No. 11-71250

# United States Court of Appeals for the Ninth Circuit

GERMAN LOPEZ BERERA,
AKA KAROLINA LOPEZ BERERA,
PETITIONER,

*v.*

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
RESPONDENT.

*ON PETITION FOR REVIEW FROM THE*
*BOARD OF IMMIGRATION APPEALS*
*AGENCY NO. A200-602-649*

**BRIEF OF *AMICI CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, AMERICAN CIVIL LIBERTIES UNION, HIV AND AIDS LEGAL SERVICES ALLIANCE, HIV LAW PROJECT, AIDS LEGAL COUNCIL OF CHICAGO, ASIAN PACIFIC AIDS INTERVENTION TEAM, EAST BAY COMMUNITY LAW CENTER, AND THE HEALTH AND HUMAN RIGHTS CLINIC AT INDIANA UNIVERSITY SCHOOL OF LAW-INDIANAPOLIS**

**IN SUPPORT OF PETITIONER, URGING REVERSAL**


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## IDENTITY AND INTERESTS OF *AMICI*

*Amici curiae* Lambda Legal Defense and Education Fund ("Lambda Legal"), American Civil Liberties Union ("ACLU), HIV and AIDS Legal Services Alliance, HIV Law Project, AIDS Legal Council of Chicago, Asian Pacific AIDS Intervention Team, East Bay Community Law Center, and the Health and Human Rights Clinic at Indiana University School of Law-Indianapolis ("*Amici*") are leading public interest organizations that represent the interests of—and provide services to—people living with HIV/AIDS. With expertise in HIV legal and policy issues, and in the application of immigration laws, as well as knowledge of the interests of HIV-affected immigrant communities, *Amici* respectfully submit this brief to assist the Court in addressing central questions raised in this case.

**Lambda Legal** is the oldest and largest national legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender ("LGBT") people and those with HIV through impact litigation, education and public policy work. Through its Proyecto Igualdad, Lambda Legal serves Latino and Spanish-speaking communities across the United States. Lambda Legal actively litigates and advocates for the rights of LGBT immigrants and asylum seekers. Lambda Legal's work helped establish important Ninth Circuit asylum jurisprudence, including *Hernandez-Montiel v. INS*, 225 F.3d 1084 (2000) (landmark asylum case recognizing persecution on the basis of sexual

orientation) and *Soto-Vega v. Gonzales*, 183 Fed. App'x 627 (9th Cir. 2006) (successful LGBT asylum case). Additionally, through its HIV Project, Lambda Legal combats HIV stigma and bias. In 1983, Lambda Legal won the first HIV discrimination lawsuit in the country, and has helped maintain or expand protections across the country for people living with HIV. Lambda Legal's expertise on HIV is particularly relevant and will assist the Court as it considers the complex issues presented in this appeal

**ACLU** is a nationwide, nonprofit, nonpartisan organization with over 500,000 members. Since its founding in 1920, the ACLU has appeared before the federal courts on numerous occasions, both as direct counsel and as amicus curiae, to defend the principles embodied in the Constitution and our nation's civil rights laws. Through its Lesbian Gay Bisexual Transgender and AIDS Project, founded in 1986, the ACLU advocates on behalf of LGBT people and people living with HIV and AIDS. Through its Immigrants' Rights Project, the ACLU advocates on behalf of noncitizens. Because this appeal presents important issues for noncitizens relating to HIV disease and its treatment, the proper resolution of this controversy is of significant concern to the ACLU and its members.

**HIV and AIDS Legal Services Alliance** is a non-profit organization dedicated to serving the HIV- and AIDS-related civil legal needs of persons living with HIV/AIDS specific to immigration, housing, benefits, privacy and

discrimination. The issues on review are therefore of particular interest to HALSA because this case implicates the discriminatory and life-threatening impact on HIV-positive individuals who may be removed to Mexico.

**HIV Law Project** fights for the rights of the most under-served people living with HIV/AIDS through innovative legal services and advocacy programs. HIV Law Project believes that all people deserve the same rights, including the right to live with dignity and respect, the right to be treated as equal members of society, and the right to have their basic human needs fulfilled. These fundamental rights are elusive for many people living with HIV/AIDS. HIV Law Project has long represented immigrant clients who daily face the challenges of living with a chronic illness and the fear of being deported to countries with limited access or no access at all to essential medical care. Because the Board of Immigration Appeals misunderstood the impact that an HIV diagnosis can have on a non-citizen's fear of returning to her native country, HIV Law Project urges the Court to grant the petition for review and remand the case for additional proceedings.

**AIDS Legal Council of Chicago** was founded in 1987 to preserve, promote, and protect the legal rights of men, women, and children in the metropolitan Chicago area living with HIV/AIDS. Each year the Council provides direct legal services to more than 1,000 low-income people with HIV, including immigrants. In the last four years, the Council has represented immigrants from more than 75

different countries. The Council also educates the public about HIV-related legal issues, advocates for social policies that ensure fair treatment for all persons with HIV/AIDS, and works to promote laws and policies that will curb further spread of the disease. Because of its experience in working with legal issues involving persons with HIV/AIDS, the Council's views will assist the Court in reaching a decision that will promote fairness and non-discrimination that are essential public health tools.

Founded in 1987, the **Asian Pacific AIDS Intervention Team** is an organization that aims to positively affect the quality of life for Asians and Pacific Islanders living with HIV/AIDS by providing a continuum of prevention, health and social services, community leadership and advocacy.

