



# Living in Dual Shadows

## LGBT Undocumented Immigrants

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# Introduction and summary

When Pulitzer Prize-winning journalist José Antonio Vargas came out as undocumented in an essay published in *The New York Times* in the summer of 2011, he was “coming out” for the second time in his life.<sup>1</sup> The first time occurred when Vargas raised his hand in history class during his junior year of high school after watching a documentary on Harvey Milk—the first openly gay person to be elected to public office in California—and told his classmates and teacher that he was gay. And while we’ve known that there are thousands of people like Vargas who are undocumented and who also identify as lesbian, gay, bisexual, and transgender, or LGBT, we’ve known little about their actual numbers or demographic characteristics.<sup>2</sup>

In a first-of-its-kind analysis, the Williams Institute at UCLA—which researches sexual-orientation and gender-identity law and public policy—today estimates that there are at least 267,000 LGBT-identified individuals among the adult population of undocumented immigrants. Undocumented people who identify as LGBT are more likely to be male and younger; less likely to be Hispanic; and more likely to be Asian than the overall undocumented population.<sup>3</sup> And because LGBT undocumented people find themselves at the intersection of two already marginalized groups—the LGBT population and the undocumented population—they are among society’s most vulnerable individuals.

With this report, we build upon the Williams Institute’s demographic findings by first unpacking demographic characteristics of the population, and then detailing the disparities and hardships that make the LGBT-identified members of the undocumented population among the most vulnerable members of our society. These issues—including employment insecurities, wage and income disparities, and health inequities—would be significantly lessened if undocumented LGBT immigrants were given a chance to earn legal status and, eventually, citizenship. Passing an immigration reform bill with a direct road map to earned citizenship would lift these immigrants out of the shadows, treat them with the dignity that they deserve, and enable them to become full and equal participants in our society, economy, and democracy.

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Citizenship cannot solve all of the issues facing the LGBT undocumented community, however, and the second and third parts of this report deal with the specific challenges facing this population. We begin with the issues facing LGBT families, including the inability to sponsor a same-sex spouse or partner through family-based immigration preferences. This section details the emotional and economic pain of separation when family members are detained or deported. We then address the challenges that LGBT immigrants encounter when they come into contact with the immigration-enforcement system. Specifically, we examine how U.S. detention centers fail to provide an adequate level of safety and care to LGBT immigrants—including to those living with HIV—who are routinely mistreated, discriminated against, and denied health care while in detention. Finally, we look at the particular obstacles—legal and otherwise—facing LGBT asylum seekers in the United States.

To alleviate the burdens facing undocumented immigrants who identify as LGBT and their families, this report makes the following recommendations.

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#### Pass immigration reform, that:

**Includes a path to citizenship:** Legalizing the at least 267,000 undocumented immigrants in America who identify as LGBT and providing them with a roadmap to citizenship would give them the legal certainty that they will not be torn away from their families and communities, give them the ability to work legally and earn higher wages, and allow them to become full and equal members of society.

**Ends discrimination against binational same-sex couples:** Including the provisions of the Uniting American Families Act in immigration reform would finally give U.S. citizens and permanent residents in same-sex couples the ability to sponsor their loved one for family-based immigration. If passed, the law would not only extend sponsorship rights to U.S. citizens and residents with same-sex spouses but also to those with committed same-sex partners—which is important, considering that same-sex couples cannot marry in 41 states. For this reason, passage of the Uniting American Families Act will be necessary even if Congress or the courts repeal the Defense of Marriage Act, the discriminatory law that prevents these couples from accessing family-based immigration preferences that are afforded to all other couples.

**Fixes and protects family-based migration:** On top of ensuring that LGBT immigrants are included in family reunification, immigration reform must do more to fix and protect the family preference visa system. The more than 4 million people stuck on backlogs waiting for a family visa must be granted a quick and reasonable path to reunification. Potential fixes include the Reuniting Families Act, which would—among other things—recapture visas that are lost to bureaucratic delay by allowing unused visa slots from one year to carry over into the next, and raise the per-country limits that restrict any one sending country to only 7 percent of all yearly visas—thus treating Mexico and Luxembourg equally, as if they were equal in size and circumstance.<sup>4</sup>

**Grants young people access to education and citizenship:** Including the provisions of the DREAM Act in immigration reform would provide thousands of undocumented LGBT youth with an expedited roadmap to citizenship, giving them the ability to reach their full potential even sooner. Those who entered the United States prior to age 16 and are currently under the age 35 would be able to earn their citizenship by completing high school and some college or U.S. military service.

