No. 20-60530

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[redacted],
Petitioner

v.

WILLIAM S. BARR,
United States Attorney General,
Respondent

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF LOUISIANA AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for Amicus Curiae, certify that the following listed persons and entities as described in the fourth sentence of 5th Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. William S. Barr, U.S. Attorney General;

2. Petitioner, [redacted]

3. Counsel for Respondent, Katherine Ann Smith, U.S. Department of Justice, Office of Immigration Litigation;

4. Counsel for Petitioner, Virginia Marie Raymond, Ellen Bentley Hahn; and

5. Amicus Curiae the American Civil Liberties Union of Louisiana.

/s/ Kelly E. Brilleaux
Kelly E. Brilleaux
IRWIN FRITCHIE URQUHART & MOORE, LLC

Dated: September 24, 2020

CORPORATE DISCLOSURE STATEMENTS UNDER FRAP 26.1

I, Kelly E. Brilleaux, attorney for Amicus Curiae American Civil Liberties Union of Louisiana, certify that the American Civil Liberties Union of Louisiana is a non-profit organization that does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

DATED: September 24, 2020

/s/ Kelly E. Brilleaux

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IDENTIFICATION OF AMICUS CURIAE

The American Civil Liberties Union of Louisiana ("ACLU-LA") is a statewide, nonprofit, nonpartisan public-interest organization with more than 5,680 members dedicated to the principles of liberty and equality embodied in the U.S. Constitution and our nation's civil rights laws. In particular, ACLU-LA works to secure the rights of those whose lives are imperiled by discrimination—including immigrants whose sexual orientation is criminalized in their home countries. A core mission of ACLU-LA is to ensure that all persons in the U.S., including immigrants, are treated fairly and in accordance with the law. ACLU-LA strives for an America that upholds the rights enshrined in the Immigration Nationality Act ("INA"), which seeks to provide a safe haven in the U.S. for those experiencing persecution in their home countries. The proper resolution of this case is thus a matter of substantial interest to ACLU-LA and its members.

ACLU-LA proffers this brief to assist the Court in reviewing the decision by the Board of Immigration Appeals ("BIA" or the "Board") affirming the denial of Petitioner's application for asylum pursuant to the INA. ACLU-LA urges the Court to reverse the ruling of the Board and grant Petitioner's application for asylum.

RULE 29(A)(4)(E) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amicus certifies that no party's counsel offered this brief in whole or in part, no party and no person, other than amicus and its counsel, contributed money that was intended to fund preparing or submitting this brief.

DATED: September 24, 2020

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INTRODUCTION

In denying Petitioner [redacted] asylum application, the Immigration Judge ("IJ") and BIA contravened clear laws and recent precedent of the United States Supreme Court. [redacted] is a gay man from Ghana—a country where, if returned, he will face physical violence because of his sexual orientation and where same-sex relations are criminalized. The BIA decision, which affirmed the IJ's determination that he is not eligible for asylum, is wrong for two reasons.

First, [redacted] meets the definition of a "refugee" eligible for asylum under the INA. The statute defines a refugee as anyone unable to return to their country of origin because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Here, the IJ correctly acknowledged that [redacted] identity as a gay man fell within the scope of a social group—but erred in finding that the group was not defined with "particularity." At bottom, there is no question that Mr. [redacted] is a member of a "particular social group" within the meaning of the INA. Gay men are recognized as belonging to a "particular social group," and this finding has not been disturbed by this Circuit on previous review of BIA decisions. Moreover, this holding has been expressly upheld by five circuits—the First, Third, Eighth, Ninth, and Eleventh.

Further, based on the facts in the record, [redacted] faces a very real fear of future persecution in Ghana. This fear cannot be ignored. When he lived in Ghana, he was beaten with stones and batons by a vigilante group because he is gay. He was additionally threatened with both torture and death because of his sexual orientation. And, when [redacted] went to the police in his home country for help, he was threatened with arrest *because being gay in Ghana is a crime*. Indeed, facts nearly identical to these have been pled by Ghanaian refugees in sister circuits that have found it imperative to grant asylum. Against this backdrop, the IJ and the BIA erred in failing to find that [redacted] has an objectively reasonable fear of future persecution in Ghana because of his identity as a gay man.

