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

In the Matter of:)
)
Anthony,*)
Respondent)
) August 15, 2013
In removal proceedings)
_____)

**REQUEST TO APPEAR AS *AMICI CURIAE* AND BRIEF
OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.,
THE CENTER FOR HIV LAW AND POLICY, THE INTERNATIONAL GAY
AND LESBIAN HUMAN RIGHTS COMMISSION, NATIONAL ASSOCIATION
OF SOCIAL WORKERS, NATIONAL ASSOCIATION OF SOCIAL WORKERS
CONNECTICUT CHAPTER, THE FELLOWSHIP OF AFFIRMING MINISTRIES,
THE NATIONAL BLACK LEADERSHIP COMMISSION ON AIDS, THE NATIONAL
BLACK JUSTICE COALITION, AMERICAN CIVIL LIBERTIES UNION,
AND AMERICAN CIVIL LIBERTIES UNION OF CONNECTICUT
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT**

* Caption and references throughout have been changed to protect anonymity.

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

Under Rules 2.10 and 4.6(i) of the Practice Manual of the Board of Immigration Appeals (the “Board”), Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”), The Center for HIV Law and Policy (“CHLP”), the International Gay and Lesbian Human Rights Commission (“IGLHRC”), the National Association of Social Workers (“NASW”), the National Association of Social Workers Connecticut Chapter, the Fellowship of Affirming Ministries (“FTAM”), the National Black Justice Coalition (“NBJC”), the National Black Leadership Commission on AIDS (“NBLCA”), the American Civil Liberties Union (the “ACLU”), and the American Civil Liberties Union of Connecticut (the “ACLU-CT”) request leave to appear and file a brief as *amici curiae* in these proceedings in support of Respondent Anthony. Counsel for Respondent consents to this motion. Counsel for proposed *amici* contacted counsel for the Department of Homeland Security (“DHS”), and DHS has advised counsel for proposed *amici* that DHS takes no position on the filing of this brief.

Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, and transgender (“LGBT”) people and individuals with HIV through impact litigation, education, and public policy work. Its work and experience in legal and policy issues involving sexual orientation provide Lambda Legal with unique information and perspective that will assist the Board in understanding the challenges that many lesbian, gay, or bisexual (“LGB”) individuals face in accepting and disclosing their sexual orientation and that the life experiences of many LGB people differ markedly from prevailing stereotypes that appear throughout mainstream culture.

Lambda Legal advocates for the rights of LGB immigrants, and its work has helped establish important LGB immigration jurisprudence, including *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000) (landmark case recognizing that individuals may be protected against persecution based on their sexual orientation), *Vega v. Gonzales*, 183 Fed. App'x 627 (9th Cir. 2006) (same), and *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997) (same). Lambda Legal's expertise on LGB immigration issues is particularly relevant and will assist the Board as it considers the complex sexual orientation issues presented in this appeal.

CHLP is a national legal and policy resource and strategy center for people living with HIV and their advocates. CHLP works to reduce the impact of HIV on vulnerable and marginalized communities and to secure the human rights of people affected by HIV. As the only national legal organization dedicated exclusively to HIV advocacy and education, CHLP knows firsthand that unfounded fears about HIV perpetuate stigma, discrimination, and homophobia. In turn, uninformed assumptions and stereotypes concerning gay men reinforce HIV stigma and phobia.

IGLHRC works to secure the full enjoyment of human rights for all people and communities subject to discrimination or abuse on the basis of sexual orientation, gender identity or expression, and/or HIV status. A U.S.-based nonprofit, non-governmental organization, IGLHRC effects this mission through advocacy, documentation, coalition building, public education, and technical assistance.

NASW was founded in 1955 by the merger of seven predecessor social work organizations. It is the largest membership organization of professional social workers in the world, with 135,000 members and 56 chapters throughout the United States and abroad. The Connecticut Chapter of NASW has 3,270 members throughout the State. With the purpose of

developing and disseminating standards of social work practice while strengthening and unifying the social work profession as a whole, NASW provides continuing education, enforces the *NASW Code of Ethics*, conducts research, publishes books and studies, promulgates professional standards and criteria, and develops policy statements on issues of importance to the social work profession.

NASW's members are expected to meet professional ethical standards for cultural competency which include "seek[ing] to understand the nature of social diversity and oppression with respect to race, ethnicity, national origin, color, sex, sexual orientation, gender identity or expression, age, marital status, political belief, religion, immigration status, and mental or physical disability" and "act[ing] to prevent and eliminate domination of, exploitation of, and discrimination against any person, group, or class" on the bases mentioned above. NASW Code of Ethics, Standard 1.05, 6.04 (2008). NASW's policy statement, *Immigrants and Refugees*, supports policies and procedures that "promote social justice and avoid racism and discrimination or profiling on the basis of race, religion, country or origin, gender, sexual orientation, or other grounds, . . . ensure due process for all individuals, including immigrants," and ". . . ensure fair treatment and due process in accordance with international human rights for all asylum seekers." *Social Work Speaks* 197, 200 (9th ed. 2012).

TFAM is a multicultural coalition of Christian and trans-denominational churches and ministries across the country. Rooted in the experience of the Black church, TFAM is a resource agent for the unity and support of radically inclusive churches and ministries reaching the furthest margins of society to serve all in need, particularly LGBT people of color. Through TFAM Global Ministries – The Global Justice Institute, a joint initiative with the Metropolitan Community Churches, TFAM provides faith-based advocacy and pastoral care for LGBT

movements located in particularly hostile countries around the world. TFAM is currently supporting congregations and advocacy groups working toward LGBT equality in Africa, Eastern Europe, Asia, Latin America, and the Caribbean.

NBJC is a civil rights organization dedicated to empowering Black LGBT people. NBJC's mission is to end racism and homophobia. NBJC's work bridges the gaps between the movements for racial justice and LGBT equality. NBJC envisions a world where all people are fully-empowered to participate safely, openly and honestly in family, faith and community, regardless of race, class, gender identity, or sexual orientation. Homophobia and the anti-gay oppression it engenders has severely limited the extent to which Black LGBT people live open, authentic lives. Within the Black community itself, the need to eradicate homophobia is critical to fostering acceptance and respect for LGBT people within their families, churches, and communities.

Founded in 1987, NBLCA is the largest not-for-profit organization of its kind in the United States. NBLCA's mission is to educate, mobilize, and empower Black leaders to meet the challenge of fighting HIV/AIDS and other health disparities in their local communities. Working with a broad spectrum of community leaders, including clergy, public officials, medical practitioners, business and civic professionals, social policy experts, and the media, NBLCA achieves its mission through capacity-building training, education, policy and advocacy, testing and referrals, research and evaluation, resource and leadership development. Through its work, NBLCA understands how HIV phobia and stigma perpetuate homophobia.

The ACLU is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU-CT is one of its statewide affiliates, with six regional

chapters, five campus chapters, and approximately 6,000 members. The ACLU Foundation of Connecticut is the litigation arm of the ACLU-CT, and engages in litigation in state and federal courts. The ACLU and the ACLU-CT advocate for equal rights of LGBT people and have significant experience litigating cases involving discrimination against LGBT people, and privacy rights, including *C.N. v. Wolf*, 410 F. Supp.2d 894, 903 (C.D. Cal. 2005) (establishing that a student has a right to privacy with respect to her sexual orientation, even where she was out to friends at school). Because this case involves issues of stereotypes about gay people and the nature of coming out, it is of significant concern to the ACLU, the ACLU-CT and their members.

The communities served by *amici* are directly affected by the Board's interpretation and application of immigration law to LGB immigrants. Individuals at imminent risk of persecution and torture, based on their actual or perceived sexual orientation, in countries where same-sex sexual conduct is criminalized should not be denied immigration protection simply because their life experiences do not conform to stereotypes or assumptions about LGB people and their identity.

