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## **Is *Windsor* the End of Discrimination? Establishing Fairness in Spousal Petitions to Immigrate in a Post-*Windsor* America**

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By Kelly Anderson\*

### INTRODUCTION

People no longer need to fear discrimination once they have been recognized as a legally protectable class. At least, that is what many believe. Just as people think that race and gender discrimination ended with the achievements of the civil rights and feminist movements of the 1960s, people inevitably think that LGBTQ<sup>1</sup> discrimination has ended or has at least subsided with the US Supreme Court's decision to recognize marriage between same-sex couples.<sup>2</sup> This is sadly not the case. This article will demonstrate that discrimination against LGBTQ couples continues even though the United States has decided to recognize same-sex marriages for determining eligibility for federal benefits.

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<sup>1</sup> "LGBTQ" is an acronym that refers to "lesbian, gay, bisexual, transgender, and/or queer" persons. The acronym recognizes that there are different terms for different sexual orientations, and that not everybody who identifies as other than heterosexual or "straight" prefers to be called "gay."

<sup>2</sup> Many think that discrimination against this class does not exist at all. Others think that it is not discrimination if the ridicule is "deserved."

This article advocates for the fundamental right to marry, to live with one's family, and to live with one's family where one chooses. It advocates for equal protection under the law. It advocates for ways to work toward ending discrimination against a group of people that has been marginalized for centuries—a type of discrimination that the United States has before confronted and has worked to resolve through legal protection of affected minority groups. The United States' ability to combat discrimination against minority groups provides a freedom that many people living in foreign countries desire. This article advocates for ways in which the United States may live up to its expectations of freedom by continuing to combat discrimination.

Many people, including those associated with the US government, are extremely skeptical about expanding immigration rights in the United States—a country whose policies may need to limit immigration rights because of the sheer volume of people who desire to immigrate.<sup>3</sup> However, by declaring section 7 of the Defense of Marriage Act (DOMA) unconstitutional, the decision in *United States v. Windsor*<sup>4</sup> necessarily expands a US citizen's or lawful permanent resident's (LPR) right to

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<sup>3</sup> See Trent R. Hightower, *Give Me Your Tired, Your Poor, Your Huddled Masses Yearning to Breath Free . . . As Long as They Have the Proper Visas: An Analysis of the Current State of United States Immigration Law, and Possible Changes on the Horizon*, 39 TEX. TECH. L. REV. 133, 134–136 (2000) (discussing changes from a US “open door” policy to more restriction and control of immigration over time).

<sup>4</sup> Windsor was the surviving spouse of her same-sex partner. She was denied a federal tax benefit because the definition of “spouse” under DOMA meant “only a person of the opposite sex who is a husband or wife,” Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (2013), thereby excluded same-sex marriages. See *United States v. Windsor*, 133 S.Ct. 2675, 2679 (2013).

petition for their spouse to immigrate to the United States.<sup>5</sup> Section 7 of DOMA defined a “spouse” as a person in a marriage of the opposite sex.<sup>6</sup>

Many individuals, organizations, groups, and communities fought long and hard to overcome the injustices that arose from DOMA’s definition of “spouse.” Even when a state allowed a same-sex couple to marry, the couple would not be recognized for most federal benefits that normally come along with marriage.<sup>7</sup> For example, before *Windsor*, a US citizen or LPR could not petition for their same-sex spouse to live permanently in the United States on the basis of that marriage because, under DOMA, the definition of a “spouse” excluded a person in a marriage with someone of the same sex.<sup>8</sup>

All of that has changed.<sup>9</sup> Post-*Windsor*, the State Department now processes petitions for same-sex couples in the same way that it processes petitions for opposite-sex couples.<sup>10</sup> It seems that the problem has been fixed. The government will now recognize same-sex marriages for federal benefits like it does opposite-sex couples.<sup>11</sup> There is no doubt that many applauded and cheered the day that *Windsor* was decided, as discrimination against same-sex couples came one step closer to “ending.”

However, just as discrimination against people who are black did not end with the abolition of slavery, discrimination against same-sex couples did

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<sup>5</sup> See *Windsor*, 133 S.Ct. at 2696 (“The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity”); see Daniel M. Kowalski, *Administration Issues Additional Guidance Following Supreme Court’s DOMA Ruling*, 18 BENDER’S IMMIGR. BULL. 985 (2013).

<sup>6</sup> DOMA, 1 U.S.C. § 7 (2013). The Immigration and Nationality Act (INA) does not define “spouse” explicitly, which is why the DOMA definition was used. See Immigration and Nationality Act (INA), 8 U.S.C. § 1101 (2013); see generally *Windsor*, 133 S.Ct. 2675.

<sup>7</sup> See, e.g., *Adams v. Howerton*, 673 F.2d 1036, 1043 (1982).

<sup>8</sup> See, e.g., *id.*

<sup>9</sup> See Kowalski, *supra* note 5.

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

not end with the abolition of DOMA. *Windsor* was an important step toward ending discrimination against same-sex couples. However, it may be a long time before the US government's policies and regulations are really in line with the anti-discriminatory policy that the *Windsor* decision appears to create. There are bound to be unexpected hurdles in implementing the decision in *Windsor*, and this article will discuss one in particular: the inability of same-sex couples to establish a genuine, bona fide relationship in the same way that opposite-sex couples are required to establish a bona fide relationship for immigration benefits.

It seems logical that the State Department would process applications for same-sex couples *in the same manner as those for opposite-sex couples*.<sup>12</sup> However, the oppression that same-sex couples have faced in the United States provokes questions about whether it is possible for the State Department to process applications in the same way as it has for opposite-sex couples. When applying for immigration status, couples must show proof that their marriage was not entered into to evade immigration laws, or in other words, that their marriage was not entered into only so that the foreign spouse may gain legal status in the United States.<sup>13</sup>

But because of discrimination, many same-sex couples do not have the opportunity to present the same kinds of proof of their bona fide relationships that has been required of opposite-sex couples. Often, same-sex couples have had to keep their relationships a secret, perhaps because the couple's peers do not approve, the couple have not been able to get married easily or are prohibited from getting married, the couple are not able to adopt children together, or the couple are unable to live together as a family.<sup>14</sup> Even if the laws are on their side, couples may fear that the people

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<sup>12</sup> *See id.*

<sup>13</sup> *See* INA, § 204(c).

<sup>14</sup> *See, e.g.,* Danielle Nelisse, *Is Same Sex Marriage Green Card Interview Different?*, IMMIGRATE TO AMERICA (Jul. 12, 2013), <http://immigrationworkvisa.wordpress.com/2013/07/12/samesexmarriagegreencard>.

around them will still discriminate against them. For example, someone might not apply for health care benefits for their same-sex spouse through their employer for fear that their employer will disapprove.<sup>15</sup> These problems and others like it are exacerbated when the beneficiary spouse comes from a country where homosexuality is stigmatized, illegal, or even criminalized.<sup>16</sup> The obstacles that same-sex couples face create a troubling problem for those who need to gather evidence to prove their bona fide relationships: there may not be any.

This article advocates for ways that the United States can build upon the decision in *Windsor* by considering the effect the decision has on same-sex couples seeking a particular immigration benefit: legal status of the foreign spouse. In the first section I will discuss the current US law on when and how the US government requires a couple to establish a bona fide relationship. The second section will discuss ways in which the immigration courts or the United States Citizenship and Immigration Services (USCIS) should consider changing their procedures and standards to address the problem that same-sex couples may face in proving a bona fide relationship. Further, I will examine laws from other countries that may be useful in considering how the United States may alleviate the burden that same-sex couples will face in proving their bona fide relationships. The third section discusses two other ways, albeit less plausible ways of proving a bona fide relationship that the United States may at least take into consideration. I finally conclude with an analysis of the options laid out, discussing feasibility and advocating specifically for a conditional residency period

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<sup>15</sup> Seth Wessler, *LGBT Immigrants Could Face Hard Road Applying for Marriage Visas*, COLOR LINES (Sept. 19, 2013, 7:00 AM), [http://colorlines.com/archives/2013/09/lgbt\\_immigrants\\_could\\_face\\_hard\\_road\\_in\\_applying\\_for\\_marriage-based\\_visas.html](http://colorlines.com/archives/2013/09/lgbt_immigrants_could_face_hard_road_in_applying_for_marriage-based_visas.html).

<sup>16</sup> According to several sources, there are at least 81 countries (and probably more) where homosexuality is actually criminalized. *81+ Countries Where Homosexuality is Illegal*, 76 CRIMES (Jul. 30, 2014, 8:10 AM), <http://76crimes.com/76-countries-where-homosexuality-is-illegal/> (citing a 2011 report by the International Lesbian, Gay, Bisexual, Trans, and Intersex Association on “State-Sponsored Homophobia”).

combined with a lowered standard of proof required for approval of a spousal immigration petition.

