

**In The United States Court of Appeals
for the Ninth Circuit**

STATE OF HAWAII; ISMAIL ELSHIKH; JOHN DOES, 1 & 2; MUSLIM ASS'N OF HAWAII,
INC.,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; U.S. DEP'T OF HOMELAND SECURITY; JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; U.S. DEP'T OF STATE; REX W. TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; UNITED STATES OF AMERICA,

Defendants-Appellants

On Appeal from the United States District Court
for the District of Hawaii
No. 17-cv-50 (DKW/KSC)

***Amicus Curiae* Brief of Immigration Equality, the New York City Gay and Lesbian Anti-Violence Project, The National Queer Asian Pacific Islander Alliance, the LGBT Bar Association of Los Angeles, the LGBT Bar Association of Greater New York, the Lesbian and Gay Bar Association of Chicago, GLBTQ Legal Advocates & Defenders, and Bay Area Lawyers for Individual Freedom in Support of Plaintiffs-Appellees**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(A) and Circuit Rule 26.1, *amicus curiae*, Immigration Equality, The New York City Gay And Lesbian Anti-Violence Project, The National Queer Asian Pacific Islander Alliance, The LGBT Bar Association of Los Angeles, The LGBT Bar Association of Greater New York, the Lesbian and Gay Bar Association of Chicago, GLBTQ Legal Advocates & Defenders, and Bay Area Lawyers for Individual Freedom (collectively, “*amici*”), make the following disclosures:

1. Each *Amici* is a non-profit organization that has no parent corporation.
2. No publicly-held corporation or other publicly-held entity owns any portion of any of the *amici*.
3. *Amici* are unaware of any publicly-held corporation or other publicly-held entity that has a direct financial interest in the outcome of this litigation.
4. This case does not arise out of a bankruptcy proceeding.

* * *

(signature appears on following page)

Dated: November 22, 2017

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STATEMENT OF INTEREST

This brief sets forth the legal and policy concerns of *Amici Curiae* Immigration Equality, The New York City Gay And Lesbian Anti-Violence Project, The National Queer Asian Pacific Islander Alliance, The LGBT Bar Association of Los Angeles, The LGBT Bar Association of Greater New York, the Lesbian and Gay Bar Association of Chicago, GLBTQ Legal Advocates & Defenders, and Bay Area Lawyers for Individual Freedom (collectively, “*Amici Curiae*”) regarding the President’s Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats (Sep. 24, 2017) (the “Proclamation” or “P.P.”).¹

Amici Curiae are organizations devoted to the promotion of equal treatment for LGBTQ individuals in the United States and around the world, including through organizing, education, counseling, direct legal representation, and advocacy. In particular, *Amici Curiae* believe that LGBTQ individuals are entitled to equal treatment in the immigration context and under the law in general.

¹ No party to the appeal, nor counsel for any party to the appeal, authored any part of this brief. No party or party’s counsel contributed money that was intended to fund preparing or submitting this brief. The parties have consented to the filing of this *amicus* brief.

Amici Curiae are deeply troubled by the impact that the Proclamation would have on LGBTQ people in the United States and in the eight countries from which the Proclamation would drastically restrict — if not effectively ban — immigration. Indeed, for all of its negative effects generally, the Proclamation will inflict unique harm on LGBTQ people in the eight target countries by foreclosing escape from the venomous, and often vicious, anti-LGBTQ conditions that prevail there. The proclamation will also affect LGBTQ Americans by blocking potential LGBTQ reunifications with loved ones in the eight countries.

The Proclamation is bad policy made worse because it assaults established United States legal principles and constitutionally protected rights. *Amici Curiae* respectfully urge the Court to affirm the District of Hawaii’s preliminary injunction in *Hawaii v. Trump*, No. 17-cv-50, 2017 WL 4639560 (D. Haw. Oct. 17, 2017), and avoid the significant, irreversible harms that the Proclamation would inflict while the litigation proceeds below.

SUMMARY OF ARGUMENT

Individuals who identify as lesbian, gay, bisexual, transgender and queer live, in many countries around the world, in persistent, grave danger. As of October 2016, homosexual conduct was still outlawed in more than 70 countries worldwide,

13 of which made such conduct punishable by death.² Some regimes deny the very existence of LGBTQ people, making it impossible for LGBTQ individuals to seek government protection from the severe persecution and violence to which they are routinely subjected.³

Like other immigrants, LGBTQ persons who already have family or partners living in the United States are eligible to apply for visas based on this family status. The process is long and difficult in the best of circumstances and the difficulty is only compounded by the Proclamation, which, if enforced, would halt visa processing from Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen (the “eight countries”). For LGBTQ individuals, this shutdown is not simply a bureaucratic inconvenience, but potentially a matter of life and death. A family-based visa delayed by the Proclamation is, in effect, a visa denied. Visa

² Aengus Carroll, *State-Sponsored Homophobia: A World Survey of Sexual Orientation Laws*, International Lesbian, Gay, Bisexual, Trans and Intersex Association, at 37-40 (12th ed. 2017), http://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf (“*World Survey*”).

