

No. 21-10496

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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A.P.A.,

*Petitioner,*

*v.*

MERRICK B. GARLAND,  
UNITED STATES ATTORNEY GENERAL,

*Respondent.*

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On Petition for Review from the Board of Immigration Appeals  
File No. A \*\*\*-\*\*-017

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**BRIEF OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND,  
INC., AND THE TRANSLATIN@ COALITION  
AS AMICI CURIAE IN SUPPORT OF PETITIONER**

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## **CERTIFICATE OF INTERESTED PERSONS**

Pursuant to Eleventh Circuit Rules 26.1-1 through 26.1-3, and 28-1(b), Amici certify that the name of each person, attorney, association of persons, firm, law firm, partnership, and corporation that has or may have an interest in the outcome of this action—including subsidiaries, conglomerates, affiliates, parent corporations, publicly traded companies that own 10% or more of a party's stock, and all other identifiable legal entities related to any party in the case—includes the following:

1. Gonzales-Pagan, Omar (counsel for amici)
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8. The TransLatin@ Coalition (amicus curiae)

Pursuant to 11th Circuit Rule 26.1-3(b), counsel certifies that neither Lambda Legal Defense and Education Fund, Inc., nor The TransLatin@

Coalition is a publicly traded company, and that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

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## **RULE 29 CERTIFICATIONS**

This brief is submitted pursuant to Federal Rule of Appellate Procedure 29(a) and Eleventh Circuit Rule 29.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for amici represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amici or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

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## INTEREST OF AMICI CURIAE

**Lambda Legal Defense and Education Fund, Inc.** (“Lambda Legal”) is the nation’s oldest and largest legal organization whose mission is to achieve full recognition of the civil rights of lesbian, gay, bisexual, and transgender (“LGBT”) people and everyone living with HIV through impact litigation, education, and public policy work. Since its founding in 1973, Lambda Legal has been counsel of record or *amicus curiae* in some of the most important cases addressing the rights of LGBT people. *See, e.g., Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731 (2020) (amicus); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (counsel); *United States v. Windsor*, 570 U.S. 744 (2013) (amicus); *Lawrence v. Texas*, 539 U.S. 558 (2003) (counsel); *Romer v. Evans*, 517 U.S. 620 (1996) (counsel). Lambda Legal has also striven to ensure fairness for LGBT immigrants by serving as counsel of record or *amicus curiae* in litigation involving the rights of LGBT immigrants and asylum seekers, and its work has helped establish important immigration jurisprudence. *See, e.g., Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017) (en banc) (amicus); *Velasquez-Banegas v. Lynch*, 846 F.3d 258 (7th Cir. 2017) (amicus); *Pitcherskaia v. I.N.S.*, 118 F.3d 641 (9th Cir. 1997) (counsel); *Immigration*

*Equality v. U.S. Dep't of Homeland Sec.*, No. 20-CV-09258-JD, --- F. Supp. 3d ---, 2021 WL 75756 (N.D. Cal. Jan. 8, 2021) (counsel).

**The TransLatin@ Coalition** is a nationwide nonprofit membership organization that advocates for the interests of transgender and gender nonconforming individuals, particularly Latinx immigrants, and provides direct services to the transgender community, such as leadership development, legal services, educational services, and employment services. The TransLatin@ Coalition's Legal Services Project serves individuals who are transgender, nonbinary, and gender nonconforming, particularly undocumented immigrants, by, inter alia, representing them in affirmative and defensive asylum cases, referring cases to pro bono attorneys, and helping immigrants obtain green cards and citizenship through naturalization. Most recently, the TransLatin@ Coalition served as one of the organizational plaintiffs in *Immigration Equality v. U.S. Department of Homeland Security*, No. 20-CV-09258-JD, 2021 WL 75756 (N.D. Cal. Jan. 8, 2021), which enjoined a final rule that would have made sweeping changes to the United States' asylum system and made it nearly impossible for LGBT people to obtain asylum in the United States.

## **STATEMENT OF THE ISSUE**

Whether the BIA erred in holding that coming out as transgender is not a “changed circumstance” that materially affects an applicant’s eligibility for asylum.

## **SUMMARY OF ARGUMENT**

Mexico has the second highest index of transphobic hate crimes in Latin America. Being an out transgender person there can be, and all too often is, fatal. Transgender people—who have a gender identity that does not align with their sex assigned at birth—are singled out for hate crimes, physical violence, and even murder due to their gender identity. They often face violence at rates that far exceed the violence directed at other members of the LGBT community, which itself typically exceeds the violence directed at straight members of the community. And while transgender people need increased protection from law enforcement, those authorities frequently refuse to intervene and help because of their own biases.

