No. 18-3471

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

[redacted],

Petitioners,

v.

William P. Barr, United States Attorney General,

Respondent.

On Petition for Review of an Order
of the Board of Immigration Appeals,
Case Nos. A208-575-411; A208-575-412; A208-575-413

# BRIEF OF *AMICI CURIAE* ASISTA IMMIGRATION ASSISTANCE, ASIAN PACIFIC INSTITUTE ON GENDER-BASED VIOLENCE, CASA DE ESPERANZA, FUTURES WITHOUT VIOLENCE, NATIONAL ALLIANCE TO END SEXUAL VIOLENCE, AND TAHIRIH JUSTICE CENTER IN SUPPORT OF PETITIONERS AND IN SUPPORT OF REVERSAL OF THE DECISION OF THE BOARD OF IMMIGRATION APPEALS

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Appellate Court Nos: 18-3471

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## STATEMENT OF IDENTITY AND INTEREST

Pursuant to Federal Rule of Appellate Procedure 29(a), the undersigned amici curiae respectfully requests leave to file this Brief of Amici Curiae in Support of Petitioners and in Support of Reversal of the Decision of The Board of Immigration Appeals. The Petitioners and Respondent have all consented to the filing of this brief.[1]

Amici are nonprofit organizations that serve and advocate on behalf of survivors of domestic violence, sexual assault and other forms of gender-based violence. Based upon their experience and expertise, amici understand that immigrant survivors of violence often face a myriad of barriers seeking justice and protection from abuse, including the fear that reaching out for help may result in their own deportation. Amici have extensive knowledge about the legal protections for immigrant survivors contained in the Violence Against Women Act (VAWA) and its progeny, which were specifically created to help address these barriers. These protections, like VAWA self-petitions, U visas and T visas, encourage survivors to seek justice and help them to gain independence, safety and stability. For immigrant survivors, meaningful access to these immigration protections can make the difference in their decision to reach out for help or to leave abusive relationships. For survivors in removal proceedings, meaningful access to these critical protections depends on the courts adhering to the proper standard of issuing continuances.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amici, their members, and their counsel made any monetary contribution to the preparation or submission of this brief.

Amici curiae are the following:

ASISTA Immigration Assistance is a national non-profit organization that works to advance and protect the rights and routes to status of immigrant survivors of violence, especially those who have suffered gender-based violence inside the United States. ASISTA worked with Congress to create and expand routes to secure immigration status for survivors of domestic violence, sexual assault, and other crimes in VAWA and its subsequent reauthorizations. ASISTA serves as liaison between those who represent these survivors and the Department of Homeland Security ("DHS") personnel charged with implementing the laws at issue in this appeal, including Citizenship and Immigration Services ("USCIS"), Immigration and Customs Enforcement ("ICE"), and DHS's Office for Civil Rights and Civil Liberties. ASISTA also trains and provides technical support to local law enforcement officials, civil and criminal court judges, domestic violence and sexual assault advocates, and legal services, non-profit, pro bono, and private attorneys working with immigrant crime survivors.

The Asian Pacific Institute on Gender-Based Violence is a national resource center on domestic violence, trafficking, and other forms of gender-based violence in Asian and Pacific Islander communities, including domestic violence dynamics in refugee zones. The institute serves national network of advocates and community-based service programs that work with Asian and Pacific Islander survivors, and is a leader in providing analysis on critical issues facing victims in the Asian and Pacific Islander community. The institute aims to strengthen advocacy, change systems, and prevent gender violence through community transformation.

Casa de Esperanza was founded in 1982 in Minnesota to provide emergency shelter for women and children experiencing domestic violence, with a primary focus on helping Latina and immigrant survivors to access safety and justice. In 2009, Casa de Esperanza launched the National Latin@ Network for Healthy Families and Communities, which is a national resource center focused on research, training, and technical assistance, and policy advocacy focused on preventing and addressing domestic violence in Latino and immigrant communities.

Futures Without Violence ("FUTURES"), is a national nonprofit organization that has worked for over thirty years to prevent and end violence against women and children around the world. FUTURES mobilizes concerned individuals and organizations to end violence through public education and prevention campaigns, public policy reform, training and technical assistance, and programming designed to support better outcomes for women and children experiencing or exposed to violence. FUTURES has a long-standing commitment to supporting the rights and interests of women and children who are victims of violence regardless of their immigration, citizenship, or residency status. FUTURES co-founded and co-chaired the National Network to End Violence Against Immigrant Women working to help service providers, survivors, law enforcement, and judges understand how best to work collaboratively to bring justice and safety to immigrant victims of violence. Using this knowledge, FUTURES helped draft legislative recommendations that were ultimately included in the Violence Against Women Act and the Trafficking Victims Protection Act to assist immigrant victims of violence.

