No. 10-1058

IN THE

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ATALA DE JESUS LEIVA-MENDOZA

Petitioner,

v.

ERIC H. HOLDER, JR., UNITED STATES ATTORNEY GENERAL

Respondent.

Appeal from the Board of Immigration Appeals
Appeal No. A097-653-566

BRIEF FOR *AMICI CURIAE* NATIONAL NETWORK TO END VIOLENCE AGAINST IMMIGRANT WOMEN, LEGAL MOMENTUM, THE FAMILY VIOLENCE PREVENTION FUND AND ASISTA IMMIGRATION ASSISTANCE PROJECT IN SUPPORT OF PETITIONER AND REVERSAL

MICHAEL L. MARTINEZ
BRUCE J. ZABARAUSKAS
CROWELL & MORING LLP
1001 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004
(202) 624-2500

Counsel For *Amici Curiae* National Network To End Violence Against Immigrant Women, Legal Momentum, The Family Violence Prevention Fund and ASISTA Immigration Assistance Project

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RULE 26.1 CERTIFICATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* National Network To End Violence Against Immigrant Women, Legal Momentum, the Family Violence Prevention Fund and ASISTA Immigration Assistance Project each state that they have no parent corporation and no publicly held company owns 10 percent or more of their stock.

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INTEREST OF THE *AMICI*

This *amici curiae* brief is submitted on behalf of the National Network to End Violence Against Immigrant Women (the "Network"), Legal Momentum, the Family Violence Prevention Fund and ASISTA Immigration Project (collectively, the "Amici").[1] The Network is a coalition of domestic-violence survivors, immigrant women, advocates, activists, lawyers, educators and other professionals working together to end domestic abuse. The Network is co-chaired by The Immigrant Women Program of Legal Momentum, the Family Violence Prevention Fund, and the ASISTA Immigration Assistance Project. These leading national organizations – who participated in drafting the Federal Violence Against Women Act – share a deep understanding of domestic violence, the procedures for fighting it, and the particular dynamics of domestic violence experienced by immigrant victims.

ASISTA Immigration Assistance Project ("ASISTA"), founded in 2004, provides comprehensive, cutting-edge technical assistance regarding immigration and domestic violence. ASISTA seeks to enhance immigrant women's security, independence and full participation in society by promoting integrated holistic approaches and educating those whose actions and attitudes affect immigrant women who experience violence. In addition to serving as a clearinghouse for

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[1] Pursuant to Federal Rules of Appellate Procedure 29(b), the Amici have filed a Motion for Leave to File *Amici* Brief, which more fully describes the interests of *amici.*

immigration law technical assistance, ASISTA staff train civil and criminal judges and system personnel in the best practices for working with immigrant survivors of violence. ASISTA works closely with Department of Homeland Security ("DHS") personnel to ensure they implement the law as Congress intended, and coordinates litigation to correct misapplications of the law by the Executive Office of Immigration Review ("EOIR"). Together with the National Network to End Violence Against Immigrant Women and DHS, ASISTA contributed a section on VAWA to EOIR's 2005 training video for all immigration judges.

Legal Momentum is the nation's oldest legal defense and education fund dedicated to advancing the rights of all women and girls. For 39 years, Legal Momentum has made historic contributions through public policy advocacy and litigation to secure personal and economic security for women. Its Immigrant Women Program is a national expert on the rights and services available under immigration, family, public benefits, and language access laws for immigrant victims of domestic violence, sexual assault, human trafficking and other violence. It shares this expertise through training, comprehensive publications, and technical assistance for lawyers, advocates, justice, and health care professionals nationwide. As co-chair of the Network, Legal Momentum led the efforts to craft and assist in implementation of the immigration protections in the Violence Against Women Acts of 1994, 2000 and 2005 ("VAWA"), the Trafficking Victims Protection Acts

of 2000 and 2008 and other federal laws including public benefits access for immigrant victims and access to federally supported services necessary to protect life and safety.

The Family Violence Prevention Fund ("FVPF") is a non-profit tax exempt organization founded in 1980. The FVPF is a national organization based in San Francisco. It focuses on domestic violence education, prevention and public policy reform. Throughout its history, the FVPF has pioneered prevention strategies for justice, public education, and health care. The FVPF's Battered Women's Rights Project expands access to legal assistance and culturally appropriate services for all women, including battered immigrant women. The FVPF was instrumental in developing the 1994 VAWA and has since worked to educate health care providers, police, judges, employers and others regarding domestic violence. In addition, the FVPF has provided training and technical assistance to domestic violence shelters, legal assistance workers and other service providers on issues facing battered immigrant women.

The Amici are concerned with the immigration determinations in this case because they improperly create a non-statutory requirement that a noncitizen seeking special rule cancellation under VAWA of an order of removal on the grounds of "extreme cruelty" directed at the noncitizen's lawful resident child, must establish that the child suffered *actual* harm or injury as a result of the alleged

abusive conduct. This incorrect legal standard improperly shifts the focus of VAWA and its progeny away from preventing abusive behavior to simply addressing the after-effects of such abuse, and only then, limiting relief to those cases where there is evidence of actual harm or injury. The decisions below subvert the purpose of VAWA by completely ignoring the well-established premise that the effects of psychological abuse often do not manifest until a substantial period of time has elapsed. The tribunals below also ignore the generational harm to our society and children that Congress sought to address because children who witness their father abuse their mother are more likely to become abusers themselves.

