

Colleen Cowgill
Emily Kyle

DETAINED

ROCKY MOUNTAIN IMMIGRANT ADVOCACY NETWORK (RMIAN)
7301 Federal Blvd, Suite 300
Westminster, CO 80030

Pro Bono Counsel for Respondent

**U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
AURORA IMMIGRATION COURT
AURORA, COLORADO**

In the matter of:)
)
)
HERNANDEZ GARCIA, Juan)
(AKA Ms. Garcia)) File No.: **A123-456-789**
)
In Removal Proceedings)
)
)

**RESPONDENT'S PRE-HEARING STATEMENT IN SUPPORT OF
PROTECTION UNDER THE CONVENTION AGAINST TORTURE**

Immigration Judge: Nina Carbone

Individual Hearing: March 1, 2021, at 8:30 am

I. INTRODUCTION

Respondent, Juan Hernandez Garcia, AKA Ms. Garcia (Ms. Garcia),¹ by and through undersigned pro bono counsel, submits this pre-hearing statement in support of her application for relief under Article III of the Convention Against Torture.²

Ms. Garcia is a twenty-eight-year-old transgender woman³ from Mexico who suffers from an array of severe psychiatric conditions. She has no immediate family, community or other support in Mexico. Ms. Garcia suffered past persecution and torture in the form of sexual and psychological abuse in Mexico. Further, she is more likely than not to suffer torture on account of her gender identity and mental health vulnerabilities if she is forced to return to Mexico. There is nowhere in Mexico where Ms. Garcia can be safe. Throughout the country, lesbian, gay, bisexual and transgender (LGBT) individuals, and especially transgender women, face extremely high levels of violence, often at the hands of police or government actors and underwritten by a culture

¹ The client's name and other identifying information have been changed to protect her identity.

² As argued in her Motion to Terminate, filed January 2, 2021, Ms. Garcia maintains that her 2015 conviction, discussed below, does not constitute an aggravated felony, and as such she is not removable as charged. However, given the court's decision on this issue finding that her conviction is an aggravated felony, Ms. Garcia acknowledges that her conviction would therefore constitute a "particularly serious crime" per se, under current case law, in turn precluding her from eligibility for asylum and withholding of removal.

³ Ms. Garcia is a transgender woman and has not had the opportunity to legally change her name and gender markers. She uses the preferred name of "Ms. Garcia" and counsel refers to her accordingly throughout this brief. The term "transgender" refers to people whose gender identity differs from the biological gender they were assigned at birth. Transgender persons may describe themselves using one or more or a variety of terms, including "transgender." Altering one's biological sex, or "transitioning", is not a one-step process. It is a complex process that occurs over time and can include personal, medical, and legal steps, including telling friends, family and co-workers, using a different name and gender pronouns, dressing differently, undergoing hormone therapy, and possibly one or more types of surgery. The exact steps involved in any particular person's transition vary greatly. *See generally* Tab II.B, Declaration and CV of Assistant Professor Andrea Bolivar, Ph.D., on Gender Identity and Country Conditions in Mexico.

of impunity. Accordingly, Ms. Garcia requests that this Court grant her application for protection under the Convention Against Torture.⁴

II. PROCEDURAL AND FACTUAL HISTORY

Ms. Garcia is anticipated to provide testimony at her merits hearing in accordance with the following statement of facts. Ms. Garcia was born in Guanajuato, Mexico, on September 15, 1992. *See* Tab I.H, Respondent’s Lawful Permanent Residency (LPR) Card. On or around May 21, 2008, Ms. Garcia was admitted to the United States as a lawful permanent resident (LPR). *Id.* All of her immediate family, including her mother, father, siblings and paternal grandparents, currently reside in California with either LPR status or U.S. citizenship.

Prior to coming to the United States, Ms. Garcia had difficulties from an early age. As her mother, Rosa Maria Garcia, recounts in her declaration, “When [s]he was around two years old, we went to the doctor and they informed us that [s]he had a developmental delay.” Tab I.F, Declaration of Respondent’s Mother, Rosa Maria Garcia, at ¶ 3. Around the age of five, after struggling in school, Ms. Garcia underwent a psychological evaluation and was diagnosed with an intellectual disability. *Id.* at ¶ 4. Ms. Garcia also recalls working with a mental health specialist in Mexico from the ages of six to eight. *See* Tab I.A, Psychological Evaluation by Elizabeth James, MD, and Amina Adi, MD, MPH [hereinafter “Medical Affidavit”], at ¶ 8.