The National Alliance to End Sexual Violence (NAESV) is the voice in

Washington for the 56 state and territorial sexual assault coalitions and 1300 rape crisis centers working to end sexual violence and support survivors. The rape crisis centers in NAESV's network see every day the widespread and devastating impacts of sexual assault upon survivors, especially those in immigrant communities. NAESV opposes any impediments to survivors feeling safe to come forward, receive services, and seek justice.

The Tahirih Justice Center ("Tahirih") is the largest multi-city direct services and policy advocacy organization specializing in assisting immigrant women and girls who survive gender-based violence. In five cities across the country, Tahirih offers legal and social services to women and girls fleeing all forms of gender-based violence, including human trafficking, forced labor, domestic violence, rape and sexual assault, and female genital cutting/mutilation. Since its beginning in 1997, Tahirih has provided free legal assistance to more than 25,000 individuals seeking legal immigration protection, including asylum, U-visas, T-visas, and VAWA provisions. Through direct legal and social services, policy advocacy, and training and education, Tahirih protects immigrant women and girls and promotes a world where they can live in safety and dignity. Tahirih amicus briefs have been accepted in numerous federal courts across the country.

Because of amici's history serving and advocating on behalf of survivors of domestic violence, sexual assault and other forms of gender-based violence and their familiarity with the statutory framework under which crime victims may seek U nonimmigrant relief pursuant to 8 U.S.C. § 1101(a)(15)(U) (the "U statute"), the amici can provide a "unique perspective" that "can assist the court of appeals

beyond what the parties are able to do," *Nat'l Org. for Women v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000) (citing *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997)).

## INTRODUCTION

In the United States, "43.6% of women (nearly 52.2 million) experienced some form of contact sexual violence in their lifetime," and "[a]pproximately 1 in 5 (21.3% or an estimated 25.5 million) women in the U.S. reported completed or attempted rape at some point in their lifetime." *The National Intimate Partner and Sexual Violence Survey: 2015 Data Brief*, Centers for Disease Control and Prevention (Nov. 2018), *available at* https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf. Of every three women murdered in the United States, one is killed by an intimate partner. *Facts about Domestic Violence and Physical Abuse,* NAT'L COALITION AGAINST DOMESTIC VIOLENCE (2015), *available at* https://www.speakcdn.com/assets/2497/domestic_violence_and_physical_abuse_ncadv.pdf.

Immigrant populations are particularly vulnerable to crimes like domestic violence, sexual assault, and human trafficking, in part because people who fear deportation are less likely to report abuse. *See* Stacey Ivie et al., *Overcoming Fear and Building Trust with Immigrant Communities and Crime Victims*, INT'L ASS'N OF CHIEFS OF POLICE (Apr. 2018), *available at* http://library.niwap.org/wp-content/uploads/PoliceChief_April-2018_Building-Trust-With-Immigrant-Victims.pdf. Abusers are likely to prey on that same fear: "One of the most intimidating tools abusers and traffickers of undocumented immigrants use is the

threat of deportation. Abusers and other criminals use it to maintain control over their victims and to prevent them from reporting crimes to the police." *Id.*

In an effort to combat these issues, Congress passed VAWA in 1994, and included provisions that allowed battered immigrants to "self-petition" for legal status, without relying on their abusers, as it recognized that "a battered spouse may be deterred from taking action to protect himself or herself, such as filing a protection order, filing criminal charges or calling the police, because of the threat or fear of deportation." Katrina Castillo et al., *Legislative History of VAWA (94, 00, 05), T and U-Visas, Battered Spouse Waiver, and VAWA Confidentiality*, NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT (June 17, 2015), http://library.niwap.org/wp-content/uploads/2015/VAWA_Leg-History_Final-6-17-15-SJI.pdf. In 2000, Congress reauthorized and reinforced VAWA's protections for survivors and created two new forms of immigration relief: U and T nonimmigrant status, more commonly known as the U visa and T visa. Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464-1548 (2000). As an incentive to cooperate with law enforcement, these visa forms offer temporary protection from deportation for qualifying immigrant crime survivors. *See* 8 U.S.C. §§ 1101(a)(15)(T)–1101(a)(15)(U).

