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Queering the Dream—The Impact Trump’s Decision has on LGBTQ+ Dreamers

Candelario Saldana

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Queering the Dream—The Impact Trump’s Decision has on LGBTQ+ Dreamers

Candelario Saldana*

On June 15, 2012, President Obama created the Deferred Action for Childhood Arrivals (“DACA”) program, which was an exercise of prosecutorial discretion that provided temporary relief from deportation to youth known as Dreamers. On September 5, 2017, the Trump administration announced that it would begin phasing out the program. The fate of the program has recently been litigated in courts including the Supreme Court, with a decision pending from the Supreme Court anytime in 2020 (although there is a push to stall a decision due to the COVID-19 pandemic). In this article I discuss the historical context of DACA and its creation, as well as its current state. Then I analyze the country conditions of the top eight home countries of DACA recipients (Mexico, El Salvador, Guatemala, Honduras, Peru, the Philippines, Colombia and the Dominican Republic), which allows me to demonstrate the risk that LGBTQ+ individuals face if they are deported back to their home countries. Finally, I give a detailed explanation of the forms of relief available if someone were to fall out of DACA status. I compare the experiences of LGBTQ+ individuals to their heterosexual counterparts to demonstrate the unique experiences that LGBTQ+ DACA recipients face. If LGBTQ+ DACA recipients are deported back to their home countries where few protections are in place, or if in place lack enforcement, they will face discrimination, beatings

* For 27 years of my life I was undocumented. I also benefitted from DACA at one point in my life. I dedicate this note to my mother, Irma Briceno, who sacrificed everything to give me a better future. Throughout my life I had people that helped me continue to reach for my goals. Without the financial help of David Ibarra, I would not be where I am. A special thank you to Rebecca Sharpless, Professor of Law and Director of the Immigration Clinic at the University of Miami School of Law. Her supervision, not only in writing this note but throughout my two years in the Immigration Clinic at Miami Law, allowed me to grow and to continue fighting for immigrant rights. Always remember that you can put your dreams on pause, so long as you do not stop dreaming.

and possible exile. Furthermore, asking LGBTQ+ individuals to simply hide their identity and return to the “closet” also has its own psychological consequences often leading to suicide. The impact that Trump’s decision has on LGBTQ+ Dreamers is dire, and I hope this article sheds a light on why we must queer the dream.

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I. INTRODUCTION

“Appealing to his most xenophobic base, Trump is risking the lives of 800,000 young people, including more than 75,000 LGBTQ people who deserve to live and work free of fear. It’s cruel and cowardly—and fits with a pattern of implementing racist, xenophobic and anti-LGBTQ polices that target core American values and move our country backward.”¹

Imagine arriving in the United States as a young child, as little as one or two years of age, and growing up believing that you were just like everyone else. When you discuss your dreams about going away to college with your parents, you find out that even though you acted “American” and did everything you could to excel, you lack a Social Security number and are not legally living in the United States. Despite these hurdles, you continue “to pull yourself up by the bootstraps.” Unwilling to give up, you find out that you can still attend college because the state you live in has a state law that allows undocumented youth to attend a higher education institution and pay in-state-tuition.² You graduate with honors from an undergraduate university, and because you qualified for a program that deferred your deportation and authorized you to legally work in the U.S., you find a job in your field of study. Because you felt safe, you came out of the closet and embraced your LGBTQ identity.³ Then after five years

¹ Aisha C. Moodie-Mills, *Statement: Trump “Cruel and Cowardly” for Ending DACA Program*, VICTORY INST. (Sept. 5, 2017), <https://victoryinstitute.org/news/statement-trump-cruel-cowardly-ending-daca-program/>.

² See Gilberto Mendoza, *Tuition Benefits for Immigrants*, NAT’L CONFERENCE OF STATE LEGISLATURES (July 15, 2015), <http://www.ncsl.org/research/immigration/tuition-benefits-for-immigrants.aspx> (explaining that twenty states offer in-state tuition to unauthorized immigrant students, sixteen by state legislative action and four by state university systems. The states that passed laws through their legislative system include: California, Colorado, Connecticut, Florida, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Jersey, New Mexico, New York, Oregon, Texas, Utah, and Washington. What these states did was enact laws that would allow undocumented students to pay in-state tuition.); see also Utah Code Ann. 1953 § 53B-8-106 (in 2002, Utah’s Governor signed H.B. 144 that “modifie[d] the State System of Higher Education code to allow a student who meets certain requirements to be exempt from paying nonresident tuition at institutions of higher education.”); see also Tanya Golash-Boza & Benigno Merlin, *Here’s how undocumented students are able to enroll at American universities*, THE CONVERSATION (Nov. 24, 2016, 3:13 PM), <http://theconversation.com/heres-how-undocumented-students-are-able-to-enroll-at-american-universities-69269>.

³ Although this makes a reference to an “out” LGBTQI person, this note does not solely focus on individuals who have decided to openly live as LGBTQI. In fact, I recognize that even in America many individuals are still afraid of coming out, and instead choose to live closeted lives, or come out to only a few people.

of having temporary relief from deportation, you are told that you are now at risk of losing your work permit and protected status, and might be in danger of being detained and deported because the government has all your information.

Unfortunately, this story is the reality for thousands of LGBTQ+ identified undocumented individuals. On September 5, 2017, Attorney General Sessions announced the Trump administration's decision to rescind the Deferred Action for Childhood Arrivals (DACA) program.⁴ DACA had allowed immigration officials to exercise prosecutorial discretion, "providing temporary relief from deportation (deferred action) and work authorization to certain young undocumented immigrants brought to the United States as children."⁵

Being deported to a country you have never visited and where you have very few, if any, memories is frightening. For DACA recipients who identify as LGBTQ+, the specter of deportation is "even more chilling."⁶ Although the United States does not have a perfect record for LGBTQI+⁷ rights, the protections afforded are more robust than in many other countries.⁸ "In 72 countries, same-sex sexual relations are criminalized; in 45 of those countries, the laws against same-sex sexual relations apply to both men and women. For some LGBTQ people, deportation means 'a death sentence.'"⁹ Although there are several forms of relief including asylum, withholding, the Convention Against Torture (CAT), and cancellation of removal, this note will analyze the difficulties in attaining these forms of relief. It will also look at how an LGBTQ+ identity makes

⁴ Attorney General Sessions, *Attorney General Sessions Delivers Remarks on DACA: Remarks as prepared for delivery*, DOJ (Sept. 5, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca>.

⁵ *The Dream Act, DACA, and Other Policies Designed to Protect Dreamer*, AM. IMMIGRATION COUNCIL (Sept. 6, 2017), <https://www.americanimmigrationcouncil.org/research/dream-act-daca-and-other-policies-designed-protect-dreamers>.

⁶ Trudy Ring, *LGBT Groups Denounce Plan to End DACA*, ADVOCATE (Sept. 5, 2017, 1:38 PM), <https://www.advocate.com/politics/2017/9/05/lgbt-groups-denounce-plan-end-daca>.

⁷ In this note I will use the term LGBTQI, LGBT, LGB, LGBTQ+ to represent people expressing a different sexual orientation than that of heterosexual. Because statistics do not always account for all the minority sexual orientations it is difficult to always be inclusive of all people. This note also does not fully explore the effects that Trump's decision will have on individuals that do not conform to what society has deemed as "normal" gender identities. For gender non-conforming and gender non-binary individuals the effects might be very similar to those faced by individuals belonging to sexual orientation minorities.

⁸ See Kimberly D. Topel, "So, what should I ask him to prove that he's gay?": *How sincerity, and not stereotype, should dictate the outcome of an LGB asylum claim in the United States*, 102 IOWA L. REV. 2357, 2358 (July 2017).

⁹ Corinne Segal, *LGBTQ "dreamers" are particularly vulnerable as DACA winds down. Here's why.*, PBS (Sept. 8, 2017, 11:57 AM), <https://www.pbs.org/newshour/nation/lgbtq-dreamers-particularly-vulnerable-daca-winds-heres>.

it harder to attain these forms of relief compared to heterosexual DACA recipients, even though LGBTQ+ identified DACA recipients are at a greater risk if deported. Following this introduction, Part II discusses the historical context of DACA and how it was created. Part III analyzes the country conditions for the top eight home countries of DACA recipients to demonstrate how LGBTQ+ people are at greater risk than their heterosexual counterparts if deported. Part IV gives a detailed explanation of the forms of relief available to those who have “fallen out” of DACA status, assuming Congress has failed to act and the individual is put in removal proceedings. Part V concludes with final thoughts.

II. A BRIEF HISTORY: FROM BEGINNING TO PHASE OUT

A. *The Dream Act*

In 2001, during the 107th Congress, Senator Orrin Hatch first introduced the Development, Relief, and Education for Alien Minors Act or the DREAM Act.¹⁰ The Act would amend “the Immigration Reform and Immigrant Responsibility Act of 1996 to repeal the denial of an unlawful alien’s eligibility for higher education benefits.”¹¹ The Dream Act as first introduced would also allow undocumented youth to adjust to permanent resident status if the person: (1) was at least 12 years of age prior to the act being enacted; (2) filed an application before reaching 21 years of age; (3) earned a high school diploma or its equivalent; (4) was physically present in the United States for a at least five years before the date that the act was enacted; (5) demonstrated good moral character; and (6) was not inadmissible or deportable under specified criminal and security grounds according the Immigration and Nationality Act (INA).¹² Despite bipartisan support, the bill did not become law.¹³ Over the last eighteen years, different versions of the Dream Act have been introduced.¹⁴ However, none of the bills has ever reached the President’s desk for signature to become the law of the United States.¹⁵

¹⁰ Dream Act, S.1291, 107th Cong. (2001), <https://www.congress.gov/bill/107th-congress/senate-bill/1291> (last visited Nov. 4, 2017).

¹¹ *Id.*

¹² *Id.*

¹³ *The Dream Act, DACA, and Other Policies Designed to Protect Dreamers*, AM. IMMIGRATION COUNCIL, https://www.americanimmigrationcouncil.org/sites/default/files/research/the_dream_act_daca_and_other_policies_designed_to_protect_dreamers.pdf (last visited Nov. 4, 2017) [hereinafter *Policies Designed to Protect Dreamers*].

¹⁴ *Id.*

¹⁵ *Id.*; see also Yamiche Alcindor & Sheryl Gay Stolberg, *After 16 Futile Years, Congress Will Try Again to Legalize ‘Dreamers’*, N.Y. Times (Sept. 5, 2017) <https://www>

B. *Obama's Creation of DACA*

In reaction to the various failed attempts by Congress to pass the Dream Act, or any bills that would fix the “broken immigration system,” President Obama along with Secretary of Homeland Security, Janet Napolitano, announced administrative steps he would take in lieu of legislation on June 15, 2012.¹⁶ These actions sought to “mend our nation’s immigration policy, to make it more fair, more efficient, and more just—specifically for certain young people sometimes called ‘Dreamers.’”¹⁷ The Department of Homeland Security took immediate steps to implement Deferred Action for Childhood Arrivals (DACA).¹⁸ “DACA [was] an “exercise of prosecutorial discretion, providing temporary relief from deportation (deferred action) and work authorization to certain young undocumented immigrants brought to the United States as children.”¹⁹

In her memorandum to the acting commissioner of the U.S. Customs and Border Protection (CBP), director for U.S. Citizenship and Immigration Services (USCIS), and director of U.S. Immigration and Customs Enforcement (ICE), Secretary Napolitano laid out the criteria for an individual to be granted DACA.²⁰ This criteria required that the individual (1) “came to the United States under the age of sixteen”; (2) continuously resided in the U.S. for at least five years before June 5, 2012, and was present in the U.S. on June 5, 2012; (3) is currently in school, graduated from high school or attained a GED certificate, or was honorably discharged from the Coast Guard or Armed Forces of the United States; (4) does not have any felony, significant misdemeanor, or multiple misdemeanor convictions, and does not pose a threat to the national security or public safety; and (5) was under the age of thirty-one as of June 15, 2012.²¹ As created, the program granted recipients deferral of removal

nytimes.com/2017/09/05/us/politics/dream-act-daca-trump-congress-dreamers.html (This article documents how in the past sixteen years Congress has failed to pass a bill in order to get it to the President’s desk. The closest attempt was in 2013, when the Senate passed the Dream Act as part of a “broader immigration package” that included language allowing dreamers to stay, work and attend school.” The bill passed the Senate with 68 votes, but then failed in the House.).

¹⁶ President Obama, *Remarks by the President on Immigration*, THE WHITE HOUSE (June 15, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration>.

¹⁷ *Id.*

¹⁸ *Id.*; see also *Policies Designed to Protect Dreamers*, *supra* note 13.

¹⁹ *Policies Designed to Protect Dreamers*, *supra* note 13.

²⁰ Memorandum from Janet Napolitano Sec’y of Dep’t of Homeland Sec. on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2017), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

²¹ *Id.*

proceedings, as well as the opportunity to legally work through the issuance of an employment authorization document and a social security number.²² It was estimated that about 900,000 individuals were “immediately eligible for deferred action at the date of the announcement.”²³ Between August 15, 2012, and June 30, 2013, USCIS received about 557,412 applications.²⁴ According to recent information, as of March 31, 2017, about 787,000 applications for initial DACA protections had been approved.²⁵

C. *Trump’s Recession of DACA*

On September 5, 2017, the Trump administration announced that it would begin phasing out the program.²⁶ Attorney General Sessions announced that no new applications would be accepted as of September 5, 2017; and that current DACA recipients whose status expired on or before March 5, 2018, could renew their status if their application was received by October 5, 2017.²⁷ Trump called on Congress to pass legislation replacing DACA.²⁸ However, as of the date of this note, Congress has yet to answer the call, leaving thousands of people to lose their DACA status in the next few years, unless the current court rulings discussed later in this note are upheld—saving the program.²⁹ When he announced the phasing out of DACA, Attorney General Sessions stated that part of the reasoning behind the administration’s decision to rescind the program included: (1)

²² Marisa Bono, *When a Rose is not a Rose: DACA, The Dream Act, and The Need for More Comprehensive Immigration Reform*, 40 T. MARSHALL L. REV. 193, 214 (2015).

²³ Nicole Prchal Svajlenka & Audrey Singer, *Immigration Facts: Deferred Action for Childhood Arrivals (DACA)*, BROOKINGS (Aug. 14, 2013), <https://www.brookings.edu/research/immigration-facts-deferred-action-for-childhood-arrivals-daca/>.

²⁴ *Id.*

²⁵ Dara Lind, *How many immigrants have DACA, really? We finally have one answer—just as they start to lose it.*, VOX (Oct. 6, 2017, 10:20 AM), <https://www.vox.com/policy-and-politics/2017/10/6/16431524/daca-how-many>.

²⁶ David Nakamura, *Trump administration announces end of immigration protection program for ‘dreamers.’* WASH POST (Sept. 5, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/09/05/trump-administration-announces-end-of-immigration-protection-program-for-dreamers/>.

²⁷ Emily Tillett, *Jeff Sessions announces DACA program to be rescinded*, CBS NEWS (Sept. 5, 2017, 3:10 PM), <https://www.cbsnews.com/news/trump-daca-decision-jeff-sessions-press-briefing-live-updates/>.

²⁸ *Donald Trump is right: Congress should pass DACA*, THE ECONOMIST (Sept. 9, 2017), <https://www.economist.com/leaders/2017/09/09/donald-trump-is-right-congress-should-pass-daca>.

²⁹ Furthermore on November 12, 2019, the Supreme Court heard oral arguments regarding whether DACA was lawful/constitutional, see Elizabeth Redden, *Supreme Court Takes up DACA*, INSIDE HIGHER ED. (Nov. 13, 2019), <https://www.insidehighered.com/news/2019/11/13/supreme-court-hears-arguments-daca>.

President Obama’s decision to “unilaterally” implement the program despite Congress’s lack of action on the DREAM Act, and that this “opened circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch”; (2) the creation of the DACA program contributed to the “surge of unaccompanied minors”; and (3) the program took away jobs from “hundreds of thousands of Americans.”³⁰

The reasoning behind Trump’s decision to end DACA is flawed. Although President Obama did unilaterally implement DACA, he did not circumvent immigration law. President Obama made the decision to emphasize immigration enforcement on those who engaged in criminal activity.³¹ However, this is a debated topic that will not be addressed in this note, but could be a topic for a future note as the courts continue to deal with the issue. Additionally, DACA did not contribute to a “surge in unaccompanied minors.”³² A study conducted by International Migration “revealed that DACA did not significantly contribute to the observed increase in unaccompanied minors.”³³ The authors concluded that the “2008 *Williams Wilberforce Trafficking Victims Protection Reauthorization Act*, along with violence in the originating countries and economic conditions in both the origin countries and the United States,” were the “key determinants” in the increase of unaccompanied minors.³⁴

³⁰ Attorney General Sessions, *Attorney General Sessions Delivers Remarks on DACA: Remarks as prepared for delivery*, DOJ (Sept. 5, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca>.

³¹ Edwin Mora, *Obama on Non-Criminal Illegal Aliens: We Don’t Want to Deport Them; We Want Them To Succeed*, CNS NEWS (Mar. 28, 2011, 4:44 pM) <https://www.cnsnews.com/news/article/obama-non-criminal-illegal-aliens-we-don-t-want-deport-them-we-want-them-succeed> (this note, however, does not address this point as it would likely make for a note of its own).

³² Alex Nowrasteh, *DACA Did Not Cause the Surge in Unaccompanied Children*, CATO INSTITUTE (July 29, 2014, 3:41 PM), <https://www.cato.org/blog/daca-did-not-cause-surge-unaccompanied-children>; Catalina Amuedo-Dorantes & Thitima Puttitanun, *Was DACA Responsible for the Surge in Unaccompanied Minors on the Southern Border?*, 55 INT’L MIGRATION 12, 13 (Dec. 2017), <http://onlinelibrary.wiley.com/doi/10.1111/imig.2017.55.issue-6/issuetoc>.

³³ Amuedo-Dorantes & Puttitanun, *supra* note 32.

