Alvarez Lagos v. Barr*, 927 F.3d 236, 249 (4th Cir. 2019) (internal quotation marks omitted); *see Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1081 (9th Cir. 2015) (directing the Board to account for the fact that transgender women are "conspicuous target[s]" for violence). The evidence before this agency easily answers that question: Living on the streets, and without

any police protection, she—like scores of Mexican transgender women—was the ultimate target. And lest there be any doubt, Ms. Alor-Reyes expressly testified that, just like her father, the cartels brutalized her *because* she is transgender. The Immigration Judge legally erred when it ignored that evidence.

Second, the Board should apply the proper standard for evaluating government participation in or acquiescence to torture. Contrary to the Immigration Judge’s conclusion, reporting abuse to the police is not a requirement for CAT protection—especially in countries where police are the victims’ “primary predators.” *See* Transgender L. Ctr. & Cornell Univ. L. Sch. LGBT Clinic, Report on Human Rights Conditions of Transgender Women in Mexico 18 (May 2016) (“Transgender Law Center”), <https://tinyurl.com/ys5yux7x>. Nor, in any event, does taking perfunctory notes on two occasions without any investigation—much less prosecution of abusers—demonstrate that the police did not acquiesce to Ms. Alor-Reyes’s torture.

Third, the Board should take care not to misgender Ms. Alor-Reyes again. In addition to being unnecessarily degrading and traumatizing, the Board’s denial of the very characteristic that brought on Ms. Alor-Reyes’s persecution confirms that its prior opinion failed to properly analyze her claims.

Reviewing this case anew on remand, the Board should reverse the Immigration Judge’s decision.

## **ARGUMENT**

### **I. A Narrow Reading Of The Nexus Requirement Ignores The Realities Of Life For Transgender Women In Mexico And Jeopardizes Meritorious Claims.**

An applicant seeking asylum based on membership in a particular social group needs to prove only that membership in the group “was at least one central reason for [her] persecution,” not that it was the sole reason. *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073 (9th Cir. 2017)

(en banc). Persecutors often “have mixed motives for their actions,” and an Immigration Judge “err[s] as a matter of law” when he refuses to find persecution “on account of” a protected ground merely because persecutors are also “motivated by criminal intent.” *Cantarero Castro v. Att’y Gen. of U.S.*, 832 F. App’x 126, 131 (3d Cir. 2020); *see also Alvarez Lagos*, 927 F.3d at 250 (a “central reason” may be “intertwined” with others).

That is why Immigration Judges—and the Board—must evaluate “the cumulative effect of all the incidents a petitioner has suffered” when determining whether an applicant was persecuted because of her protected characteristic. *Krotova v. Gonzales*, 416 F.3d 1080, 1084 (9th Cir. 2005). That holistic approach is all the more important when considering gender-identity-based claims. Transgender women are “conspicuous target[s]” for violence and abuse, and the agency must account for their “unique identities and vulnerabilities.” *Avendano-Hernandez*, 800 F.3d at 1081, 1082; *accord Cantarero Castro*, 832 F. App’x at 132 (“[T]he nature and context of the harm itself—the chosen method of harm, the locus of the harm, societal stereotypes or stigmas associated with the harm—often provide a window into a persecutor’s motives,” particularly “in cases involving sexual or sex-based violence.”).

The Immigration Judge’s focus on the immediate trigger for persecution does not comport with these requirements. Rather, the proper approach is to ask whether an applicant is “especially vulnerable” to violence—why “she, and not another person, was threatened.” *Alvarez Lagos*, 927 F.3d at 247, 249-250 (internal quotation marks in first quotation omitted) (reversing the Board and finding nexus requirement satisfied where applicant “face[d] a higher risk of harm because she [was] an unprotected woman in a country with high rates of gang violence against women” (internal quotation marks omitted)); *see also Cruz v. Sessions*, 853 F.3d 122, 129 (4th Cir. 2017) (same, where “[t]he BIA and [Immigration Judge] shortsightedly focused on” the applicant’s

conduct, but ignored “the very relationship that prompted” that conduct). The question, in other words, is why an applicant was “targeted” “in the first place.” *Oliva v. Lynch*, 807 F.3d 53, 60 (4th Cir. 2015); *see also Salgado-Sosa v. Sessions*, 882 F.3d 451, 458 (4th Cir. 2018) (observing that the Board in recent years has drawn “‘too fine a distinction’ between the ‘immediate trigger’ for persecution . . . and what ultimately led to persecution” (quoting *Oliva*, 807 F.3d at 60)). That requires looking “beyond” the “immediate trigger” for persecution—like personal retribution for refusal to hand over property to a gang—to *all* “circumstantial evidence of motive,” to determine whether the violence added up, “over time,” to “a kind of animus distinct from purely personal retribution.” *Garcia v. Wilkinson*, 988 F.3d 1136, 1145 (9th Cir. 2021); *see also Reyes v. Lynch*, 842 F.3d 1125, 1132 n.4 (9th Cir. 2016).