The **East Bay Community Law Center** is a nationally-recognized clinical program of the law school at University of California, Berkeley. Its dual mission is to provide free legal services to low-income individuals and hands-on clinical training to law students. Since 1990, through its HIV/AIDS Law Project, the Center has been representing HIV-positive individuals in multiple areas of law, including public benefits appeals and immigration applications. The Center regularly represents HIV-positive asylum seekers who have fled and fear persecution based on their sexual orientation and HIV status. Almost all of these asylum seekers will be significantly affected by this case.

The **Health and Human Rights Clinic at Indiana University School of Law-Indianapolis** is a medical-legal partnership directly representing the legal needs of low-income clients and providing community education and public policy advocacy on domestic and international health justice issues.

*Amici* are familiar with the parties' presentation on the issues and believe that additional argument on those matters is necessary. Though concurring in the Petitioner's legal analysis, *Amici*'s discussion of the issues does not duplicate that briefing. Rather, *Amici* draw on their knowledge of, and experience with, the rights of LGBT immigrants and persons with HIV/AIDS, using it to show that the Court should reverse the Board's ruling and remand for further proceedings.

## I.
## INTRODUCTION

*Amici* respectfully submit this brief to assist the Court in evaluating complex issues related to HIV/AIDS. Petitioner in this case, Ms. Lopez Berera,[1] is a transgender woman living with HIV. Her persecution cannot be considered along a single dimension or axis of identity. Her HIV status and transgender identity cannot be separated; rather, in her identity and experience her HIV status and transgender identity are inextricably intertwined. As explained below, Ms. Lopez Berera's HIV status and transgender identity—coupled together—work in tandem

to trigger a unique form of persecution. And the Board's failure to appreciate the complexities of Ms. Lopez Berera's HIV status and transgender identity, and how they affect the issues presented here—especially the issues of the reasonableness of her relocation within Mexico and the changed circumstances excusing her delay in seeking asylum—caused the Board to err.

In this brief, *Amici* show that the Board's ruling, if allowed to stand, would have devastating consequences not just for Ms. Lopez Berera, but for other similarly situated transgender people with HIV/AIDS, who have historically had access to—and continue to need—the protections of this country's asylum laws to survive. Based on their expertise advocating for transgender individuals and people living with HIV/AIDS, *Amici* urge this Court to remand this matter to the Board to ensure that Ms. Lopez Berera is not removed to Mexico to face the dangerous reality of living in that country as a transgender person with AIDS.

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[1] This is Petitioner's preferred name. Since she identifies as female, this brief uses feminine pronouns to refer to Ms. Lopez Berera. Her immigration case and record, however, reflect the name she was assigned at birth: German Lopez Berera.

## II.
## SUMMARY OF ARGUMENT

> A gay, HIV-positive Mexican man was found dead Feb. 21 [2008] with his hands tied behind his back and a cardboard sign on his body reading in Spanish, "This is what happens to me for going around infecting people with AIDS." (AR642.)

> In a new attack against [the] transgender community, … the body of a transgender woman [was found yesterday] in Chihauhua, Mexico[. The woman] was beheaded and her body was lying in a colony [more] than a mile from where her head was found. (AR726.)

The scientific research, newspapers, popular press, and country condition reports from Mexico are full of experiences such as those recounted above, each growing out of the intolerance, bias, prejudice, and persecution against transgender individuals and those with HIV/AIDS. Ms. Lopez Berera is a member of a unique social group at the intersection of these two distinct, but often overlapping, groups: transgender women with HIV/AIDS. Nevertheless, the Board rejected Ms. Lopez Berera's requests for asylum and withholding of removal based on three erroneous conclusions: (1) that legislative advancements for *gays and lesbians* indicated that Ms. Lopez Berera—a transgender woman with HIV/AIDS—no longer faced a likelihood of future persecution; (2) that Ms. Lopez Berera reasonably could relocate in Mexico to avoid persecution, despite prevalent attitudes against transgender people with HIV/AIDS and lack of access to life-saving medications to treat HIV/AIDS, which exist throughout the country; and (3) that Ms. Lopez Berera's late asylum application could not be excused despite the changed

circumstance of her HIV/AIDS diagnosis. The Board's ruling misapprehends Mexican society and culture, and the medical consequences and traumatic psychological effects of an HIV/AIDS diagnosis, as they pertain to these three findings.

First, as this Court has recognized, conditions in Mexico are unsafe for transgender people with HIV/AIDS. *See, e.g.*, *Boer-Sedano*, 418 F.3d 1082, 1091 (9th Cir. 2005) (concluding that people living with HIV are actively persecuted in Mexico). Transgender people with HIV are subject to persecution, life-threatening violence, and discrimination. Social exclusion and discrimination manifest themselves in healthcare delivery, where treatment is withheld from transgender people with HIV/AIDS because of their transgender identity. These social and cultural conditions make mere survival difficult for transgender people with HIV/AIDS in Mexico. These conditions must be considered in connection with the issues of "reasonable relocation" and "changed circumstances" to excuse Ms. Lopez Berera's late-filed asylum application, but the Board disregarded them. *See infra* Section IV.A.1.

Second, these social and cultural conditions are present throughout Mexico, making relocation not just unreasonable, but implausible without likely harm to Ms. Lopez Berera. Wherever Ms. Lopez Berera is forcibly removed to, she would still be subjected to the same social and cultural conditions that make life for her

dangerous. She would still be unable to obtain access to critical HIV/AIDS medication and treatment, causing her health to deteriorate. And she would still be unable to find employment or resources to pay for food, shelter, or to stay healthy. *See, e.g.*, *Boer-Sedano*, 418 F.3d at 1091 (concluding that relocation in Mexico was unreasonable for man with HIV). *See infra* Section IV.A.2.