This article is not meant to be an exhaustive list of methods that the US government should look to for guidance. But the United States simply cannot stop at ruling DOMA unconstitutional if it is to continue to be a place where its citizens and noncitizens alike can trust that their fundamental rights and freedoms will be protected. The bottom line is that immigrants in same-sex marriages deserve to be on equal footing with immigrants in opposite-sex marriages when applying for immigration benefits.

## II. HOW DOES A COUPLE ESTABLISH A BONA FIDE RELATIONSHIP IN THE UNITED STATES?

The Immigration and Nationality Act (INA) governs immigration law in the United States.<sup>17</sup> A citizen or LPR<sup>18</sup> petitions to the USCIS for their alien<sup>19</sup> spouse to immigrate to the United States or to receive legal status in the United States if the alien is “undocumented.”<sup>20</sup> The petitioner files the I-130 form, which requires a number of accompanying documents to show

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<sup>17</sup> See generally INA, 8 U.S.C. § 1101–1524.

<sup>18</sup> The citizen or LPR, known as the “petitioner,” applies for legal status of their alien spouse, known as the “beneficiary.”

<sup>19</sup> Many people, including myself, argue that the term “alien” is derogatory, politically incorrect, and that it contributes to ongoing xenophobia within the United States. I unfortunately feel that I must use the term for clarity, as it is the term used in the law. An alien is “any person who is not a citizen or a national of the United States.” INA § 101(a)(2). While the INA definition of “alien” includes lawful permanent residents (i.e. “resident alien”), I use the term “alien” here to refer only to those who do not have legal status in the United States, in other words, anyone who is not a US citizen nor a lawful permanent resident, regardless of which country the alien lives in. Although I use the term “alien” slightly differently than the INA defines it, the term provides clarity because a word such as “foreigner” may be confusing to readers who may infer that a lawful permanent resident or a naturalized citizen is still a “foreigner.”

<sup>20</sup> See INA § 204; *I-130, Petition for Alien Relative*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Jul. 2, 2013), <http://www.uscis.gov/i-130>.

the validity of the marriage.<sup>21</sup> While the couple must show that the marriage itself is valid, the INA and immigration case law suggest that not every citizen or LPR who wishes to petition for their spouse must initially present proof that their relationship is bona fide.<sup>22</sup> But the USCIS will likely request an interview whereby the couple will have to explain their bona fide relationship, or the USCIS may request that the couple show more documentation than what they initially sent in with their application.<sup>23</sup> Nonetheless, every alien that seeks to receive the benefits of marriage to a US citizen or LPR should have the ability to demonstrate their relationship is bona fide in the case that the USCIS challenges the petition on grounds of possible marriage fraud.<sup>24</sup>

#### A. Who Must Show a Bona Fide Relationship?

There are many situations in which an alien may receive immigration benefits based on their marriage to a US citizen or LPR, including foreign spouses of US citizens or LPRs,<sup>25</sup> non-immigrant fiancés of US citizens,<sup>26</sup> and those applying for adjustment of immigrant status based on marriage to a US citizen or LPR.<sup>27</sup> In these situations, it is less likely that the couple will need to show proof of the bona fide relationship, but it is still possible

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<sup>21</sup> For more detailed information about the basic documentation required for submission of the I-130 petition, see discussion *infra* pp. 8–9; see also *I-130*, *supra* note 20.

<sup>22</sup> See, e.g., *Frango v. Gonzales*, 437 F.3d 726 (8th Cir. 2006) (where an I-130 petition was deemed to be prima facie proof of bona fide relationship for purposes of adjustment of status); see 1 CHARLES GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR, AND RONALD Y. WADA, *IMMIGRATION LAW AND PROCEDURE*, § 3-36 (Matthew Bender, Rev. Ed., 2014).

<sup>23</sup> See GORDON ET AL., *supra* note 22, at § 41.01; see *I-130*, *supra* note 20.

<sup>24</sup> See INA § 204(c).

<sup>25</sup> See *id.* at § 201(b)(2), § 203(a)(2)(A).

<sup>26</sup> However, a visa granted under this section is a “non-immigrant” visa. See *id.* at § 101(a)(15)(K).

<sup>27</sup> An alien who is living in the United States without lawful status applies to adjust status from “illegal” to “legal” when they marry a US citizen or LPR. See *id.* at § 245.

if the USCIS suspects fraud or requests further documentation of the bona fide relationship.

There are certain situations where the couple may be required to show further evidence that their relationship is bona fide simply because of the nature of their marriage. These include marriages that are less than two years old and are subject to the conditional residency requirement,<sup>28</sup> marriages where the petitioner or sponsor gained status through a prior marriage that is less than five years old,<sup>29</sup> and marriages where the couple filed a petition based on marriage during immigration proceedings.<sup>30</sup> A widow or widower of a US citizen,<sup>31</sup> and a self-petitioner<sup>32</sup> spouse of an abusive citizen or LPR may also be required to submit additional evidence of a bona fide relationship.<sup>33</sup> Often marriages in the above-mentioned situations are more suspect because of the likelihood that the two married simply for the beneficiary to gain legal immigration status—not because the marriage resulted from a bona fide relationship.

Regardless of the likelihood that the USCIS will request additional proof, if an alien is seeking to receive any type of legal status based on marriage to a US citizen or an LPR, the couple must be prepared to show that their relationship is genuine and bona fide.<sup>34</sup>

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<sup>28</sup> *See id.* at § 216.

<sup>29</sup> The couple will be subjected to a clear and convincing standard unless the prior marriage was terminated by death. *See* 8 C.F.R. § 204.2(a)(1)(i)(A)(2) (2011).

<sup>30</sup> In this case there would be a presumption of fraud and the burden of proof to qualify for a bona fide marriage exemption would be on the petitioner. *See id.* at § 204.2(a)(1)(3).

<sup>31</sup> The beneficiary will probably not have to prove that their relationship is bona fide as long as the couple were married for at least two years, the petition was filed within two years of the spouse's death, the couple were not legally separated at the time of death, and the beneficiary is not remarried at the time the petition is filed. *See id.* 8 C.F.R. § 204.2(b).

<sup>32</sup> In a spousal petition, the US citizen or LPR is the petitioner. However, those who fall under 8 C.F.R. 204.2(c) may petition for themselves, the assumption being that the abusive spouse is unwilling to petition for them. *See id.* at § 204.2(c).

<sup>33</sup> *Id.*

<sup>34</sup> For this reason, visas that are acquired through family members that are “accompanying” or “following to join” under section § 203(d) of the INA are not subject

*B. Current Law in the United States on Establishing a Bona Fide Relationship*

Clearly, the INA prohibits approval of immigration petitions in cases where couples enter into marriages to evade immigration laws.<sup>35</sup> In order for a petition to be approved, the marriage must be valid wherever it was performed, and any divorces must be complete and valid in the jurisdiction where the marriage occurred.<sup>36</sup> There is a strong presumption in favor of the validity of the marriage.<sup>37</sup> However, the INA does not specify the procedures that the petitioner must follow in order to show that the marriage is legitimate.<sup>38</sup> Instead, the INA gave this authority to the Attorney General of the United States, so the procedures are governed by specific Department of Justice regulations.<sup>39</sup> In general, upon application, the petitioner needs documentation establishing the petitioner's US citizenship or LPR status, a current photograph, certification of the marriage, and proof of termination of previous marriages to show the validity of the marriage.<sup>40</sup>

If, however, the USCIS requests additional proof that the relationship is bona fide or requests an interview, the couple must present additional documentation to show that the marriage is not a sham.<sup>41</sup> A US citizen or an LPR who petitions for legal status of their spouse must show the USCIS, by

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to the bona fide requirements because they are not immigrating to the United States based on marriage to a United States citizen. They immigrate based on the fact that their family member acquires a visa through some other means; therefore, so as long as they are legally married, they are probably not required to show that their relationship is bona fide. *See* INA, § 203(d), 8 U.S.C.A § 1101 (2013).

<sup>35</sup> Validity in this sense means that the marriage itself is lawful, not to be confused with a bona fide marriage, which is a genuine marriage entered into in good faith. *See id.* at § 204(c).

<sup>36</sup> *See* GORDON ET AL., *supra* note 22, at § 3–36.

<sup>37</sup> *See id.*

<sup>38</sup> *See id.*

<sup>39</sup> *See The Constitutionality of the INS Sham Marriage Investigation Policy*, 99 HARV. L. REV. 1238, 1241–42 (1986).

<sup>40</sup> *See generally* 8 C.F.R. §§ 204.1, 204.2 (2011).

