

THE SUPREME COURT'S UPCOMING DECISION IN THE DACA CASES COULD PLACE LGBTQ RECIPIENTS AT SERIOUS RISK

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I. INTRODUCTION

In 2012, the Obama Administration announced the Deferred Action for Childhood Arrivals (“DACA”) policy of prosecutorial discretion. DACA allowed certain undocumented individuals who came to the United States as children to request a consideration of deferred action of removal, as well as work authorization, for a period of two years subject to renewal. In 2019, the Trump Administration announced an end to the DACA policy, which led to a number of legal challenges in federal courts throughout the country. On November 12, 2019, the United States Supreme Court will hear oral arguments on three consolidated cases: *Department of Homeland Security v. Regents of the University of California* (Docket No. 18-587), *Trump v. NAACP* (Docket No. 18-588), and *McAleenan v. Vidal* (Docket No. 18-589). These cases turn on two legal questions: (1) is judicial review of the Department of Homeland Security’s decision to end the DACA policy permitted; and (2) if yes, was the decision lawful?¹

While the legal questions may appear straightforward, there is much at stake for the DACA recipients who face removal if DACA is rescinded. Hundreds of religious, educational, governmental, private, and municipal organizations joined the over thirty amicus briefs filed with the Supreme Court, collectively identifying the many legal, cultural, and socioeconomic impacts of the rescission of DACA. The National Queer Asian Pacific Islander Alliance (“NQAPIA”),² and thirty-five of its like-minded ally agencies, submitted a brief³ focused on the serious threats to lesbian, gay, bisexual, transgender and queer or questioning (“LGBTQ”) DACA recipients who would be removed to Asian Pacific Island (“API”) countries if DACA were to end.

For these LGBTQ API individuals, removal translates to likely harassment, discrimination, criminal prosecution, violence, and even death by virtue of their sexual orientation and/or gender identity. LGBTQ API DACA recipients, if removed, will also lose substantial civil protections afforded them in the United States, including the right to marry, the ability to seek medical care, and the ability to earn a living without discrimination.

These problems are compounded by the fact that many LGBTQ DACA recipients have been open and transparent about their sexual orientation and/or

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gender identity while living in the United States, have engaged in LGBTQ activism, and have publicly disclosed their LGBTQ status in their communities through their online identities and otherwise. In this digital age, if these openly LGBTQ DACA recipients are removed, there is no realistic way to put this “genie back in the bottle.” Rescinding DACA puts some of the most vulnerable DACA recipients in even greater danger than they may have been in had DACA never been in place.

II. LGBTQ DACA RECIPIENTS AT A GLANCE

In order to be eligible for DACA, an undocumented immigrant must have entered the United States before turning 16 years old.⁴ Many DACA recipients arrived in the United States at very young ages and have spent their formative years here. Surveys of DACA recipients have suggested that the average age of entry to this country is just six years old.⁵

Over 800,000 young people have received protection from removal through DACA since the policy’s inception.⁶ The Williams Institute at the UCLA School of

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¹ 18-587, *Department of Homeland Security v. Regents of the University of California*, U.S. SUPREME COURT, <https://www.supremecourt.gov/qp/18-00587qp.pdf> (last visited Nov. 6 2019) [<https://perma.cc/PZ4L-7572>].

² National Queer Asian Pacific Islander Alliance (“NQAPIA”) is a federation of LGBTQ API organizations. NQAPIA unites local groups, develops leadership, promotes visibility, educates the community, invigorates grassroots organizing, encourages collaboration, and challenges anti-LGBTQ bias and racism. NQAPIA spearheads educational and advocacy campaigns in support of LGBTQ immigrants’ rights. Learn more at their website, NQAPIA, <https://www.nqapia.org/wpp/> (last visited Nov. 6, 2019) [<https://perma.cc/M25X-WF4N>].

³ Brief of Amicus Curiae National Queer Asian and Pacific Islander Alliance and Others in Support of Respondents, *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.* (No. 18-587), 2019 WL 4858289.

⁴ U.S. DEP’T OF HOMELAND SECURITY, EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN I (2012).