Third, the social and cultural conditions create a "changed circumstance" excusing Ms. Lopez Berera's late-filed asylum application. Since "hostility towards and discrimination against HIV/AIDS patients is common in Mexico," *Boer-Sedano*, 418 F.3d at 1091, Ms. Lopez Berera's diagnosis provides an additional reason, beyond her status as a transgender woman, to support her asylum request and make relief more likely. *Vahora v. Holder*, 641 F.3d 1038, 1044 n.4 (9th Cir. 2011) (a "material" change is one that increases likelihood of success on asylum). But the Board failed to conduct any analysis of likelihood of future persecution based on Ms. Lopez Berera's transgender identity and HIV status. Moreover, Ms. Lopez Berera's HIV/AIDS diagnosis renders the one-year period before she filed her asylum application—during which she dealt with the traumatic psychological effects of the diagnosis and attended to her critical medical needs—more than reasonable. *See infra* Section IV.B.

## III.
## BACKGROUND

Ms. Lopez Berera was diagnosed with HIV, the virus that causes AIDS, in April 2009. (Certified Administrative Record ("AR") 56, 146-147, 247.) According to her medical records, tests revealed that Ms. Lopez Berera was (and remains) in the most advanced stage of HIV/AIDS. (AR754 ¶ 31.) In fact, based on her test results and documented HIV-related opportunistic infections—including toxoplasmosis, cytomegalovirus, and herpes simplex virus—Ms. Lopez Berera meets the Centers for Disease Control category C3 of HIV/AIDS (AR754), the most severe stage. Because of the advanced nature of her illness, Ms. Lopez Berera has been hospitalized four different times for four or five days each time (AR149-50, 158-59, 165-66), and prescribed medications to treat the opportunistic infections that her immune system is unable to fight on its own. (AR149-153.)

Ms. Lopez Berera has been on life-saving drug treatment since approximately April 2010. (AR754.) This treatment, known as highly active antiretroviral therapy ("HAART"), interferes with HIV's replication process, thus reducing the amount of virus in the blood, enhancing immune function, and lowering the chances of HIV/AIDS-related complications.[2] Treatment also improves general health and quality of life. Because of the advanced nature of her

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[2] *E.g.*, NYU Center for AIDS Research, *HIV Treatment Options*. Available at http://www.hivinfosource.org/hivis/hivbasics/treatment/index.html.

condition, continuity of care is critical; Ms. Lopez Berera needs to take her medication consistently and on time.[3] *See Aguilar-Mejia v. Holder*, 616 F.3d 699, 705 (7th Cir. 2010) ("[m]issing [HIV] medication for even a brief period could be a literal death sentence). If HAART treatment is stopped—or never begun—progression from HIV to AIDS generally occurs in nine to ten years, and the median survival time after developing AIDS is only 9.2 months. *See* D. Morgan et al., *HIV-1 Infection in Rural Africa: Is There A Difference In Median Time to AIDS and Survival Compared With That In Industrialized Countries?*, 16(4) AIDS 597-632 (2002). HAART significantly increases life-expectancy. *See* Robert S. Hogg et al., *Life Expectancy of Individuals on Combination Antiretroviral Therapy in High-Income Countries: A Collaborative Analysis of 14 Cohort Studies*, 372 THE LANCET 9635, at 5 (2008) (noting prolonged survival, and that someone starting therapy at 20 can expect to live to 43 years old, on average); *see also* J.T. King et al., *Long-Term HIV/AIDS Survival Estimation in the Highly Active Antiretroviral Therapy Era*, 23(1) MEDICAL DECISION MAKING 9-20 (2003) (noting increased survival times).

[3] *See* U.S. Dept. of Health and Human Services, *Guidelines for the Use of Antiretroviral Agents in HIV-1-infected Adults and Adolescents*, at 122 (Jan. 10, 2011) (treatment adherence is highly correlated to viral suppression, reduced levels of resistance, increased survival, and improved quality of life). Available at http://www.aidsinfo.nih.gov/ContentFiles/AdultandAdolescentGL.pdf.

In addition to her prescriptions for HAART drugs, Ms. Lopez Berera was also provided with pharmaceutical options for purchasing medication in the event of a shortage at her regular pharmacy. (AR165-166.) Ms. Lopez Berera credibly testified that she does not know if will be able to access her medication in Mexico, where there are documented shortages of life-saving HIV medicines. (AR177-178.)

In addition, Ms. Lopez Berera attended a support group that counsels for medical management and psychosocial assistance and care for people with HIV/AID. (AR161-162, 271.) This group provided education for adherence to treatment and self-empowerment for overall general and mental health. (AR161-162, 271.) Thus, Ms. Lopez Berera not only has access to critical medical treatment in the United States, but there is an extended network of resources and support for her here.

## IV.
## ARGUMENT

### A. Ms. Lopez Berera's Status As A Transgender Woman With AIDS Makes Relocation Within Mexico Unreasonable.

The Board properly found that Ms. Lopez Berera experienced past persecution, but erred in concluding that the government had rebutted the presumption of future persecution by establishing that Ms. Lopez Berera could safely relocate within Mexico. (AR6.) This conclusion is not consistent with the reality of the treatment of transgender women with HIV/AIDS in Mexico.