When Ms. Garcia was around eight years old, she was sexually assaulted by her uncle. *See* Respondent’s I-589, Application for Asylum, Withholding of Removal, and Relief under the Convention Against Torture [hereinafter “Respondent’s Asylum Application”]; *see also*, Tab I.A, Medical Affidavit, at ¶ 9; Tab I.F, Declaration of Respondent’s Mother, at ¶¶ 9-12. She recalls that

⁴ Ms. Garcia requests leave to submit additional documents that may become available prior to the hearing and reserves the right to object to any exhibit or witness proffered by the Department of Homeland Security (“DHS” or “Department”) until she has the opportunity to inspect the evidence and waive objection.

she was going on a fishing trip with her father and two uncles. Tab I.A, Medical Affidavit, at ¶ 9. When the family arrived at their destination, her father and one other uncle left for a brief period to run an errand. *Id.* Ms. Garcia was left alone with the other uncle. *Id.* Her uncle raped and sexually assaulted her until her father returned. *Id.* After this traumatic experience, Ms. Garcia recalls experiencing “continued sadness, episodes of crying, and not wanting to return to school.” *Id.* at ¶ 10. When her parents later discovered what happened, Ms. Garcia recalls that they hugged her and they cried together, making her feel very supported. *Id.*

Ms. Garcia recalls that she started to realize she identifies as a woman around the age of eleven years old. *See* Respondent’s Asylum Application; Tab I.A, Medical Affidavit, at ¶ 16. As her mother recalls in her declaration, “Since [s]he was a young child in Mexico, [Ms. Garcia] told us that [s]he felt like a girl.” Tab I.F, Declaration of Respondent’s Mother, at ¶ 13. Ms. Garcia began openly identifying as a woman around 2017, while she was incarcerated. *See* Tab I.A, Medical Affidavit, at ¶ 16. As stated in her asylum application, “I dress and wear my hair like a woman and wear makeup when I have it.” *See* Respondent’s Asylum Application. She has also begun gender-affirming hormone treatment. *See* Tab I.A, Medical Affidavit; Tab I.C, Relevant Excerpts from Medical Records from GEO Group, Inc. [hereinafter “GEO Medical Records”].

When Ms. Garcia was about fifteen years old, she was admitted to the United States as an LPR. *See* Exh. 1, NTA. She adjusted status to that of an LPR based on a family petition. *See id.* Ms. Garcia has resided in the U.S. ever since. *See* Respondent’s Asylum Application. She has not returned to Mexico since her entry in 2009. *Id.*

In the United States, Ms. Garcia continued to have difficulties in school. *See* Tab I.A, Medical Affidavit, (“Ms. Garcia reported difficulties with naming common objects, reading, writing, and arithmetic. [...] Overall, Ms. Garcia’s high school educational records showed a

pattern of intellectual disability, oppositional behaviors, disciplinary actions, and individualized special education resources”) at ¶¶ 17, ¶¶ 36; Tab I.F, Declaration of Respondent’s Mother, at 2. She was again diagnosed as having borderline intellectual functioning and accordingly was enrolled in special education classes as a high school student. *See* Tab I.E, River High School District Special Education Triennial Review Summary.

Ms. Garcia also continues to struggle with an array of severe psychiatric conditions, including Major Depressive Disorder, Unspecified Anxiety Disorder, Gender Dysphoria, Gender Identity Disorders, Schizoaffective Disorder, Psychotic Disorder, Posttraumatic Stress Disorder, and Mood Disorder. *See* Tab I.C, GEO Medical Records; Tab I.D, Relevant Excerpts from Medical Records from Colorado Department of Corrections and Rehabilitation [hereinafter “CDCR Medical Records”]. In an independent evaluation, Dr. James and Dr. Adi confirmed Ms. Garcia’s diagnoses of Major Depressive Disorder and Gender Dysphoria, and added the following diagnoses: Other Specified Trauma and/or Stressor Related Disorder, Unspecified Personality Disorder, Intellectual Developmental Disorder, Pedophilic Disorder, and History of Alcohol Use Disorder. *See* Tab I.A, Medical Affidavit.

On July 22, 2015, Ms. Garcia was allegedly convicted of Lewd or Lascivious Acts with a Child in violation of California Penal Code § 288(a) and was sentenced to eight years of incarceration. *See* Tab I.J, Abstract of Judgment and Sentencing Minute Order. Based on the aforementioned, DHS initiated removal proceedings against Ms. Garcia on October 27, 2020, charging her as removable pursuant to INA § 237(a)(2)(A)(iii) for having committed an aggravated felony relating to sexual abuse of a minor. *See* Exh. 1, NTA. In Ms. Garcia’s timely pleadings on January 2, 2021, she admitted Allegations 1-4 and denied the sole charge of removability. She filed a Motion to Terminate on January 2, 2021. The Court sustained the

charge of removability on January 22, 2021. Ms. Garcia filed her application for relief on January 8, 2021⁵ and was set for her Individual Hearing on March 1, 2021.⁶

