

**No. 23-55430**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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*Plaintiffs/Appellants,*

v.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ET AL.,

*Defendants/Appellees.*

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On Appeal from the United States District Court for the Southern District of  
California, Case No. (Benitez, J.)

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**BRIEF OF *AMICI CURIAE* IMMIGRATION EQUALITY AND LAMBDA  
LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF  
APPELLANTS DAVID AND AND REVERSAL**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), the undersigned counsel certifies that Immigration Equality and Lambda Legal Defense and Education Fund, Inc. are nonprofit entities and that no parent corporation or other publicly held corporation owns 10% or more of their stock.

September 15, 2023

/s/ Amanda K. Rice  
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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

**Immigration Equality** is a leading national nonprofit that has provided free legal services for indigent LGBTQ and HIV-positive immigrants for over 28 years. Annually, Immigration Equality assists thousands of LGBTQ and HIV-positive non-citizens, actively manages more than 800 immigration cases through its nationwide pro bono program, and regularly appears in federal circuit courts as counsel or *amicus curiae*. Immigration Equality has also trained asylum officers and immigration judges on LGBTQ asylum claims.

**Lambda Legal Defense and Education Fund, Inc.** is the nation's oldest and largest legal organization whose mission is to achieve full recognition of the civil rights of LGBTQ people and everyone living with HIV through impact litigation, education, and public policy work. Lambda Legal has striven to ensure fairness for LGBTQ immigrants by serving as counsel of record or *amicus curiae* in litigation involving the rights of LGBTQ immigrants, and its work has helped shape immigration jurisprudence. *See, e.g., Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017) (en banc) (*amicus*); *Pitcherskaia v. I.N.S.*, 118 F.3d 641 (9th Cir. 1997) (counsel).

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<sup>1</sup> All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no entity or person, aside from *Amici*, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(2); Fed. R. App. P. 29(a)(4).

*Amici* thus have a deep interest in protecting the rights of LGBTQ immigrants and ensuring that immigration courts and the federal judiciary understand how to properly evaluate immigration matters related to sexual orientation and gender identity. This *amicus* brief serves those interests by providing critical context about marriages between partners of different sexual orientations and the experience of being outed to further the Court's understanding of the issues.

## INTRODUCTION

Couples decide to marry for all sorts of reasons and live their lives together in all sorts of ways. For that reason, there is no fixed formula for determining whether a marriage is bona fide. Bona fide marriages can be about money or convenience. They may lack intimacy, or even love. All that matters is that the couple intended to establish a life together, however that life might look.

For many people in the LGBTQ<sup>2</sup> community, the process of acknowledging and expressing one's sexual identity can take years. That process can be especially difficult in places like home country of Vietnam, where members of the LGBTQ community face discrimination and where marriages of same-sex couples are not legally recognized. It is therefore unsurprising that gay and lesbian people often decide to marry and establish lives with different-sex partners. According to one early study, over forty percent of self-identified gay and bisexual men reported being married to a different-sex partner at some point. And even now, over ten percent of LGBT adults report being married to a person of a different sex.

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<sup>2</sup> The umbrella term “LGBTQ” encompasses a variety of identities and personal experiences, and each LGBTQ person comes to their identity in a different way. The letters “LGB,” which stand for lesbian, gay, and bisexual, describe a person's sexual orientation—*i.e.*, the gender(s) to which a person is attracted. “T,” which stands for transgender, describes a person's gender identity—*i.e.*, a person's internal sense of gender. And “Q” means queer, an inclusive term that refers to the wide spectrum of non-cisgender and non-heterosexual identities that exist beyond LGBT.

There are many reasons why gay and lesbian people sometimes choose to marry different-sex partners. They may not yet understand their sexual orientation, they may desire to have children, they may wish to conform to cultural or familial expectations, or they may simply wish to “blend in.” For some people, these marriages can be satisfying and stable. More importantly, for the purposes of this appeal, they can be entered in good faith—like [redacted] and [redacted] marriage was here.

[redacted] married [redacted] because he wanted a life that was “as ‘normal’ as possible for the sake of [his] family’s reputation and recognition within [his] social circles.” ER-060. And he wanted to “start a family.” *Id.* The District Court was simply wrong to conclude that these “alternative reason[s] for marrying T.L.” were insufficient. ER-017. Moreover, the pleadings confirm that [redacted] and [redacted] did in fact establish a life together.