³ See, e.g., Human Rights Watch, *We Are a Buried Generation* (Dec. 15, 2010), <https://www.hrw.org/report/2010/12/15/we-are-buried-generation/discrimination-and-violence-against-sexual-minorities> (“*Buried Generation*”) (recounting statement of Iran’s then-President Mahmoud Ahmadinejad in 2007 that “[i]n Iran we don’t have homosexuals like you do in your country. This does not exist in our country.”); Choe Sang-Hun, *North Korean Defector Opens Up About Long-Held Secret: His Homosexuality*, N.Y. Times (June 5, 2015), https://www.nytimes.com/2015/06/06/world/asia/north-korea-defector-jang-yeong-jin-gay.html?_r=0 (“*North Korean Defector*”).

approvals thwarted by the Proclamation mean LGBTQ individuals must remain in hostile and unsafe conditions indefinitely, delaying reunification with family members in safe communities. The danger is heightened because merely seeking visas from local consular officials, while citing a same-sex relationship as the basis for a waiver, reveals applicants' sexual orientations or gender identities to local communities and government officials. Moreover, because the Administration will only provide waivers to applicants with "formal" and "documented" close familial relationships, LGBTQ individuals — whose relationships are neither sanctioned nor documented by their countries of origin — stand to be disproportionately excluded from these waivers.

FACTUAL BACKGROUND

I. MANY LGBTQ INDIVIDUALS FACE PERSECUTION AND HOSTILE SOCIAL ENVIRONMENTS IN THEIR COUNTRIES OF ORIGIN, ESPECIALLY IN THE EIGHT COUNTRIES TARGETED IN THE PROCLAMATION

While the United States recently has made strides in advancing LGBTQ rights, including the right to form an officially-recognized family, the situation in many countries around the globe remains exceedingly grim. Even in countries where LGBTQ status is not considered a crime, LGBTQ individuals are still unable to forge family relationships due to severely anti-LGBTQ legal regimes.⁴

⁴ *World Survey*, *supra* n.2, at 26.

Consequently, for those seeking visas based on family or relationship status, documenting their LGBTQ status in their countries of origin leaves them exposed to persecution and violence, causing many visa-seekers to fear the consequences of providing documentation of their status for those visa applications.

The Proclamation, as drafted, would significantly impair, if not block, many LGBTQ individuals' chances at family unification, and dramatically increase the risk of harm to these applicants abroad. Seven of the eight countries targeted by the Proclamation explicitly criminalize homosexual conduct, with some of them authorizing or even mandating the death penalty for such offenses.⁵ And in each of these countries, LGBTQ individuals face societal and institutionalized homophobia, with many suffering persecution from multiple sources, including disapproving family members, government and police forces, and terrorist groups. The treatment of LGBTQ people in the eight countries — treatment to which the Proclamation would indefinitely consign LGBTQ family members — is detailed below:

Chad. On December 12, 2016, Chad's National Assembly approved a revision to the penal code that criminalizes same-sex relations, punishable by

⁵ *Id.* at 37-40.

imprisonment and a fine.⁶ In support of the new law, a former prime minister stated, “Homosexuality is condemned by all religions. We do not have to forgive something that God himself rejects because Westerners have said this or that.”⁷ As a result of this new law, LGBTQ people in Chad are now exposed to threats of criminal and civil prosecution by virtue of their sexual orientation or gender identity.

Iran. As the U.N. Human Rights Council has noted and condemned on multiple occasions, LGBTQ people in Iran consistently “face harassment, persecution, cruel punishment, and are denied basic human rights.”⁸ Iran criminalizes same-sex relations between consenting adults, and even mandates the death penalty for the “passive” male engaged in “sodomy” and for fourth-time

⁶ U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Chad* 23 (2016), <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dliid=265238>.

⁷ Glenn Garner, *Parliament of Chad Calls for Criminalization of Homosexuality*, Out Magazine (Dec. 16, 2016), <https://www.out.com/news-opinion/2016/12/16/parliament-chad-calls-criminalization-homosexuality>.

⁸ U.N. Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran* 20, U.N. Doc. A/HRC/22/56 (Feb. 28, 2013), http://www.ohchr.org/Documents/Countries/IR/A-HRC-22-56_en.pdf.

“lesbian” offenders.⁹ Authorities conduct many of these executions in public.¹⁰ Those who are not subject to the death penalty may nonetheless be punished by up to 100 lashes for engaging in same-sex relations.¹¹

LGBTQ people in Iran also face pervasive harassment, abuse, and violence “at the hands of private actors, including members of their family and society at large,” as well as “members of Iran’s police, security, and intelligence forces in public spaces.”¹² The Iranian Penal Code does not include hate crime laws or other criminal justice mechanisms to aid in the prosecution of bias-motivated crimes.¹³

Libya. Libya’s Penal Code criminalizes consensual same-sex sexual acts, which are punishable by up to five years in prison for both partners.¹⁴ “In the

⁹ Mission for Establishment of Human Rights in Iran, *Islamic Penal Code of Iran*, Part 2, Article 111; Part 3, Article 131, at 5, 7, http://mehr.org/Islamic_Penal_Code_of_Iran.pdf (“*Iran Penal Code*”).