Currently, however, both the Nebraska and Vermont Service Center – where U visa applications are processed – estimate that U visa applications are taking more than four years to process, between 50.5 and 51 months. *See* U.S. Citizenship and Immigration Services Processing Times, https://egov.uscis.gov/processing-times/home (last visited February 15, 2019) (Form: 1-918, Field Office or Service

Center: Vermont Service Center). For this reason, it is vital that undocumented survivors who apply for a U visa are granted continuances in their removal proceedings. Allowing removal proceedings to progress will only serve to re-victimize these survivors and undermine Congressional intent behind the U visa program.

## SUMMARY OF ARGUMENT

Amici respectfully submit that the Board of Immigration Appeals (the "Board") erroneously disregarded two issues going to the core of an immigrant abuse survivor's request for continuance in removal proceedings. First, immigration judges have broad authority to grant continuances for good cause shown. The failure of the Board to analyze the issue of good cause is error. Second, where an alien has a pending U visa application which is prima facie approvable, it is error for the Board to deny a motion to remand the case for consideration of the 8 U.S.C. § 1182(d)(3) waiver request.

Immigration judges have broad discretionary authority over continuances and "may grant a motion for continuance for good cause shown." 8 C.F.R. § 1003.29. In *Matter of Sanchez Sosa*, the Board extended the good cause factors identified in *Matter of Hashmi* to U visa applications, including "(1) the DHS's response to the motion; (2) whether the underlying visa petition is prima facie approvable; and (3) the reason for the continuance and other procedural factors." *Matter of Sanchez Sosa*, 25 I. & N. Dec. 807, 812-813 (B.I.A. June 7, 2012) (citing *Matter of Hashmi*, 24 I. & N. Dec. 785, 790 (B.I.A. April 22, 2009)).

In a case such as this one, where Petitioners have a prima facie approvable petition for U-nonimmigrant status, the failure to grant a continuance is error. This Court has held, "[a]n immigration judge cannot be permitted, by arbitrarily denying a motion for a continuance without which the alien cannot establish a ground on which Congress has determined that he is eligible to seek to remain in this country . . . to thwart the congressional design." *Benslimane v. Gonzales*, 430 F.3d 828, 832 (7th Cir. 2005).

Further, the relevant statutes, regulations, and guidance all demonstrate that, where an alien has a pending petition for U nonimmigrant status which is prima facie approvable, the Board should be required to remand the case back to the immigration judge for consideration of the 8 U.S.C. § 1182(d)(3) waiver request. By denying the motion to remand in this case, the Board is subverting the intent of Congress to "provid[e] battered immigrant women and children . . . with protection against deportation . . . to cooperate with law enforcement and prosecutors in criminal cases brought against their abusers." Victims of Trafficking and Violence Protection Act of 2000, H.R. 3244, 106th Cong. § 1502(a)(2) (2000).

While 43.1 percent of battered immigrant women with stable immigration status called the police after experiencing physical abuse, only 18.8 percent of undocumented battered immigrant women reported the abuse. Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 67-68 (2003). If this Court allows the Board to subvert the process for requesting a waiver request under the Immigration and Nationality Act, 8 U.S.C. § 1182(d)(3), it will only serve to undermine the progress in providing

a pathway for survivors, like the Petitioners in this case, to cooperate with law enforcement without fear.

As explained below, Congress' purpose, relevant legislative history, and considerations of fundamental fairness are consistent with the plain language of the statute and militate against the Board's erroneous interpretation.

## ARGUMENT

### I. Immigration Judges Have Broad Authority Over Cases Including Authority to Grant Continuances and Waive Inadmissibility.

Immigration judges have broad discretionary authority over the cases in their courtrooms. It is beyond question that immigration judges "may grant a motion for continuance for good cause shown." 8 C.F.R. § 1003.29. In fact, the Seventh Circuit has made clear that an immigration judge has "all of the Attorney General's powers 'in the cases that come before them', unless some other regulation limits that general delegation." *Baez-Sanchez v. Sessions*, 872 F.3d 854, 855 (7th Cir. 2017). That includes the authority to waive an alien's inadmissibility under 8 U.S.C. §1182(d)(3)(A)(ii). *Id.*, at 854-55.

#### A. Immigration Judges Have Broad Authority Over Continuances and "May Grant a Motion for Continuance for Good Cause Shown."