⁵ TOM K. WONG ET AL., RESULTS FROM TOM K. WONG ET. AL., 2019 NATIONAL DACA STUDY 15 (2019), <https://cdn.americanprogress.org/content/uploads/2019/09/18122133/New-DACA-Survey-2019-Final-1.pdf> [<https://perma.cc/P7BW-K5JR>] [hereinafter *Wong 2019 Study*]; TOM K. WONG ET AL., RESULTS FROM TOM K. WONG ET AL., 2017 NATIONAL DACA STUDY 13 (2017), https://cdn.americanprogress.org/content/uploads/2017/11/02125251/2017_DACA_study_economic_report_updated.pdf [<https://perma.cc/HQ3F-3EUV>] [hereinafter *Wong 2017 Study*]; see also Nicole Svajlenka & Audrey Singer, *Immigration Facts: Deferred Action for Childhood Arrivals (DACA)*, BROOKINGS METRO. POL’Y PROGRAM (Aug. 14, 2013), <https://www.brookings.edu/research/immigration-facts-deferred-action-for-childhood-arrivals-daca/> [<https://perma.cc/K5AC-WR97>] (“The most common age at arrival was eight, however almost one-third (31 percent) were five or younger and more than two-thirds (69 percent) were 10 or younger when they arrived.”).

⁶ U.S. CITIZENSHIP & IMMIGRATION SERVS., NUMBER OF FORM I-821D, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS, BY FISCAL YEAR, QUARTER, INTAKE AND CASE STATUS FISCAL YEAR 2012-2019 3 (2019).

Law estimates that, as of March 2016, “over 36,000” of these recipients identify as LGBTQ based on a conservative extrapolation of the percentage of LGBT young adults in the general population.⁷ Surveys of LGBTQ DACA recipients indicate the rates of self-identification as LGBTQ are actually higher among DACA recipients. In a 2015 survey conducted by United We Dream, 8.6% of DACA respondents “identified as LGBTQ, a rate higher than the national average [of 3.4%] and higher [within] the 18 to 29 age group” which was reported at 6.4% nationally.⁸ Similarly, up to 10% of all DACA recipients who participated in one 2017 survey identified as LGBTQ.⁹ In the 2019 update, 6.3% of respondents identified as gay or lesbian, 7.6% identified as bisexual, and 0.3% identified as transgender or gender non-conforming—indicating that the rate of DACA recipients who identify as LGBTQ, possibly more than 100,000 individuals, may be substantially higher than the rate among the general population.¹⁰

III. UPON REMOVAL, LGBTQ API INDIVIDUALS WILL FACE CRIMINAL PENALTIES, DISCRIMINATION AND VIOLENCE

For LGBTQ children and young adults who (1) have been prevented from applying for DACA as a result of the government halting the policy, or (2) are current DACA recipients who may lose their ability to renew their status if the policy is ended, the rescission of DACA carries the risk of immediate removal to a detention facility followed by removal to their country of birth (a country to which they often have little to no connection).¹¹ Many undocumented immigrants who qualify for or have received DACA share a tangible and realistic fear of what being removed to their birth countries—countries that their families fled for fear of persecution, poverty, and/or violence—would mean. In a recent survey of DACA recipients, approximately *eighty percent* of surveyed respondents indicated concern for their physical safety and the physical safety of their families, if they were to return to their countries of birth.¹²

⁷ Kerith Conron & Taylor N.T. Brown, *There are Over 75,000 LGBT DREAMers; 36,000 Have Participated in DACA*, THE WILLIAMS INST., 1 n.3 (Feb. 2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-DREAMers-and-DACA-February-2017.pdf> [https://perma.cc/8BDV-P3U8].

⁸ ZENÉN JAIMES PÉREZ, A PORTRAIT OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS RECIPIENTS: CHALLENGES AND OPPORTUNITIES THREE-YEARS LATER 7 (2015), <https://unitedwedream.org/wp-content/uploads/2015/10/DACA-report-final-1.pdf> [https://perma.cc/6VTT-XJLM].