Instead of crediting the allegations in the pleadings, the District Court relied on statements signed by [redacted] and [redacted] after an immigration officer threatened to “out” [redacted] to [redacted]. But being “outed” involuntarily can cause LGBTQ people serious harm. And even the mere threat of being “outed”—particularly by an immigration officer—is seriously coercive. [redacted] and [redacted] statements, which were the product of that coercion, should therefore have been disregarded as unreliable—particularly at the pleading stage.

For these reasons, as well as those in the [redacted] Opening Brief, the decision

below should be reversed.

## ARGUMENT

### I. BONA FIDE, GOOD-FAITH MARRIAGES CAN TAKE MANY FORMS.

For the noncitizen spouse of a United States citizen to obtain lawful permanent residency, the “couple must maintain that they married out of a bona fide desire to establish a life together, and must not have entered the marriage to evade immigration laws.” *Zerezghi v. United States Citizenship & Immigr. Servs.*, 955 F.3d 802, 804 (9th Cir. 2020) (internal quotations omitted). In other words, the couple must have married “in good faith.” *Damon v. Ashcroft*, 360 F.3d 1084, 1088 (9th Cir. 2004).

“There is no set formula to be applied in determining whether a marriage was entered into in good faith.” *Id.* at 1088–89. The “central question,” however, “is whether [the couple] intended to establish a life together at the time they were married.” *Id.* In answering that question, a court must “confine [its] inquiry to evidence relevant to the parties’ intent at the time of marriage and refrain from imposing [its] own opinions about what a ‘real’ marriage is or should be or how parties in such a marriage should behave.” *Id.* at 1089; *see also Gazzan-Priaroggia v. Sessions*, 729 F. App’x 557, 558–59 (9th Cir. 2018) (similar); *Bark v. Immigr. & Naturalization Serv.*, 511 F.2d 1200, 1201 (9th Cir. 1975) (“The concept of establishing a life as marital partners contains no federal dictate about the kind of

life that the partners may choose to lead.”). After all, noncitizens “cannot be required to have more conventional or more successful marriages than citizens.” *Bark*, 511 F.2d at 1201–02. And citizens—like noncitizens—decide to marry for all sorts of reasons and live their lives together in all sorts of ways.

In *Bark*, for example, this Court reversed a Board of Immigration Appeals (“BIA”) decision denying adjustment of status where the couple “lived in separate quarters” and there was evidence that “the wife could and did leave as she pleased when they were together.” *Id.* at 1201–02. Those lifestyle choices, this Court emphasized, did not make their marriage any less bona fide. Indeed, “[a]ny attempt to regulate [partners’] life styles, such as prescribing the amount of time they must spend together, or designating the manner in which either partner elects to spend his or her time, in the guise of specifying the requirements of a bona fide marriage would raise serious constitutional questions.” *Id.* at 1201.

Likewise, in *Damon*, this Court concluded that a marriage was joined in good faith even though the couple initially “communicated using hand signs” because of a nearly total language barrier. 360 F.3d at 1086. The immigration judge had found it “implausible that . . . a woman with two children, would rush into marriage six days after returning from Korea to the United States with a man she hardly knew, and with whom she did not share a common language . . . .” *Id.* at 1089. But this Court “reject[ed] the implication that only those who share a common language and

background can form an intent to establish a life together.” *Id.* “Much of American culture,” it emphasized, “is itself the product of unions between people of different backgrounds . . . .” *Id.*

