
No. 14-71035

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Gerardo Rodarte-Gonzalez,
Petitioner,

v.

Matthew G. Whitaker,
Acting Attorney General of the United States,
Respondent.

**BRIEF AMICI CURIAE OF
ORGANIZATIONS WORKING TO END DOMESTIC VIOLENCE
IN SUPPORT OF REHEARING**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amici Curiae submit the following corporate disclosure statement:

Amici curiae are nonprofit corporations and/or programs of nonprofit corporations, and have no other corporate parents. They are not publicly traded.

/s/ Charles Roth
Charles Roth

TABLE OF CONTENTS

| | |
|--|-----|
| CORPORATE DISCLOSURE STATEMENT | i |
| TABLE OF CONTENTS..... | ii |
| TABLE OF AUTHORITIES | iii |
| SUMMARY OF AMICUS ARGUMENT | 1 |
| INTEREST OF AMICI CURIAE..... | 2 |
| ARGUMENT | 5 |
| I. As <i>Morales-Izquierdo</i> Held, the Reinstatement Statute Does Not Entirely Displace the Reopening Statute..... | 5 |
| II. Even if Reopening Were Generally Precluded, the VAWA Statutes Are More Specific than the Reinstatement Statute, and Should Govern..... | 10 |
| A. Congressional Intent of Original VAWA Statute..... | 11 |
| B. Congress Addresses Reinstatement for Battered Spouses..... | 14 |
| C. Allowing Survivors to Overcome Reinstatement Is Essential to Ensuring Congress' Goals | 15 |
| CONCLUSION..... | 17 |
| CERTIFICATE OF COMPLIANCE..... | 18 |
| CERTIFICATE OF SERVICE | 19 |

TABLE OF AUTHORITIES

Cases

| | |
|---|-------------|
| <i>Aguilar-Garcia v. Ridge</i> , 90 Fed. Appx. 220 (9th Cir. 2004)..... | 8 |
| <i>Arreola-Arreola v. Ashcroft</i> , 383 F.3d 956 (9th Cir. 2004)..... | 8 |
| <i>Castro-Cortez v. INS</i> , 239 F.3d 1037 (9th Cir. 2001)..... | 8 |
| <i>Dada v. Mukasey</i> , 554 U.S. 1 (2008)..... | 6, 7, 9 |
| <i>Digital Equip. Corp. v. Desktop Direct, Inc.</i> , 511 U.S. 863 (1994)..... | 6 |
| <i>FDA v. Brown & Williamson Tobacco Corp.</i> , 529 U.S.120 (2000)..... | 8 |
| <i>Fernandez-Vargas v. Gonzales</i> . 548 U.S. 30 (2006)..... | 8, 9 |
| <i>Garcia-Quintero v. Gonzales</i> , 455 F.3d 1006 (9th Cir. 2006) | 9 |
| <i>Hernandez v. Ashcroft</i> , 345 F.3d 824 (9th Cir. 2003) | 10 |
| <i>Medina-Nunez v. Lynch</i> , 788 F. 3d 1103 (9th Cir. 2015) | 9 |
| <i>Morales-Izquierdo v. Gonzales</i> , 486 F.3d 484 (9th Cir. 2007) | 7, 8, 9, 10 |
| <i>Nat’l Cable & Telecomm. Assn. v. Brand X Internet Services</i> , 545 U.S. 967 (2005)..... | 9 |
| <i>RadLAX Gateway Hotel, LLC v. Amalgamated Bank</i> , 132 S. Ct. 2065 (2012)..... | 10 |
| <i>U.S. v. Mendoza-Lopez</i> , 481 U.S. 828 (1987) | 9 |
| <i>United States v. Witkovich</i> , 353 U.S. 194 (1957) | 6 |

Statutes

| | |
|---------------------------------------|---|
| 8 U.S.C. § 1158(d)(6)..... | 6 |
| 8 U.S.C. § 1182(a)(9)(C)(i)(II) | 7 |