Should Ms. Garcia be permitted to live in the United States, she will be sponsored by her grandparents in Los Angeles, California, where she resided for many years prior to her incarceration and where her primary support network lives. *See* Tab I.I, Post-Release Behavioral Health and Self-Improvement Plan by Katherine Valentin, MSW [hereinafter “Post Release Plan”]. Ms. Garcia, with the support of her social worker, has identified plans to access family counseling, substance use support services, and psychiatric therapy upon her release. *Id.* She would like to complete her General Educational Development (GED) and obtain a diploma, with the ultimate goal of becoming a counselor and advocate for the transgender community. *Id.* Ms. Garcia will continue to have the support of her family and other members of the community, who would help her transition back to life in the United States. *Id.*; *see also* Declaration of Respondent’s Mother, at ¶16 (“My husband and I, our two other children, and my husband’s parents all live in California. We are here to provide [Ms. Garcia] support and to help make sure all of [her] needs are met if [she] is released from detention and allowed to stay here in the United States.”).

⁵ As explained in the cover page of her asylum application filing, Ms. Ms. Garcia filed her application on this date due to new regulations impacting asylum eligibility that were scheduled to take effect on January 11, 2021. *See* Respondent’s Asylum Application.

⁶ Counsel notes that a competency hearing was held in this case on December 14, 2020. On December 10, 2020, DHS submitted Respondent’s medical records from the GEO Aurora ICE Processing Center. *See* DHS’s Motion for Consideration of Medical/Mental Health Records, filed on December 10, 2020. As discussed *infra*, the medical records demonstrate that Respondent has been diagnosed with major depressive disorder, unspecified anxiety disorder, gender dysphoria, and gender identity disorders. *See id.* On December 14, 2020, the Immigration Judge found Respondent competent to proceed without appointed counsel.

III. ARGUMENT

Ms. Garcia is seeking protection under Article III of the Convention Against Torture (“CAT”). The U.S. government may not remove Ms. Garcia to Mexico, because she has borne her burden of proving that it is more likely than not that (A) she would be tortured if she were returned to Mexico and (B) that torture would be instigated by or with the acquiescence of the Mexican government. *See* 8 C.F.R. §§ 1208.16(c)(2), 1208.18(a); *Cruz-Funez v. Gonzales*, 406 F.3d 1187 (10th Cir. 2005). Once an applicant meets her burden of proof under CAT, protection is mandatory. 8 C.F.R. § 1208.16(c)(4) (“If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture.”).

A. Ms. Garcia is more likely than not to face torture in Mexico.

Pursuant to Article III of the CAT, the United States may not remove a respondent to a country where it is more likely than not that she would be tortured. 8 C.F.R. §§ 1208.16(c)(2), 1208.18(a); *Matter of D-R-*, 25 I&N Dec. 445, 464 (BIA 2011). A CAT applicant bears the burden of establishing that it is “more likely than not” that she would be tortured if removed. 8 C.F.R. § 1208.16(c)(2); *Kamalthis v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001); *see also Matter of J-R-G-P-*, 27 I&N Dec. 482, 486 (BIA 2018) (citing *Matter of J-J-F-*, 23 I&N Dec. 912, 917 (A.G. 2006)).

Torture is defined as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.” 8 C.F.R. § 1208.18(a)(1). Acts constituting torture can include beatings, *Bromfield v. Mukasey*, 543 F.3d 1071, 1079 (9th Cir. 2008); *see also Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001), rape, *Zubeda v. Ashcroft*, 333 F.3d 46 (3rd Cir. 2003), and “acute mental anguish.” *Comollari v. Ashcroft*, 378 F.3d 694, 697 (7th Cir. 2004); *see*

also Habtemicael v. Ashcroft, 370 F.3d 774, 782 (8th Cir. 2004) (explaining that torture includes “prolonged mental pain or suffering [that] either is purposefully inflicted or is the foreseeable consequence of a deliberate act”).