Amici are familiar with the parties' presentations below, and with Respondent's presentation on appeal, and believe that the public interest will be served by additional argument and information concerning the diversity of life experiences of people who are LGB. Those experiences often depart from prevailing stereotypes and other assumptions premised on uniformity of LGB life experiences. *Amici* are also familiar with the pernicious way that homophobia is intensified by HIV phobia and stigma, including in Jamaica. *Amici* have an interest in ensuring that LGB immigrants are not placed at imminent risk of persecution and

torture simply because their life experiences differ from prevailing stereotypes and assumptions, and seek to present relevant information concerning those issues.

Though concurring in Respondent's legal analysis, *amici*'s discussion of these issues does not duplicate that briefing or the briefing of other known potential *amici*. Rather, *amici* draw on their knowledge of, and experience with, LGB individuals – including immigrants – and seek to provide insight into why, in the interest of justice, the Board should reverse the decision of the Immigration Judge (“IJ”) and remand for further proceedings that will ensure that any decision on Respondent's application for immigration relief is based on evaluation of the evidence presented, not on stereotypes or other unfounded assumptions about sexual orientation.

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

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SUMMARY OF ARGUMENT

Amici submit this brief to assist the Board in evaluating complex issues related to sexual orientation, the coming out process, and the varied life experiences of people who are lesbian, gay, or bisexual (“LGB”). Respondent Anthony, a 49-year-old immigrant from Jamaica, seeks deferral of removal under the U.N. Convention Against Torture (the “CAT”) based on fear that if deported to Jamaica, he will face persecution and torture based on his actual or perceived sexual orientation.

The Immigration Judge (the “IJ”) acknowledged that Anthony presented evidence that he is gay – including his own testimony, the testimony of a former male romantic partner, and a declaration from a current romantic partner. However, the IJ concluded that Anthony did not prove that he is gay, in relevant part, because portions of the evidence were purportedly “inconsistent” with being gay, including Anthony’s testimony that while coming to terms with his sexual orientation, he had sexual relationships with women as well as men and fathered two children, and evidence that Anthony has not come out to some people in his life. But no two people who are LGB share identical life experiences, and significant numbers of lesbian and gay people have had romantic or sexual relationships with different-sex partners. While many people who are lesbian or gay have had romantic or sexual relationships only with same-sex partners, it is improper to assume that a past that includes relationships with different-sex partners is incompatible with being gay.

In evaluating evidence, a fact finder must tread carefully to avoid relying on unqualified assumptions that fail to account for the social and cultural complexities of human experience, including an LGB individual’s ability to accept and disclose his or her sexual orientation. The IJ’s finding of perceived inconsistencies between Anthony’s past experiences

and his sexual orientation reflect inappropriate assumptions and stereotypes about sexual orientation and the coming out process.

In immigration claims, as in other areas, courts have consistently held that reliance on stereotypes is impermissible. Stereotypes – even ones that may seem benign – are assumptions based on generalities. Accordingly, even a stereotype that may be true of many or even most people sharing a particular characteristic may not be true of every person sharing it. For an individual seeking immigration protection based on a characteristic that would subject him or her to persecution and torture, there are extremely high stakes: both the safety and life of the individual are at risk. For this reason, courts have repeatedly insisted that immigration claims be adjudicated based on the evidence presented, and not on stereotyped assumptions about people in a particular social group or with certain attributes or characteristics.

Authoritative sociological and psychological research establishes that for many LGB people, accepting one's sexual orientation often can be a prolonged process fraught with denial and shame, particularly amid pervasive social stigma, bias, prejudice, discrimination, and violence. Beyond the challenges of self-acceptance, disclosing one's sexual orientation to family or revealing it more publicly poses a daunting challenge to a person struggling to come to terms with his or her sexual orientation. Accordingly, evidence of an individual's sexual orientation in a legal proceeding should be evaluated on a case-by-case basis, taking into consideration cultural and social factors identified in scholarship on the subject. Assessment of this evidence must not rely on preconceived assumptions and stereotypes, including misconceptions about when someone could or should have come out, or how a person's life and relationships should have unfolded before, during, or after coming out. Lesbians and gay men who have had sexual relationships with different-sex partners are well-documented in research and scholarship on

sexual orientation and the coming out process, and by the existence of organizations formed to support individuals and families in such circumstances.

This brief addresses the assumptions that are inextricable from a conclusion that Anthony's life experiences on his journey toward recognizing, understanding, and accepting his sexual orientation are "inconsistent" with him being gay. Anthony's testimony described a process of coming to terms with being gay that has much in common with the experiences of many LGB people, as evidenced by authoritative sociological and psychological research. As studies show, accepting that one is LGB is often a dynamic and prolonged process involving struggles with feelings of denial and shame, especially for individuals raised under cultural or religious precepts that reject same-sex sexual conduct as "unnatural" and morally reprehensible. For these reasons, it is not uncommon for LGB people to try to conform to cultural, religious, and societal expectations, including having relationships with different-sex partners. Similarly, it is not unusual for LGB individuals to be cautious when evaluating whether to reveal their sexual orientation to some people but not others, depending on the nature of the relationship(s), the particular social setting, and the potential ramifications of disclosure to a particular individual. The IJ's reliance on unsubstantiated assumptions that greatly oversimplified the complex and myriad ways in which LGB people accept and express their sexual orientation was error that requires reversal.

The harm caused by the IJ's erroneous assumptions is compounded here because the government is attempting to forcibly remove Anthony to Jamaica, where men who are, or are perceived to be, gay face at imminent risk of persecution and torture based on their actual or perceived sexual orientation. Same-sex sexual conduct and intimacy are outlawed under the Jamaican penal code. Police systematically fail to investigate charges in anti-LGB crimes and,

instead, openly target LGB individuals for torture through harassment, violence, and persecution. Homophobia permeates mainstream Jamaican society, with inflammatory anti-gay rhetoric coming from entertainers, religious leaders and Jamaican government officials. Moreover, LGB individuals are also frequently presumed to be living with HIV and, as a result, face widespread HIV phobia and stigma and are perceived to be “diseased,” regardless of their HIV status.

Given these hostile conditions, *amici* respectfully urge the Board to reverse the denial of Anthony’s application for deferral of removal under the CAT.¹ Alternatively, the Board should remand this case for further proceedings with direction to consider the evidence of Anthony’s sexual orientation without reliance on stereotypes and other unfounded assumptions about LGB people.

ARGUMENT

Courts have consistently held, in many contexts, that stereotypes are impermissible substitutes for individualized assessments. In reviewing immigration decisions, courts of appeals have repeatedly explained the importance of avoiding evidentiary analysis that relies on stereotypes when evaluating a claim premised on fear of persecution based on sexual orientation.

As the IJ acknowledged, Anthony presented evidence to establish that he is gay; he presented his own testimony, testimony of a former male romantic partner, and a declaration from a current romantic partner. *See* IJ at 99-100, 102. Nevertheless, the IJ concluded that Anthony did not meet his burden of proving that he is gay, in relevant part, because of other

¹ Because *amici*’s areas of expertise focus on LGBT and HIV issues, this brief does not address issues related to Respondent’s appeal of the IJ’s denial of his Motion to Terminate Proceedings, which raises issues distinct from the LGBT issues in his application for deferral of removal under the CAT.

evidence that the IJ deemed “inconsistent” with Anthony being gay, including Anthony’s testimony that during the time that he was in the process of coming to terms with being gay, he had sexual relationships with women as well as men and fathered two children, as well as evidence that Anthony has not come out to some people in his life. *See* IJ at 99-106.