| | |
|---|-------------|
| 8 U.S.C. § 1182(a)(9)(C)(ii) | 7 |
| 8 U.S.C. § 1182(a)(9)(C)(iii) | 7 |
| 8 U.S.C. § 1229a(c)(7)(A) | 6 |
| 8 U.S.C. § 1229a(c)(7)(C)(iv)..... | 13 |
| 8 U.S.C. § 1229b..... | 12 |
| 8 U.S.C. § 1229b(b)(1)..... | 12 |
| 8 U.S.C. § 1229b(b)(2)..... | 12 |
| 8 U.S.C. § 1231(a)(5)..... | 5, 6, 7, 10 |
| 8 U.S.C. § 1254(a)(1) & (2) (1995) | 12 |
| 8 U.S.C. § 1254(a)(3) (1995) | 12 |
| 8 U.S.C. §1254(a)(3)..... | 12 |
| Illegal Immigration Reform and Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009..... | 12 |
| S. Rep. No. 138, 103d Cong., 1 st Sess. 41 (1993)..... | 11 |
| The Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902-55 | 1, 11, 12 |
| The Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified in scattered sections of 8, 18, 20, 28, 42, and 44 U.S.C.) (Oct. 28, 2000)..... | 13 |
| Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2005) | 14, 15 |
| Other Authorities | |
| 146 Cong. Rec. S10188, S10192 (Oct. 5, 2000)..... | 13, 14 |
| 151 Cong. Rec. S13749, S13752 (Dec. 16, 2005) (statement of Sen. Kennedy)..... | 14 |

| | |
|---|----|
| A. Reina, B. Lohman, and M. Maldonado, “ <i>He Said They’d Deport Me</i> ”: <i>Factors Influencing Domestic Violence Help-Seeking Practices Among Latina Immigrants</i> , 29 <i>Journal of Interpersonal Violence</i> 593–615 (2014)..... | 16 |
| Angela Browne, <i>Violence Against Women by Male Partners: Prevalence, Outcomes and Policy Implications</i> , 48 <i>Am. Psychol.</i> 1077 (1993)..... | 11 |
| Catherine F. Klein & Leslye E. Orloff, <i>Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law</i> , 21 <i>Hofstra L. Rev.</i> 801 (1994)..... | 11 |
| E. Erez and N. Ammar, VIOLENCE AGAINST IMMIGRANT WOMEN AND SYSTEMIC RESPONSES: AN EXPLORATORY STUDY (2003)..... | 15 |
| H.R. Rep. No. 395, 103d Cong., 1 st Sess., 26 (1993) | 11 |
| Leslye Orloff, Mary Ann Dutton, Giselle Hass, & Nawal Ammar, <i>Battered Immigrant Women’s Willingness to Call for Help and Police Response</i> , 13 <i>UCLA Women’s Law Journal</i> , 44-99 (2003) | 15 |
| M. Dutton, L. Orloff, & G. Hass, <i>Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications</i> , 7 <i>Georgetown Journal of Gender, Social Policy & the Law</i> 2 (2000) | 15 |
| R. Bhuyan, & K. Senturia, <i>Understanding Domestic Violence Resource Utilization and Survivor Solutions Among Immigrant and Refugee Women</i> , 20 <i>Journal of Interpersonal Violence</i> 8, 895-901 (2005) | 16 |
| Tahirih Justice Center, <i>Key Findings: 2017 Advocate and Legal Service Survey Regarding Immigrant Survivors</i> , https://www.tahirih.org/pubs/key-findings-2017-advocate-and- legal-service-survey-regarding-immigrant-survivors/ | 17 |
| The Violence Against Women Act of 2000 Section-by-Section Summary, Vol. 146, No. 126 <i>Cong. Rec.</i> , 106 th Cong., 2 nd Sess., at S10195 (Oct. 11, 2000)..... | 13 |

SUMMARY OF AMICUS ARGUMENT

Amici write to urge the Court to grant rehearing because, under this Court's case law, reinstatement proceedings cannot bar reopening generally, and certainly not where Congress has explicitly authorized such motions to be brought on behalf of survivors of domestic violence.¹

Several Amici on this brief worked with Congress to create the VAWA cancellation provision and its subsequent amendments. We are deeply concerned that the agency now appears to ignore the special protections Congress created and expanded over the past thirty years for immigrant survivors of domestic violence. The reinstatement language cited by Petitioner is one small part of a larger scheme to challenge violence against women in the United States, which Congress initiated in the Violence Against Women Act of 1994.² The overarching goal of VAWA was to eliminate use of our legal system as a weapon of power and control by abusers. Since VAWA's passage, Congress has repeatedly amended the law to address abuser behavior that threatened the safety net it hoped to create, and has repeatedly expanded the protections for immigrant survivors.