As these cases only begin to reflect, bona fide marriages do not always look like conventional love stories. A bona fide marriage may start loveless, *Matter of Peterson*, 12 I. & N. Dec. 663, 664 (BIA 1968), turn loveless, *Agyeman v. I.N.S.*, 296 F.3d 871, 885 (9th Cir. 2002), or end in divorce, *Damon*, 360 F.3d at 1086. Moreover, “[a]n intent to obtain something other than or in addition to love and companionship” from marriage “does not make a marriage a sham.” *United States v. Orellana-Blanco*, 294 F.3d 1143, 1151 (9th Cir. 2002). “[M]arriages for money,” for instance, are “hardly a novelty.” *Id.* And people marry for other reasons, too. Some bona fide marriages are born out of pity. *See Matter of Peterson*, 12 I. & N. Dec. at 664 (finding marriage bona fide where noncitizen married elderly United States citizen because “he had nobody, he was sick and she felt sorry for him”). Others are marriages of convenience. *See id.* at 665 (noting that United States citizen “needed a wife who also would be a housekeeper,” and that his noncitizen bride “agreed to become his wife and housekeeper”). And “marriages for green cards [can] be genuine” too, so long as the parties truly intended to establish a life together. *Orellana-Blanco*, 294 F.3d at 1151.

Notably, moreover, sex and other forms of physical intimacy are by no means

required. *Matter of M-----*, 7 I. & N. Dec. 601, 604 (BIA 1957) (“[I]t does not necessarily follow that a . . . marriage was not bona fide merely because the parties did not thereafter have sexual intercourse.”). Marriages can be bona fide even when the partners never “engage in normal marital relations.” *Matter of Peterson*, 12 I. & N. Dec. at 664. What matters is that the couple intended “to establish a life together,” *Orellana-Blanco*, 294 F.3d at 1151—regardless what that life looks like or how closely it conforms to conventional notions of marriage.

## **II. AND MARRIAGE WAS BONA FIDE NOTWITHSTANDING SEXUAL ORIENTATION.**

There are many reasons why partners with different sexual orientations, like and T.L., might intend to establish a life together. Like a straight couple, partners with different sexual orientations might marry “for money,” *Orellana-Blanco*, 294 F.3d at 1151; for companionship, *see Matter of Peterson*, 12 I. & N. Dec. at 664; or for convenience, *see id.* There are also other, more specific reasons why partners with different sexual orientations might chose to establish a life together—particularly when one or both partners comes from a place with high levels of stigma against LGBTQ people. And the pleadings here reflect that and did exactly that.



**A. Gay and Lesbian People Often Choose to Marry Different-Sex Partners.**

For members of the LGBTQ community, the process of self-identification can be complex and multifaceted. “[R]ealizing their sexual orientation . . . and sharing that information with family and friends is often a gradual process that can unfold over a series of years.” Pew Research Center, A SURVEY OF LGBT AMERICANS: ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES, *The Coming Out Experience*, at 44 (June 13, 2013), <https://www.pewresearch.org/social-trends/2013/06/13/chapter-3-the-coming-out-experience> (hereinafter “Pew Report”). And there is no “one” or “right” way for LGBTQ people to come to understand and express their sexual orientation. *See generally* Human Rights Campaign Foundation, COMING OUT: LIVING AUTHENTICALLY AS LESBIAN, GAY AND BISEXUAL+, at 10 (Oct. 2022), <https://www.hrc.org/resources/coming-out-living-authentically-as-lesbian-gay-and-bisexual>. Some LGBTQ people understand they are something other than straight but are not sure of their sexual orientation. *See* Pew Report at 48. Some become fully aware of their sexual orientation but choose to disclose it to only a trusted circle. *See id.* Others come out more broadly. *See id.* And of course, some LGBTQ people never come out at all. *See id.*

It can be especially difficult to understand, acknowledge, and disclose one’s sexual orientation in places where the LGBTQ community faces social stigma, discriminatory treatment, and even risks of physical harm. In much of the world, it

is not safe—much less socially acceptable—to publicly identify as LGBTQ. It is therefore unsurprising that, according to a 2019 study by the Yale School of Public Health, 83% of LGBTQ people around the world keep their orientation hidden from all or most of the people in their lives. See J.E. Pachankis JE & R. Bränström, HOW MANY SEXUAL MINORITIES ARE HIDDEN? PROJECTING THE SIZE OF THE GLOBAL CLOSET WITH IMPLICATIONS FOR POLICY AND PUBLIC HEALTH 6 (June 2019), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0218084>.