### 1. Transgender People In Mexico Are Persecuted And Lack Access to HIV Healthcare.[4]

According to the United States Agency for International Development ("USAID"), the HIV/AIDS epidemic in Mexico is concentrated in marginalized populations—especially LGBT people. *See* USAID, *HIV/AIDS Health Profile: Mexico* (Sept. 2010).[5] Notably, "factors such as social stigma related to HIV, homophobia, and gender inequities continue to hamper the response" to the epidemic. *Id.* According to USAID, "[t]he spread of HIV/AIDS in Mexico is exacerbated by stigma and discrimination, which act as a barrier to prevention, testing, and treatment." *Id.* The United Nations General Assembly Special Session on HIV/AIDS ("UNGASS") agreed, stating that "stigma, silence, discrimination and denial, together with lack of confidentiality, weaken the prevention efforts, care and treatment." UNGASS, *Declaration of Commitment on HIV/AIDS* 9 (June 2001).[6]

Anti-HIV/AIDS persecution, violence, and stigma occur in all aspects of

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[4] This Court should focus on the quality—not quantity—of supporting materials, especially because country condition reports and other sources may neglect obscure social groups like transgender women with HIV/AIDS. *See Galina v. INS*, 213 F.3d 955, 959 (7th Cir. 2000) ("[country] reports are brief and general, and may fail to identify specific, perhaps local, dangers to particular, perhaps obscure, individuals").

[5] Available at http://www.usaid.gov/our_work/global_health/aids/Countries/lac/mexico_profile.pdf.

[6] Available at http://data.unaids.org/publications/irc-pub03/aidsdeclaration_en.pdf.

life—from police and government officials, within families, in healthcares services and the workplace. It is virtually inescapable:

> HIV testing was conducted only with perceived high-risk groups, often without informed consent. Patients with AIDS were often isolated[;] … some HIV hospital patients had a sign over their beds stating they were HIV positive. There was also discrimination in the workplace.

*HIV/AIDS Health Profile: Mexico*, *supra*, at 2. In a survey of public hospital workers, 97% agreed that people with HIV/AIDS are victims of discrimination; 70% believed that people with HIV/AIDS are responsible for their illness; and 88% would not share their home with a person with HIV/AIDS. (AR429.)

Unsurprisingly, the bulk of this anti-HIV/AIDS persecution and stigma falls on marginalized communities, particularly LGBT individuals. Transgender women and gay men are often blamed for HIV/AIDS: Among healthcare professionals, for example, 25% consider homosexuality the cause of AIDS in Mexico. (AR438.) This scapegoating inevitably leads to persecution and violence against people with HIV/AIDS. (*E.g.*, A642.) Thus, homophobia remains a serious barrier to HIV treatment and prevention. *See* UNAIDS, *HIV Prevention Hampered by Homophobia* (Jan. 13, 2009).[7]

Media accounts and popular culture perpetuate the devaluation and marginalization of LGBT people. For example, in an article about the arrest of two

"transvestite" sex workers, a newspaper used terms like "women with antennae" and "AIDS-infected bedbugs." (A419.) The headline read, "Faggots arrested." (A420.) One article used the pejorative term "*sidoso*"[8]—plagued—to describe "the sad end" of a "homosexual" victim of AIDS. (A419.) Notably, the caption to a photo of the man stated that he died in "complete abandonment." (A419.)

Among marginalized LGBT groups, the transgender community is particularly vulnerable. According to a report published in 2008 by the Center for Health Systems Research in Mexico, transgender persons are "heavily stigmatized and discriminated against, even by members of the gay community." C. Infante et al., *Sex Work in Mexico: Vulnerability of Male, Travesti, Transgender and Transsexual Sex Workers*, 11(2) CULTURE, HEALTH & SEXUALITY 125, 129 (Feb. 2009). Several of the participants in the study experienced stigma and discrimination from their families as well as social rejection, physical abuse, and sexual violence. *Id.* at 135-36. Some participants also stated that they had difficulties settling down in Mexico City because of the lack of support networks in the city. *Id.* Moreover, "[s]tudies show that transsexuals are especially

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[7] Available at http://www.unaids.org/en/Resources/PressCentre/FeatureStories/2009/January/20090113MSMLATAM/.

[8] "Sidoso"—a term derived from SIDA, the Spanish word for AIDS—is an insult that conveys disgust and fear of a plague. This practice can be likened to the historical use of the term "leper" and the shunning and persecution of persons with leprosy.

vulnerable to violence, discrimination and humiliation." (A727.) Many are subjected to brutal crimes (A397, A796), and "to mass detentions, extortion, and physical abuse at the hands of police and military officials." Global Rights, *The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in Mexico: A Shadow Report* (2010)[9] ("*Shadow Report*"). At least 27 transgender people were murdered in Mexico from 2008 through 2010,[10] in addition to 22 in the first nine months of 2011.[11] In short, transgender people are "the most affected [by discrimination] and the one[s] that face[] more violence." (A430.)

Bias against people living with HIV also limits access to life-saving medication, and the delivery of HIV-related healthcare. Fear of discrimination inhibits people from even being tested for HIV. (A424, A438.) People with HIV delay medical appointments out of fear of social rejection. (A424.) They are commonly victims of confidentiality and privacy violations. (A429.) And they often receive inadequate and substandard healthcare: "The majority of public

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[9] Available at http://www.globalrights.org/site/DocServer/LGBT_ICCPR_Shadow_Report_Mexico.pdf?docID=11184.