¹⁰ U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Iran 3* (2016), <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dliid=265496> (“*Iran Country Report*”).

¹¹ *Iran Penal Code*, *supra* n.9, Part 2, Articles 112, 113; Part 3, Article 129, at 5-7.

¹² *Buried Generation*, *supra* n.3.

¹³ *Iran Country Report*, *supra* n.10, at 43-44.

¹⁴ Libya: Penal Code of 1953, as amended by Law 70 of October 2, 1973, Articles 407(4), 408(4).

Libyan society, to be gay [is] considered against Islam.”¹⁵ Indeed, in 2012, Libya’s representative to the U.N. proclaimed in a U.N. Human Rights Council meeting that “gays threaten the continuation of the human race.”¹⁶

Reflecting these social mores, official and societal persecution and violence against LGBTQ individuals in Libya are widespread, and no legislation exists to protect LGBTQ individuals against such mistreatment.¹⁷ In its 2016 report on human rights in Libya, the State Department noted several reports of physical violence, harassment, and blackmail based on sexual orientation and gender identity. “Militias often policed communities to enforce compliance with militia commanders’ understanding of ‘Islamic’ behavior, and harassed and threatened with impunity individuals believed to have LGBTI orientations and their

¹⁵ U.N. Human Rights Council, *Summary Prepared by the Office of the United Nations High Commissioner for Human Rights* (Feb. 23, 2015), http://www.ecoi.net/file_upload/1930_1453302677_g1503174.pdf.

¹⁶ Canada: Immigr. and Refugee Bd. of Canada, *Libya: Situation of sexual minorities, including legislation; treatment by society and authorities; state protection and available services (2011-July 2014)* (July 17, 2014), <http://www.refworld.org/docid/54ca12544.html> (“*Libya: Situation of Sexual Minorities*”).

¹⁷ See *id.*; U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Libya*, at 28 (2016), <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dliid=265510> (“*Libya’s Human Rights Practices*”).

families.”¹⁸ For example, in 2013, reports emerged that 12 men, believed to be homosexual, were detained and threatened with execution by an armed group seeking to enforce a strict form of Islamic Sharia law.¹⁹ Other individuals have reported being arrested and raped by Libyan police due to their sexual orientation.²⁰

North Korea. As Human Rights Watch has noted, “North Korea remains one of the most repressive authoritarian states in the world.”²¹ The coercive, intrusive atmosphere extends to nearly every aspect of North Koreans’ daily lives, including their sexuality and sexual orientation. As one North Korean refugee recently explained, the totalitarian government in North Korea “maintains that homosexuality does not exist because people there live with a ‘sound mentality and good morals.’”²² Consequently, homosexuality is not openly discussed in North Korea, and some individuals report that “no ordinary people conceptually

¹⁸ *Libya’s Human Rights Practices*, *supra* n.17, at 28.

¹⁹ United Kingdom: Foreign and Commonwealth Office, *Human Rights and Democracy: The 2012 Foreign & Commonwealth Office Report - Libya* 194 (Apr. 15, 2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408376/Cm_8593_Accessible_complete.pdf.

²⁰ *Libya: Situation of Sexual Minorities*, *supra* n.16.

²¹ Human Rights Watch, *World Report 2017: Events of 2016*, at 457, https://hrw.org/sites/default/files/world_report_download/wr2017-web.pdf (“*World Report 2017*”).

²² *North Korean Defector*, *supra* n.3.

understand what homosexuality is.”²³ Due to this ubiquitous government oppression, “[t]here are many homosexuals in North Korea who live a miserable life without even knowing why.”²⁴

Consistent with its totalitarian control over daily life, North Korea’s Criminal Code prohibits conduct that “reflects decadent, carnal or foul contents” as well as any “obscene activities.”²⁵ The government reportedly has executed LGBTQ individuals under these laws, noting that “[t]hey were badly influenced by capitalism . . . and brought corruption of public morals.”²⁶

North Korea’s government and state-controlled media openly condemn LGBTQ individuals, even in international affairs. For example, in responding to a United Nations investigation into human rights abuses in the country, the state news agency claimed that the “practice [of homosexuality] can never be found in

²³ *Id.*

²⁴ *Id.*

²⁵ Criminal Law of the Democratic People’s Republic of Korea (2009), Articles 194, 262.

²⁶ *North executes lesbians for being influenced by capitalism*, The Korea Times (Sept. 29, 2011), http://www.koreatimes.co.kr/www/news/nation/2011/09/182_95702.html.

the DPRK” and that it was “ridiculous for such gay [*sic*] to sponsor dealing with others’ human rights issue.”²⁷

Somalia. Homosexual conduct is outlawed in Somalia. In northern Somalia, where the Somalian Penal Code governs, homosexual intercourse is punishable by imprisonment from three months to three years.²⁸ In southern Somalia, under the control of militants, consensual same-sex sexual acts are punished by flogging or by death.²⁹

Somali society largely deems sexual orientation and gender identity to be taboo.³⁰ Thousands of LGBTQ individuals in Somalia keep their sexual orientation a “closely guarded secret,” knowing that revealing that information could attract potential retribution from terrorist groups or armed gangs.³¹ As one

²⁷ Nick Robins-Early, *North Korea Responds To Human Rights Report With Homophobic Statement*, HuffPost (Apr. 23, 2014), https://www.huffingtonpost.com/2014/04/23/north-korea-homophobia_n_5198717.html.