¹ No party's counsel authored this brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting this brief; no person other than Amici Curiae (including their counsel, their members, and their employees) contributed money intended to fund preparing or submitting the brief.

² The Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902-55 (codified in scattered sections of 8 U.S.C., 18 U.S.C. and 42 U.S.C.) (1994).

The BIA's misinterpretation of the statute thwarts the Congressional goal and, instead, provides the kind of weapon for abusers Congress wished to eliminate. Amici ask this court to reaffirm the intent of VAWA and progeny by affirming the ability of all eligible survivors of domestic violence to seek reopening of removal proceedings where authorized by statute.

INTEREST OF AMICI CURIAE

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 (“API”) and immigrant survivors, and provides analysis on critical issues facing victims in the API and immigrant communities, including training and technical assistance on gender-based violence during the course of the life cycle, barriers facing API victims of gender-based violence in immigration proceedings and civil and criminal legal processes. The Institute promotes culturally relevant intervention and prevention, provides expert consultation, technical assistance and training, conducts and disseminates critical research, and informs public policy on issues facing immigrant survivors of gender-based violence, including through its leadership in partnerships through the

Alliance for Immigrant Survivors (www.immigrantsurvivors.org), and the National Taskforce to End Sexual and Domestic Violence. Of particular concern for API-GBV is that immigrant victims of gender-based violence have meaningful access to justice and critical protections against abuse and exploitation afforded to victims across all communities.

ASISTA Immigration Assistance 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 (VAWA) and its progeny. ASISTA serves as liaison for the field with Department of Homeland Security (DHS) personnel charged with implementing these laws, and 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.

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; children’s, women’s, and civil rights groups; allied professionals; and other social justice 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 joins with the other amici because it has a long-standing commitment to supporting the rights and interests of women and children who are victims of crime 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 for immigrant survivors that were ultimately included in the Violence Against Women Act and the Trafficking Victims Protection Act. FUTURES co-chairs the Coalition to End Violence Against Women and Girls Globally, partnering with other national organizations to reduce sexual and domestic violence against women and children.

The **National Immigrant Justice Center** (NIJC) is a Chicago-based national non-profit organization that provides free legal representation to low-income noncitizens. In collaboration with pro bono attorneys, NIJC represents hundreds of victims of domestic violence, human trafficking, and other specified criminal offenses at any given time, before the Asylum Office, the Immigration Courts, the Board of Immigration Appeals, and the Federal Courts.

The **National Network to End Domestic Violence** (NNEDV) is a not-for-profit organization incorporated in the District of Columbia in 1994 (www.nnedv.org) to end domestic violence. As a network of the 56 state and territorial domestic violence and dual domestic violence and sexual assault coalitions and their over 2,000 member programs, NNEDV serves as the national voice of millions women, children and men victimized by domestic violence. NNEDV was instrumental in promoting Congressional enactment and eventual implementation of the Violence Against Women Acts of 1994, 2000, 2005 and 2013 and, working with federal, state and local policy makers and domestic violence advocates throughout the nation, NNEDV helps identify and promote policies and best practices to advance victim safety. NNEDV is deeply concerned with the legal rights of domestic violence victims and understands many immigrant victims face uniquely difficult challenges seeking assistance or escaping domestic violence.

ARGUMENT

I. *As Morales-Izquierdo Held, the Reinstatement Statute Does Not Entirely Displace the Reopening Statute.*

The reinstatement of removal statute, 8 U.S.C. § 1231(a)(5), bars reopening, but does so in the present tense (“the prior order... *is* not subject to being reopened or reviewed”). This distinguishes it from other clauses in § 1231(a)(5) which are in the future tense (“the alien shall be removed under the prior order at any time

after the reentry”). *Id.* The point of the reinstatement statute’s bar to reopening is to expedite re-deportation, not to permanently punish a noncitizen. When Congress has wished to create permanent bars to relief, it has not been shy about its intentions. *Cf., e.g.*, 8 U.S.C. § 1158(d)(6) (“[A]lien[s] shall be permanently ineligible for any benefits under this chapter” when guilty of asylum fraud).