The Board has noted that while the U visa petition process is progressing with USCIS, it is common for applicants in removal proceedings to request a continuance while awaiting a decision. *See, e.g., Sanchez Sosa*, 25 I. & N. Dec. at 812. Immigration judges have broad discretionary authority over continuances and "may grant a motion for continuance for good cause shown." 8 C.F.R. § 1003.29 (2012). In *Matter of Sanchez Sosa*, the Board extended the good cause factors identified in

*Matter of Hashmi* to U visa applications, including "(1) the DHS's response to the motion; (2) whether the underlying visa petition is prima facie approvable; and (3) the reason for the continuance and other procedural factors." 25 I. & N. Dec. at 812-813 (citing *Hashmi*, 24 I. & N. Dec. at 790).

Where DHS opposes the request for continuance, "the focus of the inquiry is the likelihood of success' on the visa petition." *Sanchez Sosa*, 25 I. & N. Dec. at 813 (citations omitted). In the case of a request for a continuance when a U visa application is pending, the immigration judge must evaluate whether the individual has prima facie eligibility for the U visa including: whether the individual can show that she suffered "substantial physical or mental abuse" and whether the underlying criminal activity is one of the types defined in the statute. *See* 8 C.F.R. § 214.14(b).

"If the respondent has made a prima facie showing of abuse as a victim of a qualifying crime, the Immigration Judge should evaluate whether the alien has relevant information and has been, is being, or will be helpful to authorities investigating or prosecuting it." *Sanchez Sosa*, 25 I. & N. Dec. at 813 (citing 8 C.F.R. § 214.14(b)). The requirement that the individual is helpful to authorities can be shown through the law enforcement certification. *Id.*

Nothing in the recent *Matter of L-A-B-R-* decision changes the standard set out in *Sanchez Sosa* and *Hashmi*. *See Matter of L-A-B-R-*, 27 I. & N. Dec. 405, 413, 418 (A.G. 2018) (citing *Sanchez Sosa* and *Hashmi* with approval). In fact, *L-A-B-R-* states unequivocally that it is "consistent with Board precedents." *Id.* at 418 (citing *Sanchez Sosa* and *Hashmi*).

Respondent in this case cannot use the extensive U visa backlog to justify the denial of a continuance. In *Matter of Alvarado-Turcio*, the Board recognized the significant U visa backlog and held that "processing delays are insufficient, in themselves, to deny an alien's request for a continuance" Matter of Alvarado-Turcio, A201-109-166, at 2 (BIA Aug 17, 2017), *available at* https://www.scribd.com/document/360077591/Edgar-MarceloAlvarado-Turcio-A201-109-166-BIA-Aug-17-2017. It is clear that Congress intended U visa applicants to be able to stay in the U.S. while their applications were being considered. *See infra*, at 13-19. That USCIS may take more than four years to resolve Petitioners' applications – a fact that is entirely out of their control – is no justification for using the denial of a continuance "to thwart the congressional design." *Benslimane*, 430 F.3d at 832.

The Board previously held that it is improper for an immigration judge to deny a continuance to a U visa applicant without consideration of the factors outlined in *Sanchez Sosa*. *Ricardo Garcia-Diaz*, A202 026 513, at 2 (BIA June 29, 2017), *available at* https://www.scribd.com/document/354711594/Ricardo-Garcia-Diaz-A202-026-513-BIA-June-29-2017. In *Garcia-Diaz*, the Board remanded the case back to the immigration judge to apply the *Sanchez Sosa* factors. *Id.* In this case, the Board erred by failing to adequately consider the *Sanchez Sosa* factors and should have remanded the case to the immigration judge for such an evaluation.

### B. Immigration Judges Have "All of the Attorney General's Powers" Including the Power to "Waive an Individual's Inadmissibility."

This Court has noted that an immigration judge has "all of the Attorney

General's powers 'in the cases that come before them', unless some other regulation limits that general delegation." *Baez-Sanchez v. Sessions*, 872 F.3d 854, 855 (7th Cir. 2017). Among these powers is the authority, "under 8 U.S.C. §1182(d)(3)(A)(ii) to waive an alien's inadmissibility—and thus to halt removal temporarily—while the alien requests a U visa from the Department of Homeland Security." *Id.* at 854.

Both the power to grant a continuance and the authority to waive Petitioner's inadmissibility serve "to halt removal temporarily." *Id.* The Board committed reversible error by refusing to remand this case for a waiver determination where the immigration judge clearly had authority to grant Petitioner that relief. Notably, the Board's decision is silent on the immigration judge's authority to waive Petitioner's inadmissibility.

