

Nos. 18-587, 18-588, 18-589

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IN THE  
**Supreme Court of the United States**

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DEPARTMENT OF HOMELAND SECURITY, *et al.*, *Petitioners*,  
v.  
REGENTS OF THE UNIVERSITY OF CALIFORNIA, *Respondents*.  
DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,  
*Petitioners*,  
v.  
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF  
COLORED PEOPLE, *et al.*, *Respondents*.  
KEVIN K. MCALEENAN, ACTING SECRETARY OF  
HOMELAND SECURITY, *et al.*, *Petitioners*,  
v.  
MARTIN JONATHAN BATALLA VIDAL, *et al.*, *Respondents*.

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On Writs of Certiorari to the  
United States Courts of Appeals for the  
Ninth, District of Columbia, and Second Circuits

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BRIEF OF THE NATIONAL QUEER ASIAN  
PACIFIC ISLANDER ALLIANCE AND  
OTHERS AS *AMICI CURIAE*  
IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

The National Queer Asian Pacific Islander Alliance (“NQAPIA”) is a federation of lesbian, gay, bisexual, transgender and queer or questioning (“LGBTQ”)<sup>2</sup> Asian and Pacific Islander (“API”) organizations. NQAPIA unites local groups, develops leadership, promotes visibility, educates the community, invigorates grassroots organizing, encourages collaboration, and challenges anti-LGBTQ bias and racism. NQAPIA spearheads educational and advocacy campaigns in support of LGBTQ immigrants’ rights.

NQAPIA member groups and ally LGBTQ organizations are deeply troubled by the Trump Administration’s attempt to rescind DACA and the significant risk that LGBTQ undocumented immigrants will face removal to countries that criminalize homosexuality, discriminate and marginalize LGBTQ individuals, and put them at undue risk of violence because of their LGBTQ status.

The following NQAPIA member groups and ally LGBTQ organizations join this brief as *amici curiae* and a statement of interest from each organization is attached as an Appendix to this brief:

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that they authored this brief in its entirety and that no party or its counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution to this brief’s preparation or submission. The parties have consented to the filing of this brief.

<sup>2</sup> “LGBTQ is an acronym for lesbian, gay, bisexual, transgender and queer or questioning. These terms are used to describe a person’s sexual orientation or gender identity.” *What is LGBTQ?*, THE LESBIAN, GAY, BISEXUAL & TRANSGENDER COMMUNITY CENTER, <https://gaycenter.org/about/lgbtq/#queer> (last visited Sept. 24, 2019).

- API Equality – Northern California (APIENC); •  
API Rainbow Parents of PFLAG NYC;
- APICHA Community Health Center –  
New York City;
- Asian and Pacific Islander Queers  
United for Action (AQUA);
- Asian Pacific American Labor Alliance  
(AFL-CIO);
- Asian Pacific Islander Queer Women and  
Transgender Community – San Francisco;
- ATL Q+A – Atlanta;
- Equality Federation;
- Gay Asian and Pacific Islander Men of  
New York (GAPIMNY);
- Gay Asian Pacific Alliance (GAPA) –  
San Francisco;
- GLBT Fund of America, Philadelphia;
- GLBTQ Legal Advocates & Defenders (GLAD); •  
Immigration Equality;
- Invisible to Invincible Asian Pacific Pride of  
Chicago (i2i);
- KhushATX;
- Korean American Rainbow Parents (KARP) –  
Washington D.C.;
- Korean Queer and Transgender Organization  
of Washington D.C.;
- Lambda Legal Defense and Education Fund;
- Los Angeles LGBT Center;



- National Black Justice Coalition;
- National LGBTQ Task Force;
- Our Space LGBT Youth Center;
- OutRight Action International;
- Philadelphia Asian & Queer (PAQ);
- PFLAG;
- PFLAG – San Gabriel Valley Chapter Asian Pacific Islander;
- Queer South Asian Collective Community – Boston;
- Q-WAVE;
- SAGE NYC;
- SALGA NYC;
- San Francisco LGBT Center;
- Satrang Los Angeles;
- Transgender Legal Defense and Education Fund;
- Trikone; and
- UTOPIA Seattle.

#### SUMMARY OF ARGUMENT

There are tens of thousands of individuals who identify as LGBTQ and received protection under the Deferred Action for Childhood arrivals (“DACA”) policy, many of whom were born in API nations. Without the protection afforded by DACA, those children, many of whom have now grown to be young adults who have only ever known the United States as home, will be subject to removal proceedings to their countries of birth. These children often have no memory of their

birth countries nor have they visited their countries of birth since they arrived in the United States in their infancy or young childhood. Many have no connections to their country of birth; indeed they may not know anyone there. Should they be removed, it is likely that they would have no shelter, no resources, no ability to earn income, nor even an ability to speak the local language. In sum, should DACA be rescinded, these children and young adults will be unceremoniously dispatched with no safety net to a country wholly unknown to them.

Moreover, if DACA is rescinded, many LGBTQ API DACA recipients are almost certain to face harassment, discrimination, criminal prosecution, violence and even death by virtue of their sexual orientation and/or gender identity. LGBTQ API DACA recipients from these nations will also lose substantial civil protections afforded them in the United States, including the right to marry, the ability to seek medical care, and/or the ability to earn a living without discrimination.

Many LGBTQ DACA recipients have been open and transparent about their sexual orientation and/or gender identity while living in the United States, have engaged in LGBTQ activism, and have publicly disclosed their LGBTQ status in their communities, through their online identities and otherwise. In this digital age, if these openly LGBTQ DACA recipients are removed, there is no realistic way to put this “genie back in the bottle.” The rescission of DACA will unavoidably put these individuals in danger of criminal prosecution, discrimination, violence and even death in their country of birth because of their sexual orientation and/or gender identity. The great promise of DACA was the freedom from fear of removal, and the liberating sense of security that permitted DACA re-

ipients to build their lives in America authentically, including being open about their sexual orientation and/or gender identity, without shame of being “undocumented.” Rescinding DACA not only revokes that promise but, even more cruelly, puts some of the most vulnerable DACA recipients in even greater danger than they may have been in had DACA never been in place.

### ARGUMENT

- I. LGBTQ API DACA recipients will face criminal penalties, imprisonment, discrimination, and violence (including death) if they are removed to their countries of birth

For LGBTQ children and young adults who (1) have been prevented from applying for DACA as a result of the government halting the policy, or (2) are current DACA recipients who may lose their ability to renew their status if the policy is ended, the rescission of DACA means the risk of immediate removal to a detention facility followed by removal to their country of birth.<sup>3</sup>

Many undocumented immigrants who qualify for or have received DACA share a tangible, and realistic, fear of what being removed to their birth countries—countries that their families fled for fear of persecution, poverty, and/or violence—would mean. In a recent survey of DACA recipients, approximately 80% of surveyed respondents indicated concern for their physical safety, and the physical safety of their

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<sup>3</sup> See U.S. CITIZENSHIP & IMMIGRATION SERVS., *Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction* (July 17, 2019). Further, many of these individuals have been in the United States for over 1 year, making them ineligible for asylum protections. 8 U.S.C. § 1158 (2)(B).

families, if they were to return to their countries of birth.<sup>4</sup>

For LGBTQ DACA recipients, that concern is even more acute. Approximately seventy countries worldwide still criminalize and punish same-sex relationships and same-sex sexual activity and impose extensive penalties, including life in prison.<sup>5</sup> Numerous countries sentence people engaged in consensual same-sex relationships to death as punishment.<sup>6</sup> Further, and as discussed below, the circumstances can be dire even in the absence of the criminalization of sexual orientation and/or gender identity due to rampant discrimination, bias, and significantly increased rates of violence by private actors against LGBTQ individuals. In such countries, rescinding DACA can be tantamount to a death sentence.

