United States Court of Appeals

for the

Third Circuit

Case No. 15-1232

SINA SUNDAY,

Petitioner,

– v. –

ATTORNEY GENERAL UNITED STATES OF AMERICA,

Respondent.

ON APPEAL FROM AN ORDER ENTERED BY THE
BOARD OF IMMIGRATION APPEALS, CASE NO. A076-564-640
HONORABLE ALAN A. VOMACKA

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR REHEARING OR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENTS

Under Federal Rules of Appellate Procedure 26.1 and 29(c)(1) and Third Circuit Local Appellate Rule 26.1, *amici curiae* Sanctuary For Families ("SFF"), ASISTA Immigration Assistance ("ASISTA"), New Jersey Coalition to End Domestic Violence ("NJCEDV"), Asian Pacific Institute on Gender-Based Violence, Tahirih Justice Center ("Tahirih"), the Pennsylvania Coalition Against Domestic Violence ("PCADV"), Community Legal Services in East Palo Alto ("CLSEPA"), the National Immigrant Women's Advocacy Project ("NIWAP"), the Immigrant Defense Project ("IDP"), and Jayashri Srikantiah (collectively, "Amici") each state that they have no parent corporation and that there is no publicly held corporation that owns 10% or more of them.

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STATEMENT OF IDENTITY, INTEREST AND AUTHORITY OF THE AMICI CURIAE[1]

The proposed amici are well-recognized organizations that have immigration expertise which would be useful to the Court. They have appeared frequently in federal courts to provide the benefit of their experience and knowledge on immigration issues in the United States Courts of Appeals and represented hundreds of parties in U visa applications. *See, e.g.*, *Castro v. United States Dep't of Homeland Sec.*, No. 16-1339, 2016 WL 4501943 (3d Cir. Aug. 29, 2016) (where Tahirih as amicus curiae opposed the removal of twenty-eight women and their minor children); *Ermini v. Vittori*, 758 F.3d 153, 156 (2d Cir. 2014) (where SFF submitted an amicus curiae brief concerning exceptions to Hague Convention of the Civil Aspects of International Child Abduction); *Georgia Latino All. for Human Rights v. Governor of Georgia*, 691 F.3d 1250 (11th Cir. 2012) (where ASISTA challenged the constitutionality of Georgia's Illegal Immigration Reform and Enforcement Act as amicus curiae); *Lee v. Gonzales*, No. 07-2571-ag, 2007 WL 6149118 (2d Cir. Sept. 10, 2007) (where SFF argued as amicus curiae against

[1] No person - other than amici curiae, their members, and their counsel at Morgan Lewis & Bockius LLP ("Morgan Lewis") - made a monetary contribution to the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5)(C). No party or party's counsel contributed money intended to fund preparing or submitting the instant amicus brief. *See* Fed. R. App. P. 29(c)(5)(B). Amici curiae and their counsel, Morgan Lewis, authored the brief in whole. *See* Fed. R. App. P. 29(c)(5)(A).

order of removal for domestic violence victim); *Alvarado-Euceda v. Lynch*, No 15-60782 (5th Cir. 2016) (where NIWAP argued as amicus curiae against premise that when a victim of domestic violence moves out of the residence she shares with her abuser, she has succeeded in leaving the relationship); *Orabi v. Attorney General of the United States*, 738 F.3d 535 (3d Cir. 2014) (where the Immigrant Defense Project argued as amicus curiae for recognition of the finality rule, which requires that a criminal conviction become "final" through exhaustion or waiver of direct appellate remedies before that conviction may sustain an order of removal); *Jennings v. Rodriguez*, No. 15–1204 (U.S. filed Oct. 2016) (where CLSEPA and the Immigrant Defense Project argued as amicus curiae that prolonged detention without a bond hearing has perverse and arbitrary effects on the immigration system, noncitizens, and their families); *Almanza-Arenas v. Holder*, 771 F.3d 1184 (9th Cir. 2014) (where Jayashri Srikantiah and the Immigrant Defense Project argued as amicus curiae that *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), overruled *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc), as to whether noncitizens are barred from relief from removal based on a prior conviction when the record of that conviction is inconclusive); *Elonis v. United States*, No. 13-983 (U.S. filed Oct. 2014) (where PCADV and NJCEDV (f/k/a New Jersey Coalition for Battered Women) argued as amici curiae that subjective intent to threaten is not required for conviction of threatening); *Dollar General Corp. v. Mississippi Band*

of Choctaw Indians, 136 S.Ct. 2159 (2016) (where the Asian Pacific Institute on Gender-Based Violence, as amicus curiae, offered their view on the critical relationship between tribal jurisdiction, the authority of tribal governments to self-govern, and safety for Native women and children).