⁹ Sharita Gruberg, *What Ending DACA Means for LGBTQ Dreamers*, CTR. FOR AM. PROGRESS (Oct. 11, 2017), <https://www.americanprogress.org/issues/lgbt/news/2017/10/11/440450/ending-daca-means-lgbtq-dreamers/> [https://perma.cc/4Z2X-X9FA].

¹⁰ *Wong 2019 Study*, *supra* note 5, at 16.

¹¹ See *Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (July 17, 2019), <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction> [https://perma.cc/YCP7-AX96]. Further, many of these individuals have been in the United States for over one year, making them ineligible for asylum protections. 8 U.S.C. § 1158(a)(2)(B) (2009).

¹² *Wong 2019 Study*, *supra* note 5, at 7.

For LGBTQ DACA recipients, these safety concerns are even more acute. Approximately seventy countries worldwide still criminalize and punish same-sex relationships and same-sex sexual activity, and impose extensive penalties such as life in prison.¹³ For example, Bangladesh—a country of over 150 million people—criminalizes all sexual activity between men, with a punishment of ten years to life in prison.¹⁴ Malaysia criminalizes certain same-sex sexual activity with punishment of up to twenty years in prison, and punishes consensual same-sex intercourse with twenty years in prison plus lashings and fines.¹⁵ As recently as September 2018, two women were sentenced to caning in Malaysia after allegedly attempting to engage in same-sex relations.¹⁶ Bhutan criminalizes same-sex sexual activity as “unnatural” and punishes it by imprisonment, as do Singapore and the Maldives.¹⁷ Myanmar, Sri Lanka, and Brunei all punish same-sex relations with imprisonment for up to ten years.¹⁸ In Indonesia, recent changes to national law appeared to ostensibly protect the rights of LGBTQ individuals at the national level, but the 2019 proposed revisions to the Indonesian criminal code include a number of changes that, if passed, could be used to violate the rights of LGBTQ individuals.¹⁹ Indonesia also has local provinces and cities that already criminalize homosexuality.²⁰ In one such province in May 2017, two men were sentenced to 85 lashes in a public caning after being accused of having sex with each other.²¹

¹³ LUCAS RAMÓN MENDOS, STATE-SPONSORED HOMOPHOBIA, INT’L LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASS’N 15 (2019), https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019.pdf [<https://perma.cc/FD2R-UJYE>]; #Outlawed: “The Love That Dare Not Speak its Name”, HUMAN RIGHTS WATCH, http://internap.hrw.org/features/features/lgbt_laws/ [<https://perma.cc/T5YL-54V6>].

¹⁴ BANGL. PENAL CODE, Act No. XLV of 1860, § 377 (Oct. 6, 1860); Mendos, *supra* note 13, at 432.

¹⁵ MALAY. PENAL CODE, Act No. 574, §§ 377A, 377B (2015); Mendos, *supra* note 13, at 450–51.

¹⁶ *Malaysia: Two Women Face Caning for Same-Sex Conduct*, HUMAN RIGHTS WATCH (Aug. 21, 2018), <https://www.hrw.org/news/2018/08/21/malaysia-two-women-face-caning-same-sex-conduct> [<https://perma.cc/2VC2-7R3Y>].

¹⁷ SING. PENAL CODE, No. 2 of 2008 (Revised Ed.), §§ 294, 377a (Jan. 28, 2008); BHUTAN PENAL CODE §§ 213–14 (2004); MALDIVES PENAL CODE, Law No. 6/2014, §§ 411–12; Mendos, *supra* note 13, at 435, 454–55, 536.

¹⁸ BRUNEI PENAL CODE, Ch. 22 of 1951 (Revised Ed. 2001), § 377 (Oct. 1, 2001); SRI LANKA PENAL CODE, Act No. 22 of 1995, §§ 365, 365A (1995); MYAN. PENAL CODE, Act 45/1850, Revised Edition, § 377; Mendos, *supra* note 13, at 437, 457, 531–32.