The cruelty of reversing DACA for this vulnerable population is evident from the laws and customs in the API nations where DACA recipients may be forced to return if the rescission of DACA is upheld.

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<sup>4</sup> Tom K. Wong et al., *2019 National DACA Study*, at 7 (Sept. 19, 2019), <https://cdn.americanprogress.org/content/uploads/2019/09/18122133/New-DACA-Survey-2019-Final-1.pdf> [hereinafter Wong et al.].

<sup>5</sup> Lucas Ramón Mendos, *State-Sponsored Homophobia 2019*, INTERNATIONAL LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION (ILGA), at 15 (March 2019), [https://ilga.org/downloads/ILGA\\_State\\_Sponsored\\_Homophobia\\_2019.pdf](https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019.pdf) [hereinafter *State-Sponsored Homophobia* (2019)]; *#Outlawed the Love That Dare Not Speak its Name*, HUMAN RIGHTS WATCH, [http://internap.hrw.org/features/features/lgbt\\_laws/](http://internap.hrw.org/features/features/lgbt_laws/).

<sup>6</sup> *State-Sponsored Homophobia* (2019), *supra* note 5, at 15-16; *#Outlawed the Love That Dare Not Speak its Name*, Human Rights Watch, [http://internap.hrw.org/features/features/lgbt\\_laws/](http://internap.hrw.org/features/features/lgbt_laws/).

### Criminal Prohibitions and the Death Penalty:

Many API countries still criminalize same-sex sexual activity and relationships, posing a grave threat to the LGBTQ DACA recipients from these countries if they are forced to return, especially where they are not closeted. The mere fact that such laws exist significantly impairs the liberty and “autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct” for LGBTQ individuals in these countries. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

For example, Bangladesh—a country of over 150 million people—criminalizes all sexual activity between men, with a punishment of ten years and up to life in prison.<sup>7</sup> Pakistan criminalizes a broadly-worded category of “obscene acts” and same-sex activity.<sup>8</sup> Punishment is severe: two to ten years imprisonment<sup>9</sup> and possible penalty by death.<sup>10</sup> In Afghanistan, United

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<sup>7</sup> BANGL. PENAL CODE, Act No. XLV of 1860, § 377 (Oct. 6, 1860).

<sup>8</sup> PAKISTAN PENAL CODE, Act No. XLV of 1860, § 294 (Oct. 6, 1860); *see also* Aengus Carroll & Lucas Ramón Mendos, *State-Sponsored Homophobia: A world survey of sexual orientation laws: criminalization, protection and recognition*, INTERNATIONAL LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION (ILGA), at 133 (May 2017), [https://ilga.org/downloads/2017/ILGA\\_State\\_Sponsored\\_Homophobia\\_2017\\_WEB.pdf](https://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf) [hereinafter *State-Sponsored Homophobia* (2017)].

<sup>9</sup> PAKISTAN PENAL CODE, Act No. XLV of 1860, §§ 294, 377 (Oct. 6, 1860).

<sup>10</sup> *Id.*; *State-Sponsored Homophobia* (2019), *supra* note 5, at 15–16; *LGBTI Rights*, AMNESTY INTERNATIONAL, <https://www.amnesty.org/en/what-we-do/discrimination/lgbt-rights/> (last visited Sept. 24, 2019).

Arab Emirates, Yemen, Iran, Brunei, and Saudi Arabia, homosexuality is also punishable by death.<sup>11</sup>

Malaysia criminalizes certain same-sex sexual activity with punishment of up to twenty years in prison, and punishes consensual same-sex intercourse with lashings.<sup>12</sup> In September of 2018, two women were sentenced to caning in Malaysia after allegedly attempting to engage in same-sex relations.<sup>13</sup> There are also many reports of state-sanctioned violence and discrimination against LGBTQ individuals who are found to violate Malaysian law. The 2018 U.S. State Department *Malaysia 2018 Human Rights Report* includes reports from local advocates stating that “imprisoned transgender women served their sentences in prisons designated for men and that police and inmates often abused them verbally and sexually.”<sup>14</sup> LGBTQ Cambodians also face documented discrimination as a result of laws giving police broad authority to enforce security and public order.<sup>15</sup>

Bhutan criminalizes same-sex sexual activity as “unnatural” and punishes by imprisonment, as does

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<sup>11</sup> *State-Sponsored Homophobia* (2019), *supra* note 5, at 15–16; *see also* BRUNEI SYARIAH PENAL CODE ORDER, Part IV, Ch. 1 §§ 69, 82 (2013).

<sup>12</sup> MALAYSIA PENAL CODE, Act No. 574, §§ 377A, 377B (2015).

<sup>13</sup> *State-Sponsored Homophobia* (2017), *supra* note 8, at 131; *Malaysia: Two Women Face Caning for Same-Sex Conduct*, HUMAN RIGHTS WATCH (Aug. 21, 2018), <https://www.hrw.org/news/2018/08/21/malaysia-two-women-face-caning-same-sex-conduct>.

<sup>14</sup> U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., *Malaysia 2018 Human Rights Report*, at 29 (2018).

<sup>15</sup> U.N. DEV. PROGRAMME & U.S. AGENCY FOR INT’L DEV., *Being LGBT in Asia: Cambodia Country Report*, at 8, 21, 31-32 (2014).

Singapore and the Maldives.<sup>16</sup> Myanmar punishes same-sex relations with imprisonment for up to ten years, as does Sri Lanka.<sup>17</sup> Brunei's penal code also provides for imprisonment for up to ten years.<sup>18</sup> Moreover, in April 2019, the government of Brunei fully implemented the Syariah Penal Code.<sup>19</sup> Now, individuals in Brunei may also face death by stoning and/or whipping.<sup>20</sup>

In Indonesia, recent changes to national law appeared to ostensibly protect the rights of LGBTQ individuals at the national level, but the 2019 proposed revisions to the Indonesian criminal code include a number of changes that, if passed, could be used to violate the rights of LGBTQ individuals.<sup>21</sup> Indonesia also has local provinces and cities that already criminalize homosexuality.<sup>22</sup> In one such province in May

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<sup>16</sup> BHUTAN PENAL CODE, Act of 2004, §§ 213–14; SINGAPORE PENAL CODE, No. 2 of 2008 (Revised Ed.), §§ 295, 354, 377a (Jan. 28, 2008); MALDIVES PENAL CODE, Law No. 6/2014, § 411.

<sup>17</sup> MYANMAR PENAL CODE, Act 45/1850, Revised Edition, § 377; *State-Sponsored Homophobia* (2019), at 531–32; SRI LANKA PENAL CODE, Act No. 22 of 1995, §§ 365, 365A.

<sup>18</sup> BRUNEI PENAL CODE, Ch. 22 of 1951 (Revised Ed. 2001), § 377 (Oct. 1, 2001).

<sup>19</sup> Brunei Prime Minister's Office, Press Statement (March 30, 2019).

<sup>20</sup> BRUNEI SYARIAH PENAL CODE ORDER, Part IV, Ch. 1, §§ 69, 82 (2013); Yvette Tan, *Brunei implements stoning to death under anti-LGBT laws*, BBC (Apr. 3, 2019), <https://www.bbc.com/news/world-asia-47769964>.