Notwithstanding this myriad of risks, coming to terms with one’s gender identity and coming out are essential steps for transgender people, like Ms.

A.P.A., to live as their authentic selves.<sup>1</sup> “The right to identify our own existence lies at the heart of one’s humanity.” *Arroyo González v. Rosselló Nevares*, 305 F. Supp. 3d 327, 334 (D.P.R. 2018). But the BIA ignored the substantial change that identifying as transgender can have on one’s circumstances, including the risk of persecution. It also ignored the undisputable dangers that people known, or perceived, to be transgender face in Mexico, due solely to their actual or perceived transgender identity. Without explanation, much less any reasoning, the BIA held that Ms. A.P.A.’s self-recognition and coming out publicly as transgender was not a “changed circumstance” that materially affected her claim for asylum. It therefore concluded that Ms. A.P.A.’s asylum application was untimely. Certified Administrative Record (“CAR”) 3-4. This was legal error.

This Court should reject the BIA’s erroneous ruling so that it does not negatively affect Ms. A.P.A. and other transgender people seeking asylum in the United States. The requirements for a “changed circumstance” are straightforward: changed circumstances need only “materially affect[] the applicant’s eligibility for asylum,” and “may include, but are not limited to . . .

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<sup>1</sup> Consistent with Petitioner’s brief, amici use “Ms. A.P.A.” to refer to the petitioner.

[c]hanges in the applicant’s circumstances.” 8 C.F.R. § 1208.4(a)(4)(i)(B). The training materials for asylum officers expressly state that “[i]f an individual has recently ‘come out’ this may qualify as an exception to the one-year filing deadline based on changed circumstances.” Refugee, Asylum, and Int’l Operations Directorate, U.S. Citizenship & Immigration Services, *Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims* 48 (Dec. 28, 2011).

This stands to reason. Personal circumstances, including identifying one’s gender identity and coming out, can materially affect the danger and persecution a transgender applicant will face if returned to their home country. Indeed, “[t]he unique identities and vulnerabilities of transgender individuals must be considered in evaluating a transgender applicant’s asylum, withholding of removal, or CAT claim.” *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1082 (9th Cir. 2015). But transgender applicants who require asylum protection to survive, must have a valid opportunity to seek it. The BIA’s conclusion arbitrarily closes that door for individuals who come out after the one-year asylum application date passes. It should be reversed.

## ARGUMENT

### I. Identifying and Coming Out as Transgender Are Complex, Social Processes that Can Take Years.

Transgender individuals constitute a distinct group and face challenges that may differ from those faced by the broader LGBT community.

The umbrella term “LGBT” is an acronym for Lesbian, Gay, Bisexual, and Transgender and encompasses a variety of identities and personal experiences. Each LGBT person comes to their identity in a different way. As relevant here, “LGB” describes a person’s sexual orientation, i.e., the gender or genders to which a person is attracted, while “T,” which stands for Transgender, is defined by a person’s gender identity, a distinct concept from a person’s sexual orientation.<sup>2</sup>

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<sup>2</sup> “LGBT” and “LGBTQ” are the generally accepted terms used to refer to the large and heterogeneous groups of people who may identify as lesbian, gay, bisexual, transgender, queer, or questioning, among other identities reflecting a minority sexual orientation and/or gender identity. *See, e.g.*, Hum. Rts. Campaign, Our Work, <https://www.hrc.org/our-work>. In instances where LGB or Transgender are used here, it is because the specific source or study focused on particular identities within the larger community. LGB or LGBQ refers to non-heterosexual sexual orientation identities of lesbian, gay, and bisexual (and queer). Transgender and Gender Nonconforming Patients: Terminology, Am. Psychiatric Ass’n, <https://www.psychiatry.org/psychiatrists/culturalcompetency/education/transgender-and-gender-nonconforming-patients/terminology>. Transgender (or gender nonconforming) refers to non-cisgender gender identities, including those of transgender and gender non-conforming people. *Id.* Cisgender refers to people whose gender identity aligns with the sex assigned or presumed at

Gender identity “describes each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body . . . and other expressions of gender, including dress, speech and mannerisms.” TRANSGENDER L. CTR. & CORNELL UNIV. L. SCH. LGBT CLINIC, REPORT ON HUMAN RIGHTS CONDITIONS OF TRANSGENDER WOMEN IN MEXICO 6 (2016); *see also Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1292 (11th Cir. 2020) (defining “gender identity” as a person’s “consistent, internal sense of gender”); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018) (“A person’s gender identity is their subjective, deep-core sense of self as being a particular gender.”); Judson Adams et. al., *Transgender Rights and Issues*, 21 GEO. J. GENDER & L. 479, 481 (2020).<sup>3</sup>

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birth. *Id.* Transgender refers to people whose gender identity, their inner sense of being male, female, or nonbinary, differs from their assigned or presumed sex at birth. *Id.*

<sup>3</sup> Gender identity is a multidimensional construct that includes “an individual’s knowledge of belonging in a gender category, experienced compatibility with that particular category, felt pressure to conform, and attitudes towards gender groups.” *See* Sabra L. Katz-Wise et al., *Transactional Pathways of Transgender Identity Development in Transgender and Gender Nonconforming Youth and Caregivers from the Trans Youth Family Study*, 18 INT’L J. TRANSGENDERISM 244 (2017); *see also* Kevin M. Barry et. al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 514–515 (2016).