Additionally, the regulations under the VAWA recognize that certain types of behavior mandate a finding of "extreme cruelty." Amici believe that the psychological abuse associated with a child witnessing intentional acts of domestic abuse by a parent, regardless as to proof of actual harm or injury, mandates a determination of "extremely cruelty" as a matter of law.

ISSUES PRESENTED

I. Whether the courts below applied an incorrect legal standard by holding that "extreme cruelty" under VAWA requires evidence of "actual harm" to the child of a noncitizen parent facing deportation?

II. Whether the psychological abuse associated with a child witnessing intentional acts of domestic violence perpetrated by her father against her noncitizen mother constitutes "extreme cruelty" under VAWA as a matter of law?

SUMMARY OF ARGUMENT

There is no dispute from the record below that the Petitioner's child, who was a United States citizen, witnessed physical violence against her mother which was intentionally committed by the child's permanent resident father in the child's presence. The father then reported the Petitioner's immigration status to the Petitioner's employer. (A-6)[2] Shortly thereafter, removal proceedings were commenced against the Petitioner.[3]

The special cancellation of removal provisions of VAWA were specifically designed to, *inter alia*, protect from deportation, unmarried noncitizens whose children have been "battered or subjected to extreme cruelty" by a permanent resident parent.

In the instant case, the courts below erred by holding that "extreme cruelty" does not exist unless there is proof that the alleged abusive conduct has resulted in "actual harm" to the child. However, the statute does not, by its terms, require a

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[2] References to ("A.") are to Petitioner's Appendix.

[3] Congress acted to prevent abusers from using the immigration system as a weapon against their noncitizen victims) when it enacted 8 U.S.C. § 1367, which prohibits, *inter alia*, the use of information from abusers and suspected abusers when making evidentiary or deportation decisions.

showing of actual harm. In fact, since evidence of psychological harm to a child may only manifest years after witnessing one parent perpetrate domestic abuse against the other parent, it may be impossible to prove actual injury, specifically in the case of infants. Thus, by creating an actual harm requirement, the tribunals below made bad law, and turned VAWA on its head by punishing the victim and protecting the abuser.

The tribunals below should have recognized that which is self-evident – certain acts are so repulsive to society that they are, by their nature, extremely cruel. Forcing a young child to witness her mother being brutally beaten by her father is such an act. Indeed, such activity promotes future domestic violence since social science research shows that child witnesses of domestic violence perpetrated by one parent against the other parent are more likely to become abusers in their adult life. Child witnessing therefore propagates future, multigenerational domestic violence which is anathema to the underlying purpose of VAWA.[4] Accordingly, this Court should hold that a child's witnessing of acts of intentional parental domestic violence constitutes "extreme cruelty" as a matter of law.

Indeed, any other determination would result in the absurd and harmful situation where the abused noncitizen parent of a child who is a United States citizen could be required to make the "Hobson's Choice" of either leaving the

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[4] The Social Science research cited in this brief are contained in the appendix being filed by Amici simultaneously herewith ("*Amici* Appendix").

country with the child, who will thereby lose the most basic fruits of her U.S. citizenship, or leave the child in the United States to be raised by an abusive parent. Neither result was contemplated by VAWA. In fact, the fear of such result was among the reasons Congress enacted the special cancellation provisions of VAWA. Therefore, the decision below should be reversed.

ARGUMENT

Under VAWA, a noncitizen facing deportation may obtain special cancellation under VAWA of an order of removal ("VAWA Cancellation") by establishing that: (i) the noncitizen is the parent of a United States citizen who has been subject to "extreme cruelty" by the child's other parent who is a citizen or permanent resident of the United States; (ii) the noncitizen has been continuously in the United States for a period of three years prior to the filing of their application; (iii) the noncitizen is a person of good moral character; (iv) the noncitizen is not subject to deportment under *8 U.S.C. § 1182(a)(2) or (3)* or *8 U.S.C. § 1227(a)(1)(G)* or *(2)* through *(4)*; and (v) removal of the noncitizen would result in extreme hardship to the noncitizen or her child. *8 U.S.C. § 1229b.*

There is no dispute that the Immigration Judge found that each of the last four requirements had been met in this case. (A-17) Moreover, the tribunals below determined the Petitioner had introduced "credible evidence" that her infant

child had witnessed Petitioner being physically beaten by the child's father.[5] (A-22; A-16) However, both the Immigration Judge and the Board of Immigration Appeals ("BIA"), erred in holding that "extreme cruelty" did not exist because there was no evidence of "actual harm" to the Petitioner's child. (A-23; A-18)

POINT I

THE TRIBUNALS BELOW APPLIED AN INCORRECT LEGAL STANDARD BY REQUIRING EVIDENCE OF "ACTUAL HARM" AS A PREREQUISITE TO A DETERMINATION OF "EXTREME CRUELTY"

As the Supreme Court has stated on numerous occasions, Congress "says in a statute what it means and means in a statute what it says there." *Connecticut General Bank v. Germain, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149 (1992); see also United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241-42, 109 S. Ct. 1026, 1030-31* (1989); *United States v. Goldenberg,* 168 U.S. 95, 102-103, 185 Ct. 3, 4 (1897). As such, a court may not substitute its own judgment for that of Congress by imposing additional requirements or conditions in a statute that were not enacted by the legislature.