Even when gay and lesbian people understand their sexual orientation and choose to come out publicly, they may still be unable to enter into a marriage with someone of their same sex. Marriages of same-sex couples were not legally recognized in much of the United States until 2015. See *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (guaranteeing same-sex couples the right to marry); *id.* at 695 (Roberts, C.J., dissenting) (explaining that, before *Obergefell*, same-sex couples could marry legally in just sixteen states and in the District of Columbia). And even in states where they were legally recognized, they lacked federal protections until 2013. See *United States v. Windsor*, 570 U.S. 744, 775 (2013). Even today, marriages between same-sex couples are still not legally recognized in many places around the world. See generally HUMAN RIGHTS CAMPAIGN, MARRIAGE EQUALITY AROUND THE WORLD, <https://www.hrc.org/resources/marriage-equality-around-the-world> (last visited September 7, 2023).

Because of the complexities involved in coming to understand and publicly acknowledge their sexual orientations, gay and lesbian people frequently choose to marry and establish lives with different-sex partners—even in places where same-sex couples can marry. *See generally* J.L. Kays *et al.*, *Relationship Factors And Quality Among Mixed-Orientation Couples*, 40 J. OF SEX & MARITAL THERAPY 512 (2014) (discussing “mixed-orientation” marriages and studying a sample of mixed-orientation couples). According to one early study, “42% of . . . self-identified gay and bisexual men . . . reported being heterosexually married at one time.” *Id.* at 512 (citing J. Harry, *A probability sample of gay males*, 19 J. OF HOMOSEXUALITY 89 (1990)). And although research on this issue is “sparse,” more recent studies suggest that “there is a sizable number of [mixed-orientation couples] in the adult U.S. population.” *Id.*; *see also* Michelle Wolkowicz, *Making Heteronormative Reconciliations*, 23 GENDER & SOCIETY 494, 496 (2009) (estimating that “approximately 2 million [gay-straight] marriages exist in the United States”). Indeed, recent Gallup polls suggest that “different-sex and same-sex marriages are equally common among LGBT adults,” with 11% of LGBT adults reported as “married to a person of a different sex.” Jeffrey M. Jones, GALLUP, *LGBT Americans Married To Same-Sex Spouse Steady At 10%* (February 2022), <https://news.gallup.com/poll/389555/lgbt-americans-married-same-sex-spouse-steady.aspx>.

There are many reasons why gay and lesbian people might choose to enter marriages with different-sex partners: They may “desire to have children, to have a ‘normal’ life, to avoid rejection by family and friends, to deny a gay identity, and/or to potentially ‘cure’ homosexuality.” Wolkomir, *supra*, at 497 (citing a series of five prior studies); *see also id.* at 502 (finding that participants in new study likewise “sought normalcy, family, and acceptance”). In one “study of gay men who had been heterosexually married,” for example, participants “described their decisions as ‘[doing] what I thought was normal,’ ‘just expected. I didn’t feel there was a choice,’ ‘all I wanted was a family—to be normal,’ or ‘a cure . . . to avoid the shame of not being married.’” *Id.* at 497 (quoting Daryl Higgins, *Living with Contradictions: Experiences of Same-Sex Attracted Men Within Heterosexual Marriage*, *OUT IN THE ANTIPODES: AUSTRALIAN & NEW ZEALAND PERSPECTIVES ON GAY AND LESBIAN ISSUES IN PSYCHOLOGY* (D.W. Riggs & G.A. Walker, eds.)). In another study, “a gay heterosexually married man” explained it this way:

I was always the good kid—did the right thing and tried to fit in. You grow up, go to school, kiss the girl, marry and have kids. It was part of the same overall picture of the right thing to do. I wanted to do the right thing.

*Id.* at 502. And a “married lesbian” similarly “explained that her motivation was to ‘blend in, to maintain the status quo and try to be like everyone else’ because being gay was simply ‘too risky and embarrassing.’” *Id.*

Although mixed-orientation marriages (like other marriages) are sometimes

unhappy, that is not always true. See Kays, *supra*, at 513, 522–23 (concluding that a majority of mixed-orientation couples “are not highly satisfied” but that “a smaller portion” of those couples “experienc[e] good relationship satisfaction”); Wolkomir, *supra*, at 503 (“Most couples reported enjoying reasonably satisfying marriages for a period of time, ranging from just three to more than 50 years.”). Many mixed-orientation couples “buil[d] careers, raise[ ] children, and fe[el] that they ha[ve] established a life partnership” together. Wolkomir, *supra*, at 503. Many remain married even “after disclosure of the sexual-minority spouse’s same-sex attraction.” Kays, *supra*, at 513 (citing A.P. Buxton, *Works in progress: How mixed-orientation couples maintain their marriages after the wives come out*, 4 J. of BISEXUALITY 57 (2004)). And many “report having a highly satisfying and stable relationship.” *Id.* at 513, 522–23 (citing M.A. Yarhouse *et al.*, *Heterosexually married sexual minorities: A five-year follow-up study*, 17 FAMILY J. 329 (2009)).