Often, a person’s gender identity is consonant with the sex assigned to him or her at birth. Those people, who comprise the majority of the population, are called “cisgender.” *See Boyertown Area Sch. Dist.*, 897 F.3d at 522 (noting “the term ‘cisgender’ refers to a person who identifies with the sex that person was determined to have at birth”).

However, “it is universally acknowledged in leading medical guidance that not all individuals identify as the sex they are assigned at birth.” *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1143 (D. Idaho 2018). People whose gender identity does *not* align with the sex they were assigned at birth are transgender. *See Boyertown Area Sch. Dist.*, 897 F.3d at 522 (noting the “term ‘transgender’ refers to a person whose gender identity does not align with the sex that person was determined to have at birth”). “Just like being cisgender, being transgender is natural and is not a choice.” *Grimm v. Gloucester Cty. School Bd.*, 972 F.3d 586, 594 (4th Cir. 2020). Rather, “it is as natural and immutable as being cisgender,” *id.* at 612–13, “deeply ingrained and inherent in [one’s] very being[],” *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 289 (W.D. Pa. 2017).

“Coming out,” particularly for transgender people, is not susceptible to any easy definition. In general, it refers to the process by which members of

the LGBT community acknowledge their sexual orientation and/or gender identity.<sup>4</sup> Although the phrase often refers to public acknowledgment of their gender or sexual orientation—that is, coming out to others—“coming out” can also refer to the predicate step of privately coming to recognize one’s own gender identity or sexual orientation—that is, coming out to oneself. As used here, the term “coming out” encapsulates both this private and public process.

For many LGBT people, coming out takes years—the process always involves coming to recognize oneself and accepting one’s sexual orientation and gender identity, and then deciding whether and with whom to share that information. Moreover, coming out is not a distinct moment in time, but is instead a complex, ongoing, and interactional process. It is therefore not unusual for individuals to come to identify as transgender in their 20s or 30s,

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<sup>4</sup> “Coming out” is generally distinct from “transitioning,” which is the process of taking steps to align one’s lived experience and appearance in a manner consistent with one’s gender identity. In other words, coming out publicly as transgender can be *part of some* transgender people’s transition. The concepts are not interchangeable, however. Indeed, transgender people transition in different ways and at different rates. The process is distinct for each individual. Some medically transition, some do not. And the process of navigating gender expectations that coming out requires is “an ongoing process that starts long before transitioning.” Stacey M. Brumbaugh-Johnson & Kathleen E. Hull, *Coming Out as Transgender: Navigating the Social Implications of a Transgender Identity*, 66 J. HOMOSEXUALITY 1148, 1170 (2019).

or even later in life. Although some transgender individuals have a strong sense of their identity early in life—a “eureka” moment or an intuitive sense that their gender identity does not match social expectations—that experience is not universal, or even standard. Many transgender people instead experience “vacillation and non-linear processes of ‘uncovering.’” Pranee Liamputtong et al., *Embodying Transgender: An Analysis of Trans Women in Online Forums*, 17 INT’L J. ENVIRON. RES. PUB. HEALTH 1, 5 (2020). The process entails overcoming “confusion, repression and conditioning.” *Id.* at 5.

This is especially true for transgender people from cultural, religious, or social backgrounds where gender nonconformity is discouraged and LGBT people are subjected to discrimination and harassment. Complexities, social pressure, and stigma often can contribute to the deferral and postponement of identifying as transgender or coming out to others. “The data show that coming out as transgender is not merely an act of declaring one’s gender identity to self and others. Rather, it is an ongoing and situational process of navigating the social implications of one’s gender identity and gendered behavior.” Brumbaugh-Johnson & Hull, *supra*, at 1158. As a result, when and how someone comes to identify with their gender identity is heavily influenced by how a person anticipates their social circles will respond. *Id.* at 1162–66.

In this respect, “[t]he greater restrictions on the gender of boys and men compared to girls and women is just one of the complexities of others’ gender expectations that transgender people must navigate.” *Id.* at 1160. And as this Court has recognized, “[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.” *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011).