**A. Ms. Alor-Reyes’s transgender identity was a central reason for her persecution.**

The factual record readily establishes that Ms. Alor-Reyes’s transgender identity is at minimum *a* “central reason” for her persecution. *Barajas-Romero v. Lynch*, 846 F.3d 351, 359 (9th Cir. 2017).<sup>2</sup> Start with her childhood. Because she was transgender, Ms. Alor-Reyes was brutally beaten by her father “[d]aily” ever since he was released from prison for murdering her mother. Tr. 10/17/2019 at 41-43. As he told her repeatedly, she “shouldn’t have been born like that”; she should be “a man like him.” *Id.* at 42. No longer able to bear the beatings, she left home as a young adolescent. *Id.* at 48-49. She was repeatedly fired from jobs because her transgender identity gave businesses “the wrong image.” *E.g., id.* at 47-48. As a result, she was forced to live “[o]n the street.” *Id.*

Ms. Alor-Reyes explained many times that cartels “specifically target transgender women” because “the police . . . don’t protect us.” *Id.* at 55, 68. That is why the cartels “forced” “all women

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<sup>2</sup> The bar for withholding of removal is even lower: Ms. Alor-Reyes’s transgender identity need only be “a reason” for her persecution. *Barajas-Romero*, 846 F.3d at 359.

trans” to work for them. *Id.* at 65. “[I]f something ever happens to us, it’s . . . as if something would have never happened, according to the police.” *Id.* at 68; *see also id.* at 55, 64, 78.<sup>3</sup> Tying the assault still more directly to her identity, Ms. Alor-Reyes recounted derogatory language cartel members used as they beat her. *E.g., id.* at 57, 60, 63, 65, 68; *see Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004) (holding that motivation for persecution may be proved through victim’s testimony of statements made by persecutors during assault). And she testified that the cartel cut off her thumb “[b]ecause [she] was a transgender woman.” Tr. 10/17/2019 at 40 (emphasis added).

Yet the Immigration Judge determined that Ms. Alor-Reyes was persecuted “based on her refusal to participate in criminal activities” and not her transgender identity. IJ Dec. at 12. The facts do not support that determination.

Take the Immigration Judge’s conclusion that the “record establishes that *some* transgender women have been victims of hate crimes and that *some* have been killed” but that the “record does not establish whether transgender women are victims of homicide . . . at a rate greater than the rest of the population.” *Id.* at 13 (emphases added). But the country conditions Ms. Alor-Reyes submitted established that “[t]ransgender women *in particular* face discrimination and violence.” Grp. Ex. 4, Tab B at 45 (emphasis added). Those facts were all over the record. *E.g., id.*, Tab D at 60 (Mexico is a “deadly dangerous” place for transgender women); *id.* at 69 (transgender women “are particularly likely to be singled out for abuse”); *id.*, Tab E at 106 (transgender women are “at particular risk of murder”).

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<sup>3</sup> These are just the harms that *directly* exposed Ms. Alor-Reyes to cartel violence. Unwinding the thread further, Ms. Alor-Reyes explained, for example, that she was forced to leave school to escape abuse from classmates. Tr. 10/17/2019 at 45-46. The Immigration Judge erred when he refused to consider the “cumulative effect” of such mistreatment. *Krotova*, 416 F.3d at 1084.

Indeed, the record established that Mexico is the second-deadliest country for transgender women *in the world*. *Id.*, Tab L at 233; *id.*, Tab M at 242. And it traced that violence to the cartels. *E.g.*, *id.*, Tab D at 73 (transgender women “are often victims of drug cartel and gang violence” and are frequently “forced into sex work”); *id.*, Tab M at 241 (“transgender women are . . . at risk from the drug cartels”). The Immigration Judge was not entitled to disregard this evidence—particularly when “[g]athering data about the Mexican LGBT community is hampered by the fact that many individuals are reluctant to reveal their sexual orientation or gender identity” for fear of violence and assault. *Id.*, Tab D at 63; *see also id.*, Tab F at 116 (similar).

The Immigration Judge also observed that the cartels “were clearly comfortable with the respondent’s presence in the community had she agreed to work for them.” IJ Dec. at 12. That cartels were “comfortable” degrading and prostituting Ms. Alor-Reyes *strengthens*, rather than detracts from, the argument that cartels targeted her *because* she was transgender.

Finally, the Immigration Judge acknowledged that because Ms. Alor-Reyes fled her father’s ruthless reaction to her transgender identity and was homeless, she was “particularly vulnerable to recruitment by criminals.” *Id.*<sup>4</sup> But despite this, the Immigration Judge mistakenly concluded that Ms. Alor-Reyes was not persecuted “because she is a transgender woman.” *Id.*

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<sup>4</sup> Indeed, the violence Ms. Alor-Reyes suffered at the hands of her father “beginning at approximately age 13 *because* of her sexual identity,” IJ Dec. at 11 (emphasis added), independently entitles her to asylum. The Board’s prior opinion concluded otherwise, citing *Matter of A-B- I*, 27 I&N Dec. at 320. BIA Dec. at 2 n.2 (“Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”). But that decision is no longer good law. *See Matter of A-B- III*, 28 I&N Dec. at 307. In any event, as the Ninth Circuit recently explained in *Diaz-Reynoso v. Barr*, that statement in *Matter of A-B- I* is “*descriptive*” and “*general*,” while the “*prescriptive* instruction” directs the Board to conduct the “particular social group analysis on a case-by-case basis.” 968 F.3d 1070, 1080 (9th Cir. 2020); *see also Grace v. Barr*, 965 F.3d 883, 906 (D.C. Cir. 2020) (reaching the same conclusion). Here, conclusive evidence establishes the Mexican government’s unwillingness to address violence against transgender women, be it from cartels or from their families. *See infra* Section II.A. More fundamentally, government (un)willingness to protect victims does not bear