Reading § 1231(a)(5) as a permanent and conclusive bar to reopening would trigger conflicts with multiple other statutes. The conflict is most immediate with reopening statutes. The general reopening statute affords every noncitizen the right to file “one motion to reopen proceedings under this section.” 8 U.S.C. § 1229a(c)(7)(A). Interpreting § 1231(a)(5) as a permanent bar creates a conflict is created between the two statutes. The Supreme Court's decision in *Dada v. Mukasey* is analogous and instructive. 554 U.S. 1, 18 (2008). In *Dada*, the Government argued that a voluntary departure grant effectively ousted a noncitizen’s ability to seek reopening. *Dada*, 554 U.S. at 19-20. Citing to prior case law, the Court refused to read one statutory provision “in isolation and literally,” looking to the “Act as a whole” *United States v. Witkovich*, 353 U.S. 194, 199 (1957) and “harmonizing” the various provisions of the statute. *Witkovich*, 353 U.S. at 200; *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994) (noting the “familiar principle of statutory construction... when possible, courts should construe statutes ... to foster harmony with other statutory

and constitutional law”). Instead, the Court interpreted the reopening and voluntary departure statutes as coexisting. 554 U.S. at 19-21; see also *id.* at 18 (noting that “[t]he purpose of a motion to reopen is to ensure a proper and lawful disposition” of a noncitizen’s claims, characterizing reopening as an “important safeguard” of noncitizen’s rights).

Interpreting § 1231(a)(5) as a permanent bar would also render nullities several other waivers and exceptions, especially those related to prior removal orders. See 8 U.S.C. §§ 1182(a)(9)(C)(iii) (special waiver for 8 U.S.C. § 1182(a)(9)(C)(i)(II)); 1182(a)(9)(C)(i)(II) (unlawfully present after previously being removed); 1182(a)(9)(C)(ii) (waiver of inadmissibility after ten years abroad). Congress could not have intended to take away with one hand what it gave with the other. To avoid *sub silentio* overruling these other provisions, the reinstatement provision must be understood to bar relief, and reopening, *only* in the context of reinstatement proceedings.

In other cases, this Court has interpreted § 1231(a)(5) consistently with the principles of *Dada* and related cases. It explicitly found that the reinstatement statute did not prevent a motion to reopen from being considered from abroad. *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 497-98 (9th Cir. 2007) (en banc). The *Morales-Izquierdo* Court explained that this reading does not undermine or hinder the reinstatement statute, since the “prior order . . . is not subject to being

reopened or reviewed during the course of the reinstatement process.” *Id.* at 498 (emphasis added, internal quotations omitted). Outside the reinstatement process, *Morales-Izquierdo* permits a noncitizen with “a legitimate basis for challenging his prior removal order [to] pursue it... *just like every other alien in his position.*” *Id.* (emphasis added). This is consistent with the Supreme Court’s treatment of reinstatement in *Fernandez-Vargas v. Gonzales*. 548 U.S. 30, 44 (2006) (“§ 1231(a)(5)... does not penalize an alien for reentry (criminal and civil penalties do that); it establishes a process to remove him ‘under the prior order at any time after the reentry.’ [T]he statute applies to stop an indefinitely continuing violation.”). Since the reinstatement and reopening statutes can be read to not conflict with each other, traditional canons of statutory interpretation support *Morales-Izquierdo*. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

Morales-Izquierdo also avoids an interpretation of the reinstatement statute that would be of doubtful constitutionality. Prior to *Morales-Izquierdo*, the Ninth Circuit found that minimum due process required that a noncitizen be permitted to mount a collateral attack on an underlying removal order in the reinstatement context. See *Arreola-Arreola v. Ashcroft*, 383 F.3d 956, 963 (9th Cir. 2004) (“[T]he INS cannot reinstate a prior order of removal that did not comport with due process.”); *Aguilar-Garcia v. Ridge*, 90 Fed. Appx. 220, 220 (9th Cir. 2004); *Castro-Cortez v. INS*, 239 F.3d 1037, 1048 (9th Cir. 2001), abrogated on other

grounds by *Fernandez-Vargas*, 548 U.S. at 36; cf. *U.S. v. Mendoza-Lopez*, 481 U.S. 828, 838 (1987) (“[W]here the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense”).

This Court’s en banc formulation avoids most constitutional challenges to the reinstatement statute; since the noncitizen may seek reopening of an improper removal order apart from the reinstatement proceeding, constitutional and other claims relating to the underlying removal proceeding may be raised there rather than in a challenge to reinstatement proceedings.