¹⁹ *Indonesia: Draft Criminal Code Disastrous for Rights*, HUMAN RIGHTS WATCH (Sept. 18, 2019), <https://www.hrw.org/news/2019/09/18/indonesia-draft-criminal-code-disastrous-rights> [<https://perma.cc/Q34M-CWR3>]. Provisions include criminalizing sex outside of marriage (where same-sex marriage does not exist) and “obscene acts.” *Id.*

²⁰ M.V. LEE BADGETT, AMIRA HASENBUSH & WINSTON EKAPRASETIA LUHUR, LGBT EXCLUSION IN INDONESIA AND ITS ECONOMIC EFFECTS, 5 (2017).

²¹ Ed Davies, *Indonesia’s Aceh Resumes Public Caning Despite Pledge to Curb Access*, REUTERS (July 13, 2018), <https://www.reuters.com/article/us-indonesia-aceh-caning/indonesias-aceh-resumes-public-caning-despite-pledge-to-curb-access-idUSKBN1K31N1> [<https://perma.cc/6Z4A-7X66>]; Jon Emont, *2 Men in Indonesia Sentenced to Caning for Having Gay Sex*, N.Y. TIMES (May 17, 2017), <https://www.nytimes.com/2017/05/17/world/asia/indonesia-gay-caning.html> [<https://perma.cc/EH56-PV8Y>].

Numerous countries sentence people engaged in consensual same-sex relationships to death as punishment.²² In April 2019, the government of Brunei fully implemented the Syariah Penal Code.²³ Now, individuals in Brunei may also face death by stoning or whipping.²⁴ Pakistan punishes a broadly-worded category of “obscene acts” with two to ten years imprisonment and possible penalty by death.²⁵ In Afghanistan, United Arab Emirates, Yemen, Iran, and Saudi Arabia, homosexuality is also punishable by death.²⁶

Further, daily life carries dire risks for LGBTQ people, even when their sexual orientation and/or gender identity are not criminalized, due to discrimination, bias, and significantly increased rates of violence against LGBTQ individuals.

In country after country outside of the United States, LGBTQ API individuals are marginalized or repressed. In China, LGBTQ discrimination and stigma is omnipresent, including from one’s family and friends.²⁷ In a 2012 poll of residents of the Beijing, Shanghai, and Guangzhou provinces, only thirty-one percent of participants said they accepted people who identify as gay, and only twenty-seven percent said that there should be legal protections for sexual minorities.²⁸ In India, there remains immense cultural prejudice against LGBTQ individuals, which is not surprising given that the Supreme Court of India decriminalized same-sex sexual activities just over one year ago.²⁹

²² Mendos, *supra* note 13, at 15–16 (stating that “[s]ix UN Member States impose the death penalty on consensual same-sex sexual acts,” and five more make it a possible punishment); #*Outlawed the Love That Dare Not Speak its Name*, HUMAN RIGHTS WATCH, http://internap.hrw.org/features/features/lgbt_laws/ [https://perma.cc/56PY-6Y3T].

²³ Press Release, Brunei Prime Minister’s Office (Mar. 30, 2019) <http://www.pmo.gov.bn/Lists/2019%20PMO%20News/NewDispForm.aspx?ID=79> [https://perma.cc/H6H6-7LDL].

²⁴ BRUNEI SYARIAH PENAL CODE ORDER, Part IV, Ch. 1, §§ 69, 82 (2013); Yvette Tan, *Brunei Implements Stoning to Death Under Anti-LGBT Laws*, BBC (Apr. 3, 2019), <https://www.bbc.com/news/world-asia-47769964> [https://perma.cc/A9S9-EZ3B].

²⁵ PAK. PENAL CODE, Act No. XLV of 1860, § 294 (Oct. 6, 1860); *see also* Mendos, *supra* note 13, at 16; Aengus Carroll & Lucas Ramón Mendos, *State-Sponsored Homophobia: A World Survey of Sexual Orientation Laws: Criminalization, Protection and Recognition*, INT’L LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASS’N 133 (May 2017), https://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf [https://perma.cc/C56X-P3NN]; *LGBTI Rights*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/discrimination/lgbt-rights/> [https://perma.cc/A5AV-FZ99] (last visited Sept. 24, 2019).