Like many people, Anthony’s identity includes his sexual orientation, race/ethnicity, culture, national origin, and religion – interactive components that cannot be viewed properly in isolation from one another. The process of coming out has elements that may be considered universal, but for each LGB individual, his or her process of coming to terms with their sexual orientation and integrating that component into other aspects of his or her identity is unique, because each has his or her own mix of personal characteristics.² For many LGB people, their background and other characteristics complicate their coming out process, particularly for people raised with cultural and religious precepts that regard LGB people as aberrant or abhorrent.³ For these individuals, their background and religion can trigger a particularly difficult coming out experience.⁴

² “Coming out refers to the process in which one acknowledges and accepts one’s own sexual orientation. It also encompasses the process in which one discloses one’s sexual orientation to others.” American Psychological Association (the “APA”), *Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients* (Feb. 18-20, 2011) at Introduction (hereinafter “APA’s *LGBT Guidelines*”), available at <http://www.apa.org/pi/lgbt/resources/guidelines.aspx>. The APA’s *LGBT Guidelines* are intended to educate and train practitioners on psychosocial issues. *See also* Kenneth M. Cohen & Ritch C. Savin-Williams, *Coming Out to Self and Others: Developmental Milestones*, in *The LGBT Casebook 17* (Petros Levounis, Jack Drescher & Mary E. Barber, eds., 2012) (“The process of coming out to self and others is frequently an evolving and lengthy one. It consists of multiple developmental milestones, the order and timing of which vary across individuals.”) (hereinafter, “Cohen, *Coming out to Self and Others*”); National Association of Social Workers (NASW), *Social Work Speaks: Lesbian Gay and Bisexual Issues* (hereinafter “NASW *LGBT Issues*”), available at <http://www.socialworkers.org/pressroom/2013/lesbiangayandbisexualissues.pdf>.

³ Because Anthony’s claim involves sexual orientation, this brief focuses on sexual orientation issues. Nevertheless, cultures that regard LGB people as aberrant or abhorrent are

Evidence of a person's sexual orientation should not be evaluated based on assumptions about whether a gay man would ever have sex with women. In light of the strong pressures to conform to heterosexuality, a lesbian or gay man should not be denied immigration protection simply because he or she tried to satisfy social expectations.

The risk of harm caused by the IJ's erroneous assumptions about LGB individuals is compounded because the government is attempting to forcibly remove Anthony to Jamaica, which has been described as the "most homophobic place on earth." Tim Padgett, *The Most Homophobic Place on Earth?*, Time (Apr. 12, 2006), available at <http://www.time.com/time/world/article/0,8599,1182991,00.html>. Same-sex sexual conduct and intimacy between men are criminalized under Jamaican law. Police systematically fail to investigate charges in anti-LGB crimes, and, instead, they openly target LGB individuals for

often, if not always, also hostile to people who are transgender, and perpetrators of anti-LGBT violence seldom pause to consider whether they are attacking someone because they are lesbian, gay, bisexual, or transgender. See, e.g., Human Rights Watch, *Jamaica: Cross-Dressing Teenager Murdered* (Aug. 1, 2013), available at <http://www.hrw.org/news/2013/08/01/jamaica-cross-dressing-teenager-murdered> (a sixteen-year-old was attacked by a mob and died from multiple stab wounds and a gun wound). Nevertheless, for the purposes of this brief, particularly in Section II, *amici* focus on the plight of LGB individuals in Jamaica.

⁴ Cohen, *Coming Out to Self and Others* at 27 ("[M]embers of conservative racial/ethnic groups or religiously orthodox communities may have limited opportunities for sexual authenticity if they wish to avoid real or fear widespread social admonishment in their own country or culture. . . . [C]loseted sexual minorities may arrange to marry someone also on the 'down low' and thus serve as each other's cover while publicly fulfilling societal mandates for heterosexual coupling and, perhaps, procreation."); Linda D. Garnets, et al., *Lesbian, Gay Male, and Bisexual Dimensions in the Psychological Study of Human Diversity*, in *Psychological Perspectives on Lesbian, Gay, and Bisexual Experiences* 10 (2d ed. 2003) ("The lesbian, gay male, and bisexual community encompasses diversity in terms of gender, race, ethnicity, age, socioeconomic status, relationship status, parenthood, health, disabilities, politics, and sexual behavior. . . . Individuals who are both ethnic and sexual minorities may encounter sexual prejudice from both mainstream society, from their own racial/ethnic communities, and from the predominant Anglo gay, lesbian, and bisexual communities."); Brian Dodge, *Individual and Social Factors Related to Mental Health Concerns Among Bisexual Men in the Midwestern United States*, 12 J. Bisexuality 223 (2012) ("race/ethnicity . . . is intricately linked with sexuality."), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3383005/>; *NASW LGBT Issues* ("The complexities of multiple forms of oppression cannot be ignored.").

torture through harassment, violence, and persecution. Homophobia is pervasive in mainstream Jamaican society, with inflammatory anti-gay rhetoric coming from entertainers, religious leaders, and Jamaican government officials. Furthermore, LGB individuals are commonly presumed to be living with HIV and, as a result, face widespread HIV phobia and stigma and are perceived to be “diseased,” regardless of their HIV status.

I. Because the coming out process is unique to each individual, evidence of a particular person’s coming out experience cannot be measured against stereotyped assumptions.

The evidence concerning Anthony’s life experiences while coming to terms with his sexual orientation are consistent with the experiences of other LGB individuals reflected in the scholarship describing the often difficult and painful process of acknowledging, accepting, and disclosing one’s LGB sexual orientation. Because the experiences and life histories of LGB people are so diverse, concluding that particular evidence is “inconsistent” with being gay raises the specter of improperly relying on stereotyped assumptions that courts have consistently admonished decision-makers to avoid.

A *Courts have consistently deemed it inappropriate to rely on stereotypes, in immigration proceedings and other areas.*

When important legal rights and protections are involved, courts have held that reliance on stereotypes is not a permissible substitute for the assessment of the particular individual’s attributes and qualities.

Stereotyping is a category-based response that contrasts with fully individualized, attribute-by-attribute consideration of another person. Susan T. Fiske, *Controlling Other People: The Impact of Power on Stereotyping*, *American Psychologist* 621, 623 (1993). Although psychologists once thought that only bigoted people used stereotypes, research has shown that individuals systematically use stereotypes in their implicit decision-making. *See, e.g.*, Anthony

G. Greenwald, Debbie E. McGhee & Jordan L.K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. Personality & Soc. Psych. 1464, 1478 (1998) (finding that individuals exhibit implicit attitudes “that can mask personally or socially undesirable evaluative associations, such as [negative] ethnic and racial attitudes . . .”).

The CAT makes the safety of individuals facing removal to countries in which they would be persecuted a matter of paramount importance. Indeed, as the Supreme Court has recognized, “[d]eportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Because of the danger that can result from removal, courts have consistently admonished that it is critically important that immigration judges evaluate applicants’ claims based solely on evidence in the record and avoid relying on stereotypes about a person’s sexual orientation.

In *Ali v. Mukasey*, the Second Circuit vacated a denial of an asylum claim because it rested, in part, on improper observations that were “impermissibly derive[d] from stereotypes about homosexuality and how it is made identifiable to others.” 529 F.3d 478, 492 (2d Cir. 2008) (vacating decision because immigration judge erred in finding “that no one would perceive [the applicant] as a homosexual unless he had ‘a partner or cooperating person’”). Other circuit courts, too, have vacated immigration decisions where the findings were premised on stereotyping. *See, e.g., Razkane v. Holder*, 562 F.3d 1283, 1286-88 (10th Cir. 2009) (vacating decision because IJ’s observations reflected “homosexual stereotyping . . . preclud[ing] meaningful review”); *Todorovic v. Holder*, 621 F.3d 1318, 1326-27 (11th Cir. 2010) (vacating decision where asylum denial was based on IJ’s observations, including that applicant would not face persecution because applicant “[did] not appear to be overtly gay,” which were “offensive”

and, more importantly, “were not credibility findings based on demeanor, but instead driven by stereotypes about how a homosexual is supposed to look”); *Shahinaj v. Gonzales*, 481 F.3d 1027, 1029 (8th Cir. 2007) (vacating decision because, in part, IJ “discredited . . . claim of persecution due to homosexual orientation [was] based on the IJ’s “personal and improper opinion [that the applicant] did not dress or speak like or exhibit the mannerisms of a homosexual”). Just as stereotypes about how a gay person appears or acts are an impermissible basis for denying immigration relief, stereotypes and assumptions about the experiences of LGB people as they live through the coming out process should not be permitted to be grounds for denying such relief.