Immigration Equality’s personal experience working with LGBTQ immigrants is consistent with those studies. Many gay and lesbian individuals whom Immigration Equality has represented in immigration proceedings are or were previously married to different-sex partners with whom they intended to establish a life. In some of those cases, those individuals did not understand their sexual orientation at the time they married their different-sex partner. In others, they were forced to enter into the marriage by their families. DM, for example, a lesbian

asylum seeker from Chad, was forced by her family to marry her male cousin. DM was in a secret relationship with a woman at the time. But she could not reveal her sexual orientation to her family, who threatened her with violence, and even death, if she did not go through with the marriage. Not surprisingly, she complied—and intended to establish a life with her male cousin to appease her family. More frequently, however, these individuals choose to enter different-sex marriages in part to hide their orientation or from a desire to conform to familial and societal expectations.

Sometimes, the spouse is fully aware of their partner’s sexual orientation prior to entering into the marriage. For example, Immigration Equality client KB, a gay man from Kyrgyzstan, entered into a different-sex marriage with FB, a female friend, for his safety and to appease his family. The couple first joked about getting married; KB was struggling with the pressures of being an unmarried man in his thirties in a traditional society, and FB was recovering from an emotionally painful breakup. But eventually, the couple decided that they wanted to establish a life together. FB was aware of KB’s sexual orientation, but believed that their marriage “held the key to solving certain challenges from [their] traditional society” and would “quiet the rumors/incessant nagging from [KB’s] family to settle down with a woman.” The couple came to the United States together and remain married. FB is a derivative on KB’s asylum application.

In other cases, the spouse is unaware of their partner's sexual orientation at the time they enter the marriage but learns about it later. For example, ZZ, an asylee from Myanmar, was caught being intimate with a man in Myanmar and severely beaten by his family, who accused him of rejecting Islam. His family then threatened to tell the police about ZZ's sexual orientation, knowing that the criminal penalty for sodomy carried up to 10 years in prison. Soon after the incident, ZZ's family arranged for him to be married to a woman. The threats and violence did not stop, however, and ZZ ultimately sought and was granted asylum in the United States. Although ZZ and his wife struggled because of ZZ's sexual orientation, they formed a life together and their union brought ZZ the "happiest moment of [his] life," including the birth of his son. After receiving asylum, ZZ filed an I-730, Asylee Relative Petition, for his wife, which was granted. She has since joined him in the United States. ZZ remains married and "deeply cares for his wife."

Despite the fact many of these unions in some ways do not resemble conventional marriages, they are nevertheless bona fide.<sup>3</sup>

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<sup>3</sup> In addition, a narrow view of who enters into different-sex marriages and why can also lead to the erasure of bisexual people, who are part of the LGBTQ community and may enter into different-sex relationships for a host of reasons, including love. "One of the most critical dangers of immigration boards uneducated about the valid existence of bisexuals is that if an individual seeking asylum on the basis of sexual orientation had previously been in an opposite-sex marriage, some officials might deem the subsequent same-sex relationship to be a sham." Nancy C. Marcus, *Bridging Bisexual Erasure in LGBT-Rights Discourse and Litigation*, 22 Mich. J. Gender & L. 291, 316 (2015). Simply put, being or having been married to