²⁸ Somalia: Penal Code, Legislative Decree No. 5/1962, Article 409.

²⁹ Amnesty Int’l, *Making Love a Crime, Criminalization of Same-Sex Conduct in Sub-Saharan Africa* (June 24, 2013), <https://www.amnestyusa.org/reports/making-love-a-crime-criminalization-of-same-sex-conduct-in-sub-saharan-africa>.

³⁰ U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Somalia*, at 38 (Mar. 3, 2017), <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dliid=265300>.

³¹ Catarina Stewart, *Young Somali activist sentenced to death for being a lesbian*, The Independent (Jan. 30, 2016), <http://www.independent.co.uk/>

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source described it, “LGBT people in Somalia are silent and invisible, often facing violence and rejection from their families and communities that results in honour killings and suicides.”³²

Violence against LGBTQ people in Somalia is rampant. For example, there have been reports of gangs of armed men searching the streets of Somalia for people suspected of being LGBTQ.³³ The U.N. Human Rights Council reported a 2013 incident in which a gay Somali 18-year-old teen was blindfolded, buried up to his waist, and then stoned to death for allegations of homosexuality.³⁴

Syria. The Syrian Penal Code prohibits “carnal relations against the order of nature,” and provides for at least three years’ imprisonment for violations.³⁵ Though the law does not specifically address LGBTQ activity, police have used

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news/world/Africa/young-somali-activist-sentenced-to-death-for-being-a-lesbian-a6844216.html.

³² Swedish Int’l Government Cooperation Agency, *The Rights of LGBTI People in Somalia*, at 1 (Nov. 2014), <http://www.sida.se/globalassets/sida/eng/partners/human-rights-based-approach/lgbti/rights-of-lgbt-persons-somalia.pdf>.

³³ *Id.*

³⁴ U.N. Human Rights Council, *Universal Periodic Review second cycle, Summary of stakeholders’ information*, at 3 (Nov. 6, 2015).

³⁵ Syria: Penal Code of 1949, Articles 517, 520.

this provision to persecute LGBTQ people.³⁶ Police also frequently target LGBTQ individuals by arresting them without basis on pretexts such as abusing social values; selling, buying, or consuming illegal drugs; and organizing and promoting “obscene” parties.³⁷

The State Department has recognized “overt societal discrimination based on sexual orientation and gender identity in all aspects of [Syrian] society.”³⁸ Syrian media has reported numerous examples of government and police forces using accusations of homosexuality as a pretext to detain, arrest, and torture LGBTQ people.³⁹

LGBTQ people in Syria also face extreme threats of violence at the hands of militant Islamist groups. NGOs have documented such violence, including against a fifteen-year-old boy who was stoned to death after he was accused of being gay.⁴⁰ According to Human Rights Watch, at least twenty-five Syrian men were murdered in 2016 by extremist groups “on suspicion of homosexuality or for

³⁶ U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Syria*, at 53 (Mar. 29, 2017), <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dliid=265520>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *World Report 2017*, *supra* n.21, at 575-76.

sodomy.”⁴¹ Amnesty International documented the execution of three men — one of whom was just seventeen years old — accused of homosexuality.⁴² A witness to the shooting described the horrific scene: “When I approached the crowd, I saw the body of the boy shot twice. . . . A man standing there told me that he was shot . . . in front of all the people because he was gay.”⁴³

Venezuela. In Venezuela, LGBTQ individuals “constantly live [in] situations of discrimination, threats and attacks against their moral, psychological [and] physical integrity, and still lack legal protection which makes them defenseless citizens in an atmosphere of alarming growth of homophobia and transphobia, as a result of the absence of laws, policies and institutions that guarantee equality in the exercise of fundamental rights and freedoms.”⁴⁴

According to a 2016 report, 175 hate crimes occurred on the basis of sexual

⁴¹ *Id.*

⁴² Amnesty Int’l, *Torture was my Punishment: Abductions, Torture and Summary Killings Under Armed Group Rule in Aleppo and Idleb, Syria*, at 28 (July 2016), <https://www.amnestyusa.org/reports/torture-was-my-punishment-abductions-torture-and-summary-killings-under-armed-group-rule-in-aleppo-and-idleb-syria/>.

⁴³ *Id.*

⁴⁴ Red LGBTI de Venezuela and Unión Afirmativa de Venezuela, *Report of the LGBTI Network of Venezuela to the United Nations Human Rights Committee on the Fourth Periodic Report of Venezuela concerning the International Covenant on Civil and Political Rights during the 114th Period of Sessions*, at 3 (May 2015), http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/VEN/INT_CCP R_CSS_VEN_20596_E.pdf (“*Venezuela Report*”).

orientation, gender identity and expression between January 2009 and May 2016.⁴⁵ Victims of these hate crimes frequently do not report incidents to the authorities, since they are often subjected to threats or extortion if they file formal complaints.⁴⁶ Perpetrators of these hate crimes often act with impunity since “no progress has been made to investigate and prosecute acts of violence against lesbian, gay, bisexual, trans and/or intersex people.”⁴⁷ Although only a narrow category of Venezuelan government officials is affected by the Proclamation, those individuals are no less affected by such threats to their personal safety. *See* P.P. § 2(f).