<sup>21</sup> *Indonesia: Draft Criminal Code Disastrous for Rights*, HUMAN RIGHTS WATCH (Sept. 18, 2019), <https://www.hrw.org/news/2019/09/18/indonesia-draft-criminal-code-disastrous-rights>.

<sup>22</sup> M.V. Lee Badgett et al., *LGBT Exclusion in Indonesia and Its Economic Effects*, THE WILLIAMS INSTITUTE, at 5 (2017).

2017, two men were sentenced to eighty-five lashes in a public caning after being accused of having sex with each other.<sup>23</sup> State-sanctioned discrimination and violence against LGBTQ individuals in Indonesia is also prevalent. According to a 2014 report, police often fail to protect or intervene on behalf of LGBTQ individuals and commonplace police roundups often target, and potentially abuse, the population.<sup>24</sup> Law enforcement and militant groups in the country sometimes even work together to achieve these ends. For example, in late 2016, the Indonesian militant group Islamic Defenders Front, tipped off local police about an alleged sex party at a private home in Jakarta. Police on the scene detained the individuals who were present.<sup>25</sup> Just a few months later in May 2017, a similar raid also took place in Jakarta and almost 150 men were arrested.<sup>26</sup>

Criminalizing same-sex relations effectively makes it illegal to be LGBTQ in these countries. Unlike in the United States, these countries can and do “demea[n] the lives of homosexual persons” and “demean their

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<sup>23</sup>Jon Emont, *2 Men in Indonesia Sentenced to Caning for Having Gay Sex*, N.Y. TIMES, May 18, 2018, § A at 7; *Indonesia’s Aceh Resumes Public Caning Despite Pledge to Curb Access*, REUTERS (July 13, 2018, 7:58 AM), <https://www.reuters.com/article/us-indonesia-aceh-caning/indonesias-aceh-resumes-public-caning-despite-pledge-to-curb-access-idUSKBN1K31N1>.

<sup>24</sup>U.N. DEV. PROGRAMME & U.S. AGENCY FOR INT’L DEV., *Being LGBT in Asia: Indonesia Country Report*, at 8, 10, 27 (2014).

<sup>25</sup>Kyle Knight, *Indonesian Militant Islamists, Police Raid Gay Gathering*, HUMAN RIGHTS WATCH (Nov. 29, 2016), <https://www.hrw.org/news/2016/11/29/indonesian-militant-islamists-police-raid-gay-gathering>.

<sup>26</sup>Jon Emont, *Indonesia Police Arrest 141 Men Accused of Having Gay Sex Party*, N.Y. TIMES, May 23, 2017, § A at 7.



existence or control their destiny by making their private sexual conduct a crime.” *Lawrence*, 539 U.S. at 575, 578.<sup>27</sup> Beyond the significant threat of criminal detention or even death, such laws have a dramatic chilling effect on the “autonomy of self” to which all individuals should be entitled in a free society; as the Court has recognized, the “stigma” of such criminal statutes is “not trivial.” *Lawrence*, 539 U.S. at 575.

#### Discrimination and Hate Crimes:

Discrimination against LGBTQ individuals in API nations is deeply-rooted and pervasive, and there can be no question that LGBTQ API DACA recipients would face discrimination in their personal and professional lives if they were expelled from this country. Just as was the case in America for many years, LGBTQ persons in many API countries are “barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.” *Obergefell*, 135 S. Ct. at 2596. Rampant discrimination in these countries denies LGBTQ individuals “dignity in their own distinct identity.” *Id.* It remains true in many countries that “the argument that gays and lesbians [have] a just claim to dignity [is] in conflict with both law and widespread social conventions.” *Id.*

In country after country outside of the United States, LGBTQ API individuals are marginalized or repressed. In China, LGBTQ discrimination and stigma is omni-

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<sup>27</sup> This Court has recognized how in this country as well, “[u]ntil the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself . . . , a belief often embodied in the criminal law.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015).

present, including from one's family and friends.<sup>28</sup> In a 2012 poll of residents of the Beijing, Shanghai, and Guangzhou provinces, only 31% of participants said they accepted people who identify as gay, and only 27% said that there should be legal protections for sexual minorities.<sup>29</sup> Likewise, in India, there remains immense cultural prejudice against LGBTQ individuals, and not surprisingly so, given that the Supreme Court of India only recently decriminalized same-sex sexual activities.<sup>30</sup>

In Indonesia, public acceptance of LGBTQ individuals remains very low and has changed little over the past decade; media coverage remains generally negative.<sup>31</sup> LGBTQ individuals are denied educational opportunities,<sup>32</sup> employment opportunities,<sup>33</sup> and face physical, psychological, cultural and sexual violence.<sup>34</sup>

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<sup>28</sup> U.N. DEV. PROGRAMME & U.S. AGENCY FOR INT'L DEV., *Being LGBT in Asia: China Country Report*, at 27 (2014).

<sup>29</sup> *Id.*

<sup>30</sup> Jeffrey Gettleman et al., *India Gay Sex Ban Is Struck Down. Indefensible, Court Says*, N.Y. TIMES, Sept. 7, 2018, § A at 1; see also Sushmita Pathak & Furkan Latif Khan, *India's Anti-Gay Law Is History. Next Challenge: Treat LGBTQ Patients with Respect*, NPR (Sept. 17, 2018, 1:26 PM), <https://www.npr.org/sections/goatsandsoda/2018/09/17/645279722/indias-anti-gay-law-is-history-next-challenge-treat-lgbtq-patients-with-respect>; Annie Banerji, *Mind your own business: Small firms opt out as India Inc races to be LGBT-friendly*, REUTERS (Feb. 12, 2019, 5:16 AM), <https://www.reuters.com/article/us-india-lgbt-business/mind-your-own-business-small-firms-opt-out-as-india-inc-races-to-be-lgbt-friendly-idUSKCN1Q113D>.

<sup>31</sup> Badgett et al., *supra* note 22, at 5-7.

<sup>32</sup> *Id.*, at 8-12.

<sup>33</sup> *Id.*, at 13-16.

<sup>34</sup> *Id.*, at 16-22.

Even in an advanced democracy like South Korea, there are no antidiscrimination laws in place to protect LGBTQ individuals, and efforts to implement such protections have repeatedly failed.<sup>35</sup>

As a result of discrimination and marginalization, numerous API nations report increased rates of hate crimes and/or interpersonal violence against individuals identifying as LGBTQ—even where the government decriminalized same-sex relationships or sexual activity. In 2018, when India decriminalized same-sex sexual activity, the country reported 218 hate crimes, with eight attacks on individuals identifying as transgender, and the majority of attacks on women of marginalized groups (sexual orientation was not specified).<sup>36</sup> In Fiji, a 2011 community-based survey funded by the United Nations Development Programme and conducted by the AIDS Task Force of Fiji found that LGBTQ individuals experience high rates of discrimination and violence. Over 65% individuals surveyed reported feeling unsafe expressing their sexuality, 30.3% of respondents reported being physically hurt in the prior six months, and 26.8% of respondents reported being sexually abused or assaulted.<sup>37</sup> These

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<sup>35</sup> Timothy Rich & Isabel Eliassen, *What's Behind South Korea's Persistent LGBT Intolerance?*, THE DIPLOMAT (March 19, 2019), <https://thediplomat.com/2019/03/whats-behind-south-koreas-persistent-lgbt-intolerance/>; *South Korea: Military 'Sodomy' Law Violates Rights*, HUMAN RIGHTS WATCH (March 7, 2019, 1:00 AM), <https://www.hrw.org/news/2019/03/07/south-korea-military-sodomy-law-violates-rights>.