As the Fourth and Ninth Circuits have explained, that chain of reasoning does not withstand scrutiny. Addressing gang retaliation in *Oliva*, for example, the Board ruled that an applicant was persecuted because he “violat[ed] the [gang’s] rules”—paying rent—rather than because he left the gang. 807 F.3d at 59 (second alteration in original). That was “an overly restrictive view of *Oliva*’s case,” the Fourth Circuit held: The reason *Oliva* had to pay rent in the first place was *because* he left the gang. Had the Board conducted “[a] close examination of the record,” it would have spotted “the inextricable relationship between *Oliva*’s membership in [the protected] social group[ ] and his refusal to pay rent.” *Id.*; accord, e.g., *Perez Vasquez v. Garland*, 4 F.4th 213, 224-227 (4th Cir. 2021) (finding the Board erred in focusing exclusively on “the immediate trigger for the gang’s extortion demands and death threats” and holding nexus requirement satisfied because the record demonstrated that “the gang targeted Petitioner, and not some other person, because of her familial relationship to her husband” (internal quotation marks omitted)).

*Hernandez-Avalos v. Lynch* provides another example. There, the Board concluded that cartels threatened an applicant because she refused to allow her son to engage in criminal activity, not because of her family membership. 784 F.3d 944, 949 (4th Cir. 2015). The Fourth Circuit rejected that reading of the record as “excessively narrow” and instead looked to why the applicant, “and not another person was threatened.” *Id.* at 949-950.

So too here. Ms. Alor-Reyes, “and not another person” was persecuted because her identity has made her exceedingly vulnerable to the cartels, *id.*—even if the “immediate trigger” for violence was Ms. Alor-Reyes’s refusal to sell her body, *Alvarez Lagos*, 927 F.3d at 247. A “full

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on the nexus requirement, and the Board’s prior opinion erred in conflating these two inquiries. It should not do so again.

reading of the record leaves no doubt” of that. *Bringas-Rodriguez*, 850 F.3d at 1073. The Board should reverse the Immigration Judge’s contrary decision.

**B. The Immigration Judge’s nexus analysis overlooked the underlying causes of cartel violence against transgender women.**

Looking beyond the “immediate trigger” means asking why an applicant has become vulnerable to persecution “in the first place.” *Oliva*, 807 F.3d at 60. The answer is not hard to find when it comes to transgender women: They are the most marginalized members of Mexico’s society. The Immigration Judge’s cramped interpretation of the nexus requirement ignores that critical point.

One obvious reason Mexican cartels target transgender women is that violence against them largely goes unpunished. Steeped in rigid patriarchal norms, police openly refuse to investigate cases brought by transgender women. *See* Transgender Law Center, *supra*, at 12. And having learned from past negative interactions with the police, transgender women just do not report the crimes. They know from experience that their pleas for help will be at best met with “stereotypes and prejudice,” and may even result in violence *at the hands of* the police. U.N. Hum. Rts. Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, Addendum: Mission to Mexico, ¶ 86, U.N. Doc. A/HRC/26/32/Add.1 (Apr. 28, 2014), <https://tinyurl.com/yt8fv9em>; *see infra* Section II.A.

The heartbreaking narratives of Immigration Equality’s clients bear out these reports. Take Janet’s<sup>5</sup> case. One morning, as she was walking to work, a truck full of cartel members blocked her path. They were “going to take” her, they said, because she is “running around here with [her] faggot behavior.” They brought her to a house where she would be held, tied up, for three months. During those months they repeatedly tortured her, including mutilating her earlobes because she

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<sup>5</sup> All client names are pseudonyms. Client narratives are on file with the *amici*.

“liked wearing earrings” and severely beating her buttocks with a wooden paddle to “see her bruised.” They also repeatedly and savagely raped her, to the point where she needed several rounds of rectal surgery when she finally managed to escape. Still, Janet felt scared to go to the police because “it was well known that the police worked together with the cartels.” She did not even want to go to the *hospital*, because she was convinced that the cartel would find her there and the police would refuse to protect her. Finally, at the behest of her dying grandfather, she reported the crimes. The response? Police laughed at her, passing her around from officer to officer to repeat (and relive) her traumatic story. At day’s end, she returned to a home ransacked—according to witnesses—by the cartel: either a striking coincidence or a predictable outcome of reporting a crime to police in league with her abusers.

Janet is not alone. *Amici*’s transgender clients routinely report harrowing accounts of being kidnapped, tortured, and raped by Mexican cartels *because* they are transgender—and because the police refuse to protect them.

Other factors compound transgender women’s vulnerability to the cartels. Many are put out on the street when families discover they are transgender. Inter-Am. Comm’n on H.R., Situation of Human Rights in Mexico, OEA/Serv.L/V/II., Doc. 44/15 (Dec. 31, 2015), <https://tinyurl.com/m8kzkspm>; *Trans Women in Mexico Fight for Justice As Murders Go Unpunished*, NBC News (Sept. 10, 2019, 10:09 AM EDT) (“NBC News”), <https://tinyurl.com/ekxy5afk>. Others leave to escape emotional, physical, and often sexual abuse at the hands of their families. See, e.g., Marshall K. Cheney et al., *Living Outside the Gender Box in Mexico: Testimony of Transgender Mexican Asylum Seekers*, 107 Am. J. Pub. Health 1646 (2017) (“Cheney”), <https://tinyurl.com/rvs8yjfs> (reciting horrific accounts of family violence suffered by Mexican transgender women, such as being raped by male relatives, only to be blamed

for the rape and ostracized from the family); Transgender Law Center, *supra*, at 21 (estimating 45% of transgender women in Mexico City “experienced abuse from their families”). Altogether, as many as 70% of transgender women and girls in Latin America have been estimated “to run away from or be thrown out of their homes.” Transgender Law Center, *supra*, at 21.