But stereotypes need not be egregious or demeaning to interfere with an individual’s ability to be evaluated based on his or her own individual attributes. The Supreme Court has held, in a range of contexts, that reliance on stereotypes can result in unfairness and injustice. The Court has held that laws violated equal protection where they differentiated based on stereotyped assumptions about men and women, such as: that men, not women, are breadwinners, *Califano v. Westcott*, 443 U.S. 76 (1979) (benefit programs); that women, not men, remain (or should remain) at home, *Orr v. Orr*, 440 U.S. 268 (1979) (domestic relations); and that women between the ages of 18 and 21 are more mature than men of the same age, *Stanton v. Stanton*, 421 U.S. 7 (1975) (age of majority). Legislatures, too, have confronted persistent gender-based stereotypes concerning parents and children in the domestic relations context. Historically, courts placed children with their mother when different-sex parents separated, because women, rather than men, were presumed the most appropriate caregiver. Matthew B. Firing, Note, *In Whose Best Interests? Courts’ Failure to Apply State Custodial Laws Equally Amongst Spouses and Its Constitutional Implications*, 20 Quinnipiac Prob. L. J.

223, 224 (2007). Many states responded to custody decisions employing that presumption by enacting gender neutral statutes adopting a “best interest” standard, requiring that courts forego any gender-based presumption and evaluate custody solely on the basis of what is best for the child. *Id.* at 229-30.

Thus, in many contexts, it has been recognized that reliance on stereotypes is not compatible with fair adjudication. When evaluating immigration claims, as when evaluating employment or child custody matters, decisions must be based on an individualized assessment, not on generalizations and misconceptions about what attributes are necessary to qualify as a member of some particular social group.

- B. *The coming out process can be lengthy and challenging for people who feel denial, shame, and fear about their sexual orientation because of social stigma, bias, and prejudice.*

Considerable scholarship about LGB people has explained that bias, prejudice, and social stigma can further complicate the often difficult process of acknowledging, accepting, and disclosing one’s sexual identity. When viewed in this context, it is understandable that there are people who identify as lesbians and gay men, who have had sexual experiences – sometimes a significant number of sexual experiences and/or long-term romantic relationships – with different-sex partners. It is also understandable that a person who is LGB can be out of the closet somewhat selectively without having disclosed his or her sexual orientation to certain people, even close family members.

- 1. The coming out process may have universal elements, but it is unique for each LGB person.

Recognizing, accepting, and revealing to others that one is LGB is a process frequently referred to as “coming out.” APA’s *LGBT Guidelines* at Introduction; *see also* Jack Drescher, *The Closet: Psychological Issues of Being In and Coming Out*, 21 *Psychiatric Times*

11 (Oct. 1, 2004) (hereinafter, “J. Drescher, *The Closet*”) (“In the jargon of contemporary homosexual culture, those who hide their sexual identities are referred to as either *closeted* or said to be *in the closet.*”) (emphasis in original).

Research indicates that rather than a single event, coming out is a process, which may begin in childhood, adolescence, or at any stage of adulthood. Margaret Rosario, et al., *Predicting Different Patterns of Sexual Identity Development Over Time Among Lesbian, Gay, and Bisexual Youths: A Cluster Analytic Approach*, 42 Am. J. Community Psychol. 266 (2011), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3192490/> (noting “great[] variability” in the ages during which individuals undergo the process of coming out); Cohen, *Coming Out to Self and Others* at 17 (“The process of coming out to self and others is frequently an evolving and lengthy one. It consists of multiple developmental milestones, the order and timing of which vary across individuals.”).

For LGB individuals, the process of coming to recognize, acknowledge, and accept one’s sexual orientation – as well as whether to reveal it to others – is a process that is inherently psychologically complex. Indeed, “[i]n the developmental histories of gay men and women, periods of difficulty in acknowledging their [sexual orientation], either to themselves or to others, are often reported.” J. Drescher, *The Closet* at 11. “Closeted individuals frequently cannot acknowledge to themselves, let alone to others, their homoerotic feelings, attractions and fantasies.” *Id.* (noting that same-sex sexual attraction “is so unacceptable that it must be kept out of conscious awareness and cannot be integrated into [a] public persona”). Since same-sex sexual attraction is frightening to many people, some people have periods of their lives when they try to repress their identity to preserve their sense of an acceptable – that is to say, heterosexual – sexual orientation. Bryce McDavitt, et al., *Strategies Used by Gay and Bisexual*

Young Men to Cope with Heterosexism, 20 J. Gay & Lesbian Soc. Servs. 354 (Oct. 19, 2010), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2957017/> (finding that “suppressive behavior” is common); Cohen, *Coming Out to Self and Others* at 24 (“Stereotypes associated with terms such as *lesbian*, *bisexual*, and *gay* prevent some homoerotic individuals from recognizing and naming, in some form, their sexuality, and that can impede self-acceptance. . . . Permitting detailed expression of anticipated losses in relationships, identity, and expected heterosexual life, as well as shame-related personal beliefs (e.g., one is immoral, weak, mentally ill), facilitates the grieving that is often necessary for eventual acceptance.”). “Coming out to others can be fraught with danger,” and a “need to hide may be based on reasonable concerns.” J. Drescher, *The Closet* at 11.

Because of pervasive discrimination against LGB individuals, coming out can be a daily, unending process, during which even casual conversations involving self-disclosures that are routine for many people can place an LGB individual at risk for discrimination and violence. See, e.g., APA’s *LGBT Guidelines* at Guideline 1 (noting that “[l]iving in a heterosexist society inevitably poses challenges to people with non-heterosexual orientations”)⁵; J. Drescher, *The Closet* at 11 (“as gay people must decide on a daily basis whether to reveal and to whom they will reveal themselves, coming out is a process that never ends”); see also Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 820 (2002) (discussing the multiplicity of gay “closets,” and explaining that “[e]very encounter . . . erects new closets [that] . . . exact from at least [some] gay people new surveys, new calculations, new draughts and requisitions of secrecy or disclosure”) (alterations in original) (citation omitted).

⁵ Heterosexism is “the ideological system that denies, denigrates, and stigmatizes any non-heterosexual form of behavior, identity, relationship, or community.” APA’s *LGBT Guidelines* at Guideline 1.

Coming out is, therefore, an intensely personal process, and LGB individuals each do it in differing steps and stages. Because the process is so personal and no two people are exactly alike, mental health experts explain that “coming out to others needs to be addressed in a way that recognizes individual differences.” J. Drescher, *The Closet* at 11. The process of sexual identity development is not linear, and LGB individuals face continuous challenges in figuring out “when, to whom, and how . . . to disclose or reveal their sexual orientation.” Julie Carpineto, et al., *Young Men’s Perspectives on Family Support and Disclosure of Same-Sex Attraction*, 2 J. LGBT Issues in Counseling 53, 53-54 (2008), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3059305/> (finding that “identity formation is a continual and interactive process”).

Given the complex dynamics of the coming out process, it is understandable that a person who has come out may nonetheless be reluctant to disclose his or her sexual orientation in some circumstances, not only to his family, but also to strangers in certain in settings.