<sup>41</sup> *See* GORDON ET AL., *supra* note 22, at § 3–36; *see* 8 C.F.R. § 204.2.

a preponderance of the evidence, that the relationship is bona fide.<sup>42</sup> But the standard may sometimes be higher in situations where the law presumes that the marriage may not be bona fide.<sup>43</sup>

The most common situation where the law requires the petitioner to meet a higher burden of proof is when the marriage took place while the alien was in deportation or removal proceedings.<sup>44</sup> Instead of a preponderance of the evidence standard, the petitioner in this situation must show that the relationship is bona fide by clear and convincing evidence.<sup>45</sup> A higher burden of proof is also required when the petitioner, whether an LPR or a citizen, acquired their status through a prior marriage that ended less than five years before the current petition was filed. If the couple do not wait until five years have passed since the end of the prior marriage, the petitioner must show by clear and convincing evidence that the *prior marriage* was not entered into in order to evade immigration laws.<sup>46</sup>

On appeal of an adverse decision by the USCIS, immigration judges use their individual discretion, and the critical consideration is whether the couple intended to establish a life together at the time they were married.<sup>47</sup> Documentation supporting a bona fide relationship includes, but is not limited to: proof of joint insurance policies, joint leases, joint income tax forms, joint bank accounts, and other comingling of financial resources; testimony regarding courtship and wedding ceremony; proof of shared residence; proof of shared experiences such as photographs, affidavits, birth certificates of children born into the marriage, and any other documentation

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<sup>42</sup> See, e.g., *Berrios v. Holder*, 502 Fed.App'x 100, 101 (2012) (citing *Matter of Laureano*, 19 I&N, 2, Dec. 1 (BIA 1983)).

<sup>43</sup> See, e.g., INA § 240, § 245(e)(3), § 204(g), 8 U.S.C.A § 1101 (2013).

<sup>44</sup> See *id.*

<sup>45</sup> See *id.*

<sup>46</sup> This requirement applies unless the prior marriage was terminated by death. See *id.* at § 204.

<sup>47</sup> See, e.g., *Matter of Laureano*, 19 I&N at 2; See GORDON ET AL., *supra* note 22, at §□3–36.

that is relevant to establish that the marriage was not entered into in order to evade immigration laws.<sup>48</sup>

### *C. Implications of Current US Law for Same-Sex Marriages*

While the law and regulations seem fairly straightforward when applied to opposite-sex couples, one can imagine how difficult it could be for a same-sex couple to prove their bona fide relationship based on the traditional forms of proof discussed above. If a same-sex couple have been hiding their relationship from friends and family who disapprove of homosexuality, it will not be easy for the couple to acquire affidavits from people that an adjudicator may deem credible because not many people will even know about their relationship. It will not be easy to present photographs of a hidden relationship because there may not be any. If the same-sex couple have been living in a country or state where homosexuality is illegal or criminalized, it will also not be easy for the couple to present documentation about shared assets, experiences, and residency because it may have been impossible for the couple to share those aspects of their lives. If the couple have been living in the United States but have been unable to get married because their state's laws prohibit same-sex marriage, it will not be easy for the couple to show that they have been sharing a life together before their eventual marriage. The couple may have to wait for years to build up proof before petitioning for legal status based on their marriage, and if so, the couple may risk missing deadlines or they may have to go through the extra difficult step of applying for a waiver.<sup>49</sup> Even if a

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<sup>48</sup> See, e.g., *Agyeman v. I.N.S.*, 296 F.3d 871 (9th Cir. 2002). There are no enumerated requirements for widows or widowers, and the requirements for self-petitioners by spouses of abusive citizens are slightly different. See 8 C.F.R. 204.2(b)–(c) (2011). However, the distinction is not too important as case law suggests that all of the enumerated types of proof are taken into consideration, no matter what the marriage situation. See, e.g., *Agyeman*, 296 F.3d at 872.

<sup>49</sup> Undocumented immigrants can sometimes qualify for waivers that would allow them to apply for status even though they have been in the United States unlawfully. For example, an undocumented immigrant may apply for a waiver if they been in the United

couple do not face any barriers in terms of presenting proof of a bona fide relationship, they may still feel discriminated against by the law or by people around them. Thus, they may choose not to be open about their sexuality or their relationship, which may result in not being able to take advantage of the benefits that marriage provides.

Because of these difficulties, the US government must rethink how a same-sex couple might establish their bona fide relationship or rethink how it considers the bona fide relationships of same-sex couples. Traditional forms of proof will likely be insufficient and extremely difficult for the couple to present. And if a couple has little or no proof, the preponderance of the evidence standard will be difficult or impossible to meet; the clear and convincing standard will be even harder.

Additionally, while discrimination against same-sex couples is an important reason for restructuring the way the government considers the bona fide status of marriages for immigration decisions, the US government may also have a strong immigration policy interest in the matter. The recent ruling invalidating section 7 of DOMA necessarily expands the number of people whom an alien would be able to marry if an alien does plan to marry solely in order to evade immigration laws. Therefore, the US government has a strong interest in looking at more efficient ways to apply immigration laws to same-sex couples, not only to provide equal protection, but also to continue to enforce the extremely important policy of preventing immigration fraud. If the United States does not adapt its immigration laws and regulations to account for the challenges faced by same-sex couples, the immigration system may deny petitions by legitimate same-sex spouses while accepting fraudulent petitions by, for example, people who marry close friends of the same sex with whom they have plenty of photographs

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States for a long period of time, have established family ties in the United States, and a US citizen family member, such as a spouse, demonstrates hardship if the alien returns to their home country. *See I-601, Application for Waiver of Grounds of Inadmissibility*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Jul. 2, 2013), <http://www.uscis.gov/i-601>.

and shared experiences. But if the United States does address the issue, then it may be able to respect the equal protection rights of same-sex couples while also protecting government interests of preventing immigration fraud.

The next two sections discuss some ways that the US government may alleviate the difficult, and in some cases impossible, burden that same-sex couples may have to overcome to prove their bona fide relationships.

## II. CHANGE THE PROCEDURES OF THE COURTS OR THE USCIS

Although the petitioner has the burden to prove that the relationship is genuine,<sup>50</sup> it is unfair for the government to ask same-sex couples to meet that burden in the same way that it requires opposite-sex couples to prove the burden. This is because the burden is almost always going to be harder on same-sex couples than it is for opposite-sex couples.

For example, in *Matter of Laureano*, two petitions from an opposite-sex couple for immediate relative status were denied because of the couple's failure to show that a bona fide relationship existed.<sup>51</sup> The couple tried to argue that the marriage certificate itself was sufficient proof that their relationship was bona fide, but the court rejected that argument and laid out other evidence that it would consider appropriate forms of proof.<sup>52</sup> The court presumed that, if the relationship was bona fide, the couple would have been able to present these forms of proof to the USCIS officer or immigration judge, and the petition may have been granted.

However, imagine if the couple in *Laureano* was a same-sex couple instead. They lacked proof not because their marriage was a fraud but because their relationship was hidden. Nevertheless, the same-sex couple is put in the exact same situation as the fraudulent opposite-sex couple, where the court held the couple did *not* have a bona fide relationship. It is unfair

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<sup>50</sup> See, e.g., *Berrios v. Holder*, 502 Fed. App'x 100, 101 (2nd Cir. 2012) (citing *Matter of Laureano*, 19 I&N, 2, Dec. 1 (BIA 1983)).

<sup>51</sup> *Laureano*, 19 I&N at 3–4.

<sup>52</sup> See *id.* For the forms of proof laid out, see *supra* Part I.B and note 48.

for the same-sex couple. The lack of proof does not come from the fact that their relationship is fraudulent, rather, the lack of proof comes from the historical discrimination<sup>53</sup> and scrutiny that they have faced that led them to hide their relationship, prevented them from being able to share assets,<sup>54</sup> or prevented them from being able to legally marry until recently.<sup>55</sup>

The immigration courts or the USCIS should therefore have the responsibility to change how they consider the bona fide status of same-sex couples. There are several things that either USCIS or the immigration courts<sup>56</sup> can do to alleviate the burden, including: (1) imposing a “conditional period” on same-sex couples; (2) giving more weight to same-sex couples’ testimony than they would otherwise; (3) lowering the standard of proof required; or (4) taking into consideration non-traditional forms of proof.

#### *A. Conditional Period for Same-Sex Couples*

One option for providing same-sex couples equal access to immigration benefits would be to impose a conditional period for same-sex couples, much like the conditional period already established by the Immigration Marriage Fraud Amendments (IMFA).<sup>57</sup> The IMFA provides that when a citizen or an LPR who has been married to an alien for less than two years

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<sup>53</sup> See, e.g., Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537, 586 (2010).

<sup>54</sup> See, e.g., *A Closer Look at the Marriage Equality Cases Before the United States Supreme Court*, 55 MAY ORANGE COUNTY LAW. 18, 20 (2013) (“each spouse is taxed individually by the IRS on his or her share of the community property owned by the couple, even though they are prohibited from filing joint tax returns.”).

<sup>55</sup> See *19 States with Legal Gay Marriage and 33 States with Same-Sex Marriage*, PROCON (Mar. 24 2014), <http://gaymarriage.procon.org/view.resource.php?resourceID=004857>.

<sup>56</sup> The USCIS reviews and either approves or denies the visa petition. If the decision is adverse to the petitioner, the petitioner can appeal it to the Board of Immigration Appeals (BIA). See 8 C.F.R. § 1003.1(b)(5) (2014).