If the Agency rejected *Morales-Izquierdo* in a published opinion, the Court would be obliged to decide if the Board’s approach were reasonable. *Nat’l Cable & Telecomm. Assn. v. Brand X Internet Services*, 545 U.S. 967, 982 (2005); *Medina-Nunez v. Lynch*, 788 F. 3d 1103 (9th Cir. 2015); *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1011 (9th Cir. 2006). If the Court deferred to an agency reinterpretation, that would in turn require the Court to revisit the ultimate holding of *Morales-Izquierdo*, since eliminating that “important safeguard” of rights, *Dada*, 554 U.S. at 18, would perforce reopen questions of the constitutionality of reinstatement proceedings and of judicial review accorded to such decisions. But the Board has not challenged *Morales-Izquierdo* in a published decision; *Morales-*

Izquierdo remains binding law in this circuit, and establishes that the broad language of § 1231(a)(5) does not establish a per se bar to reopening outside the reinstatement process.

II. Even if Reopening Were Generally Precluded, the VAWA Statutes Are More Specific than the Reinstatement Statute, and Should Govern.

Even if the Court were to find that *Morales-Izquierdo* does not resolve this question, reopening would still be permitted in the VAWA context because of the well-established principle that, in the face of any apparent conflict between statutes, “the specific governs the general.” *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012).

This Court has noted that the goal of the VAWA immigration provisions “was to eliminate barriers to women leaving abusive relationships.” *Hernandez v. Ashcroft*, 345 F.3d 824, 841 (9th Cir. 2003). VAWA suspension of deportation, now codified as the VAWA cancellation provision at issue in this case, is “a generous enactment, intended to ameliorate the impact of harsh provisions of immigration law on abused women.” *Id.* at 840. “[W]hen the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion.... This is particularly so in the immigration context where doubts are to be resolved in favor of the alien.” *Id.* at 841. Amici now ask this Court to apply the same framework in reviewing Congress' clear

intent that VAWA cancellation applicants be able to overcome reinstatement of removal.

A. Congressional Intent of Original VAWA Statute.

In the Violence Against Women Act (VAWA) of 1994 Congress initiated a concerted project to combat domestic violence in the United States,³ recognizing that abusers often use our legal system as a weapon of power and control over their victims. In particular, Congress recognized that immigration laws foster abuse by placing the ability of family members to gain permanent lawful status in the hands of abusive U.S. citizen or lawful permanent resident spouses.⁴ As the House of Representatives' Committee on the Judiciary noted:

Domestic battery problems can become terribly exacerbated in marriages where one spouse is not a citizen, and the noncitizen's legal status depends on his or her marriage to the abuser. Current law fosters domestic violence in such situations by placing full and complete control of the noncitizen's spouse's ability to gain permanent legal status in the hands of the citizen or lawful permanent resident spouse.

* * *

Many immigrant women live trapped and isolated in violent homes, afraid to turn to anyone for help. They fear both continued abuse if they stay with their batterers and deportation if they attempt to leave.⁵

³ See H.R. Rep. No. 395, 103d Cong., 1st Sess., 26-27 (1993); S. Rep. No. 138, 103d Cong., 1st Sess., 38, 41 (1993).

⁴ See H.R. Rep. No. 395, at 26-27 (1993).

⁵ *Id.*

To address this problem, Congress created a special "self-petitioning" provision for those who, but for abuse by their sponsors, would be en route to securing proper legal status. See VAWA § 40703, initially codified at 8 U.S.C. § 1254(a)(3). For domestic violence survivors in deportation proceedings, Congress created a special VAWA suspension of deportation requiring three years of continuous presence instead of the seven years other cancellation applicants must show. *Compare* 8 U.S.C. § 1254(a)(1) & (2) (1995) *with* 8 U.S.C. § 1254(a)(3) (1995).

When Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") in 1996,⁶ it replaced suspension of deportation with the more restrictive cancellation of removal.⁷ However, it did not do so in VAWA cases; rather, it transformed VAWA suspension into VAWA cancellation of removal, retaining special exceptions and provisions, such as three years (instead of ten years) of continuous physical presence and extreme hardship to the alien and her children, regardless of their status (instead of "exceptional or extremely unusual hardship" to US citizen or lawful permanent resident family members).⁸

⁶ Illegal Immigration Reform and Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (hereinafter "IIRIRA").

⁷ *See* 8 U.S.C. § 1229b.

⁸ *Compare* 8 U.S.C. § 1229b(b)(1) *with* 8 U.S.C. § 1229b(b)(2).