Second, in light of recent Supreme Court case law and the law of this Circuit, [redacted] should not be denied asylum and forced to return to a country where his identity is criminalized. The laws still in effect in Ghana are of the type that the Supreme Court has denounced in recent years as "demeaning the existence" and "controlling the destiny" of gay men. [redacted] cannot "define and express" his identity in his home country. Because he "cannot," as this Circuit has held, "be forced to live in hiding in order to avoid prosecution," denying him asylum fell outside the bounds of the law.

This case presents the first opportunity this Circuit has had within the past five years—during which a number of seminal and related Supreme Court cases have

been decided—to review a petition for asylum from a gay man who would otherwise face the forced return to a home country where his *very identity* is criminalized. As this Court and other circuits have recognized, "the notion that one can live a full life while being forced to hide or suppress a core component of one's identity is an oxymoron." Yet this is exactly what [redacted] would be forced to do if returned to Ghana. This runs contrary to the language and purpose of our asylum laws.

Amicus accordingly urges this Court to reverse the ruling of the Board and grant [redacted]'s application for asylum.

ARGUMENT

I. [redacted] MEETS THE DEFINITION OF REFUGEE UNDER THE INA.

A gay man who can demonstrate a pattern and practice of intimidation and harassment against lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons *in a country where being gay is a crime* clearly meets the definition of "refugee" under the INA. ROA. 95. [redacted], who has faced this very persecution because of his sexual orientation, so qualifies. He should be granted asylum. The BIA erred in reaching the opposite conclusion—specifically in finding that [redacted]'s status as a gay man did not fall within the meaning of "particular social group." ROA. 95.

Under the INA, "any person who is physically present in the United States, irrespective of his immigration status, may be granted asylum if he is a refugee

within the meaning of the statute." *Gjetani v. Barr*, 968 F.3d 393, 396 (5th Cir. 2020); *Doe v. Att'y Gen. of the U.S.*, 956 F. 3d 135, 141 (3d Cir. 2020) (citing 8 U.S.C. § 1158(a)(1), (b)(1)). A refugee is defined as anyone who is unable or unwilling to return to their country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Gjetani,* 968 F.3d at 396; *Doe*, 956 F.3d at 141, (citing § 1101(a)(42)(A)).

This Circuit has interpreted the foregoing statutory language to mean that "asylum is available where 1) a person is 'unwilling to return to' their home country 'because of persecution *or* a well-founded fear of persecution'; and 2) the applicant has demonstrated that 'race, religion, nationality, membership in a particular social group, or political opinion was *or* will be at least one central reason for persecuting the applicant.'" *Cabrera v. Sessions*, 890 F.3d 153, 159 (5th Cir. 2018) (citing *Tamara–Gomez v. Gonzales*, 447 F.3d 343, 348 (5th Cir. 2006); 8 C.F.R. § 208.13(b)). Either a petitioner must prove that he "was persecuted in the past on account of one of the five statutory grounds *or* that she has a well-founded fear of being persecuted in the future because of one of those grounds." *Id*. (emphasis in original) (citing *Eduard v. Ashcroft*, 379 F.3d 182, 187–92 (5th Cir. 2004)).

In proving a well-founded fear of future persecution, as opposed to past persecution, a three-step analysis is required. *First*, the application must establish

that he is a member of a protected group. *Second*, he must show that his protected status is the cause of the harm he faces in his home country—*i.e.*, the "causal nexus." *Third*, he must prove that the harm he faces is a well-founded fear of persecution. *See generally* 8 U.S.C. § 1158(a)(1), (b)(1).

[redacted] satisfies each step of the analysis.

A. [redacted]–a Gay Man from Ghana–Is a Member of a "Particular Social Group" Under the INA.

The IJ[1] here correctly acknowledged that [redacted]'s identity as a member of the LGBTQ+ community was based on an immutable characteristic and was therefore a social group defined with social distinction. ROA. 95. But the IJ erred in finding that the group had not been defined with "particularity." ROA. 95. Indeed, this determination was inconsistent with both this Circuit's previous rulings and those of sister circuits that have expressly held the opposite.