³⁴ *Id.*; see also Glenn Kessler, *The Trump administration’s claim that DACA ‘helped spur’ the 2014 surge of minors crossing the border*, WASH. POST (Sept. 6, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/09/06/the-trump-administrations-claim-that-daca-helped-spur-the-2014-surge-of-minors-crossing-the-border/?utm_term=.84b874005069 (claims that the surge of unaccompanied minors was not a result of DACA, but instead a result of a belief that these children could get “permisos” (permits). This was not a reference to DACA but instead to “the fact that children from countries that did not border the United States were allowed to stay in the United States, with relatives, until they faced deportation hearings—and at the time [2014, it was taking] a year or more.” This was the effect of a 2008 anti-trafficking law that was signed by President

Furthermore, although the majority of DACA recipients are employed, economists argue that there is no evidence to suggest that DACA recipients are taking jobs away from Americans.³⁵ According to Ray Perryman, president and CEO of the Texas economic research firm the Perryman Group, at the time of the decision to end DACA, the country was “at full employment with more job openings than at any point in history,” and “[w]e desperately need workers in this country.”³⁶ Allowing DACA recipients to work would actually increase jobs and continue bolstering the economy.³⁷

D. *The Courts Become Involved*

Although the Trump administration announced that it would begin phasing out DACA on September 5, 2017,³⁸ several federal courts have

George W. Bush—Trafficking Victims Protection Reauthorization Act (TVPRA). In fact, the article points out how the surge that the White House referred to occurred in 2014. To qualify for DACA, a minor had to arrive in the U.S. before Obama’s June 15, 2012, implementation of the program. Therefore, the unaccompanied minors did not qualify.); see also Raul A. Reyes, *Fact Checking Attorney General Jeff Sessions on DACA*, NBC NEWS (Sep. 7, 2017, 11:25 AM), <https://www.nbcnews.com/news/latino/fact-checking-attorney-general-jeff-sessions-daca-n799366> (checking the remark made by Attorney General Sessions the author states, “[t]he influx of unaccompanied minors from Central America actually began in 2008, four years before Obama announced DACA. While these young people could seek asylum or Special Immigrant Juvenile status, they are ineligible for DACA because the program requires continuous residency in the U.S. since 2017.” Furthermore, “research and reporting” show that other “push factors” had an actual impact, such as “deadly gangs and violence, that have driven these young people to flee their homeland.”).

³⁵ Danielle Kurtzleben, *Fact Check: Are DACA Recipients Stealing Jobs Away From Other Americans?*, NPR (Sept. 6, 2017, 3:12 PM), <https://www.npr.org/2017/09/06/548882071/fact-check-are-daca-recipients-stealing-jobs-away-from-other-americans>; see also, Bryce Covert, *No, DACA Immigrants Aren’t Stealing American Jobs*, NEW REPUBLIC (Sept. 7, 2017), <https://www.newrepublic.com/article/144720/no-daca-immigrants-arent-stealing-american-jobs> (uses other economist to explain how the economy works, in relation to job availability. “[A]llowing DACA recipients to work legally and earn more, thereby opening up more economic opportunities to them that pay dividends to everyone else—is how the economy works generally. To assume that immigrants steal jobs is to assume that work is a zero-sum game: if I get work, I’ve taken it away from you. But that’s not how things function in practice, because there is not fixed amount of work to be divided up. This is what economists have come to call the ‘lump of labor’ fallacy.” If there were only a certain amount of jobs available in the economy, then the country would have been dealing with an “ongoing, incurable mass unemployment.” Allowing immigrants to get jobs, helps the economy and creates even more jobs.).

³⁶ Kurtzleben, *supra* note 35.

³⁷ *Id.*

³⁸ Segal, *supra* note 9, at 1.

issued temporary victories for Dreamers.³⁹ Although these victories are a step in the right direction, they do not solve the issue indefinitely. Congress has still failed to act as of March 5, 2018, which is the date that Trump picked as the “‘expiration date’ for DACA recipients themselves.”⁴⁰ In fact, on April 1, 2018, Trump tweeted that there was “NO MORE DACA DEAL!,” and “directed congressional Republicans to pass tough anti-immigration legislation.”⁴¹

Following Trump’s decision to terminate DACA, multiple lawsuits were filed across the country seeking to either halt the government’s termination of DACA or challenging the constitutionality of the DACA program.⁴² This led to two U.S. district courts enjoining/halting the government’s termination of DACA and requiring USCIS to continue accepting DACA renewal applications from those who already had DACA.⁴³ Another U.S. district court (in the district of Maryland) “ordered the government to follow its original 2012 policy of not sharing DACA recipients’ private information for enforcement purposes.”⁴⁴ A fourth district court (in the District of Columbia) has also issued orders that have struck down Trump’s decision to terminate DACA, and it has also reinstated the program.⁴⁵ “On May 1, 2018, Texas and six other states [also] filed a lawsuit . . . challenging the 2012 DACA program itself.”⁴⁶ “[T]he plaintiffs asked the court to issue a preliminary injunction that would stop USCIS from adjudicating applications for deferred action under DACA” until the court ruled on the issue.⁴⁷ However, after hearing the request by the states the court concluded that “such an injunction would not be in the public’s interest.” Therefore, as of the last update of this note, it is still the case that “individuals who have or have previously had DACA can apply to renew it.”⁴⁸

³⁹ See *Status of Current DACA Litigation*, NAT’L IMMIGRATION LAW CTR. (last updated June 7, 2019), <https://www.nilc.org/issues/daca/status-current-daca-litigation/>.

⁴⁰ See Dara Lind, *What the Supreme Court’s DACA Ruling—and the March 5 “deadline”—actually means for immigrants*, VOX (last updated Mar. 5, 2018, 10:31 AM), <https://www.vox.com/policy-and-politics/2018/2/16/17015818/daca-deadline-trump-dreamers-march-5>.

⁴¹ Philip Rucker & David Weigel, *‘No more DACA deal,’ Trump says as he threatens to ‘stop’ NAFTA if Mexico doesn’t better secure border*, WASH. POST (Apr. 2, 2018), https://www.washingtonpost.com/news/post-politics/wp/2018/04/01/deal-on-daca-no-more-trump-says/?noredirect=on&utm_term=.88171c675009.

⁴² See *Status of Current DACA Litigation*, *supra* note 39.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

On January 9, 2018, in *Regents of the University of California, et al. v. Department of Homeland Security, et al.*, “a federal judge in California issued an injunction [. . .] and told [USCIS] to make a reasonably timely plan to resume accepting renewal applications.”⁴⁹ After the preliminary injunction was issued, “the government [sought] to skip review in the Ninth Circuit and [] appeal[ed] directly to the U.S. Supreme Court through a rarely used legal mechanism[—certiorari] before judgment.”⁵⁰ This kind of request requires a “showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in [the Supreme Court].”⁵¹ On February 26, 2018, the Supreme Court declined to hear an appeal to the California federal judge’s ruling, and issued a brief order stating that “[i]t assumed the court of appeals will act expeditiously to decide the case.”⁵² “On November 8, 2018, the Ninth Circuit,” after hearing oral arguments, “issued a decision [upholding] the preliminary injunction.”⁵³ “To date, the preliminary injunction issued in *U.C. Regents* remains in effect, and DACA recipients are eligible to continue applying to renew their DACA” status.⁵⁴

On February 13, 2018, another federal judge, in New York, also issued an injunction, in *Batalla Vidal v. Nielson and State of New York, et al. v. Trump, et al.*⁵⁵, and ordered USCIS to keep accepting renewal

⁴⁹ See Dara Lind, *March 5 is supposed to be the DACA “deadline.” Here’s what that means for immigrants.*, VOX (Mar. 5, 2018, 10:31 a.m.), <https://www.vox.com/policy-and-politics/2018/2/16/17015818/daca-deadline-trump-dreamers-march-5>; see also *Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1048-49 (N.D. Cal. 2018); *ALERT: Court Orders the Department of Homeland Security to Allow Individuals with DACA to Apply to Renew It*, NAT’L IMMIGRATION LAW CTR. (Jan. 10, 2018), <https://www.nilc.org/issues/daca/daca-preliminary-injunction-regents-v-dhs/> (affecting only “DACA recipients who have been unable to renew their DACA after the government’s Sept. 5, 2017, DACA termination announcement because of one of the following—(1) their DACA expired before Sept. 5, 2017, (2) their DACA expiration date falls after March 5, 2018, or (3) their renewal application was rejected due to clerical error . . .”).

⁵⁰ See *Status of Current DACA Litigation*, *supra* note 39 (the government filed its petition of certiorari with the Supreme Court on January 18, 2018).

⁵¹ *Id.* (citing Supreme Court Rule 11, pg.6 <https://www.supremecourt.gov/filingandrules/2017RulesoftheCourt.pdf>).

⁵² See Pete Williams, *In blow to Trump, Supreme Court won’t hear appeal of DACA ruling*, NBC NEWS (Feb. 26, 2018, 12:31 PM), <https://www.nbcnews.com/politics/politics-news/supreme-court-won-t-hear-daca-case-n851186>.

⁵³ *Id.* (citing *Regents of the Univ. of Cal. v. United States Dep’t of Homeland Sec.*, No. 18-15068, 2018 BL 89926 (9th Cir. Mar. 15, 2018)).

⁵⁴ See *Status of Current DACA Litigation*, *supra* note 39.

⁵⁵ The *Batalla Vidal* case was brought by six DACA recipients from New York, and the State of New York case was brought by a coalition of seventeen attorneys general. See *also Vidal v. Nielsen*, 291 F. Supp. 3d 260 (E.D.N.Y. Mar. 29, 2018).

applications.⁵⁶ This injunction was the “same in scope” as the one issued by the district court in California.⁵⁷ The court held that “there was a substantial likelihood that the plaintiffs would prevail on their claim that the Trump administration ended DACA in a way that was arbitrary and capricious, and therefore unlawful.”⁵⁸

On March 5, 2018, the U.S. District Court for the District of Maryland also issued an opinion on DACA.⁵⁹ The court dismissed most of the plaintiff’s claims, including the claim that the termination of DACA was unlawful.⁶⁰ However, the court did grant a nationwide preliminary injunction to DACA recipients on the claim regarding the sharing and usage of the information DACA recipients provide the government when they apply for DACA.⁶¹ The plaintiff’s appealed the dismissal of their claim—that the termination of DACA was unlawful—in the Fourth Circuit Court of Appeals.⁶² On May 17, 2019, the Fourth Circuit Court of Appeals held DHS had failed to give a reasoned explanation for its change in policy when it rescinded DACA, and therefore the decision was arbitrary and capricious.⁶³ The Department of Justice filed a petition for writ of certiorari asking the Supreme Court to review the decision issued by the Fourth Circuit, and for an expedited briefing schedule to allow the Court to consider its petition before the end of the Court’s term.⁶⁴ However, the Court denied the expedited consideration request on June 3, 2019, but not certiorari.⁶⁵

In a more recent decision from the United States District Court for the District of Columbia, a federal judge ruled that DACA protections must be reinstated as ruled by other federal judges.⁶⁶ However, Judge John D.

⁵⁶ *Id.*; see also *Vidal vs. Nielsen*, Secretary, DHS, Memorandum & Order, 16-CV-4756 (NGG) (JO), available at <http://cdn.cnn.com/cnn/2018/images/02/13/orderdaca.pdf>.

⁵⁷ See *Status of Current DACA Litigation*, *supra* note 39.

⁵⁸ *Id.*; see also *Vidal v. Nielsen*, No. 16-cv-4756 (NGG) (JO), 2018 U.S. Dist. LEXIS 3179 (E.D.N.Y. Jan. 08, 2018).

⁵⁹ *Casa de Md., et al. v. Dep’t of Homeland Sec., et al.*, 284 F. Supp. 3d 758 (D. Md. Mar. 5, 2018).

⁶⁰ *Id.* at 779.

⁶¹ *Id.*

⁶² *Casa de Md. v. U.S. Dep’t of Homeland Sec.*, 924 F.3d 684, 705 (4th Cir. May 17, 2019).

⁶³ *Id.*

⁶⁴ *DACA Litigation Timeline*, NAT’L IMMIGRATION LAW CTR. (Sept. 28, 2019), <https://www.nilc.org/issues/daca/daca-litigation-timeline/>.

⁶⁵ *Id.*

⁶⁶ Miriam Jordan, *U.S. Must Keep DACA and Accept New Applications, Federal Judge Rules*, N.Y. TIMES (Apr. 24, 2018), <https://www.nytimes.com/2018/04/24/us/daca-dreamers-trump.html>; see also *Trustees of Princeton University, et al. v. United States of America*, 1:17-cv-02325-JBD (Apr. 24, 2018), https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2017cv1907-23.

Bates went ever further and ordered the government to accept new applications.⁶⁷ The decision was based on the fact that “[o]ne of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.”⁶⁸ Accordingly, the court held that the government’s reasoning “was insufficient to satisfy the Department’s obligation to explain its departure from its prior stated view that DACA was lawful.”⁶⁹ “In concluding that DACA was implemented ‘without statutory authority,’ neither the Sessions Letter nor the Rescission Memo cited any statutory provision with which DACA was in conflict.”⁷⁰ Although the court ruled that the government must resume DACA including new applications, it did stay its order giving the government ninety-days for DHS to “better explain its rescission decision.”⁷¹ This same decision also applied to, *NAACP v. Trump*, due to the fact that the court found that the cases were related to each other.⁷² Responding to the Judge’s decision, on June 22, 2018, DHS Secretary Kirstjen Nielsen issued a new memorandum, which “concur[s] with and decline[s] to disturb” the September 5, 2017, memorandum that rescinded the enforcement of DACA.⁷³ The government then asked Judge Bates to reconsider his prior order, stating that Secretary Nielsen’s new memorandum provided more details on the government’s decision to end DACA.⁷⁴ However, on August 3, 2018, Judge Bates found that the new memorandum did not present “impermissibly post hoc rationalizations.”⁷⁵ Ultimately, the District Court for the District of Columbia, ordered that the Trump administration’s termination of the DACA program be vacated, however, the order has been stayed, which effectively leaves its order that USCIS process DACA renewal applications in effect, but it does not reimplement the entire program itself.⁷⁶

On May 1, 2018, Texas along with Alabama, Arkansas, Louisiana, Nebraska, South Carolina, and West Virginia filed a lawsuit against the federal government challenging the creation of the DACA program.⁷⁷

⁶⁷ Jordan, *supra* note 66, at 1.

⁶⁸ *Trustees of Princeton University*, *supra* note 66, at 41 (citing *Encino Motorcars*, 136 S. Ct. at 2125).

⁶⁹ *Id.* at 42.

⁷⁰ *Id.*

⁷¹ Jordan, *supra* note 66, at 1.

⁷² *NAACP v. Trump*, 315 F. Supp. 3d 457 (D.D.C. 2018).

⁷³ Memorandum from Secretary Kirstjen M. Nielsen on the “Duke memorandum” and the rescinding of DACA (June 22, 2018), https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf.

⁷⁴ See *Status of Current DACA Litigation*, *supra* note 39.

⁷⁵ *NAACP v. Trump*, 315 F. Supp. 3d at 465-66.

⁷⁶ See *Status of Current DACA Litigation*, *supra* note 39.

⁷⁷ *Texas v. United States*, 328 F. Supp. 3d 662 (S.D. Tex. 2018).

Afterward, the state of Kansas and the governors of Mississippi and Maine also joined the lawsuit against DACA.⁷⁸ The plaintiffs sought a declaration that DACA was unlawful and a nationwide order that prohibited the federal government from issuing any new deferrals.⁷⁹ On August 31, 2018, the court found that DHS “lacked statutory authority to implement the DACA program.”⁸⁰ Further, the court expressed that the “states had a substantial likelihood of success on the merits of the claim that DACA [] violated the [Administrative Procedure Act’s] notice-and-comment requirements.”⁸¹ However, the court denied the plaintiff’s request for a preliminary injunction finding that the states had failed to show that they would likely suffer irreparable harm in the absence of a preliminary injunction and that the factors regarding hardship to the parties and the public interest weighed against the issuance of an injunction.⁸²

On June 28, 2019, the Supreme Court announced that it would review three cases (*Department of Homeland Security v. Regents of the University of California*, *Trump v. NAACP* and *McAleenan v. Vidal*) challenging the Trump administration’s decision to end DACA, despite it having held that “[t]he exclusion of aliens is a fundamental act of sovereignty . . . inherent in the executive power.”⁸³ The Court’s decision is not expected until early 2020, which would put the DACA program as part of the presidential campaign unless congress acts prior to the Court issuing a decision.⁸⁴ Until then, DACA recipients remain in a world of uncertainty about their futures.

⁷⁸ *See id.*

⁷⁹ *Status of Current DACA Litigation*, *supra* note 39.

⁸⁰ *Texas v. United States*, 328 F. Supp. 3d 662, 713-14 (S.D. Tex. 2018).

⁸¹ *Id.* at 735.

⁸² *Id.* at 736-43.

⁸³ *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *see also* Brenda Solorzano, *What Happens to Dreamers now that the Supreme Court is Hearing the DACA Case?*, IMMIGRATION IMPACT (July 2, 2019), <http://immigrationimpact.com/2019/07/02/what-happens-to-dreamers-now-that-the-supreme-court-is-hearing-daca-case/#.XUpEj5NKiu0>; Robert Barnes, *Supreme Court to review DACA program protecting young undocumented immigrants*, WASH. POST (June 28, 2019), https://www.washingtonpost.com/politics/courts_law/supreme-court-to-review-daca-program-protecting-young-undocumented-immigrants/2019/06/28/c69a8b04-1500-11e9-b6ad-9cfd62dbb0a8_story.html?noredirect=on.

⁸⁴ Solorzano, *supra* note 83; Pete Williams, *Supreme Court agrees to hear DACA case in win for Trump administration*, NBC NEWS (June 28, 2019), <https://www.nbcnews.com/politics/supreme-court/supreme-court-agrees-hear-daca-case-win-trump-administration-n1020481>.

III. COUNTRY CONDITIONS

Although at first those eligible for DACA were hesitant to turn over their information to the authorities, eventually about 800,000 individuals did so and were approved.⁸⁵ According to the Migration Policy Institute, anywhere from one million to 1.9 million individuals were eligible to participate in the DACA program.⁸⁶ Of those eligible, the Williams Institute estimates that “there are about 75,000 LGBT DREAMers in the U.S.” and more than 36,000 of these have benefited from DACA.⁸⁷ Some of the top countries of origin of eligible DACA youth and DACA applications accepted for processing are Mexico, El Salvador, Guatemala, Honduras, Peru, the Philippines, Colombia, and the Dominican Republic.⁸⁸ These countries have made significant strides to protect LGBTQ+ individuals. However, the protections are not enough to end persecution, violence, discrimination, and killings against LGBTQ+ identified members.

⁸⁵ See Alcindor & Stolberg, *After 16 Futile Years, Congress will try again to legalize 'Dreamers,'* NY TIMES, <https://www.nytimes.com/2017/09/05/us/politics/dream-act-daca-trump-congress-dreamers.html>; see also Jens Manuel Krogstad, *DACA has shielded nearly 790,000 young unauthorized immigrants from deportation*, PEW RESEARCH CTR. (Sept. 1, 2017), <http://www.pewresearch.org/fact-tank/2017/09/01/unauthorized-immigrants-covered-by-daca-face-uncertain-future/>; see also *Trustees of Princeton University*, *supra* note 66, at 4 (acknowledging that “to be considered for deferred action under DACA, an applicant had to provide DHS with certain identifying information, including her name, mailing address, and contact information. “[M]any applicants feared that this information would later be used to initiate removal proceedings against them.” However, relying in DHS’s assurance that “their information would in most cases be ‘protected from disclosure to [U.S. Immigration and Customs Enforcement (“ICE”)] and U.S. Customs and Border Protection (CBP) for the purpose of immigration enforcement proceedings” about 800,000 youth applied. This has led to at least one case “enjoin[ing] DHS from ‘using information provided by Dreamers through the DACA program for enforcement purposes,’ explaining that so doing would violate applicable principles of equitable estoppel. (citing *Casa de Md. v. U.S. Dep’t of Homeland Security*, 284 F. Supp. 3 d 748, 779 (D. Md. 2018)).