This Court has held that "[a]n immigration judge cannot be permitted, by arbitrarily denying a motion for a continuance without which the alien cannot establish a ground on which Congress has determined that he is eligible to seek to remain in this country. . . to thwart the congressional design." *Benslimane*, 430 F.3d at 832. The Court made clear that it would not allow an individual in immigration proceedings "to be ground to bits in the bureaucratic mill against the will of Congress." *Id.* at 833. The Board's decision in this case is calling for removal of a family who has suffered extensive abuse here in the United States and provided substantial assistance to law enforcement personnel. Where, as here, Petitioners have a prima facie approvable petition for U nonimmigrant status and there is no suggestion that the claim is frivolous or intended for delay, the failure to remand is error. Removal in this case would be blatantly disregarding the will of Congress.

## II. Congress Intended the U Visa Statute to Prevent the Deportation of Battered Immigrants Who Cooperate with Law Enforcement, and the Enforcing Agencies Have Issued Supporting Regulations and Guidance Consistent with This Congressional Intent.

Gender-based violence is distressingly prevalent in the United States. As noted previously, one in three women in the United States will suffer physical violence at the hands of an intimate partner in her lifetime. *Facts about Domestic Violence and Physical Abuse*, *supra*, at 5. Immigrant populations are particularly vulnerable to these types of gender-based violence and are less likely to report it due to the threat of deportation. *See* Ivie, *supra*, at 6. It is against this backdrop that Congress passed the Victims of Trafficking and Violence Prevention Act of 2000, H.R. 3244. The legislative history of the Victims of Trafficking and Violence Protection Act shows that Congress intended to reduce the usage of the immigration system as a tool of abuse and coercion and protect survivors of abuse from deportation. Subsequent regulations and guidance demonstrate that the enforcing agencies understood and have sought to implement the Congressional intent behind U visa program.

### A. Congress Intended to "Provid[e] Battered Immigrant Women and Children . . . With Protection Against Deportation . . . to Cooperate With Law Enforcement."

The U visa was created as part of the Victims of Trafficking and Violence Prevention Act of 2000, which reauthorized VAWA. Pub. L. No. 106-386, 114 Stat. 1464 ("VAWA II"). In particular, the Battered Immigrant Women Protection Act of 2000 ("BIWPA") created the U visa program. H.R. 3083, 106th Cong. § 1513 (2000).

When Congress created the U visa program, its express and declared intent was

two-fold: (1) to "facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status," and "give law enforcement officials a means to regularize the status of cooperating individuals during investigations or prosecutions" and (2) to provide "temporary legal status to aliens who have been severely victimized by criminal activity [which] also comports with the humanitarian interests of the United States." Pub. L. No. 106-386, § 1513(a)(2)(B), 114 Stat. 1464 (2000).

In providing legal status for those who have been victimized, Congress recognized that immigrant survivors often face many barriers to achieving safety and protection, including the fear that reaching out for help will result in their deportation. In creating the U visa program, Congress found that "providing battered immigrant women and children . . . *with protection against deportation* . . . frees them to cooperate with law enforcement and prosecutors in criminal cases brought against their abusers." Pub. L. No. 106-386, § 1502(a)(2), 114 Stat. 1464 (2000) (emphasis added).

The legislative history surrounding the U visa program likewise makes clear the congressional purpose of alleviating the barriers immigrant survivors often face, i.e., that "battered immigrant women should not have to choose to stay with their abusers in order to stay in the United States." 146 Cong. Rec. S10185 (2000) (statement of Sen. Patrick Leahy). Representative of this stated goal, Senator Barbara Boxer discussed the difficulties confronting immigrants who suffer abuse: "We also, for the first time, look at battered immigrants . . . . They need to understand their rights, that their bodies don't belong to anyone else, and they have

a right to cry out if they are abused." 146 Cong. Rec. S10164, 10173 (2000); *See also* 146 Cong. Rec. S8571 (2000) (statement of Sen. Paul Sarbanes) ("[VAWA II] will also make it easier for battered immigrant women to leave their abusers without fear of deportation."); 146 Cong. Rec. H8094 (2000) (statement of Rep. John Conyers) ("There are still demographic groups that need better access to services and the criminal justice system. Predominantly among them are people who have not had their immigrant status resolved and are not yet citizens but are subject to lots of unnecessary violence."). Similarly, during the debate on the Violence Against Women Reauthorization Act of 2013, Senator Amy Klobuchar summarized the importance of U visas, noting that when she was a prosecutor, they "would have a number of cases where an immigrant was a victim" and the perpetrator threatened that the victim would be "deport[ed] you if you come forward to law enforcement." 159 Cong. Rec. S497, 498 (2013).