The gender and culture expectations in which an individual is situated greatly influence whether and how an individual comes out, and can contribute to identity suppression, delay, and alteration of behavior to conform to gender expectations. To start, identifying themselves either publicly or privately as transgender—particularly for transgender women—requires a transgender person to consider consequences to their safety, or being outed in different social contexts, and to balance personal safety with their level of “out-ness.” *Brumbaugh-Johnson & Hull, supra*, at 1172; *see also* Alecia D. Anderson, “*Your Picture Looks the Same as My Picture*”: *An Examination of Passing in Transgender Communities*, 37 GENDER ISSUES 54 (2020).

Given social pressures and fear for safety, it is not surprising that individuals coming to terms with their gender identities often report initially suppressing and disguising their gender identities and behaviors.

Brumbaugh-Johnson & Hull, *supra*, at 1158–60; *see also* Walter Bockting et al., *Adult Development and Quality of Life of Transgender and Gender Nonconforming People*, 23 CURRENT OP. ENDOCRINOLOGY & DIABETES & OBESITY 188, 190 (2016). In a survey of transgender people, “[m]any participants reported that as pressure to conform to cisgender standards was placed on them, they began to believe that their gender was dysfunctional, which sometimes led to self-hatred and profound loneliness.” Heidi M. Levitt & Maria R. Ippolito, *Being Transgender: The Experience of Transgender Identity Development*, 61 J. HOMOSEXUALITY 1727, 1737 (2014).

Social pressures thus have a powerful impact on when and how an individual comes out—or, as here, delays coming out for years. Indeed, transgender individuals have “described confusing and painful experiences of ostracism and invalidation as they struggled to understand their experience of gender and why it was so different from what was expected of them,” Levitt & Ippolito, *supra*, at 1747, with some reporting “drug and alcohol addictions as an attempt to numb themselves of this emotional tumult,” *id.* at 1738.

For these reasons, an individual does not come to identify as transgender, privately or publicly, on any set timeline. And regardless of when they do, it constitutes an enormous change to their life circumstances.

This case illustrates the point. Ms. A.P.A., a transgender woman, was brought to this country at the age of 10. *See* A.P.A. Br. 5–7. Her time to file an asylum application would have expired, in the ordinary course, long ago. However, she only recently came to understand herself to be transgender and came out as such. As a result, her transgender identity, which she should not have to suppress to escape persecution,<sup>5</sup> exposes her to particular risks and dangers if returned to Mexico that are exponentially greater than those she faced before.<sup>6</sup>

## **II. Transgender Women in Mexico Currently Face Particularized Danger of Violence, Murder, and State-Sponsored Abuse.**

Transgender people face a danger that is separate from and in addition to that faced by the broader LGBT community in Mexico, and the violence against this population has only increased in recent years. Limited LGB legislative victories in Mexico, like marriage for same-sex couples, have not

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<sup>5</sup> Living openly is “an integral part of human freedom.” *Karouni v. Gonzales*, 399 F. 3d 1163, 1173 (9th Cir. 2005) (citation omitted); *accord Doe v. Att’y Gen.*, 956 F.3d 135, 154 (3d Cir. 2020) (a noncitizen “cannot be forced to live in hiding in order to avoid persecution.” (citation omitted)).

<sup>6</sup> Although amici write principally with respect to asylum, to address the BIA’s erroneous application of the one-year bar to Ms. A.P.A.’s case, the same facts that establish Ms. A.P.A.’s eligibility for asylum entitle petitioner to withholding from removal and CAT protection. Transgender women are subject to pervasive and widespread anti-trans violence in Mexico. *See infra*.

provided protection to transgender women; instead, “[t]ransgender women continue to experience pervasive discrimination in public and in their private lives,” TRANSGENDER L. CTR. & CORNELL UNIV. L. SCH. LGBT CLINIC, *supra*, at 11, and the group is targeted with particularly brutal violence.

The Mexican State not only refuses to investigate the crimes committed against transgender women, it also directly perpetrates crimes against transgender women in the first instance. “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.” *Avendano-Hernandez*, 800 F.3d at 1081. While some immigration judges have mistakenly looked to LGB legislative victories and changes in antidiscrimination laws in Mexico City as a basis for safe relocation without fear of persecution, the reality is that “rates of violence and murder have actually increased in Mexico City as well as throughout the nation since the changes in same-sex marriage and adoption laws,” TRANSGENDER L. CTR. & CORNELL UNIV. L. SCH. LGBT CLINIC, *supra*, at 26, and the vast majority of crimes against transgender women are never solved.