<sup>36</sup> *Halt the Hate*, AMNESTY INTERNATIONAL INDIA (Mar. 5 2019, 10:49 AM), <https://amnesty.org.in/news-update/over-200-alleged-hate-crimes-in-2018-reveals-halt-the-hate-website/>.

<sup>37</sup> Ben Bavinton et al., *Secret Lives, Other Voices: A community-based study exploring male-to-male sex, gender identity and HIV transmission risk in Fiji*, AIDS TASK FORCE OF FIJI, at 9 (2011),

statistics are corroborated by media reports of LGBTQ individuals in Fiji who have been victims of physical violence on the island. In 2017 and 2018, there were a number of violent murders of LGBTQ individuals that were classified as hate crimes.<sup>38</sup> Activist groups in Fiji consistently report high levels of violence and discrimination against members of the LGBTQ community.<sup>39</sup> In 2017, two gay men were physically assaulted in Fiji by teenagers, but did not report the assault to the police because they had “fear of reprisals from the people who allegedly attacked them.”<sup>40</sup> The two men also refused to reveal their identities to the media because “they feared for their lives.”<sup>41</sup> Similar

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[https://www.aidsdatahub.org/sites/default/files/documents/secret\\_lives\\_other\\_voices\\_research-report33.pdf](https://www.aidsdatahub.org/sites/default/files/documents/secret_lives_other_voices_research-report33.pdf).

<sup>38</sup> *State-Sponsored Homophobia* (2019), *supra* note 5, at 168-169; *see also, e.g.*, Liam Fox, *Murdered on International day against Transphobia: fears Fiji killing is a hate crime*, ABC NEWS (July 23, 2018, 5:06 AM), <https://www.abc.net.au/news/2018-07-23/trans-woman-murdered-in-fiji-in-suspected-hate-crime/10026188> (murder by blunt force trauma of individual identifying as transgender); Tokada Rainima, *No arrest yet on Vesida murder*, FBC NEWS (Oct. 12, 2017, 1:20 AM), <https://www.fbcnews.com.fj/news/no-arrests-yet-on-vesida-murder/> (mutilation and murder of student who identified as gay).

<sup>39</sup> Anamika Singh, *More LGBT people are expressing their love openly, however they are also being targeted*, FIJIVILLAGE (Nov. 20, 2017), <https://fijivillage.com/news-feature/More-LGBT-people-are-expressing-their-love-openly-however-they-are-also-being-targeted-k9s25r/>.

<sup>40</sup> Suva Shahani Mala, *Attack On Gay Men Condemned*, FIJI SUN (Feb. 7, 2017), <http://fijisun.com.fj/2017/02/07/attack-on-gay-men-condemned/>.

<sup>41</sup> *Id.*

hate crimes have been reported against individuals identifying as transgender in Malaysia as well.<sup>42</sup>

In the Philippines, in the first half of 2011 alone, at least twenty-eight people were killed on the basis of identifying as LGBTQ.<sup>43</sup> Moreover, LGBTQ individuals in the Philippines report physical violence within their own family. A 2012 report highlighting different manifestations of violence against women in the LGBTQ community in the Philippines points to family-based violence as a form of physical abuse against this community:

Most of those interviewed said family members within a nuclear family unit, predominantly male members of family or clan, including fathers, brothers, uncles and stepfathers, had inflicted most of the physical violence. Most incidents of violence occurred immediately after a person voluntarily disclosed her sexual orientation and/or gender identity, was “outed” (a person’s sexual orientation or gender identity is revealed without the person’s knowledge or permission), or was suspected of being non-heteronormative.<sup>44</sup>

The reported acts of violence in these API nations are not isolated incidents, and violence against

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<sup>42</sup> Neela Ghosal & Thilaga Sulathireh, *The Deceased Can’t Speak for Herself: Violence Against LGBT People in Malaysia*, GEO. J. OF INT’L AFF. (2019).

<sup>43</sup> U.N. DEV. PROGRAMME & U.S. AGENCY INT’L DEV., *Being LGBT in Asia: The Philippines Country Report*, at 8 (2014).

<sup>44</sup> *Kwentong Bebot: Lived Experiences of Lesbians, Bisexual and Transgender Women in the Philippines*, RAINBOW RIGHTS PROJECT, at 14 (2013), <https://www.outrightinternational.org/sites/default/files/phillipinescc.pdf>.

LGBTQ individuals remains a real risk across API nations. The serious repercussions also decrease reporting—suggesting even higher rates of such violence actually occur.<sup>45</sup> The situation is exacerbated by the fact that only two out of over forty API nations (East Timor and Mongolia) have enacted legislation aimed at curbing violence motivated by sexual orientation.<sup>46</sup>

Despite what appears to be some modest increase in legal protections in some API nations, scholars have noted that the continued “discrimination, marginalisation and violence experienced by LGBTQ people in the countries of Southeast Asia, point to the reality that, in practice, recognition of LGBTQ people’s human rights is uneven, incomplete and frequently contradictory and arbitrary, reflecting national, regional and international politics, as well as multiple intersecting dynamics of privilege and marginalisation.”<sup>47</sup>

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<sup>45</sup> U.S. State Department reports on human rights in Laos and the Maldives both highlight the fact that even where “there were no reports of discrimination . . . observers believed societal stigma and concern about repercussions led some to withhold reporting incidents of abuse.” U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., *Laos 2018 Human Rights Report*, at § 6 (2018); U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., *Maldives 2018 Human Rights Report*, at § 6 (2018) (“There were no reports of officials complicit in abuses against LGBTI persons, although societal stigma likely discouraged individuals from reporting such problems. Local citizens who expressed support for LGBTI rights on social media reportedly were targeted for online harassment . . .”)

<sup>46</sup> *State-Sponsored Homophobia* (2019), *supra* note 5, at 257–59.

<sup>47</sup> Cai Wilkinson et al., *LGBT Rights in Southeast Asia: One Step Forward, Two Steps Back?*, IAFOR J. OF ASIAN STUD., at 7 (2017).

And, as was formerly the case in the United States, homosexuality is still “treated as an illness” in many API countries. *Obergefell*, 135 S. Ct. at 2596. While psychiatrists and others in the United States now recognize that “sexual orientation is both a normal expression of human sexuality and immutable,” *id.*, the governments of many API nations do not. In Indonesia, for example, Government Regulation 61/2014 on Reproductive Health defines a healthy sexual life as free from “sexual orientation dysfunction or deviance.”<sup>48</sup> The country has become increasingly intolerant in the last several years, with increasing prosecutions of LGBTQ people under its Pornography Law, which refers to same-sex conduct as “deviant behavior.”<sup>49</sup> In Thailand, until 2011, LGBTQ individuals were banned from serving in the military, branded as individuals of “permanent mental disorder.”<sup>50</sup> The Supreme Court in Singapore has declared that there is “no definitive conclusion” on the “supposed immutability” of homosexuality and upheld antiquated, discriminatory laws from legal challenge.<sup>51</sup> For LGBTQ DACA recipients, a return to the numerous API countries that embrace these harmful and hurtful ideologies would deny them the “lawful realm, to

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<sup>48</sup> *State-Sponsored Homophobia* (2017), *supra* note 8, at 125.

<sup>49</sup> Kyle Knight, *Indonesia’s anti-LGBT drive should concern all Asia*, HUMAN RIGHTS WATCH (Feb. 20, 2018, 1:42 PM), <https://www.hrw.org/news/2018/02/20/indonesias-anti-lgbt-drive-should-concern-all-asia>; Badgett et al., *supra* note 22, at 5.