The intent of Congress, as reflected both in the plain language of the statute and in the express declarations of its sponsors and supporters, could not be clearer. Congress intended that immigrants who have been victimized in the United States should be able to work with law enforcement without the threat of deportation. Allowing removal proceedings to progress and be adjudicated after the filing of a prima facie approvable application for U nonimmigrant status would directly contravene Congressional intent.

### B. Subsequent Regulations, Guidance Documents, and Decisional History Demonstrate the Enforcement Agencies Understood and Have Sought to Implement Congress' Intention That U Visa Applicants Remain in the United States.

Congress' stated intention to protect abused immigrants from the fear of deportation in order to facilitate cooperation with law enforcement and prosecutors is confirmed by the regulations and guidance promulgated by enforcement agencies charged with implementing the law. By both regulation and guidance documents, these agencies have likewise sought to protect immigrant survivors of violence and abuse from the silencing fear of being deported if they report their abusers.

#### *1. Relevant Regulations.*

The U visa statute states that an alien is eligible for U nonimmigrant status if:

> (I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity . . .
>
> (II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning criminal activity . . . [and]
>
> (III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, . . . prosecutor, . . . judge, . . . or . . . other . . . authorities . . . prosecuting criminal activity . . . .

8 U.S.C. § 1101(a)(15)(U)(i) (2006). "[P]hysical or mental abuse" is defined in the regulations as "injury or harm to the victim's physical person, or harm to or impairment of the emotional or psychological soundness of the victim." 8 C.F.R. § 214.14(a)(8).

The process of applying for a U visa is rigorous. Applicants must file a Petition for U Nonimmigrant Status on a Form I-918, must supply initial evidence

supporting their I-918, and must provide an I-918 Supplement B law enforcement certification signed by a certifying official and attesting that the applicant has been or will be helpful to the investigation and prosecution of qualifying criminal activity. 8 C.F.R. § 214.14(c)(1). Because the application process is so rigorous, the process of reviewing U visa applications is also quite time consuming. And with the volume of applications USCIS receives, the time it takes to process U visa applications now exceeds four years. *See* USCIS Processing Times, *supra*, at 7.

DHS regulations demonstrate that the government understood Congress intended survivors should be allowed to remain in the United States during the pendency of their U visa applications. Under 8 C.F.R § 214.14(c)(1)(i), Immigrations and Customs Enforcement ("ICE") is authorized "to file, at the request of the alien petitioner, a joint motion to terminate proceedings without prejudice with the immigration judge or Board of Immigration Appeals, whichever is appropriate, *while a petition for U nonimmigrant status is being adjudicated by USCIS*." (emphasis added). Similarly, 8 C.F.R. § 214.14(c)(1)(ii) provides for stays of a final order of removal while a survivor's U visa application is being processed.

*2. Relevant Guidance Documents.*

In 2009, ICE issued guidance designed to create a safety net against the removal of domestic abuse survivors with applications pending. Pursuant to that guidance, when an individual provides proof that she has filed a U visa petition, "the OCC *shall* request a continuance to allow USCIS to make a prima facie determination." *Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal*, U.S. DEP'T OF

HOMELAND SECURITY, IMMIGR. AND CUSTOMS ENFORCEMENT (Sept. 25, 2009), https://www.ice.gov/doclib/foia/dro_policy_memos/vincent_memo.pdf (emphasis added). "Once USCIS has determined that the alien has made a prima facie case, the OCC should consider administratively closing the case or seek to terminate proceedings pending final adjudication of the petition." *Id.* Although there have been discrepancies in how ICE officials have implemented this guidance, the guidance documents remain operational.

Moreover, it is the stated policy of ICE that "ICE officers, special agents, and attorneys should exercise all appropriate prosecutorial discretion to minimize any effect that immigration enforcement may have on the willingness and ability of victims, witnesses, and plaintiffs to call police and pursue justice." ICE, FEA No. 306-112-002b, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (Jun. 17, 2011), *available at* https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf. ICE has reaffirmed this policy and declared it remains in effect. Tyler Kingkade, *Domestic Abuse Victims Aren't Coming Forward Because They're Scared of Being Deported*, BuzzFeed (Mar. 16, 2017), https://www.buzzfeednews.com/article/tylerkingkade/under-trump-domestic-abuse-victims-are-more-afraid-of-being.