⁸⁶ Jeanne Batalova, et. al., *Deferred Action For Childhood Arrivals at the One-Year Mark: A Profile of Currently Eligible Youth and Applicants*, MIGRATION POL’Y INST. (Aug. 2013) at 6, <https://www.migrationpolicy.org/research/deferred-action-childhood-arrivals-one-year-mark-profile-currently-eligible-youth-and>; see also Faye Hipsman et al., *DACA at Four: Participation in the Deferred Action Program and Impacts on Recipients*, MIGRATION POL’Y INST. (Aug. 2016), file:///Users/candelariosaldana/Downloads/DACA at Four-FINAL.pdf.

⁸⁷ THE WILLIAMS INSTITUTE, <https://williamsinstitute.law.ucla.edu/research/media-advocacy-there-are-over-75000-lgbt-dreamers-36000-have-participated-in-daca/> (last visited Sept. 13, 2019).

⁸⁸ Batalova, *supra* note 86, at 6.

A. Mexico

Although Mexico has made progress in passing laws that are meant to protect LGBTQI individuals, violence is still prevalent.⁸⁹ Mexico's laws prohibit discrimination against LGBTI individuals.⁹⁰ However, reports show that the government does "not always investigate and punish those complicit in abuses" against LGBTI individuals.⁹¹ This is particularly true outside of Mexico City.⁹² LGBTQI individuals are not only the subjects of discrimination by private individuals, but they are also victims at the hands of state agents.⁹³ Police routinely mistreat LGBTI people while they are in custody.⁹⁴ Furthermore, when LGBTI individuals are victims of hate

⁸⁹ Sharita Gruberg, *What Ending DACA Means for LGBTQ Dreamers*, CTR. FOR AM. PRESS (Oct. 11, 2017, 11:08 am), <https://www.americanprogress.org/issues/lgbt/news/2017/10/11/440450/ending-daca-means-lgbtq-dreamers/>; see also Brief for the UNHCR, at 4, *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1072 (2017), available at <http://www.refworld.org/type,AMICUS,UNHCR,USA,57447af34,0.html> (stating that although a country might have "*de jure* commitment to LGBTI protections" it is not always equivalent to the "*de facto* reality of whether the State is able and willing to provide protection from those who persecute LGBTI individuals within its borders." In many countries being able to be "oneself without fear of persecution remains a distant aspiration" for many LGBTI identified individuals. In Mexico, this is the reality even though it has passed many laws that are meant to protect the LGBTI population, the Supreme Court of the country has also stated that marriage must be extended to same-sex couples. Despite all these improvements UNHCR has "on two occasions since the 2011 statement documented that Mexico has much work to implement the standards referenced in UNHCR's press release." A study done by the Human Rights Council demonstrates that the reality in Mexico is that "[w]hile some progress has been made since the first study in 2011, the overall picture remains one of continuing, pervasive, violent abuse, harassment and discrimination affecting [LGBTI] persons in all regions. These constitute serious human rights violations, often perpetrated with impunity, indicating that current arrangements to protect the human rights of [LGBTI] persons are inadequate." In another report by the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns found that "[k]illings of LGBT individuals are marked by either a total failure to investigate or a faulty investigation guided by stereotypes and prejudice . . . [C]rimes and human rights violations based on sexual orientation, gender identity or expression are not isolated, but are emblematic of patterns of conduct of some members of society and recurrent actions of certain public servants including prejudices, dislikes and rejections, reflecting the existence of a serious structural problem of intolerance."); see also United Nations, General Assembly, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns*, A/HRC/26/36/Add.1 (Apr. 28, 2014), available from <http://tinyurl.com/HeynsMexico> (documenting how homicides of LGBT individuals are often done with the "complicity of investigative authorities).

⁹⁰ Mexico 2016 Human Rights Report, U.S. DEP'T OF STATE, at 26, <https://www.state.gov/documents/organization/265812.pdf> (last visited Jan 2, 2017).

⁹¹ *Id.*

⁹² *Id.*

⁹³ See *id.* at 26-27.

⁹⁴ *Id.*

crimes, including killings, the crimes are “often mischaracterized [] as ‘crimes of passion,’ which resulted in the authorities’ failure to adequately investigate, prosecute, or punish these incidents.”⁹⁵ In its 2016 human rights report, the U.S. Department states: “The Executive Committee for Victims Assistance, an independent federal agency completed a survey [of] 435 lesbian, gay, bisexual, or transgender persons. Seven of 10 respondents reported discrimination in schools; half reported employment discrimination or harassment; and six of 10 reported having known an LGBT person murdered in the past three years.”⁹⁶ In its December 2015 report on the human rights situation in Mexico, the Inter-American Commission on Human Rights discusses the murders and attacks against LGBT people in more detail.⁹⁷ According to the report:

“The Commission’s Special Rapporteur on the rights of LGBTI persons received information that in a period of 15 months (between January 2013 and March 2014), there were a total of 42 murders and 2 attacks on physical integrity in Mexico (both knife attacks) against transgender people (or perceived as such); 4 attacks on the physical integrity of lesbians (or perceived as such), 3 of which were beatings and one death threat; and 37 murders of gay men (or perceived as such) and two attacks on the physical integrity, including a case of mutilation where the victim’s eyes were torn out, and another related case of sexual violence and beatings from Police agents.”⁹⁸

The murders of LGBTIQ individuals, or individuals perceived to have an LGBTIQ identity, continues to be a problem in Mexico.⁹⁹ Sending LGBTIQ identified DACA recipients back to Mexico, the country with the most DACA recipients,¹⁰⁰ would only put these individuals at risk of facing discrimination or death.

Courts have also established that persecution against LGBTIQ individuals in Mexico is still a problem. In *Avendano-Hernandez v.*

⁹⁵ *Id.*

⁹⁶ *Id.*; see also *Mexico: Sexual orientation and gender identity (SOGI)*, Austrian Red Cross/ACCORD (May 2017), <https://www.justice.gov/eoir/page/file/972466/download>.

⁹⁷ Austrian Red Cross/ACCORD, *supra* note 97, at 32.

⁹⁸ *Id.*

⁹⁹ *Id.* (stating that “[b]etween 1995 and 2014 there were 1,218 murders in Mexico motivated by prejudice against individuals because of their real or perceived sexual orientation and/or gender identity . . .”).

¹⁰⁰ *Deferred Action for Childhood Arrivals (DACA) Data Tools*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/programs/data-hub/deferred-action-childhood-arrivals-daca-profiles> (last visited Jan. 2, 2018).

Lynch, 800 F.3d 1072 (2015), the court remanded the case for a grant of relief under CAT, stating that although Mexico has recently passed anti-discrimination laws, it has not made life safer for transgender individuals, and that there was “significant evidence of violence targeting [transgender individuals].”¹⁰¹ In this case, a transgender woman who was feminine since she was young and wore makeup and dresses, was frequently the victim of harassment and physical and sexual abuse.¹⁰² When she was young, her father “brutally beat her and called her ‘faggot’ and ‘queer.’”¹⁰³ She was also sexually abused by her elder brothers and cousins, who forced her to perform oral sex, raped her, and beat her when she tried to resist their attacks.¹⁰⁴ However, she was not only the victim at the hands of family members or other members of the community. “One evening, when Avendano-Hernandez was on her way to visit family in Oaxaca’s capital city, armed uniformed police officers stationed at a roadside checkpoint hurled insults at her as she walked past them.”¹⁰⁵ They grabbed her and forced her into the bed of their truck, and drove her to an unknown location where they forced her to perform oral sex and raped her while shouting homophobic slurs.¹⁰⁶ On a different occasion, when she attempted to cross the border she encountered a group of uniformed Mexican military officers who also called her “faggot” and “[o]ne of the officers forced her to perform oral sex on him, while the rest of the group watched and laughed.”¹⁰⁷ The court held that although Mexico had passed laws “purporting to protect the gay and lesbian community” it did not always protect the transgender community from “discrimination, police harassment, and violent attacks in daily life.”¹⁰⁸ And although the case involved a transgender woman, the court’s decision illustrates that LGBTQI individuals in general continue to be victims of discrimination and hate crimes in Mexico. The court states that “the passage of these laws

¹⁰¹ *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1075 (2015); see also *Boer-Sedano v. Gonzalez*, 418 F.3d 1083, 1091-92 (2005) (holding that IJ erred in finding that petitioner no longer had a well-founded fear of prosecution because “[i]n light of the evidence of continuing persecution of homosexuals in Mexico, no reasonable factfinder could find that Boer-Sedano’s return trips alone demonstrate a fundamental change in circumstances to show that Boer-Sedano no longer has a well-founded fear of persecution”).

¹⁰² *Id.*; see also *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1054 (9th Cir. 2006) (considering a “withholding of removal claim by a Mexican gay male who ‘suffered a great deal of abuse . . . because of his homosexuality and female sexual identity’; he was beaten by his parents and raped by his father’s friend, his cousins, and a worker at his grandfather’s hacienda.”).

¹⁰³ *Avendano-Hernandez*, 800 F.3d at 1075.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1076.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1076-77.

¹⁰⁸ *Id.* at 1080.

has made the situation . . . paradoxically become increasingly more perilous [for the gay, lesbian, and transgender community], as the public and authorities react to their expressions of a form of sexuality that the culture does not embrace and, in fact, fears.”¹⁰⁹ In fact, Mexico City, a city where “arguably the most efforts have been made to protect the rights of sexual minorities,” continues to be unsafe for LGBTQI individuals. In 2010, after the passage of several laws and same-sex marriage, Mexico City had the highest number of hate crimes.¹¹⁰ There is also a “continued failure to prosecute the perpetrators of homophobic hate crimes throughout Mexico.”¹¹¹

B. *El Salvador*

Discrimination and violence against LGBTI people in El Salvador is also widespread.¹¹² According to the U.S. Department of State’s Human Rights Report on El Salvador, there have been reports by NGOs that “public officials, including police, engaged in violence and discrimination against sexual minorities.”¹¹³ The report states that LGBTI individuals

¹⁰⁹ *Id.* at 1081-82 (quoting Declaration of Dr. Nielan Barnes, Mar. 5, 2013, ECF No. 6-1 at 412) (internal quotations omitted).

¹¹⁰ *Id.* at 1082; *see also Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1057 (2017) (“Additionally he submitted 2009 and 2010 U.S. Department of State County Reports for Mexico and several newspaper articles that documented violence against, including murders of, gays and lesbians. The reports showed that the violence rose even as—and perhaps because—Mexican laws were becoming increasingly tolerant of gay rights.”).

¹¹¹ *Avendano-Hernandez*, 800 F.3d at 1082; *see also Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1057-1075 (9th Cir. 2017) (explaining how respondent testified that his gay friends had gone to the police to report that they had been raped, but the police officers “ignored their reports and ‘laughed on their faces.’” He also submitted country conditions that demonstrated that violence against LGBTI individuals had risen perhaps because the Mexican government had passed laws that were “tolerant of gay rights.” The court also acknowledged that although “Mexico is to be lauded for its efforts,” it is “well recognized that a country’s laws are not always reflective of actual country conditions.” The court in its decision that Mexico was unwilling and unable to protect the respondent, quoted a 2010 U.S. Department of State Human Rights Reports for Mexico in which a “particularly severe example of discrimination by Mexican officials” occurred. In that instance Agustin Humberto Estrada Negrete, a teacher and gay activist from Ecatepec, Mexico State was dismissed from his teaching position. After his dismissal, he began lobbying the government to reinstate him. While attending a meeting with state officials he was beaten by police, taken to prison, threatened, and raped. Even after he was released he still faced harassment by state authorities.); *see also Maestro victim de homophobia denuncia violacion y amenazas*, LAJORNADA (June 12, 2009), <http://www.jornada.unam.mx/2009/06/12/estados/035n1est> (discussing Augustin Humberto Estrada Negrete’s accusations of Mexican police authorities).

¹¹² U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., El Salvador 2017 Human Rights Report 5 (2017), https://www.justice.gov/sites/default/files/pages/attachments/2018/04/24/dos-hrr_2017_el_salvador.pdf.

¹¹³ *Id.*

have reported that “agencies in charge of processing identification documents, the PNC, and the Attorney General’s Office harassed transgender and gay individuals when they applied for identification cards or reported violence against LGBTI persons.”¹¹⁴

Like Mexico, El Salvador has also made progress in protecting LGBTI rights.¹¹⁵ In 2010, “President Funes issued Executive Decree 562, which prohibits public sector employees from discriminating because of sexual orientation and gender identity.”¹¹⁶ “The Decree also created the National Directorate for Sexual Diversity within the office of the Secretary of Social Inclusion.”¹¹⁷ The goal was to “eradicat[e] discrimination against LGBT individuals, promot[e] inclusive policies, ensur[e] equal treatment in the provision of services, and increase[e] awareness and sensitivity about the LGBT community.”¹¹⁸ However, despite the decree, the country continues to grapple with discrimination and violence against LGBT individuals.¹¹⁹ An activist compares the decree as a “letter to Santa Clause: a list of all these things that would be nice to have, someday[.]”¹²⁰ because despite the decree, “epidemic levels of violent crime and alarming rates of impunity

¹¹⁴ *Id.* at 5 (according to the report “[t]he NGO Association of Communication and Training of Transgender Women with HIV in El Salvador (COMCAVIS Trans) reported that, as of September, a total of 28 LGBTI persons were attacked or killed because of their sexual orientation.”); see also *2018 Country Reports on Human Rights Practices: El Salvador*, U.S. DEP’T OF STATE (Mar. 13, 2019), <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/el-salvador/> (“NGOs reported that public officials, including police, engaged in violence and discrimination against sexual minorities. Persons from the lesbian, gay, bisexual, transgender, and intersex (LGBTI) community stated that the PNC, and the Attorney General’s Office harassed transgender and gay individuals when they reported cases of violence against LGBTI persons, including by conducting strip searches.”).

¹¹⁵ Allison Davenport, *SEXUAL DIVERSITY IN EL SALVADOR* (Laurel E. Fletcher ed., 2012), https://www.law.berkeley.edu/files/IHRLC/LGBT_Report_English_Final_120705.pdf.

¹¹⁶ *The process of Decree 56 in El Salvador “Its existence is an achievement. The problem is that discrimination continues.”* LGBTQ POL’Y J. A HARVARD KENNEDY SCH. STUDENT PUBL’N (Oct. 21, 2013), <https://lgbtq.hkspublications.org/2013/10/21/the-process-of-decree-56-in-el-salvador-its-existence-is-an-achievement-the-problem-is-that-discrimination-continues/>.

¹¹⁷ Davenport, *supra* note 115, at I.

¹¹⁸ *Id.* at 19.

¹¹⁹ *Id.*; see also *The process of Decree 56 in El Salvador “Its existence is an achievement. The problem is that discrimination continues.”*, *supra* note 116 (using examples of the continual discrimination and violence, both by state and non-state actors, that goes without actual justice).

¹²⁰ *The process of Decree 56 in El Salvador “Its existence is an achievement. The problem is that discrimination continues.”*, *supra* note 116 (quoting activist Paty Hernandez) (internal quotations omitted).

are the backdrop against which LGBT individuals experience violence and harassment.”¹²¹

Another major problem in El Salvador are gangs, which have “evolved into sophisticated organized crime networks, capable of terrorizing entire communities and manipulating the justice system.”¹²² Because of their size and power, they can get away with the violence they perpetrate against the LGBTI community.¹²³ According to a report on the violations of the rights of LGBT people in El Salvador, gangs often use violence against LGBT individuals for initiation purposes and have not been held accountable.¹²⁴ Members of the LGBT community believe that they are a particularly easy target for violence because perpetrators know the police are “less likely to investigate crimes against LGBT individuals.”¹²⁵

¹²¹ See DAVENPORT, *supra* note 115, at I; see also Rafael Cortez, Karin-Annabela Revuelta & Yolanda Guirola, *Adolescent Sexual and Reproductive Health in El Salvador*, WBG (June 2015), at 35, <http://documents.worldbank.org/curated/en/540771467987846262/pdf/102611-WP-PUBLIC-Box394833B-ElSalvadorASRH.pdf> (“The study also found that LGBT individuals were exposed to high levels of discrimination, despite the government’s efforts to protect and guarantee their rights in recent years.”).

¹²² *Id.* at 14; see also Nelson Renteria, *Transgender Murders in El Salvador Leave Community in Fear*, HUFFINGTON POST (Mar. 28, 2017), https://www.huffingtonpost.com/entry/el-salvador-transgender-murders_us_58dac266e4b01ca7b4278e8a (explaining that in February 2017, three transgender people were murdered, sending fear in members of the LGBT community. “The spate of murders puts a spotlight on the violence El Salvador’s LGBT community faces, a problem rights activists blame on powerful street gangs and entrenched social prejudices . . . The gangs don’t accept lesbians, gay boys or transgender people. Diversity doesn’t fit into their rules . . . Not only are LGBT people victims of general gang violence, like other Salvadorans, they are also persecuted because of their sexual orientation . . . A 2013 survey by the U.S.-based Pew Research Centre found nearly two thirds of Salvadorans believed society should not accept homosexuality.”); Anastasia Moloney, *‘Terrorized at home’, Central America’s LGBT people to flee for their lives: report*, REUTERS (Nov. 27, 2017), <https://www.reuters.com/article/us-latam-lgbt-rights/terrorized-at-home-central-americas-lgbt-people-to-flee-for-their-lives-report-idUSKBN1DR280> (Central America is experiencing “epidemic levels of violence” and LGBT people are “particularly vulnerable to macho, powerful gangs who control entire neighborhoods,” and these crimes often go without punishment.).

¹²³ Nelson Renteria, *‘Am I next?’: Killings in El Salvador leave transgender people in fear*, REUTERS (Mar. 28, 2017, 9:41 a.m.), <https://www.reuters.com/article/us-el-salvador-lgbt-violence/am-i-next-killings-in-el-salvador-leave-transgender-people-in-fear-idUSKBN16Z1QR>.

¹²⁴ *The Violation of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in El Salvador*, ASOCIACION SALVADORENA DE DERECHOS HUMANOS “ENTRE AMIGOS” ET AL. (Oct. 2010), http://www2.ohchr.org/english/bodies/hrc/docs/ngo/LGBT_Shadow_Report_El_Salvador_HRC100.pdf.

¹²⁵ See Davenport, *supra* note 115, at 14.

C. Guatemala

Similar to the individuals escaping El Salvador, many LGBTI individuals from Guatemala have been forced to leave their country “to escape ‘epidemic levels of violence’ and threats by criminal gangs and security forces”¹²⁶ However, unlike Mexico and El Salvador, antidiscrimination laws do not apply to LGBTI individuals in Guatemala, and very few efforts have been undertaken by the government to address the discrimination LGBTI individuals face.¹²⁷ LGBTI individuals face discrimination “in access to education, health care, employment, and housing.”¹²⁸ The National Police and Public Ministry made changes to their complaint registrations system to include a field that allowed them to identify whether the complaint was made by a member of the LGBTI community.¹²⁹ However, because many LGBTI individuals do not feel “comfortable self-identifying to officials” (perhaps because of the abuse they have faced by members of the police themselves) the success of the program is not completely known.¹³⁰ Furthermore, women who identify as lesbian experience a specific form of discrimination.¹³¹ Often they are forced into marriages that they do not want or are raped and forced to become pregnant, known as “corrective rape.”¹³²

D. Honduras

In Honduras, although the law protects LGBTI individuals from discrimination, and also includes hate crimes in its penal code, many

¹²⁶ See Moloney, *supra* note 122.