<sup>50</sup> U.N. DEV. PROGRAMME & U.S. AGENCY INTL DEV., *Being LGBT in Asia: Thailand Country Report*, at 23 (2014).

<sup>51</sup> *Lim Meng Suang et al. v. Attorney General*, Court of Appeal of Republic of Singapore (decided October 29, 2014), <https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/-2014-sgca-53-pdf.pdf>

define and express their identity” that they enjoy in this country. *Obergefell*, 135 S. Ct. at 2593.

The Fundamental Right to Marry:

Unlike in the United States, same-sex individuals have little to no access to the fundamental right to marry in nearly every API country. Thus, despite the “utmost importance” of the “fundamental right” to marry, LGBTQ API DACA recipients would be denied this right entirely if forced to return to their country of birth. *Obergefell*, 135 S. Ct. at 2589, 2605. Only in May of this year did Taiwan become the very first—and only—country in Asia to recognize same-sex marriage.<sup>52</sup> Thus, countries that collectively have billions of citizens deny this fundamental right to same-sex couples, including China, India, Indonesia and South Korea. In all of the many countries that do not recognize same-sex marriage, DACA recipients would be “demean[ed] or stigmatize[ed]” by laws that would, if they are removed to one of these many countries, “disparage their choices and diminish their personhood.” *Obergefell*, 135 S.Ct. at 2602. Marriages recognized in the United States would not be recognized in their countries of birth, a pernicious and cruel result and insult to personhood.

Public Expression and Freedom of Association:

In addition to criminalization and discrimination in society at large, the right to free expression and association is severely reduced in many API countries. In Indonesia, for example, broadcasting standards limit LGBTQ expression on TV, with the logic of

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<sup>52</sup>Chris Horton, *After a Long Fight, Taiwan’s Same-Sex Couples Celebrate New Marriages*, N.Y. TIMES, May 25, 2019, § A at 7; *State-Sponsored Homophobia* (2019), *supra* note 5, at 27.



protecting children, and factions in the country are seeking bans on LGBTQ-focused apps and websites.<sup>53</sup> In Pakistan, the media has depicted an admitted serial killer of gay men as the “epitome of righteousness.”<sup>54</sup> In the countries that still criminalize same-sex sexual activities, freedom of expression and association for LGBTQ individuals is often curtailed, if not eliminated altogether. Social scientists have described how actors in various Southeast Asian countries have used “political homophobia”—that is, “overt claims to political legitimacy through homophobia”—to advance their political goals in culturally and religiously-conservative countries.<sup>55</sup> For LGBTQ people, such political opportunism has, as its devastating side-effect, “the perpetuation of a ‘chilly’ socio-political climate in which there is little or no protection from scapegoating, exclusion, marginalisation, discrimination and violence, even in the absence of criminalization.”<sup>56</sup>

In short, LGBTQ individuals would be denied basic freedoms that they have obtained and relied on in America if the rescission of DACA is upheld and LGBTQ API DACA recipients are forced to return to their countries of birth. Worse, they would be subject to physical, psychological, cultural and sexual violence simply for being who they are, and living authentically in the United States.

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<sup>53</sup> *State-Sponsored Homophobia* (2017), *supra* note 8, at 41; Badgett et al., *supra* note 22, at 8.

<sup>54</sup> *State-Sponsored Homophobia* (2017), *supra* note 8, at 134.

<sup>55</sup> Wilkinson, *supra* note 47, at 13 (internal quotations omitted).

<sup>56</sup> *Id.*, at 14.

II. The tens of thousands of LGBTQ DACA recipients, especially those who publically identified themselves as such, will be at increased risk for discrimination and mistreatment if DACA is rescinded

Over 800,000 young people have received protection from removal through DACA since the policy's inception.<sup>57</sup> The Williams Institute at the UCLA School of Law estimates that, as of March 2016, "over 36,000" of these recipients identify as LGBTQ "including 24,000 who renewed" based on a "conservative estimate of the percentage of LGBTQ individuals among 15 to 34 year olds eligible for or participating in DACA."<sup>58</sup> Surveys of LGBTQ DACA recipients indicate the rates of self-identification as LGBTQ are actually higher than the national average. In a 2015 survey conducted by United We Dream, 8.6% of respondents "identified as LGBTQ, a rate higher than the national average and higher for the 18 to 29 age group."<sup>59</sup> Similarly, the authors of a 2017 survey of DACA recipients reported that up to 10 percent of all DACA recipients who

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<sup>57</sup> U.S. CITIZENSHIP & IMMIGRATION SERVS., *Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake and Case Status Fiscal Year 2012-2019* (June 30, 2019).

<sup>58</sup> Kerith Conron & Taylor N.T. Brown, *There are Over 75,000 LGBTQ DREAMers; 36,000 Have Participated in DACA*, THE WILLIAMS INST., UCLA School of Law, at n.3 (Feb. 2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-DREAMers-and-DACA-February-2017.pdf>.

<sup>59</sup> Zenén Jaimes Pérez, *A Portrait of Deferred Action for Childhood Arrivals Recipients: Challenges and Opportunities Three-Years Later*, UNITED WE DREAM, at 7 (Oct. 2015), <https://unitedwedream.org/wp-content/uploads/2015/10/DACA-report-final-1.pdf>.

participated in the survey identified as LGBTQ.<sup>60</sup> In the 2019 update, 6.3% of respondents identified as gay or lesbian, 7.6% identified as bisexual, and 0.3% identified as transgender or gender non-conforming—indicating the rate of DACA recipients who identify as LGBTQ may be substantially higher than in the general population, and amount to over 100,000 individuals.<sup>61</sup>

In order to be eligible for DACA, an undocumented immigrant must have entered the United States before turning sixteen years old.<sup>62</sup> Many DACA recipients arrived in the United States at very young ages, and have spent their formative years here. Surveys of DACA recipients have suggested that the average age of entry to this country is just six years old.<sup>63</sup> Importantly, LGBTQ DACA recipients have grown up in a country that provides significant rights

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<sup>60</sup> Sharita Gruberg, *What Ending DACA Means for LGBTQ Dreamers*, CTR. FOR AMERICAN PROGRESS (Oct. 11, 2017 11:08 AM), <https://www.americanprogress.org/issues/lgbt/news/2017/10/11/440450/ending-daca-means-lgbtq-dreamers/>.

<sup>61</sup> Wong et al., *supra* note 4, at 16.

<sup>62</sup> U.S. DEP'T OF HOMELAND SECURITY, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, at 1 (June 12, 2012).

<sup>63</sup> Tom K. Wong et al., *2017 National DACA Study*, at 13 (Nov. 2, 2017), [https://cdn.americanprogress.org/content/uploads/2017/11/02125251/2017\\_DACA\\_study\\_economic\\_report\\_updated.pdf](https://cdn.americanprogress.org/content/uploads/2017/11/02125251/2017_DACA_study_economic_report_updated.pdf); Wong et al., *supra* note 4, at 15; *see also* Nicole Svajlenka & Audrey Singer, *Immigration Facts: Deferred Action for Childhood Arrivals (DACA)*, BROOKINGS METRO. POL'Y PROGRAM (Aug. 14, 2013), <https://www.brookings.edu/research/immigration-facts-deferred-action-for-childhood-arrivals-daca/> (“The most common age at arrival was eight, however almost one-third (31 percent) were five or younger and more than two-thirds (69 percent) were 10 or younger when they arrived.”).

and protections to LGBTQ individuals and where opportunities for LGBTQ activism and community are ample.<sup>64</sup> In building their lives here, especially in reliance on the expectation of DACA continuing, LGBTQ DACA recipients have often elected to live publicly “out” lives on social media and otherwise. Those expressions of identity, made in reliance on the continued expectation of DACA, cannot be undone and could result in serious repercussions in their countries of birth, as outlined *infra*, Section I.