SFF is New York State's largest dedicated service provider and advocate for survivors of domestic violence, human trafficking, and related forms of gender violence. Each year, SFF provides legal, clinical, shelter, and economic empowerment services to approximately 15,000 survivors and their children. SFF's legal arm, The Center for Battered Women's Legal Services (the "Center"), plays a leading role in advocating for legislative and public policy changes that further the rights and protections afforded battered women and their children, and provides training on domestic violence and trafficking to community advocates, pro bono attorneys, law students, service providers, and the judiciary. The Center also provides legal assistance and direct representation to indigent victims, mostly in family law and immigration matters. The Center is a subject-matter expert in humanitarian forms of immigration relief, like petitions for U nonimmigrant status. Center staff, together with volunteers from the private bar, law schools, and New York City's public interest community, file hundreds of petitions for U nonimmigrant status each year.

ASISTA worked with Congress to create and expand routes to secure

immigration status for survivors of domestic violence, sexual assault, and other crimes, which were incorporated in the 1994 Violence Against Women Act and its progeny. ASISTA serves as liaison between those who represent these survivors and the Department of Homeland Security personnel charged with implementing the laws at issue in the instant appeal, most notably Citizenship and Immigration Services, Immigration and Customs Enforcement, 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 Tahirih Justice Center is a national non-profit organization that provides holistic legal services to immigrant women and children who have suffered sexual and domestic violence. Tahirih has subject-matter expertise in the impact of sexual and domestic violence on immigrant women and children and in the range of immigration remedies available to them, including U nonimmigrant status.

The NJCEDV is a statewide coalition of thirty domestic violence programs and concerned individuals whose purpose and mission is to end domestic violence. The NJCEDV provides safety and support to victims and survivors of domestic violence, engages community-based systems to enhance their response to all forms of domestic violence, and develops and implements programs that promote the

prevention of domestic and sexual violence. Recognizing that domestic and sexual violence knows no boundaries regardless of race, class, education level, socio-economic status, gender, sexual orientation, age, nation of origin, or immigration status, NJCEDV works with member organizations and community partners to ensure that programs and services are inclusive and accessible to individuals from all backgrounds and communities, including the immigrant community.

The Asian Pacific Institute on Gender-Based Violence (formerly, Asian & Pacific Islander Institute on Domestic Violence) is a national resource center on domestic violence, sexual violence, trafficking, and other forms of gender-based violence in the Asian and Pacific Islander communities. The Institute serves a national network of advocates and community-based service programs that work with Asian and Pacific Islander survivors, and provides analysis on critical issues facing victims in the Asian and Pacific Islander ("API") communities, including training and technical assistance on implementation of the Violence Against Women Act, immigration law and practice, and how they impact API survivors. The Institute promotes culturally relevant intervention and prevention, provides expert consultation, technical assistance and training; conducts and disseminates critical research; and informs public policy.

PCADV is a private nonprofit organization working at the state and national levels to eliminate domestic violence, secure justice for victims, enhance safety for

families and communities, and create lasting systems and social change. PCADV was established in 1976 as the nation's first domestic violence coalition, and is now comprised of 60 funded community-based domestic violence programs across Pennsylvania, providing a range of life-saving services, including shelters, hotlines, counseling programs, safe home networks, medical advocacy projects, transitional housing and civil legal services for victims of abuse and their children. Community Legal Services in East Palo Alto ("CLSEPA") is a non-profit organization that provides legal assistance to low income immigrants in and around East Palo Alto, California, where two-thirds of the population is Latino or Pacific Islander. The immigration team provides consultations to and represents local residents in various types of immigration benefits, including applications for U nonimmigrant status. The immigration team also represents a large volume of clients in removal proceedings in immigration court. East Palo Alto is a small city that suffers from significant criminal activity. CLSEPA has a close working relationship with the East Palo Alto Police Department as well as crime victims in the community. These relationships facilitate crime victims in reporting crimes to the police department, which accordingly assists law enforcement in investigating and prosecuting criminal activity.

Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for all immigrants

accused and convicted of crimes. IDP provides defense attorneys, immigration attorneys, immigrants, and judges with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP seeks to improve the quality of justice for immigrants accused of crimes and therefore has a keen interest in ensuring that immigration law is correctly interpreted to give noncitizens convicted of criminal offenses the full benefit of their constitutional and statutory rights. IDP has submitted amicus curiae briefs in many key cases before this Court, the U.S. Supreme Court, and the Courts of Appeals, that involve the interplay between criminal and immigration law and the rights of immigrants in the criminal justice and immigration systems, including the availability of discretionary relief from removal. *See, e.g.*, *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015); *Vartelas v. Holder*, 566 U.S. 257 (2012); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *I.N.S. v. St. Cyr*, 533 U.S. 289, 322-23 (2001) (citing IDP brief); *Sauceda v. Lynch*, 819 F.3d 526 (1st Cir. 2016); *Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2015) (en banc); *Orabi v. Attorney Gen.of the United States*, 738 F.3d 535 (3d Cir. 2014); *Ponnapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004).

The National Immigrant Women's Advocacy Project ("NIWAP") is a non-

profit public policy advocacy organization that develops, reforms, and promotes the implementation and use of laws, policies and practices to improve legal rights, services and assistance to immigrant women, children and immigrant victims of domestic violence, sexual assault, stalking, human trafficking, and other crimes. NIWAP is a national resource center offering technical assistance and training to assist a wide range of professionals – including attorneys, advocates, immigration judges, the Board of Immigration Appeals judges and staff, state court judges, police, sheriffs, prosecutors, Department of Homeland Security (DHS) adjudication and enforcement staff -- who work with and/or whose work affects immigrant women, children, and immigrant crime victims. Additionally, NIWAP Director Leslye E. Orloff has been closely involved with the drafting and enactment of Violence Against Women Act ("VAWA") legislation, including the VAWA self-petition provisions in 1994, the T and U visas in 2000, VAWA confidentiality protections in 1996, the VAWA reauthorizations in 2000, 2005 and 2013, and has published legal and social science research articles on domestic violence experienced by immigrant women and children.

Jayashri Srikantiah is a Professor of Law and Director of the Immigrants' Rights Clinic at Stanford Law School. She has litigated, written about, and researched immigraiton law, with a focus on the immigration consequences of past convictions and the due process rights of immigrants. She and her clinic have

represented scores of individuals seeking U visas, most of whom have concurrently sought waivers of inadmissibility grounds under the Immigration and Nationality Act.

Accordingly, Amici are well positioned, pursuant to Fed. R. App. P. 29, to provide this Court with critical context and perspective on U nonimmigrant status and the immigration issues affected by this case.

SUMMARY OF ARGUMENT

Amici support the Petition for Rehearing or Rehearing *En Banc* (the "Rehearing Petition") submitted by Petitioner Sina Sunday ("Petitioner"), seeking reconsideration of this Court's opinion of August 1, 2016, the effect of which is that immigration judges ("IJs") and the Board of Immigration Appeals ("BIA") lack jurisdiction to review Department of Homeland Security ("DHS") agency determinations of many U visa applicants' requests for waivers of inadmissibility under sections 212(d)(3) or 212(d)(14) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(d)(14). *See Sunday v. Attorney Gen. United States*, 832 F.3d 211, 214–215 (3d Cir. 2016) (the "Decision").

Specifically, this Court found that "Section 212(d)(3)(A)(ii) of the Immigration and Nationality Act gives the Attorney General the discretion to grant a waiver of inadmissibility to aliens who are 'seeking admission'" and held that Petitioner "was previously admitted into the United States and overstayed [and …] therefore cannot seek a waiver of inadmissibility from an IJ under § 212(d)(3)(A)(ii)." *Id.* at 217. The Decision deprives U visa applicants with cases in immigration court from seeking IJ consideration of inadmissibility waiver denials, even though DHS regulations provide for no independent, meaningful review of U waiver denials and, in similar kinds of cases, IJs have authority to consider inadmissibility waivers.

Amici support the arguments for reversal set forth in the Rehearing Petition, and hereby submit four additional reasons to reverse the Decision. *First*, U visa applicants are entitled to fundamental procedural fairness provided by recognizing the existing jurisdiction of IJs to review inadmissibility waiver requests; the Decision only allows consideration of waivers and their denials by the very same adjudicator within DHS (the Vermont Service Center of United States Citizenship and Immigration Services) that issued the denial in the first place. *Contra L.D.G. v. Holder*, 744 F.3d 1022 (7th Cir. 2014). Recognizing IJs' jurisdiction to review waivers is appropriate, consistent with the jurisdiction they exercise in other contexts, and would ensure that U visa applicants enjoy the protections Congress intended for victims of crimes who are helpful to law enforcement.

Instead, the Decision leaves applicants without meaningful review outside of DHS. Recognizing IJ authority to consider waivers would protect crime victims—consistent with Congressional intent—because the adversarial nature of cases heard in immigration court, IJs' ability to assess live testimony, and IJs' duty to apply articulated, presented criteria and legal frameworks in exercising their discretion provide a greater opportunity for well-reasoned and well-articulated decisions, as further explained below.