²⁶ Mendos, *supra* note 13, at 15–16; *LGBTI Rights*, *supra* note 26.

²⁷ U.N. DEV. PROGRAMME & U.S. AGENCY FOR INT’L DEV., BEING LGBT IN ASIA: CHINA COUNTRY REPORT 27 (2014) (“In China, stigma and discrimination are expressed in seemingly mild but pervasive ways, such as close surveillance of activities or behavior, and the rigorous disapproval of non-conforming sexual or gender practices from one’s parents, relatives, friends, colleagues and acquaintances.”).

²⁸ *Id.*

²⁹ Jeffrey Gettleman, Kai Schultz & Suhasini Raj, *Court in India Strikes Down Gay Sex Ban*, N.Y. TIMES, Sept. 7, 2018, at A1; *see also* Sushmita Pathak & Furkan Latif Khan, *India’s Anti-Gay Law Is History. Next Challenge: Treat LGBTQ Patients with Respect*, NPR (Sept. 17, 2018), <https://www.npr.org/sections/goatsandsoda/2018/09/17/645279722/indias-anti-gay-law-is-history-next-challenge-treat-lgbtq-patients-with-respect> [https://perma.cc/MHC4-SFFG] (describing the bias LGBTQ Indians face when trying to obtain healthcare); Annie Banerji, *Mind Your Own Business: Small Firms Opt Out as India Inc Races to be LGBT-Friendly*, REUTERS (Feb. 12, 2011), <https://www.reuters.com/article/us-india-lgbt-business/mind-your-own-business-small-firms-opt-out->

In Indonesia, public acceptance of LGBTQ individuals “is very low and has changed little over the past decade.”³⁰ Media coverage there remains generally negative.³¹ LGBTQ individuals are denied educational opportunities,³² employment opportunities,³³ and face physical, psychological, cultural and sexual violence.³⁴ Even in an advanced democracy like South Korea, there are no antidiscrimination laws in place to protect LGBTQ individuals, and efforts to implement such protections have repeatedly failed.³⁵

As a result of discrimination and marginalization, numerous API nations report increased rates of hate crimes and/or interpersonal violence against individuals identifying as LGBTQ—even where the government has technically decriminalized same-sex relationships or sexual activity. In 2018, India reported 218 hate crimes, eight of which were against individuals identifying as transgender.³⁶ In Fiji, a 2011 community-based survey funded by the United Nations Development Programme and conducted by the AIDS Task Force of Fiji found that LGBTQ individuals experience high rates of discrimination and violence.³⁷ Over 65% of individuals surveyed reported feeling unsafe expressing their sexuality, 30.3% of respondents reported being physically hurt in the prior six months, and 26.8% of respondents reported being sexually abused or assaulted.³⁸ These statistics are corroborated by media reports of LGBTQ individuals in Fiji who have been victims of physical violence on the island. In 2017 and 2018, there were a number of violent murders of LGBTQ individuals.³⁹ One activist group in Fiji said that, “despite

as-india-inc-races-to-be-lgbt-friendly-idUSKCN1Q113D [https://perma.cc/HLU4-WVUK] (explaining that homo- and transphobia remain common in small businesses in India).

³⁰ BADGETT, HASENBUSH & LUHUR, *supra* note 21, at 5.

³¹ *Id.* at 7.

³² *Id.* at 8–12.

³³ *Id.* at 13–16.

³⁴ *Id.* at 16–22.

³⁵ Timothy S. Rich & Isabel Eliassen, *What’s Behind South Korea’s Persistent LGBT Intolerance?*, THE DIPLOMAT (Mar. 19, 2019), <https://thediplomat.com/2019/03/whats-behind-south-koreas-persistent-lgbt-intolerance/> [https://perma.cc/B5AQ-SC7L] (noting that South Korea does not criminalize homosexuality, but has no nationwide anti-discrimination laws protecting LGBT individuals); *South Korea: Military ‘Sodomy’ Law Violates Rights*, HUMAN RIGHTS WATCH (Mar. 7, 2019), <https://www.hrw.org/news/2019/03/07/south-korea-military-sodomy-law-violates-rights> [https://perma.cc/7ARE-U2ZK] (arguing to end South Korea’s ban on same-sex sexual conduct between soldiers).