¹²⁷ U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Guatemala 2016 Human Rights Report, 27 (2017), https://www.justice.gov/sites/default/files/pages/attachments/2017/03/09/dos-hrr_2016_guatemala.pdf.

¹²⁸ *Id.* at 27; see also Visibles, *UN Launches Guatemala version of global LGBT campaign*, WASHINGTON BLADE (Nov. 24, 2017, 6:00 AM) <http://www.washingtonblade.com/2017/11/24/un-launches-guatemala-version-global-lgbt-campaign/> (quoting U.N. High Commissioner for Human Rights Zeid Ra’ad al-Hussein who stated that “LGBTI people are stigmatized, dehumanized even, by Guatemalan society and media, leaving them particularly vulnerable to violence and ill-treatment. They face discrimination at all levels, discrimination that prevents them from accessing education and justice, getting decent jobs and receiving adequate health care.”).

¹²⁹ Guatemala 2016 Human Rights Report, *supra* note 127.

¹³⁰ *Id.* at 27.

¹³¹ *Id.*

¹³² *Id.*; see also Christine Bolanos, *Guatemala’s First Lesbian Congresswoman Challenges Status Quo*, NEWS DEEPLY: WOMEN & GIRLS (May 29, 2017), <https://www.newsdeeply.com/womenandgirls/articles/2017/05/29/guatemalas-first-lesbian-congresswoman-challenges-status-quo>.

individuals are still victims of violence and discrimination.¹³³ “Since 2009 until December 1, 2014, there have been 174-recorded violent deaths of LGBT people in the country (90 gays, 15 lesbians and 69 trans gender people)”¹³⁴ Even with the National Congress adopting amendments to the Criminal Code that are meant to protect LGBT individuals, these laws are not enough to stop the violence towards those expressing a non-heterosexual identity or perceived as non-heterosexual.¹³⁵ In fact, “killings of LGBT people or those perceived as such tend to go unpunished,” because of the “discriminatory stereotypes;”¹³⁶ “of [the] 141 violent deaths reported between 2010 and 2014, only 30 cases had been prosecuted, that is, fewer than one fourth of the violent deaths of LGBT people.”¹³⁷ The lack of punishment for those committing the murders can lead to underdeterrence and thus further crimes being committed towards LGBTI individuals.

The case *Velasquez-Banegas v. Lynch* documents the continual persecution that LGBTQI individuals face in Honduras.¹³⁸ Writing for the majority, Judge Posner states that the record did not support the denial of withholding of removal.¹³⁹ “The petitioner, a citizen of Honduras, entered the United States without authorization, after being put in removal proceedings he applied for withholding of removal and for protection under the CAT claiming that he would be persecuted if he was sent back to Honduras.¹⁴⁰ Although he did not identify as a homosexual male, he claimed that because of his HIV status he would be perceived as a gay

¹³³ U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Honduras 2016 Human Rights Report, at 34 (2016), <https://www.state.gov/wp-content/uploads/2019/01/Honduras-1.pdf>.

¹³⁴ *Situation of Human Rights in Honduras*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, at 59 (Dec. 31, 2015), <http://www.oas.org/en/iachr/reports/pdfs/Honduras-en-2015.pdf>.

¹³⁵ *Id.* at 60 (stating the amendments to the Criminal Code include “(i) establishing the commission of aggravating crimes due to ‘hatred or contempt by reason of [. . .] [the] sexual orientation or gender identity of the victim; (ii) sentence of imprisonment and fine in case of the arbitrary and illegal restriction or cancellation of the exercise of individual and collective rights, or the denial of provision of professional services on the grounds of sexual orientation and gender identity, among other reasons; and (iii) sentences of imprisonment and fines in case of public incitement to hatred or discrimination by reason of sexual orientation and gender identity, among other reasons.”).

¹³⁶ *Id.* at 61.

¹³⁷ *Id.* at 62.

¹³⁸ *Velasquez-Banegas v. Lynch*, 846 F.3d 258, 259 (7th Cir. 2017).

¹³⁹ *Id.* at 261 (stating that “immigration judge made a hash of the record. A highly qualified American Ph.D. professor of Latin American studies, Suyapa Portillo, who specializes in the LGBTQ community (lesbian, gay, bisexual, transgender, and queer—an acronym that covers the entire spectrum of homosexual and related sexual orientations) in Honduras, testified as an expert witness for the petitioner.”).

¹⁴⁰ *Id.* at 259.

male, and therefore would be a victim of persecution.¹⁴¹ Using expert testimony by Dr. Suyapa Portillo, the petitioner argued that if he were deported, he would face “acute danger . . . resulting from the fact that a great many Hondurans believed that AIDS is an affliction of homosexuals . . . and also that any man with HIV is also a homosexual” and because of this he would face the hostile violent treatment by Hondurans towards anyone they believed to be a homosexual.¹⁴² According to Dr. Portillo, “it’s very difficult for people with HIV to find employment [because] employers often require proof that an applicant does not have HIV.”¹⁴³

“She testified that since Honduras’s 2009 coup d’etat (when the Honduran Army, following orders from the Honduran Supreme Court to oust President Manuel Zelaya, sent him into exile), more than 200 LGBTQ people have been murdered according to a pattern she thought indicated an ‘LGBT cleansing,’ in which transgendered women were murdered with a single shot to the head and homosexual men tied up and mutilated . . . the police are complicit in the murders and that laws purporting to protect LGBTQ people from assaults and murders are rarely enforced.”¹⁴⁴

Although the petitioner was not a homosexual man himself, the court held that because Hondurans perceive anyone with HIV to be homosexual he “fits the description of Hondurans at risk of persecution because believed (accurately or not) to be homosexual.” Because the petitioner is not required to “hide characteristics like religion or sexual orientation, and medical conditions, such as being HIV positive[,]”¹⁴⁵ the court remanded the case for reconsideration.¹⁴⁶

E. Peru

In Peru, LGBTQI individuals also face acts of violence, discrimination, and other abuses.¹⁴⁷ According to the human rights report

¹⁴¹ *Id.* at 259-60.

¹⁴² *Id.* at 259.

¹⁴³ *Id.* at 261.

¹⁴⁴ *Id.* at 263-64.

¹⁴⁵ *Id.* at 262.

¹⁴⁶ *Id.* at 264.

¹⁴⁷ Ana Cristina Hernandez, Kellea Miller & Irene Schneeweis, *Peru LGBTI: Landscape Analysis of Political, Economic and Social Conditions*, Astraea Lesbian Foundation for Justice (2015), <http://www.astraeafoundation.org/uploads/files/Reports/Astraea%20Peru%20Landscape%202015.pdf>.

by the U.S. State Department, “LGBTI persons remained some of the most marginalized individuals in the country and frequently were targets of discrimination.”¹⁴⁸ The law does not protect LGBTQI Peruvians, and the reality that they live is not quite understood because the state does not keep national-level statistics of the discrimination faced by LGBTQI individuals.¹⁴⁹ However, according to studies conducted by NGOs, about 95 percent of LGBTI Peruvians “experienced some type of violence or discrimination directed at them because of their status as LGBTI persons.”¹⁵⁰ In its 2015-2016 annual report on LGBT human rights in Peru, Promsex, a feminist NGO, reported that between April 2015 and March of 2016, there were eight murders of LGBTI people reported.¹⁵¹ Several of them were stabbed repeatedly, beheaded, asphyxiated or punched or kicked until death.¹⁵² In one case, the victim was beaten to death, after being subjected to acts of torture, and inhumane or degrading treatment.¹⁵³ However, although the number of murders is not representative of the magnitude of violence against the LGBTI population, it serves to

¹⁴⁸ U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Peru 2016 Human Rights Report, at 25-26 (2016), <https://www.state.gov/wp-content/uploads/2019/01/Peru-1.pdf>.

¹⁴⁹ *Id.* at 25; see also *Peruvian lesbian wins asylum with help from law school students*, WIS. GAZETTE (May 18, 2012), http://www.wisconsin gazette.com/news/peruvian-lesbian-wins-asylum-with-help-from-law-school-students/article_c5581aed-ac7e-53b2-aa09-ec8a524cec9d.html (“Karina’s experience as a lesbian in Peru, supported by friends and family who still live there—as well as by reports and news articles—shows that the Peruvian government does not protect LGBT individuals from sexual orientation—based crimes . . . [l]esbians face both physical and sexual violence, and the Peruvian police fail to address this persecution.”).

¹⁵⁰ Peru 2016 Human Rights Report, *supra* note 148, at 26.

¹⁵¹ Lliurka Otsuka, Karen Anaya, Alberto Hidalgo & Manuel Forno, *Informe Annual Sobre Derechos Humanos de Personas Trans, Lesbianas, Gays y Bisexuales en el Peru 2015-2016*, (Promsex June 2016), 11, <https://promsex.org/wp-content/uploads/2016/05/InformeTLGB2015a2016-1.pdf> (translated from Spanish).

¹⁵² *Id.* at 54.

¹⁵³ *Id.* at 55; see also *Peruvian Lesbians wins asylum with help from law school students*, WIS. GAZETTE (May 18, 2012), http://www.wisconsin gazette.com/news/peruvian-lesbian-wins-asylum-with-help-from-law-school-students/article_c5581aed-ac7e-53b2-aa09-ec8a524cec9d.html (students at Columbia Law School’s Sexuality and Gender Law Clinic helped a lesbian Peruvian secure asylum in 2012, because of her fear that she would be persecuted in Peru because of her sexual orientation. As support they used the petitioner’s experience as a lesbian in Peru, along with affidavits from friends and family, and reports and news articles that showed that the Peruvian government does not protect LGBT individuals from crimes against them because of their sexual orientation. The students also used a study by Movimiento Homosexual de Lima, a Peruvian LGBT community organization, that stated that “each week a person is killed in Peru due to sexual orientation or gender identity.”); see also Mattia Cabitza, *Peru gay rights activists push for more rights in law*, BBC NEWS (Feb. 12, 2012), <http://www.bbc.com/news/world-latin-america-16965382>.

demonstrate that homicides towards the LGBTI community are particularly cruel.¹⁵⁴

For LGBTQI people in Peru, discrimination is part of their everyday reality, and the police do nothing to protect them.¹⁵⁵ In fact, the police also participate in the discrimination or violence against LGBTQI individuals.¹⁵⁶ Over Valentine's Day weekend in 2016, LGBTQI individuals held a small demonstration, "Kisses Against Homophobia."¹⁵⁷ A demonstrator was beaten by police while kissing his boyfriend, and police also "forcibly broke up the crowd using batons and water cannons."¹⁵⁸ Because discrimination toward LGBTQI people is so embedded in the culture it is hard to get support from presidential and other political candidates,¹⁵⁹ who do not need the support of the LGBTQI

¹⁵⁴ See Otsuka et al., *supra* note 151 (discussing the experiences of LGBTQ individuals relating to torture and other cruel, inhumane and degrading treatment).

¹⁵⁵ Brendan O'Boyle, *Peru's LGBT Community Frustrated by Violence, Presidential Election*, AM. Q. (Mar. 3, 2016), <http://www.americasquarterly.org/content/perus-lgbt-community-seeks-voice-presidential-election>.

¹⁵⁶ *Id.*; see also *Response to Information Requests (RIRs)*, IMMIGRATION & REFUGEE BOARD OF CANADA (Mar. 3, 2005), <https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/07/PER43413.FE.pdf> (stating in its section on police treatment of LGBTQ people, "[o]n 18 June 2004, a gay and lesbian nightclub was raided by the Lima municipal police, accompanied by cameras from major television networks. Raiz Diversidad criticized the police for using violence and invading the privacy of those apprehended during the raid. The police reportedly attacked and beat people who tried to avoid being filmed on camera."); see also *Violence against LGBTI Persons*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, at 78 (Nov. 12, 2015), <http://www.oas.org/en/iachr/reports/pdfs/violenceagainstlgbtipersons.pdf> ("In 2013, the IACHR was informed of the case of Joel Molero, a 19 year-old Peruvian man who was brutally attacked and beheaded [after leaving a gay club], with his genitals, fingers and toes mutilated. His body was then put on a mattress and set on fire.").

¹⁵⁷ O'Boyle, *supra* note 155; see also Cabitza, *supra* note 154 ("On 12 February 2011, the Peruvian police beat a group of gay, lesbian, bisexual and transgender people who were kissing in the capital's main square to protest against discrimination.").

¹⁵⁸ O'Boyle, *supra* note 155.

¹⁵⁹ *Id.*; see also *Peru: The situation of homosexual men and women, including protection available to victims of ill treatment*, CANADA: IMMIGRATION & REFUGEE BOARD OF CANADA, (Apr. 12, 2010), <http://www.refworld.org/docid/4e438c7b2.html> (stating in an article by Andean Air Mall & Peruvian Times, that in Peru, "homosexuality is 'perceived as inherently flawed and often as an illness.'" In another article by the Runa Institute for Gender Development and Research they stated that "a person who displays 'an abnormal [sexual orientation] exposes him-or herself to dangerous situations and loss of social consideration.). Yet another report by Peruvian Centre for Promoting and Defending Sexual and Reproductive Rights and Peruvian Network of Lesbians, Gays, Bisexuals and Transgenders stated that "in 2008, acts of violence were committed by the Peruvian National Police (Policia Nacional del Peru, PNP) and by members of various communities in different regions of the country, which 'demonstrates that discrimination and prejudice against [] LGBTs are rooted in cultural practices.'").

community to win their elections when they have the support of the majority of Peruvian who also oppose same-sex unions.¹⁶⁰

F. *The Philippines*

LGBTQI people in the Philippines are victims of discrimination from a very young age.¹⁶¹ Although “[i]n recent years, lawmakers and school administrators in the Philippines have recognized that bullying of LGBT youth is a serious problem” these policies are not enough to protect LGBT youth.¹⁶² In *Vitug v. Holder*, the court held the BIA’s denial of withholding of removal for a Filipino homosexual male “was not supported by substantial evidence.”¹⁶³ Vitug knew that he was “different” since he was about three years old.¹⁶⁴ He was “effeminate” and played with toys socially acceptable for girls.¹⁶⁵ As a child in school, his classmates would bully him for “being a sissy.”¹⁶⁶ During high school, he continued to experience bullying “because of his perceived effeminate behavior and homosexuality.”¹⁶⁷ The violence and discrimination he faced continued as an adult.¹⁶⁸

The Immigration Judge found Vitug credible, and found that (1) he had been “beaten and robbed five times in Manila after being targeted as a homosexual,” and “[t]wo of these beatings were severe”; (2) “[w]hile waiting for the bus in Manila, Vitug was harassed by police officers on account of his perceived sexual orientation,” and they “threatened to arrest

¹⁶⁰ Anastasia Moloney, *Peru gay marriage bill ‘doomed’ this year-congressman*, REUTERS (May 17, 2019), <http://news.trust.org/item/20190517151615-mz15t/> (I draw the conclusion that political candidates do not need the LGBTQ community’s vote from the fact that “[t]wo different polls in 2017 showed that at least seven in 10 Peruvians were against same-sex unions.” When a majority opposes rights for the LGBT community, it is easier for candidates to also oppose these rights, and not fear losing their elections.).

¹⁶¹ *Philippines: LGBT Students Face Bullying, Abuse*, HUMAN RIGHTS WATCH (Jne 22, 2017), <https://www.hrw.org/news/2017/06/21/philippines-lgbt-students-face-bullying-abuse#>.

¹⁶² “*Just Let Us Be*” *Discrimination Against LGBT Students in the Philippines*, HUMAN RIGHTS WATCH (June 21, 2017), <https://www.hrw.org/report/2017/06/21/just-let-us-be/discrimination-against-lgbt-students-philippines> (“But these policies, while strong on paper, have not been adequately enforced. In the absence of effective implementation and monitoring, many LGBT youth continue to experience bullying and harassment in school. The adverse treatment they experience from peers and teachers is compounded by discriminatory policies that stigmatize and disadvantage LGBT students and the lack of information and resources about LGBT issues available in schools.”).

¹⁶³ *Vitug v. Holder*, 723 F.3d 1056, 1064 (9th Cir. 2013).

¹⁶⁴ *Id.* at 1060.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (internal quotations omitted).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

him for loitering if he did not give them money”; (3) he was “unable to find a job in the Philippines on account of his sexual orientation”;¹⁶⁹ (4) “[t]he police will not do anything to help gay men who report abuse but will rather ridicule them and tell them they deserve it”; (5) “[t]he government has failed or refused to protect gay men from persecution.”¹⁷⁰ Although Vitug had not reported the attacks to the police, he did “credibly testify that it is well known in the Philippines that police harass gay men and turn a blind eye to hate crimes committed against gay men.”¹⁷¹ Along with his testimony, he also presented “documentary evidence of a police raid on a gay theater during which police beat and robbed the patrons.”¹⁷² Accordingly, the evidence was sufficient to grant the petitioner withholding of removal especially since the government had not shown “by a preponderance of the evidence that the circumstances within the Philippines [had] changed such that Vitug no longer face[d] a threat to his life or freedom in the Philippines.”¹⁷³

Vitug’s experience in the Philippines is only one of the multiple stories of discrimination and violence LGBTQI people face. According to a report by the United Nations Development Programme and USAID, although there are signs of acceptance towards LGBT Filipinos, LGBT Filipinos are still being murdered.¹⁷⁴ According to the report, 32 LGBT individuals

¹⁶⁹ See *Matter of T-Z*, 24 I. & N. Dec. 163, 171 (Board of Immigration Appeals May 9, 2007) (“Generally [the] case law has described persecution as the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (e.g., race, religion, political opinion, etc.), in a manner condemned by civilized governments. The harm or suffering need not [only] be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or deprivation of liberty, food, housing, employment or other essential of life.”).

¹⁷⁰ *Vitug*, 723 F.3d at 1061.

¹⁷¹ *Id.* at 1065.

¹⁷² *Id.*

¹⁷³ *Id.* at 1066.

¹⁷⁴ United Nations Development Programme & United States Agency International Development, *Being LGBT in Asia: The Philippines Country Report*, at 8 (2014), <https://www.usaid.gov/sites/default/files/documents/1861/2014%20UNDP-USAID%20Philippines%20LGBT%20Country%20Report%20-%20FINAL.pdf>; see also Dominique Mosbergen, *The Dangers of Being LGBT in ‘Tolerant’ Philippines*, HUFFINGTON POST (Oct. 12, 2015, 9:11 AM), https://www.huffingtonpost.com/entry/lgbt-philippines_us_5614f92fe4b021e856d2d870 (“On the surface, the Philippines may appear to be one of the more ‘liberal’ ASEAN countries when it comes to the LGBT community. Homosexuality is not criminalized, and a handful of anti-discrimination ordinances . . . [and in a] Pew Research Center report about global opinions of the LGBT community, more than 70 percent of Filipinos said homosexuality should be ‘accepted by society,’ making the Philippines the most ‘tolerant’ nation surveyed in the Asia-Pacific region after Australia. However, although ‘there is high tolerance here, there’s not acceptance,’ Ging Cristobal . . . Legal recognition and protection of LGBT people at the national level largely remains absent.”).

were murdered in 2011.¹⁷⁵ However, for transsexual individuals, the experience is worse.¹⁷⁶ According to Transrespect versus Transphobia Worldwide, between 2008 and 2015, there were 40 reported murders of trans and gender diverse people.¹⁷⁷ These are only reported murders; murders that are not reported by authorities or murders of individuals that are not classified as trans or gender diverse are still missing.¹⁷⁸ It is believed that the number is higher because many murders of transsexual individuals go unreported.¹⁷⁹ Therefore, without accurate numbers the true experience of trans people is unknown.