Second, IJs' jurisdiction to consider waivers is important to ensure that issues may be presented and elucidated in a way that may be obscured in purely

"on the papers" administrative system employed by DHS. Many waiver cases require the individualized assessments that in-person hearings permit. The ability to provide in-person testimony, address negative factors raised by the government, and explain the crime-victim context in which acts triggering inadmissibility arise are all significant benefits unavailable to applicants whose cases are considered solely in the administrative context, where the agency has no direct contact with the applicant. U visa applicants often face barriers to clearly explaining their cases on the papers, which may be better explained and overcome in immigration court. These barriers include language and cultural context, and the effects of trauma on providing testimony in a credible fashion.

Third, recognizing IJs' jurisdiction to consider inadmissibility waivers furthers the purpose and legislative intent behind the U visa program. Congress created the U visa to protect crime victims who step forward to assist law enforcement in investigating and prosecuting crimes such as domestic violence, sexual assault, and human trafficking, and to facilitate their cooperation with law enforcement. Since DHS provides no meaningful review of its own waiver decisions, ensuring immigration judges retain their ability to consider U waivers is vital to furthering the social goals of this law. A system that provides no meaningful review of U waivers dissuades crime victims and law enforcement alike from utilizing the system Congress created to encourage their cooperation.

BACKGROUND

I. Congress Created the U Visa to Pursue Justice for Noncitizen Victims of Domestic Violence and Other Serious Crimes

U nonimmigrant status (the "U visa") was created by the Battered Immigrant Women Protection Act of 2000 ("BIWPA"), passed as sections 1501 through 1503 of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (modifying scattered sections of 8 U.S.C.). U visas allow noncitizens who are not lawfully present in the United States to obtain lawful status because they are victims of certain designated crimes, such as domestic violence, rape and human trafficking; suffered "substantial physical and mental abuse;" and can assist law enforcement with investigating or prosecuting those crimes. *See* 8 U.S.C. § 1101(a)(15)(U) (defining eligibility), § 1184(p)(1) (concerning procedures).

Congress created the U visa for two reasons: first, to assist noncitizen crime victims, particularly undocumented individuals or those who lack stable immigration status or fear deportation and separation from children if they report crimes; and second, to assist local, state and federal law enforcement in effectively investigating and prosecuting such crimes by strengthening the ability to identify and target cases of domestic violence, sexual assault, and human trafficking. *See* Victims of Trafficking and Violence Prevention Act, Pub. L. 106-386, 114 Stat. 1464 § 1513(a) (2000) ("Findings and Purpose"); "USCIS Publishes New Rule for

Nonimmigrant Victims of Human Trafficking and Specified Criminal Activity," *USCIS News Release* (Dec. 8, 2008), *available at* https://goo.gl/1jKqBy (last accessed Oct. 21, 2016).

Congress recognized that immigrant victims may not have legal status, and may thus be reluctant to come forward to report crimes and help with their investigation, because they fear being deported. *See* New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014 (Sept. 17, 2007). The prospect of deportation can cause immigrant communities to fear police and to hesitate to inform law enforcement about violent crimes, even when victimized. As the President of the Police Foundation testified before Congress:

> In communities where people fear the police, very little information is shared with officers, undermining the police capacity for crime control and quality services delivery. As a result, these areas become breeding grounds for drug trafficking, human smuggling, terrorist activity, and other serious crimes. As a police chief in one of our focus groups asked, "How do you police a community that will not talk to you?"

Hearing on Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws, 111th Cong. 111-19 at 81–82 (statement of Hubert Williams), *available at* https://web.archive.org/web/20130305085720/http://judiciary.house.gov/hearings/printers/111th/111-19_48439.PDF (last accessed on Nov. 6, 2016). Consequently, perpetrators of

violent crime remain on the street, emboldened because they know they can strike with impunity vulnerable communities, including immigrants without legal status.

Language barriers, psychological trauma associated with abuse, and particular challenges associated with populations who are domestic violence victims, when coupled with undocumented status, create feelings of fear, isolation, and marginalization. *See generally* Jamie Rene Abrams, "Legal Protections for an Invisible Population: An Eligibility and Impact Analysis of U Visa Protections for Immigrant Victims of Domestic Violence," 4 *Mod. Am*. 26 (2008). Victims of domestic violence-related crimes already face social and physical isolation, fear and threats of deportation from their abusers, and other social, economic, and psychological hurdles to reporting crime. *See generally* Cecilia Menjívar and Olivia Salcido, "Immigrant Women and Domestic Violence: Common Experiences in Different Countries," 16 *Gender & Soc'y* 898 (2002) (assessing the multiple challenges immigrant women face when they resettle in a foreign country). "Domestic violence has often been described as a 'hidden war' taking place in the privacy of the home[, while] [u]ndocumented immigrants in the United States are also commonly labeled as 'invisible,' living outside the sights and minds of society." *See* 4 *Mod. Am*. at 26. Congress aimed to address these challenges by creating a mechanism for victims of crime to simultaneously address their immigration status and assist with reporting crime and prosecuting their abusers.