Yemen. “Yemen is a conservative Arab state where homosexuality is seen as taboo and is condemned under the country’s strong Islamic beliefs.”⁴⁸ Yemen’s Penal Code outlaws same-sex relations, with punishments ranging from 100 lashes

⁴⁵ Red LGBTI de Venezuela and Unión Afirmativa de Venezuela, *Universal Periodic Review- Venezuela (November, 2016) A summary on Lesbian, Gay, Bisexual Trans and Intersex (LGBTI) human rights issues in Venezuela and recommendations*, http://ilga.org/downloads/SUMMARY_VENEZUELA.pdf.

⁴⁶ U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Venezuela*, at 36 (2016), <https://www.state.gov/documents/organization/265834.pdf>.

⁴⁷ *Venezuela Report*, *supra* n.44, at 10.

⁴⁸ Int’l Refugee Rights Initiative, *Rights In Exile Programme, Yemen LGBTI Resources*, <http://www.refugeelegalaidinformation.org/yemen-lgbti-resources>.

to death by stoning.⁴⁹ Yemen's laws similarly do not protect against discrimination or hate crimes against LGBTQ individuals.⁵⁰ Quite the opposite. "[T]he most serious issue connected to the ban on homosexuality is that victims of hate crimes cannot seek help from the authorities."⁵¹

Because of the risk of criminal prosecution and severe punishment, as well as the societal condemnation they face, most LGBTQ individuals in Yemen are forced to live in hiding, and few LGBTQ people are open about their sexual orientation or gender identity.⁵²

⁴⁹ Int'l Labour Org., *Republican Decree for Law No 12 for the Year 1994 Concerning Crimes and Penalties*, Section 11, Article 264, <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/83557/92354/F1549605860/YEM83557.pdf>.

⁵⁰ U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Yemen*, at 44 (2016), <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dliid=265528> (“*Yemen Country Report*”).

⁵¹ Ben Gladstone, *For Yemen's gay community social media is a savior*, *The Irish Times* (Aug. 22, 2015), <http://www.irishtimes.com/news/world/middle-east/for-yemen-s-gay-community-social-media-is-a-saviour-1.2324447>.

⁵² *Yemen Country Report*, *supra* n.50, at 42-43.

ARGUMENT

I. THE UNIQUE HARDSHIPS IMPOSED ON LGBTQ POPULATIONS BY THE PROCLAMATION ARE CONTRARY TO U.S. LAW AND AGAINST THE PUBLIC INTEREST

A. Constitutional And Federal Law Emphasize The Importance Of Family Reunification And Marriage

The public interest in protecting family units, both LGBTQ and otherwise, is enshrined in constitutional law. As the Supreme Court has long recognized, the right to marry is fundamental. *See Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (“[T]he right ‘to marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.” (citation omitted)). In *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015), the Court made clear that these rights extend to LGBTQ people. 135 S. Ct. at 2604 (“The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”).

The right to marry regardless of sexual orientation inheres in all persons within the United States, not just U.S. citizens. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the right “to marry, establish a home and bring up children” is a central part of the liberty protected by the Due Process Clause); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“the Due Process Clause applies to all ‘persons’ within

the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent”).

The United States’ commitment to enabling families to live together is also embodied in its visa policies, which provide special allowances for family-sponsored visas. *See, e.g.*, 8 U.S.C. § 1153(a)(2) (allowing legal permanent residents to sponsor spouses, children, and unmarried sons or daughters). Members of the LGBTQ community may normally avail themselves of such family reunification visas to assist family members living abroad, including those suffering persecution in countries that discriminate against LGBTQ people. For example, LGBTQ individuals might apply for admission on a K-1 “fiancé(e)” visa, which allows the K-1 visa applicant’s sponsor in the United States to petition the government to bring the applicant to the United States to be married.⁵³

Immigration law must take family unity into account because “[p]ublic policy supports recognition and maintenance of a family unit.” *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) (“The Immigration and Nationality

⁵³ *See* U.S. Dep’t of State, Bureau of Consular Affairs, *Nonimmigrant Visa for a Fiancé(e) (K1)*, <https://travel.state.gov/content/visas/en/immigrate/family/fiance-k-1.html> (last visited Nov. 16, 2017); U.S. Citizenship and Immigration Services, *K-1 Process: Step by step*, <https://www.uscis.gov/family/k-1-process-step-step> (last visited Nov. 16, 2017). Once approved, the applicant must submit significant documentation, including proof to substantiate the applicant’s relationship with his or her fiancé(e) in the United States, to a U.S. Consulate or Embassy, participate in an in-person interview, and submit to a medical examination. *Id.*

Act ('INA') was intended to keep families together. It should be construed in favor of family units and the acceptance of responsibility by family members.”); *see also INS v. Errico*, 385 U.S. 214, 220 (1966) (“Congress felt that, in many circumstances, it was more important to unite families and preserve family ties than it was to enforce strictly the quota limitations or even the many restrictive sections that are designed to keep undesirable or harmful aliens out of the country.”).⁵⁴

Moreover, the value of family unification is an important limitation on deportation proceedings, wherein the Government is required to consider “humanitarian or public interest considerations,” including the “compelling humanitarian interest in keeping families united.” *United States v. Raya-Vaca*, 771 F.3d 1195, 1207-08 (9th Cir. 2014) (citing cases).