³⁶ *Over 200 Alleged Hate Crimes in 2018, Reveals ‘Halt the Hate’ Website*, AMNESTY INT’L INDIA (Mar. 5 2019), <https://amnesty.org.in/news-update/over-200-alleged-hate-crimes-in-2018-reveals-halt-the-hate-website/> [https://perma.cc/E7KB-7SE3].

³⁷ Ben Bavinton, Niraj Singh, Dipesh Shrinil Naiker, Marcus Navin Deo, Metuisela Talala, Moji Brown, Rishi Raj Singh, Sanjay Dewan & Simone Navokavokadrau, *Secret Lives, Other Voices: A Community-Based Study Exploring Male-to-Male Sex, Gender Identity and HIV Transmission Risk in Fiji*, AIDS TASK FORCE OF FIJI 9 (2011), https://www.aidsdatahub.org/sites/default/files/documents/Secret_Lives_Other_Voices__Research_Report3.3.pdf [https://perma.cc/B7MM-ZURS].

³⁸ *Id.*

³⁹ See e.g., Mendos, *supra* note 13, at 169 (reporting hate killing of transgender woman in July 2018); Liam Fox, *Murdered on International Day Against Transphobia: Fears Fiji Killing is a Hate Crime*, ABC NEWS (July 23, 2018), <https://www.abc.net.au/news/2018-07-23/trans-woman-murdered-in-fiji-in-suspected-hate-crime/10026188> [https://perma.cc/YS3H-ZX6F] (reporting murder by blunt force trauma of individual identifying as transgender); Tokada Rainima, *No Arrest Yet on Vesida*

constitutional protection for LGBT people [since 2013], the reality is that they still face high levels of violence, stigma, discrimination and even murder.”⁴⁰ In 2017, two gay men were physically assaulted in Fiji by teenagers, but did not report the assault to the police because they had “fear of reprisals from the people who allegedly attacked them.”⁴¹ The two men also refused to reveal their identities to the media because “they feared for their lives.”⁴²

Similar hate crimes have been reported against individuals identifying as transgender in Malaysia as well.⁴³ Further, there are many reports of state-sanctioned violence and discrimination against LGBTQ individuals who are found to violate Malaysian law. For example, the 2018 U.S. State Department *Malaysia 2018 Human Rights Report* includes reports from local advocates stating that “imprisoned transgender women served their sentences in prisons designated for men and that police and inmates often abused them verbally and sexually.”⁴⁴

State-sanctioned discrimination and violence against LGBTQ individuals in Indonesia is also prevalent. According to a 2014 report, police often fail to protect or intervene on behalf of LGBTQ individuals while police roundups often target, and potentially abuse, that population.⁴⁵ Law enforcement and militant groups in the country sometimes even work together to achieve these ends. For example, in late 2016, the Indonesian militant group Islamic Defenders Front, tipped off local police about an alleged sex party at a private home in Jakarta.⁴⁶ Police on the scene detained the individuals who were present. Just a few months later in May 2017, a similar raid also took place in Jakarta and almost 150 men were arrested.⁴⁷ LGBTQ

Murder, FBC NEWS (Oct. 12, 2017), <https://www.fbcnews.com.fj/news/no-arrests-yet-on-vesida-murder/> [<https://perma.cc/9HZA-9YMC>] (reporting mutilation and murder of student who identified as gay).

⁴⁰ Anamika Singh, *More LGBT People are Expressing Their Love Openly, However They are Also Being Targeted*, FIJIVILLAGE (Nov. 20, 2017), <https://fijivillage.com/news-feature/More-LGBT-people-are-expressing-their-love-openly-however-they-are-also-being-targeted-k9s25r/> [<https://perma.cc/997C-DS6S>].

⁴¹ Suva Shahani Mala, *Attack On Gay Men Condemned*, FIJI SUN (Feb. 7, 2017), <http://fijisun.com.fj/2017/02/07/attack-on-gay-men-condemned/> [<https://perma.cc/UXT5-E6YL>].