<sup>57</sup> Section 216 of the INA incorporates these amendments. See Immigration and Nationality Act § 216, 8 U.S.C. § 1118 (2013).

wishes to sponsor their spouse for immigration purposes within those two years, the foreign spouse is subject to a conditional residency period of two years.<sup>58</sup> During the two years of conditional residency, the alien's residency status may be revoked if the government believes that the marriage is a sham used to evade immigration laws.<sup>59</sup> Moreover, three months prior to the couple's two-year anniversary of residing together in the United States, the couple must attend a hearing where they must show that their relationship is bona fide.<sup>60</sup>

Presuming that all or most same-sex couples would have a difficult time establishing their bona fide relationship, the law could impose a similar conditional period for all same-sex couples wishing to gain status, regardless of how soon after the marriage the petitioner applies. This may allow the couple to gather proof during the conditional period and later show evidence of their bona fide relationship. However, perhaps not all same-sex couples will have difficulty establishing their bona fide relationship. It may be preferable for the immigration courts or USCIS to use discretion to impose a conditional period only for those same-sex couples who are unable to meet the standard of proof in their case.

As an example, the USCIS may request that the same-sex couple have an interview with a USCIS officer to determine whether the relationship is genuine. The couple does not have to offer any proof, but must testify as to their relationship's genuineness. Under the current rules, the examiner would likely decide that their testimony is insufficient because they lack other forms of proof, and that their testimony alone does not meet the preponderance of the evidence standard. Under the proposed rule, instead of denying the petition, the officer could give the beneficiary a conditional residency period as described above, recognizing that the same-sex couple does not have the same opportunity to present proof as an opposite-sex

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<sup>58</sup> See 8 C.F.R. § 216; see Immigration and Nationality Act § 216.

<sup>59</sup> See *id.*

<sup>60</sup> See *id.*

couple would have. Imposing a conditional period would *theoretically* give the couple time to gather documentation in the United States to affirmatively prove to the court that their relationship is genuine.

I say “theoretically” because proving a bona fide relationship still might be difficult. For example, the couple may still intend to keep their relationship a secret. In that case, affidavits, or at least credible affidavits from close family and friends, would be difficult or impossible to obtain. As another example, the couple might move to a state where same-sex marriage or same-sex domestic partnerships are prohibited,<sup>61</sup> in which case the couple still might not be able to gather relevant documentation. For example, obtaining shared tax or financial documentation or shared correspondence at their address might be difficult. However, chances are that the couple will be able to gather more proof in the two years they are married in the United States than they had been able to gather before the petition for sponsorship, especially if the foreign spouse was living outside of the United States in a place where homosexuality is forbidden or otherwise oppressed prior to the petition. Obtaining proof during the conditional residency period may also be easier in the United States if the beneficiary comes from a country where the laws are very adverse to homosexuality because the United States may have relatively liberal laws when it comes to homosexuality.

#### *B. Give More Weight to Testimony and Credibility*

Currently, testimony from the couple alone would likely be insufficient to meet a preponderance of the evidence standard, let alone a clear and convincing standard. This is especially true when one of the persons has previously shown they are not credible.<sup>62</sup> The couple usually must show

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<sup>61</sup> See, e.g., 19 States with Legal Gay Marriage and 33 States with Same-Sex Marriage, *supra* note 55.

<sup>62</sup> See, e.g., Matter of Laureano, 19 I&N Dec. 1, 6 (BIA 1983) (where the couple were not credible because their previous I-130 petition was denied on fraud grounds).

more proof than just their own testimony.<sup>63</sup> But, as discussed above, a same-sex couple might not have other forms of proof for a variety of reasons: they may have hidden their relationship from the world, laws may have prohibited them from sharing a life in the same way that opposite-sex couples have been able to, or the fear of discrimination may have caused them not to apply for certain benefits as a couple.

One solution is that the court or USCIS could give more weight to a same-sex couple's testimony about their relationship than either institution would in an opposite-sex couple's case. Courts have recognized that in deciding what constitutes a bona fide relationship, the ultimate question is whether the couple has shown that they intended to establish a life together at the time they were married.<sup>64</sup> If the testimony from the couple has clearly shown that the couple intended to establish a life together, but there is no other proof of their relationship, the court should approve their petition and accept that their relationship is bona fide.

However, giving more weight to testimony and credibility of the couple might prove difficult for a court or the USCIS because doing so is contrary to policies in place to prevent immigration fraud.<sup>65</sup> If more weight is given

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<sup>63</sup> See, e.g., *In re Jara Riero*, 24 I&N Dec. 267, 270 (BIA 2007) (where petitioner's visa was denied because apart from testimony, "no evidence has been presented to show that the marriage was bona fide at its inception. The lead respondent could have attempted to procure evidence of the bona fides of his first marriage, such as financial records or affidavits from neighbors"); see also *Berrios v. Holder*, 502 Fed.App'x 100, 101 (2012) ("An I-130 petitioner bears the burden of showing by a preponderance of the evidence that his or her marriage was *bona fide* at its inception and not 'entered into for the primary purpose of circumventing the immigration laws.' [citation omitted]. Relevant evidence, as specified by the Board of Immigration Appeals ('BIA'), includes 'proof that the beneficiary has been listed as the petitioner's spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence, and experiences[.]'[citation omitted]" implying that solely testimony is insufficient).

<sup>64</sup> See, e.g., *Bark v. INS*, 511 F.2d 1200, 1201-02, (9th Cir. 1975).

<sup>65</sup> See, e.g., *The Status of Section 5 of the Immigration Marriage Fraud Amendments of 1986 Since Smith v. INS: No Relief From the Courts But a Hope for Amendment*, 1989 B.Y.U. L. REV. 899, 900 (1989) ("Concern for sham marriages and the difficulty of the

to the couple's testimony without other evidence, the government might approve more fraudulent petitions—something the government wants to avoid in the first place.<sup>66</sup>

### *C. Lower the Standard of Proof*

The typical standard of proof that the petitioner has to meet to establish a bona fide relationship is a preponderance of the evidence.<sup>67</sup> A clear and convincing standard is imposed in other situations.<sup>68</sup> The judge does not decide which standard to impose, but rather, the INA and the federal regulations lay out which standard of proof is used in any given situation.<sup>69</sup>

A lower standard of proof may be a solution for same-sex couples who are unable to meet the current standard. A “substantial evidence” standard<sup>70</sup> is probably the lowest that the government should accept in order to prevent fraud, but a “some credible evidence” standard<sup>71</sup> is also an option. One of these lower standards could replace the preponderance of the evidence standard in the typical case, thereby allowing less evidence, evidence deemed less credible, or even different types of evidence to meet the burden of proof.

In the less typical cases where the couple would be subject to a clear and convincing standard because of the higher potential for fraud, a preponderance of the evidence standard could be used under the new policy. Yet, the reason that there is a higher standard in certain situations (for

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INS in discovering this fraud led Congress to enact the Immigration Marriage Fraud Amendments of 1986 (“IMFA”).”)

<sup>66</sup> For discussion on my proposed solution to this general competing interest, see discussion in *infra* Part IV.C.

<sup>67</sup> See, e.g., *Berrios*, 502 Fed. App'x at 101.

<sup>68</sup> See INA §§ 240, 245(e)(3), 204(g).

<sup>69</sup> See GORDON ET AL., *supra* note 22, at §□38.

<sup>70</sup> Substantial evidence is defined as “evidence that a reasonable mind could accept as adequate to support a conclusion.” *Black's Law Dictionary* (9th ed. 2009), available at Westlaw BLACKS.

<sup>71</sup> Credible evidence is defined as “evidence that is worthy of belief; trustworthy evidence.” *Black's Law Dictionary* (9th ed. 2009), available at Westlaw BLACKS.

example, when an alien marries a US citizen while the alien is in deportation proceedings) is because there is a higher likelihood that the marriage is not bona fide. Therefore, the government may opt to retain the clear and convincing standard in situations where the potential for immigration fraud is high despite lowering the standard of proof in typical cases.

Similar to giving more weight to couples' testimony, lowering the standard of proof could increase the possibility that the court is approving petitions that are in fact fraudulent, contradicting US policy. A preponderance of the evidence standard is already a relatively low standard compared to a beyond a reasonable doubt standard, as is used in criminal cases,<sup>72</sup> or a clear and convincing standard, as is used in many types of civil cases.<sup>73</sup> Lowering the standard just might make it *too* easy for couples to commit immigration fraud because less evidence, less credible evidence, or even different types of evidence would be sufficient to meet the lower standard. Having the ability to meet the lower standard might allow couples to fabricate a bona fide relationship with less difficulty than they would be able to with a higher standard.

Nevertheless, replacing the preponderance of the evidence standard with a substantial evidence standard is one way to alleviate the burden on same-sex couples to show that their relationship is bona fide. However, replacing the clear and convincing standard with a preponderance of the evidence standard may go too far because the United States still has an interest in preventing fraud. Thus, if the government decides to lower the standard of proof, the ideal balance may be to hold same-sex couples to a substantial evidence standard unless additional factors indicate that the marriage may be fraudulent, in which case, a clear and convincing standard may still be required.