Once forced from their childhood homes, transgender women encounter “rampant employment discrimination,” keeping them on the streets. *Id.* at 23; NBC News; *see also* ‘We Don’t Want Any More Murderers’: A Fight for Justice in Mexico, Al Jazeera (Mar. 31, 2020), <https://tinyurl.com/vey9e7xc> (reporting that “[w]orkplace discrimination makes it particularly difficult for transgender women to find work in the formal economy”). Although “the law prohibit[s] discrimination with respect to employment,” the Mexican government does “not effectively enforce” it. Bureau of Democracy, Hum. Rts., & Lab., U.S. Dep’t of State, 2020 Country Reports on Human Rights Practices: Mexico 43 (last visited March 10, 2022), <https://tinyurl.com/2p8jce2d>. As many as 35% of LGBTQ+ people have been refused employment and 26% have been fired due to their identity. *See* Immigr. & Refugee Bd. of Canada, Mexico: Situation and Treatment of Sexual Minorities, Particularly in Mexico City, Cancún, Guadalajara, and Acapulco; State Protection and Support Services Available (2012-July 2015) (Aug. 18, 2015), <https://tinyurl.com/ycmuajw8>.

All of this adds up to a simple truth. Socially and economically marginalized, and “[w]ithout protection from [their] family or the police,” transgender women in Mexico are easy targets for cartels. Transgender Law Center, *supra*, at 21. This truth is not up for debate.<sup>6</sup>

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<sup>6</sup> E.g., Oscar Lopez, *Death of Trans Doctor in Mexico Sparks New Fears Over LGBT+ Violence*, Reuters (June 19, 2020, 3:33 PM) (“Reuters 2020”), <https://tinyurl.com/yadxsvkm> (reporting that “[t]ransgender women are among the most vulnerable to . . . drug cartel-fueled violence”); Austrian Ctr. for Country of Origin & Asylum Rsch. & Documentation, Austrian Red Cross, Mexico: Sexual Orientation and Gender Identity (SOGI), COI Compilation 35 (May 2017) (“Austrian Red

Treating cartel crime against transgender women as if it arises in a vacuum, as the Immigration Judge did, ignores this reality and asylum law. The evidence must be viewed “holistically, with an eye to the full factual context” and “not by focusing myopically on a particular word or fact.” *Oliva*, 807 F.3d at 60; *see Bromfield v. Mukasey*, 543 F.3d 1071, 1078 (9th Cir. 2008) (“[I]f [an applicant] is able to show a ‘pattern or practice’ of persecution against a group of which she is a member, then she will be eligible for asylum.” (quoting *Mgoian v. INS*, 184 F.3d 1029, 1035 (9th Cir. 1999))). The Immigration Judge failed to do so here. The Board should reverse.

## **II. The Mexican Government Is Unwilling And Unable To Protect Transgender Women.**

Mexican police are unwilling and unable to protect transgender women. As the Ninth Circuit has explained, “[c]ountry conditions evidence shows that police specifically target the transgender community for extortion and sexual favors, and that Mexico suffers from an epidemic of unsolved violent crimes against transgender persons.” *Avendano-Hernandez*, 800 F.3d at 1081; *see also Xochihua-Jaimes v. Barr*, 962 F.3d 1175, 1187 (9th Cir. 2020) (noting “[e]xtensive record evidence” that “LGBTQ individuals are at risk throughout Mexico”); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094, 1089 (9th Cir. 2000) (observing that “gay men with female sexual identities . . . are a separate social entity within Latin American society,” “subjected to greater abuse than others”).

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Cross”), <https://tinyurl.com/syt7tr3j> (concluding that “transgender women are . . . at risk from the drug cartels”); Org. for Refugee, Asylum & Migration, *Blind Alleys: The Unseen Struggles of Lesbian, Gay, Bisexual, Transgender and Intersex Urban Refugees in Mexico, Uganda and South Africa – Part II: Country Findings: Mexico* 15 (Feb. 2013) (“Org. for Refugee, Asylum & Migration”), <https://tinyurl.com/35huz78n> (finding that transgender women who try to relocate to Mexico City often suffer “forced recruitment into gangs”); UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* 27 (Oct. 2015), <https://tinyurl.com/zr9xzexh> (explaining that transgender women are at risk for “forced sex work” *because they are transgender*).

“Considered alongside” evidence of a transgender person’s “past torture,” these “country conditions reports . . . compel the conclusion that [Ms. Alor-Reyes] is likely to be tortured if returned.” *De La Luz Ramos v. Garland*, 861 F. App’x 145, 148 (9th Cir. 2021) (mem.). But the Immigration Judge ignored that record evidence and instead erroneously concluded that the Mexican government did not acquiesce in Ms. Alor-Reyes’s torture and that Ms. Alor-Reyes lacked a well-founded fear of future persecution. In affirming the Immigration Judge’s decision, the Board’s prior decision committed the same error. The Board should not make the same mistake again. *See Godoy-Ramirez v. Lynch*, 625 F. App’x 791, 793 (9th Cir. 2015) (mem.) (chastising the agency for “ignor[ing] record evidence of the government’s indifference to harms suffered by the transgender community, including police inaction”).