In determining whether it is “more likely than not” that an applicant will be tortured, the Court must take into consideration all possible sources of torture and make an assessment of the aggregate risk of torture. *See Cole v. Holder*, 659 F.3d 762, 775 (9th Cir 2011) (finding that the BIA erred by treating each potential source of torture individually, rather than considering the aggregate risk that the applicant would be tortured based on all potential sources of torture). Further, the act must be directed against a person in the torturer’s custody or physical control and must be “for such purposes as obtaining from [her] or a third person information or a confession, punishing [her] . . . or intimidating or coercing [her] or a third person, or for any reason based on discrimination of any kind.” *Id.*

In assessing whether it is more likely than not that a respondent would be tortured, all evidence relevant to the possibility of future torture should be considered. 8 C.F.R. § 1208.16(c)(3). Such evidence includes, but is not limited to: (1) evidence of past torture inflicted upon the applicant; (2) evidence that the applicant could relocate to a part of the country of removal where she is not likely to be tortured; (3) evidence of gross, flagrant, or mass violations of human rights within the country of removal, where applicable; and (4) other relevant information regarding conditions in the country of removal. *Id.*

In the present case, if Ms. Garcia were returned to Mexico, (1) it is more likely than not that she would be tortured because of her gender identity as a transgender woman, (2) it is more likely than not that she would be tortured because of her mental illnesses and past history of trauma, and (3) in the aggregate her danger of torture is exceedingly high.

As detailed above, Ms. Garcia has already endured sexual and physical torture in the form of rape and sexual assault in Mexico. *See supra*, SEC II. Ms. Garcia continues to deal with the physical and psychological manifestations of that rape and abuse that occurred during her childhood. *Id.* These acts undoubtedly rise to the level of torture. *See Zubeda v. Ashcroft*, 333 F.3d 46 (3rd Cir. 2003) (finding that “[r]ape can constitute torture. Rape is a form of aggression constituting an egregious violation of humanity.”). Further, since leaving Mexico, Ms. Garcia has begun openly expressing her gender identity as a transgender woman. *See supra*, SEC II. The combination of her past torture, mental health diagnoses and status as a transgender woman should weigh heavily in the assessment of the likelihood of future torture, especially considering the current conditions for transgender women in Mexico. *See generally*, Tab II; *see, e.g.*, Tab II.A, Declaration and CV of Ann Wilkinson, MA, MSSc, Ph. D. Candidate in Anthropology, on Country Conditions in Mexico [hereinafter “Declaration of Ann Wilkinson”], at ¶ 12 (“[W]omen, sexual minorities, and gender non-conforming persons (*most especially transgender persons*) face disproportionately accelerating violence.”) (emphasis added); Tab I.H, Declaration and CV of Eddy Francisco Alvarez Jr, Ph. D in Chicana and Chicano Studies, on Country Conditions in Mexico [hereinafter “Declaration of Eddy Francisco Alvarez Jr”], at ¶ 14 (“In Mexico . . . [v]iolence against transgender people is often extreme and fatal. Every year, the deaths of transgender women go either unreported or are ignored by the media. In many cases, the perpetrators have used inhumane and extremely cruel methods in the assaults of transgender women. Often trans women are raped, brutalized with sharp objects, bludgeoned or shot with excessive rounds of bullets.”).

First, Ms. Garcia is more likely than not to suffer torture because of her gender identity as a transgender woman. Violence against transgender women is widespread in Mexico and “ranges from death threats to physical harm, rape, and sexual harassment.” Tab II.BB, Carolina Romero, *Violence against Mexico’s transgender community goes unpunished*, EL UNIVERSAL, Oct. 16, 2018; *see also* Tab II.A, Declaration of Ann Wilkinson, at ¶ 14 (“During their lifetime, 94.7 % of Mexican sexual minorities will face some degree of discrimination [] and/or physical violence, the most extreme of which leads to death.”) (citations omitted); Tab II.I Transgender Law Center and Cornell University Law School, *Report on Human Rights Conditions of Transgender Women in Mexico* (May 2016) [hereinafter “Transgender Law Center Report”], at pg. 15 (“Mexico has the second-highest index of crimes motivated by transphobia in Latin America, behind Brazil. Reports of hate crimes—particularly transphobic murders—continue to rise, including in Mexico City.”); Tab II.P, The Advocates for Human Rights, *Mexico Compliance with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Mar. 22, 2019), (“[B]etween 2014 and 2016, at least 202 LGBTI persons were murdered—a rate of nearly six homicides per month—*most of whom were trans women.*”) (emphasis added).

Transgender women in Mexico are often “viewed as deserving of torture,” evidenced by “the extremely high homicide rates faced by transwomen or those perceived as such . . . as well as the particularly horrific ways that these individuals are killed, which tend to follow extreme torture, particularly sexual torture, and highly gendered mutilation.” Tab II.A, Declaration of Ann Wilkinson, at ¶ 27; *see also* Tab II.AA, EFE, *More than 200 members of LGBT community killed in Mexico over three-year period*, AL DIA NEWS, May 18, 2017, pg. 2 (“Trans women are also victims of savage violence, with the difference being that their bodies are often dumped in vacant lots and other public areas.”). Country conditions expert, Ann Wilkinson, explains this fact as

follows, “The key linkage that conjoins gender-based violence (GBV) targeted towards women and sexual minorities respectively, especially transgender and non-gender conforming individuals, is that they are both rooted in an effort to maintain a sex/gender system in which masculine males are dominant, and violence is used as a deterrent and/or corrective to those who pose a challenge to this system.” *Id.* at ¶ 13.