Ultimately, the U visa was introduced to give a voice to this silent and invisible population, to facilitate their reporting of violent crimes while simultaneously protecting crime victims, and to better equip law enforcement to serve immigrant victims by enabling them to regularize the immigration status of cooperating individuals during investigations and prosecutions. *See* 72 Fed. Reg. at 53,015; Pub. Law 106-386, 114 Stat. at 1533. In turn, protecting individual noncitizen victims and offering legal status through U visas ensures safer communities because more crime is reported, which benefits *all* citizens, not just unauthorized immigrants.

II. U Visa and Related Inadmissibility Waiver Application Procedure

The Secretary of Homeland Security has discretion to determine whether to grant U visa applications. *See* 8 U.S.C. § 1101(a)(15)(U). U visa applications and any related requests for waiving grounds of inadmissibility are filed by mail with the United States Citizenship and Immigration Services ("USCIS"), a sub-agency within the DHS. *See* 8 C.F.R. § 214.14(c).

To obtain a U visa, an applicant must be "admissible" under INA section 212. *See* 8 U.S.C. § 1182; 8 C.F.R. § 214.1(a)(3). Applicants may be deemed "inadmissible" under certain statutorily enumerated grounds, including past criminal convictions, as in this case. *See* 8 U.S.C. § 1182(a)(2). "Inadmissible" applicants may overcome grounds of inadmissibility, however, in two possible

ways. First, a U visa applicant who is not living in the United States may apply for a waiver of the ground of inadmissibility under INA section 212(d)(3)(A)(ii). *See* 8 U.S.C. § 1182(d)(3)(A)(ii). If that application is denied, the applicant has a "right to appeal to the [BIA]." *See* 8 C.F.R. § 1212.4(b).

Congress designated a second option for U visa applicants, creating the special waiver for crime victims found at INA section 212(d)(14), and vesting authority with the Secretary of Homeland Security to waive, as a matter of discretion, any ground of inadmissibility (save a few extreme grounds) for U visa applicants, whether presently in the United States or abroad. 8 U.S.C. § 1182(d)(14).[2] The USCIS Vermont Service Center reviews and determines applications for such waivers ("U Waivers"). There is no statutory language prohibiting review within the agency. For instance, the implementing regulations provide that the Administrative Appeals Office ("AAO") has jurisdiction over denials of U visa applications generally, 8 C.F.R. § 214.14(c)(5)(ii). The regulations prohibit, however, such review for U Waiver denials. 8 C.F.R.

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[2] As this Court has noted, the text of this provision refers to the "Attorney General's discretion," but that reference "appears to be an error by the codifier" because the U Visa statutory provisions were written before DHS was created, and original references to the Attorney General in the original legislation were replaced in every other case. *See* Decision at 4 n.1. The non-waivable grounds are listed in 8 U.S.C. § 1182(a)(3)(E) ("Participants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing").

§ 212.17(b)(3), instructs that "there is no appeal of a decision to deny a [U] waiver." Thus, under this regulatory scheme, the same part of DHS (the Vermont Service Center) that denies U Waivers also reviews its own denials, precluding any meaningful agency review of such denials. Consequently, the essentially unreviewed waiver denial results in a wholesale denial of the U visa application. DHS has stripped the AAO of the ability to review any U application that was denied because of the unreviewable discretion of the adjudicators below when considering waivers. Given this fundamentally unfair system, the only way to ensure the DHS system does not thwart the will of Congress is to allow immigration judges to exercise their authority when immigrant crime victims who have been helpful to law enforcement appear in their courtrooms.

ARGUMENT

I. By Eliminating IJs' Authority to Review Waivers, The Decision Deprives Crime Victims of Any Mechanism for Independent, Fair Consideration of Their Waiver Claims

Under the Decision, inadmissible U visa applicants are deprived of the opportunity to present in-person testimony in an adversarial setting where evaluation of witness credibility, the ability to refute and explain adverse evidence, and assessment of evidence in the context of trauma and other crime victim experience do not exist. Victims of domestic violence and other serious crimes in

the United States should have the same opportunity as others in immigration court to explain why they merit inadmissibility waivers.