[10] *See* Transgender Europe, Transrespect Versus Transphobia Worldwide, *Trans Murder Monitoring Results: February 2011 Update*, available at http://www.transrespect-transphobia.org/en_US/tvt-project/tmm-results/tmm-march-2011.htm.

[11] *See* Rebekah Curtis, *Transgender People Murdered As World Resists Change*, Reuters (Nov. 17, 2011). Available at http://www.reuters.com/article/2011/11/17/us-transgender-idUSTRE7AF1UA20111117.

hospitals in Mexico have a discriminatory and homophobic attitude towards citizens who live with HIV/AIDS and who are sexually diverse [namely, LGBT]," according to data published in 2009 by the Director of the AIDS program of Mexico's National Commission of Human Rights. (A427.)

Many complaints involved the complete denial of medical services and treatment to people with HIV/AIDS. (A428.) According to a report from the Immigration and Refugee Board of Canada, analyzing statistics provided by Mexico's National Human Rights Commission, "more than 570 HIV/AIDS-related complaints were lodged with the commission between 1992 and October 2006," most centering on such issues as the "denial of adequate health services or medication, acts of discrimination or negligence by medical personnel, and violations of confidentiality." Immigration and Refugee Board of Canada, *Mexico: Situation of Witnesses to Crime and Corruption, Women Victims of Violence and Victims of Discrimination Based on Sexual Orientation* (Feb. 2007).[12] Almost 44% of complaints came from Mexico City. *Id.* Such neglect often leads to death. In 2010, five people with AIDS died at a hospital because healthcare personnel refused them treatment. The discrimination is systemic: "The problem is that emergency personnel in the Metropolitan Hospital, adhering to state regulations,

[12] Available at http://www.irb-cisr.gc.ca:8080/Publications/PubIP_DI.aspx?id=327&pcid=1402.

systematically deny them medical attention and send them to farmacists [sic] because of their sexual preferences and illness." (A368.)[13]

Even though Mexico has had a national commitment since 2003 to provide universal access to antiretroviral drugs, "stigma and discrimination remain barriers to seeking information, testing, and treatment." *HIV/AIDS Health Profile: Mexico*, *supra*, at 2, 4. Thus, as of 2007, only about 57% of HIV-affected people who needed antiretroviral therapy were receiving it. *See* World Health Organization, *Towards Universal Access* 119 (2008).[14] While Mexico's 2010 UNGASS report claims that 82% of HIV-affected people were receiving treatment in 2009,[15] the

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[13] Even without HIV/AIDS stigma, Mexican society is extremely homophobic and transphobic. The U.S. Department of State's 2008 country report for Mexico confirms that "[h]omophobic beliefs and practices were common, reflected principally in entertainment media programs and everyday attitudes. *Reports of attacks against homosexuals were frequent*." (A334) (emphasis added); *see also* (A315, A404). The record here is replete with recent examples of anti-LGBT violence and discrimination. (A350, 354, 365, 377, 404, 442.) USAID notes that there are laws to prevent discrimination based on HIV/AIDS status, but "in most cases the laws are not successfully implemented, and there are no sanctions when discrimination does occur." *HIV/AIDS Health Profile: Mexico*, *supra*, at 3. The anti-LGBT bias has continued, even in Mexico City, despite the LGBT community's recent legislative achievements. (A338-339, 350, 382-383.) Indeed, legislative progress created a violent anti-LGBT backlash. (A350, A377, A382.)

[14] Available at http://www.who.int/hiv/pub/towards_universal_access_report_2008.pdf.

[15] CONASIDA, *Informe Nacional Sobre Los Progresos Realizados en la Aplicación del UNGASS* 48 (Mar. 2010). Available (in Spanish) at http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportssubmittedbycountries/mexico_2010_country_progress_report_es.pdf.

World Health Organization estimates that number to be only 71%. *See* World Health Organization, *Towards Universal Access* 116 (2010).[16] But regardless of the actual number, as discussed above, it is marginalized communities—LGBT people—that are being denied treatment. Mexico itself acknowledges that stigma and discrimination prevent marginalized groups from receiving life-saving medication. *See* CONASIDA, *supra*, at 48; *see also HIV/AIDS Health Profile: Mexico*, *supra*, at 3, 4. In addition, there are shortages of key HIV medicines, such that those receiving treatment must stop treatment or change drugs, and those who are not under therapy are unable to begin. *See* CONASIDA, *supra*, at 48; *see also HIV/AIDS Health Profile: Mexico*, *supra*, at 3, 4. Thus, despite the stated desire to provide treatment to all people living with HIV/AIDS, the reality is far different. Mexican activists describe this as "administrative homophobia"— government and agency inaction, borne out of homophobia and transphobia, that prevents life-saving medication from reaching LGBT people. (A368.)

As this evidence shows, transgender people with HIV/AIDS are subject to violence, abuse, and discrimination—and yes, persecution—in Mexico. The Board disregarded this evidence in considering Ms. Lopez Berera's likelihood of facing

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[16] Available at http://www.who.int/hiv/pub/2010progressreport/full_report_en.pdf.

future persecution; the Board further erred by failing to appreciate how these facts affect the reasonableness of Ms. Lopez Berera's relocation within Mexico.

### 2. Relocation Within Mexico Is Not A Reasonable Option For Ms. Lopez Berera.

As the above discussion makes clear, there is no place in Mexico where Ms. Lopez Berera could relocate where (1) HIV medicine is readily available for transgender women like herself, and (2) violence and discrimination are not a threat to her. Indeed, relocating within Mexico will actually place Ms. Lopez Berera at risk of serious harm and further endanger her health.