For example, in *Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 107 S. Ct. 1207 (1987),* the decision of the Immigration Judge and BIA was reversed in connection with a noncitizen's application for

[5] *Mendez v. Holder*, 566 F.3d 316, 318 (2d Cir. 2009) (where the Board of Immigration Appeals has not questioned the noncitizen's credibility, a court of appeals takes the facts asserted by the noncitizen to be true).

asylum as a refugee. While the statute at issue provided that a person may qualify as a refugee if he or she "has a well-founded fear of future persecution," the BIA held, and the government argued, that the only way that a noncitizen can establish a "well founded fear" is if she can establish that persecution is "more likely than not." *480 U.S. at 430-31, 107 S. Ct. at 1212-13.* The Ninth Circuit reversed the BIA and the Supreme Court affirmed the Ninth Circuit's ruling. The Supreme Court rejected the immigration judge's attempt to impose a "more likely than not" standard into the statute, and held that "[t]he statutory language does not lend itself to [the immigration judge's] reading." *Id. See also Jama v. Immigration and Customs Enforcement,* 543 U.S. 335, 341, 125 S. Ct. 694, 700 (2005) ("We do not lightly assume that Congress omitted from its adopted text requirements that it nonetheless intends to apply.")

In the instant case, the express language of the statute at issue provides that it applies to "the parent of a child of an alien who is or was a lawful permanent resident and the child has been battered or subjected to extreme cruelty by such permanent resident parent." *8 U.S.C. § 1229b(b)(2)(A)(i)(II).* Nowhere in that statute is there a requirement that an applicant who is the non-abusive immigrant parent of an abused child or an applicant who is an abused child or spouse is required to prove that the extreme cruelty resulted in actual harm to their child or themselves.

Indeed, the government's own regulations concerning VAWA support Petitioner's position that "actual injury" is not a prerequisite to a finding of "extreme cruelty" Specifically, 8 C.F.R. § 204.2(c)(vi) provides:

> Battery or extreme cruelty. For purposes of this chapter, the phrase "was battered or was the subject of extreme cruelty" includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which **threatens** to result in physical or mental injury.

(emphasis supplied).

The regulation's express acknowledgement that extreme cruelty includes actions which merely "threaten" to result in physical or mental injury is wholly inconsistent with the immigration judge's and the BIA's determinations that "actual harm" is required for a finding of extreme cruelty.

The legislative history to VAWA similarly supports the Petitioner's position that "actual harm" is not required for a finding of "extreme cruelty." The House Report accompanying VAWA stated that it was modifying the existing law which required applications based upon "extreme cruelty" to be supported by an affidavit from a mental health professional. The House Report noted that this requirement was being eliminated because, *inter alia*, the existing regulation "*focuses the inquiry on the effect of the cruelty on the victim rather than on the violent behavior of the abuser.*" H. Rep. 103-395 at p. 38 (1998) (emphasis supplied). Thus, harm to the victim (*i.e.*, the effect of the cruelty) is not the appropriate focus on an

extreme cruelty determination under VAWA; rather, the focus is on the nature of the abuser's behavior.

In this case, the decisions of the tribunals below acknowledged that the Petitioner had introduced evidence of threatened harm to Petitioner's child as a result of the child's witnessing domestic abuse against the Petitioner. *See* (A-23) ("expert witness, Dr. Matthews testified that a young child may suffer significant psychological harm if exposed to abuse of that child's caregiver"); (A-18) ("[Dr. Matthews] provided testimony that a young child may suffer significant psychological harm if exposed to abuse of that child's caregiver. The Court finds this to be a very plausible position, as an exposure to serious trauma being inflicted on a parent/caregiver may result in consequences to the child.").

However, the decisions below wrongly held that extreme cruelty did not exist in this case because of the lack of evidence of actual, as opposed to potential or threatened, harm to the child. See (A-23) ("We agree with the Immigration Judge's finding that it is speculative to say that Naiela suffered any negative effects from witnessing Naiel's abuse of respondent."); (A-18) ("So while we have testimony that it is possible that Naiela may suffer some negative effects of seeing Respondent abused by Naeil, it is entirely speculative at this point whether or not any negative effects have actually taken or will take place."). VAWA does not

require the Petitioner to introduce any evidence of "actual injury" and the immigration judge's requirement of proof of "actual injury" was clear error.[6]

The insistence of the tribunals below on evidence of actual injury subverts the purpose of VAWA, which is part of a national effort to prevent domestic violence. The opinions below acknowledge that a child's witnessing of domestic abuse perpetrated by one parent against the other can result in harm to the child and that such damage may manifest at some time in the future. (A-18) The social science research on a child's witnessing of parental abuse is clear that such damage may take years to show. *See infra,* at pp. 17-20 There is not a scintilla of authority to support the proposition that it was Congress' intent simply to ignore those victims of extremely cruel behavior solely because, by happenstance, they had the fortune or misfortune of having the effects of their abuse manifest only after an application has been made for VAWA Cancellation.