**A. Country reports reveal unchecked violence against transgender women, often at the hands of police.**

The U.S. Government, intergovernmental organizations, nonprofits, and reporters on the ground all agree that “[d]espite recent legal reforms,” “rates of violence against transgender women are higher than ever” in Mexico. Transgender Law Center, *supra*, at 4. In 2018, Mexico became the world’s second-deadliest country for transgender people, with 261 transgender women slain in just 6 years. NBC News, *supra*. The numbers have only continued to climb since then. In 2019, the overall murder rate increased by 2.5%, but the number of LGBTQ+ murder victims went up by a staggering 27%. Reuters 2020, *supra*. Nine transgender women were murdered in Veracruz alone—Ms. Alor-Reyes’s hometown. Bureau of Democracy, Hum. Rts., & Lab., U.S. Dep’t of State, 2019 Country Reports on Human Rights Practices: Mexico 27 (last visited Mar. 10, 2022), <https://tinyurl.com/ekr6uz6e>. Overall, the life expectancy for a Latin American transgender woman is just 35. U.N. Hum. Rts.: Off. of High Comm’r, Statement on the Occasion of International Transgender Day of Visibility (Mar. 29, 2018), <https://tinyurl.com/3dx9ts4k>;

*accord Avendano-Hernandez*, 800 F.3d at 1081 (“Mexico has one of the highest documented number of transgender murders in the world.”).

Survey and anecdotal evidence paint an even bleaker picture. According to one study, 66% of transgender women in Mexico have been physically assaulted. Immigr. & Refugee Bd. of Canada, Responses to Information Requests (Aug. 18, 2019) (“Immigr. & Refugee Bd. of Canada”), <https://tinyurl.com/5dyt6k96>; *see also* Austrian Red Cross, *supra*, at 26 (60% of Mexican transgender women surveyed have been victims of violence because of their gender identity, with police responsible for 14% of that violence). And six out of 10 LGBTQ+ people report knowing an LGBTQ+ person who was murdered in Mexico in the three years preceding the survey. Bureau of Democracy, Hum. Rts., & Lab., U.S. Dep’t of State, 2016 Country Reports on Human Rights Practices: Mexico 27 (Apr. 7, 2017) (“2016 Country Report”), <https://tinyurl.com/4vw7pxux>.

Many of these murders are unusually “grotesque,” manifesting animus towards the gender non-conforming victims. U.N. Hum. Rts. Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in Follow-up to His Mission to Mexico, ¶ 62, U.N. Doc. A/HRC/32/39/Add.2 (May 6, 2016) (“Special Rapporteur 2016”), <https://tinyurl.com/3p4smw2e>. In 2020, a transgender woman was “found in a trash bin with her face pummeled beyond recognition by a rock.” NBC News, *supra*. Another was “tortured to death . . . while her family heard her last moments over the phone.” *Id.* Yet another was found “naked and strangled in her bedroom.” *Id.* “No suspects have been publicly identified in any of those cases.” *Id.*; *see also* Gerardo Sánchez Guadarrama, *Así Es el Homicidio de Odio por Lgbtttifobia en México*, CC News (May 2, 2020), <https://tinyurl.com/dy4tue42> (reporting that 60 of the 473 homicides committed against transgender women between 2013 and 2018 bore torture marks).

And just a few months, the bodies of two more LGBTQ+ women were found in trash bags alongside a highway. Jesse O'Neill, *Texas Couple Tortured, Murdered and Dismembered in Mexico*, N.Y. Post (Jan. 19, 2022, 9:35 PM), <https://tinyurl.com/2p8ts2de>. The women, who were recently married and left behind three children, were “tortured, shot and dismembered.” *Id.*

It is no wonder that the U.S. Department of State has termed assault on transgender women one of the “most significant human rights issues” in Mexico. Bureau of Democracy, Hum. Rts., & Lab., U.S. Dep’t of State, 2017 Country Reports on Human Rights Practices: Mexico 1 (last visited Mar. 10, 2022), <https://tinyurl.com/3enbbfk4>.

Police compound that violence, through inaction and action alike. Studies overwhelmingly conclude that crimes against transgender women are rarely investigated.<sup>7</sup> Instead, “authorities often denigrate” transgender women “to trivialize attacks.” Special Rapporteur 2018, *supra*, ¶ 75. And when crimes *are* investigated, penalties are rarely imposed. Perpetrators are often allowed “a gay or trans ‘panic’ defence,” which excuses crimes committed upon “discovering the victim’s sexuality or gender identity.” Lily Wakefield, *Mexico Is Now the World’s Second-Deadliest Country for Trans People*, PinkNews (Sept. 11, 2019), <https://tinyurl.com/2439rh9z>.