G. Colombia

Colombia, like Mexico, has come a long way in making changes through legislation and court orders to ensure protections for LGTQI individuals.¹⁸⁰ According to the U.S. State Department human rights

¹⁷⁵ Mosbergen, *supra* note 174; see also *The Struggles of the LGBT Filipinos: A Look into the Prejudice and Hate Crimes that LGBT Filipino Experience*, THE PHILIPPINE LGBT HATE CRIME WATCH (Nov. 29, 2011), <https://onedrive.live.com/view.aspx?cid=F5A5CCD7C8A4C0EC&resid=F5A5CCD7C8A4C0EC%21162&app=WordPdf> (last visited Jan. 8, 2018) (asserting, according to a chart used by this organization, there were a total of 144 LGBT individuals killed between 1996-2011 (98 were gay, 16 lesbian, 26 transgender, and 4 bisexual). However, it is important to remember that these numbers are not an accurate representation of all the murders committed against LGBT individuals because of underreporting.).

¹⁷⁶ See Mosbergen, *supra* note 174 (“The Philippines has one of the worst records of violence against the trans community.”).

¹⁷⁷ *2,016 reported deaths of trans and gender diverse persons murdered between January 2008 and December 2015*, TRANSRESPECT VERSUS TRANSPHOBIA WORLDWIDE, <http://transrespect.org/en/map/legal-gender-recognition-change-of-name/> (last visited Nov. 10, 2019).

¹⁷⁸ See Mosbergen, *supra* note 174.

¹⁷⁹ *Id.*

¹⁸⁰ See *Colombian Civil Society Organizations Highlight LGBTQ Violence in New Report*, HUMAN RTS. CAMPAIGN: INTERNATIONAL BLOG (Feb. 24, 2017), <https://www.hrc.org/blog/colombian-civil-society-organizations-highlight-lgbtq-violence-in-new-repor> (stating that Colombia has made significant progress, but that violence towards LGBTQ Colombians is still a reality); see also Press Release, Org. of Am. States, *IACHR Hails Regional Progress on Human Rights of LGBTI People in the Americas* (Mar. 10, 2017), http://www.oas.org/en/iachr/media_center/preleases/2017/028.asp (asserting that although a lot of progress has been made in Latin American countries including Colombia to protect LGTQI human rights there is still violence and discrimination that occurs. This news article states that “[d]espite all these steps forward, the Inter-American Commission concurs with the concern expressed by various civil society organizations in the region regarding the danger of losing ground in the recognition of the rights of LGBT people. According to information the Commission has received, this situation is manifested in disinformation campaigns about measures some States are taking in the area of LGBT rights. Such campaigns further stigmatize LGBT people, encourage violence, intensify hate speech, and hamper the implementation of certain measures already in States. The IACHR

report, “there was no official discrimination based on sexual orientation in employment, housing, statelessness, or access to education or health care.”¹⁸¹ Furthermore, Colombia’s Constitutional Court, in 2015, granted same-sex couples the right to adopt children.¹⁸² In April 2016, the court also granted same-sex couples the right to marry.¹⁸³ However, the reality faced by LGBTQI individuals is similar to other countries where LGBTQI people face persecution, discrimination, and violence.¹⁸⁴ According to a report done by civil society organizations in Colombia, homicides against LGBTQ people increased in 2015.¹⁸⁵ In 2015, there were 110 LGBTQ people murdered, which is the highest number of homicides against LGBTQ people since 2012.¹⁸⁶

However, Colombian LGBTQI individuals are not only victims of violence by private individuals, they are also the victims of police brutality because of their LGBTQI identity.¹⁸⁷ According to the same report by Colombia Diversa, 91 LGBTQ people were victims of police brutality in

is concerned to observe situations in Mexico, Colombia, and Peru in which, according to information it has received, there have been incidents involving attacks, the spread of hate speech, and rejection of LGBTQ people by conservative sectors.”).

¹⁸¹ U.S. Dep’t of State, Bureau of Democracy, H.R., and Lab., Colombia 2016 Human Rights Report, at 45 (last visited Jan. 10, 2018), <https://www.state.gov/wp-content/uploads/2019/01/Colombia-2.pdf>.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*; see also Luz E. Nagle, *Giving Shelter from the Storm: Colombians Fleeing Persecution Based on Sexual Orientation*, 48 TULSA L. REV. 1, 17 (2013) (“The reality for Colombia’s LGBTQs is that having laws enacted and court rulings rendered to extend rights to them is far different than LGBTQs being able to actually reap the benefits of those rights.” Having laws on the books does not change the fact that LGBTQ individuals are still subject to discrimination in their daily life. Colombians know that enforcement and redress for discrimination based on sexual orientation is low, therefore they continue to engage in such actions.).

¹⁸⁵ See *Colombian Civil Society Organizations Highlight LGBTQ Violence in New Report*, *supra* note 180; see also *Excluded Bodies Faces of Impunity: Report Violence Against LGBTQ People in Colombia*, COLOMBIA DIVERSA (2015), <http://colombiadiversa.org/ddhh-lgbt/EN/>.

¹⁸⁶ *Colombian Civil Society Organizations Highlight LGBTQ Violence in New Report*, *supra* note 180 (asserting that from 2012-2015 there were about 405 homicides against LGBTQ people in Colombia, with Antioquia having the highest number, at 118 individuals. Of the 110 individuals murdered, 52 were gay, 33 transgender, 11 lesbian, and 7 bisexual.).

¹⁸⁷ See Nagle, *supra* note 184, at 20 (“In addition to family and community biases, persecution by police officers against homosexuals in Colombia is a symptom of firmly entrenched homophobia throughout law enforcement agencies nationwide. The proclivities of Colombia’s ‘macho’ attitudes so pervade the police forces that fear and disdain for homosexuals border on paranoia.” This widespread homophobia makes it difficult, if not impossible, for homosexuals to report acts of violence committed towards them in fear that they will be victims of even further abuse by the police.).

2015.¹⁸⁸ Of these 91 cases of police brutality, 57 of them were against trans people, and eight of them included sexual abuse of trans sex workers.¹⁸⁹ Other forms of violations against LGBT Colombians by police include: “raids, arbitrary detentions, torture, sexual harassment, and expulsion from public places,” and “threats and murders targeting people who denounce these violations.”¹⁹⁰

Furthermore, LGBTQI Colombians have also been victims of discrimination and violence because of the civil war.¹⁹¹ Paramilitary groups, which formed to fight the FARC (a Colombian guerrilla group), have committed crimes against LGBTQI individuals.¹⁹² In a small town, San Onofre, in the state of Sucre, “gay men and transgender women were forced to participate in a boxing competition as a form of public humiliation.”¹⁹³ The idea “was to force these [individuals] to ‘bring out their masculinity’ through the use of violence and physical domination—traits traditionally associated with manhood.”¹⁹⁴ Additionally, the militants also “distributed pamphlets that promised to cleanse the town

¹⁸⁸ *Id.* (according to the report the main types of violence committed by police towards LGBT individuals were personal injuries, selective application of the law (meaning “fines to same sex couples, exclusion from public places of groups of LGBT people or transgender women performing sexual work, detention of clients of transgender women”), threats, arbitrary detention, oral aggression, alleged attempt of murder, and alleged extrajudicial execution.)

¹⁸⁹ *Id.*; see also Kate Lyons, *The trans experience in Colombia: ‘This is where we work and this is where we are killed,’* THE GUARDIAN (Oct. 8, 2017, 11:00 AM), <https://www.theguardian.com/global-development/2017/oct/08/trans-women-in-colombia> (documenting the story of Daniela Maldonado Salamanca, a transsexual woman, who was standing on the street in Bogota, Colombia, in 2010, when five men beat and stabbed her. When the police arrived, they took her to the hospital, but they never investigated the crime, even though the street she was standing on was a busy street, and there were witnesses. However, Salamanca does not think that the fact that there were witnesses would help her since most of the witnesses were actually urging the attackers on. This article also discusses how three quarters of all murders of trans people take place in South and Central America. Due to the high level of “violence, poverty, and the risk of HIV the life expectancy of a trans women in Latin America is estimated at between 35 and 41 years.” After Salamanca was attacked she founded an organization, Red Comunitaria Trans, which helps record the number of actual crimes committed against transsexual women, to try to counter the “scant official statistics.” According to Red Comunitaria Trans there had been 12 murders of trans women in the suburb of Santa Fe, Bogota from January till October 2017.).

¹⁹⁰ See Monica Espitia, *LGBT In Colombia: A War Within*, CUNY ACAD. WORKS (Dec. 16, 2016), https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1156&context=gj_etds.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

from ‘undesired members of society,’ including drug addicts, criminals, and members of the LGBT community[.]”¹⁹⁵

The Revolutionary Armed Forces of Colombia (“FARC”) also participates in violence against LGBTQI individuals.¹⁹⁶ They persecute “male and female homosexuals ‘because they break social norms.’”¹⁹⁷ LGBT individuals are viewed as “sub-human degenerates that have no place at the table of social and political liberation envisioned by their Marxist-based revolutionary movement.”¹⁹⁸ The FARC justifies their violence against LGBT individuals as a “legitimate weapon of war against the government for having supported and legislated the recognition of political and civil rights for Colombia’s gay and lesbian community.”¹⁹⁹ Like in many other countries the progress made in protecting LGBTQI people’s rights is pushed back with violence, and often the crimes go without punishment because the systems put in place to protect them are “mired in red tape, corruption, [and] lingering homophobic bias[.]”²⁰⁰ Courts and legislatures can pass laws, but they cannot eliminate the homophobic culture that has been around for decades, sometimes even centuries. And Colombia society continues to be homophobic, in fact, “[t]he majority of Colombia society refers to LGBTs in pejorative and crude terms, and there is no attempt to contain such bigotry or show discretion.”²⁰¹

H. Dominican Republic

Although same-sex sexual activity is not criminalized in the Dominican Republic like in other Caribbean countries, LGBTQI individuals are victims of violence and discrimination because of their

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*; see also Nagle, *supra* note 184, at 21.

¹⁹⁷ See Nagle, *supra* note 184, at 21 (explaining that often times the FARC participates in “social cleansing,” but for them it is only retaliation against the government for having passed laws that give recognition to the political and civil rights of Colombian LGBT citizens.); see also Thomas Graham, *Colombia’s ‘social cleansing’ phenomenon: Exterminating people like bugs*, COLOMBIA REPORTS (Apr. 21, 2016), <https://colombiareports.com/social-extirmination-undesirables-colombia/> (“Legal authorities continue to turn a blind eye to so-called ‘social cleansing’ practices that kill hundreds of ‘undesirables’ in Colombia’s urban areas every year. Social cleansing killings have a long, bloody history in Colombia’s major cities. For the most part they remain unsolved, yet to human rights monitors they are part of a vicious crusade against society’s ‘disposables,’ targeting vagrants, criminals, prostitutes, drug addicts, homosexuals and anyone deemed undesirable.”).

¹⁹⁸ Nagle, *supra* note 184, at 21.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 17.

²⁰¹ *Id.* at 19.

sexual orientation or gender identity.²⁰² LGBTQI Dominicans face discrimination in their everyday life, including in the areas of housing, employment, education, and healthcare.²⁰³ In fact, many LGBT individuals, especially transgender individuals, do not seek medical care because they have experienced, or heard about the experience of other LGBT members, “ridicule and stigmatization by healthcare professionals and administrative staff.”²⁰⁴ This is also true about LGBT member’s interactions with the police.²⁰⁵ Many LGBTQI individuals do not report crimes committed against them because they do not trust the police or justice system.²⁰⁶ This distrust in the police is because “[m]embers of the police force have been responsible for arbitrary arrests of LGBT Dominicans and violence and extortion of those in custody.”²⁰⁷

²⁰² *LGBT Issues in the Dominican Republic*, HUMAN RTS. FIRST, <http://www.humanrightsfirst.org/sites/default/files/dominican-republic-fact-sheet.pdf> (last visited Jan. 11, 2018); see also U.S. Dep’t of State, Bureau of Democracy, H.R., and Lab., *Jamaica 2016 Human Rights Report*, <https://www.state.gov/documents/organization/265810.pdf> (stating that Jamaica, a country in the Caribbean, continues to have laws in the books that forbid “acts of gross indecency” between persons of the same sex, in public or in private, and provides a penalty of two years in prison for the offense.” The country also has “antibuggery” laws that criminalizes consensual and nonconsensual anal intercourse, punishable by up to 10 years in prison.” However, according to the report no one was prosecuted under this law, except in cases of sexual assault and child molestation.).

²⁰³ See *Hope Will Prevail: Advancing the Human Rights of LGBT People in the Dominican Republic*, HUMAN RTS. FIRST (Dec. 2015), <http://www.humanrightsfirst.org/sites/default/files/HRFReportLGBTinDR.pdf> (“According to a 2014 poll, 73 percent of Dominican citizens believe there is discrimination against LGBT people.”).

²⁰⁴ *Id.* at 1; see also Colectiva Mujer y Salud et al., *Violations of Economic, Social and Cultural Rights of Person with Diverse Sexual Orientations and Gender Identities in the Dominican Republic*, at 2 (Aug. 2016), http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/DOM/INT_CESCR_CSS_DOM_25002_E.pdf (“The Dominican Republic has failed to meet its obligations with respect to the right to health. Persons with diverse sexual orientations and gender identities face discrimination in obtaining equal access to health care services []. More broadly, they are denied respect for their sexual orientation and gender identity and are confronted with pervasive violence and discrimination.”).

²⁰⁵ *Id.*

²⁰⁶ Colectiva Mujer y Salud, *supra* note 204.

²⁰⁷ *Hope Will Prevail: Advancing the Human Rights of LGBT People in the Dominican Republic*, *supra* note 203, at 7-8 (explaining that a clear example of police targeting LGBT individuals was evidenced when two gay men were arrested for kissing in public even though the law does not criminalize such actions. When the local prosecutor intervened the men were released. In October 2015, transgender women in Santiago also denounced the persecution by local police. Prostitution in the country is not illegal, however, transgender sex workers are arrested, beaten, and extorted.); see also Janet Arelis Quezada, *Transgender woman files claim against police in Dominican Republic*, GLAAD (Oct. 21, 2014), <https://www.glaad.org/blog/transgender-woman-files-claim-against-police-dominican-republic> (explaining that transgender woman was beaten and arrested after refusing to

Furthermore, the homophobia felt by LGBTQI individuals is not only due to violence by individual police officers, but a function of homophobia being embedded in the law.²⁰⁸ The law “prohibits police officers from engaging in sodomy.”²⁰⁹ Those who violate the law can be punished with up to two years in prison.²¹⁰ The effect of the law is the prohibition of LGBT people from serving in the police force.²¹¹ “In 2014, National Police Chief Manuel Castro affirmed this interpretation, stating that the law prohibits LGBT people from becoming members of the police force.”²¹² Those LGBTQI individuals who do decide to serve on the National Police Force must do so without expressing their sexual orientation, and often “live in fear of abuse, harassment, humiliation and removal from the force.”²¹³

IV. FORMS OF RELIEF AVAILABLE

If the court injunctions are not upheld, many DACA recipients will begin to lose their status, revert back to their prior undocumented status, and be at risk for deportation.²¹⁴ Those that never applied out of fear or for

give the police officers money. According to reports they beat her until she was left unconscious.).

²⁰⁸ *LGBT Issues in the Dominican Republic*, *supra* note 202.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*; *see also* Colectiva Mujer y Salud, *supra* note 204, at 8.

²¹³ Colectiva Mujer y Salud, *supra* note 204, at 8.

²¹⁴ *See* Patrick Taurel, *Screening Potential DACA Requestors for other forms of Relief*, AM. IMMIGRATION COUNCIL (Sept. 5, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/screening_potential_daca_requestors_for_other_forms_of_relief.pdf (reaffirming, as stated earlier in this note the Trump administration on September 5, 2017, decided to end the DACA program. The administration did not end the program immediately instead they decided to phase it out. As of September 5, 2017, no new applications would be accepted. Anyone who currently had DACA would be allowed to keep their status until the expiration of their Employment Authorization Document (EAD). Anyone with an EAD that expired before March 5, 2018, would be allowed to renew their status, as long as they submitted their applications by October 5, 2017. However, anyone with an EAD that expired after March 5, 2018 would not be allowed to renew their status, and they would simply go back to “whatever unauthorized status they possessed at the time they acquired DACA.”); *see also* *Regents of the Univ. of Cali. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1048 (N.D. Cal. 2018) (stating that on October 17, 2017, U.S. District Court Judge William Alsup issued a ruling blocking the Trump administration’s attempt to end DACA. In his ruling, he ordered the Department of Homeland Security to reinstall the program on a “nationwide basis on the same terms and conditions as were in effect before the recession on September 5, 2017. Although this case is important, this case note will not take it into consideration. I will proceed as if DACA is ending, because it is still the Trump’s administration position to end the program as evidenced by his remarks made after the ninth circuit issued the ruling and the

lack of funds and are unable to do so now due to no new applications being processed, continue to live in fear of being sent back to their home countries. Sending LGBTQI youth back to countries where violence and discrimination is the daily experience for people who openly identify as LGBTQI or are perceived as LGBTQI is like sending them to exile. Although there are forms of relief such as asylum, withholding, Convention Against Torture, cancellation of removal for non-legal permanent residents, adjustment of status through family-sponsorship, U-visas, and T-visas, LGBTQI DACA recipients will have difficulties that their heterosexual counterparts will not face. In this section, I analyze the different forms of relief now available for those who lose their status and are then put into deportation proceedings. In each section, I also analyze how LGBTQI DACA recipients will have a harder time attaining these forms of relief and the overall difficulties that all DACA recipients have.

A. *Asylum*²¹⁵

A person who fears returning to his country might be eligible to apply for asylum.²¹⁶ To attain asylum, a person must demonstrate that they meet the definition of a refugee.²¹⁷ To establish that they are a refugee, a person

administrations attempts to have the Supreme Court rule that the program is unconstitutional.)