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[6] Under VAWA, the Petitioner was only required to proffer "any credible evidence" to support her petition. 8 U.S.C. § 1229(b)(2)(D). Under the "any credible evidence" standard, the immigration judge may not deny a petition for failure to submit particular evidence. It may only be denied on evidentiary grounds if the evidence that was submitted is not credible or otherwise fails to establish eligibility. Leslye E. Orloff, et al., *Mandatory U-Visa Certification Unnecessarily Undermines The Purpose of the Violence Against Women's Act's Immigration Protections and its "Any Credible Evidence Rules – A Call for Consistency,"* 11 Georgetown J. Gender & L. 619, 627 (2010). In this case, the Petitioner satisfied the "any credible evidence" standard by introducing the unopposed, expert testimony of Dr. Matthews. *Amici* submits that such testimony, which the Immigration Judge stated was "very plausible" satisfied Petitioner's evidentiary burden.

The "actual harm" legal standard relied upon in the decisions below leads to results which are dangerous and antithetical to the purposes underlying VAWA. For example, common sense dictates that a parent who points a gun at a child's head has engaged in extreme cruelty towards the child. However, under the rationale of the decisions on appeal, such heinous activity does not constitute "extreme cruelty" under VAWA unless it can be shown that the child has been actually harmed. In other words, unless and until the trigger is pulled or the child manifests evidence of emotional damage or harm, VAWA Cancellation is unavailable.

This reasoning stands VAWA on its proverbial head, and is not what Congress intended when it created VAWA immigration relief including VAWA Cancellation of removal. VAWA was enacted to help stop the continuation of domestic violence and possible resultant injuries from patterns of continued abuse. Congress designed immigration protection under VAWA to offer help to immigrant victims of battering *or extreme cruelty.* Congress, recognizing the escalating nature of abuse in violent relationships, provided access to VAWA immigrant relief when there was battering *or extreme cruelty* without requiring that the abuse escalate to the point where the victim actually suffers the first physical

beating.[7] Under the rationale of the tribunals below, VAWA Cancellation only comes into play after it is too late and harm from domestic violence has occurred.

Moreover, under that rationale, the noncitizen parent of a child who is a United States citizen and who has been psychologically or emotionally abused, may be required to make a Hobson's Choice between leaving the United States with the child who will thereby lose the most basic fruits of her citizenship, or leave the child in the United States to be raised by an abusive parent or to be placed in the foster care system. VAWA was enacted to prevent the noncitizen parent from making such a "choice," not to force the noncitizen parent into making that "choice." Thus, the rulings below undermine the statutory protections enacted by Congress in VAWA. Accordingly, the decision of the BIA should be reversed.[8]

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[7] *See, generally*, Leslye E. Orloff & Janice V. Kaguyutan, *Offering A Helping Hand: Legal Protections For Battered Immigrant Women: A History Of Legislative Responses,* 10 Am. U.J. Gender Soc. Pol'y & L. 95, 107 (2001).

[8] In affirming the Immigration Judge, the BIA also wrongly held that "the respondent had failed to establish that two instances of potential psychological harm to her daughter are sufficient to constitute extreme cruelty." (A-23) The number of instances of violence is irrelevant. As noted in the social science literature: "Even a single episode of violence can produce postraumatic stress disorder in the children." Daniel G. Saunders, *Child Custody Decisions in Families Experiencing Women Abuse*, 39 Social Work 1, 51-52 (1994). Moreover, the Petitioner asserts in its brief that the record shows that there were more than two instances of violence witnessed by Petitioner's child. *See* Petitioner's Brief at pp. 8-10.

POINT II

THE PSYCHOLOGICAL ABUSE ASSOCIATED WITH A CHILD WITNESSING INTENTIONAL ACTS OF DOMESTIC VIOLENCE AGAINST HER MOTHER CONSTITUTES "EXTREME CRUELTY" AS A MATTER OF LAW

In addition to committing clear error by improperly requiring the Petitioner to establish actual harm to her child, the decisions below are also erroneous because the psychological abuse associated with a child's witnessing intentional acts of domestic violence against her mother constitutes "extreme cruelty" under VAWA as a matter of law.

The government's regulations underlying VAWA recognize that certain types of behavior are so heinous by their nature that they constitute "extreme cruelty" *as a matter of law*. This proposition is made evident by 8 C.F.R. § 204.2(c)(vi), which addresses the "extremely cruelty" standard, and which provides, in part:

> Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution ***shall*** be considered acts of violence. Other abusive actions ***may*** also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence.