**B. and Marriage Was Bona Fide.**

During childhood and continuing through to the time he married T.L., Vietnam was a place where “[s]tigma and discrimination against LGBT people . . . [was] pervasive.” United Nations Development Programme and United States Agency for International Development, BEING LGBT IN ASIA: VIETNAM COUNTRY REPORT, at 38 (2014), <https://www.undp.org/vietnam/publications/being-lgbt-asia-viet-nam-country-report>) (hereinafter “Vietnam Country Report”). In 2000, the Vietnamese government passed the Marriage and Family Law, which formally banned marriages of same-sex couples. *See* The Marriage and Family Law 2000, Law No. 22/2000/QH1, art. 10 ¶ 5 (June 9, 2000). In 2002, Vietnam’s state-run media declared homosexuality a “social evil” and “called for the arrest of homosexual couples.” *See* Vietnam Country Report at 14. And “[a] study of online and print news articles from 2004, 2006, and 2008” showed that “the majority of journalists used stereotypical and discriminatory language to emphasize that homosexual activities are abnormal, seductive, and addictive.” *Id.* at 16–17.

Throughout this period, LGBTQ people in Vietnam were “often portrayed as hedonistic, self-indulgent, and immoral, and living dangerous and risky lives.” *Id.*

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a different-sex partner must not presumptively negate a person’s LGB status and the legitimacy of their immigration or asylum claim.



at 17. “Sensational media headlines often link[ed] homosexuality with promiscuity, infidelity, prostitution, and murder.” *Id.* And “[t]raditional perceptions of sex, sexuality and family” made many “families generally hostile to LGBT individuals.” *Id.* at 6. It is therefore unsurprising that, as recently as 2009—just one year before immigrated to the United States—only 2.5 percent of gay men in Vietnam came out completely, and only 5 percent were “mostly open.” *Id.* at 19.

Although the situation in Vietnam has undoubtedly improved since then, stigma against the LGBTQ community remains. And marriage between same-sex couples—though no longer criminalized—is still not afforded legal recognition or protections. See Simon Lewis, *Same-Sex Marriage Ban Lifted in Vietnam But a Year Later Discrimination Remains*, TIME (Jan. 18, 2016) <https://time.com/4184240/same-sex-gay-lgbt-marriage-ban-lifted-vietnam/>; EqualDex, *LGBT Rights in Vietnam*, <https://www.equaldex.com/region/vietnam> (last visited Sept. 7, 2023). It was not until 2022 that the Vietnamese Ministry of Health declared that being gay is not a mental illness or disease. Human Rights Watch, VIETNAM ADOPTS GLOBAL LGBT HEALTH STANDARD (Aug. 18, 2022), <https://www.hrw.org/news/2022/08/18/vietnam-adopts-global-lgbt-health-standard>. And as recently as 2020, social researchers in Vietnam reported that “youth are acutely aware of the pervasive belief that same-sex attraction is a diagnosable mental condition . . . .” Human Rights Watch, MY TEACHER SAID I HAD A DISEASE:

BARRIERS TO THE RIGHT TO EDUCATION FOR LGBT YOUTH IN VIETNAM, at 2 (February 12, 2020), <https://www.hrw.org/report/2020/02/13/my-teacher-said-i-had-disease/barriers-right-education-lgbt-youth-vietnam>.

In the face of this deep-rooted prejudice, LGBTQ individuals in Vietnam have long felt “intense pressure to conform to heteronormative expectations about maintaining the family.” *See* Human Rights Watch, MY TEACHER SAID I HAD A DISEASE. Couples are expected, for example, to reproduce and continue their family line, often causing other family members, and society at large, to view same-sex relationships as failures. *Id.* at 20. As a result, many in Vietnam’s LGBTQ community hide their sexual orientation for fear of “upsetting parents and being subjected to negative reactions from parents, families, friends, and colleagues.” *Id.* at 19. And marrying a different-sex partner can help conceal one’s sexual orientation and conform to social expectations.

It is easy to understand, then, why [redacted] did not come out as gay until long after he arrived in the United States and, instead, sought to establish a life with a female partner. ER-059–60. [redacted] knew that being gay was “unacceptable” in Vietnam and that his sexual orientation would “hurt” his family’s “reputation and social status.” ER-060. He worried that his family would punish and reject him if they found out he was gay. *See* ER-060. And he thought that finding a girlfriend in the United States was “the right thing to do to please [his] parents.” ER-060. When

married T.L., he believed his marriage “would make [him] straight and acceptable again,” ER-116, and help him “hide [his] sexuality,” ER-060. He wanted a life that was “as ‘normal’ as possible for the sake of [his] family’s reputation and recognition within [his] social circles.” ER-060. And he wanted to “start a family.” *Id.* Like many gay and lesbian people in mixed-orientation marriages, in other words, he “sought normalcy, family, and acceptance.” Wolkomir, *Making Heteronormative Reconciliations* at 502.