Tony Choi is one such individual. Mr. Choi is a twenty-eight year old DACA recipient who lives in Bergen County, New Jersey. Tony was born in Korea, but his family moved to the United States after the Asian financial crisis in 1996 when he was eight years old.<sup>65</sup> Tony identifies as gay, and has become an

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<sup>64</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (recognizing same-sex marriage); *Lawrence v. Texas*, 539 U.S. 558 (2003) (decriminalizing sodomy); *Hively v. Ivy Tech Cmty. College of Ind.*, 853 F.3d 339 (7th Cir. 2017) (extending the protections of Title VII of the Civil Rights Act of 1964 to discrimination based on sexual orientation); *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017) (same); see also 18 U.S.C. § 249 *et seq.* (criminalizing hate crimes on the basis of actual or perceived sexual orientation); Executive Order No. 13087, 63 Fed. Reg. 30097 (May 28, 1998) (prohibiting discrimination in the federal government on the basis of sexual orientation); N.Y. Exec. Law § 296 (Consol. 2019) (prohibiting discrimination on the basis of sexual orientation in many forums in New York); N.J. Stat. § 18A:35-4.36 (2019) (requiring New Jersey public schools to teach LGBTQ-inclusive materials); Cal Health & Saf Code Div. 104, Pt. 5, Art. 5 (2016) (requiring that single-occupancy restrooms in California businesses, government buildings, and places of public accommodation be universally accessible to all genders).

<sup>65</sup> *Uncovering Our Stories: Tony Choi*, National Queer Asian Pacific Islander Alliance (Oct. 11, 2013), <https://www.nqapia.org/wpp/uncovering-our-stories-tony-choi/>.

outspoken advocate for undocumented and LGBTQ individuals. In Mr. Choi's own words:

In 2010, after the failure of the DREAM Act and my mother's cancer diagnosis, I had lost hope. The choices ahead of me were to live a closeted life taking care of my mother or to return to Korea where my LGBTQ identity would subject me to harsh hazing for two years in the mandatory military service in an unfamiliar cultural environment echoes away from my home here in New Jersey. Instead, I chose to speak out and find my community. Finding my voice in advocating for, and then in receiving, DACA protection has given me the ability to live a fuller life out of the closet, and allowed me to find a community both online and in New Jersey.

Mr. Choi has a prominent online presence as an LGBTQ activist and organizer. In 2012, Mr. Choi appeared on the cover of TIME Magazine alongside Jose Antonio Vargas, a nationally recognized immigrant rights activist and journalist who is undocumented.<sup>66</sup>

Bupendra Ram is another such individual. Mr. Ram is a thirty-two year old DACA recipient who lives and works in Los Angeles, California, and identifies as queer.<sup>67</sup> He was born in Fiji, but is ethnically Indian, and came to the United States when he was two years

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<sup>66</sup> Feifei Sun, *Behind the Cover: America's Undocumented Immigrants*, TIME (June 14, 2012).

<sup>67</sup> "Queer" is typically used to denote people, particularly younger people, whose sexual orientation is not exclusively heterosexual." *What is LGBTQ?*, *supra* note 2.

old.<sup>68</sup> His family fled Fiji as a result of a political coup.<sup>69</sup> While his family was granted political asylum in the United States, Mr. Ram's name was never included on the application through an error of the family's counsel. As a result, he remains undocumented. In recent years, Mr. Ram has been "out" on social media and online." He has "become more public about his identity" as a queer, undocumented South Asian immigrant, more involved in activism, and more involved in the LGBTQ community. Mr. Ram is a vocal advocate for immigration reform.<sup>70</sup> In short, DACA has allowed Mr. Ram to be more open about his identity as both undocumented and queer.

Like Mr. Ram and Mr. Choi, many young people who identify as LGBTQ are open about their sexual orientation and/or gender identity in ways that are publicly accessible, such as through activism and social media. On average, DACA recipients are 24 years old, 29% of recipients are between the ages of 16 and 20 years old, and 37% are between the ages of 21 and 25 years old.<sup>71</sup> Social media use is almost ubiquitous within this age group: 90% of people between the ages of 18 and 29 years old report they use at least one

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<sup>68</sup> *Uncovering Our Stories: Bupendra Ram*, National Queer Asian Pacific Islander Alliance (Aug. 24, 2013), <https://www.nqapia.org/wpp/uncovering-our-stories-bupendra/>.

<sup>69</sup> *DACA Stories, Bupendra (Bupen) Ram*, SAALT, <http://saalt.org/policy-change/immigrant-rights/daca-stories/bupendra-bupen-ram/> (last visited Sept. 27, 2019).

<sup>70</sup> *Id.*

<sup>71</sup> Gustavo López & Jens Krogstad, *Key facts about unauthorized immigrants enrolled in DACA*, PEW RES. CTR. (Sep. 25, 2017), <http://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/>.

social media platform.<sup>72</sup> These social media platforms are widely used amongst young people who identify as LGBTQ to convey their unique stories and to build community. In a survey of LGBTQ adults, 55% say they “have met new LGBTQ friends online” and 43% “have revealed their sexual and/or gender identity on a social networking site.”<sup>73</sup> Both Mr. Ram and Mr. Choi use social media in order to convey their stories about being undocumented and identifying as LGBTQ. They also use social media to connect with similarly situated individuals and organizations like NQAPIA, and to provide support to other undocumented Asians who self-identify as LGBTQ.

This use of social media, or more generally being identified as “out” online, is significant. It means that information regarding DACA recipients’ sexual orientation and/or gender identity is publically and readily available. This information is not limited to individuals residing in the United States but is readily available to both governmental and private actors here *and abroad*, putting LGBTQ DACA recipients at *increased* risk for discrimination and mistreatment, for the reasons set forth *supra*. Even without social media, it is not unreasonable to expect that the news of being “out,” especially in countries that criminalize sexual orientation and/or gender identity, will follow DACA recipients to their countries of birth.

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<sup>72</sup> *Social Media Fact Sheet*, PEW RES. CTR., INTERNET & TECH., (June 12, 2019), <https://www.pewinternet.org/fact-sheet/social-media/>.

<sup>73</sup> *A Survey of LGBT Americans*, PEW RES. CTR. SOC. & DEMOGRAPHIC TRENDS (June 13, 2013), <https://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans/>.

There is no question that many LGBTQ API DACA recipients will face harassment, persecution, violence and possible criminal prosecution by virtue of their sexual orientation and/or gender identity if DACA is rescinded and they are removed to their country of birth. This risk is compounded to the extent that among the tens of thousands of LGBTQ DACA recipients, there are individuals who are “out”—a decision undoubtedly guided and informed in reliance on the continued expectation of DACA and the protections of this country—who will be at higher risk of danger if and when removed to their countries of birth. This creates a serious risk for Mr. Choi, Mr. Ram and those similarly situated if detained and/or removed.