(emphasis added).

This regulation divides all abusive behaviors into two categories: (i) acts which "shall" be considered violent and thus are, *per se*, extremely cruel; and

(ii) acts that "may" be considered extremely cruel behavior under some, but not all, circumstances.

The use of both "shall" and "may" in close proximity to each other in the same regulation triggers the long standing principle that "shall" has a mandatory connotation, while "may" means discretionary treatment. *Jama*, 543 U.S. at 346, 125 S.Ct. at 702-03; (the word "may" customarily connotes discretion, and that connotation is particularly apt where "may" is used in contraposition to the world "shall"); *Alabama v. Bozeman*, 533 U.S. 146, 153, 121 S. Ct. 1079 (2001) ("The word 'shall' is ordinarily 'the language of command.'"), *quoting Anderson v. Yungkau,* 329 U.S. 482, 485, 67 S. Ct. 428 (1947). The regulation at issue in this case, by its very terms, provides that psychological abuse falls within the category of mandatory types of violent behavior which are extremely cruel. 8 C.F.R. § 204.2(c)(vi). Thus, if a child is subjected to psychological abuse, such activity requires a finding of "extreme cruelty" under the VAWA Cancellation provisions. *See also* Anna Byrne, *What Is Extreme Cruelty? Judicial Review of Deportation Cancellation Decisions for Victims of Domestic Abuse*, 60 Vand. L. Rev. 1815 (2007) (advocating that certain types of abuse should be considered extreme cruelty as a matter of law).

Both the extensive and accepted social science research on "child witnessing" and the uncontradicted testimony of Petitioner's expert witness below

unequivocally establish that requiring a child to witness one parent committing violent domestic abuse upon the other parent constitutes psychological abuse.

"There is no doubt that children are harmed in more than one way – cognitively, psychologically, and in their social development – merely by observing or hearing the domestic terrorism of brutality against a parent at home." Howard A. Davidson, *A Report to the American Bar Association, The Impact of Domestic Violence on Children*, p. 1 (1994). "The impact of violent environments on very young children suggests that permanent negative changes in the child's brain and neural development can occur, such as altering the development of the central nervous system, predisposing the individual to more impulsive, reactive, and violent behavior." Peter G. Jaffe *et al.*, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 Juvenile and Family Court Journal 4, 57, 60-61 (2003). Indeed, infants who have witnessed domestic abuse may not develop the attachment to caretakers that is critical to their development and may suffer from "failure to thrive." Janet Carter, *Domestic Violence, Child Abuse, and Youth Violence: Strategies For Prevention and Early Intervention,* p. 2 (2005).[9] In addition to emotional and behavioral problems, difficulties experienced by child witnesses can encompass a variety of trauma

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[9] Available at http://www.mincava.umn.edu/link/documents/fvpf2/fvpf2.shtml

symptoms, including nightmares, flashbacks, hypervigilance, depression, and regression to earlier stages of development." *See* Peter G. Jaffe *et al.*, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 Juvenile & Family Ct. J. 4, 57, 60 (2003). "[W]itnessing violence as a child has also been associated with adult reports of depression, trauma-related symptoms and low self-esteem among women." Jeffrey L. Edleson, *Children's Witnessing of Adult Domestic Violence*, p. 11(1997).[10]

It is further recognized that the effects of this psychological abuse may not manifest until years later. Witnessing domestic abuse at a young age lays the foundation for long-term effects to become apparent. In *Problems Associated with Children's Witnessing of Domestic Violence*, Jeffrey Edleson acknowledges that child witnesses to domestic abuse have "an increased risk of psychological, emotional problems, cognitive functioning problems, and long-term development problems." Jeffrey L. Edleson, *Problems Associated with Children's Witnessing of Domestic Violence*, p. 4 (1999) (emphasis added).[11] Edelson further states: "A number of studies have mentioned much longer term effects reported retrospectively by adults or indicated in archival records." *Id.* at 2.

Dr. Matthews' uncontradicted expert testimony below, is consistent with these authorities. Dr. Matthews testified that "a child who has witnessed the abuse

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[10] Available at http://www.ncdsv.org/images/ChildrenWitnessingAdultDV.pdf

[11] Available at http://new.vawnet.org/category/Main_Doc.php?docid=392

of his/her caregiver has suffered a form of psychological abuse even without any proof of harm." (A-15) The Immigration Judge acknowledged the plausibility of Dr. Matthews' opinion. (A-18)

The testimony of the Petitioner below, which the Immigration Judge expressly found to be credible, was that Petitioner's child helplessly watched her father violently smash the Petitioner's face against the window of the car and on at least one other occasion witnessed her father violently attacking the Petitioner. (A-8) Such actions constitute psychological abuse of the Petitioner's child. The regulations under VAWA provide that in cases of psychological abuse, courts "shall" find these violent acts to constitute extreme cruelty. Indeed, in at least one other case, the BIA has held that a child's witnessing of domestic abuse upon her mother constituted "extreme cruelty." *Matter of N-A-J* (BIA 11/29/2001). [12]