⁵⁴ Congress recognized in enacting and amending the INA that the immigration system is designed to preserve family units. *See* H.R. Rep. No. 85-1199, at 2 (1957) (the “legislative history of the [INA] clearly indicates that Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united.”); H.R. Rep. No. 1365, 82d Cong., 2d Sess., 29 (1952) (the INA implements “the underlying intention of our immigration laws regarding the preservation of the family unit”); *cf. Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977) (“[T]he legislative history of the provision at issue here establishes that congressional concern was directed at ‘the problem of keeping families of United States citizens and immigrants united.’ To accommodate this goal, Congress has accorded a special ‘preference status’ to certain aliens who share relationships with citizens or permanent resident aliens.”).

The United States has further recognized that the public interest includes consideration of LGBTQ families by its ratification of the International Covenant on Civil and Political Rights (“ICCPR”) in 1992. 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992).⁵⁵ Specifically, in ratifying the ICCPR, the United States recognized that its domestic law incorporates the fundamental precept that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” ICCPR, art. 23, § 1. That principle obligates the United States to recognize the right of a family to live together, and to adopt appropriate measures “to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.”⁵⁶

B. “Familial Relations” Should Be Construed Broadly To Give Equal Dignity To LGBTQ Families

In both the immigration context and throughout the law, policies protecting and valuing family reunification and “familial relations” should cover *all* families

⁵⁵ Even if the ICCPR is not a self-executing treaty, the United States declared that “U.S. law generally complies with the Covenant[.]” S. Exec. Report 102-23 (102d Cong., 2d Sess.). Ratified treaties — even without implementing legislation — remain the supreme law of the land. *See* U.S. Const. art. VI, cl. 2. Thus, the ICCPR may be a “useful guide” to interpret domestic law. *See Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009) (a treaty that does not have force of law nonetheless serves as a “useful guide” in interpreting other provisions of law) (citation omitted).

⁵⁶ Human Rights Committee, *General Comment No. 18, para. 6*, U.N. Doc. HRI/GEN/1Rev.1, at 26 (1994).

— including embracing kinship arrangements that, due to discriminatory legal barriers, cultural factors, or circumstance, do not fit the traditional nuclear family model. A narrow conception of “family” that is limited to immediate legal or genetic family, as is the case for the “close familial relationship” waivers under the Proclamation, *see* Section II *infra*, fails to account for the lived experiences of many LGBTQ families. Accordingly, a narrow construction of familial relationships would cause concrete harms for LGBTQ individuals by excluding from admission to the United States in-laws, extended family and others whose relationships are no less “close” or “bona fide” than traditional nuclear family members.

For instance, same-sex marriage and step-parent or joint adoption of children by same-sex couples are not permitted in any of the eight countries.⁵⁷ As a result, LGBTQ families in these countries may be made up of permanent partners, parents, and children who are not legally recognized as belonging to the same family.⁵⁸ Moreover, many LGBTQ people, disowned by immediate family because of their sexual or gender identity, are raised by grandparents or other extended family, or form their own supportive networks with legally unrelated people. Indeed, many

⁵⁷ *See World Survey, supra* n.3, at 68-77 (surveying countries that recognize marriage and adoption by same-sex couples).

⁵⁸ *See Obergefell*, 135 S. Ct. at 2595 (discussing the legal patchwork that precluded adopted children of LGBTQ families from claiming two legal parents).

LGBTQ people are forced to flee violence and oppression from their families of origin because of their sexual or gender identity. To the extent they have “traditional” family members in the United States, they may be unwilling or unable to draw upon those relationships.

In this country, too, non-nuclear families are increasingly common. As the Supreme Court noted seventeen years ago, “[t]he demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.” *Troxel v. Granville*, 530 U.S. 57, 63 (2000). The number of people living in multi-generational or skipped-generation families in the United States has doubled in recent decades.⁵⁹ Likewise, many LGBTQ individuals in the United States rely on “families of choice” or alternative family structures for the support that their biological families are unable or unwilling to provide.⁶⁰ The Supreme Court has acknowledged that such non-traditional families are no less worthy of protection.

⁵⁹ See Richard Fry & Jeffrey S. Passel, *In Post-Recession Era, Young Adults Drive Continuing Rise in Multi-Generational Living*, Pew Research Center (July 17, 2014), <http://www.pewsocialtrends.org/2014/07/17/in-post-recession-era-young-adults-drive-continuing-rise-in-multi-generational-living/> (“A record 57 million Americans . . . lived in multi-generational family households in 2012, double the number who lived in such households in 1980.”).