If DACA is terminated, many LGBTQ undocumented immigrants would be subject to removal proceedings under United States immigration law. Unless individuals are able to apply for another type of protection, or agree to voluntarily return to their country of birth, such undocumented immigrants could be sent to an immigration detention center for days or even months during these proceedings. For LGBTQ undocumented immigrants, immigration detention centers in the United States are particularly violent. According to an analysis by the Center for American Progress, the Immigration, Customs and Enforcement (“ICE”) sexual assault reporting data released pursuant to the Prison Rape Elimination Act demonstrates that, in 2017, “although LGBT people were 0.14 percent of the people ICE detained in FY2017, they accounted for 12 percent of victims of sexual abuse and assault in ICE detention that year.”<sup>74</sup> This means that

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<sup>74</sup> Sharita Gruberg, *ICE’s Rejection of Its Own Rules Is Placing LGBT Immigrants at Severe Risk of Sexual Abuse*, CTR. FOR AMERICAN PROGRESS (May 30, 2018, 12:00 PM), <https://www.>



“assuming each report of sexual violence is substantiated and involves a separate victim, LGBTQ people in ICE custody are 97 times more likely to be sexually victimized than non-LGBTQ people in detention.”<sup>75</sup> Further, the “ICE data show[s] that 1 in 8 transgender people detained in FY 2017 were placed in solitary confinement” which is “considered a form of torture by the United Nations.”<sup>76</sup>

The risks and violence continue if an individual is removed. As Mr. Choi has stated:

For many of us, going back to our home countries is a scary proposition because of our queerness. I worry about my safety, and the safety of my fellow undocumented DACA recipients. I have serious concerns about being forced to return to Korea as a gay man, including forced conscription to a military that openly criminalizes, and punishes, homosexual acts. Further, I am deeply concerned that I will be unable to adjust to an unfamiliar culture after two decades of life here in the United States.

As Mr. Choi has recognized, removal to Korea would have a severe impact on his life. Korea’s mandatory conscription mandates that he serve in a military

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[americanprogress.org/issues/lgbt/news/2018/05/30/451294/ices-rejection-rules-placing-lgbt-immigrants-severe-risk-sexual-abuse/](https://www.americanprogress.org/issues/lgbt/news/2018/05/30/451294/ices-rejection-rules-placing-lgbt-immigrants-severe-risk-sexual-abuse/).

<sup>75</sup> *Id.*

<sup>76</sup> Sam Hananel, *Release: LGBT Immigrants in Detention Centers at Severe Risk of Sexual Abuse, CAP Analysis Says*, CTR. FOR AMERICAN PROGRESS (May 30, 2018), <https://www.americanprogress.org/press/release/2018/05/30/451380/release-lgbt-immigrants-detention-centers-severe-risk-sexual-abuse-cap-analysis-says/>.

which outlaws and could prosecute him for “sodomy or other disgraceful conduct”<sup>77</sup> (a provision that was upheld as constitutional as recently as July 2016).<sup>78</sup>

Mr. Ram would also be put at risk for societal discrimination and violence on the basis of his sexual orientation.<sup>79</sup> In fact, he reports hearing even “close family members make anti-LGBTQ comments about how they would hurt members of my community.” Further, Mr. Ram’s family left Fiji because of the political climate, which was severe enough and dangerous enough for his family members as ethnic Indians to be granted asylum in the United States.<sup>80</sup> That danger and discrimination would be compounded by his LGBTQ status.

Both men would lose these civil protections afforded to them in the United States, including the fundamental right to marry.<sup>81</sup> Neither man could engage in any

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<sup>77</sup> MILITARY CRIMINAL ACT (SOUTH KOREA) Article 92-6.

<sup>78</sup> *State-Sponsored Homophobia* (2019), *supra* note 5, at 132.

<sup>79</sup> *See supra* text accompanying note 38.

<sup>80</sup> To be eligible for asylum in the U.S., Mr. Ram’s family must have faced demonstrated “persecution” in Fiji. *See* 8 U.S.C. § 101(a)(42). “[P]ersecution must rise above unpleasantness, harassment and even basic suffering.” *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2000). Rather, persecution in asylum jurisprudence is “an extreme concept”, marked by “the infliction of suffering or harm . . . in a way regarded as offensive.” *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (*quoting Ghaly v INS*, 58 F.3d 1481 (9th Cir. 1995)).

<sup>81</sup> In fact, in Fiji, the prime minister has explicitly stated that his government would “never” allow same-sex marriage in his lifetime, and called same-sex marriage “rubbish.” *Fiji PM’s gay marriage comments shock*, RNZ (Jan. 6, 2016, 7:31 PM), <https://www.rnz.co.nz/international/pacific-news/293597/fiji-pm’s-gay-marriage-comments-shock>.

LGBTQ advocacy without real risk of repercussions and possible violence.<sup>82</sup>

LGBTQ API DACA recipients who have built their lives in this country should not be arbitrarily forced to return to face near-certain discrimination and mistreatment in countries that for many recipients, will be entirely foreign. As Mr. Ram stated:

Receiving DACA allowed me for the first time to breathe easier. I can live, I can take care of myself, and I have some stability. Removal would take all that I have worked for away, and place me without any support in a country I do not even remember. I would also be separated from my family and friends who live in America.

Rescinding DACA for Mr. Choi, Mr. Ram and other LGBTQ recipients would be the perfect embodiment of what the Court of Appeals deemed “the cruelty and wastefulness of deporting productive young people to countries with which they have no ties.” *Regents of the Univ. of Calif. v. U.S. Dep’t Homeland Sec.*, 908 F.3d 476, 486 (9th Cir. 2018). Removal to countries of birth is exceptionally cruel for LGBTQ API DACA recipients, who not only have no ties to their countries of birth, but would also face discrimination, criminal prosecution violence upon their return.

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<sup>82</sup> Further, both Mr. Ram and Mr. Choi are very active in the Asian LGBTQ community, and if DACA is rescinded, their removal will be an irreparable loss to the community and NQAPIA.

## CONCLUSION

For the foregoing reasons and those in the briefs of Respondents and other *amici curiae* supporting them, the National Queer Asian Pacific Islander Alliance, Inc., and the other *amici curiae* on this brief urge the Court to affirm the judgments of the Court of Appeals for the Ninth Circuit and the United States District Court for the District of Columbia, as well as the orders of the United States District Court for the Eastern District of New York.

Respectfully submitted,

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September 30, 2019

## APPENDIX

## APPENDIX

List of *Amici Curiae*

API Equality – Northern California (APIENC) builds queer and transgender Asian and Pacific Islander power to amplify their voices and increase the visibility of their communities. Through organizing, the organization inspires and trains leaders, establishes intergenerational connections, and documents and disseminates queer and transgender Asian and Pacific Islander histories.

API Rainbow Parents of PFLAG NYC provides information and support to Asian Pacific Islander families with LGBTQ family members.

The mission of the APICHA Community Health Center – New York City is to improve the health of the community and to increase access to comprehensive primary care, preventive health services, mental health, and supportive services for underserved and vulnerable people, especially Asians and Pacific Islanders, the LGBT Community and individuals living with and affected by HIV/AIDS.

Asian and Pacific Islander Queers United for Action (AQUA) promotes the positive identity and general welfare of the LGBTQ+ members of the Asian and Pacific Islander communities in the DC metro area, through advocacy, coalition building, education, networking, outreach, and support.

Founded in 1992, Asian Pacific American Labor Alliance (AFL-CIO), is the first and only national organization of Asian American and Pacific Islander (AAPI) workers, most of who are union members, and allies advancing worker, immigrant and civil rights.

The Asian Pacific Islander Queer Women and Transgender Community – San Francisco is a fun, welcoming, multi-generational group of Asian & Pacific islander queer women and transgender people in the Bay Area, who are building community together. It is the legacy of queer A&PI activism, stemming from earlier-founded organizations going back to 1987. It is a wholly volunteer-based organization.

ATL Q+A – Atlanta supports and respects Queer/Trans Asian folk living in the Atlanta area.