**A. The Frequent, Violent Hate Crimes Against Transgender Women in Mexico Continue to Increase.**

Broadly speaking, “LGBTQ individuals are at risk throughout Mexico.” *Xochihua-Jaimes v. Barr*, 962 F.3d 1175, 1187 (9th Cir. 2020). “Mexico has the highest total number of homicides of LGBTQ people due to homophobia and transphobia,” CAR 246, and 2019 was a deadlier year for LGBT people than the five preceding years, with deaths rising by nearly a third from 2018. Oscar Lopez, *Mexico sees deadliest year for LGBT+ people in five years*, REUTERS (May 15, 2020), <https://www.reuters.com/article/us-mexico-lgbt-murders-trfn/mexico-sees-deadliest-year-for-lgbt-people-in-five-years-idUSKBN22R37Y>.

These sobering statistics reflect the reality that recent LGB legislative victories in Mexico, such as the legalization of marriage for same-sex couples in 2010, have also come at great cost for the LGBT community. Marshall K. Cheney et al., *Living Outside the Gender Box in Mexico: Testimony of Transgender Mexican Asylum Seekers*, 107 AM. J. PUB. HEALTH 1646, 1646 (2017). The challenge to deeply ingrained cultural notions surrounding gender in traditional Mexican society, with an emphasis on machismo and restrictions on male identity, has intensified fears of cultural change. Paradoxically, “violence against the LGBTQ community has actually increased since the



recognition of same-sex marriage throughout Mexico because of backlash of these progressive changes in the law.” CAR 249; *see also* Cheney et al., *supra*, 1646 (finding that recent reforms have fostered a rise in harassment and discrimination).

Transgender women have borne the brunt of this abuse. “While conditions related to LGBT Mexicans generally may be relevant, adjudicators must address evidence that specifically relates to persecution of the particular social group at issue, transgender women in Mexico.” TRANSGENDER L. CTR. & CORNELL UNIV. L. SCH. LGBT CLINIC, *supra*, at 25. Transgender people—and transgender women, in particular—are subject to particularized dangers, and the “unique . . . vulnerabilities of transgender individuals must be considered in evaluating a transgender applicant’s asylum, withholding of removal, or CAT claim.” *Avendano-Hernandez*, 800 F.3d at 1082. Transgender women are more likely to be targeted for abuse than other members of the LGBT community, TRANSGENDER L. CTR. & CORNELL UNIV. L. SCH. LGBT CLINIC, *supra*, at 25, and “significant evidence suggests that transgender persons [in Mexico] are often especially visible, and vulnerable, to harassment and persecution.” *Avendano-Hernandez*, 800 F.3d at 1081.

Indeed, the violent social backlash stemming from even the limited legislative victories has been the most pronounced against transgender women, “who are the most marginalized members of the LGBT community and violate traditional gender social norms the most.” Cheney et al., *supra*, at 1646. As such, “legal advocates and individuals living in both Mexico and the U.S. report that rates of violence against transgender women are higher than ever.” CAR 249. Mexico has the second highest index of transphobic hate crimes in Latin America, behind only Brazil. CAR 246. Reports of hate crimes, especially transphobic murders, have continued to increase—even in Mexico City, the only city in Mexico with legal protections against gender-identity discrimination. CAR 246.

The danger remains pronounced still today, and, as recent immigration decisions have noted, there is “overwhelming record evidence of ineffective police protection of transgender persons,” and “transgender persons are caught in the crosshairs of both generalized homophobia and transgender-specific violence and discrimination.” *Avendano-Hernandez*, 800 F.3d at 1082, 1081; *see also Moreno v. Lynch*, 624 F. App’x 531 (9th Cir. 2015) (the BIA “erred in assuming that recent anti-discrimination laws in Mexico have made life safer for transgender individuals while ignoring significant record

evidence of violence targeting them”); *Lorenzo-Lopez v. Whitaker*, 747 F. App’x 587, 588 (9th Cir. 2019) (immigration judges and the BIA must consider “the record evidence submitted in this case concerning the conditions faced by transgender persons in Mexico”); *Molina Mendoza v. Sessions*, 712 F. App’x 240, 245 (4th Cir. 2018) (“The record contained evidence that significantly undermined the Immigration Judge’s finding that LGBTQ individuals in Mexico do not face a pattern or practice of harm.”). The reports of the greater threat to transgender women bears out in the data: “while the number of murder victims was up 2.5% in 2019, the number of gay and trans people killed was 27% higher than in 2018,” and “[m]ore than half the victims were transgender women.” Lopez, *supra*. In 2020, Mexico again reported the second-highest number of transgender murders in the world, after only Brazil. Michele Zipkin, *Brazil, Mexico, USA saw most trans murders in 2020*, PHILA. GAY NEWS (Dec. 30, 2020), <https://epgn.com/2020/12/30/brazil-mexico-usa-saw-most-trans-murders-in-2020/>.