⁶⁰ See generally Soon Kyu Choi & Ilan H. Meyer, *LGBT Aging: A Review of Research Findings, Needs, and Policy Implications*, Los Angeles: The Williams Institute (Aug. 2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Aging-A-Review.pdf>.

“Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family.” *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977) (association with extended family members is constitutionally protected); *see also Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 545-46 (1987) (the Constitution “protects those relationships, including family relationships, that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life”) (citations omitted). In the immigration context, the reason for this flexibility is simple: the “humane purpose of the [INA] to reunite families would be frustrated” by an overly strict interpretation of who is considered a family member. *Kaliski v. Dist. Dir. of INS*, 620 F.2d 214, 217 (9th Cir. 1980) (father was not required to prove under the strict laws of his home country his relationship with his child born out of wedlock; the “purpose of the Act . . . is to prevent continued separation of families”).

As the District of Hawaii recently observed, “context matters” when defining familial relationships.⁶¹ Recognizing that families do not look the same everywhere, the UNHCR has advocated, with respect to family reunification, that

⁶¹ Order, *Hawaii v. Trump*, No. 1:17-cv-00050-DKW-KSC, 2017 WL 2989048, at 12 (D. Haw. July 13, 2017).

“[e]conomic and emotional ties should be given the same weight in reunification as relationships based on blood ties or legally sanctioned unions.”⁶² International humanitarian law supplies a context-sensitive approach, “recogniz[ing] that a family consists of those who consider themselves and are considered by each other to be part of the family, and who wish to live together.”⁶³

LGBTQ people come to the United States to achieve formal recognition and protection for their often unconventional families. A broad construction of “family” serves the public interest in family reunification and avoids perpetuating the policies that prevent LGBTQ people in the eight countries from realizing co-equal status in society.

II. THE PROCLAMATION CONTRAVENES U.S. LAW AND POLICY, WHICH ACCEPT LGBTQ INDIVIDUALS AS IMMIGRANTS

Many LGBTQ individuals apply for visas to permanently relocate to the United States, including the spouses, parents, children, and fiancés of U.S. citizens, residents, and asylees. The Proclamation shuts down visa processing for certain

⁶² Kate Jastram & Kathleen Newland, *Family unity and refugee protection*, Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection 586 (Erika Feller, *et al.* eds., 2003) (citing UNHCR, *Background Note: Family Reunification in the Context of Resettlement and Integration*, Annual Tripartite Consultations on Resettlement, Geneva 2 (June 2001)), <http://www.unhcr.org/419dbf664.html>.

⁶³ *Id.* at 585-86 (citing *Commentary to the Additional Protocols of the 1949 Geneva Conventions*).

visa applicants from the eight countries. P.P. § 2(c). While the Proclamation allows for certain case-by-case exceptions to the ban on issuing visas, including “to visit or reside with a close family member” in the case of “undue hardship,” the waiver provisions provide no indication — much less assurance — that LGBTQ visa applicants will be recognized as permitted to proceed under that narrow and perhaps illusory exception, as discussed *infra*. P.P. § 3(c)(iv)(D).

The public policy goal of family reunification would be thwarted if the Proclamation were to take effect, by preventing U.S. citizens and residents from sponsoring U.S. visa applications of LGBTQ family members located in the eight countries. The Proclamation would deprive those U.S.-based family members of the fundamental right to family reunification, the very policy the INA was designed to accomplish. *See Solis-Espinoza*, 401 F.3d at 1094.

For example, the Proclamation would impair U.S. citizens and residents whose fiancés or partners are located in the eight countries from exercising the fundamental right to marry, as their partners may be prohibited from obtaining a K-1 “fiancé(e)” visa to visit the United States. *See* P.P. § 3(c). That harm is exacerbated for same-sex couples because those individuals cannot travel to one of the eight countries to be married, as those countries do not recognize same-sex marriages. By the same token, U.S. children and family members of same-sex couples, unable to marry because they are stranded in one of the eight countries,

would be uniquely deprived of the ability to form a legally-recognized family, and thus would be forced to bear “the stigma of knowing their families are somehow lesser” because their families receive unequal treatment under the Proclamation. *See Obergefell*, 135 S. Ct. at 2600. The Proclamation would thus be an extension of the same context-blind immigration policies that have disparately impacted LGBTQ immigrants and their families.⁶⁴ Although same-sex couples can utilize immigration benefits previously available only to opposite-sex couples, other avenues for family reunification remain closed or only available after surmounting additional hurdles. For instance, proving a parent-child relationship is significantly complicated, if not impossible, for a *de facto* parent who by the law of her country of origin cannot adopt or gain legal custody of her child, or marry the child’s