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<sup>72</sup> See, e.g., *In re Winship*, 397 U.S. 358, 363 (1970).

<sup>73</sup> See, e.g., 5 Wash. Prac., Evidence Law and Practice § 301.3 (5th ed.).

*D. Take Into Account Non-Traditional Forms of Proof*

Finally, the court or USCIS could take into account and give weight to non-traditional forms of proof that were previously not considered or weighed in cases involving opposite-sex couples. The court and USCIS are not limited to considering the forms of proof laid out in the federal regulations and case law.<sup>74</sup> Non-traditional forms of proof may include evidence of frequent communication and visits or an affidavit from an acquaintance rather than a close friend. The court and USCIS could also require only one affidavit, rather than several.

The court and USCIS are already able to take into consideration all and any type of proof that the couple is able to present.<sup>75</sup> However, in order to help same-sex couples meet their burden of proof, perhaps the courts or USCIS should be willing to give more weight to non-traditional forms of proof even though courts have historically found these non-traditional forms of proof to not be strong or credible enough.<sup>76</sup>

Much like the option to lower the burden of proof, this option also presents policy concerns contrary to the United States' interest in preventing fraud. Non-traditional forms of proof are not usually considered sufficient because they may not be very reliable.<sup>77</sup> For example, an affidavit from an acquaintance may not be considered as credible as an affidavit from someone who has known the couple for a long time and has spent a

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<sup>74</sup> See *supra* Part I.B. and note 48 (discussing the proof that is traditionally required or taken into consideration to show a bona fide relationship).

<sup>75</sup> See GORDON ET AL., *supra* note 22, at §□3–36 (“The USCIS may use the conduct of the parties after marriage to assess their intent at the time of marriage. This type of inquiry often includes whether the spouse’s name appears on insurance policies, leases, income tax forms or bank accounts, and testimony or *other evidence* regarding courtship, wedding ceremony, shared residence, and shared experiences” (emphasis added)).

<sup>76</sup> See, e.g., Matter of Patel, 19 I&N Dec. 774, 775–79 (1988) (where petitioner failed to sustain his burden of proof after providing only affidavits from himself and his first wife, unidentified photographs, and a greeting card. The officer denied his petition because these forms of proof were insufficient to prove his bona fide intentions in entering his marriage).

<sup>77</sup> See, e.g., *id.*

significant amount of time with the couple. But the policy concern of granting equal protection to same-sex couples may outweigh the potential for fraud that taking non-traditional proof into account may create. Even if the evidence is not as reliable as other types of evidence, a couple should not automatically be denied their spousal immigration petition because they are only able to produce non-traditional evidence of their relationship.

### III. MORE RADICAL CHANGES

The US government should look to other countries for guidance on how to address the difficulty that same-sex couples will have in proving their bona fide relationships. Some foreign countries legalized same-sex marriage before the United States and therefore may have had similar issues arise.<sup>78</sup> While some foreign countries have been addressing same-sex marriage issues for a longer time, many of these countries' immigration laws require couples to provide similar forms of evidence as the United States requires for its couples to prove their bona fide relationships.<sup>79</sup> Therefore, comparing solely the forms of proof required in other countries with the forms of proof used in the United States is insufficient guidance.

The following are two other options that the US government might consider to address the difficulty that same-sex couples will have in proving their bona fide relationships. However, the two options derive from foreign policies that have not necessarily been implemented specifically to address the difficulty that same-sex couples will face in proving bona fide relationships. There are fundamental differences in the way that some other

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<sup>78</sup> However, in my case law research of several countries (Canada, Australia, and the United Kingdom) I have not seen issues arise relating to the difficulty of same-sex couples to establish a "genuine" or bona fide relationship.

<sup>79</sup> For example, Australia's law requires that the couple show evidence of any joint ownership of major assets, sharing of finances, joint bank accounts, sharing of household expenses, legal commitments undertaken as a couple, and any other evidence to support the claims. See AUSTL. Gov't, DEPT. OF IMMIGR. AND BORDER PROT. PARTNER MIGRATION (2007), available at <http://www.immi.gov.au/Visas/Pages/300.aspx>.

countries provide immigration benefits for same-sex couples that may offer guidance to the United States, two of which are discussed below. The first option is to allow unmarried couples to receive immigration benefits. The second is to allow same-sex couples the benefits of spousal sponsorship only if the couple are married in the United States. These two options would change US immigration law in significant ways, but may provide some relief from same-sex couples' burden of establishing their bona fide relationships.

*A. Could Allowing Unmarried Couples to Receive Immigration Benefits Based on Their Relationship Alleviate the Difficulty of the Burden of Proof for Same-Sex Couples?*

There are many countries where immigration laws allow citizens or permanent residents to sponsor their partners<sup>80</sup> for immigration purposes.<sup>81</sup> One difference between US laws and some foreign laws is that citizens or permanent residents are allowed to sponsor their partners for immigration even if they are not married.<sup>82</sup> A US citizen or LPR can only sponsor their partner if the two are married; civil unions and domestic partnerships do not qualify.<sup>83</sup>

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<sup>80</sup> I use "partner" as a general term meaning spouse, husband, wife, significant other, unmarried partner, or any other type of partner suggesting a romantic relationship. I do this because I do not have extensive knowledge of all the legal terms regarding marriage and legal relationships that may have different meanings in other countries.

<sup>81</sup> According to a 2006 Human Rights Watch report, there are at least 19 major world countries that recognize same-sex couples for immigration sponsorship. These include Australia, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Iceland, Israel, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, the United Kingdom, and now the United States. *Appendix B: Countries Protecting Same-Sex Couples' Immigration Rights*, HUMAN RIGHTS WATCH 150–83 (May 2006), available at <http://www.hrw.org/reports/2006/us0506/10.htm>.

<sup>82</sup> See Austl. Gov't, DEPT. OF IMMIGR. AND BORDER PROT., PARTNER MIGRATION, *supra* note 79; Immigration and Refugee Protection Regulations, SOR/2002-227 (Can.); Immigration Directorate Instructions, 2013, FM 2.1, Ch. 8 (U.K.).

<sup>83</sup> See Kowalski, *supra* note 5.

## 1. International Examples

Looking to other countries' immigration laws is helpful to discern whether the United States should change its laws to emulate foreign laws that may alleviate the burden on same-sex couples to prove their bona fide relationships. Australia, Canada, and the United Kingdom are examples of places where a citizen or permanent resident can sponsor their partner, even though they are not married, as long as they meet the qualifications for a certain type of partnership.<sup>84</sup> Although there is no indication that these countries enacted this immigration policy in order to alleviate the burden of same-sex couples, it may be a consideration for the United States to alleviate that burden.

In Australia, the unmarried partner is called a "de facto" partner. Along with other general requirements, the unmarried couple must have been together for twelve months prior to applying for status.<sup>85</sup> The couple must live together, or at least not live separately on a permanent basis.<sup>86</sup> The couple is then subject to very similar requirements as those used in the United States to establish that their relationship is genuine and continuing (which is comparable to a bona fide relationship in the United States). Additionally, the couple must show a "mutual commitment to a shared life to the exclusion of all others."<sup>87</sup> The Australian government has interpreted mutual commitment as the couple intending to have an interdependent relationship without any interdependent relationships with other people.<sup>88</sup>

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<sup>84</sup> See AUSTL. Gov't, DEPT. OF IMMIGR. AND BORDER PROT., PARTNER MIGRATION, *supra* note 79; Immigration and Refugee Protection Regulations, *supra* note 82; Immigration Directorate Instructions, *supra* note 82.

<sup>85</sup> See AUSTL. Gov't, DEPT. OF IMMIGR. AND BORDER PROT., PARTNER MIGRATION, *supra* note 79, at 20.

<sup>86</sup> See HUMAN RIGHTS WATCH, *supra* note 81.

<sup>87</sup> See *id.*; AUSTL. Gov't, DEPT. OF IMMIGR. AND BORDER PROT., PARTNER MIGRATION, *supra* note 79, at 3.

<sup>88</sup> See, e.g., V04/07407, Migration Review Tribunal of Australia (Dec. 7, 2005), available at <http://www.austlii.edu.au/au/cases/cth/MRTA/2005/1114.html>.

In Canada, the laws allow a citizen or a permanent resident to sponsor their partner if they are in a “common-law partnership” or a “conjugal partnership.”<sup>89</sup> A conjugal partnership is one in which the foreign national is residing outside of Canada but has had a conjugal relationship with the partner for at least one year prior to their application. A common-law partnership is a conjugal relationship in which the couple have lived together in Canada for at least one year prior to application.<sup>90</sup> The relationship is not valid for immigration sponsorship if the relationship is not “genuine.”<sup>91</sup> The requirements for showing that their relationship is genuine are similar to those required of couples in the United States to show that their relationship is bona fide.<sup>92</sup>

In the United Kingdom, the law allows relationships “akin to marriage or a civil partnership” that are at least two years old to be the basis for immigration sponsorship.<sup>93</sup> A “civil partnership” is a separate legal classification for same-sex couples that is essentially equivalent to a marriage of opposite-sex couples.<sup>94</sup> Again, the couple must show that their relationship is “genuine and subsisting,” which is similar to the US requirement of showing a bona fide relationship.<sup>95</sup>

## **2. Should the United States Also Allow Non-Married Couples Immigration Benefits?**

Allowing unmarried couples to qualify for immigration benefits may alleviate much of the burden for same-sex couples to prove that they have a bona fide relationship. Same-sex marriage is more difficult to obtain than opposite-sex marriages because of same-sex marriage prohibitions around

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<sup>89</sup> See Immigration and Refugee Protection Regulations, *supra* note 82.