## **B. The Mexican Government Perpetrates the Violence Committed Against Transgender Women.**

What is more, the pervasive persecution of transgender women in Mexico is deeply ingrained. The law does little to prevent it. And Mexican police and military officials sanction and perpetuate it. In Mexico, transgender

women often experience verbal, physical, and sexual abuse from a young age. Cheney et al., *supra*, at 1647. These assaults are often committed both by family members and by community authority figures, such as teachers and police. *Id.* At the same time, the legal protections for transgender women remain very limited, and in many parts of Mexico, laws have been passed that facilitate discrimination against transgender people. Many “Mexican communities and states have enacted laws making transgender expression illegal.” *Id.* at 1646. These “morality laws” permit and encourage both citizen and police harassment of transgender women. TRANSGENDER L. CTR. & CORNELL UNIV. L. SCH. LGBT CLINIC, *supra*, at 13.

More important than a lack of positive protections, the Mexican government fails to take action to prevent even the most horrific abuses committed against transgender women. “It is clear that the Mexican government is unable to effectively protect transgender women,” who “regularly experience harassment and hate crimes at the hands of members of the public.” *Id.* at 15. The vast majority of crimes against transgender women are never solved, often because police refuse to adequately investigate or charge the crimes, and instead dismiss homophobic and transphobic offenses as “crimes of passion.” CAR 246. The lack of accountability means

that the vast majority of crimes against transgender women can be committed with impunity.

But Mexican law enforcement not only fails to protect transgender women from the routine violence they face; it also directly perpetrates that violence. There is a “well-documented culture of violence with impunity,” as “crimes against transgender (and LGB) persons [are] committed by police, military, and security forces.” Nielan Barnes, *Within the asylum-advocacy nexus: An analysis of Mexican transgender asylum seekers in the United States*, 2 SEXUALITY, GENDER & POL’Y 5, 9 (2019). Police officers and the military target and pretextually arrest and physically abuse transgender women. TRANSGENDER L. CTR. & CORNELL UNIV. L. SCH. LGBT CLINIC, *supra*, at 18. Transgender women are specifically targeted for extortion and sexual favors by Mexican police, *Avendano-Hernandez*, 800 F.3d at 1081, and describe Mexican police officers assaulting them, forcing them to perform oral sex, and raping them, Cheney et al., *supra*, at 1649–50; Barnes, *supra*, at 10. A common example of this is a practice in which officers place a transgender woman under false or pretextual arrest, holding her in a cell where she is physically and sexually assaulted by both other arrestees or the officers themselves, often at gunpoint. Cheney et al., *supra*, at 1649–50.

As a result of both the Mexican government's failure to respond to and its role in the violence, the vast majority of the attacks on transgender women are never reported at all. TRANSGENDER L. CTR. & CORNELL UNIV. L. SCH. LGBT CLINIC, *supra*, at 12 (“Transgender women often do not report hate crimes or police abuse because the authorities rarely investigate these crimes.”). Moreover, the failures of police and military officials to protect transgender women create a culture of mistrust: “In spite of the gravity of the aggressions suffered, the majority (over 80%) of victims prefer to keep silent about what happens because police, military, and public security forces are the perpetrators in 20%–30% of cases[.]” Barnes, *supra*, at 10. Consequently, the “vast majority . . . of hate crimes and murders are committed with impunity and remain unsolved.” *Id.* The persistent under-reporting of anti-trans violence is plain from the data: For example, “from January 2012 to April 2013 the [Mexico City agency charged with addressing discrimination complaints] had received only one official complaint of human rights abuse against a transgender individual. During the same period there were at least eight violent murders of transgender women in Mexico City.” CAR 246.

The incidents of anti-trans violence that *do* get reported are appalling. “The nature of hate crimes and violence against transgender individuals in

particular is extreme: The bodies of victims often show signs of torture, of being shot, beaten, dismembered.” Barnes at 10; CAR 217. Amici submit here ten representative examples of the brutal violence regularly perpetrated against transgender women in Mexico between 2010 and 2020, all of which postdate the legalization of marriage for same-sex couples in the country. These examples make plain that transgender women in Mexico still face grave, anti-trans violence and persecution.

1. Transgender rights advocates Fernanda Valle and Agnes Torres were both tortured prior to their deaths; Ms. Valle was found “tied up and tortured with two bullets in the head,” CAR 258, while Ms. Torres’s tortured body was found in a ravine, Barnes, *supra*, at 9.
2. “[A] group of men kidnapped two transgender women in Hotel Carmen. Days later, the dismembered bodies of these women were found in a van.” CAR 246.
3. Ms. Lezama was killed by strangulation “with a cord and [] blunt force trauma to her head.” CAR 258.
4. “[I]n Mexico City, the body of a transgender woman was dismembered. Her remains were found abandoned in different neighborhoods in the Benito Juarez district.” CAR 256.