Additionally, evidence shows that Ms. Garcia could not reasonably relocate to avoid future torture, as violence and extreme transphobia are “prevalent throughout all of Mexico and transgender women are hyper visible.” Tab II.B, Declaration and CV of Assistant Professor Andrea Bolivar, Ph.D., on Gender Identity and Country Conditions in Mexico [hereinafter “Dealation of Andrea Bolivar”], at ¶ 61; *see also*, Tab I.H, Declaration of Eddy Francisco Alvarez Jr, at ¶ 22 (“Based on Ms. Garcia’s transgender identity and other violence factors in Mexico, it would be difficult or almost impossible for her to relocate within the country. Violence and torture are rampant everywhere in Mexico, particularly for transgender people.”). As stated in her affidavit, Ann Wilkinson finds:

It is my conclusion that as a transgender woman with a history of trauma, including sexual violence perpetrated by a close family member, who suffers from a stress disorder, major depressive disorder, and intellectual disability, and who has little or no support system in Mexico and dismal employment potential or connections, Ms. Garcia faces an extremely high risk of facing torture in Mexico if she is removed to Mexico. This physical and/or sexual violence may be perpetrated again by her uncle who previously abused her, or, equally likely, from a neighbor, stranger, government official, or organized criminal actors. Unlike in the United States, the Respondent cannot count on law enforcement for protection and safety from hate crimes and social and economic discrimination and persecution related to her sexual and gender identities and her gender presentation.

Tab II.A, Declaration of Ann Wilkinson, at ¶ 30.

Another country conditions expert, Andrea Bolivar, explains that, “[t]ransgender women with a history of trauma and interactions with the police, and without a proper support system,

would likely face torture if returned to Mexico.” Tab II.B, Declaration of Andrea Bolivar, at ¶ 61. This is especially applicable to Ms. Garcia’s case, where her lack of a support system in Mexico would result in the deterioration of her mental health, *see* Tab I.A, Medical Affidavit, at ¶ 48, thereby increasing the likelihood that Ms. Garcia would experience homelessness and/or encounter law enforcement. This is a significant consideration, as homelessness elevates both the risk of torture and the likelihood of contact with law enforcement. *See* Tab II.A, Declaration of Ann Wilkinson, at ¶ 26; *see also* Tab II.T, Colectivo Hombres XX, Discrimination due to gender identity and sex characteristics in Mexico (Feb. 27, 2017 – March 3, 2017), pg. 3 (“The precarious social and economic situation of the majority of trans people in Mexico also has fatal consequences for them. Killings of trans people who engage in sex work and/or who are homeless are frequent, and they tend to end in impunity.”). It is more likely than not that law enforcement, who are the most common perpetrators of abuses against transgender women, would torture Ms. Garcia with impunity. *Id.* at ¶ 15 (“The Mexican experience has shown that when security forces are deployed, violence, and particularly violence against women and sexual minorities, is often exacerbated rather than eliminated []. This is in part because security forces, both military and police, are some of the primary perpetrators of violence against women and LGBT persons.”) (citations omitted).

Second, Ms. Garcia’s severe mental health diagnoses also make it more likely than not that she will suffer torture in Mexico. As Dr. Adi and Dr. James found:

[I]t is our opinion that Mexico represents a negative and risk-laden environment, and that Ms. Garcia will have a significant deterioration of her mental health if she is deported back to Mexico. Individuals suffering from trauma or stressor-related disorders and/or depressive disorders, when placed in environments that exacerbate their underlying illnesses, tend to display symptoms of low mood, low energy, poor concentration, insomnia or hypersomnia, possible suicidal ideation, nightmares, flashbacks, and emotional dysregulation. As stated, such a worsening of symptoms would increase Ms. Garcia’s likelihood for self-harm. Without a supportive social safety net, recovery from such symptoms would likely be prolonged and, as a result, the severity of symptoms would be likely to increase as well. This trajectory would

also be impacted by Ms. Garcia's intellectual disability. Her difficulty with cognition, planning, and executive functioning also makes Ms. Garcia less likely to locate, engage in, and follow-up with mental health treatment without increased wraparound services which would also worsen her prognosis and risk.

Tab I.A, Medical Affidavit, at ¶ 48.