<sup>90</sup> See *id.* at 1.

<sup>91</sup> See *id.* at 10–11.

<sup>92</sup> See *id.*

<sup>93</sup> See Immigration Directorate Instructions, *supra* note 82.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

the world.<sup>96</sup> As such, having proof of a bona fide relationship as a married couple (such as shared assets) may be impossible. At the same time, showing other aspects of the relationship, such as frequent communications, or solely providing testimony of their bona fide status would be insufficient according to the immigration courts.<sup>97</sup> But if the couple did not have to be married, other aspects of the relationship might actually be sufficient to show a bona fide relationship. Thus, it may be easier for an unmarried couple to show that their relationship was not entered into in order to evade immigration laws. For example, showing that an unmarried couple who live apart from each other frequently communicate and travel to each other's country is less of a burden than having to get married and show that the couple share assets.

However, allowing unmarried couples to access this benefit makes it easier to evade immigration laws. Realistically, if marriage is not required for a couple to apply for immigration benefits, two people could easily evade immigration laws by pretending to have a bona fide relationship when in reality the alien just wants to receive US immigration status.

On the other hand, the option for couples to receive immigration benefits without the additional step of marriage would alleviate many concerns that a same-sex couple would generally have. For example, a same-sex couple may not want to get married for a variety of reasons, some of which may be the same reasons that they have kept their relationship a secret for so long. Perhaps they fear being discriminated against when trying to find housing.<sup>98</sup> Perhaps they are moving to a state where same-sex marriage is not legal<sup>99</sup> and they do not have the resources to travel to another state. Perhaps even though they plan to live together in the United States, their families will still

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<sup>96</sup> See 81+ *Countries Where Homosexuality is Illegal*, *supra* note 16.

<sup>97</sup> See *supra* note 63 (discussing types of and insufficiency of evidence).

<sup>98</sup> See Wessler, *supra* note 15.

<sup>99</sup> See 19 *States With Legal Gay Marriage and 33 States with Same-Sex Marriage*, *supra* note 55.

not approve. If the law recognized unmarried couples for immigration benefits, the couple would be able to live together in the United States, hopefully with fewer of these further concerns.

### 3. Would It Be Worth It?

Adopting such large-scale changes will admittedly be difficult for the United States to achieve. First, the United States is probably one of the biggest “magnet” countries for immigration,<sup>100</sup> which means that the United States has to regulate immigration much differently than other countries.<sup>101</sup> The United States was at one point well known for allowing many immigrants into the country in order have a better life, and immigrants have held on to that idea.<sup>102</sup> But because of the number of people desiring to immigrate to the United States, the immigration quotas<sup>103</sup> tend to be filled very quickly; thus the United States continues to see an influx of illegal immigration.<sup>104</sup> The United States may therefore have to regulate immigration more vigorously or at least differently than Canada, Australia, or certain places in Europe where immigration is an important issue as well.

Second, there is a constant political debate about immigration reform, and nothing on the list of possible modifications under Congress’s consideration includes actually expanding the laws to allow more legal immigrants into the United States.<sup>105</sup> In fact, many people in the United States want to further restrict the types of relationships that allow

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<sup>100</sup> See, e.g., Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 669 (1997).

<sup>101</sup> For example, the United States has criminalized many aspects of immigration law in order to deal with the influx of illegal immigration. See *id.* at 671.

<sup>102</sup> See Hightower, *supra* note 3.

<sup>103</sup> For a short description of the US quota system, see *infra* note 107.

<sup>104</sup> See Hightower, *supra* note 3.

<sup>105</sup> See American Immigration Council, *Cracking the SAFE Act: Understanding the Impact and Context of H.R. 2278, “The Strengthen and Fortify Enforcement Act,”* IMMIGRATION POLICY CENTER (Sept. 16, 2013), available at <http://www.immigrationpolicy.org/just-facts/cracking-safe-act>.

immigrants to be sponsored.<sup>106</sup> However, if the United States is able to allocate the number of visas currently given only to those who were married among both those who are married and those who are not, the number of immigrants actually admitted through spousal sponsorship does not have to change. For example, a domestic partner does not even have to count as an immediate family member (which is not subject to the quota system), but could be counted as a part of the same quota system for spouses of LPR's, whether or not the petitioner is an LPR or US citizen.<sup>107</sup>

Third, there could be a high potential for abuse of the system and fraud if the couple were not required to get married. But, the United States could counteract this problem by restricting the requirements to sponsor one's spouse further than other countries do. By doing so, the United States may be successful in this policy change without having more concerns about fraud than it had before domestic partnerships would qualify, while also giving same-sex couples the same opportunity as opposite-sex couples.

An example of a further restriction could be that the United States places a time limit of five or ten years of living together, rather than one year of living together such as is the case in Canada's conjugal partnerships. Imposing a longer requirement for living together would increase the chances that the couple's relationship is bona fide and increase the amount of time the couple has for gathering proof of that bona fide relationship. Alternatively, the United States could revoke status to the immigrant if the couple break up,<sup>108</sup> perhaps monitoring the couple's status through periodic hearings or reports. Another alternative could be that the law prohibits a

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<sup>106</sup> *See id.*

<sup>107</sup> The United States' immigration laws are currently based on a quota system, meaning that there is a strict limit on the number of immigrants allowed to enter each year. However, an immigrant beneficiary who is sponsored by their US citizen spouse qualifies as an "immediate family member" and is therefore not subject to a quota, whereas an immigrant beneficiary who is sponsored by their spouse who is an LPR rather than a citizen is subject to a numerical quota. *See* INA § 203(a), 8 U.S.C. § 1101 (2013).

<sup>108</sup> Although, this does create a potential risk for domestic violence victims because it could give an abusive citizen spouse a lot of power over a relationship.

path to citizenship to the immigrant unless they eventually get married. A further example of a restriction could be that unmarried couples are subject to a special quota—meaning that only a certain, maybe small, number of unmarried couples would be allowed to receive this benefit each year.

There are probably countless ways that the United States could regulate immigration petitions for spouses and partners, but the bottom line is that marriage, because it is so difficult for some same-sex couples to obtain, perhaps should not be the only way that a couple can live in the United States together. It would be easier for the couple to prove that their relationship is genuine if they did not have to get married, especially if they were allowed to get married or live together in the United States and *then* begin collecting proof in order to petition for their conditional status to be removed.

*B. Could Recognition Only of Marriages That Have Occurred Within the United States Alleviate Same-Sex Couples' Burden by Giving Same-Sex Couples the Chance to Establish Proof of Their Bona Fide Relationship?*

If the United States is not going to recognize unmarried couples for immigration sponsorship, perhaps it should take a narrower route and only recognize same-sex marriages that occur within the United States. Marriages occurring within the United States may make the burden of proof for same-sex couples easier to satisfy because couples may then have the chance to establish proof that their relationship is bona fide.<sup>109</sup>

Right now, the United States recognizes marriages regardless of location, as long as the marriage was valid where it took place.<sup>110</sup> Canada, after first passing the Civil Marriage Act of 2005,<sup>111</sup> had an interim policy that recognized same-sex marriages for immigration sponsorship only when the

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<sup>109</sup> See short discussion on possibly extending this rule to opposite-sex couples as well in order to address potential equal protection concerns, *infra* Part IV.B.

<sup>110</sup> See GORDON ET AL., *supra* note 22, at § 36.02.

<sup>111</sup> Canada's Civil Marriage Act changed the law to allow same-sex marriage. See *generally*, Civil Marriage Act, R.S.C. 2005, c. 33.

marriage took place in Canada.<sup>112</sup> Under the law of the United States, an alien can apply for a non-immigrant fiancé visa in order to travel to the United States to get married, and then adjust status as an immigrant on the basis of that marriage.<sup>113</sup> So the couple has two options: the alien could either apply for a non-immigrant fiancé visa and then adjust to an immigrant status once already in the United States, or the couple could get married outside of the United States and then petition for the alien to immigrate, assuming that the marriage is valid. However, allowing same-sex partners to be sponsored for immigration only if their marriage takes place in the United States, and not recognizing *any* marriage that takes place outside of the United States, could eliminate some hurdles the couple would face to show that their relationship is bona fide. There are several reasons why this is the case.