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<sup>7</sup> E.g., Transgender Law Center, *supra*, at 12; Jose A. Del Real, ‘They Were Abusing Us the Whole Way’: A Tough Path for Gay and Trans Migrants, N.Y. Times (July 11, 2018), <https://tinyurl.com/yxman7kf>; U.N. Hum. Rts. Council, Report of the Special Rapporteur on the Situation of Human Rights Defenders on His Mission to Mexico, ¶¶ 48-50, 75, U.N. Doc. A/HRC/37/51/Add.2 (Feb. 12, 2018) (“Special Rapporteur 2018”), <https://tinyurl.com/2vc6jzwj>; Letra S: Sida, Cultura y Vida Cotidiana, A.C. et al., Human Rights Violations Against Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) People in Mexico: A Shadow Report 2, 5-6 (July 2014), <https://tinyurl.com/3bkadp3m>; Michael Santos, LGBTQ Pol’y J., Harv. Kennedy Sch., *In the Shadows: The Difficulties of Implementing Current Immigration Policies in Adjudicating Gender-Diverse Asylum Cases in Immigration Courts* (Nov. 14, 2012), <https://tinyurl.com/em7scjac>; Univ. of Toronto Fac. of L., Int’l Hum. Rts. Program, Mexico: Country Report for Use in Refugee Claims Based on Persecution Relating to Sexual Orientation and Gender Identity 5-9 (Aug. 7, 2009), <https://tinyurl.com/fetks9z8> (all concluding that crimes against transgender women are committed with impunity).



As just one example, consider the highly-publicized murder of Paola. Despite the perpetrator's admission that he shot Paola when he realized she was "not a woman," witness testimony, and a video of a literal smoking gun, the judge ruled that "police lacked sufficient evidence" to prosecute and released him after just 48 hours. Jo Tuckman, *The Killing of a Trans Woman in Mexico City Highlights Harsh Reality for LGBTQ in the Americas*, Vice News (Oct. 11, 2016, 12:00 PM), <https://tinyurl.com/cx5323mh>. Overall, less than 3% of LGBTQ+ murders in Mexico since 2013 have resulted in convictions. NBC News, *supra*.

Overwhelming evidence also confirms that police are often the *perpetrators* of the crimes against transgender women—if not their "primary predators." Transgender Law Center, *supra*, at 11, 18.<sup>8</sup> Transgender asylum seekers from Mexico consistently recount horrific instances of police rape, extortion to avoid rape or arrest, and sexual assault in all-male cells without police intervention—after being arrested for offenses like talking outside a gay bar or wearing female clothing. Cheney, *supra*, (cataloging "representative excerpts from asylum declaration[s]" (capitalization altered)). Mary—another Immigration Equality client—suffered just this kind of abuse when she reported being shot at by the local cartel. Rather than investigate the report, five uniformed officers kidnapped her, raped her, burned her with a cigar, cut her with a razor blade, and beat her with a stone. *See also* Transgender Law Center, *supra*, at 13, 18 (reporting that transgender women stopped by police "frequently faced extortion," were forced to undress, forced

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<sup>8</sup> *See also* Special Rapporteur 2016, *supra*, ¶ 62 (noting "complicity of investigative authorities" in LGBTQ+ murders); 2016 Country Report, *supra*, at 27 ("Civil society groups claimed police routinely subjected LGBTI persons to mistreatment while in custody."); Bureau of Democracy, Hum. Rts., & Lab., U.S. Dep't of State, 2018 Country Reports on Human Rights Practices: Mexico 9 (Mar. 13, 2019), <https://tinyurl.com/du4ya43m> ("Six of 10 LGBTI prisoners were victims of abuse such as sexual violence and discrimination at the hands of other prisoners or security officials"); Immigr. & Refugee Bd. of Canada, *supra* (reporting that 31% of transgender women survey respondents had been detained because of their transgender status).

to take HIV tests, forced into all-male cells, and threatened into “sexual favors”); *Avendano-Hernandez*, 800 F.3d at 1081 (“Country conditions evidence shows that [Mexican] police specifically target the transgender community for extortion and sexual favors . . .”).

The most charitable reading of these country conditions is that “the Mexican government is unable to effectively protect transgender women.” Transgender Law Center, *supra*, at 14.

**B. Requiring victims to report abuse to the police is not the law.**

Unbridled police violence easily explains why transgender women think twice before reporting assaults. Other reasons include “concerns about disclosing sexual orientation or gender identity, fears of retaliation, lack of confidence in national agencies, a long history of corruption in Mexican investigative agencies, and doubts about the agency’s ability to investigate and remedy” violations. Transgender Law Center, *supra*, at 11; *see also* Immigr. & Refugee Bd. of Canada, *supra* (“the two main reasons for not reporting are mistrust and alleged inaction of the authorities”).

These concerns become even more pressing when cartels are involved: Transgender women who already find themselves “targeted by police and cartels separately” understandably forgo “report[ing] any discrimination or violence” suffered at the hands of cartels. Transgender Law Center, *supra*, at 20; *see also* Org. for Refugee, Asylum & Migration, *supra*, at 11 (“Many refugees view the police as being more harmful than helpful and are therefore reluctant to ask for protection.”).

That is why there is no “per se reporting” requirement for individuals seeking asylum; as the Ninth Circuit has warned, adopting such a requirement would transform nonreporting into a “‘gulf’ never to be quite filled, especially for those who were victimized as children, the least likely persons to report their abuse to authorities.” *Bringas-Rodriguez*, 850 F.3d at 1065, 1070 (citing *Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir. 2004)); *Ornelas-Chavez v. Gonzales*, 458

F.3d 1052, 1058 (9th Cir. 2006) (an applicant need not have reported “persecution to the authorities if he can convincingly establish that doing so would have been futile or have subjected him to further abuse”); *accord, e.g., Portillo Flores v. Garland*, 3 F.4th 615, 635 (4th Cir. 2021) (en banc) (“[W]e have rejected a per se reporting requirement”).