Finally, the social science research also shows that child witnesses of domestic violence are more likely to become abusers in the future. *See, e.g.,* Alan Rosenbaum & K. Daniel O'Leary, *Children: The Unintended Victims of Marital Violence*, 51 American Journal of Orthopsychiatry 692, 698 (1981) (male children who witness the abuse of mothers by fathers are more likely to become men who batter women). Thus, each of the following outcomes is contrary to VAWA's goals of stopping domestic violence, encouraging non-abusive parents of abused

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[12] A copy of the *N-A-J* decision is located at (A-397).

children to take steps to protect children and holding abusers accountable for the abuse they perpetrated against family members – allowing child witnesses of domestic abuse to either remain in the United States with their abusive parent to continue to be abused themselves and/or to unwittingly become tolerant and versant in the ways of abuse; or alternatively requiring such psychologically scarred children to return to their mother's country of origin where access to appropriate mental health treatment may be nonexistent. Accordingly, the tribunals below erred by failing to hold that the psychological abuse caused by Petitioner's child witnessing intentional acts of parental abuse constituted extreme cruelty under VAWA as a matter of law.

POINT III

UNDER PRIOR PRECEDENT FROM THIS COURT, APPELLATE JURISDICTION EXISTS TO DETERMINE WHETHER THE BIA APPLIED THE CORRECT LEGAL STANDARD AND WHETHER IT PROPERLY APPLIED THE LAW TO THE FACTS OF THIS CASE

Finally, *amici* is aware of case law which purports to reference a split amongst the circuits, as to whether the Court of Appeals has jurisdiction over the denial of an application under 8 U.S.C. § 1229b seeking VAWA Cancellation of an order of removal. *Compare Reyes-Vasquez v. Ashcroft*, 395 F.3d 903 (8th Cir. 2005) (court has jurisdiction); *Sepulveda v. Gonzales*, 407 F.3d 59, 60 (2d Cir. 2005) (Sotomayor, J.) (court has jurisdiction); *Hernandez v. Ashcroft*, 345 F.3d 824, 828 (9th Cir. 2003) (court has jurisdiction); *with Johnson v. Attorney General*,

602 F.3d 508, 512 (3rd Cir. 2010) (court lacks jurisdiction); *Perales-Cumpean v. Gonzales,* 429 F.3d 977, 981 (10th Cir. 2005) (court lacks jurisdiction); *Wilmore v. Gonzales*, 455 F.3d 524, 527 (5th Cir. 2006) (court lacks jurisdiction).

The extent of appellate jurisdiction over the denial of VAWA Cancellation is governed by 8 U.S.C. § 1252. Although § 1252(a)(2)(B) provides that except as provided in subsection (D), the court of appeals lacks jurisdiction to hear any appeal from a judgment regarding a request for VAWA Cancellation under 8 U.S.C. § 1229b, subsection (D) provides that nothing in 8 U.S.C. § 1252 shall limit or eliminate judicial review of "constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(B) and (D). Applying these principles, the courts of appeal have held that issues of law, which are often referred to as nondiscretionary issues, are subject to judicial review; whereas, issues within the discretion of the Attorney General are not subject to judicial review.

In *Kucana v. Holder,* 130 S. Ct. 827 (2010), the Supreme Court recently addressed the jurisdictional provisions of 8 U.S.C. § 1252, and held that the Court of Appeals had jurisdiction over an appeal from a decision of BIA. In reaching this result, the Supreme Court stated:

> Any lingering doubt about the proper interpretation of 8 U.S.C. § 1252(a)(2)(B)(ii) would be dispelled by a familiar principal of statutory construction: the presumption favoring judicial review of administrative action. When a statute is "reasonably susceptible to

> divergent interpretation, we adopt the reading that accords with traditional understandings and basic principles: the executive determinations generally are subject to judicial review." *Gutierrez de Martinez v. Lamagno,* 515 U.S. 417, 434, 115 S. Ct. 2227, 132 L. Ed. 2d 375 (1995). We have consistently applied that interpretive guide to legislation regarding immigration, and particularly to questions concerning the preservation of federal-court jurisdiction. *See, e.g., I.N.S. v. St. Cyr,* 533 U.S. 289, 298, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001); *Catholic Social Services, Inc.,* 509 U.S., at 63-64, 113 S. Ct. 2485; *McNary,* 498 U.S., at 496, 111 S. Ct. 888.

The Supreme Court's decision in *Kucana* is consistent with its prior decision *I.N.S. v. St. Cyr*, 533 U.S. 289, 298, 121 S. Ct. 2271 (2001) where the Court noted that there is a "strong presumption in favor of judicial review of administrative action" and that there is a "long standing principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *St. Cyr,* 533 U.S. at 320, 121 S. Ct. at 2290.