A particular social group shares 'a common immutable characteristic that [members] either cannot change or should not be required to change because it is fundamental to their individual identities or consciences.'" *Morales-Duran v. Barr*, 770 Fed. App'x 200, 200-201 (5th Cir. 2019), quoting *Orellana-Monson v. Holder*, 685 F.3d 511, 518 (5th Cir. 2012). "In order to prove membership in a particular

[1] When the BIA summarily affirms the IJ's opinions, this Circuit reviews the factual findings and legal conclusions of the IJ. *Cabrera*, 890 F.3d at 158 (5th Cir. 2018), (citing *Sealed Petitioner v. Sealed Respondent*, 829 F.3d 379, 383 (5th Cir. 2016)).

social group, the BIA established—and this circuit accepted—a test that questions: "(1) 'whether the group's shared characteristic gives the members the requisite social visibility to make them readily identifiable in society' and (2) 'whether the group can be defined with sufficient particularity to delimit its membership.'" *Cabrera*, 890 F.3d at 162, (citing *Orellana–Monson*, 685 F.3d at 519 (quoting *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 69 (BIA 2007)); *see also Hernandez–De La Cruz v. Lynch*, 819 F.3d 784, 786 (5th Cir. 2016)).

To date, this Circuit has let stand on review a finding by the BIA that a gay man was a member of a particular social group under the INA. *Elizondo v. Lynch*, 652 Fed. App'x 308, 309 (5th Cir. 2016); *see also W.M.V.C. v. Barr*, 926 F.3d 202, 213 (5th Cir. 2019), *cert. denied*, 206 L. Ed. 2d 822 (Apr. 20, 2020). This case presents the Court with a ripe controversy to join the ranks of its First, Third, Eighth, Ninth, and Eleventh Circuit brethren in holding that the sexual orientation and identity of LGBTQ+ persons, like [redacted], is a cognizable basis for membership in a particular social group under the INA. *See Amanfi v. Ashcroft*, 328 F.3d 719, 730 (3d Cir. 2003) (holding that sexual orientation is a cognizable basis for "membership in a social group"); *Ayala v. Att'y Gen. U.S.*, 605 F.3d 941, 949 (11th Cir. 2010) (recognizing that gay men are a particular social group within the meaning of the INA); *Kadri v. Mukasey*, 543 F.3d 16, 21 (1st Cir. 2008) (holding "sexual orientation can serve as the foundation for a claim of persecution, as it is the

basis for inclusion in a particular social group"); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1117 (8th Cir. 2007) (recognizing that lesbians are members of a "particular social group" based on sexual orientation); *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1094 (9th Cir. 2000) (holding that transgender individuals may be classified into a "particular social group" based on their "sexual orientation and sexual identity"), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005).

In *Doe*, a Third Circuit case, the circumstances are nearly identical to those of the instant case. 956 F.3d at 139. Like [redacted], the petitioner there was a gay Ghanaian. *Id*.; ROA. 90. Also like [redacted], petitioner there was beaten and attacked for being gay. *Id*. at 139. Upon reviewing *Doe* petitioner's application, the circuit court held that the petitioner's "sexual orientation and identity as a gay man is enough to establish his membership in the lesbian, gay, bisexual transgender and intersex (LGBTI) community in Ghana, 'a particular social group' within the meaning of the INA." *Id*. at 142, (citing 8 U.S.C. § 1101(a)(42)(A)).

This decision is in keeping with the vast majority of circuits, which have found that—other than establishing that one is a member of the LGBTQ+ community—an asylum seeker need not further define the social group at issue with "particularity." *See Amanfi*, 328 F.3d at 730; *accord Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073 (9th Cir. 2017) (*en banc*) (affirming that "sexual orientation and sexual identity

can be the basis for establishing a particular social group"); *Ayala*, 605 F.3d at 949 ; *Kadri*, 543 F.3d at 21; *Nabulwala*, 481 F.3d at 1117; *Hernandez-Montiel*, 225 F.3d at 1094, *overruled on other grounds by Thomas*, 409 F.3d 1177.

[redacted] defined the social group to which he belonged with sufficient particularity. Indeed, the IJ and BIA never questioned the veracity of his sexual orientation and identity as a gay man. In keeping with the law of this Circuit and others, it is clear that, where the person seeking asylum is gay, as Mr. Muntaka is here, he is a member of a "particular social group."

B. [redacted] Has Established the Requisite Causal Nexus Between His Alleged Persecution and His Protected Status as a Gay Man.