Before the ability to relocate can rebut the presumption of future persecution, the government must meet its burden to show that it would be reasonable for Ms. Lopez Berera to do so "under all the circumstances." 8 C.F.R. § 208.13(b)(1)(i)(B), (b)(2)(ii), (b)(3)(ii). The analysis involves many factors:

> [A]djudicators should consider … whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. Those factors may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

8 C.F.R. § 208.13(b)(3). Consideration of these factors shows that relocation is not reasonable for Ms. Lopez Berera.

First, relocation would not solve the pressing issue of access to HIV/AIDS

medical treatment for Ms. Lopez Berera. Problems with access to treatment issues exist nation-wide, and the government has made no showing that access is better in Mexico City than anywhere else—particularly for a transgender woman. In fact, as discussed above, transgender people have increased difficulty in obtaining drugs for HIV/AIDS treatment. Second, as Ms. Lopez Berera credibly testified, she cannot hide her status as a transgender woman with AIDS, no matter where she relocates. (AR173.) Because of the significant social and cultural biases that she will inevitably face, which are set forth above in detail, it is highly likely that she will not be able to get a job, obtain healthcare or health insurance, or pay for her basic necessities. For these reasons, relocation is far short of reasonable.

Notably, the Board misapplied the law on reasonableness of relocation. It considered none of the factors of § 208.13(b)(3), instead holding that Ms. Lopez Berera "had not demonstrated that any inadequacies in the Mexican healthcare system are an attempt to persecute HIV-positive individuals" and thus could not argue that relocation on the basis of lack of HIV treatment is unreasonable. (AR6.) This holding errs in at least two ways. First, it mistakenly placed the burden to prove unreasonableness of relocation on Ms. Lopez Berera, rather than on the government to prove its reasonableness. *See* 8 C.F.R. § 208.13(b)(1)(ii). Second, it wrongly required Ms. Lopez Berera to prove that the healthcare disparities she would face would rise to the level of persecution—a much higher standard.

In fact, this Court has already held that the health status of an HIV-affected person from Mexico, combined with other social and cultural constraints, "would make relocation unreasonable." *Boer-Sedano*, 418 F.3d at 1091. In *Boer-Sedano*, the Court found that the petitioner "would face significant social and cultural constraints as a gay man with AIDS in Mexico, as hostility towards and discrimination against HIV/AIDS patients is common." *Id.* In addition, this Court recognized that Boer-Sedano's health status would rapidly deteriorate without HIV medications, which would be difficult to obtain in Mexico, and that his "status as a homosexual with AIDS would make it impossible to find a job to provide health insurance or money to pay" for life-saving medication. *Id.* These facts made it impossible to conclude that relocation would be reasonable:

> We hold, therefore, that after considering the cumulative evidence on the social and cultural constraints Boer-Sedano would face as a homosexual man in Mexico, his current health, and the likelihood that serious harm would come to him if forced to relocate to Mexico where he could not obtain his required medication, *no reasonable factfinder could conclude that the INS has carried its burden of showing that such relocation is reasonable.*

*Id*. (emphasis added). A different conclusion here is unwarranted given that the very same evidence is present: Ms. Lopez Berera's status as a transgender woman with HIV/AIDS will subject her to the same "social and cultural constraints" as Boer-Sedano—possibly even more so because she is transgender—because "hostility toward and discrimination against HIV/AIDS patients is common." *Id.*

She will be unable to obtain a job due to transgender- and HIV-based discrimination. And she will be unable to pay for food and shelter, much less purchase life-saving medication. From this, Ms. Lopez Berera would face serious harm, as her health would rapidly deteriorate. As in *Boer-Sedano*, relocation is unreasonable for Ms. Lopez Berera, and this Court should find that the BIA misapplied the law.

## B. Ms. Lopez Berera's HIV/AIDS Diagnosis Is A "Changed Circumstance" That Materially Affects Her Asylum Eligibility.

The Board also erred in failing to recognize that Ms. Lopez Berera's HIV/AIDS diagnosis meets the changed circumstance exception to the one-year asylum filing deadline. Federal law allows individuals to apply for asylum, but it requires that the applicant show "that the application has been filed within 1 year after the date of the alien's arrival in the United States." 8 U.S.C. § 1158(a)(2)(B). This deadline, however, is subject to two exceptions:

> An application for asylum of an alien may be considered, notwithstanding [the one-year bar], if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period … .

8 U.S.C. § 1158(a)(2)(D). Under this statute, Ms. Lopez Berera's HIV/AIDS diagnosis should be considered a "changed circumstance" which materially affected her asylum eligibility.

### 1. Legal Standard For "Changed Circumstances"

Changed circumstances are "circumstances materially affecting the applicant's eligibility for asylum." 8 C.F.R. § 208.4(a)(4). Regulations provide a non-exhaustive list of examples, including "[c]hanges in the applicant's circumstances that materially affect the applicant's eligibility for asylum." 8 C.F.R. § 208.4(a)(4)(i)(B). Thus, an applicant's individual life changes—for example, the conversion from one religion to another, or abandonment of religion altogether[17]—may qualify. Moreover, this Court has expressly held that a "material" effect on asylum eligibility "is an effect that increases, in a non-trivial way, the applicant's likelihood of success in his application." *Vahora v. Holder*, 641 F.3d 1038, 1044 n.4 (9th Cir. 2011).

### 2. Ms. Lopez Berera's Status As A Transgender Woman With HIV/AIDS Increases The Likelihood Of Future Persecution In Mexico.