5. And in a suburb of Mexico City, a transgender woman was found dead on the street, after being “beaten horribly and then decapitated.” CAR 247.
6. “[A] youth dressed as a woman was found dead in Puebla with extensive skull injuries and torture marks on his body.” Barnes, *supra*, at 9.
7. The body of a transsexual woman was found wrapped in a Mexican flag in Chihuahua, with her body bearing signs of torture prior to being shot. CAR 217.
8. “Paulett Gonzalez, a transgender beauty queen from the western state of Nayarit, was found dead” after weeks of searching; “[h]er charred remains were found in a vacant lot.” CAR 217.
9. Transgender victims from 2018 “include a woman found in a trash bin with her face pummeled beyond recognition by a rock. One was tortured to death by captors while her family heard her last moments over the phone. Another was found naked and strangled in her bedroom.” The Associated Press, *Trans women in Mexico fight for justice as murders go unpunished*, NBC NEWS (Sept. 10, 2019), <https://www.nbcnews.com/feature/nbc-out/trans-women-mexico-fight-justice-murders-go-unpunished-n1051886>.



10. Most recently, in 2020, Jesusa Fidel Ventura Reyes’s “severed head was placed on the steps of the town hall with her body being discovered on a nearby street.” *Sickening murder and mutilation of trans woman*, OUTNEWSGLOBAL (May 22, 2020), <https://outnewsglobal.com/sickening-murder-and-mutilation-of-trans-woman/>.

As these examples make clear, the pattern of brutal and sadistic violence committed against transgender women is pervasive across Mexico, including in Mexico City. The pervasive violence inflicted on transgender women sets this vulnerable group apart from the rest of the LGBT community. An asylum applicant who comes out as transgender faces substantial risk of persecution, torture, and death she did not face before.

### **III. The Agency Erred in Concluding, Without Analysis, that Coming Out Does Not Constitute a “Changed Circumstance.”**

The facts of this case are undisputed. The IJ correctly found that Ms. A.P.A. is a transgender woman, CAR 81, 86-87, a conclusion the BIA agreed with and adopted, CAR 3. However, in a split decision, the BIA “disagreed” with Ms. A.P.A.’s argument that “her coming out publicly as a transgender female qualifies as ‘changed circumstances’ pursuant to 8 C.F.R. § 1208.4(a)(4)(B)(i) [sic], as we consider this a change in personal circumstances which is not sufficient to circumvent the one-year time bar for

asylum filing.” CAR 3. The BIA was presumably referring to § 1208.4(a)(4)(i)(B), which provides that “[t]he term ‘changed circumstances’ in section [1158(a)(2)(D)] shall refer to circumstances materially affecting the applicant’s eligibility for asylum,” and “may include, but are not limited to . . . [c]hanges in the applicant’s circumstances that materially affect the applicant’s eligibility for asylum.”

The BIA’s single-sentence determination that Ms. A.P.A.’s coming out does not constitute a “changed circumstance” under § 1208.4(a)(4)(i)(B) is wholly conclusory, perhaps because it is inexplicable. And “when a decision of an immigration judge or the BIA is so lacking in reasoned consideration and explanation that meaningful review is impossible, [this court] ha[s] granted petitions for review, vacated agency decisions, and remanded for further proceedings.” *Jeune v. U.S. Att’y Gen.*, 810 F.3d 792, 803 (11th Cir. 2016).

To the extent the BIA’s reasoning is discernable, the agency appears to have erred as a matter of law. The BIA’s distinction between “personal circumstances” and “changed circumstances” suggests it may have erroneously applied precedent related to a *different* changed circumstances bar—the regulation governing motions to reopen prior determinations, which require “changed circumstances *arising in the country of nationality*.” See 8

C.F.R. § 1003.2(c)(3)(ii) (emphasis added). Because that language is narrower than § 1208.4(a)(4)(i)(B), and expressly requires changed conditions in the petitioner’s country of nationality, the BIA has concluded that a change in “personal circumstances” does not satisfy the requirement for reopening. *See In re C-W-L-*, 24 I. & N. Dec. 346, 353 (BIA 2007). But in so doing, the BIA held that “the language at section 208(a)(2)(D) and 8 C.F.R. § 1208.4”—the provisions at issue here—“permits an updated or successive asylum application based on *changed personal circumstances . . .* at any time during proceedings before the entry of a final order of removal.” *Id.* (emphasis added).