A. The Decision Deprives U Waiver Applicants of The Basic Procedural Fairness That Recognizing IJs' Authority Would Otherwise Ensure.

The administrative system created by DHS for U Waivers violates fundamental fairness. Those who appeal a denial of a U Waiver have only two options: (1) file a motion with USCIS to reopen or reconsider the denial of the U Waiver; or (2) refile the U Waiver application with USCIS. *See* 8 C.F.R. § 212.17(b)(3). Regulations state that "[t]here is no appeal of a decision to deny a waiver" 8 C.F.R. § 212.17(b)(3). USCIS interprets that regulation to preclude the AAO from reviewing the discretion exercised by USCIS in denying a waiver; rather, the AAO may only consider whether the petitioner is in fact inadmissible. *See, e.g.*, AAO Decision, Vermont Service Center (Apr. 1, 2015), *available at* https://www.uscis.gov/sites/default/files/err/D14%20-%20Application%20for%20U%20Nonimmigrant%20Status/Decisions_Issued_in_2015/APR012015_03D14101.pdf ("As we do not have jurisdiction to review whether the director properly denied the Form I-192, we do not consider whether approval of the Form I-192 should have been granted."). Without independent IJs considering the waivers, crime victims would be limited to the unreviewable

decision-making structure of USCIS, and the effect of this interpretation is to preclude any review of the U Waiver application.

B. Immigration Judge Authority to Consider Waivers in Cases Where DHS Retains Authority Is Common In Immigration Law and Would Make the U Visa System Fairer and More Efficient.

In its Decision, this Court read the DOJ's immigration regulations to expressly limit IJs' waiver authority, noting that "IJs may only exercise the powers and duties delegated to them . . . by the Attorney General through regulation." *See* Decision at 6. Relying on a textual interpretation of section 212(d)(3)(A)(ii), and *Borrego v. Mukasey,* 539 F.3d 689, 692 (7th Cir. 2008), a Seventh Circuit opinion that preceded the *L.D.G.* decision, this Court determined that the statute "limits the Attorney General's authority to issue waivers of inadmissibility to those aliens 'seeking admission.'" Decision at 11; *see also L.D.G.*, 744 F.3d at 1028 (distinguishing *Borrego*). This Court further emphasized DOJ immigration regulations in 8 C.F.R. § 1212.4(b) and § 1235.2(d), finding that they limited an IJ's waiver authority to "only those instances where the alien has applied to a district director prior to entry." *Id.*

The Court did not appreciate, or chose to disregard, that IJ authority to consider waivers exists in other kinds of immigration cases where DHS retains jurisdiction, such as Petitions to Remove Conditions of Residency, *see Matter of Francisco Herrera Del Orden,* 25 I. & N. Dec. 589 (BIA 2011) (finding that an

immigration judge has jurisdiction to adjudicate a petition to remove the conditions of residency on Form I-751 if the application is denied by USCIS), and fiancée visas (K-Series), *Atunnise v. Mukasey*, 523 F.3d 830, 833-34 (7th Cir. 2008) (interpreting section 1182(d)(3)(A) to permit an IJ to waive inadmissibility of a nonimmigrant). Immigration judges also may conduct independent determinations of eligibility for Temporary Protected Status (TPS), including eligibility for a waiver of inadmissibility. 8 C.F.R. §§ 244.2, 244.10(b), 244.10(d), and 244.11.

Amici agree with the *L.D.G.* court, which noted "[c]oncurrent jurisdiction over U Visa Waivers, shared by DOJ and DHS, . . . has its advantages for the administration of the immigration system when compared to the possibility of exclusive USCIS jurisdiction." *L.D.G.*, 744 F.3d at 1032 (highlighting the practicality of having an IJ become familiar with the underlying facts concerning the waiver determination as part of adjudication of the removal proceeding).

This Court should recognize the jurisdiction of IJs to consider requests for U Waivers made by crime victims who appear in their courts. Such a decision is necessary to ensure crime victims' due process rights in an otherwise fundamentally unfair administrative system, to vindicate Congressional intent, and to provide crime victims with the opportunity to present and address issues in court that might remain opaque or unresolved in a purely administrative process that lacks in-person testimony or any basic adversarial process.