2. The coming-out process is complicated by discrimination, stigma, and violence.

Accepting that one is LGB can be difficult for many LGB individuals, but the difficulty of the process is compounded in the face of the entrenched social stigma, bias, prejudice, discrimination, and violence directed at sexual minorities in some cultures and communities. See, e.g., J. Drescher, *The Closet* at 15 (finding that coming out is significantly complicated by “social stigma, the severity of antihomosexual attitudes in the culture and the difficulties associated with revealing one’s sexual identity”); Gregory M. Herek, *Why Tell If You’re Not Asked? Self-Disclosure, Intergroup Contact, and Heterosexuals’ Attitudes Toward Lesbians and Gay Men in Psychological Perspectives on Lesbian, Gay, and Bisexual Experiences* 277 (Linda D. Garnets, et al., eds., 2d ed. 2003) (“Public revelation that one is a

homosexual can have serious negative consequences, including personal rejection and isolation, employment discrimination, loss of child custody, harassment, and violence.”). It is widely recognized that “lesbian, gay, and bisexual people face social stigma, heterosexism, violence, and discrimination.” APA’s *LGBT Guidelines* at Guideline 1. LGB people often face extreme antipathy and violence. In 2011, according to the U.S. Department of Justice’s Federal Bureau of Investigation (“FBI”), 20.8% of hate crimes “were motivated by a sexual orientation bias.” Press Release, FBI, FBI Releases 2011 Hate Crime Statistics (Dec. 10, 2012), *available at* <http://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2011-hate-crime-statistics>.⁶ Not surprisingly, “antigay victimization has been experienced by approximately 1 in 8 lesbian and bisexual individuals and by about 4 in 10 gay men in the United States.” APA’s *LGBT Guidelines* at Guideline 1. *See also* Kenneth T. Berrill, *Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences*, 5 J. Interpersonal Violence 274-94 (1990); Gregory M. Herek, *Hate Crimes Against Lesbians and Gay Men: Issues for Research and Policy*, 44 Am. Psychologist 948-55 (1989).

In the face of pernicious social and cultural prejudice that devalues LGB people and their relationships, accepting one’s sexual orientation can involve a particularly complex and prolonged process of transforming a “negative, stigmatized identity into a positive one.” Linda D. Garnets & Douglas C. Kimmel, *Identity Development and Stigma Management*, in *Psychological Perspectives on Lesbian, Gay, and Bisexual Experiences* 217 (Linda D. Garnets & Douglas C. Kimmel eds., 2d ed. 2003) (describing the “process of developing a positive sense of

⁶ FBI’s data further suggests that hate crimes against LGB individuals were rampant during the 1990s and early 2000s as well. *See, e.g.*, FBI, Hate Crime Statistics, 2002, *available at* <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2002> (approximately 16.7% of all hate crimes motivated by sexual orientation bias); FBI, Hate Crime Statistics 1996, *available at* <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/1996> (approximately 12% of all hate crimes motivated by sexual orientation bias).

identity in the social context of negative values about a core aspect of oneself”); *see also* Margaret Rosario, et al., *Different Patterns of Sexual Identity Development Over Time: Implications for the Psychological Adjustment of Lesbian, Gay, and Bisexual Youths*, 48 *J. Sex Res.* 3 (2012), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2914848/> (noting that the “formation and integration of a lesbian, gay, and bisexual [] identity can be a complex and often difficult process”).

For some LGB people, the earlier stages of the coming out process “are fraught with confusion and despair, marked by low self-acceptance and low self-esteem” as the individual struggles with the realization of two related concepts: first, that he or she is somehow “different”; and, second, that this “difference” is despised, undesirable, and socially unacceptable. Christopher J. Rowen, et al., *Correlates of Internalized Homophobia and Homosexual Identity Formation in a Sample of Gay Men*, 43 *J. Homosexuality* 77, 78 (2002). These psychosocial difficulties can be exacerbated by the internalization of social animosity directed toward LGB people, sometimes called “internalized homophobia.” David M. Frost & Ilan H. Meyer, *Internalized Homophobia and Relationship Quality Among Lesbians, Gay Men, and Bisexuals*, 56 *J. Counseling Psychol.* 97 (2010), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2678796/> (“Internalized homophobia represents ‘the gay person’s direction of negative social attitudes toward the self’ and in its extreme forms, it can lead to the rejection of one’s sexual orientation Furthermore, internalized homophobia may never be completely overcome, thus it could affect LGB individuals long after coming out”); *see also* APA’s *LGBT Guidelines* at Guideline 1 (explaining that “most lesbian, gay, and bisexual people have some level of internalized negative attitudes toward non-heterosexuality”).

Internalizing society's negative attitudes can cause significant psychological distress, often involving feelings of fear, denial, and shame. *See, e.g.*, David M. Huebner, et al., *The Impact of Internalized Homophobia on HIV Preventive Interventions*, 30 *Am. J. Cmty. Psychol.* 327 (2002) (hereinafter, "Huebner, *Internalized Homophobia*"); *see also* John E. Pachankis, et al., *Extension of the Rejection Sensitivity Construct to the Interpersonal Functioning of Gay Men*, 76 *J. of Consulting & Clinical Psychol.* 306, 307 (2008), *available at* <http://www.isipar.org/files/Pachankis%20et%20al%202008.pdf> (hereinafter, "Pachankis, *Rejection Sensitivity*") (noting that "[g]ay individuals may see themselves and other gay men as inferior, morally unacceptable, or shameful and may perceive that their sexual orientation has a negative impact on others").

During the time that individuals are beginning to understand and come to terms with their LGB identity, they can be even more acutely affected by prejudice, because their identity and coping skills are in early stages of development, and because they may lack adequate social support from others who will affirm their identity. *See* Huebner, *Internalized Homophobia*, at 330 (explaining that "[u]nlike other members of stigmatized groups, such as ethnic minorities, gay and lesbian children do not grow up with parents who share their stigmatized identity, and thus they have neither appropriate gay and lesbian role models nor parental buffers against the antagonistic culture"); *see also* APA's *LGBT Guidelines* at Guideline 1 (noting that LGB individuals may experience "a significant degree of minority stress . . . in the form of ongoing daily hassles (such as hearing anti-gay jokes) and more serious negative events (such as loss of employment, housing, custody of children, and physical and sexual assault)"); Ilan H. Meyer, Statement Before the U.S. Commission on Civil Rights, *Briefing on Peer-to-Peer Violence and Bullying: Examining the Federal Response*, 11 (May 13, 2011),

<http://williamsinstitute.law.ucla.edu/wp-content/uploads/Meyer-Statement-USCCR-May-2011.pdf> (noting that LGB “minority stress” can be manifested through “(a) chronic and acute prejudice events and conditions, (b) expectations of such events and conditions and the vigilance required by such expectations, (c) internalization of social stigma (internalized homophobia), and (d) concealing or hiding of one’s LGB identity”).

Because of discrimination, some people who are LGB feel “tolerated only when they are ‘closeted.’” APA’s *LGBT Guidelines* at Guideline 1 (explaining that “gay and bisexual men are not only confronted with sexual prejudice but also with the pressures associated with expectations for conformity to norms of masculinity in the broader society as well as in particular subcultures they may inhabit”).⁷ Thus, internalized biases not only can interfere with acceptance of one’s sexual orientation, but may also cause reluctance to disclose it to others.

The coming out process can take place over many years and is further drawn out by the very real risks of ostracism, discrimination, and violence that individuals often face when they are recognized or identified as being LGB. As a result, a person’s individual journey and experience of such difficulties must be taken into account when assessing whether the evidence “proves” his or her minority sexual orientation.

3. LGB individuals who are castigated by their own racial, ethnic, cultural, and religious communities face additional challenges in the coming out process.

For individuals raised with cultural and religious beliefs that regard LGB people and same-sex relationships as anathema, the sense of shame, fear, and vulnerability that can accompany acknowledging one’s LGB identity can be deeply-rooted and profound. *See, e.g.,*

⁷ A former partner, who testified in support of Anthony to confirm their six-month relationship, identifies as bisexual. Bisexuality is the sexual orientation of people who are attracted physically, emotionally, and sexually to members of both sexes. *See, e.g.,* APA’s *LGBT Guidelines* at Introduction.