²¹⁵ Withholding and the CAT are also forms of available relief for anyone with a fear of being persecuted if returned to their home country. Because most of the same struggles exist that are illustrated in the asylum section I will only highlight the minor differences. The standard for withholding is much higher than for asylum. To qualify for withholding “an alien must prove it is more likely than not that he will be persecuted if returned to the country of removal. *See Salkeld v. Gonzales*, 420 F. 3d 804, 809 (8th Cir. 2005). This requires proof that there is “more than a 50 percent chance you will be persecuted.” *See Asylum, Withholding of Removal, and Convention Against Torture*, U. OF MIAMI SCH. OF L. IMMIGRATION CLINIC, <http://media.law.miami.edu/clinics/pdf/2013/immigration-Asylum-Withholding-Removal-CA.pdf> (last visited Mar. 5, 2018). Another major difference is that under withholding there is not a one-year deadline. To qualify for the CAT, and applicant must prove that “it is more likely than not that he or she would be tortured if removed to the proposed country of removal.” *See Reyes-Reyes*, 384 F. 3d at 787 (quoting 8 C.F.R. § 208.16(c)(2)). Under the CAT the torture has to be at the hands of the government or with the “consent or acquiescence” of the government, or that the government had “actual knowledge, or willful acceptance” or were “willful[ly] blind[ed].” *Reyes-Reyes*, 384 F. 3d at 787 (quoting *Zheng v. Ashcroft*, 332 F. 3d 1186, 1194-95 (9th Cir. 2003)). Because of the higher burden of proof necessary for these two forms of relief, seeking an experienced lawyer is even more essential. However, the financial burden is once more a problem.

²¹⁶ Ilona Bray, *Asylum or Refugee Status: Who is Eligible?*, NOLO, <https://www.nolo.com/legal-encyclopedia/asylum-or-refugee-status-who-32298.html> (last visited Nov. 10, 2019).

²¹⁷ *Asylum in the United States*, AMERICAN IMMIGRATION COUNCIL (May 14, 2018), <https://www.americanimmigrationcouncil.org/research/asylum-united-states>.

must show that they are “unable or unwilling to return to [their] country of nationality either because: (1) [they were] persecuted in the past; or (2) [they have] a well-founded fear of future persecution ‘on account of race, religion, nationality, membership in a *particular social group*, or political opinion.’”²¹⁸

i. Particular Social Group

Most gay and lesbian individuals would seem to fit in the particular social group class of protected people. In *Hernandez-Montiel*, the court discusses how sexual orientation and sexual identity are a basis for establishing the particular social group (“PSG”) requirement.²¹⁹ Although the definition of “PSG” is not entirely consistent in the circuits, sexual orientation has been accepted as the basis for establishing a particular social group.²²⁰ In 1990, the B.I.A., in *In re Toboso-Alfonso*, affirmed an immigration judge’s decision holding that sexual orientation can be the basis for establishing a PSG for asylum purposes.²²¹ In 1994, then Attorney General Janet Reno issued an order mandating that the immigration system adopt *Toboso-Alfonso* as precedent “in all

²¹⁸ *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1091 (9th Cir. 2000); *see also* INA § 101(a)(42)(A); *see also* 8 U.S.C. § 1101(a)(42)(A); *see also* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987).

²¹⁹ *Hernandez-Montiel*, 225 F.3d at 1093.

²²⁰ Connor Cory, *The LGBTQ Asylum Seeker: Particular Social Groups and Authentic Queer Identities*, GEO. J. GENDER & L. XX, 584-587.

²²¹ *See Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 820-23, (B.I.A. 1990); *see also* *Hernandez-Montiel*, 225 F.3d at 1094; *see also* *Asylum Law Basics: A Brief History*, IMMIGRATION EQUALITY, <https://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/asylum-law-basics-a-brief-history/#.Xcjb42xYaZs> (last visited Nov. 10, 2019) (stating that “[t]his case was pivotal in establishing that a well-founded fear of persecution on the basis of one’s sexual orientation is a valid basis on which to claim asylum status in the United States”); *see also* David Johnston, *Ruling Backs Homosexuals on Asylum*, N.Y. TIMES (June 14, 1994), <http://www.nytimes.com/1994/06/17/us/ruling-backs-homosexuals-on-asylum.html>; *see also* Robert C. Leitner, *A Flawed System Exposed: The Immigration Adjudicatory System and Asylum for Sexual Minorities*, 58 U.MIAMI.L.REV. 679, 686 (2004), available at <https://repository.law.miami.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1419&context=umlr> (stating that before 1990 homosexuals were “categorically barred from entering the United States. In fact, Congress made its intent to bar homosexuals from entering by adding “‘sexual deviation’ to the exclusion grounds in 1965.” Then in 1990 when Congress enacted the Immigration Act of 1990 it removed the bar on homosexuals. That same year the BIA affirmed an IJ’s decision that held that Cuban gays was a particular social group. Later in 1993, another immigration judge also granted asylum to a homosexual man from Brazil. Both these cases allowed homosexuality to serve as the basis for establishing membership in a particular social group that was subject to persecution.”).

proceedings involving the same issue or issues.”²²² This opened the door for gay men and lesbians to apply for asylum based on their claim on their particular social group—a sexual minority.²²³ But even though the designation of *Toboso-Alfonso* as precedent established that sexual minorities were a PSG, all LGBTQI asylum seekers still have to prove that they belong to this particular social group or protected class—a sexual minority.²²⁴

As stated earlier, there is no one definition of what a “PSG” is. In fact, there are three definitions. The first, which the First Circuit has adopted,²²⁵ comes from the B.I.A. decision of *Matter of Acosta*, which held that a PSG was composed of persons who share a “common, immutable characteristic” that is either “innate” or arises from “shared past experience.”²²⁶ The common characteristic must be one that members “cannot change” or is so “fundamental to their individual identities or consciences” that they should not be required to change it.²²⁷ Under this understanding of PSG, the implication is that sexuality “cannot change, or should not be required to change because it is fundamental to their individual identities or consciousness.”²²⁸ However, not everyone agrees that sexuality is an immutable characteristic. In fact, sexual fluidity seems

²²² Att’y Gen. Ord. No. 1895-94 (June 19, 1994).

²²³ See Zsea Bowmani, *Queer Refuge: The Impacts of Homoantagonism and Racism in U.S. Asylum Law*, 18 GEO.J.GENDER & L. 1, 4 fn. 14 (2017) (explaining that although transgender individuals have been granted asylum there is still no precedent decision that establishes that a transgender identity is its own particular social group.); see *Hernandez-Montiel*, 225 F.3d at 1088 (showing that although this decision is often hailed as a victory for LGBTQI individuals, it is also troubling because it shows how the attorney’s had to use a homosexual identity for the respondent in order to fit the framework in *Matter of Toboso-Alfonso* (homosexual man being granted asylum and establishing homosexuality as a particular social group). However, the respondent seems to be a transsexual female, but instead is referred to as a “gay man with female sexual identities.” The court failed to address whether a transgender identity constituted a particular social group, in fact there is no actual precedent established by the BIA that a transgender identity meets the PSG requirement.”); see also Victoria Neilson & Aaron Morris, *The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal*, 8 N.Y. CITY L. REV. 233, 240 (2005) (referring to *Reyes-Reyes v. Ashcroft*, a case where the court also made its decision using a “‘gay man with ‘deep female identity,’” although the applicant was a male to female transgender person from El Salvador).

²²⁴ See Reagan Greenberg, Comment, *The “Particular Social Group” Requirement: How the asylum process is consistently failing LGB applicants and how an evidentiary standard of “self-attestation” can remedy these failures*, 17 U. MD. L.J. RACE, RELIGION, GENDER AND CLASS 147, 148-149 (2017).

²²⁵ See *Ananeh-Firempong v. I.N.S.*, 766 F. 2d. 621, 626 (1st Cir. 1985).

²²⁶ *Matter of Acosta*, 191 I. & N. Dec. 211, 233 (B.I.A. 1985).

²²⁷ *Id.* at 233-34.

²²⁸ *Id.*

to be on the rise, and more and more people are refusing to accept labels for their sexuality.²²⁹

The Ninth Circuit has articulated another definition of a PSG.²³⁰ Under the Ninth Circuit's definition, "a social group consisted of a group united by a common interest and that the associational relationship must be voluntary and possess a common characteristic that is fundamental to the shared identity."²³¹ The court's definition in *Sanchez-Trujillo v. INS*, instead of adopting an immutable characteristic, "insists that a voluntary association exists (implying that the members of the group are aware of their association) and requires "that the group not be overbroad."²³²

In *Gomez v. INS*, the Second Circuit gave yet another definition for PSG.²³³ In that case, the court held that the "social group was defined as 'individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a Persecutor—or in the eyes of the outside world in general.'"²³⁴ Under this test, although "the attributes of a particular social group must be recognizable and discrete[.]" it was more in the view of the actual persecutor rather than the "alien's own self-identification with the group."²³⁵ Although this decision is important because it seems to allow an asylum claim for those who do not identify as homosexuals, but still participate in what we recognize as "homosexual activities" or even as "perceived homosexuality," it is not a complete victory for LGBT individuals.²³⁶ The decision creates a test "based on how the persecutor perceives them, not on whether they have sexual relations with men or women or neither or both."²³⁷ This is troubling because the persecutor has to perceive them as homosexual or know about the person committing homosexual acts. Because there is no real "characteristic that is readily observable" to identify a person as LGBTQI and because many people continue to try to fit in and hide any sexual attractions or actions with same-sex partners, the persecutor would

²²⁹ See *Explainer: What is Sexual Fluidity?*, THE CONVERSATION (Jan. 23, 2015, 7:51 AM), <http://theconversation.com/explainer-what-is-sexual-fluidity-33120>; see also Jenell Williams Paris, *The End of Sexual Identity: Why Sex is Too Important to Define Who We Are*, INTERVARSITYPRESS, at 73 (2011).

²³⁰ See KAREN MOULDING & NATIONAL LAWYERS GUILD, LESBIAN, GAY, BISEXUAL, AND TRANSGENDER COMMITTEE, *SEXUAL ORIENTATION AND THE LAW*, at 844 (2017-2018 ed. 2017) (citing *Sanchez-Trujillo v. I.N.S.*, 766 F.2d 1571, 1576 (9th Cir. 1986)).

²³¹ *Id.*

²³² MOULDING ET. AL., *supra* note 230.

²³³ *Id.*

²³⁴ *Id.* (citing *Gomez v. I.N.S.*, 947 F.2d 660, 664 (2nd Cir. 1991)).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

not always identify a person as LGBTQI, and this has led immigration judges to determine that individuals would not face persecution.²³⁸

Although it seems that one would just be able to go into immigration court and state that they identify as lesbian, gay, bisexual, transgender, queer, or intersex, that is not the case. A respondent bears the burden of proof in establishing that they belong to a particular social group,²³⁹ and because there is no real unifying characteristic for LGBTQI individuals, proving one's identity is often more difficult than it seems. LGBTQI individuals "often do not outwardly show traits or knowledge that comport with an IJ's perception of the protected class" and this sometimes leads to "inappropriate questions" from an immigration judge,²⁴⁰ and further exacerbates the stereotypes that people have of LGBTQI individuals—that gay men are more feminine, and lesbians are masculine women. This is troubling because it leaves out those who are not "obviously" gay or lesbian according to the stereotypes that the judge or asylum officer has, and it also leaves out bisexuals.²⁴¹

In *Ali v. Mukasey*, the immigration judge denied relief under the CAT to a gay Guyanese man.²⁴² The gay man's CAT claim was based on his status as a criminal deportee and homosexual.²⁴³ The IJ stated that "violent dangerous criminals and feminine contemptible homosexuals are not usually considered to be the same people[.]"²⁴⁴ Furthermore the immigration judge also stated that "the picture of [Ali] as a proud, professed homosexual in Guyana seems to be more an expression of wishful thinking than something that's particularly likely to come true."²⁴⁵

²³⁸ *Id.*

²³⁹ *Asylum Basics: Elements of Asylum Law*, IMMIGRATION EQUALITY, <https://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/asylum-basics-elements-of-asylum-law/#.XcjG1NpKhE> (last visited Nov. 10, 2019).

²⁴⁰ See Topel, *supra* note 8, at 2369.

²⁴¹ See Greenberg, *supra* note 224, at 161; see also Apphia Kumar, "I was the first bisexual person granted asylum in the U.S.," a first-person account for #BiWeek, GLAAD (Sept. 20, 2017), <https://www.glaad.org/blog/i-was-first-bisexual-person-granted-asylum-us-first-person-account-biweek> (explaining that bisexual individuals are often denied asylum because of the "false assumption that adjudicators and judges make:" that "a bisexual person can choose to be with someone of the opposite gender and pass as [a heterosexual person] and be safe in their home country.").

²⁴² *Ali v. Mukasey*, 529 F. 3d 478,479 (2d Cir. 2008) (although CAT is not the same as asylum, immigration judges are the same adjudicators of asylum claims and this case shows the biases that immigration judges hold).

²⁴³ *Id.* at 480.

²⁴⁴ *Id.* at 487, 491.

²⁴⁵ *Id.* at 487.

Although the Second Circuit remanded the case because of the IJ's bias, it noted that the "agency may well reach the same decision on remand."²⁴⁶

In yet another case, *Razkane v. Holder*, the circuit court also remanded the decision because of the gay stereotypes that the IJ used.²⁴⁷ The IJ relied "on his own views of the appearance, dress, and affect of a homosexual" to conclude that Razkane "would not be identified as a homosexual."²⁴⁸ Even though these cases have been remanded, they are still proof that some immigration judges hold stereotypes of what it means to be LGBTQI. If a person does not follow these stereotypes, the judge can find that they lack credibility, or that they will not be perceived as such in their countries and therefore not face persecution.

Another key case that demonstrates how sexual identity is not always recognized by the courts is the case of *Kimumwe v. Gonzalez*.²⁴⁹ In this case, the Eighth Circuit denied asylum to a "gay Zimbabwean man who feared persecution because of his sexual orientation."²⁵⁰ Zimbabwe criminalized homosexuality, making it "punishable by imprisonment and a substantial fine."²⁵¹ However, the court did not take into account "Kimumwe's self-identification [] as a gay man."²⁵² Instead, the court focused on the fact that he would be punished for sexual conduct with another male, and not the fact that he was a homosexual.²⁵³ The IJ stated that Kimumwe's "problems with the authorities in Zimbabwe 'were not based *simply* on his sexual orientation, but instead resulted [from] his engaging in prohibited sexual conduct."²⁵⁴ Both the IJ and the Eighth Circuit decided to focus on the sexual conduct, rather than on the homosexual identity as the reason for the criminalization.²⁵⁵

ii. One-year deadline

The one-year deadline presents an additional obstacle for LGBTQ individuals applying for asylum. In 1996, Congress made changes to the

²⁴⁶ *Id.* at 493.

²⁴⁷ *Razkane v. Holder*, 562 F.3d 1283 (10th Cir. 2009); *see also* MOULDING ET. AL., *supra* note 230.

²⁴⁸ *Razkane*, 562 F.3d at 1288; *see also* *Shahinaj v. Gonzales*, 481 F. 3d 1027, 1029 (8th Cir. 2007) (remanding the case based on the fact that the IJ discredited Shahinaj's claim of persecution due to homosexual orientation base on "personal and improper opinion [that] Shahinaj did not dress or speak like or exhibit the mannerisms of a homosexual").

²⁴⁹ *See* *Kimumwe v. Gonzalez*, 431 F.3d 319, 320 (8th Cir. 2006).

²⁵⁰ *Bowmani*, *supra* note 223, at 23; *see also* *Kimumwe*, 431 F.3d at 323.

²⁵¹ *See* *Bowmani*, *supra* note 223, at 23.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

INA that changed asylum law by imposing a one-year deadline.²⁵⁶ To be eligible for asylum, a foreign national had to submit their application within one year of entering the United States.²⁵⁷ However, Congress did leave some exceptions to the deadline. The INA allows for individuals who missed the deadline to still apply if they can demonstrate “changed circumstances” or “extraordinary circumstances” related to the case.²⁵⁸ Because most DACA recipients have been here for years (to be eligible for DACA, one of the requirements was that you continuously resided in the U.S. for at least five years before June 5, 2012, and that you were present in the U.S. on June 5, 2012) the one-year filing deadline will make it difficult for them to apply for asylum.²⁵⁹

Although there is no case law that addresses whether the fact that a person is no longer eligible for DACA constitutes an extraordinary circumstance or changed condition, one could argue by analogy. If a person is lawfully present in the U.S., and then loses their status and applies within a reasonable period after losing their status the regulation seems to allow for the person to file under the “extraordinary circumstance.”²⁶⁰ However, because DACA status might not be considered lawful status, it might not work.²⁶¹ “Another common exception, is ‘legal disability,’ which includes being a minor.”²⁶² In *Matter of Y-C-*, the BIA reiterated the asylum regulation that being an unaccompanied minor would qualify as an “extraordinary circumstance.”²⁶³ However, this would mean that you either apply before you turn eighteen, or within a “reasonable time” after you turned eighteen.²⁶⁴ And according to a Pew Research Center survey only about

²⁵⁶ Victoria Neilson & Reena Arya, *Practice Advisory: Overcoming the One-Year Filing Deadline for Asylum for DACA Recipients*, CATHOLIC LEGAL IMMIGRATION NETWORK, INC. (2018), <https://cliniclegal.org/sites/default/files/DACA-and-the-One-Year-Filing-Deadline.pdf>.

²⁵⁷ 8 U.S.C. § 1158(a)(2)(B) (2000).

²⁵⁸ 8 U.S.C. § 1158(a)(2)(D) (2000).

²⁵⁹ Jason Dzubow, *Asylum for DACA Recipients and Dreamers*, THE ASYLUMIST (Dec. 1, 2016), <http://www.asylumist.com/2016/12/01/asylum-for-daca-recipients-and-dreamers/>.

²⁶⁰ 8 C.F.R. § 208.4(a)(5)(iv) (2009).

²⁶¹ *Id.* (reading, “[t]he applicant maintained Temporary Protected Status, lawful immigrant or nonimmigrant status, or was given parole, until a reasonable period before the filing of the asylum application[.]” This does not mention DACA, so the argument would have to be made by analogy.).

²⁶² Dzubow, *supra* note 259.

²⁶³ *In re Y-C-*, 23 I. & N. Dec., 286 (B.I.A. 2002).

²⁶⁴ *See* Dzubow, *supra* note 259.

29 percent of DACA recipients are between the ages of 16 and 20,²⁶⁵ and this percentage is even less for LGBTQI identified individuals.

Under the changed circumstance exception, “these changes can be in the conditions of an applicant’s country of origin (e.g., an outbreak of violence or change of regime), in the applicant’s circumstances (e.g. . . . coming out as gay . . .).”²⁶⁶ However, even though coming out as LGBTQ counts as a changed circumstance exception, there are still requirements for the use of the exception because an applicant has to file the application within a “reasonable period [of time]” in light of the particular circumstances at issue.²⁶⁷ Because many LGBTQ youth decided to come-out during the time that they had DACA they might have difficulty proving that they are filing their application within a “reasonable period [of time].”²⁶⁸ However, some of the youth could possibly argue that they came out because they had DACA and therefore felt safe being out, and now that the situation has changed they now have an actual fear of returning. It is still recommended that youth submit their applications within six months of losing DACA status if possible or even sooner.²⁶⁹ However, it is quite likely that asylum adjudicators or immigration judges will deny the applications because the applications were not filed in a “reasonable time” after the youth came out as LGBTQ.²⁷⁰

iii. Country Conditions Improving

Another hurdle that LGBTQI individuals have to face is the fact that the government, the Department of Homeland Security (DHS), is presenting evidence of positive changes in conditions in the countries listed above to rebut the fear of persecution.²⁷¹ DHS is using the fact that some of these countries have now passed same-sex marriage and anti-discrimination laws as proof that LGBTQI individuals will not face

²⁶⁵ Gustavo Lopez & Jens Manuel Krogstad, *Key facts about unauthorized immigrants enrolled in DACA*, PEW RES. CTR. (Sept. 25, 2017), <http://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/>.