⁴² *Id.*

⁴³ Neela Ghosal & Thilaga Sulathireh, “*The Deceased Can’t Speak for Herself*” *Violence Against LGBT People in Malaysia*, GEO. J. OF INT’L AFF. (June 25, 2019).

⁴⁴ U.S. DEP’T OF STATE, MALAYSIA 2018 HUMAN RIGHTS REPORT 29 (2018) https://my.usembassy.gov/wp-content/uploads/sites/30/reports_malaysia_human_right_practices_2018_031819.pdf [<https://perma.cc/5CXY-LE75>].

⁴⁵ U.N. DEV. PROGRAMME & U.S. AGENCY FOR INT’L DEV., BEING LGBT IN ASIA: INDONESIA COUNTRY REPORT 8, 27 (2014) (explaining that LGBTQ individuals and activists in public space are sometimes arrested as “undesirable people,” then physically or sexually abused and extorted in exchange for their release).

⁴⁶ Kyle Knight, *Indonesian Militant Islamists, Police Raid Gay Gathering*, HUMAN RIGHTS WATCH (Nov. 29, 2016), <https://www.hrw.org/news/2016/11/29/indonesian-militant-islamists-police-raid-gay-gathering> [<https://perma.cc/GS56-K9J8>].

⁴⁷ Jon Emont, *Indonesia Police Arrest 141 Men Accused of Having Gay Sex Party*, N.Y. TIMES, May 23, 2017, at A7.

Cambodians also face documented discrimination as a result of laws giving police broad authority to enforce security and public order.⁴⁸

In the Philippines, in the first half of 2011 alone, at least 28 people were killed on the basis of identifying as LGBTQ.⁴⁹ Moreover, LGBTQ individuals in the Philippines report physical violence within their own families. A 2012 report highlighting different manifestations of violence against women in the LGBTQ community in the Philippines points to family-based violence as a form of physical abuse against this community:

Most of those interviewed said family members within a nuclear family unit, predominantly male members of family or clan, including fathers, brothers, uncles and stepfathers, had inflicted most of the physical violence. Most incidents of violence occurred immediately after a person voluntarily disclosed her sexual orientation and/or gender identity, was “outed” (a person’s sexual orientation or gender identity is revealed without the person’s knowledge or permission), or was suspected of being non-heteronormative.⁵⁰

The reported acts of violence in these API nations are not isolated incidents, and violence against LGBTQ individuals remains a real risk across API nations. The serious repercussions also decrease reporting—suggesting even higher rates of such violence actually occur.⁵¹ The situation is exacerbated by the fact that only two out of over 40 API nations (East Timor and Mongolia) have enacted legislation aimed at curbing violence motivated by sexual orientation.⁵²

In addition to criminalization and discrimination in society at large, the right to free expression and association is severely reduced in many API countries. In Indonesia, for example, broadcasting standards limiting LGBTQ expression on TV are justified as a means of “protecting children,” and factions in the country are seeking bans on LGBTQ-focused apps and websites.⁵³ In Pakistan, the media has

⁴⁸ U.N. DEV. PROGRAMME & U.S. AGENCY FOR INT’L DEV., BEING LGBT IN ASIA: CAMBODIA COUNTRY REPORT 8, 30–31 (2014) (describing police targeting of LGBTQ individuals in enforcing laws against prostitution, drug sales and use, gang membership, domestic violence, and more).

⁴⁹ U.N. DEV. PROGRAMME & U.S. AGENCY FOR INT’L DEV., BEING LGBT IN ASIA: THE PHILIPPINES COUNTRY REPORT 8 (2014).

⁵⁰ RAINBOW RIGHTS PROJECT, KWENTONG BEBOT: LIVED EXPERIENCES OF LESBIANS, BISEXUAL AND TRANSGENDER WOMEN IN THE PHILIPPINES 14 (2013), <https://outrightinternational.org/sites/default/files/PhilippinesCC.pdf> [<https://perma.cc/Z2VF-7H6V>].