**C. The Immigration Judge impermissibly ignored the country conditions and the law.**

Bucking the tide of that precedent and record evidence, the IJ concluded that the Mexican government did not acquiesce to Ms. Alor-Reyes’s persecution because she had only twice talked to the police about her assaults and did not follow up. *See* IJ Dec. at 13-15. The Board’s prior decision reached the same conclusion. *See* BIA Dec. at 2-3 (observing that “the police twice listened to the respondent’s report of assaults,” the officers “instructed” her to “contact the police if [she] saw [her] attackers again,” but Ms. Alor-Reyes “did not follow[ ] up with a complaint”).

That was error, for two reasons. First, the Immigration Judge wrongly faulted Ms. Alor-Reyes for not reporting every instance of abuse. *See* IJ Dec. at 13-14. But the Ninth Circuit has “never required that an applicant report [their] alleged torture to public officials to qualify for relief under CAT.” *Ornelas-Chavez*, 458 F.3d at 1060. The Immigration Judge’s decision also ignores the factual record, replete with explanations of why Ms. Alor-Reyes did not seek more help. Ms. Alor-Reyes testified that the police themselves had “targeted” her “[b]ecause [she] was a trans girl.” Tr. 10/17/2019 at 76. They used derogatory terms, *id.*, told her she “was not welcome,” Tr. 10/17/2019 at 75, and threatened “to send [her] back” to her hometown, *id.* She also testified that going to the police would have been futile at best: She knows at least one transgender woman who tried to report an assault but the police “did not pay any attention to her.” *Id.* at 55, 65. But most of all, she was afraid the police “could turn [her] in to the cartels.” *Id.* at 58, 66. *See Avendano-Hernandez*, 800 F.3d at 1079-80 (abuse by police officers constitutes governmental “acquiescence”).

The country-conditions evidence Ms. Alor-Reyes submitted thoroughly backed up her story. *E.g.*, Grp. Ex. 4, Tab A at 1 (“Human rights issues included . . . involvement by police . . . , sometimes in coordination with criminal organizations, in . . . violence targeting lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons.”); *id.*, Tab D at 72 (describing, with examples, the Mexican police’s track record of “arbitrary detention, torture, and other human rights violations” towards transgender women); *id.* at 74 (establishing “links between Mexican government, police and organized crime” (capitalization altered)); *id.*, Tab E at 106 (concluding that the Mexican police “[f]ail[ed] to prevent, and to appropriately investigate and prosecute killings of LGBTI individuals because of their sexuality”); *id.*, Tab J at 168 (citing “collusion between police and drug cartels” as the primary reason “many human rights violations against marginalized populations in Mexico occur with impunity”).

Ignoring that record was error. “Though the [agency] need not cite every piece of evidence supporting an applicant’s claim, where potentially dispositive testimony and documentary evidence is submitted, [it] must give reasoned consideration to that evidence.” *Godoy-Ramirez*, 625 F. App’x at 793 (internal quotation marks omitted); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (agency’s findings of fact must reflect consideration of “the whole record”). And it must “undertake an ‘individualized consideration’ of how country conditions would affect [Ms. Alor-Reyes] as a transgender woman.” *Godoy-Ramirez*, 625 F. App’x at 793-794 (quoting *Nuru v. Gonzales*, 404 F.3d 1207, 1218 n.6 (9th Cir. 2005)). Neither the Immigration Judge nor the Board’s prior opinion did any of that.

Second, the Immigration Judge wrongly concluded that because the police listened to Ms. Alor-Reyes’s reports when she did report her abuse, there was no evidence of government acquiescence. *See* IJ Dec. at 13-14. The Immigration Judge relied on two strained reasons in

support of that conclusion. The first was that Ms. Alor-Reyes “provided police, in response to their detailed questions, significant information that she had about the [thumb-cutting] incident” and “told the officers that she would be willing to testify.” *Id.* at 14. But succumbing to a police interrogation while in the hospital the day after her thumb was brutally sawed off says nothing about Ms. Alor-Reyes’s beliefs about what would happen had she returned to the police and pressed for an investigation. And the fact that the police never investigated—much less caught—her abusers despite that “significant information,” *id.*, underscores that the hospital interview was just for show.

The Immigration Judge’s second reason is even more astounding. He concluded that the police were willing to go after cartels because “the criminals who sought to recruit [Ms. Alor-Reyes] consistently threatened further harm to her should she report their threats or assaults to police.” *Id.* Let that sink in. The Immigration Judge used vile threats made by people who kidnapped Ms. Alor-Reyes several times over, pistol whipped her, and cut off her thumb as *proof* that the police were effective at investigating cartel crime. It was “evidence,” the Immigration Judge concluded, of “the extraordinary efforts of the Mexican government and the courageous efforts of individual police” to combat cartel violence. *Id.* at 15.

That reasoning unabashedly flouts conclusions of the U.S. Government (including the Department of Justice itself), intergovernmental organizations, respected research universities, and media reports that the Mexican police are unwilling to investigate cartel crime—especially when that crime involves transgender women. *See supra* 13-18. The Board should reverse.