There can be no doubt that Ms. Lopez Berera's status as a transgender woman with HIV/AIDS markedly increases the likelihood of persecution in Mexico. *See supra* Section IV.A. Though the Board acknowledged Ms. Lopez Berera's membership in the particular social group "Mexican gay transgender and transsexual persons with AIDS," it assumed that Ms. Lopez Berera was vulnerable to persecution only because of the "outward manifestations of [her] sexual and

[17] *See Asylum Officer Basic Training Course, Lesson: One-Year Filing Deadline*, at 9-10.

transgender identity." (AR4.) But much of the evidentiary record relates to the treatment of persons with HIV/AIDS in Mexico—and much of that pertains to transgender people living with HIV/AIDS. *See, e.g.*, (AR619-621, 624-626, 637-638, 642-643, 648, 653-669, 672.) Based on this evidence, Ms. Lopez Berera explicitly argued in her closing brief before the Immigration Judge that her status as a transgender woman with HIV/AIDS increases the likelihood of future persecution:

> German Lopez Barrera's status as an individual with AIDS materially affects her asylum claim because it will make her even more of a despised pariah than her sexual orientation and being transgender and transsexual alone did. The background materials submitted to the court document the unchecked persecution of transgender and transsexual homosexuals with HIV/AIDS in Mexico. (AR15.)

Ms. Lopez Berera's transgender identity and HIV status, combined, make her particularly vulnerable to persecution, abuse and healthcare exclusion. But the Board found that people with HIV—including transgender individuals like Ms. Lopez Berera—are all equally excluded from medical treatment in Mexico. (AR6) ("the unavailability of HIV drugs and proper healthcare is not persecution of homosexuals, but is a problem felt throughout Mexican society"). This view is legally and factually wrong.

Contrary to the Board's view, people living with HIV in Mexico are not equally disadvantaged. Country condition reports show that transgender people are

deliberately excluded from HIV treatment (AR424),[18] and this exclusion amounts to continued persecution. Nevertheless, the Board improperly assumed that everyone with HIV—regardless of sexual orientation, gender expression, or transgender identity—has equal access to healthcare. The Board's position is over-inclusive: it treats people with HIV as if they constitute only one social group, yet HIV differently affects people from distinct social groups—some of which, like transgender women, are more vulnerable to persecution. Transgender people are deliberately excluded from, and denied access to, healthcare, and they experience an acute deprivation from government protection and services.[19] This renders HIV-affected transgender people particularly vulnerable. Thus, the Board erred in glossing over Ms. Lopez Berera's *transgender*-specific claim by relying on dicta about healthcare access for *gay* men from *Castro-Martinez v. Holder*, 641 F.3d 1103, 1109 (9th Cir. 2011) (summarily discussing gay HIV issues) (pet. for rehr'g pending).[20]

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[18] *See also Homophobia Justifies Forsaking of People Infected with HIV/AIDS in Mexico* (Aug. 15, 2009).

[19] *E.g.*, *Shadow Report*, *supra*; *see also* U.S. Dep't of State, *Mexico*: *Country Reports on Human Rights Practices—2010*, available at http://www.state.gov/documents/ organization/160469.pdf.

[20] The petition for *en banc* review was filed in *Castro-Martinez* in part because the asylum denial stands in stark contrast to Ninth Circuit precedent. *Compare Castro-Martinez*, 641 F.3d at 1109 (denying asylum to HIV-affected gay man from Mexico), *with Boer-Sedano*, 418 F.3d at 1091 (granting asylum to HIV-affected gay man from Mexico).

Since this Court has already concluded that "hostility towards and discrimination against HIV/AIDS patients is common in Mexico," *Boer-Sedano*, 418 F.3d at 1091, it should not countenance the Board's effort to rely on vague generalizations about HIV medical care to deny Ms. Lopez Berera's asylum claim. *See also Eneh v. Holder*, 601 F.3d 943 (9th Cir. 2010) (granting asylum based on HIV persecution). This case should be remanded to the Board for a full review of the merits of the asylum claim. As part of its analysis, the Board should be required to conduct an individualized assessment of access to HIV medical care for transgender people like Ms. Lopez Berera. The Board should also analyze the likelihood of future persecution based on Ms. Lopez Berera's status as a transgender woman with HIV/AIDS.

### 3. Ms. Lopez Berera Filed For Asylum Within A Reasonable Time After Her HIV/AIDS Diagnosis.

An applicant is required to apply for asylum within a "reasonable period" given changed circumstances. 8 C.F.R. § 208.4(a)(4)(ii). Ms. Lopez Berera applied within one year after learning of her HIV/AIDS diagnosis. (AR945-956) (I-589 dated April 2010). This period of delay is reasonable because Ms. Lopez Berera's medical condition and the psychological effects of the diagnosis—both a

serious illness and a disability under the law[21]—required all of her attention. After attending to her own medical needs and obtaining medical and psychological support, Ms. Lopez Berera filed her asylum application within a year.

An HIV diagnosis is a traumatic event. This traumatic nature, coupled with high correlation rates of HIV and psychological problems, can often result in poor overall psychological adjustment and coping. Psychological maladjustment to such a diagnosis can trigger other ailments such as depression, anxiety, and stress and may have a negative effect on a wide range of self-care behaviors. Further, an HIV diagnosis is especially traumatic for individuals who are already socially marginalized, particularly transgender people.