The prolonged mental pain and suffering Ms. Garcia would experience in Mexico, a country where she has no immediate family or support and where her current mental health diagnoses would only be exacerbated, constitutes torture. *See Habtemicael v. Ashcroft*, 370 F.3d 774, 782 (8th Cir. 2004) (torture includes “prolonged mental pain or suffering [that] either is purposefully inflicted or is the foreseeable consequence of a deliberate act”). As discussed *infra* in Section III(B), her prolonged mental pain and suffering is a foreseeable consequence of the Mexican government's deliberate failures to act to provide protection to transgender women like Ms. Garcia. *See* Tab II.K, AJPH Research, *Living Outside the Gender Box in Mexico: Testimony of Transgender Mexican Asylum Seekers* (Oct. 2017), at pg. 1651 (“Rejection by their families and living without the protection of police or other authorities can lead to psychological trauma, mental health problems, suicide attempts, low educational attainment, and unemployment. Trauma from sexual, physical, or emotional abuse can greatly undermine feelings of safety, trust, personal control, and beliefs in justice, which can lead to depression, posttraumatic stress disorder, and physical health problems.”); Tab II.I, Transgender Law Center Report, at pg. 21 (“Many transgender women face abuse and rejection at the hands of their own families. The abuse ranges from physical, verbal, and sexual attacks to murder A recent survey of transgender women in Mexico City found that 45% had experienced abuse from their families. As many as 70% transgender women and girls in Latin America are estimated to run away from or be thrown out of their homes. The consequences of such family rejection include psychological

trauma and emotional suffering, which often lead to mental health problems, suicide attempts, failure to complete education, and unemployment.”).

Finally, as a survivor of incestuous sexual abuse, Ms. Garcia is statistically at a high risk of repeated victimization throughout her life, by her past abuser, other Mexican citizens, or Mexican officials. *See* Tab II.E, Declaration and CV of Judith Herman, MD, on Incest and Traumatic Stress, at ¶ 42 (referencing a study wherein two-thirds of women who had been incestuously abused in childhood were subsequently raped).

These multiple sources of torture, including her gender identity, mental health diagnoses and history of trauma, in addition to her lack of support in Mexico, must be aggregated in assessing the likelihood of Ms. Garcia’s torture in Mexico. *See, e.g., Quijada-Aguilar v. Lynch*, 799 F.3d 1303, 1308 (9th Cir. 2015) (“CAT claims must be considered in terms of the aggregate risk of torture from all sources, and not as separate, divisible CAT claims.”); *Cole v. Holder*, 659 F.3d 762, 775 (9th Cir. 2011). When taken together, and considering all other relevant evidence to the possibility of future torture, as required under 8 C.F.R. § 1208.16(c)(3), Ms. Garcia has met her burden of establishing it is more likely than not that she would be tortured in Mexico.

B. It is more likely than not that the torture Ms. Garcia faces in Mexico would be instigated by or with the acquiescence of the Mexican government.

Acquiescence requires only “awareness” and “willful blindness” by a government official to torture. *Cruz-Funez*, 406 F.3d at 1192; *see also, e.g. Zheng v. Ashcroft*, 332 F.3d 1186, 1194 (9th Cir. 2003), *Villegas v. Mukasey*, 523 F.3d 984, 989 (9th Cir. 2008). “Willful blindness” is defined as “[d]eliberate avoidance of knowledge of a crime, esp. by failing to make a reasonable inquiry about suspected wrongdoing despite being aware that it is highly probable.” Black’s Law Dictionary 1737 (9th ed. 2009). This standard is applied in the majority of circuits, including the Tenth. *See Cruz-Funez v. Gonzales*, 406 F.3d 1187 (10th Cir. 2005). To meet her burden, an

applicant need only show that a public official “could have inferred the alleged torture was taking place, remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it.” *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1060 (9th Cir. 2006).

Governmental acquiescence can be established even where high-level elected officials do not acquiesce in torture and such acquiescence would be contrary to official policy, if local officials are acquiescing in torture under the color of law. *See Marmorato v. Holder*, 376 Fed. Appx. 380, 385 (5th Cir. 2010) (unpublished). Further, governmental acquiescence can be found where low-level officers misuse their official power, if their abuse of power is widespread and generally tolerated by the state, meaning they are rarely prosecuted and frequently return to their official duties despite accusations of corruption. *See Ramirez-Peyro v. Holder*, 574 F.3d 893 (8th Cir. 2009). The respondent may also qualify by showing that she would likely suffer torture while under private parties’ exclusive custody or physical control. *Azanor v. Ashcroft*, 364 F.3d 1013, 1019 (9th Cir. 2004). “If the torture is at the hands of private individuals, the petitioner’s burden is to show the government’s ‘consent or acquiescence.’” *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 787 (9th Cir. 2004) (quoting 8 C.F.R § 208.18(a)(1)). Acquiescence may range from actual knowledge to willful blindness. *Reyes-Reyes*, at 787 (citation omitted); *see also Cruz-Funez v. Gonzalez*, 406 F.3d 1187 (10th Cir. 2005).