### **III. The Board’s Prior Opinion Misgendered Ms. Alor-Reyes, Confirming That It Improperly Disregarded The Causal Connection Between Her Identity And Her Persecution.**

Both the Board’s prior opinion and the Immigration Judge’s decision misgendered Ms. Alor-Reyes, despite the fact that the government itself has stipulated to her identity as a transgender

woman. BIA Dec. at 1 & n.1; *see id.* at 2 (going as far as to replace feminine pronouns in a quotation from the Immigration Judge’s decision); *see also, e.g.*, IJ Dec. at 1, 6-7 (alternating between she/her and he/him pronouns, despite stating that the Immigration Judge would “refer to [Ms. Alor-Reyes] in the feminine in this decision”). Misgendering can cause severe psychological harm. It erodes the legitimacy of the immigration system. And it attests to a general willingness to downplay the nexus between transgender women’s identities and the harms they face. The Board should not commit the same error on remand.

A growing body of research documents how misgendering persons inflicts measurable psychological and physiological harms. Chan Tov McNamarah, *Misgendering as Misconduct*, UCLA L. Rev. (May 11, 2020), <https://tinyurl.com/jcz8h7km>; Kevin A. McLemore, *A Minority Stress Perspective on Transgender Individuals’ Experiences With Misgendering*, 3 Stigma & Health 53, 53 (2018), <https://tinyurl.com/3afufuv> (noting transgender individuals find misgendering stigmatizing and psychologically distressing). Using the proper pronouns, by contrast, is associated with lower depression, suicidal ideation, and suicidal behavior. Stephen T. Russell et al., *Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation and Behavior Among Transgender Youth*, 63 J. Adolescent Health 503 (2018).

Medical research aside, judges have an ethical duty to ensure that all people are treated fairly and respectfully in their courts. *See* Judicial Conference, Code of Conduct for United States Judges, Canon 3(A)(3) (2019). They must “avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.” *Id.* (commentary on Canon 3(A)(3)). That duty extends to administrative tribunals, as well. *See* Exec. Off. for Immigr. Rev., Dep’t of Just., Ethics and Professionalism Guide for Members of the Board of Immigration Appeals 3 (May 4, 2011), <https://tinyurl.com/paj2awj3> (“A Board Member should be alert to avoid behavior, including

inappropriate demeanor, which may be perceived as biased.”). Unsurprisingly, courts and judicial ethics bodies across the nation have spoken strongly against misgendering because the practice can “make [litigants] feel unwelcome,” “distract from the adjudicative process,” and “undermine public confidence in the judiciary’s impartiality.” N.Y. State Advisory Comm. on Jud. Ethics, Opinion 21-09 (Jan. 28, 2021), <https://tinyurl.com/ekv62sty>.<sup>9</sup>

This misgendering did not just erase Ms. Alor-Reyes’s past experience of violence. It strongly “suggest[s]” that neither the Immigration Judge’s nor the Board’s prior decisions were “focused on [Ms. Alor-Reyes] as a person” or “guided . . . by a fair consideration of the facts.” *Patel v. Att’y Gen. of U.S.*, 435 F. App’x 155, 160 (3d Cir. 2011) (internal quotation marks omitted) (vacating Board order using a masculine pronoun to refer to a female asylum applicant). After all, if the Agency could not bring itself to recognize Ms. Alor-Reyes’s gender on a piece of paper, how could it have understood the real-life causal connection between her identity and her persecution? *See Avendano-Hernandez*, 800 F.3d at 1075 (admonishing the agency for “ironically exhibiting some of the same misconceptions about the transgender community” that applicants face back home by failing to “recognize the difference between gender identity and sexual orientation” and “refusing to allow the use of female pronouns”).

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<sup>9</sup> See also, e.g., *Matter of M.E.B.*, 126 N.E.3d 932, 934 n.1 (Ind. Ct. App. 2019) (reprimanding the trial court for misgendering a litigant and directing it to “show far greater respect (as well as objectivity and impartiality)”; *G. G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 716 (4th Cir. 2016) (finding misgendering “display[s] hostility”), *vacated*, 137 S. Ct. 1239 (2017) (mem.); *Hampton v. Baldwin*, No. 3:18-CV-550-NJR-RJD, 2018 WL 5830730, at \*2 (S.D. Ill. Nov. 7, 2018) (quoting medical testimony that “misgendering transgender people can be degrading, humiliating, invalidating, and mentally devastating”); *Doe v. City of New York*, 976 N.Y.S.2d 360, 364 (N.Y. Sup. Ct. 2013) (concluding purposeful misgendering is “not a light matter, but one which is laden with discriminatory intent”).

The Board should not make the same mistakes again on remand—either with respect to Ms. Alor-Reyes’s pronouns and gender identity, or with respect to her credible fears of persecution based on her transgender identity. The Immigration Judge’s decision should be reversed.

### **CONCLUSION**

For the forgoing reasons, the Board should reverse the Immigration Judge’s decision.

March 10, 2022

Respectfully submitted,

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## **PROOF OF SERVICE**

On March 10, 2022, I, Danielle Desaulniers Stempel, mailed or delivered a copy of the foregoing **PROPOSED BRIEF OF AMICI CURIAE IMMIGRATION EQUALITY, ET AL., IN SUPPORT OF RESPONDENT** and any attached pages via FedEx to the following address:

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