Petitioner in this case did exactly what Congress and the enforcing agencies sought to facilitate—she cooperated with law enforcement authorities. To deny her a continuance and to proceed with her removal under these circumstances thus risks the exact consequence Congress and the enforcing agencies have sought to avoid by reinforcing abuse and frightening immigrant victims into remaining silent.

ICE guidance makes clear that filing a U visa petition is all that is necessary to warrant a continuance until USCIS can make a prima facie determination, and disregarding that policy not only miscarries justice in this case, but imperils the cooperation of other immigrant abuse victims considering whether to cooperate with law enforcement and prosecutors or to remain silent for fear of deportation.

## III. The Impact of a Failure to Correct the Board's Error Could Be Catastrophic.

The implications of this case are real and far-reaching. Between 34 and 49.8 percent of immigrant women in the United States experience domestic violence in their lifetimes. *Battered Immigrant Woman Protection Act of 1999: Hearing on H.R. 3083 Before the Subcommittee on Immigration and Claims of the H. Comm. on the Judiciary*, 106th Cong. 58 (2000) (statement of Leslye Orloff, Director, Immigrant Women Program, NOW Legal Defense and Education fund). While women with unstable immigration statuses are more likely to experience abuse, they are half as likely to report their abuse to law enforcement. Nawal H. Ammar et al., *Calls to Police and Police Response: A Case Study of Latina Immigrant Women in the USA*, 7 INT'L J. OF POLICE SCI. & MGMT. 230, 236 (2005).

In the United States generally, between 53 and 58 percent of battered women report their abuse. Orloff et al., *supra*, at 9, pp. 67-68. That number falls to 43.1 percent among battered immigrant women with *stable permanent* immigration status. *Id.* Among undocumented battered immigrant women, only 18.8 percent are willing to report their abuse to law enforcement. *Id.* Notably, 41 percent of Latinos and Latinas report that deportation is the primary reason why Latino and Latina survivors do not come forward. *The No Más Study: Domestic Violence and Sexual*

*Assault in the Latin@ Community*, CASA DE ESPERANZA (2015), http://nomore.org/wp-content/uploads/2015/04/NO-MAS-STUDY-Embargoed-Until-4.21.15.pdf.

A 2017 survey of more than 700 advocates working with survivors of intimate partner violence, sexual abuse, and human trafficking revealed that 43 percent of advocates had clients who dropped a civil or criminal case due to fear of immigration enforcement. *Key Findings: 2017 Advocate and Legal Service Survey Regarding Immigration Survivors*, TAHIRIH JUSTICE CENTER ET AL. (2017), https://www.tahirih.org/wp-content/uploads/2017/05/2017-Advocate-and-Legal-Service-Survey-Key-Findings.pdf. When faced with the difficult decision to report, survivors are already suffering from various measurable cognitive and psychological reactions to trauma, such as high anxiety, depression, feelings of helplessness rooted in fears of not being believed and self-blame, and other symptoms related to post-traumatic stress disorder. Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 326-330 (1992). Compounding these psychological afflictions with the additional fear of deportation effectively demobilizes survivors from seeking help.

The decision to report carries significant risk for immigrant survivors of violence. These survivors continue living in situations that jeopardize their physical safety because of the risk of deportation if they come forward. Deportation, it should be noted, comes with its own significant documented hazards: loss of financial stability, the possibility of increased violence in one's home country, loss of access to the justice system and services that are assisting them with their recovery, and

either separation from their children or subjecting their children to deportation. For many survivors, these risks were not worth reporting the violence they were suffering. The U visa, however, is supposed to provide a potential pathway for these survivors – and for many is their last hope. Jacqueline P. Hand & David C. Koelsch, *Shared Experiences, Divergent Outcomes: American Indian and Immigrant Victims of Domestic Violence*, 25 WIS. J. L. GENDER & SOC'Y 185, 203 (2010).

### A. Deportation Strips Immigrant Women of Financial Stability, Plunging Them into Poverty.

When deciding whether or not to report violence, many immigrant survivors are forced to choose between abuse or poverty. Domestic violence is a leading cause of homelessness for women within the United States. *Domestic Violence and Homelessness*, ACLU WOMEN'S RIGHTS PROJECT (2008), https://www.aclu.org/sites/default/files/pdfs/womensrights/factsheet_homelessness_2008.pdf. At least half of women in the United States who leave their abusers will fall below the poverty line after doing so. Lisa M. De Sanctis, *Bridging the Gap Between the Rules of Evidence & Justice for Victims of Domestic Violence*, 8 YALE J. L. & FEMINISM 359, 368 (1995) (citing NAT'L CLEARINGHOUSE FOR THE DEF. OF BATTERED WOMEN, STATISTICS PACKET (3d ed. Fed. 1994)).