Those are perfectly valid reasons for two people to seek “to establish a life” together. *Damon*, 360 F.3d at 1088. And establish a life together is exactly what [redacted] and [redacted] proceeded to do. Indeed, the pleadings reflect that [redacted] and [redacted] shared a car and a family phone plan, that they comingled their finances, and that they traveled and spent time together. ER-121–22; ER-061; ER-153. Although their marriage in some ways did not resemble a conventional marriage, the immigration laws do not “dictate ... the kind of life that [two married] partners may choose to lead.” *Bark*, 511 F.2d at 1201. And courts may not “impos[e] [their] own opinions about what a ‘real’ marriage is or should be or how parties in such a marriage should behave.” *Damon*, 360 F.3d at 1089. Because [redacted] and [redacted] intended to establish a life together, they had a bona fide marriage deserving of respect. *See id.* at 1086–89.

### III. THE STATEMENTS ON WHICH THE DISTRICT COURT RELIED ARE INHERENTLY UNRELIABLE BECAUSE A THREAT TO “OUT” AN LGBTQ PERSON IS COERCIVE.

The only contrary indication in the pleadings are the statements and signed after the immigration officer threatened to “out” to his wife. But meeting with an immigration officer can be frightening and intimidating even in the best of circumstances. *See Ching v. Mayorkas*, 725 F.3d 1149, 1158 (9th Cir. 2013) (“An unexpected visit from government officers can be quite intimidating, particularly if the officials point out that having filed a fraudulent I-130 petition could result in a \$250,000 fine and imprisonment for up to five years.”). Where an officer threatens to “out” an LGBTQ immigrant, he crosses the line from intimidating to coercive. *Cf. Bong Youn Choy v. Barber*, 279 F.2d 642, 646 (9th Cir. 1960) (“Expulsion cannot turn upon utterances cudgeled from the alien by governmental authorities; statements made by the alien and used to achieve his deportation must be voluntarily given.”). And any resulting statement should be considered inherently unreliable.

For many people, it is “difficult to imagine a more private matter than one’s sexuality . . . .” *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000). Coming out “is a process” that can be made “difficult” because of “discrimination, homophobia, or potential marginalization from their families and community at large.” Arielle P. Schwartz, *Why Outing Can Be Deadly*, NAT’L LGBTQ TASK FORCE (Feb. 20, 2014), <https://www.thetaskforce.org/why-outing-can-be-deadly>.

And “the cost-benefit tradeoff [of coming out] varies from person to person.” Russell K. Robinson, *Masculinity As Prison: Sexual Identity, Race, and Incarceration*, 99 Cal. L. Rev. 1309, 1371 (2011). Accordingly, “many individuals, particularly those in . . . ethnically or religiously intolerant environments, prefer to remain in the closet.” Brad S. Weinstein, *A Right with No Remedy: Forced Disclosure of Sexual Orientation and Public “Outing” Under 42 U.S.C. § 1983*, 90 Cornell L. Rev. 811, 824 (2005). “A person who chooses to ‘stay in the closet’ might do so to feel safe, to preserve his privacy, or because he fears the ‘legal and societal consequences of exposure.’” Anne C. Hydorn, *Does the Constitutional Right to Privacy Protect Forced Disclosure of Sexual Orientation?*, 30 Hastings Const. L.Q. 237, 252 (2003) (internal quotations omitted).

When an LGBTQ person decides to come out, it can be “one of the biggest events in their lives.” David H. Pollack, *Forced Out Of The Closet: Sexual Orientation And The Legal Dilemma Of “Outing,”* 46 U. Miami L. Rev. 711, 721 (1992) (internal quotations and alterations omitted). And “[b]ecause of the potential psychological effects of disclosure of sexual orientation, it should ultimately be left to the individual to determine when and how to disclose such private information.” Hydorn, *supra*, at 252.