Isaiah Crawford, et al., *The Influence of Dual-Identity Development on the Psychosocial Functioning of African-American Gay and Bisexual Men*, 39 J. Sex Res. 179, 179 (2002) (explaining that some “individuals must contend with the challenges of managing dual minority status (i.e., being African-American and gay or bisexual)”; see Christian Grov, et al., *Race, Ethnicity, Gender, and Generational Factors Associated With the Coming-Out Process Among Gay, Lesbian, and Bisexual Individuals*, 43 J. Sex Res. 115, 115 (2006) (hereinafter, “Grov, *Factors Associated With the Coming-Out Process*”) (noting that “[d]emographic factors like race, ethnicity, gender, and age play important roles in the coming out process”). In fact, “the belief that homosexuality is ‘always wrong’ [is] significantly associated with” certain minority communities, and “[n]egative attitudes toward homosexuality at the population level may inhibit [men who have sex with men] from coming out.” Sara Nelson Glick & Matthew R. Golden, *Persistence of Racial Differences in Attitudes Toward Homosexuality in the United States*, 55 J. Acquired Immune Deficiency Syndrome 516 (2010), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2974805/>.

Individuals who are racial, ethnic, or cultural minorities face the additional challenge of negotiating the beliefs regarding sexual orientation of not only mainstream, but also their particular minority culture. Cultural variation in “norms, values, beliefs and attitudes can be a significant source of psychological stress that affects the health and mental health of lesbians, gay men, and bisexual women and men.” APA’s *LGBT Guidelines* at Guideline 11. Thus, “the integration of multiple identities could pose challenges for lesbian, gay and bisexual people from diverse racial, ethnic, and cultural backgrounds.” *Id.*

Racial minorities may rely on their families as an important source of support in challenging negative ethnic stereotypes, but for members of all racial and ethnic groups, family

members are sometimes the most direct and painful source of negative stereotypes about the LGB community. *See, e.g.,* Caitlin Ryan, et al., *Family Rejection As A Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 *Pediatrics* 346, 350 (2009), *available at* <http://pediatrics.aappublications.org/content/123/1/346.full.pdf+html> (finding that “negative family reactions to an adolescent’s sexual orientation are associated with negative health problems in LGB young adults”); *see also* Pachankis, *Rejection Sensitivity*, at 312 (parental rejection of a child’s minority sexual orientation “can produce distorted schemas of self and others, such as the internalization of negative self-views and sensitivity to future rejection from others”).

Anti-LGB prejudice by family members frequently leaves LGB individuals feeling isolated, alienated and estranged from their family, depriving them not only of an important source of support for their sexual orientation, but also for their racial identity. As a result, individuals who are LGB *and* members of a racial minority may risk alienating themselves from the racial group that provides a critical buffer against larger societal racial biases, while struggling to find role models encompassing valid memberships in both LGB and racial minority communities. *See, e.g.,* Omar B. Jamil, et al., *Sexual and Ethnic Identity Development Among Gay/Bisexual/Questioning (GBQ) Male Ethnic Minority Adolescents*, 15 *Cultural Diversity & Ethnic Minority Psychol.* 203, 206 (2009), *available at* <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2846409/> (finding that “immersion into [an] ethnic community may be difficult due to heterosexism and homophobia within [an] ethnic community”).

Studies show that racial and ethnic minorities are less likely than Caucasians to be “out.” Grov, *Factors Associated With the Coming-Out Process*, at 118. As experts explain:

[d]eveloping multiple identities based on sexuality, race/ethnicity, and other factors can be difficult. Among [LGB] people of color, sexual identity often remains secondary or tertiary to other identities and roles. A person of color may prioritize the development of a racial/ethnic identity over a sexual identity in response to many psychosocial and environmental barriers associated with race, ethnicity, and socioeconomic status.

Id. (finding that racial and ethnic minorities experience “barriers of disclosure”).

In addition to race and ethnic identity, religious ideology often profoundly influences social and cultural views of sexual orientation. *See, e.g.*, Caitlin Ryan, et al., *Family Acceptance in Adolescence and the Health of LGBT Young Adults*, 23 *J. Child & Adolescent Psychiatric Nursing* 205, 208 (2010), available at http://familyproject.sfsu.edu/files/FAP_Family%20Acceptance_JCAPN.pdf (finding that “[c]hildhood family religiosity [is] also linked to family acceptance”); *see also* APA’s *LGBT Guidelines* at Guideline 12 (noting that some LGB individuals may experience “rejecting and hurtful religious experiences” from spiritual belief systems). Being raised with fundamentalist religious beliefs that condemn LGB people can greatly hinder the process of accepting one’s sexual orientation and coming out to others. *Id.* (noting that certain faiths have historically been “condemnatory (e.g., Christianity, Judaism, and Islam)”). In fact, the ridicule, harassment, discrimination, and violence against LGB people by those who insist their views are supported by religious teachings can have a devastating psychological effect. *Id.*

The inherently challenging coming out process can become extraordinarily difficult for individuals who struggle, over time, to reconcile fundamentalist religious and cultural ideologies with their sexual identity. For some people, this slow and difficult process may delay public disclosure of sexual orientation. Setting an overly high bar for proof of one’s

sexual orientation – one that does not take into account the circumstances of an individual’s family life and particular cultural norms – further traumatizes and punishes that person for having experienced the very fear, shame, and denial that complicated the coming out process in the first place.

4. Significant numbers of lesbians and gay men have had past romantic and sexual relationships with different-sex partners.

Because of widespread assumptions and expectations of heterosexuality, some lesbians and gay men have had sexual and romantic relationships with different-sex partners. But those experiences do not compromise or negate an individual’s lesbian or gay identity. Nor do those experiences diminish the legitimacy of his or her identity.

Scholarly research and news reports confirm what many people already know: some lesbians and gay men have had intimate relations with different-sex partners – often, but not always – before fully coming to terms with their own sexual orientation. *See, e.g.,* Amity P. Buxton, *A Family Matter: When a Spouse Comes Out as Gay, Lesbian, or Bisexual*, 1 *J. of GLBT Family Studies* 2, 49, 62 (2005) (estimating that “up to two million gay, lesbian, or bisexual adults in the United States have ever married [an individual of the opposite sex]”); Daryl J. Higgins, *Gay Men from Heterosexual Marriage: Attitudes, Behaviors, Childhood Experiences, and Reasons for Marriage*, 42 *J. of Homosexuality* 15, 15 (2002) (identifying internalized homophobia as a factor leading gay and bisexual men to marry women); Katy Butler, *Many Couples Must Negotiate Terms of ‘Brokeback’ Marriages*, *N.Y. Times Magazine* (Mar. 7, 2006) (estimating that 1.7 to 3.4 million women in the United States are or have been married to gay or bisexual men). While individual reasons vary, societal or family pressure and expectations of heterosexuality are a common thread. Some people may have been unaware of their sexual orientation early in their in life, others felt social or family pressure to be

heterosexual, and still others refused to accept their orientation because of internalized homophobia. *See, e.g.,* Buxton, *A Family Matter*, at 51; Higgins, *Gay Men from Heterosexual Marriage*, at 15.

The number of lesbians and gay men who have had different-sex relationships before identifying as lesbian or gay has led national organizations like COLAGE (a support network for people with a lesbian, gay, bisexual, transgender or queer parent) to provide support to the children and spouses of those relationships – including resources to handle a parent or spouse’s coming out process. *See, e.g.,* COLAGE, *Guide for when your Parent(s) Come Out as Gay, Lesbian, Bisexual, Transgender, and/or Queer*, available at <http://www.colage.org/wp-content/uploads/2013/05/When-your-parents-come-out-guide1.pdf>; Straight Spouse Network, *My Spouse Came Out Now What?*, available at <http://www.straightspouse.org/faq.php>.

Thus, the coming out process is different for everyone, and for some individuals it even includes sexual and romantic relationships with different-sex partners.