²⁶⁶ See *Immigration Relief for DACA Recipients Based on Fear of Return*, CTR. FOR GENDER & REFUGEE STUD. (Feb. 2018), https://pennstatelaw.psu.edu/sites/default/files/CGRS%20DACA%20Fear%20of%20Return%20Claims%20Practice%20Advisory_02-28-2018.pdf.

²⁶⁷ 8 C.F.R. § 208.4(a)(4)(ii), (a)(5) (2005).

²⁶⁸ *Id.*

²⁶⁹ *DACA: Frequently Asked Questions*, BERKELEY, <https://undocu.berkeley.edu/daca-frequently-asked-questions/> (last visited Nov. 10, 2019).

²⁷⁰ *Id.*

²⁷¹ *Isn't It Safe Now? How to Reconcile Official Tolerance and an Emerging LGBT Nightlife with your Client's Fear or Returning Home*, ABA (Nov. 8, 2018), https://www.americanbar.org/groups/international_law/publications/international_law_news/2014/fall/isnt_it_safe_now_how_reconcile_official_tolerance/.

persecution anymore.²⁷² With the recent decision by the Inter-American Court urging countries to pass same-sex marriage,²⁷³ DHS will have more evidence to show that the conditions are improving. However, what DHS fails to take into consideration are different reports by NGOs showing that the conditions are sometimes made worse when countries pass progressive LGBTQI laws—there is a backlash against the passage of these laws.²⁷⁴

In *Neri-Garcia v. Holder*, the court upheld the BIA’s denial of a Mexican citizen’s applications for restriction of removal and for relief under the CAT.²⁷⁵ The court held that evidence that the BIA based its conclusion about “fundamental changes in Mexico with respect to the treatment of homosexuals” was enough to prove that conditions in Mexico had improved, and that the level of “inhospitable attitude, even discrimination” that Neri-Garcia would face were “insufficient to establish a threat to Neri-Garcia’s life or freedom if he returned to Mexico.”²⁷⁶

Even if a DACA recipient claims past persecution, such as sexual abuse by a family member, which in turn establishes a presumptive entitlement of future persecution, the government could argue age as a

²⁷² *Id.*

²⁷³ See Enrique Andres Pretel, *Latin American human rights court urges same-sex marriage legalization*, REUTERS (Jan. 9, 2018, 7:58 PM), <https://www.reuters.com/article/us-latinamerica-lgbt/latin-american-human-rights-court-urges-same-sex-marriage-legalization-idUSKBN1EZ020>; see also Opinion Consultiva OC-24/17, *Identidad de genero, e igualdad y no discriminacion a parajas del mismo sexo*, CORTE INTERAMERICANA DE DERECHOS HUMANOS (Nov. 24, 2017), http://www.corteidh.or.cr/docs/opiniones/seriea_24_esp.pdf.

²⁷⁴ Marillia Brocchetto, *The perplexing narrative about being gay in Latin America*, CNN (Mar. 3, 2017), <http://www.cnn.com/2017/02/26/americas/lgbt-rights-in-the-americas/index.html> (“Latin America offers a contradictory narrative: The region has the highest rates of violence against the LGBT community, according to research done by Transgender Europe, a non-governmental organization, but it also has some of the most progressive laws for LGBT equality and protection . . . Lutz argues that while more LGBT people have been coming out of the closet in Chile, some of the violence is a backlash to society’s increasing acceptance of the LGBT community.”).

²⁷⁵ *Neri-Garcia v. Holder*, 696 F.3d 1003, 1006 (10th Cir. 2012); see also David W. Austin, *Sexual Orientation and Gender Identity*, 47 YEAR IN REV. (ABA) 469 (2013), (“[I]n *Neri-Garcia v. Holder*, the Tenth Circuit considered whether Mexico’s treatment of gay men had sufficiently improved to justify returning a victim of past persecution. The court was impressed by the ‘mostly positive developments’ outlined in the U.S. State Department Human Rights Report (notably Mexico City’s legalization of gay marriage and adoption by gay couples and a Mexican Supreme Court decision requiring recognition of valid same-sex marriages in states that had yet to legalize them) and concluded that petitioner could be removed. In light of the murder of several Mexican LGBT activists in recent years, some have argued that the case sets dangerous precedent by fostering an undue reliance on representations by the State Department that ‘everything is cool.’”).

²⁷⁶ *Neri-Garcia*, 696 F.3d at 1009 (citing *Ba v. Mukasey*, 539 F.3d 1265, 1270 (10th Cir. 2008) (stating “discrimination . . . , as morally reprehensible as it may be, does not ordinarily amount to persecution”)).

changed circumstance to rebut the fear of future persecution. In *Ixtlilco-Morales v. Keiser*, the Eighth Circuit upheld the BIA's use of age progression as a "fundamental change in circumstances that rebutted Morales' fear of future persecution."²⁷⁷ Morales argued that the reading of the "term 'fundamental change in circumstances'" only referred to "changes in country conditions, not changes in an applicant's personal circumstances."²⁷⁸ However, the court upheld the broader interpretation and stated that "[w]hile it is certainly true that changed country conditions may constitute a fundamental change in circumstances . . . we have found no law suggesting that country conditions are the exclusive type of 'circumstances' envisioned by the regulation."²⁷⁹ Therefore, it upheld that the BIA's determination "that as an adult, Morales would not be subject to the persecution that he suffered in the past: significant harm inflicted by his family members."²⁸⁰ Furthermore, the court also upheld the BIA's conclusion that the attacks on homosexuals and those with HIV in Mexico "have not been so numerous or so widespread as to support a claim that the respondent has a well-founded fear of persecution."²⁸¹

iv. Financial Hurdles

For many LGBTQ youth eligible for asylum, financial hurdles get in the way of actually seeking relief under asylum. Because of the complications that arise in making a legal asylum claim, it is advisable that LGBTQI DACA recipients seeking to apply for asylum attain an experienced attorney to help them out with the merits of the case. However, the cost of legal representation is yet another roadblock for many DACA recipients. According to a report by Migration Policy Institute, more than one-third (35 percent) of eligible DACA youth in 2013, lived in families with incomes below 100 percent of the federal poverty level, and two-thirds of the youth lived in families with incomes below 200 percent of the federal poverty level.²⁸² For many, finding the

²⁷⁷ *Ixtlilco-Morales v. Keiser*, 507 F.3d 651, 654 (8th Cir. 2007).

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 655.

²⁸¹ *Id.* at 653-56 (citing *Salkeld v. Gonzales*, 420 F.3d 804, 809 (8th Cir. 2005) (holding that evidence of police harassment of homosexuals and "alarming instances of violence towards homosexuals" in Peru, did not compel a finding that alien demonstrated a clear probability of persecution if returned to Peru; noting that Peru does not have laws prohibiting homosexuality or requiring homosexuals to "register themselves"))).

²⁸² Jana Kasperkevic, *The high cost of being a legal immigrant in the US: \$465*, THE GUARDIAN (Jan. 8, 2014, 20:01), <https://www.theguardian.com/money/2014/jan/08/undocumented-dreamers-immigration-daca-cost-fee>; see also Jeanne Batalova et al., *Deferred Action for Childhood Arrivals at the One-year Mark*, MIGRATION POL'Y INST. (Aug. 2013), file:///Users/candelariosaldana/Downloads/DACA2013-FINAL%20(1).pdf.

cost of the application, \$495, was a big enough barrier.²⁸³ Trying to find enough to pay a lawyer will contribute to the obstacles already in place within the immigration system. For LGBTQ youth, it becomes even more difficult because many of them, “as many as 25%,” are disinherited by their parents.²⁸⁴ “Ask[ing] Mom or Dad [, or other family members,] for help—especially if they’re told to ‘get out’” is almost impossible.²⁸⁵ As mentioned later in this note, LGBTQ youth are disproportionately more likely than their heterosexual counterparts to end up homeless due to family unacceptance,²⁸⁶ which also contributes to the financial hurdles LGBTQ youth face.

B. *Cancellation of Removal for Non-Permanent Residents*

Although some LGBTQ Dreamers will meet the requirements for cancellation of removal for non-permanent residents, many will not because they are disconnected to their family and because the law itself has a heteronormative requirement for eligibility. In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) replaced suspension of deportation with cancellation of removal and adjustment of status for certain nonpermanent residents, or often referred to as the “10-year cancellation of removal.”²⁸⁷ To be eligible for non-LPR cancellation of removal a noncitizen must meet certain elements: (1) they “[have] been physically present in the United States for a continuous period of not less than 10 years immediately preceding the issuance of the

²⁸³ See Noah Lanard, *Rhode Island’s Dreamers No Longer Have to Shoulder \$500 in DACA Renewal Fees*, MOTHER JONES (Sept. 18, 2017, 5:41 PM), <http://www.motherjones.com/politics/2017/09/rhode-islands-dreamers-no-longer-have-to-shoulder-500-in-daca-renewal-fees-1/> (Rhode Island worked with individual donors and organizations to help with the financial obstacle of applying to renew DACA. Governor Raimondo stated, “We’re not going to allow \$495 to stand in the way of our neighbors’ dreams.” Other cities and organizations also followed suit, in San Francisco, the Mission Asset Fund also announced it would provide \$1 million to help about 2,000 dreamers renew their permits. This was acknowledgment that money continues to stand in the way for DACA recipients.).

²⁸⁴ Joseph Gentile, *Disowned LGBT Students Need Financial Aid Help*, HUFFINGTON POST (Apr. 4, 2012), https://www.huffingtonpost.com/tngg/lgbt-students-financial-aid_b_1246762.html.

²⁸⁵ *Id.*

²⁸⁶ *Lesbian, Gay, Bisexual, Transgender, Transexual, Queer, Questioning and Two-Spirit (LGBTQ2S)*, HOMELESS HUB, <https://www.homelesshub.ca/about-homelessness/population-specific/lesbian-gay-bisexual-transgender-transsexual-queer> (last visited Nov. 10, 2019).

²⁸⁷ Maria Baldini-Potermin, IMMIGRATION TRIAL HANDBOOK, §6:30, (Thomas West, 2019); see also *Building Your Case from the Ground Up: A Guide to 10-year Cancellation of Removal*, FLORENCE IMMIGRANT & REFUGEE RTS. PROJECT, <http://firrp.org/media/10-Year-Cancellation-Guide-2013.pdf> (last visited Jan. 20, 2018).

notice to appear”; (2) they “[have] been a person of good moral character” during the 10-year period immediately preceding the date of the application for relief; (3) they have not been convicted of an offense under INA § 212(a)(2) [8 U.S.C.A. § 1182(a)(2)] (criminal and related grounds), INA § 237(a)(2) [8 U.S.C.A. § 1227(a)(2)] (criminal offenses), or INA § 237(a)(3) [8 U.S.C.A. § 1227(a)(3)] (failure to register or falsification of documents); (4) the removal of the noncitizen “would result in exceptional and extremely unusual hardship to the [] spouse, parent, or child[(ren)]” who is a U.S. citizen or an LPR; and (5) he “merits a favorable exercise of discretion.”²⁸⁸

i. 10-year Presence and good moral character

Any DACA recipient put into removal proceedings, served with an NTA, after June 15, 2017, would meet the first requirement, 10-year presence in the United States, because one of the requirements for DACA is that the person “has continuously resided in the United States for at least five years preceding the date of [the June 15, 2012] memorandum.”²⁸⁹ Most would also meet the good moral character requirement as well because it is a requirement that they are “currently in school, has graduated from high school, has obtained a general education, . . . or is an honorable discharged veteran of the Coast Guard or Armed Forces of the United States” and that they not be “convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety.”²⁹⁰

However, there are some crimes that LGBTQI youth are more susceptible to due to the fact that they are also more likely to become homeless. According to the U.S. Department of Housing and Urban Development, on average there were about 549,928 people experiencing homelessness on any given night in 2016.²⁹¹ Of the total number of homeless individuals, over one-fifth are children, and about nine percent are individuals between the ages of 18 and 24.²⁹² Although the report does not account for lesbian, gay, and bisexual individuals, it does take into consideration transgender individuals.²⁹³ According to the report, there are about 1,770 transgender homeless individuals in a night; 0.6 percent of

²⁸⁸ INA § 240A(b)(1); 8 USC § 1229b(b)(1).

²⁸⁹ Napolitano, *supra* note 20.

²⁹⁰ *Id.*

²⁹¹ Meghan Henry et al., *The 2016 Annual Homeless Assessment Report (AHAR) to Congress*, THE U.S. DEP’T OF HOUSING AND URBAN DEV. (2016), 1, <https://www.hudexchange.info/resources/documents/2016-AHAR-Part-1.pdf>.

²⁹² *Id.* at 1.

²⁹³ *See generally id.*

which were living in unsheltered locations.²⁹⁴ Further research by the National Alliance to End Homelessness puts the number of unaccompanied youth and young adults up to the age of 24 that experience homelessness in a year at 550,000.²⁹⁵ About 40 percent, or 220,000, of these individuals, identify as lesbian, gay, bisexual, transgender, or questioning (LGBTQ).²⁹⁶

“When [they are] left out on the streets without shelter, many youths will resort to the criminal activities of prostitution and drug dealing in order to survive.”²⁹⁷ “Studies focused in New York City consistently report that homeless youth often trade sex for a place to stay each night because of the absence of available shelter beds.”²⁹⁸ Also, due to the “homophobic and transphobic harassment, discrimination, and physical violence within the child welfare and foster care systems and emergency short-and long-term shelters” LGBTQ youth are about “three times more likely than young women to have traded sex for a place to stay, and LGBTQ youth were seven times more likely than heterosexual youth to have done so.”²⁹⁹ Many of these youth would not have traded sex for shelter if “they had alternative options for shelter.”³⁰⁰ Most of the youth involved in sex trade became involved because of the need to survive and obtain “basic necessities such as food and shelter.”³⁰¹ Often times,

²⁹⁴ *Id.* at 9.

²⁹⁵ *Youth and Young Adults*, NAT'L ALLIANCE TO END HOMELESSNESS, <https://endhomelessness.org/homelessness-in-america/who-experiences-homelessness/youth/> (last visited Nov. 30, 2017).

²⁹⁶ Jeffrey Poirier & Christian Rummell, *Review of the LGBTQ Youth Homelessness Prevention Initiative Planning Phase*, THE U.S. DEP'T OF HOUSING & URBAN DEV. (2016), <https://www.hudexchange.info/resources/documents/Review-of-LGBTQ-Youth-Homelessness-Prevention-Initiative.pdf>; see also Carl Siciliano, *Three LGBT Youths Describe Being Homeless in NYC*, ADVOCATE (Dec. 21, 2015, 6:02 AM), <https://www.advocate.com/commentary/2015/12/21/three-lgbt-youths-describe-being-homeless-nyc> (stating that “[t]here are at least 200,000 LGBT youths suffering homelessness in our nation”).

²⁹⁷ *Homeless LGBT Youth in New York City*, THE ALI FORNEY CTR., https://www.aliforneycenter.org/_aliforney/assets/File/Youth%20Crisis%20Stats.pdf (last visited Dec. 1, 2017); see also Victoria Bekiempis, *Why are Homeless LGBTQ Youth Trading Sex for Shelter?*, NEWSWEEK (Feb. 25, 2015, 3:49 PM), <http://www.newsweek.com/lgbt-survival-sex-gay-lesbian-transgender-309123> (explaining a study done in 2013, in New York City, a city that in 2015 had about 75,323 homeless people (or about 16 percent of the U.S. homeless population), found that about 25 percent of the homeless youth had traded sex for shelter.).

²⁹⁸ Meredith Dank, *Surviving the Streets of New York: Experiences of LGBTQ Youth, YMSM, and YWSW Engaged in Survival Sex*, URBAN INST. (Feb. 2015), https://www.urban.org/research/publication/surviving-streets-new-york-experiences-lgbtq-youth-ymsm-and-ywsw-engaged-survival-sex/view/full_report.

²⁹⁹ *Id.* at 5-6.

³⁰⁰ *Id.* at 19.

³⁰¹ *Id.*

LGBTQ youth are charged as sex offenders, even if they did not commit a sexual crime.³⁰² This leads to LGBTQ youth having to register as “sex offenders in 29 states if convicted,” and this can have dire consequences later in life because of the stigma associated with being a registered sex offender.³⁰³ These criminal records can also have possible consequences when applying for cancellation of removal of non-LPRs.³⁰⁴

- ii. You have a parent, spouse, or child who is an LPR or U.S. citizen and your deportation will cause them an “exceptional and extremely unusual” hardship

Even if a LGBTQI DACA recipient has no prior criminal record and is able to prove good moral character, LGBTQI youth will have a harder time than heterosexual DACA recipients with the requirement of showing that a U.S. citizen or LPR parent, spouse, or child will suffer an exceptional and extremely unusual hardship. One could almost eliminate a citizen and LPR parent, as the majority of the DACA recipient parents are also undocumented.³⁰⁵ And even if they are legal permanent residents or citizens, they might not actually be around or willing to support the DACA recipient after they decided to come out as LGBTQI.³⁰⁶ As evidenced in the country conditions section above, the majority of DACA recipients come from countries where homophobia is prevalent. For many, their parents grew up embracing this homophobic culture, which leads to rejection, physical and mental abuse, and often times to kicking the youth out of the home. A study conducted by the Human Rights Campaign and The League of United Latin American Citizens found that about forty percent of Latino LGBTQ youth did not have family acceptance, and “slightly less than half of LGBT Latino youth have an adult in their family

³⁰² Jerome Hunt & Aisha Moodie-Mills, *The Unfair Criminalization of Gay and Transgender Youth*, CTR. FOR AM. PROGRESS (June 29, 2012), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/juvenile_justice.pdf.

³⁰³ *Id.*

³⁰⁴ See generally §N.10 *Sex Offenses*, IMMIGRANT LEGAL RES. CTR. (Mar. 2014), https://www.ilrc.org/sites/default/files/resources/10_sex_offenses_2014_final.pdf.

³⁰⁵ Zenen Jaimes Perez, *A Portrait of Deferred Action for Childhood Arrivals Recipients: Challenges and Opportunities Three-Years Later*, UNITED WE DREAM (2015), <https://unitedwedream.org/wp-content/uploads/2015/10/DACA-report-final-1.pdf> (asserting that about 3.5 percent of DACA recipients had a U.S. citizen parent, 10.6 percent had a lawful permanent resident, and 77.9 percent had undocumented parents.).