C. IJ Authority to Consider Inadmissibility Waivers Increases The Likelihood of Procedural Fairness

As noted above, the DHS process provides for no meaningful review of a line officer's determination of the waiver. In contrast, IJ hearings provide an adversarial process with due process and some evidentiary protections. IJs are also bound by case law governing waivers and the exercise of discretion. For example, in the context of an INA section 212(d)(3)(A)(ii) inadmissibility waiver (one of the two waivers available to a U visa applicant), the BIA has made clear that three factors must be weighed, including "the risk of harm to society if the applicant is admitted," "the seriousness of the applicant's prior immigration law, or criminal law, violations, if any" and "the nature of the applicant's reasons for wishing to enter the United States." *United States v. Hamdi*, 432 F.3d 115, 119 (2d Cir. 2005) (quoting *Matter of Hranka*, 16 I. & N. Dec. 491, 492 (BIA 1978)).

Likewise, IJs are bound to follow a clear standard in deciding inadmissibility waivers under INA section 212(h). *See Matter of Mendez-Moralez*, 21 I. & N. Dec. 296, 300 (1996) (explaining that IJs "must balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and human considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interest of this country").

Moreover, IJs are typically required to enunciate the basis for their decisions in opinions, explaining how they weighed the factors and arrived at their conclusions. *See, e.g.*, *Vasquez v. Attorney Gen. of the United States*, 377 Fed. App'x 245, 247 (3d Cir. 2010) (citing *Matter of Edwards*, 20 I. & N. Dec. 191, 195 (BIA 1990)); *Sagaydak v. Gonzales*, 405 F.3d 1035, 1040 (9th Cir. 2005).

Because there is no review within the DHS system, crime victims can be denied waivers, and consequently U status, without any review of an officer's decision-making. In addition to providing basic rules of fair decision-making, IJs may be better positioned to resolve complex issues arising in waiver requests from the crime victims who appear before them.

II. Through In-Person, Adversarial Adjudications of Waivers, IJs Are Better Positioned To Address the Complex Issues that Arise In Waivers for Crime Victims Than A Paper Determination By DHS Alone.

For vulnerable populations, in-person review by experienced IJs is an essential and effective way to determine credibility, to evaluate the effects of trauma, language, culture and the crime victim's experience on testimony and eligibility, and to allow for rebuttal of adverse evidence. Review in immigration court may help clarify issues that are unclear "on the papers" such as the applicant's sincerity and honesty, impediments imposed by language barriers, and how abuse or crime victimization may impair recollections, testimony and behavior.

As explained above, the U status is reserved for victims of certain crimes who have suffered mental or physical abuse from violence such as rape, human trafficking, assault, or domestic abuse. An applicant must present evidence that he or she: (i) has suffered substantial mental or physical abuse from the criminal activity; (ii) has information regarding the relevant criminal activity; and (iii) has assisted government officials with investigating and prosecuting such criminal activity. *See* 8 U.S.C. § 1101(A)(15)(U)(i).

IJs are able to hear in-person testimony and receive other evidence necessary to evaluate and compensate for the unique situations of these victims, the psychological trauma that might impact their applications, and the language barriers that can affect exercise of their rights. For example, in the domestic violence context, abusers often isolate immigrants by preventing them from learning English. Consequently, when a victim is ready to communicate with law enforcement, the victim may lack a way to report crimes because English-speaking abusers may be the only available translators. *See* Deanna Kwong, "Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections Under VAWA I & II," 17 *Berkeley Women's L.J.* 137, 141–42 (2002). Non-English speaking immigrant victims of abuse encounter further barriers when facing biases, even in systems designed to protect them, such as domestic violence shelters. *Id.*

Providing U visa applicants with the opportunity to be heard in-person, with the aid of a court-approved translator, is essential to protecting them from inadvertent error or bias. It thereby may help neutralize the language barrier that might otherwise act as a barrier to justice. Similarly, because a credibility determination is central to U-visa applications, in-person review by an IJ may be essential.

IJs have played a longstanding role in establishing credibility in a multitude of similar proceedings. In the asylum context, for instance, it is well-recognized that in-person testimony is vital to assessing credibility and IJs are "uniquely qualified to decide whether an alien's testimony has about it the ring of truth." *Abdulrahman v. Ashcroft*, 330 F.3d 587, 597 (3d Cir. 2003) (quoting *Sarvia-Quitanilla v. INS*, 767 F.2d 1287, 1395 (9th Cir. 1985)); *cf. Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1057 (9th Cir. 2005) (noting that written materials cannot suffice when proffered in-person testimony would "reflect[] directly on Petitioner's credibility.").