II. LGB individuals in Jamaica face discrimination and torture.

The IJ’s errors in denying Anthony’s application for deferral of removal under the CAT are especially acute in light of the deplorable conditions for LGB individuals in Jamaica. Anti-LGB discrimination is enshrined in Jamaica’s legal system, which criminalizes same-sex sexual conduct; police in Jamaica systematically fail to investigate, prosecute, or punish anti-LGB violence and frequently perpetrate violence against LGB individuals. Furthermore, homophobia pervades Jamaican social, cultural, and political life. Popular music encourages violence against LGB individuals, and the rhetoric of political and religious leaders endorses systemic homophobia, effectively rendering the LGB community politically powerless. Additionally, many Jamaicans perceive same-sex sexual conduct and HIV as inextricably linked.

LGB individuals – regardless of their HIV status – are thus perceived to be “diseased” and “morally impure.”

A. *The Jamaican legal system criminalizes same-sex sexual conduct and institutionalizes homophobia.*

Jamaica’s criminal code codifies a policy of intolerance of LGB individuals. *See, e.g., Bromfield v. Mukasey*, 543 F.3d 1071, 1078 (9th Cir. 2008) (finding that “there exists in Jamaica a pattern or practice of persecution of gay men”). Two Jamaican penal statutes – Article 76, an “anti-buggery” law, and Article 79, an “anti-indecency” law – criminalize same-sex sexual conduct, and arrests are made regularly under these laws.⁸ Jam. Penal Code, The Offences Against the Person Act §§ 76, 79 (1864), *available at* <http://www.supremecourt.gov.jm/sites/default/files/publications/Constitution.pdf>; *see also* Human Rights Watch, *Hated to Death: Homophobia, Violence, and Jamaica’s HIV/AIDS Epidemic* Vol. 16 No. 6 (B) at 23 (2004) (hereinafter, “Human Rights Watch, Hated to Death”), *available at* <http://www.hrw.org/reports/2004/jamaica1104/jamaica1104.pdf>.

In addition to criminalizing and prosecuting intimate same-sex conduct,⁹ the Jamaican government is directly responsible for acts of violence against LGB individuals. In addition to prosecution of gay men under Articles 76 and 79, police may arrest any person found “loitering” at night. Jam. Penal Code § 80. While the anti-loitering statute does not target LGB individuals specifically, the police use it to arrest and harass those perceived to be LGB. Human

⁸ Under Article 76, individuals convicted of engaging in anal sex may be sentenced to up to 10 years in prison. Jam. Penal Code, The Offences Against the Person Act § 76. Article 79 targets gay men specifically, making it criminal for two men to engage in any act of sexual intimacy. Jam. Penal Code § 79.

⁹ Even if a person can avoid being convicted, simply having been arrested and charged under those laws would make him a target for violence and persecution by the general public, particularly because the Jamaican press regularly publishes the names of individuals accused under anti-LGB laws. Human Rights Watch at 23-24.

Rights Watch at 34 (citation omitted). Although the government does not maintain official statistics concerning state violence against LGB individuals, advocacy organizations have compiled evidence of pervasive and brutal police violence against people who are – or are suspected of being – gay.¹⁰

Moreover, Jamaican police have a history of failing to investigate hate crimes. Several Jamaican officials have gone so far as to deny that gay individuals are targeted for hate crimes at all, despite the fact that the number of such crimes has continued to increase over the years.¹¹ *See* Human Rights Watch at 29. Even when Jamaican officials record anti-LGB hate crimes, they tend to classify them as “crimes of passion” between same-sex partners, despite clear contravening evidence. *Id.* By mischaracterizing these crimes, police manipulate hate crimes data while constructing a justification for not investigating these crimes. *Id.* (according to Jamaican police, “[m]ost of the violence against homosexuals is internal” crimes of passion and police involvement “is not a thing that people [in the community] want in these areas”). In this manner, police not only fail to control, but actually perpetrate and foster, the growing incidence of anti-LGB violence across the island.

¹⁰ In 2011 alone, there were twelve separate documented occurrences of public officials assaulting LGBT Jamaicans. U.K. Home Office, Country of Origin Information Report, Jamaica, 2013, *available at* <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/coi/jamaica/report-01-13.pdf?view=Binary>.

¹¹ While Jamaica’s government does not keep official records, Jamaica Forum for Lesbians, All-Sexuals and Gays (“J-FLAG”), Jamaica’s only LGBT rights organization, collects and documents information about known anti-LGBT attacks. In 2009, for instance, J-FLAG received reports of 27 hate-based attacks; in 2010, the number rose to 51; and during the first eight months of 2011 alone, 62 attacks were reported. J-FLAG at 11. Because those numbers represent only those attacks reported to J-FLAG, they underestimate the actual scope of the brutality and violence.

Furthermore, even when Jamaican authorities do characterize anti-LGB crimes as hate-based, a victim's sexual orientation is often deemed a mitigating, rather than aggravating, factor. J-FLAG at 17. Instead of receiving harsher penalties for committing a hate-crime, perpetrators are allowed to claim "self-defense" and receive significantly reduced sentences. For instance, after an allegedly gay clergyman was found dead at his home in 2006, the killer claimed that he had acted in self-defense to fend off the reverend's sexual advances and received a relatively lenient 12-year sentence based on this defense. Dan Wooding, *Anglican Priest Brutally Murdered in Jamaica*, Assist News Serv., Nov. 14, 2006, available at <http://www.assistnews.net/Stories/2006/s06110062.html>; Barbara Gayle, *Priest's Killer Gets 12 Years*, Jamaica Star, available at <http://jamaica-star.com/thestar/20090205/news/news2.html>.

B. *Homophobia is endemic in Jamaican Society.*

Homophobia permeates all aspects of Jamaican society. Not long ago, *Time* magazine labeled Jamaica the "most homophobic place on earth." Tim Padgett, *The Most Homophobic Place on Earth?*, *Time*, Apr. 12, 2006, available at <http://www.time.com/time/world/article/0,8599,1182991,00.html>. Rebecca Schleifer, an advocacy director at Human Rights Watch, has said that "Jamaica is the worst [country] any of us has ever seen." *Id.* The Jamaican government officially describes homosexuality as an issue of "great sensitivity in Jamaican society, in which cultural norms, values and religious and moral standards underlay a rejection of male homosexual behavior by a large majority of Jamaicans." Working Group on the Universal Periodic Review, Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Jamaica*, U.N. Doc A/HRC/16/14 (Jan. 4, 2011), available at http://www.upr-info.org/IMG/pdf/a_hrc_16_14_jamaica_e.pdf. A 2012 study of Jamaican attitudes toward same-sex relationships found that over 80% of respondents felt that same-sex or bisexual relationships were immoral. Ian Boxill, et al., *National Survey of*

Attitudes and Perceptions of Jamaicans Towards Same Sex Relationships: A Follow-Up Study 2
(July 21, 2012), available at

[http://www.aidsfreeworld.org/RSS/~~/media/Files/Homophobia/Jamaica%](http://www.aidsfreeworld.org/RSS/~~/media/Files/Homophobia/Jamaica%20National%20Survey%20on%20Homophobia.pdf)

[20National%20Survey%20on%20Homophobia.pdf](http://www.aidsfreeworld.org/RSS/~~/media/Files/Homophobia/Jamaica%20National%20Survey%20on%20Homophobia.pdf). According to one observer, “gay-bashing has become a kind of patriotism, an act in defense of the nation, and an integral part of the Jamaican identity.” Kelly Cogswell, *Jamaica’s Queer Obsession: Is it all That’s Holding the Country Together?*, The Gully (Mar. 10, 2005),

http://www.thegully.com/essays/gaymundo/050310_LGBT_jamaica_homoph.html. In addition to LGB persons, transgender Jamaicans face persecution in their communities. See, e.g., Human Rights Watch, *Jamaica: Cross-Dressing Teenager Murdered* (Aug. 1, 2013), available at <http://www.hrw.org/news/2013/08/01/jamaica-cross-dressing-teenager-murdered> (a sixteen-year-old was attacked by a mob and died from multiple stab wounds and a gun wound).¹²

Influential Jamaicans, including cultural and religious figures, stoke the country’s homophobic culture through inflammatory and discriminatory statements. Human Rights Watch at 13. Religious groups, particularly powerful social institutions in Jamaica, denounce homosexuality as a sin. *Id.* at 12. Religious leaders are outspoken critics of LGB individuals and vocal opponents of LGB rights. White at 353. Wellesley Blair, the Administrative Bishop for the New Testament Church of God, told a newspaper that he believed “[s]odomites who are caught should be beaten.” See Claredon Spaldings, *The Wrath of a Bishop*, The Gleaner (Feb. 28, 2007), available at <http://jamaica-gleaner.com/gleaner/20070228/news/news2.html>.