Equality Federation is the movement builder and strategic partner to state-based organizations advocating for LGBTQ people.

The Gay Asian and Pacific Islander Men of New York (“GAPIMNY”) was founded on 1990 and is an all-volunteer, membership-based community organization that provides a range of political, social, educational, and cultural programming. GAPIMNY works in coalition with other community organizations to help educate its communities on issues of race, sexuality, gender, and health. Its mission is to empower LGBT Asian and Pacific Islander people to create positive change.

The Gay Asian Pacific Alliance (GAPA) in San Francisco Bay Area is an organization dedicated to furthering the interests of LGBT Asian and Pacific Islanders by creating awareness, developing a positive collective identity, and establishing a supportive community. GAPA envisions a powerful Queer Trans Asian and Pacific Islander community that is seen, heard, and celebrated.

The GLBT Fund of America, Philadelphia was established in 2007 to support its community in the areas of social justice, health needs and civil rights.

Through strategic litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders (GLAD) works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals and people living with HIV and AIDS. GLAD has an enduring interest in affirming the right of all LGBTQ individuals to live in a free and just society.

Immigration Equality is a leading national non-profit organization that provides legal services and advocacy for lesbian, gay, bisexual, transgender, queer (“LGBTQ”) and HIV-positive immigrants.

Invisible to Invincible Asian Pacific Pride of Chicago (i2i) is a community-based organization that celebrates and affirms Asians & Pacific Islanders who identify as Lesbian, Gay, Bisexual, Transgender, Questioning, and Queer in the Chicago area.

KhushATX, is an active South Asian gay, lesbian, bisexual, and transgender group based in Austin, Texas.

Korean American Rainbow Parents (KARP) – Washington D.C., aims to build compassion on queer issues within the Korean American community, on behalf of LBGTQ loved ones.

Korean Queer and Transgender Organization of Washington, DC is comprised of LGBTQ individuals, parents, and allies of Korean descent committed to promote a welcoming space and advocating for LGBTQ rights.



Lambda Legal Defense and Education Fund, Inc. is the nation's oldest and largest non-profit legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender, and queer ("LGBTQ") people and everyone living with HIV through impact litigation, education, and public policy work. Lambda Legal's advocacy on behalf of youth and adult immigrants includes, in addition to direct representation to secure legal protections, educating the public and courts regarding the emotional and physical harm and state-sponsored, government-sanctioned discrimination faced by LGBTQ people and people living with HIV, or those perceived to be, in countries around the world and the life or death consequences if forced to return to their home countries.

Since 1969, the Los Angeles LGBT Center has cared for, championed, and celebrated LGBT individuals and families in Los Angeles and around the world. Today, the organization's nearly 750 employees provide services for more LGBT people than any other organization in the world, offering programs, services, and global advocacy that span four broad categories: health, social services and housing, culture and education, and leadership and advocacy.

National Black Justice Coalition is a civil rights organization dedicated to empowering Black lesbian, gay, bisexual, and transgender people.

Founded in 1973, the National LGBTQ Task Force is a progressive social justice organization that works to build power, take action, and create change to achieve freedom and justice for LGBTQ people and their families. The Task Force works toward a society that values and respects the diversity of human expression and identity and achieves equity for all.

Our Space LGBT Youth Center is a vibrant safe space for LGBTQ youth ages 11-23 in Alameda County which served over 500 queer and trans youth each year. LGBTQ young people experience significantly higher rates of harassment and abuse—as well as poverty, homelessness, and involvement in the child welfare and juvenile justice systems—than their straight peers. Our Space provides the much-needed safe space where LGBTQ youth can express their authentic selves and feel seen, accepted, and celebrated. Comprehensive services for youth include: peer support groups in schools, community-based mental health and case management, intergenerational community building activities, paid youth leadership opportunities, as well as a community center with drop-in hours and a gender affirming clothing closet and food pantry. Our Space also offers specialized support services for adult caregivers and families, as well as trainings for staff from schools, clinics, and other service providers working with LGBTQ youth. At its heart, Our Space is working to create a world where LGBTQ youth are empowered to show fierce love for themselves and their community.

OutRight Action International seeks to advance human rights and opportunities for LGBTIQ people around the world by developing partnerships at global, regional, and national levels to build capacity, document human rights violations, advocate for inclusion and equality, and hold leaders accountable for protecting the rights of LGBTIQ people.

Philadelphia Asian & Queer (PAQ) is a volunteer, social organization that strives to engage queer (LGBTQIA+), Asian Pacific Islander (API) folx within the greater Philadelphia area. Through a range of advocacy, social and supportive programming, PAQ

commits to building and uniting the collective voices of the queer, API community.

PFLAG is the first and largest organization for lesbian, gay, bisexual, transgender, and queer (LGBTQ+) people, their parents and families, and allies. With over 400 chapters and 200,000 members and supporters crossing multiple generations of families in major urban centers, small cities, and rural areas across America, PFLAG is committed to creating a world where diversity is celebrated and all people are respected, valued, and affirmed. PFLAG's mission is to build on a foundation of loving families united with LGBTQ people and allies who support one another, and to educate ourselves and our communities to speak up as advocates until all hearts and minds respect, value and affirm LGBTQ people.

The PFLAG – San Gabriel Valley Asian Pacific Islander accomplishes the vision and mission of PFLAG National in promoting the health and well-being of LGBT individuals, their families, and friends through: support, education and advocacy. The organization addresses the culture-specific needs of the Asian-American, Pacific-Islander, East Asian, and South Asian people and fosters inter-generational dialogue.

Queer South Asian Collective Community – Boston is a collective community of LGBTQIA folx, residing in the Greater Boston Area of API descent.

Q-WAVE is a community organization based in New York City, founded in 2004. It is dedicated to strengthening the voices of lesbian / bisexual / queer women and transgender / gender variant people of Asian & Pacific Islander descent.

SAGENYC leads in addressing issues related to lesbian, gay, bisexual and transgender (LGBT) aging.

In partnership with its constituents and allies, SAGE works to achieve a high quality of life for LGBT older people, supports and advocates for their rights, fosters a greater understanding of aging in all communities, and promotes positive images of LGBT life in later years.

SALGA NYC serves to promote awareness, acceptance, empowerment, and safe inclusive spaces for people of all sexual orientation and/or gender identity, who trace their heritage to South Asia or who identify as South Asian. SALGA-NYC is a not-for-profit, all-volunteer organization, serving the South Asian LGBT community. Its mission is to enable community members to establish cultural visibility and take a stand against oppression and discrimination in all its forms.

San Francisco LGBT Center is San Francisco's only organization serving the full spectrum of LGBT communities. The Center innovates powerful human service programs to meet changing community needs, to address problems that have been neglected, and to shine light on LGBT culture and community in new ways. The Center's major program areas are economic development, youth programming, community programming and building services.

Satrang Los Angeles, serves the South Asian LGBTQ community by promoting awareness, acceptance, and empowerment through social, educational, and advocacy-related events. It envisions and works towards an inclusive and visible community in which South Asian LGBTQ-identified people feel whole and heard.

Transgender Legal Defense and Education Fund is an American civil rights organization that

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focuses on transgender equality through impact litigation and public policy work.

Trikone offers a supportive, empowering and non-judgmental environment where LGBTQ South Asians and their allies can meet, make connections, and proudly promote awareness and acceptance of their sexual identity.

UTOPIA Seattle's mission is to provide sacred spaces to strengthen the minds and bodies of QTPIs (Queer and Trans Pacific Islanders) through community organizing, community care, civic engagement, and cultural stewardship.