In *Reyes-Vasquez v. Ashcroft,* 395 F.3d 903 (8th Cir. 2005), this Court addressed the jurisdiction issue in connection with an appeal from a BIA order denying a noncitizen's application for VAWA Cancellation under 8 U.S.C. § 1229b. This Court held that it had jurisdiction to consider:

> the predicate legal question whether the IJ properly applied the law to the facts in determining an individual's eligibility to be considered for the relief.

Id. at 906. *See also Solano-Chicas v. Gonzales*, 440 F.3d 1050, 1055 (8th Cir. 2006) (same).

In, *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003), the Ninth Circuit held it had jurisdiction to review the BIA's determination that the Petitioner had not satisfied the "extreme cruelty" requirement under the VAWA Cancellation provisions. In reaching this result, the Ninth Circuit held, as this Court held in *Reyes-Vazquez*, that "determinations that require application of law to factual determinations are nondiscretionary" and are therefore reviewable. *Id.* at 833-834 (internal citations omitted). Since "extreme cruelty involves a question of fact, determined through the application of legal standards," the Ninth Circuit held that jurisdiction existed over the appeal. *Id.* at 834.

In *Sepulveda v. Gonzalez*, 407 F.3d 59, 60 (2d Cir. 2005), the Second Circuit, in an opinion written by then-Judge Sotomayor, held that the issue of whether a noncitizen has "good moral character" is nondiscretionary and is therefore legal in nature and subject to judicial review. *See also Barco-Sandoval v. Gonzales,* 516 F.3d 35, 39 (2d Cir. 2008) (noting that nondiscretionary legal issue exists where there is "fact-finding which is flawed by an error of law" or where a discretionary decision is "without rational justification" or is based upon "a legally erroneous standard.").

The issues in the instant case are nondiscretionary and involve issues of law because the tribunals below applied an incorrect legal standard by requiring evidence of "actual harm." Additionally, the instant case involves the issue as to whether the psychological abuse associated with a child witnessing intentional acts of domestic abuse against her mother constitutes "extreme cruelty" as a matter of law.

In *Perales-Cumpean v. Gonzales,* 429 F.3d 977 (10th Cir. 2005), the Tenth Circuit held that it lacked jurisdiction to determine whether the BIA erred in denying VAWA Cancellation on the grounds that the noncitizen had failed to establish extreme cruelty. However, the Tenth Circuit's decision is consistent with Petitioner's position in this case. The alleged "extremely cruel" behavior in that case consisted only of name-calling.[13] Under 8 C.F.R. § 204.2(c)(vi), name-calling would fall within the category behaviors which "may" constitute extreme cruelty, as opposed to the extremely cruel actions that included in this case the child helplessly watching her father violently smash her immigrant mother's head against the window of the car, which falls within that category of behaviors which "shall" be considered "extremely cruel" behavior. *Supra* at pp. 16-21.

Furthermore, *Perales-Cumpean v. Gonzales,* 429 F.3d 977 (10th Cir. 2005) and *Wilmore v. Gonzales*, 455 F.3d 524, 527 (5th Cir. 2006), where the courts held

[13] *Perales-Cumpean* also involved an allegation of rape, which the BIA determined was not credible.

that they lacked jurisdiction, predate the Supreme Court's decision in *Kucana*, which takes an expansive view of the Court's of Appeal's jurisdiction under 8 U.S.C. § 1252.

Neither *Perales-Cumpean,* nor *Wilmore* and *Johnson v. Attorney General,* 602 F.3d 508 (3d Cir. 2010) involved a claim, such as this case, that the BIA had applied an incorrect legal standard. As set forth earlier, the erroneous legal standard in this case was the imposition of an "actual injury" requirement which is not contained within VAWA and is inconsistent with the government's own regulations under VAWA. *Supra* at pp. 8-14.

Moreover, in *Perales-Cumpean, Johnson* and *Wilmore,* the Courts sought to analogize the "extreme cruelty" provisions of VAWA with VAWA's requirement that removal of the noncitizen would result in "extreme hardship." However, the purposes behind the "extreme cruelty" and "extreme hardship" requirements differ significantly and the case law defining "extreme hardship" cannot simply be applied to the "extreme cruelty" requirement. For example, the purpose of the "extreme cruelty" requirement is to grant abused immigrant spouses, children, and parents of abused children access to VAWA's immigration protections to prevent the escalation of abuse and is focused on the conduct of the abuser. Conversely, an "extreme hardship" analysis is focused on the likely effects of removal of the noncitizens from the United States. Thus, the courts attempts to simply apply the

law of "extreme hardship" to the "extreme cruelty" standard is without basis or justification.