⁵¹ See U.S. DEP’T OF STATE, LAOS 2018 HUMAN RIGHTS REPORT (2017) <https://www.ecoi.net/en/document/1430210.html> [<https://perma.cc/6Y72-2GUY>] (“[T]here were no reports of discrimination. . . . [O]bservers believed societal stigma and concern about repercussions led some to withhold reporting incidents of abuse.”); U.S. DEP’T OF STATE, MALDIVES 2018 HUMAN RIGHTS REPORT (2018) <https://www.ecoi.net/en/document/2004214.html> [<https://perma.cc/6VCC-XDJD>] (“There were no reports of officials complicit in abuses against LGBTI persons, although societal stigma likely discouraged individuals from reporting such problems. Local citizens who expressed support for LGBTI rights on social media reportedly were targeted for online harassment . . .”).

⁵² Mendos, *supra* note 13, at 259.

⁵³ Carroll & Mendos, *supra* note 26, at 41; BADGETT, HASENBUSH & LUHUR, *supra* note 21, at 8.

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

IV. THE DIGITAL AGE COMPOUNDS THE RISKS FOR “OUT” LGBTQ INDIVIDUALS UPON REMOVAL

The risk that LGBTQ API DACA recipients will face harassment, persecution, violence, and possible criminal prosecution by virtue of their sexual orientation and/or gender identity if DACA is rescinded and they are removed to their API country of birth is compounded in the modern digital era. Among the tens of thousands of LGBTQ DACA recipients, many are “out” in their communities or on social media—a decision undoubtedly guided by reliance on the continued expectation of DACA and the protections of this country. These young people will now be at higher risk of danger if they are removed to their countries of birth.

Many young people who identify as LGBTQ are open about their sexual orientation and/or gender identity in ways that are publicly accessible, such as through activism and social media. The average DACA recipient is currently 24 years old. More specifically, 29% of recipients are between the ages of 16 and 20 years old, and 37% are between the ages of 21 and 25 years old.⁵⁷ Social media use is almost ubiquitous within this age group: 90% of people between the ages of 18 and 29 years old report they use at least one social media platform.⁵⁸ These social media platforms are widely used amongst young people who identify as LGBTQ to convey their unique stories and to build community. In a survey of LGBTQ adults, 55% say they “have met new LGBTQ friends online” and 43% percent “have revealed their sexual and/or gender identity on a social networking site.”⁵⁹

⁵⁴ Carroll & Mendos, *supra* note 26, at 134.

⁵⁵ Cai Wilkinson, Paula Gerber, Baden Offord & Anthony J. Langolis, *LGBT Rights in Southeast Asia: One Step Forward, Two Steps Back?*, 3 IAFOR J. ASIAN STUD. 5, 13 (Summer 2017).

⁵⁶ *Id.* at 14.

⁵⁷ Gustavo López & Jens Manuel Krogstad, *Key Facts About Unauthorized Immigrants Enrolled in DACA*, PEW RESEARCH CTR. (Sep. 25, 2017), <http://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/> [https://perma.cc/QP75-T3G9].

⁵⁸ *Social Media Fact Sheet*, PEW RES. CTR., INTERNET & TECH. (June 12, 2019), <https://www.pewinternet.org/fact-sheet/social-media/> [https://perma.cc/JLG8-GX9F].

⁵⁹ *A Survey of LGBT Americans*, PEW RESEARCH CTR. SOC. & DEMOGRAPHIC TRENDS (June 13, 2013), <https://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans/> [https://perma.cc/UKA9-SSXU].

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

The risks to any LGBTQ individual, or any individual perceived to identify as LGBTQ, are significant and could be life threatening following removal to an API nation. For individuals who cannot put the “genie back in the bottle” of being openly LGBTQ, the rescission of DACA is quite likely to put them in even greater danger than they may have been in had DACA never been in place. This is a cruel and politicized result, and one which serves as the perfect embodiment of what the Court of Appeals deemed “the cruelty and wastefulness of deporting productive young people to countries with which they have no ties.”⁶⁰

⁶⁰ *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 486 (9th Cir. 2018).