Having established that [redacted] can demonstrate his membership in a "particular social group," the next element of the inquiry asks whether his fear of future persecution is "on account of" this statutorily protected ground. *See* 8 C.F.R. § 208.13(b)(2. To satisfy this element, [redacted] must prove that his protected ground for asylum is "at least one central reason" that he fears future persecution. *Martinez Manzanares v. Barr,* 925 F.3d 222, 227 (5th Cir. 2019) (citing 8 U.S.C. § 1158(b)(1)(B)(i)); *Revencu v. Sessions*, 895 F.3d 396, 402 (5th Cir. 2018)); *see also Cabrera v. Sessions*, 890 F.3d 153, 159 (5th Cir. 2018) (citing *Tamara-Gomez v. Gonzales*, 447 F.3d 343, 348 (5th Cir. 2006)). "The protected ground 'cannot be incidental, tangential, superficial, or subordinate to another reason for harm.'"

Martinez Manzanares, 925 F.3d at 227 (citing *Shaikh v. Holder*, 588 F.3d 861, 864 (5th Cir. 2009)).

Here, [redacted]'s identity as a gay man is not only "one central reason"—but *the central reason*—that he fears future persecution in Ghana. As an initial matter, there is no indication in the record that the feared persecution is due to anything other than [redacted]'s identity as a gay man.[2] There is no allegation, let alone any evidence, that the persecution feared by Petitioner is motivated by a "personal vendetta," "prior conduct," "desire for revenge" or some other reason unrelated to Petitioner's membership in a protected social group. *Compare Martinez Manzanares,* 925 F.3d at 227 (citing *Hernandez-Rivera v. Sessions*, 721 F. App'x 401, 402 (5th Cir. 2018) (per curiam) (agreeing applicant did not establish nexus when persecution was based on "revenge," not applicant's "former police officer" status); *Sanjaa v. Sessions*, 863 F.3d 1161, 1165 (9th Cir. 2017) ("The personal retribution [applicant] suffered . . . because of his role in the drug-trafficking investigation is not cognizable under the INA."); *Marin-Portillo v. Lynch*, 834 F.3d 99, 101 (1st Cir. 2016) (concluding no nexus when threats were motivated by "a personal dispute"); *Rodriguez-Leiva v. Holder*, 607 F. App'x 807, 810–11 (10th Cir.

[2] The IJ's opinion stated that "it was not even clear that persons who knocked on [Petitioner's] door . . . were seeking out the respondent due to his homosexuality as opposed to merely trying to recruit him to a criminal mob or for some *other unexplained reason*." ROA. 92 (emphasis added). Notably, the IJ's opinion does not cite to any evidence in support of this speculative conclusion.

2015) (concluding a witness to a murder "was targeted by criminals because he posed a threat to their interest in avoiding prosecution," not "on account of his social status"); *Costa v. Holder*, 733 F.3d 13, 17 (1st Cir. 2013) (concluding persecution based on a "personal vendetta" is "not due to . . . membership in a social group"); *Ayala v. Holder*, 640 F.3d 1095, 1098 (9th Cir. 2011) (per curiam) (concluding persecution based on prior arrest of a drug dealer "is not cognizable under the INA"); *Pavlyk v. Gonzales*, 469 F.3d 1082, 1088–89 (7th Cir. 2006) (concluding applicant cannot demonstrate nexus when "persecution stemmed from his conduct in [two] particular investigations")).

In contrast to the aforementioned cases, neither the IJ nor BIA here identified *a single piece of evidence* in support of the proposition that [redacted] fear of persecution stemmed from *anything other than* his identity as a gay man. In fact, Mr. [redacted] testified that he was previously persecuted and fears future persecution on the basis of his sexual orientation. *See generally* ROA. 159-163; ROA. 170-71; ROA. 179-182. The requisite causal nexus between [redacted] alleged persecution and his protected status is thus clearly met.

Nor is there evidence to support a finding that [redacted] is using his membership in a "particular social group" as an "incidental, tangential, superficial, or subordinate" basis for asylum. *Id.* at 227. The Third Circuit's decision in *Doe* is once again instructive. 956 F. 3d 135. There, the court found "no serious dispute"

that petitioner's feared persecution resulted from his "same-sex relationship since that is the only conduct that could have conceivably incriminated him under Ghanaian law." *Id.* at 142-43. So too here. Petitioner's way of life is criminalized under Ghanaian law; it is anything but an "incidental" basis for his asylum claim. It is the *central reason* he fears returning to his home country. The causal nexus requirement he needs to establish to qualify as a "refugee" has thus been met.