First, documentation of a marriage occurring in the United States may be easier to verify in the United States because foreign laws inevitably have different requirements and regulations of marriages.<sup>114</sup> Second, assuming that the couple applies for the alien's adjustment of status as soon as they are married, the couple would be automatically subject to the same conditional residency period as any opposite-sex couple whose marriage is less than two years old.<sup>115</sup> This would give the couple time to gather proof of their relationship that they may not otherwise have had. Third, it would be easier for the couple to prove that their relationship is bona fide because, at least in some areas, they may be able to have a public marriage and thus

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<sup>112</sup> See HUMAN RIGHTS WATCH, *supra* note 81.

<sup>113</sup> See INA § 101(a)(15)(K).

<sup>114</sup> Sometimes countries do not recognize certain marriages that happen abroad because of the differences in laws and regulations. See, e.g., AUSTL. Gov't, DEPT. OF IMMIGR. AND BORDER PROT., PARTNER MIGRATION, *supra* note 79, at 34.

<sup>115</sup> Recall that under the IMFA, couples that seek immigration benefits based on a marriage less than two years old are subject to a two-year conditional residency requirement whereby they must show that their relationship is bona fide after two years of being married in order to retain the foreign spouse's immigration status. See INA § 216.

proof of their marriage that they perhaps could not have had in another country. In fact, the very reason they may decide to get married in the United States in the first place could be that they are able to have a public relationship. Where the couple have little to no proof because they had to hide their relationship in another country, requiring that they get married in the United States would leave them no other option to applying for immigration benefits. They would further be able to begin collecting proof from the time they get married in the United States until the time that they must petition for removal of their conditions.

#### IV. PROPOSALS

The above discussion proposes six options that the United States could choose from to address the problems that same-sex couples may have in proving their bona fide relationships. The United States could: (1) impose a conditional residency period; (2) give more weight to couples' testimony; (3) lower the standard of proof; (4) consider non-traditional evidence and give it greater weight; (5) allow non-married couples to receive immigration benefits; or (6) give immigration benefits to same-sex couples only if they are married within the United States. The next two sections respectively discuss the feasibility of each option and the combination of options that would be most effective.

##### *A. Feasibility and Equal Protection of Changing USCIS or Court Procedures*

At least three of the options proposed for changing USCIS or court procedures could be implemented with minimal difficulty. However, conditional residency periods<sup>116</sup> for same-sex couples may face a constitutional challenge. Just as imposing conditional residency requirements under the IMFA was incorporated into the INA, the new

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<sup>116</sup> See *supra* Part II.A.

conditional residency requirement for same-sex couples could similarly be incorporated into the INA by way of an IMFA amendment or by an act of Congress

One downside to a conditional residency period is that it may pose constitutional equal protection issues for same-sex couples. Same-sex couples may feel that the law unfairly discriminates against them by providing a conditional residency period whereby the marriage is presumed not to be bona fide, rather than trying to alleviate a burden. Same-sex couples may therefore have an equal protection claim against the government for unfair discrimination. The government would have the burden to prove that imposing a conditional residency period on same-sex couples is rationally related to a legitimate government interest.<sup>117</sup> The government may argue that it has a legitimate interest in counteracting historical discrimination by imposing a law that would alleviate the burden that same-sex couples otherwise bare to prove their relationships are bona fide.

While the government's interest might be sufficient to counteract such an equal protection claim, imposing a law that has even the potential for an equal protection claim may cause problems because the main purpose of imposing a conditional residency period is, in essence, to provide equal protection to same-sex couples by alleviating their burden in showing a bona fide relationship. In terms of equal protection, imposing the conditional residency period may not be so practical, and imposing a conditional residency period on same-sex couples also may be procedurally burdensome for the USCIS.<sup>118</sup>

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<sup>117</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (discussing the “rational basis” test for equal protection claims under the Fourteenth Amendment of the US Constitution).

<sup>118</sup> See discussion on feasibility of passing a law allowing spousal immigration petitions for both same- and opposite-sex couples, which would require that all couples be subject to a conditional period, *infra* Part IV.B.

Second, giving more weight to the couple's testimony<sup>119</sup> can also be implemented with minimal difficulty. Since they have a certain amount of discretion,<sup>120</sup> a USCIS official or an immigration judge can individually make the decision to give more weight to certain testimony. However, they probably will not start doing this automatically unless they realize that there is a problem; and case law has shown that testimony from the couple alone is insufficient to prove a bona fide relationship.<sup>121</sup> Examiners would probably need some kind of directive: job training, an official mandate, or a decision from case law to exercise their discretion to give more weight to couples' testimony.

Third, lowering the standard of proof<sup>122</sup> would also be quite feasible. Since case law determined the preponderance of the evidence standard,<sup>123</sup> it would probably take case law to establish a lower standard as well. For the situations that require a standard of clear and convincing evidence, the courts or USCIS could implement the new standard through either case law or INA amendments in the relevant provisions. Perhaps an appeal of a case where the government denies a same-sex couple's I-130 petition based on insufficient proof of a bona fide relationship will be enough for the courts to change the standard.

Finally, considering non-traditional forms of proof<sup>124</sup> would be feasible, assuming that forms of proof beyond what is normally considered even exist. In theory, taking into consideration other forms of proof would be effective because it would give couples the opportunity to show the USCIS official or immigration judge that they have a bona fide relationship even though they may not have proof similar to that of an opposite-sex couple in

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<sup>119</sup> See *supra* Part II.B.

<sup>120</sup> See, e.g., *Patel v. Ashcroft*, 375 F.3d 693, 697 (8th Cir. 2004).

<sup>121</sup> See discussion on testimony alone as insufficient proof of bona fide relationship, *supra* note 63

<sup>122</sup> See *supra* Part II.C.

<sup>123</sup> See, e.g., *Berrios v. Holder*, 502 Fed. App'x 100, 101 (2012).

<sup>124</sup> See *supra* Part II.D.

the same situation. It is difficult to imagine what other types of proof a same-sex couple might come up with if they have been isolated in a world where many people, including their own friends and family, do not approve of their relationship and perhaps even discriminate against them. For example, couples, even if they are married, may not apply for housing as a couple because they fear that they will be discriminated against because of their sexual orientation.<sup>125</sup> Consequently, the couple would not have the forms of proof related to housing that would establish their bona fide relationship because their documents related to housing may only contain one of their names; or their documents might refer to the couple as roommates rather than as a married couple.<sup>126</sup> Non-traditional forms of proof will probably be taken into account anyway,<sup>127</sup> but the problem could be that there just is not *any* “non-traditional” proof available.

Because no same-sex couple has yet been denied a petition based on lack of showing a bona fide relationship,<sup>128</sup> none of the abovementioned options have yet been implemented, despite relative feasibility. But the problem may still arise and it is clear that lawyers and their clients are deeply concerned about it.<sup>129</sup> Eventually, a pattern of same-sex petition denials may accumulate based on lack of proof of a bona fide relationship. Once that pattern is established, judges and USCIS examiners will need a creative solution, given the current erroneous belief that they can process these applications in the same way as the applications by opposite-sex couples.<sup>130</sup>

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<sup>125</sup> See, e.g., Wessler, *supra* note 15.

<sup>126</sup> See *id.*

<sup>127</sup> See GORDON ET AL., *supra* note 22.

<sup>128</sup> See Wessler, *supra* note 15.

<sup>129</sup> See *id.*

<sup>130</sup> See Kowalski, *supra* note 5, at 985.

*B. Feasibility and Equal Protection of the More Radical Changes*

The final two options, allowing unmarried couples to receive immigration benefits,<sup>131</sup> or allowing same-sex couples to petition for immigration benefits only when married in the United States,<sup>132</sup> are probably not practical and therefore not feasible.

First, the US government is likely not willing to create a new law to include unmarried couples because the costs of doing so may be too high compared to the benefits of nondiscrimination in this particular immigration process. The United States has historically been a place where people immigrate in order to have a better life, live the “American Dream,” reunite with their families, take advantage of economic opportunity, etc.<sup>133</sup> The current quota-based system was created, at least in part, to prevent high numbers of immigrants from coming to the United States because of a previous “open door” policy that allowed immigrants to realize those opportunities.<sup>134</sup> Many people now believe that the United States must regulate immigration laws more carefully than it did with the old “open door” policy because immigration may have a significant, and perhaps negative, impact on the country economically, socially, culturally, or otherwise.<sup>135</sup> Allowing an alien who is not married to a US citizen to immigrate based solely on their romantic relationship with a US citizen or LPR may impede US policy and interests because it may expand the number of people allowed to immigrate while perhaps allowing the alien to keep their legal status even if the couple break up. Expanding the number of people legally allowed to reside in the country seems to counteract the original policy of the quota system.

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<sup>131</sup> See *supra* Part III.A.

<sup>132</sup> See *supra* Part III.B.

<sup>133</sup> See, e.g., Medina, *supra* note 100, at 670.

<sup>134</sup> See, e.g., Hightower, *supra* note 3, at 136.

<sup>135</sup> The United States used to have what some call an “open door policy.” After some time, the quota system was created to counteract the negative impact that this policy had on the country. See *id.* at 134–37.