According to the Diagnostic and Statistical Manual for Mental Disorders, a diagnosis of a life-threatening illness such as HIV is a Criterion A trauma that can lead to post-traumatic stress disorder ("PTSD"). Am. Psychiatric Ass'n, *Diagnostic & Statistical Manual for Mental Disorders* § 309.81 (4th ed. 1994). Traumatic diagnoses have been found to trigger "maladaptive, impaired and extended coping," and a general inability to deal with and treat the underlying illness. *See* Angelo A. Alonzo, *The Experience of Chronic Illness and Post-traumatic Stress Disorder: The Consequences of Cumulative Adversity*, 50 SOC. SCI. MED. 1475,

[21] *See, e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 637 (1998) ("HIV infection satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease.").

1480 (2000). Indeed, discovery that one is HIV-affected is "shocking and life threatening and altering" and is analogous to other traumatic medical events. *Id.*

Although PTSD incident to medical diagnosis can occur across a range of illnesses, studies show that an HIV diagnosis is particularly traumatic. *See* Steven A. Safren et al., *Symptoms of Posttraumatic Stress and Death Anxiety in Persons with HIV and Medication Adherence Difficulties*, 17 AIDS PATIENT CARE & STDS 657, 661 (2003) (finding a high frequency of PTSD symptoms related to HIV diagnosis). In fact, a diagnosis can precipitate "chronic disease comorbidities" and stressors, such as negotiating a health care system, self-care activities, and coping with lifestyle changes. *Id.* at 662.

The psychological and emotional responses to an HIV diagnosis take many other forms as well. Immediate reactions include devastation, shock, and indignation. Patricia E. Stevens & Eugenie Hildebrandt, *Life Changing Words: Women's Responses to Being Diagnosed with HIV Infection*, 29 ADVANCES IN NURSING SCI. 207, 215 (2006). Long-term responses include depression, denial, escalated drug and alcohol use, shame, and suicidal ideation. *Id.* at 216; *see also* Carol L. Galletly et al., *CDC Recommendations for Opt-out Testing and Reactions to Unanticipated HIV Diagnoses*, 22 AIDS PATIENT CARE & STDS 189 (2008). Indeed, reactions to an HIV diagnosis have been described as an "existential crisis" characterized by an "overwhelming terror and emotional distress" coupled with a

altered sense of self. *See* Karolynn Siegel & Ilan H. Meyer, *Hope and Resilience in Suicide Ideation and Behavior of Gay and Bisexual Men Following Notification of HIV Infection*, 11 AIDS EDUC. & PREVENTION 53, 57 (1999).

Stigma associated with HIV disease can exacerbate psychological maladjustment. In one study, 41% of participants reported that others behaved negatively around them when learning an individual's HIV status. Peter A. Vanable et al., *Impact of HIV-related Stigma on Health Behaviors and Psychological Adjustment Difficulties Among HIV-positive Men and Women*, 10 AIDS & BEHAVIOR 473 (2006). Depression was also strongly correlated with stigmatization. *Id.* In addition, being LGBT can exacerbate psychological maladjustment to an HIV diagnosis. Studies have reported a higher prevalence of stress and anxiety symptoms in people with HIV, noting that LGBT people face additional difficulties adjusting because factors related to societal prejudice against homosexuality, such as stigma and increased vulnerability to violence, "may contribute to stress across many aspects of daily life." Margaret C. Sewell et al., *Anxiety Syndromes and Symptoms Among Men With AIDS: A Longitudinal Controlled Study*, 41 PSYCHOSOMATICS 294, 299 (2004).

Consistent with these general findings, Ms. Lopez Berera herself experienced psychological effects from her HIV/AIDS diagnosis and had to focus on the medical treatment of HIV/AIDS-related infections. She testified that she

was traumatized by the diagnosis, sick from infections, and suffering from psychological issues and side effects from the various medications that she had been taking to combat her infections. (AR145-161, 173.) Ms. Lopez Berera also had four hospitalizations after diagnosis and before her detention. (AR149-151.)

In addition, Ms. Lopez Berera testified that after her release from the hospital when she was first diagnosed, she was extremely scared. (AR161.) She sought support and assistance to help her survive her illness through a local non-profit agency that offered a support group for HIV-affected Latinos. She attended this group regularly. (AR160-166.) In short, Ms. Lopez Berera's HIV/AIDS diagnosis permeated "almost every phase of [her] life," *Bragdon*, 524 U.S. at 637—her physical and mental health, self-confidence, employability, financial state, and general level of stability.

Given her diagnosis, compounded with the knowledge that she was facing a life-threatening illness and potential deportation to Mexico, it is not surprising that an individual in Ms. Lopez Berera's situation would face difficulties in being able to attend to matters beyond those of dealing with her immediate medical needs. The Court should find the Ms. Lopez Berera's medical and psychological condition were such that the delay in filing her asylum application following her HIV/AIDS diagnosis was reasonable.

## V.
## CONCLUSION

The Board erred in refusing to consider Ms. Lopez Berera's asylum claim, and in analyzing the reasonableness of her relocation in Mexico. *Amici* respectfully urge the Court to remand this case to the Board for corrective proceedings, including a full review of the merits of the asylum claim.

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Respectfully submitted,

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**COMBINED CERTIFICATION OF COMPLIANCE AND CERTIFICATION OF SERVICE**

I, Peter E. Perkowski, counsel for *Amici*, certify:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Rule 32(a)(7)(B) because it contains 6,978 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in Microsoft Word 2007 using the proportionally spaced typeface 14 point Times New Roman.

2. I caused this brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 29, 2011, and that all current participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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