C. Ghana's Criminalization of Same-Sex Relations Establishes a Well-Founded Fear of Future Persecution.

The final element [redacted] needs to establish to qualify as a "refugee" under the INA is a "well-founded fear of future persecution." 8 U.S.C. § 1158(a)(1), (b)(1). An asylum seeker can demonstrate this by showing a pattern or practice of persecution against a particular social group of which he is a member. 8 C.F.R. § 208.13(b)(2)(iii). Under Fifth Circuit law, "[t]o show a well-founded fear of future persecution, [the applicant] must have subjective fear of persecution, and that fear must be objectively reasonable." *Cabrera v. Sessions*, 890 F.3d 153, 159 (5th Cir. 2018) (citing *Eduard v. Ashcroft*, 379 F.3d 182, 189 (5th Cir. 2004)). The term "persecution" has been defined by this Circuit as:

> The infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (*e.g.,* race, religion, political opinion, etc.), in a manner condemned by civilized governments. The harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage ***or the***

> ***deprivation of liberty***, food, housing, employment or other essentials of life.

Eduard v. Ashcroft, 379 F.3d 182, 187 (5th Cir. 2004) (quoting *Abdel–Masieh v. INS,* 73 F.3d 579, 583–84 (5th Cir. 1996) (emphasis added)). In sum, it is not necessary for an applicant to prove fear of physical harm or suffering; a well-founded fear of deprivation of liberty is sufficient to meet the standard set forth in the INA.

The test for establishing a well-founded fear of persecution is described in 8 C.F.R. § 208.13. The test requires that: (a) the applicant "has a fear of persecution" in his home country on account of one of the five statutorily protected grounds; (b) there is a "reasonable possibility of suffering such persecution" if the applicant were to return to that country; and (c) the applicant is "unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear." 8 C.F.R. § 208.13(b)(2)(i). The Fifth Circuit has expressly recognized that this standard is satisfied if the applicant establishes "that there is a pattern or practice of persecution" of the particular social group of which he is a member. *Cabrera*, 890 F.3d at 160 (citing 8 C.F.R. § 208.13(b)(2)(iii); *Zhao v. Gonzales*, 404 F.3d 295, 307 (5th Cir. 2005) ("There are therefore two different ways for the [petitioner] to prove the objectivity of his claim."); *Wakkary v. Holder*, 558 F.3d 1049, 1060 (9th Cir. 2009) ("In the asylum context, the INA's implementing regulations map out two routes by which an asylum-seeker cam show that the objective risk of future persecution is high enough to merit relief."); *Sugiarto v. Holder*, 586 F.3d 90, 97

(1st Cir. 2009) ("[A]n applicant need not provide evidence of a 'reasonable possibility' of being 'singled out individually for persecution' in the event that the applicant establishes a 'pattern or practice' in her country of persecution of 'a group of persons similarly situated to the applicant' on account of a protected ground.") (quoting 8 C.F.R. § 208.13(b)(2)(iii)(A)).

In the end, "[p]roving that fear is objectively reasonable . . . 'does not require an applicant to demonstrate that he *will* be persecuted in his native country; *rather the applicant must 'establish, to a "reasonable degree," that return to his country of origin would be intolerable.*'" *Cabrera*, 890 F.3d at 160 (citing *Eduard*, 379 F.3d at 189 (emphasis added) (quoting *Mikhael v. INS*, 115 F.3d 299, 305 (5th Cir. 1997) (emphasis added)); *see also*, *Zhao*, 404 F.3d at 307 ("This standard, however, does not require [the petitioner] to demonstrate that he will be persecuted on returning to [his country of nationality]. It requires a lesser showing . . . .").

Because same-sex relations are criminalized in Ghana, [redacted] has a subjective fear of persecution that is objectively reasonable. If returned, he would be unable to seek any meaningful recourse for the ongoing harassment, intimidation, and physical violence that would result from his identity as a gay man. *See, e.g.,* ROA. 257-59. This pattern and practice of harassment to which [redacted] would be subjected were he to return to Ghana would necessarily render that return

intolerable—a deprivation of his liberty. *See, e.g.,* ROA. 273-74; ROA. 392; ROA. 528-29, 544; *Cabrera*, 890 F.3d at 160.[3]