Further, the government would not be as concerned about married couples committing immigration fraud as it would be about unmarried couples committing immigration fraud. Breaking up a romantic relationship is procedurally very easy because there is no legally binding arrangement, whereas breaking up a marriage is procedurally more difficult. There would therefore have to be strict regulations in place to prevent fraud and control the volume of people coming in if a new policy allowing people to sponsor their unmarried partners were adopted. It may not be very economically or socially desirable to adopt a policy that would help same-sex couples prove their bona fide relationships only in limited circumstances if it meant that a significant amount of resources would go into creating the regulations.<sup>136</sup>

Second, allowing same-sex couples to petition for immigration benefits only when married in the United States may also raise some equal protection issues. Canada eliminated its similar policy two years after the Civil Marriage Act was passed in order to recognize all marriages equally.<sup>137</sup> Same-sex couples may claim that this law unfairly discriminates against them based on sexual orientation, rather than legitimately distinguishing between same-sex and opposite-sex couples in order to fulfill an important government interest. Although the government may have a legitimate interest in preventing immigration fraud and addressing discrimination by imposing such a law, the law may not be worth imposing if it would raise even more concerns about equal protection than before.

To address this equal protection issue, the United States could impose a law allowing a US citizen to sponsor their alien spouse only if they are married in the United States, and apply the law to both opposite-sex couples and same-sex couples. However, doing so may not be practical. If everyone

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<sup>136</sup> See Part III.A.3 (discussing possible stricter regulations in order to prevent immigration fraud).

<sup>137</sup> See Minister of Public Works and Government Services Canada, ANNUAL REPORT TO PARLIAMENT ON IMMIGRATION (2007), available at <http://www.cic.gc.ca/english/resources/publications/annual-report2007/section3.asp>.

who wanted to immigrate based on marriage were required to get married in the United States in order to do so, the procedure for immigrating may be very troublesome to the USCIS and the courts. Processing applications may take more time because under current law, all couples who apply for immigration benefits as soon as they are married would be subject to the conditional residency requirement since their marriage would be less than two years old. More immigration petitions based on marriage would be subject to review after two years under the conditional residency requirement, which would potentially be very burdensome. Therefore, applying the rule to all couples rather than only same-sex couples could be unfeasible.

*C. An Effective Solution: Conditional Residency Plus a Lower Burden of Proof*

Imposing a conditional residency requirement for same-sex couples while also lowering the standard of proof would make it easier for same-sex couples to prove their bona fide relationship while taking into account the government's interests in preventing fraud. A conditional residency period could be imposed either in (1) every same-sex marriage petition case, or (2) only when the couple has not met the initial standard of proof.

First, the government could lower the standard of proof while imposing a conditional residency period for all same-sex couples applying for benefits. This may be very sweeping and, as discussed above, may have equal protection issues.<sup>138</sup> Lowering the standard of proof with a conditional residency period could have too broad a reach because allowing same-sex couples to meet a lower burden while also gathering more proof during the conditional residency would mean that perhaps *all* same-sex couples applying for immigration benefits, whether in a bona fide relationship or

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<sup>138</sup> See discussion *supra* Part IV.A.

not, would be able to meet the low burden. Therefore, the potential for fraud increases greatly.

Assuming the couple do not plan to keep their relationship a secret once they are residing in the United States legally, they may not need a lower standard of proof after the conditional residency period because it would be easier for them to satisfy the higher burden. But to cover those who do plan on keeping their relationship a secret, or for those who plan on moving to a state where same-sex marriage is not yet recognized legally, lowering the standard of proof while imposing a conditional residency period could give such couples a fair chance to prove their bona fide relationship.

Second, instead of lowering the standard of proof and imposing a conditional residency period in all petitions based on a same-sex marriage, the government could do so only when the couple has not met their burden of proof—a “discretionary burden.” When a couple cannot meet their initial burden, they will be subject to the conditional period, giving them a chance to meet the burden. Arguably, lowering the standard of proof would again not be necessary for those couples who are able to meet the standard once they are in the United States for two years during the conditional residency period. This method would cover those who would still be unable to gather sufficient evidence because they still fear discrimination—discrimination that could still be very oppressive depending on where the couple lives or other circumstances.

A discretionary burden would be less sweeping than the first proposal because it would allow couples that are able to establish a bona fide relationship to avoid the conditional period, while also recognizing that many couples will have a difficult time satisfying the same burden of proof. A discretionary burden may also address possible issues surrounding an equal protection claim by narrowing the scope of same-sex couples that are subject to the conditional residency period.<sup>139</sup> The discretionary burden

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<sup>139</sup> *See id.* (discussing equal protection concerns of conditional residency period).

would further help to avoid a claim that a policy lowering the burden of proof is overbroad.

Practically speaking, establishing a lower standard of proof in combination with a conditional residency period only for couples who cannot meet their (lower) burden would mean that there would be two points in time in which the couple would have to prove their bona fide relationship: the first would be when the couple initially petitions, and the second would be when the couple appear at their hearing to remove the conditions on the foreign spouse's residency (at the end of the conditional residency period). The burden of proof could therefore be higher or lower at either point in time.

For example, say the burden of proof is initially lower than a preponderance of the evidence standard—a substantial evidence standard. The couple did not meet the burden, and so the foreign spouse is subject to a conditional residency period of two years. After two years, the couple will appear at their hearing in order to remove the conditions, and could have to show either (1) a higher burden of proof than what they initially had to show (i.e. a preponderance of the evidence) or (2) the same lower burden of proof. At this point, it would make sense to keep the burden low for those who may still run into trouble. It might also make sense to keep the burden at a preponderance of the evidence standard in order to address fraud prevention. Keeping the burden at a preponderance of the evidence standard at the point where the couple petition for removal of their conditions would be effective in balancing the government's interests with the couple's interests.

Alternatively, the government could impose a conditional period without lowering the burden of proof at all. But a conditional residency period alone might be insufficient to lower the burden for same-sex couples because many couples may still have trouble establishing a bona fide relationship even after living in the United States for two years. For example, if the couple still plan to keep their relationship a secret from family and friends,

then obtaining sufficient proof may be just as difficult as it ever was. For this reason, lowering the standard of proof on a discretionary basis would be more efficient than only imposing a conditional period.

Yet imposing a conditional period for all same-sex couples and not for all opposite-sex couples could present issues of equal protection.<sup>140</sup> Same-sex couples may object to the fact that because of their sexual orientations they have to be subject to conditional residency periods. To address a possible equal protection claim, the conditional period may be imposed as a temporary requirement until some point in the future when same-sex couples are not subject to so much discrimination.

For example, if all US states officially legalize same-sex marriage, or even better if the whole world did so, the conditional period requirement could be repealed; couples may no longer face discrimination, or at least not on the same systematic level.<sup>141</sup> Therefore, same sex couples' ability to show that their relationship is bona fide will improve and the conditional period would no longer be necessary. This would exemplify how far society has come in recognizing rights for LGBTQ couples. However, it is difficult to be sure that same-sex couples would not still face discrimination even in the absence of same-sex marriage prohibition. Just as human beings will discriminate based on race, whether consciously or subconsciously, human beings may inevitably discriminate based on sexual orientation, regardless of the laws in place to protect those groups.

#### *D. One Limited Solution*

A final solution could be implemented in some limited circumstances. When a couple initially has traditionally weak forms of proof, such as only one affidavit, only evidence of frequent communication, or only their own testimony, the problem may be addressed by simply lowering the standard of proof. That way the examiner will not face the issue of having to give

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<sup>140</sup> *See id.* (discussing equal protection concerns of conditional residency period).

<sup>141</sup> *See supra* p. 4 (discussion on discrimination with regard to LGBTQ couples).

more weight to non-traditional proof or solely testimony in order to meet a higher standard, because the evidence may be sufficient to meet the lower standard. But only lowering the standard of proof without any other checks on fraud prevention, such as also imposing a conditional residency period, may not be favorable to the US government.

#### V. CONCLUSION

To address the discrimination same-sex couples have faced, the government should take it upon itself to alter its procedures so that this class is protected in its marriages and immigration rights, just as opposite-sex couples are. Many lawyers who have anticipated this issue may advise clients not only to seek advice from an expert in the field, but to also begin gathering as much proof as possible as soon as possible, no matter what type.<sup>142</sup> The reason that attorneys tell their clients to do this is so that, if the problem does arise when applying for immigration benefits, the couple will be prepared to defend their bona fide marriage. But given the discrimination this class has faced, it is important that the government also take steps to ensure that same-sex couples are granted equal access to federal immigration benefits and processes. At the very least, with implementation of a conditional residency period coupled with a reduction of the standard of proof, instead of outright denial for failure to meet the burden, same-sex couples may have a higher chance to prove to the government that their relationship is genuine. The United States will then be one step closer to living up to its reputation of protecting the freedoms that immigrants expect and hope for.

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<sup>142</sup> See, e.g., Nelisse, *supra* note 14.