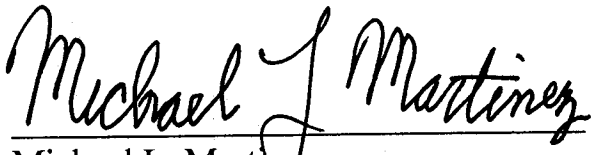
Finally, in the absence of judicial review, the interpretation of the VAWA Cancelation provisions would not be uniform throughout the nation; rather, the interpretation of "extreme cruelty" would be left to each immigration judge's personal interpretation, subject only to BIA review. There exists no authority for the proposition that Congress intended the VAWA Cancellation provisions to be subject to the whim of the executive branch, which could be interpreted differently in every case. To the contrary, Congress enacted VAWA to achieve a specific, unified goal – eradicate domestic violence against noncitizens. This goal can only be achieved through a uniform interpretation of the "extreme cruelty" standard, and uniformity can only be achieved through judicial review. Accordingly, the instant appeal involves nondiscretionary/legal issues and this Court therefore has jurisdiction over the instant appeal.

CONCLUSION

For the reasons set forth above, this Court should reverse the decision of the BIA.

Dated: August 13, 2010
Washington, D.C.

Respectfully submitted,

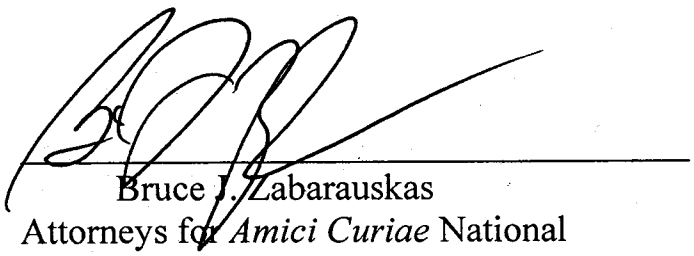


Michael L. Martinez
Bruce J. Zabarauskas
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500
Counsel for *Amici Curiae*
National Network To End
Violence Against Immigration
Women, Legal Momentum,
The Family Violence
Prevention Center and ASISTA
Immigration Assistance Project

CERTIFICATE OF COMPLIANCE

I, Bruce J. Zabarausks, certify that Petitioner's Brief was prepared with proportionately spaced 14-point type and in Times New Roman font on the Microsoft Word 2003 word processing software program. Petitioner's Brief complies with the type-volume limitation in that it contains 5,972 words excluding the cover page, the Table of Contents, the Table of Authorities, Summary and Request for Oral Argument, and the Certificate of Compliance. I further certify that the enclosed CD containing Petitioner's Brief is free of viruses.

Dated: August 13, 2010



Bruce J. Zabarauskas
Attorneys for *Amici Curiae* National Network To End Violence Against Immigrant Women, Legal Momentum, the Family Violence Prevention Fund and the ASISTA Immigration Assistance Project

CERTIFICATE OF SERVICE AND FILING

I, Bruce J. Zabarauskas, declare under penalty of perjury that I am an attorney in the office of Crowell & Moring LLP, that on August 13, 2010, I dispatched to a third-party commercial carrier (Federal Express) for overnight delivery to the Clerk of the Court of the Eighth Circuit Court of Appeals for filing the original and nine copies of the Brief For Amici Curiae National Network To End Violence Against Immigrant Women, Legal Momentum, the Family Violence Prevention Fund and ASISTA Immigration Assistance Project In Support Of Petitioner And Reversal (the "Amici Brief"), a digital version of the Amici Brief in Portable Document Format on a CD, and a Certificate of Service and Filing. I also dispatched to Federal Express for overnight delivery two copies of the Amici Brief and a digital version of the Amici Brief in Portable Document Format on a CD, to the persons named below at each of the addresses stated below:

I. Attorneys for Petitioner

Katherine Barrett Wiik
ROBBINS, KAPLAN, MILLER & CIRESI L.L.P.
800 LaSalle Avenue, Suite 2800
Minneapolis, MN 55402
(612) 349-8500

Sheila Stuhlman
IMMIGRANT LAW CENTER OF MINNESOTA
450 N. Syndicate Street, #175
St. Paul, MN 55104
(651) 641-1011

Benjamin Casper
1509 South Robert Street, Suite 100
West St. Paul, MN 55118
(651) 271-6661

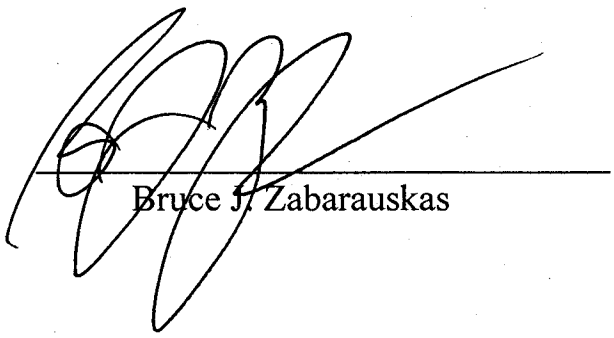
Bruce D. Nestor
De León & Nestor, LLC
3547 Cedar Ave. South
Minneapolis, MN 55407
(612) 659-9019

II. Attorneys for Respondent

Lori Warlick, Esq.
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
Ben Franklin Station
450 Fifth Street
Washington, DC 20001

Scott Baniecke, Esq.
U.S. Immigration
& Naturalization Service
2901 Metro Dr., Suite 100
Bloomington, MN 55425-0000

Dated: August 13, 2010



Bruce J. Zabarauskas