Indeed, the U.S. Citizenship and Immigration Service’s own materials confirm that a change in personal circumstances—including coming out—can constitute a “changed circumstance” under the one-year asylum bar. One general lesson plan instructs asylum officers that qualifying changed circumstances include “changes in an applicant’s *personal circumstances*, such as recent political activism, conversion from one religion to another, etc.” USCIS, *Lesson Plan Overview: One-Year Filing Deadline* 9 (Mar. 23, 2009), [http://cdn.ca9.uscourts.gov/datastore/library/2013/02/26/Vahora\\_LessonPlan.pdf](http://cdn.ca9.uscourts.gov/datastore/library/2013/02/26/Vahora_LessonPlan.pdf) (emphasis added). Another training module, entitled “Guidance for

Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims,” is even more direct, and states that “[i]f an individual has recently ‘come out’ this may qualify as an exception to the one-year filing deadline based on changed circumstances.” Refugee, Asylum, and Int’l Operations Directorate, *supra*, at 48.

This stands to reason. The statute and regulation require only changed circumstances “materially affecting the applicant’s eligibility for asylum.” Coming out plainly qualifies. In Ms. A.P.A.’s case, her identity as a transgender woman subjects her to different risks of persecution than she faced prior to fully understanding her own identity, and during which time she presented as a gay man. As detailed above, transgender women in Mexico are singled out for violence, abuse, and murder at a higher rate than other members of the LGBT community, are specifically abused by law enforcement, and are targeted by gender-expression laws. *See supra*, pp. 13–24. This difference in treatment between transgender people and other LGB individuals led the Ninth Circuit to grant CAT relief and remand a Mexican petitioner’s case back to the agency when it evaluated her claim based only on her sexual orientation as a “gay boy,” but failed to consider “[t]he unique identities and vulnerabilities” associated with her coming out as a transgender

woman. *Avendano-Hernandez*, 800 F.3d at 1082. The court acknowledged that, “[w]hile the relationship between gender identity and sexual orientation is complex, and sometimes overlapping, the two identities are distinct,” and “significant evidence suggests that transgender persons are often especially visible, and vulnerable, to harassment and persecution due to their often public nonconformance with normative gender roles.” *Id.* at 1081.

The same is true for many asylum applicants who come out as transgender—or even as lesbian, gay, or bisexual—more than one year after arriving in the United States. Often, the public expression of their sexuality or gender identity may provide them with a new reason to fear persecution if they are returned to their countries of origin. Proper application of the changed-circumstances exception is therefore vitally important to LGBT asylum seekers.

Indeed, the one-year bar on asylum applications “disproportionately impacts” groups of applicants for whom cultural stigma delays recognition of one’s membership in a protected group, or stigmatizes disclosure of that fact. These applicants include “victims of sexual violence, rape survivors, victims of domestic violence, lesbian, bisexual, gay and transgender persons, and HIV-positive individuals.” Karen Musalo & Marcelle Rice, *The Implementation of*

*the One-Year Bar to Asylum*, 31 HASTINGS INT'L & COMP. L. REV. 693, 716 (2008).

Even those who come to the United States as adults may not come to identify as LGBT until more than one year after their entry. As explained above, coming out is an individualized process that occurs at different rates for different individuals. *See supra*, pp. 6–13. And it is especially dependent on an individual's social, cultural, and religious background. This is true for transgender people, *supra*, pp. 9–11, and is equally true for lesbian, gay, and bisexual people. Just as with transgender people, the notion that “it is ‘typical’ for lesbians and gay men to become aware of their sexual orientation in adolescence,” is “incomplete” even as a matter of LGB experiences in the United States, and “may be yet more misleading when applied to other cultural contexts.” Laurie Berg & Jenni Millbank, *Constructing the Personal Narratives of Lesbian, Gay, and Bisexual Asylum Seekers*, 22 J. REFUGEE STUD. 195, 208 (2009). A categorical rule that coming out does not qualify as a changed circumstance will prevent their meritorious asylum claims from being heard.

## CONCLUSION

Amici respectfully submit that the Court should grant the petition for review.

May 26, 2021

Respectfully submitted,

/s/ Ana C. Reyes

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## CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2021, I electronically filed the foregoing document with the United States Court of Appeals for the Eleventh Circuit by using the appellate NextGen system. I certify that all participants in the case are registered NextGen users and that service will be accomplished by the appellate NextGen system.

May 26, 2021

/s/ Ana C. Reyes  
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## CERTIFICATE OF COMPLIANCE

I certify, pursuant to Rules 29 and 32 of the Federal Rules of Appellate Procedure, that the attached Amicus Brief contains 6,001 words and complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2016, in 14-point CenturyExpd BT.

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