⁶⁴ As the Supreme Court has recognized, the federal government until only very recently categorically discriminated against LGBTQ people in the immigration context by, among other things, making homosexuality grounds for inadmissibility and by refusing to recognize same-sex spouses. *See, e.g., Obergefell*, 135 S. Ct. at 2596 (noting that gays and lesbians have been “excluded under immigration laws”); *Boutilier v. INS*, 387 U.S. 118 (1967) (determining that the INA’s exclusion of aliens afflicted with “psychopathic personality” was intended by Congress to exclude homosexuals from admission); *Bassett v. Snyder*, 59 F. Supp. 3d 837, 849 (E.D. Mich. 2014) (“The federal government categorically discriminated against gays and lesbians in immigration until 1990, barring all gay and lesbian noncitizens from entering the United States. . . . And the [INA] labeled gay and lesbian people as mentally ill.” (citations omitted)).

biological parent.⁶⁵ And given that in-laws are a “clear” example of close family, *see Trump v. International Refugee Assistance Project*, ___ U.S. ___, 137 S. Ct. 2080, 2088 (2017), no same-sex couples in the eight targeted countries have legally recognized or documented in-law relationships, unless they were married in a country that recognizes their relationships.⁶⁶

The Proclamation indefinitely delays the ability of LGBTQ foreign nationals to leave the eight countries, even though some of these individuals could have strong cases to obtain visas by virtue of their familial relationships with U.S. citizens or residents. Moreover, if LGBTQ visa applicants in the eight countries are forced to wait an indefinite period of time for the visa process to resume, they will be waiting in hostile political and social environments. Each day the Proclamation suspends the processing of visa applications, deserving visa applicants will be exposed to the likelihood of violence — and the certainty of discrimination — in the eight countries.

⁶⁵ *See, e.g.*, 8 U.S.C. §§ 1101(b)(1), (c)(1) (defining “child” to include a genetic child, a stepchild by marriage, a child legitimated by law, or an adopted child in the adoptive parent’s legal custody).

⁶⁶ These examples illustrate how the Proclamation, even with waivers for “close family members,” is too narrow to protect LGBTQ individuals’ close family relationships.

III. THE PROCLAMATION’S WAIVER PROVISIONS FAIL TO MITIGATE THE HARMS THE PROCLAMATION INFLECTS ON LGBTQ INDIVIDUALS

The Proclamation’s waiver provisions for visa-seekers do little to mitigate the harms LGBTQ individuals would face if the Proclamation were allowed to go into effect. The Proclamation allows for waivers of the suspension on visa-issuance for individuals with a “close familial relationship” to someone living in the United States, including fiancés and immediate in-laws.⁶⁷

The notion that the Government will issue a significant number of waivers to LGBTQ individuals from the eight affected countries, however, begs credulity in light of the Administration’s determination that the waiver provisions may only apply to “close familial relationships” that are “formal” and “documented.”⁶⁸ As discussed above, LGBTQ individuals, whose familial relationships are often legally *unrecognized* in their countries of origin — and therefore are unlikely to be formal, much less documented — will suffer a disproportionate and unjustified restriction on their ability to qualify for visas under the terms of the Proclamation. Moreover, the Proclamation is sharply limited so as to preclude visa applications based on relationships with “extended” family members, even though that

⁶⁷ U.S. Dep’t of State, *Court Order on Presidential Proclamation on Visas* (Oct. 17, 2017), <https://travel.state.gov/content/travel/en/news/important-announcement.html>.

⁶⁸ *Id.*

definition perpetuates the outdated, context-blind definition of familial relationships that fails to effectuate, and here would undermine, the purposes of U.S. immigration law.⁶⁹ Thus, in contrast to similarly situated non-LGBTQ persons whose relationships are officially recognized in the eight affected countries, LGBTQ persons stand to be disproportionately excluded from the Proclamation’s waiver provisions.

Furthermore, waivers are unlikely to offer real protection even to those visa-applicants who can document a basis for the waiver. Neither the Proclamation nor the Administration has provided visa-seekers with meaningful guidance on the criteria that will be used in considering waiver applications. Instead, applicants are left with the cold comfort that a consular officer or Customs and Border Protection official “may, in their discretion, grant waivers on a case-by-case basis.” P.P. § 3(c). An applicant must prove to that official’s subjective satisfaction that “denying entry would cause [him or her] undue hardship,” that he or she “would not pose a threat to the national security or public safety of the United States” and that his or her “entry would be in the public interest.” P.P. § 3(c)(i). This vague language is insufficient, and could be easily abused, creating further uncertainty as to whether LGBTQ persons may obtain these waivers.

⁶⁹ *See supra*, Section I.B.

Moreover, the fact that the waiver provisions require LGBTQ individuals to reveal information about their sexual orientation or gender identity to consular officers, and possibly the consulate's staff (often consisting of foreign nationals), poses additional dangers beyond those typically faced by LGBTQ persons seeking to travel to the United States. The resulting chilling effect on LGBTQ persons' willingness to apply for admission to the United States would only compound their suffering in the eight countries — and the suffering of their American relatives here. The waiver provisions therefore do not diminish any of the special risks and dangers imposed by the Proclamation on LGBTQ people.

CONCLUSION

For all the reasons stated above, *Amici Curiae* respectfully request that this Court affirm the order of the District of Hawaii, enjoining the Government from enforcing the Proclamation.

(signature appears on following page)

Respectfully submitted,

s/ Matthew E. Sloan

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Matthew E. Sloan
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