In *Abass v. Sessions*, the Ninth Circuit reached a similar conclusion in a factually analogous case. 731 F. App'x 646, 649 (9th Cir. 2018), *reh'g denied* (July 5, 2018). There, a gay Ghanaian male sought asylum based on a well-founded fear of future persecution tied to his sexual orientation. *Id.* In finding this fear objectively reasonable, the *Abass* court held that the record reflected "pervasively homophobic attitudes that often manifest in violence towards gay individuals and these attitudes show no signs of change"; "[t]here is also nothing to suggest that certain areas of Ghana are more hospitable to gay individuals or that the police in certain parts of Ghana do not partake in extortion of gay persons." *Id.* at 645. Further, in analyzing the applicant's claims pursuant to the Convention Against Torture (CAT), the Court noted the following findings specific to Ghana:

> Ghana is rife with "gross, flagrant or mass violations of human rights." 8 C.F.R. § 1208.16(c)(3)(iii). The newspaper articles in the record are filled with violent acts towards gay individuals. . . . The head of Ghanaian Commission on Human Rights and Administrative Justice stated that the organization "would not fight for gay rights because homosexuality is illegal." Finally, Amnesty International reported that "[h]uman rights abuses against individuals suspected of same-sex relations continue, as well as unlawful killings and excessive use of force by police and security officers."

[3] Amicus notes that, although not addressed in this Brief, Petitioner also presented evidence to the IJ establishing evidence of past persecution in addition to establishing a well-founded fear of future persecution. ROA. 694-700.

Id. at 651–52 (internal citations omitted).

Gay men returned to Ghana have an objectively reasonable fear of persecution. [redacted] is no different. Because his fear of returning to his home country stems directly from his membership in a particular social group, he has a well-founded fear of future persecution. He meets the definition of "refugee," and the IJ's and BIA's reasons finding otherwise fall flat.[4]

II. FORCING A GAY MAN TO RETURN TO A COUNTRY WHERE HIS IDENTITY IS CRIMINALIZED RUNS COUNTER TO THE PURPOSE OF OUR ASYLUM LAWS.

Recent decisions from the United States Supreme Court and federal circuit courts have consistently recognized that LGBTQ+ persons cannot be free when their very identity is criminalized. It follows that [redacted] freedom is *necessarily* threatened if he is forced to return to his home country, where same-sex relations are criminalized.

In recent years, particularly the past five, courts have recognized time and again that it is necessary to draw "upon principles of liberty and equality to define and protect the rights of gays and lesbians . . . ." *Obergefell v. Hodges*, 576 U.S.

[4] It bears little import that the IJ did not credit Petitioner's testimony that the police "did not take the report [of a violent attack on Petitioner] and told him to leave." ROA. 92. In determining whether a petitioner has a valid subjective fear, the IJ "may weigh the credible testimony along with other evidence of record." *See Cabrera*, 890 F.3d at 160 (citing 8 U.S.C. § 1158(b)(1)(B)(ii)). Here, the record is clear that Ghana is exceedingly hostile to gay men. The IJ's credibility determination about [redacted] police report is thus of no moment.

644, 651, 135 S. Ct. 2584, 2593, 192 L. Ed. 2d 609 (2015) (ruling that state statutes prohibiting same-sex couples from marrying were unconstitutional) (quoting *Lawrence v. Texas*, 539 U.S. 558, 578, 123 S. Ct. 2472, 2484, 156 L. Ed. 2d 508 (2003) (eliminating sodomy laws and recognizing that LGBTQ+ persons are entitled to constitutional protections for private, consensual, intimate conduct, free from government intervention)); *see also Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1754 (2020) (holding that "[a]n employer who fires an individual merely for being gay or transgender defies the law.").

But, in these past five years, this Court has not yet had an opportunity to directly address how the Supreme Court's LGBTQ+ jurisprudence impacts asylum cases. Nonetheless, it recently held that "[t]he case law is clear that an alien cannot be forced to live in hiding in order to avoid persecution." *Singh v. Sessions*, 898 F.3d 518, 522 (5th Cir. 2018) (emphasis added). But that is *precisely* what Mr. [redacted] would be forced to do were he to return to Ghana. He would be forced to live in hiding, unable to express his identity. This country's highest court has described such an existence as "demeaning" and "controlling the destiny" of LGBTQ+ persons such that they cannot "define and express their identity." "The notion that one can live a 'full life' while being forced to hide or suppress a core component of one's identity is an oxymoron." *Doe*, 956 F.3d at 154, (citing *Qiu v. Holder*, 611 F.3d 403, 409 (7th Cir. 2010)). Forcing an asylum seeker to abandon

or hide who he is, in the hope that such an existence will allow him to evade discovery, "runs contrary to the language and purpose of our asylum laws." *Qiu*, 611 F.3d at 409.