This risk is amplified for immigrant survivors, because many lack independent financial resources or a support network of friends or family within the country. Michelle J. Anderson, *A License to Abuse: The Impacts of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401, 1405, fn. 11 (1993). Many immigrant survivors are thus faced with the choice between the food and shelter provided by

their abuser and the risk of deportation where that meager support will be stripped away. For immigrant survivors with children who have been here for multiple years, deportation means returning to a country where their support structure may no longer exist. Their ability to provide safe housing and food for their families is impaired. For these survivors, deportation almost certainly means homelessness and deep poverty. Natalie Nanasi, *The U Visa's Failed Promise for Survivors of Domestic Violence*, 29 YALE J. OF L. & FEMINISM 273, 296 (2018).

For many survivors, this is reason enough to stay with their abuser rather than reporting a crime and facing potential deportation. To allow Petitioners in this case "to be ground to bits in the bureaucratic mill against the will of Congress" will only serve to reinforce these women's fears and prevent them from reporting crimes. *Benslimane*, 430 F.3d at 833.

### B. Deportation Forces Immigrant Victims of Abuse to Make a Sophie's Choice Between Remaining with Their Abusers or Being Removed to an Unsafe Country.

If the Board's decision stands, Petitioners will be returned to the country they fled. For many survivors in Petitioners' position who seek U visas, they risk deportation to a country they left precisely because they feared for their safety and the safety of their children. When weighing the impossible choice of continuing to be subjected to the abuse by a single known individual within the borders of a country that guarantees certain protections versus the known and unknown abuses that may be inflicted should they be returned to a country that is unsafe, many survivors may choose to remain silent so as not to risk deportation. Further, where an immigrant abuser may be prosecuted and deported, a survivor who came forward to

assist in the investigation and prosecution of the crime and sought protection through a U visa would now run the risk of being deported to that same country while the U visa case is pending. Such a survivor would be left without any protection in a country where the abuser is likely waiting to retaliate. If the Board's decision stands it would undermine the intent of the U visa program which exists to encourage cooperation with law enforcement authorities and provide protection for survivors who come forward.

Indeed, deportation itself may aggravate the domestic abuse that survivors experience. If the United States deports survivors who courageously report their abuse, they will be sent away without any protection and will be at an increased risk of "separation violence"—retaliatory physical abuse that seeks to re-establish control over the survivor after she has threatened to leave. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 65-66 (1991). A woman's fear of leaving is grounded in reality: at least half of women who leave their abusers are followed and harassed or further attacked by them. Carolyn R. Block, *Intimate Partner Homicide*, U.S. DEP'T OF JUST., 250 NAT'L INST. OF JUST. J. 1, 6 (2003), https://www.ncjrs.gov/pdffiles1/jr000250.pdf. In fact, attempting to leave a violent relationship was the cause of 45 percent of murders of a woman by a man. Mahoney, *supra*, at 23. If the United States deports survivors instead of offering them protection, they "may be reluctant to seek any form of help in the future, which could increase the level of risk and danger they face in their relationships." Nanasi, *supra*, at 22.

Many survivors do not make this choice with only themselves in mind—there are children to consider, too. Deportation leaves two possible outcomes for the survivor's children, both of which place them at greater harm than remaining in the abusive relationship. The children may: (1) be separated from their mother and remain in the U.S., either with an abusive parent or in foster care, without her protection, or (2) be deported along with their mothers to her home country to face the heightened financial and physical risks of harm discussed previously. Anderson, *supra*, at 21, pp. 1427-28, fn. 127.

If survivors report abuse and are not offered protection from deportation, their physical safety, and that of their children, can be further compromised. Denying the Petitioners in this case the relief they seek will only serve to reinforce for the immigrant community that the safety offered by the U visa program is a false promise that cannot be relied upon. The Board's decision in this case reinforces the coercive threats that abusers tell survivors that when they are deciding whether to report their abuse to law enforcement, they may well be deciding between the risk of physical harm with their abuser or the increased risk of physical harm that accompanies deportation. The Board's decision puts at risk the very lives that the U visa program purports to protect.

## CONCLUSION

For the foregoing reasons, amici support the position of the Petitioners and respectfully requests that this Court grant the relief requested by Petitioners.

Dated: February 19, 2019 By: 

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I hereby certify that on February 19, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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