Likewise, presenting applicants' individual stories in court may be better than an appeal process that is limited to paper alone because live testimony may better reveal how the acts that raise inadmissibility issues arose from the dynamics of domestic violence or other crime victimization. Domestic violence victims, for example, may react to abuse in many different ways, such as passively accepting

the abuse or employing self-defense tactics against their abuser. *See* Caitlin Valiulis, "Domestic Violence," 15 *Geo. J. Gender & L.* 123, 148 (2014). With the assistance of experts in court and the applicant's own testimony, IJs hearing live testimony are well-positioned to evaluate credibility, context and other issues that may not be clear in a written record. *See* Dana Harrington Conner, "Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women," 17 *Am. U. J. Gender Soc. Pol'y & L.* 163, 173-74 (2009) (discussing credibility research and psychological observations). Moreover, while it is often impossible to determine why or how DHS is evaluating adverse evidence when it denies U waivers, because these denials are subject to no review, a crime victim in court cannot confront and explain such adverse evidence presented by the government or evident in the record. *See* 8 USC § 1229a(b)(4)(B). A hearing in immigration court alleviates these deficiencies and may also provide a fuller hearing on the positive factors illustrating why a waiver should be granted, including the helpfulness certified by law enforcement.

III. Recognizing IJs' Jurisdiction Over Denials of Inadmissibility Waivers Would Further The Purposes and Legislative Intent Behind the U Nonimmigrant Status.

The Decision's failure to recognize IJ jurisdiction is incongruent with the purpose and legislative intent behind the U visa status, and detrimental to the population of crime victims it was meant to serve. Allowing IJs' jurisdiction

would further the U classification's goals of protecting crime victims and encouraging them to set their fears of deportation aside to cooperate with law enforcement and apprehend their attackers.

As discussed in the Background *supra*, Congress recognized that U visa applicants may suffer from unique circumstances that make them "inadmissible" to the United States for a variety of reasons, such as criminal records, and therefore created the more generous U waiver of inadmissibility under INA section 212(d)(14), above and beyond the generic waiver available to all noncitizens. *Compare* 8 U.S.C. § 1182(d)(14) (granting DHS the power to grant U Waivers), *with* 8 U.S.C. § 1182(d)(3) (allowing DOJ to grant waivers for a more limited set of inadmissibility grounds). Recognizing IJ jurisdiction ensures neutral arbiters and a check on the unfettered discretion of DHS, essential to furthering the twin goals of U classification: enabling law enforcement to protect immigrant victims and to hold perpetrators accountable, and encouraging immigrant crime victims who fear removal if they report crimes to contact and work with law enforcement.

IJ jurisdiction to consider U Waivers increases applicants' and law enforcement's faith in the system, by encouraging immigrant crime victims to help law enforcement, even if they may have inadmissibility issues. Given the Congressional goals, the ameliorative nature of U visa program, and DHS' failure

to provide meaningful review of its waiver decisions, it is vital that IJs retain authority to consider waivers for the crime victims that appear before them.

CONCLUSION

Because the Decision denies U visa crime victim applicants the full protections of due process, and frustrates Congress's desire to protect this particularly vulnerable population, Amici respectfully request that the Rehearing Petition should be granted, so that the Decision can be reversed.

Dated: November 7, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Amy J. Greer, hereby certify that pursuant to Fed. R. App. P. 29 and 32, as well as 3d Cir. L.A.R. 28 and 29.0 that the attached "*Amicus Curiae* Brief in Support of Petition For Rehearing Or Rehearing *En Banc*":

1. complies with the type-volume limitation set forth in Fed. R. App. P. 29(d), 32(a)(7)(B), and 3d Cir. L.A.R. 29.1(b), because it contains 6,071 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 3d Cir. L.A.R. 29.1(b);

2. complies with the format requirements of Fed. R. App. P. 32(a)(1)-(4);

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CERTIFICATE OF BAR MEMBERSHIP

I, Amy J. Greer, hereby certify, pursuant to 3d Cir. L.A.R. Local App. R. 28.3(d), that I am a member of the Bar of this Court.

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L.A.R. RULE 35.1 CERTIFICATE CONCERNING REHEARING EN BANC

The following certification is made pursuant to 3d Cir. L.A.R. 35.1 with respect to this petition for panel rehearing and rehearing en banc:

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves a question of exceptional importance, i.e., it decides an issue of first-impression under a statute of extreme importance to U nonimmigrant status applicants and due process concerns related to the availability of *de novo* review on their inadmissibility waiver requests. It creates a precedential Circuit Court opinion beyond that intended by Congress by misunderstanding the related statutes' administrative process.

Dated: November 7, 2016

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CERTIFICATE OF SERVICE

I, Mary Christina Pennisi, hereby certify that on this 7th day of November, 2016, the foregoing *Amicus Curiae* Brief in Support of Petition for Rehearing or Rehearing *En Banc*, was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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