Pursuant to the law in the Tenth Circuit, willful blindness suffices to prove the acquiescence of government officials to torture. *See Karki v. Holder*, 715 F.3d 792, 806–07 (10th Cir. 2013) (affirming the “willful blindness” standard set forth in *Cruz-Funez* and rejecting the actual knowledge requirement the government urged the court to adopt); *see also Zheng v. Ashcroft*, 332 F.3d 1186, 1196 (9th Cir. 2003) (“The correct inquiry as intended by the Senate is whether a respondent can show that public officials demonstrate ‘willful blindness’ to the torture

of their citizens by third parties, or as stated by the Fifth Circuit, whether public officials ‘would turn a blind eye to the torture.’” (quoting *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 355 (5th Cir. 2002)); *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004) (adopting “willful blindness” standard); *Amir v. Gonzales*, 467 F.3d 921, 927 (6th Cir. 2006) (same); *Silva-Rengifo v. U.S. Att’y Gen*, 473 F.3d 58, 65 (3d Cir. 2007) (same); *Hakim v. Holder*, 628 F.3d 151 (5th Cir. 2010) (same).

Ms. Garcia has met her burden of establishing that the Mexican government would be willfully blind to her torture, as the Mexican government actively engages in torture of transgender persons. *See e.g.* Tab II.A, Declaration of Ann Wilkinson, at ¶ 15 (“The Mexican experience has shown that when security forces are deployed, violence, and particularly violence against women and sexual minorities, is often exacerbated rather than eliminated []. This is in part because security forces, both military and police, are some of the primary perpetrators of violence against women and LGBT persons.”) (citations omitted); *see also*, Tab I.H, Declaration of Eddy Francisco Alvarez Jr, at ¶ 3 (“The Mexican government, including police and other authorities do not have the capacity to protect [Ms. Garcia], and will likely be implicated in the violence against her and will acquiesce in such persecution or torture because of her gender identity and sexual orientation.”). As country conditions illustrate, rape, violence, and torture of transgender women in Mexico is all too common and Mexican police and military are often the primary perpetrators. *See* Tab II.A, Declaration of Ann Wilkinson, at ¶ 15 (“Hate crimes are committed with impunity in the vast majority of cases because police are often (33% of the time) the perpetrators.”) (citations omitted); *see also* Tab II.B, Declaration of Andrea Bolivar, at ¶ 47 (“Transgender women commonly experience harassment, extortion, sexual assault, physical abuse, and torture at the hands of police and military officers. Because transgender women, and their stigmatized gender nonconformity,

are particularly visible, the Mexican police target the transgender community for extortion and sexual assault.”); Tab II.C, Declaration and CV of Professor Jesus Ramirez-Valles, Ph.D., M.P.H., on Country Conditions in Mexico, pg. 6-7 (“In Mexico there are local police, state police, and federal police, and the three levels of police – and soldiers – engage in violence toward vulnerable citizens, which includes transgender people and indigenous people. [...] The police [are] one of the primary drivers of violence on the streets in Mexico. They often blackmail, beat, and rape transgender women with impunity.”).

Country condition reports⁷ also demonstrate that violence and killings perpetrated against transgender women are rarely investigated and that it is unlikely perpetrators will ever be prosecuted. *See* Tab II.A, Declaration of Ann Wilkinson, at ¶ 14 (“Less than 3% of targeted killings of LGBT people resulted in convictions.”); *see also* Tab II.B, Declaration of Andrea Bolivar, at ¶ 51 (“Holding the Mexican police and military accountable for the torture of transgender women is nearly impossible.”); Tab II.PP, Will Grant, *Three Lives, One Message: Stop Killing Mexico’s Transgender Women*, BBC, Feb. 1, 2021 (“As many as 98% of murders in the country go unsolved and unpunished, and the authorities often show little inclination to investigate the killings of transgender women.”). Thus, these incidents of torture are clearly committed “with the consent or acquiescence of state authority.” *See Ornelas-Chavez*, 458 F.3d at 1060; *see also Avendano-Hernandez*, 800 F.3d at 1081 (“Country 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. Indeed, Mexico has one of the highest documented number of transgender murders in the world.”); *see also* Tab II.CC, Editorial Board, *Trump is sending LGBTQ migrants ‘back to hell,’* WASHINGTON POST, July 24, 2018,

⁷ “It is well-accepted that country conditions alone can play a decisive role in granting relief under [CAT].” *Karki v. Holder*, 715 F.3d 792, 806 (10th Cir. 2013).

pg. 3 (“Police and law enforcement authorities in Central America and Mexico are often indifferent, and frequently overtly hostile, to the fate of LGBTQ individuals.”).