Political leaders exploit Jamaican homophobia to win elections and publicly engage in anti-LGB speech to gather political support. *Id.* at 5. Actual or perceived LGB

¹² For the purposes of this brief, *amici* focus on the plight of LGB individuals in Jamaica.

identity is used to smear opposing parties, and graffiti and popular discourse focus on the sexual orientation of politicians. Ruth C. White and Robert Carr, *Homosexuality and HIV/AIDS Stigma in Jamaica*, 7 *Culture, Health & Sexuality* 347, 352 (2005), available at http://assets00.grou.ps/0F2E3C/wysiwyg_files/FilesModule/lhommearme/20110706110658-ixrobagkeyprvumsy/Homosexuality_and_HIVAIDS_Stigma_in_Jamaica.pdf. In 2009, Ernest Smith, a member of the Jamaican Parliament, said in a remark targeted toward gay people, “because your behavioral pattern is in breach of all decency[,] . . . do not try to impose your filth on others, don’t force others to accept you and your filth.” Video: Violence and Venom Force Gay Jamaicans to Hide, available at http://www.youtube.com/watch?v=8uOqZkkJ_bQ. He also declared the existence of J-FLAG “illegal” and warned that its existence could lead to the formation of “similar illegal organizations” by “pedophiles.” *Outlaw J-FLAG – Smith – MP Says It Could Inspire Wave of Illegal Groups*, *The Gleaner* (Feb. 17, 2009), available at <http://jamaica-gleaner.com/gleaner/20090217/lead/lead6.html>. Similarly, in 2010, former Jamaican Prime Minister Bruce Golding stated during an interview that “encouragement or recognition of the appropriateness of the homosexual lifestyle is going to undermine the effectiveness of [the] family . . . and, in that process, undermine the basic fabric of society.” Video: Is Jamaica Homophobic? available at <http://www.youtube.com/watch?v=tKc8wwijVVU>.

Government discrimination and violence against LGB individuals is endemic, but it represents only a small fraction of the anti-LGB discrimination and violence committed in Jamaica. Private actors are responsible for the majority of attacks and killings. Anti-LGB verbal abuse is common. Deborah Bourne, et al., Hope Research Group and C-Change/FHI 360, *Stigma and Discrimination Against Men Who Have Sex with Men in Jamaica* 26 (2012), available at www.c-changeprogram.org/sites/default/files/Stigma-MSM-Jamaica.pdf. Men

perceived to be gay are attacked with derogatory slurs, such as “batty bwoy,” “batty man,” or “sodomite.” *Id.* Landlords openly discriminate after asking questions intended to find out if a potential tenant is gay, such as “Where is your girlfriend at sir?” *Id.* at 20. Cashiers and store clerks are often unwilling to assist customers who are perceived to be gay. *Id.* at 2. Upon discovering that an individual is gay, family members often become violent and eject that individual from the home. *Id.* at 26. Jamaicans “participate in, acquiesce, or passively observe” anti-gay discrimination, abuse and violence. *Id.* at 27.

C. *In Jamaica, homophobia is inextricably intertwined with HIV stigma.*

In Jamaica, the persecution of gay men is exacerbated by the population’s widely held perception of gay men as vectors of disease, particularly HIV. Many Jamaicans assume that all HIV-affected individuals are gay, and HIV becomes conflated with gay identity. As a result, deep-seated homophobia and HIV stigma¹³ converge to create a uniquely intensified form of torture and persecution for gay men, regardless of their HIV status. *See* Human Rights Watch at 2, 10; *see also* White, at 348. Anthony’s own testimony concerning his past experience reflects the way that gay men face torture and persecution in Jamaica not only based on sexual orientation, but also because of the perceived connection between same-sex sexual conduct and HIV. Transcript of Record at 280-81 (noting Anthony’s testimony that his mother was told “get your batty man son out of here . . . don’t bring disease”).

¹³ “[S]tigma exists when the following four interrelated components converge: 1) individuals distinguish and label human differences, 2) dominant cultural beliefs link labeled persons to undesirable characteristics (or negative stereotypes), 3) labeled persons are placed in distinct categories to accomplish some degree of separation of ‘us’ from ‘them,’ and 4) labeled persons experience status loss and discrimination that lead to unequal outcomes.” Anish P. Mahajan et al., *Stigma in the HIV/AIDS Epidemic: A Review of the Literature & Recommendations for the Way Forward*, AIDS (2008), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2835402/>. “[D]ynamic social/economic/political processes [] simultaneously produce and intensify stigma and discrimination.” *Id.*

In Jamaica, it is difficult to decouple homophobia and HIV stigma. Because of the pervasive homophobia in Jamaican society, all LGBT individuals – regardless of HIV status – consider HIV advocacy groups to be their only social outlets and safe spaces. Transcript of Record at 566-67 (Testimony of Dr. Ruth White: “I studied people who were gay, not people necessarily who had AIDS . . . many of those relationships were being maintained through AIDS organizations only because that was the only safe place for gay men in Jamaica”). Not surprisingly, HIV-advocacy efforts have been met with violence and persecution:

Because HIV/AIDS and homosexuality often are conflated, people living with HIV/AIDS and organizations providing HIV/AIDS education and services have also been targeted for violence. Both state and private actors join violent threats against gay men with threats against HIV/AIDS educators and people living with HIV/AIDS. In July 2004, for example, the Jamaican Forum of Lesbians, All-Sexuals and Gays (J-FLAG) received an email threatening to gun down “gays and homosexuals” and “clean up” a group that provided HIV/AIDS education

Human Rights Watch, at 5 (emphasis added); *see also* Byron Buckley, *Church Opposes Gay Stigma On HIV/AIDS Advocacy*, *The Gleaner*, Apr. 8, 2012 (reporting assertions by church leaders that “the homosexuals have used AIDS to push their agenda”), *available at* <http://jamaica-gleaner.com/gleaner/20120408/cleisure/cleisure4.html>; Karen DeYoung, *A Deadly Stigma in Caribbean*, *Wash. Post*, June 19, 2001 at A01, *available at* www.hartford-hwp.com/archives/43/287.html (reporting that homophobia and HIV stigma are so intertwined that Jamaica’s former Prime Minister was reportedly afraid that efforts to address the HIV epidemic “will fan rumors that he might be gay.”).

The relationship between LGB sexual orientation and HIV has been used to justify the continued criminalization of same-sex sexual conduct. Kay Bailey, *Tell Men Who Have Sex With Men The Truth*, *The Gleaner*, July 21, 2013, *available at* <http://jamaica-gleaner.com/gleaner/20130721/focus/focus4.html>. Because same-sex sexual conduct and

perceived HIV status work in tandem to trigger a unique form of persecution and torture, the dangers that gay men face in Jamaica cannot be considered based on sexual orientation alone. In fact, one's gay orientation triggers homophobia and HIV stigma, both of which are pathways to institutional bias and physical violence. A gay man who is forcibly removed to Jamaica will be susceptible to both the persecution that the LGBT community experiences and to the abuses perpetrated against people presumed to have HIV and their advocates.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Board to reverse the denial of Anthony's application for deferral of removal under the CAT. Alternatively, *amici* respectfully urge this Board to reverse and remand for further proceedings devoid of reliance – either explicit or implicit – on unfounded, stereotyped assumptions about the life experiences of people who are LGB.

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