As the Third Circuit noted in *Doe*, Ghana in particular "deprives gay men such as Petitioner of any meaningful recourse to government protection." 956 F.3d at 147. In her concurrence in *Lawrence*, Justice O'Connor recognized that the purpose of laws criminalizing homosexual sex "is not just limited to the threat of prosecution or consequence of conviction . . . [the law] brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else. . . the law 'legally sanctions discrimination against [gay men and women] in a variety of ways unrelated to the criminal law' including in the areas of 'employment, family issues, and housing.'" *Lawrence*, 539 U.S. at 582 (quoting *State v. Morales*, 826 S.W.2d 201, 203 (Tex. App. 1992)). In other words, this impingement on freedom is not just philosophical, it extracts a tangible physical and mental toll.

A gay man like [redacted] who outs himself to Ghanaian police, or police in any country where same-sex relations are criminalized, opens himself up to arrest, prosecution, and incarceration—simply for being himself. *Doe*, 956 F.3d at 148. Further, studies have shown that LGBTQ+ persons who are compelled to conceal their sexual orientation and identity tend to report more frequent mental health

concerns than their openly gay counterparts and are also at risk for physical health problems.[5] Moreover, LGBTQ+ persons returning to a country where their very identity is criminalized find it nearly impossible to advocate for themselves and effect change within the political process; they have no means to beat back the institutionalized discrimination and prejudice against them, because doing so would be to risk their very lives. *See Abass*, 731 F. App'x at 649. Certainly, the strides made by LGBTQ+ people in the United States would have been untenable if LGBTQ+ persons throughout the nation had been forced to stay in the shadows. Yet this is the predicament Petitioner and others like him would be subject to in their home countries.

To force individuals like [redacted] to return to a country where their very sexual identity is illegal would be to slam the door on individuals fleeing a country where they have no safety and security. As this Court has already held, Petitioner

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[5] I.H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 Psychol. Bull. 674 (2003); G.M. Herek, *Why Tell If You're Not Asked? Self-Disclosure, Inter-group Contact, and Heterosexuals' Attitudes Toward Lesbians and Gay Men,* in *Out in Force: Sexual Orientation and the Military* 197, 211-12 (G.M. Herek et al. eds., 1996); S.W. Cole, *Social threat, personal identity, and physical health in closeted gay men, in Sexual orientation and mental health: Examining identity and development in lesbian, gay, and bisexual people*, 245-67 (A.M. Omoto & H.S. Kurtzman eds., 2006); E.D. Strachan et al., *Disclosure of HIV status and sexual orientation independently predicts increased absolute CD4 cell counts over time for psychiatric patients, Psychosomatic Medicine*, 69, 74-80 (2007); P.M. Ullrich, et. al., *Concealment of homosexual identity, social support and CD4 cell count among HIV-seropositive gay men, 54 J. of Psychosomatic Research* 205-212 (2003) as cited in Amicus Curiae Brief by American Psychological Association et al., *In re Marriage Cases*, Supreme Court of California, Case No. S147999, Sept. 26, 2007.

and similarly situated LGBTQ+ persons cannot be forced to "live in hiding" and conceal their identity in order to avoid persecution. Such a life is not (indeed, it cannot) be free. Amicus thus asks this Court to hold that the freedom of an LGBTQ+ person is necessarily threatened when, upon denial of asylum, the individual would be forced to return to a home country where same-sex relationships are criminalized.

CONCLUSION

The United States opens its doors to those who have a "well-founded fear of persecution" on account of race, religion, nationality, political opinion or membership in a particular social group. As a member of the LGBTQ+ community, [redacted] faces fear of future persecution—including the very real threat of intimidation, beatings, and death—in his home country of Ghana. For [redacted] return to his home country would be intolerable because his very identity is criminalized there.

For the foregoing reasons, [redacted] should be granted asylum.

Respectfully submitted,

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Dated: September 24, 2020

CERTIFICATE OF SERVICE

I, Kelly E. Brilleaux, hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on September 24, 2020. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE UNDER FED. R. APP. P. 32(G) AND 5TH CIR. R. 32.3

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