Further, while it may seem as though protections for LGBT persons have improved in recent years, it is widely documented that these changes have not translated into improved safety or better livelihoods for LGBT persons. *See* Tab II.A, Declaration of Ann Wilkinson, at ¶ 19 (finding that “Mexico City has passed anti-discrimination legislation protecting LGBT individuals and same-sex marriage is now legal in eleven states, beginning in 2010 with Mexico City (and currently slowly progressing state by state through Mexico’s 31 states). However, these legal gains are unavailable to the vast majority of LGBT persons, and most especially transgender individuals.”). In fact, as stated by Ann Wilkinson, “these legal gains may in fact actually work to generate *more* violence in the form of political and social backlash, one factor that explains the increase in LGBT hate crimes despite these reforms.” *Id.* (emphasis added) (going on to cite her own research, which found “violence against LGBT people tracks anti-LGBT public discourse and political activity, which have been on the rise in tandem in Mexico since 2016”); *see also* Tab II.I Transgender Law Center Report, at pg. 11 (“[T]hese federal antidiscrimination laws do not protect transgender communities from persecution because the Mexican government is unable to enforce them, especially because the police themselves are often the perpetrators of violence against transgender people.”); Tab II.Q, University of Toronto Faculty of Law: International Human Rights Program, *‘Unsafe’ and on the Margins: Canada’s Response to Mexico’s Mistreatment of Sexual Minorities and People Living with HIV* (June 20, 2016), at pg. 16 (“Despite some legislative victories, such as laws implemented to remove administrative obstacles for transgender individuals changing their gender on identity documents, the transgender community faces a hostile and dangerous environment throughout Mexico. This is particularly true for transgender women. [...]”)

Access to justice is virtually non-existent for transgender women, and crimes against them are almost always committed with impunity.”); Tab II.KK, Oscar Lopez, *Mexico sees deadliest year for LGBT+ people in five years*, REUTERS, May 15, 2020 (“Mexico is seeing a surge of extreme violence toward LGBT+ people in its deadliest year in half a decade, a leading rights group said on Friday, citing cases of victims brutally stabbed and brazenly killed in public. In 2019, 117 lesbian, gay, bi and trans people were killed in Mexico, up almost a third compared with 2018 and the highest number since 2015, according to LGBT+ advocacy group Letra S.”).

The unchecked sexual, physical, and psychological torture committed against transgender persons by Mexican citizens and government officials alike, along with the pattern and practice of ongoing and increased violence against transgender women, indicate that it is more likely than not that Ms. Garcia will be tortured in any region in Mexico based on her transgender identity alone and that the government will, at a minimum, be willfully blind to her torture. *See supra* SEC III.B; Tab II.A, Declaration of Ann Wilkinson, at ¶ 30 (“[T]he Mexican government has and continues to fail to take seriously or take action on the skyrocketing rates of anti-LGBT hate crimes and femicides, including of transgender women. I unequivocally and unqualifiedly believe that there is no region, city, or town within Mexico where the Respondent could re-locate to evade the clear risk of torture described above. The problems that exist for transgender women in Mexico exist in every part of the country.”); *see also*, Tab I.H, Declaration of Eddy Francisco Alvarez Jr, at ¶ 27 (“Based on Ms. Garcia’s history and on my research and experience on LGBTI communities, it is my professional opinion that there is a high likelihood that she will face threats to her life, torture, and sexual assault on account of her gender identity and gender presentation if she returns to Mexico, and that the Mexican government, including police and other authorities, do not have the capacity to protect her and will likely be implicated in the

violence against her on account of her identity.”). Accordingly, Ms. Garcia establishes that she qualifies for protection under the Convention Against Torture and a grant of relief is mandated.

IV. CONCLUSION

In sum, protection pursuant to the Convention Against Torture is mandatory given that it is “more likely than not” that Ms. Garcia will be tortured by the government of Mexico or with its acquiescence. 8 C.F.R. § 1208.16(c). Consequently, Ms. Garcia respectfully requests the Court grant her lasting relief from removal.

Dated: February 11, 2021

Respectfully Submitted,

/s/ Emily Kyle
Emily Kyle

/s/ Colleen Cowgill
Colleen Cowgill

PRO BONO COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Colleen Cowgill, hereby certify that, on February 11, 2021, I served a true and correct copy of the foregoing RESPONDENT’S PRE-HEARING STATEMENT IN SUPPORT OF PROTECTION UNDER THE CONVENTION AGAINST TORTURE on the Department of Homeland Security Office of Chief Counsel via the ICE eService portal at <https://eservice.ice.gov/>.

/s/ Colleen Cowgill _____
Colleen Cowgill, Esq.