Even the “threat of forced disclosure” can be profoundly “distressing.” Weinstein, *supra*, at 824. “For many individuals, the threat of forced disclosure

means revealing and explaining a facet of life that they have worked very hard to conceal for many years.” *Id.* And they may experience profound “fear over the legal and societal consequences of exposure.” Katheleen Guzman, *About Outing: Public Discourse, Private Lives*, 73 Wash. U. L.Q. 1531, 1548 (1995). “[B]eing outed could result in alienation from cultural, religious, and familial relationships,” and a person facing outing “may fear their entire support system may vanish if their identity or orientation is revealed.” JBWS, HOW THE THREAT OF OUTING IMPACTS DOMESTIC VIOLENCE, <https://jbws.org/news/how-the-threat-of-outing-impacts-domestic-violence/> (last visited Aug. 30, 2023). “Given the[se] potentially drastic consequences,” outing or threatening to out an LGBTQ person “seem[s] ‘utterly intolerable in a civilized community.’” Guzman, *supra*, at 1592–93 (quoting Restatement (Second) of Torts § 46 cmt. d (1977)).

The tragic facts underlying the Third Circuit’s decision in *Sterling* underscore just how drastic those consequences can be. 232 F.3d at 196. *Sterling* involved an 18-year-old named Marcus Wayman who was arrested for underage drinking. *Id.* at 193. The police officer who made the arrest, however, suspected that Marcus was gay. *See id.* And he “warned [Marcus] that if [Marcus] did not inform his grandfather about his homosexuality that [the officer] would take it upon himself to disclose this information.” *Id.* “After hearing this statement, [Marcus] confided to his friend that he was going to kill himself.” *Id.* And “[u]pon his release from

custody, [Marcus] committed suicide in his home.” *Id.* Unsurprisingly, the Third Circuit affirmed the district court’s order denying summary judgment for the officer on qualified immunity grounds. “[T]he confidential and private nature of [Marcus’s sexual orientation] was obvious,” the Court reasoned, and therefore “the concomitant constitutional violation was apparent.” *Id.* at 198.

was put to a similar choice when an immigration officer threatened to out him to his wife, asking: “you want to tell her or should I tell her?” ER-061.

had concealed his sexual orientation from his family and from for many of the reasons gay people—particularly gay people from places where LGBTQ people are stigmatized and discriminated against—often do. *See supra* Part II. When the officer made that threat, “started to shake and feel embarrass[ed] and humiliated.” *Id.* He found it “hard to talk or say anything,” and he “mentally shut down.” *Id.* That is the context in which signed the statement on which the District Court relied. Now, that statement serves as the primary justification for denying the opportunity to obtain lawful permanent residency in the United States.

Because that statement was obtained under threat of outing, it is inherently unreliable. And unreliable statements should not serve as a basis for denying important rights and benefits. *See, e.g., Singh v. Cissna*, No. 18-cv-782, 2018 WL 4770737, at \*13 (E.D. Cal. Oct. 1, 2018) (denying motion to dismiss in part because

“Plaintiffs allege in their complaint that Ms. Williams was ‘intimidated’” and “coerced into making admissions of marriage fraud”); *cf. Bong Youn Choy*, 279 F.2d at 646 (“Expulsion cannot turn upon utterances cudged from the alien by governmental authorities; statements made by the alien and used to achieve his deportation must be voluntarily given.”); *United States v. McGowan*, 668 F.3d 601, 603, 606–08 (9th Cir. 2012) (holding that prison inmate’s uncorroborated statements were “insufficiently reliable to serve as a basis” for sentence imposed where there was no procedural mechanism to test their truthfulness). At the very least, at the motion-to-dismiss stage a court cannot dismiss a claim in reliance on the plaintiff’s prior statement where the plaintiff has made plausible allegations that that statement was false and obtained under duress. *See* Opening Br. 30–43, 62–73.

### **CONCLUSION**

The Court should reverse the district court’s order granting the government’s motion to dismiss.



September 15, 2023

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## CERTIFICATE OF COMPLIANCE

I certify, pursuant to Rules 29 and 32 of the Federal Rules of Appellate Procedure, that the attached brief contains 5,532 words and complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2016, in 14-point Times New Roman font.

September 15, 2023

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## CERTIFICATE OF SERVICE

I hereby certify that 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 on September 15, 2023. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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