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## Repeal the federal Defense of Marriage Act

One of the many reasons that Congress and the Supreme Court need to repeal the Defense of Marriage Act is to ensure that the government treats all families equally under existing immigration law. Congress can and should swiftly pass the Respect for Marriage Act, which would legislatively repeal the Defense of Marriage Act. Alternatively, in *United States v. Windsor*—a case currently pending before the Supreme Court—the court could strike down the section of the law that denies federal benefits and protections to same-sex couples. The repeal of the Defense of Marriage Act would then allow the federal government to treat all families equally for the purpose of family-based immigration.

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## Modify detention and asylum standards to address the issues facing the LGBT-identified undocumented community

**Implement and vigorously enforce existing standards:** Over the past four years, the Department of Homeland Security has issued guidance, rules, and regulations that promote the safety and well-being of LGBT detainees. The department

has taken similar administrative actions to ensure that LGBT asylum seekers are treated with dignity and given a fair asylum hearing. While these policies are significant steps forward, the Obama administration must work to implement and enforce them in practice.

To reform detention standards, the administration should:

- Provide sensitivity training on a regular basis to detention staff working with LGBT detainees and create oversight to ensure compliance
- Ensure that detention staff understand their role in preventing, detecting, and responding to physical and sexual abuse of LGBT detainees
- Investigate allegations of abuse, discrimination, neglect, denial of medical services, and violence against detainees, including those who are LGBT
- Revoke the contracts of and funding for detention centers that fail to adequately implement and enforce these standards
- Provide increased access to legal services for people in detention, including those who are LGBT

**Pass the Detainee Basic Medical Care Act:** The Detainee Basic Medical Care Act would fill significant gaps in the detention health care system that have resulted in substandard medical treatment and even deaths among immigrant detainees. The proposed law contains a provision that requires immigration officials to ensure that immigrants continue to have access to medications prescribed prior to their detention, including those for transgender and HIV-positive detainees. This bill also gives immigration detainees with serious medical or health care conditions priority consideration for release on parole, on bond, or into an alternate to detention program, which again will benefit transgender and HIV-positive detainees. Third, and perhaps most importantly, by providing a basic floor of medical care to detainees, this proposal would help to address the significant health issues and inequities facing the LGBT undocumented population.<sup>5</sup>

**Expand the use of alternatives to detention:** To protect the most vulnerable detainees from mistreatment—particularly LGBT detainees—policymakers should consider alternatives to traditional detention such as house arrest or ankle monitors. These are common-sense cost-saving solutions that would advance the

twin goals of monitoring the undocumented and protecting the most vulnerable detainees from avoidable mistreatment. In fact, detentions cost taxpayers \$122 per day or more, while alternatives to detention can cost as little as \$12 per day, a savings that allows the detainee to remain with their family and in their community.<sup>6</sup>

Another alternative to traditional detention for LGBT detainees is to create special facilities that separate LGBT detainees from others in detention without placing them into administrative segregation. In 2012 the Department of Homeland Security created the country's first dedicated protective custody unit for LGBT detainees.<sup>7</sup> While creating new facilities for LGBT detainees is not optimal, it is better than putting them in solitary confinement or putting them in harm's way.

**End the one-year filing deadline for asylum seekers and ensure standards:** The one-year deadline to apply for asylum is arbitrary and has resulted in the denial of protections to thousands of otherwise legitimate asylum seekers. Because of the one-year ban, LGBT people are often forced to return to their home countries and risk persecution or death because of their sexual identity. Congress must repeal the one-year filing deadline and allow all people with a well-founded fear of persecution the right to asylum guaranteed by international law.

The Department of Homeland Security should also ensure that the training included in its LGBT refugee manual is implemented in practice. All too often asylees are at risk of having their cases dismissed if they do not conform to stereotypes about what it means to be a gay man or lesbian woman. All asylum adjudicators must ensure that they give each and every asylum seeker a fair hearing—one that is free of prejudice.

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