³⁰⁶ *Why do parents reject their LGBTQ children*, HUFFINGTON POST (Mar. 3, 2017, 12:45 PM), https://www.huffingtonpost.com/entry/why-do-parents-reject-their-lgbtq-children_us_58b9a3f7e4b0fa65b844b26d (“One in twelve people who were out to the family they grew up with got kicked out of the home . . . In one study, 40% of homeless youth identified as LGBT. The #1 reason for homelessness among LGBT youth is that they ran away because of family rejection. The #2 reason is that they were thrown out for being LGBT.”).

they can turn to, if worried or sad, while 8 in 10 of their non-LGBT Latino peers have such an adult.”³⁰⁷

Furthermore, the majority of DACA recipients are unmarried.³⁰⁸ According to a Pew Research Center study, about 83 percent of DACA recipients are unmarried, and 15 percent are married.³⁰⁹ Following the fact that only about four to five percent of DACA recipients are LGBT identified, this would mean that less than one percent of DACA LGBTQI youth are married, and unfortunately it is unknown if these are married to another DACA recipient, U.S. Citizen, legal permanent resident, or an undocumented spouse.³¹⁰ If they were married to a U.S. Citizen or LPR they would have likely already applied for adjustment of status as others have done.³¹¹ Furthermore, another report by the Pew Research Center shows that about “16 [percent] of LGBT adults [] are currently married, compared with about half the adults in the general public.”³¹² Together this means that less than about 0.096 percent of LGBTQI DACA recipients are married, making it unlikely that LGBTQI DACA recipients would have a citizen or LPR spouse that would suffer exceptional and extremely unusual hardship.

The last option would entail having an LPR or U.S. citizen child.³¹³ Although homosexuals do have children, the percentage is small.³¹⁴ According to a research done by the Williams Institute, about 28.7 percent of LGBT people were raising children,³¹⁵ compared to a Gallup poll that

³⁰⁷ *Id.*; See *Supporting and Caring for Our Latino LGBT Youth*, HUMAN RTS. CAMPAIGN & THE LEAGUE OF UNITED LATIN AM. CITIZENS (2018), <https://lulac.org/assets/pdfs/LGBT-LatinoYouthReport.pdf>.

³⁰⁸ See Lopez & Krogstad, *Key facts about unauthorized immigrants enrolled in DACA*, PEW RESEARCH (SEPT. 25, 2017), <https://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/>.

³⁰⁹ *Id.*

³¹⁰ *Id.*; see also Kerith Conron & Taylor N.T. Brown, *LGBT DREAMers and Deferred Action for Childhood Arrivals (DACA)*, THE WILLIAMS INST. (Feb. 2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-DREAMers-and-DACA-February-2017.pdf>.

³¹¹ See Kate Linthicum, *Another thing Trump stripped from ‘Dreamers’: A loophole that helped 40,000 of them get green cards*, L.A. TIMES (Sept. 7, 2017, 3:00 AM), <http://www.latimes.com/world/mexico-americas/la-fg-daca-mexico-20170907-story.html>.

³¹² *A Survey of LGBT Americans*, PEW RES. CTR. (June 13, 2013), <http://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans/>.

³¹³ Perez, *supra* note 305, at 9 (showing that of the people surveyed about 24.9 percent had a U.S. citizen child.).

³¹⁴ *Same-Sex Couple and LGBT Demographic Data Interactive*, THE WILLIAM INST. & UCLA SCH. OF L. (May 2016), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#about-the-data>.

³¹⁵ *Id.*

showed that, in 2013, seventy-four percent of adults had children.³¹⁶ However, this number might not be directly correlated to LGBTQI DACA recipients, as the study takes into account people from ages 18 to 65-plus, and “[n]o DACA recipients are older than 36 because the program required applicants to have entered the U.S. before their 16th birthday and have been under the age of 31 as of June 15, 2012.”³¹⁷ So, the number of LGBTQI DACA recipients with children is probably significantly less especially if one takes into consideration that millennials are also having less children.³¹⁸

Even if an LGBTQI DACA recipient does have a child, the burden of hardship is a hard one to meet. The Board of Immigration Appeals (BIA), in *In re Francisco Javier Monreal-Aguinaga*, held that although “exceptional and extremely unusual hardship” was a higher burden to meet than “extreme hardship,” the hardship did not have to rise to the level of “unconscionable.”³¹⁹ The BIA also stated that “[i]n establishing eligibility for cancellation of removal, only hardship to qualifying relatives, not to the applicant himself or herself, may be considered, and hardship factors relating to the applicant may be considered only insofar as they might affect the hardship to a qualifying relative.”³²⁰ The court found that the level of hardship demonstrated by the respondent did not meet the standard of “exceptional and extremely unusual hardship” because although the children would have to relocate to Mexico the father was in “good health and able to work,” that there was “nothing to show that he would be unable to work and support his United States citizen children in Mexico.”³²¹ Although the Board recognized that the “respondent’s children will suffer some hardship and likely will have fewer opportunities, should they go to Mexico” it was not enough to establish that they would “suffer hardship that is substantially different from, or beyond, that which would normally be expected from the deportation of an alien with close family members here.”³²²

³¹⁶ Frank Newport & Joy Wilke, *Desire for Children Still Norm in U.S.*, GALLUP (Sept. 25, 2013), <http://news.gallup.com/poll/164618/desire-children-norm.aspx> (this poll does not take into consideration sexual orientation, various other data puts the LGBT population anywhere between 3.8 percent and seven percent. However, if one subtracts 28.7 percent from 74 percent it is equivalent to about 45.3 percent of heterosexual adult individuals having children, which is about 36 percent higher than LGBT identified individuals.)

³¹⁷ Lopez & Krogstad, *supra* note 308.

³¹⁸ Ariana Eunjung Cha, *We’re having fewer babies. Could that kill the economy?*, WASH. POST (June 30, 2017, 2:27 PM), <http://www.miamiherald.com/news/nation-world/national/article158997969.html>.

³¹⁹ 23 I. & N. Dec., 56, 60 (B.I.A. 2001).

³²⁰ *Id.* at 56.

³²¹ *Id.*

³²² *Id.* at 65.

In another case, *In re Martha Andazola-Rivas*, the BIA also found that the respondent had not established “exceptional and extremely unusual hardship” to her U.S. citizen children.³²³ The BIA reasoned that because the respondent owned a home, two vehicles, and had \$7,000 in savings “the respondent and her children would not be penniless upon her return to Mexico.”³²⁴ Further, the BIA stated that although the educational opportunities were not the same for the children as they would be in the United States, “the respondent ha[d] not shown that the children will be deprived of all schooling or of an opportunity to obtain an education.”³²⁵ But most importantly, the BIA stated that the hardships that the respondent “ha[d] outlined are simply not substantially different from those that would normally be expected upon removal to a less developed county.”³²⁶

Therefore, although not impossible to meet, the hardship must be exceptional and extremely unusual and it must be to the LPR or citizen spouse, child, or parent. Some reasons why a family member might suffer are that “someone in the family is very, very sick and depends on you to pay the medical bills,” “someone in the family has to stay in the United States to receive medical treatment and couldn’t come back to your country with you,” or “your kids have special needs or disabilities that they receive help for in school or at the doctor, and that help isn’t available in your country.”³²⁷ Although an LGBTQI individual could use the discrimination that they will experience in their home country for their claim, this discrimination has to then be shown to create a hardship for the U.S. citizen as well.

C. Family Petitions

Only certain DACA recipients can obtain legal permanent resident status within the United States. DACA recipients “who entered the country illegally cannot easily get lawful status, even if they have a family member who can sponsor them for permanent residence.”³²⁸ Having entered the country without inspection makes the DACA recipient inadmissible.³²⁹

³²³ 23 I. & N. Dec., 319 (B.I.A. 2002).

³²⁴ *Id.* at 324.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ Baldini-Potermin, *supra* note 287.

³²⁸ Lena Graber & Jose Mgana-Salgado, *DACA, Advance Parole, and Family Petitions*, IMMIGRANT LEGAL RESOURCE CTR. (2016), https://www.ilrc.org/sites/default/files/resources/prac_adv-daca_advance_parole_fam_pet-20160531.pdf.

³²⁹ *Entry Without Inspection (EWI) and Family Unity Waiver in a Nutshell*, NAT’L IMMIGRATION FORUM (April 6, 2012), <https://immigrationforum.org/article/entry-without-inspection-ewi-family-unity-waiver-nutshell/>; see also Keith Southam, *Will Having Had DACA Make It Easier for Me to Get a Marriage-Based Green Card?*, NOLO,

However, under the program, DACA recipients were allowed to travel abroad with permission from the government to depart and return, known as advance parole.³³⁰ When the person reentered, or were paroled into the U.S., it was considered a lawful entry.³³¹ This further allowed a person to be considered for adjustment of status.

To apply for advance parole, a person has to pay a filing fee of \$575.³³² As discussed earlier, many individuals did not take advantage of advance parole because of the cost of filing the form and also the cost of travel. Those that did apply, however, had to show that they were traveling abroad for either “humanitarian purposes [(including travel to obtain medical treatment, attending funeral services for a family member, or visiting an ailing relative)]; educational purposes (such as semester-abroad programs and academic research[]), or employment purposes [(such as overseas assignments, interviews, conferences or training, or meetings with clients overseas)].”³³³ Although advance parole “authorizes the reentry into the U.S. [it] does not guarantee that its holder will be paroled into the United States upon [] return.”³³⁴ What it does is it gives “an immigration official [authority to] make a discretionary decision as to whether she will be paroled into the United States.”³³⁵

But, as discussed in the section on cancellation of removal, over 83 percent of DACA recipients are single.³³⁶ Once more, the only option seems to be if they have a U.S. citizen child.³³⁷ Although there are “about 200,000 children who are U.S. citizens who have parents that receive DACA protections,”³³⁸ these children are unlikely to be of the age of 21,

<https://www.nolo.com/legal-encyclopedia/will-having-had-daca-make-it-easier-for-me-to-get-a-marriage-based-green-card.html> (last visited Nov. 17, 2019).

³³⁰ *Id.* at 1 (stating that advanced parole was eliminated under the new administration.); see also *Deferred Action For Childhood Arrivals: Response to January 2018 Preliminary Injunction*, USCIS (July 17, 2019), <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction> (“USCIS will not accept or approve advance parole requests from DACA recipients.”).

³³¹ *Deferred Action For Childhood Arrivals: Response to January 2018 Preliminary Injunction*, *supra* note 330.

³³² *I-131, Application for Travel Document*, USCIS, <https://www.uscis.gov/i-131> (last visited Nov. 17, 2019).

³³³ Graber & Magana-Salgado, *supra* note 328, at 2-3.

³³⁴ *Id.* at 3.

³³⁵ *Id.* at 3.

³³⁶ See Lopez & Krogstad, *supra* note 317.

³³⁷ Perez, *supra* note 305 (asserting that 24.9 percent of DACA recipients surveyed had a U.S. citizen child).

³³⁸ Betsy Woodruff, *200,000 Kids Could Lose Their Parents if DREAMers are Deported*, HOT AIR (Sept. 7, 2017), <https://hotair.com/headlines/archives/2017/09/200000-kids-lose-parents-dreamers-deported/>.

the age required to sponsor a parent.³³⁹ Many were also unaware of the possibility of advance parole, had financial difficulties in applying and executing an advance parole, and LGBTQ+ individuals feared returning to their home countries because of the prevalent homophobia and transphobia present there. Therefore, many DACA recipients continue to be ineligible for adjustment because of their entry without inspection. Further, the fact that advance parole is no longer available for DACA recipients means that many DACA recipients will not be able to adjust their status unless they leave the country therefore triggering the three or ten-year bar.³⁴⁰

LGBTQI individuals who did apply for advance parole and did not adjust their status through a relative petition, and later decide to apply for asylum, might also have complicated their case even further. In affect, it allows the government to make a claim that they visited their country of origin on advance parole and they were not persecuted. In *Boer-Sedano v. Gonzales*, the IJ concluded that Boer-Sedano's trips back to Mexico "rebutted the presumption of a well-founded fear of persecution."³⁴¹ Although the Ninth Circuit found that there was still sufficient evidence to find that Boer-Sedano would face persecution, the court did reference its precedent. "According to [the court's] precedent, return trips can be considered as one factor, among others, that rebut this presumption."³⁴² The precedent the court referenced was *Belayneh v. INS*, where it determined that the presumption of persecution "was rebutted when the applicant made three return trips, there had been two favorable changes in government, fifteen years had passed between the past persecution and the asylum request, and there was no nexus between the spouse's persecution and the applicant's fear."³⁴³ However, even though the court used other factors, as evidenced in the asylum section, the government could use changed country conditions, changed personal circumstances and also the fact that a LGBTQI DACA recipient traveled to their home country and

³³⁹ *I am a U.S. Citizen: How do I help my relative become a U.S. permanent resident?*, USCIS (Oct. 2013), <https://www.uscis.gov/sites/default/files/USCIS/Resources/A1en.pdf>; see also INA 201(b)(2)(A)(i) (2019) (defining the term "immediate relative" as a child, spouse, or parent of a U.S. citizen, "in the case of parents, such citizens shall be at least 21 years of age").

³⁴⁰ *The Three- and Ten-Year Bar: How New Rules Expand Eligibility for Waivers*, AM. IMMIGRATION COUNCIL (Oct. 28, 2016), <https://www.americanimmigrationcouncil.org/research/three-and-ten-year-bars>; see also 8 U.S.C.S. 1182(a)(9)(B) (2019).

³⁴¹ *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1091 (9th Cir. 2005).

³⁴² *Id.*

³⁴³ *Id.* (citing *Belayneh v. INS*, 213 F.3d 488, 491 (9th Cir. 2000)).

did not experience persecution as evidence to rebut the possibility of persecution.³⁴⁴

V. CONCLUSION

LGBTQI DACA recipients face unique challenges compared to their heterosexual counterparts. If sent back to their home countries, there is a high probability that they will be victims of persecution, discrimination, and violence on account of their LGBTQI identity. In seeking alternative remedies, they face immigration judges and adjudicators that hold stereotypes and personal beliefs on what an LGBTQI individual looks like and acts like, and if they do not meet these stereotypes, they face an asylum petition denial.³⁴⁵ Because immigration laws are based on heteronormative policies and practices, and on the idea of a heteronormative family, the laws in place often fail the LGBTQI community.

Although there are other forms of relief that are not analyzed in this note, such as VAWA, U-Visa, and T-Visa, LGBTQI DACA recipients often face other hurdles in attaining these.³⁴⁶ For example, although domestic violence is highly prevalent in same-sex relationships, often the abusive partner “exert[s] ‘heterosexist control’ over the victim by threatening to ‘out’ the victim to friends, family, or employer or threatening to make reports to authorities that would jeopardize child custody, immigration, or legal status.”³⁴⁷ Even though LGBTQI individuals overall have better experiences living in the United States, they are still victims of homophobia and discrimination here. A clear example is seen in the fact that “[l]esbian victims seldom report violent incidents to the police because many fear prejudicial treatment.”³⁴⁸ Also, as discussed above, LGBTQI homeless youth often fail to report sexual trafficking because they “fear that they will be mistreated or not believed because of

³⁴⁴ *Isn't It Safe Now? How to Reconcile Official Tolerance and an Emerging LGBT Nighlife with your Client's Fear or Returning Home*, *supra* note 271.

³⁴⁵ See Greenberg, *supra* note 224, at 161; see also Kumar, *supra* note 241.

³⁴⁶ See *Overcoming Common Hurdles in VAWA Applications*, NATALIA SEGERMEISTER IMMIGRATION LAWYERS OF PRICE BENOWITZ, <https://thevisafirm.com/blog/overcoming-common-vawa-application-hurdles/> (last visited Nov. 17, 2019); see generally *Equality For All: VAWA and its New LGBT Provisions*, LAWS, <https://criminal.laws.com/marriage-news/equality-for-all-vawa-and-its-new-lgbt-provisions-36558.html> (last visited Nov. 17, 2019).

³⁴⁷ Suzana Rose, *Lesbian Partner Violence Fact Sheet*, NAT'L VIOLENCE AGAINST WOMEN PREVENTION RES. CTR. U. OF MISSOURI AT ST. LOUIS, <https://mainweb-v.musc.edu/vawprevention/lesbianrx/factsheet.shtml> (last visited Jan. 21, 2018).

³⁴⁸ *Id.*

their gender identity or sexual orientation.”³⁴⁹ In fact, “[s]tudies have found that LGBTQ youth are overrepresented in detention for prostitution-related offenses and report higher levels of police misconduct than their straight peers.”³⁵⁰

Trump’s decision to end DACA will have an impact on young immigrant dreamers: individuals that have made their lives here in the United States, and call America home. Some of these individuals have never returned to their native countries or have only done so recently through advance parole for a brief period of time. For many, being sent to their native countries will mean leaving loved ones, the end of a career, and living in poverty. For LGBTQI individuals, it means possible exile, or discrimination to a level they have not experienced before. No one should be required to hide their sexual orientation or gender identity. However, if sent back to their home countries many LGBTQI individuals will have to return to the “closet” in order to survive. But this form of survival is even questionable due to the dire psychological consequences of hiding one’s identity.

Although the courts have recently become involved and have issued favorable decisions that require the U.S. government to reinstate DACA, it is quite likely that the government will appeal these decisions, continuing to leave many in limbo.³⁵¹ It is also highly probable that the Supreme Court will eventually rule that Trump can rescind the program as it is part of the executive’s “sovereign power.”³⁵² “Fortunately for Trump, the law on immigration and related matters favors the president. Legal precedents have traditionally accorded the chief executive complete and nearly unchecked power to deny foreigners permission to enter the United States.”³⁵³ At the time of the final edit of this note, these topics are still relevant; and should continue to be relevant because DACA is not an actual permanent solution to one’s undocumented status, only Congress

³⁴⁹ *Sex Trafficking and LGBTQ Youth*, POLARIS PROJECT, <https://polarisproject.org/sites/default/files/LGBTQ-Sex-Trafficking.pdf> (last visited Jan. 21, 2018).

³⁵⁰ *Id.*

³⁵¹ *See Status of Current DACA Litigation*, NAT’L IMMIGRATION LAW CTR. (last updated June 7, 2019), <https://www.nilc.org/issues/daca/status-current-daca-litigation/> (listing all the current cases litigating the DACA issue).

³⁵² *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

³⁵³ David G. Savage, *On travel ban, legal precedent favors president*, CHI. TRIB., http://digitaledition.chicagotribune.com/tribune/article_popover.aspx?guid=f56b12e2-8e9c-401e-9019-188d21244b91 (last visited Aug. 10, 2019) (“‘The exclusion of aliens is a fundamental act of sovereignty . . . inherent in the executive power,’ the Supreme Court said in 1950. And lest there be doubt, Congress adopted a provision in 1952 saying the president ‘may by proclamation and for such period as he shall deem necessary, suspend the entry of all aliens and any class of aliens as immigrants or non-immigrants’ whenever he thinks it ‘would be detrimental to the interests of the United States.’”).

can grant a way to legal residency or a path to citizenship. Therefore, LGBT youth are still at risk of being sent back to situations where discrimination, violence and threats are part of everyday life.