The 2000 Battered Immigrant Women Protection Act (BIWPA) was enacted as part of The Violence Against Women Act.⁹ In BIWPA, Congress sought to eliminate residual obstacles or “catch-22” glitches impeding immigrants seeking to escape from abusive relationships,¹⁰ to further its efforts to “ensure that domestic abusers with immigrant victims are brought to justice and that the battered immigrants Congress sought to help in the original Act are able to escape the abuse.”¹¹ In particular, Congress created special motions to reopen immigration proceedings for immigrant survivors of domestic violence, providing exceptions to the normal number and timing limits.¹²

Congress recognized that abused spouses are exposed to “an atmosphere of deception, violence, and fear that make it difficult for a victim of domestic violence to learn of or take steps to defend against or reopen an order of removal in the first instance.”¹³ Congress determined that not allowing an immigrant to reopen

⁹ The Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified in scattered sections of 8, 18, 20, 28, 42, and 44 U.S.C.) (Oct. 28, 2000).

¹⁰ The Violence Against Women Act of 2000 Section-by-Section Summary, Vol. 146, No. 126 Cong. Rec., 106th Cong., 2nd Sess., at S10195 (Oct. 11, 2000).

¹¹ *Id.*

¹² § 1506(c), 114 Stat. at 1528 (codified as amended at 8 U.S.C. § 1229a(c)(7)(C)(iv)).

¹³ 146 Cong. Rec. S10188, S10192 (Oct. 5, 2000) (joint managers’ statement).

removal proceedings after a final order of removal was entered would “thwart justice or be contrary to the humanitarian purpose of [VAWA 2000].”¹⁴

B. Congress Addresses Reinstatement for Battered Spouses

In 2005 Congress further fixed VAWA motions to reopen and addressed survivor ability to overcome reinstatement of removal. Senator Edward Kennedy (D-MA) described the goals of immigration provisions of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (“VAWA 2005”),¹⁵ which he co-sponsored:

Eliminating domestic violence is especially challenging in immigrant communities, since victims often face additional cultural, linguistic and immigration barriers to their safety. *Abusers of immigrant spouses or children are liable to use threats of deportation to trap them in endless years of violence.*

The improvements in immigration protections in the bill are *designed to help prevent the deportation of immigrant victims who qualify for immigration relief under the Violence Against Women Act (VAWA).*¹⁶

Regarding reinstatement of removal, Congress stated that

[T]he Secretary of Homeland Security, *the Attorney General*, and the Secretary of state have discretion to consent to an victim’s reapplication for admission after a previous order of removal, deportation, or exclusion. . . . It is the sense of Congress that the officials described . . . should particularly consider exercising this authority in cases under the Violence Against Women Act of 1994,

¹⁴ *Id.*

¹⁵ Pub. L. No. 109-162, 119 Stat. 2960 (2005).

¹⁶ 151 Cong. Rec. S13749, S13752 (Dec. 16, 2005) (statement of Sen. Kennedy) (emphasis supplied).

*cases involving [VAWA cancellation of removal] or [VAWA suspension of deportation.]*¹⁷

Amici urge this Court to implement this clearly stated will of Congress by holding that VAWA cancellation applicants may overcome reinstatement of removal.

C. Allowing Survivors to Overcome Reinstatement Is Essential to Ensuring Congress' Goals

One of an abuser's most powerful tools is the threat of deportation. Sixty-five percent of women interviewed in one study reported that their abuser had used threats of deportation as a form of abuse.¹⁸ Abusers tell their partners that they will be deported if they call police, "warn" they will lose their children if they attempt to leave, or directly threaten to call immigration authorities if the partner does not comply with the batterer's demands.¹⁹ To keep immigrant survivors silent and compliant, abusers compliment threats of deportation by isolating survivors from information about the U.S. legal system, from social services and criminal justice resources, from resources in their own language, and from others in their

¹⁷ VAWA 2005, §813(b)(2) (emphasis supplied).

¹⁸ E. Erez and N. Ammar, VIOLENCE AGAINST IMMIGRANT WOMEN AND SYSTEMIC RESPONSES: AN EXPLORATORY STUDY (2003). In another study, 72% of Latina domestic violence victims reported that their citizen or legal permanent resident spouses failed to file family-based petitions for them. M. Dutton, L. Orloff, & G. Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 *Georgetown Journal of Gender, Social Policy & the Law* 2 (2000).

¹⁹ Leslye Orloff, Mary Ann Dutton, Giselle Hass, & Nawal Ammar, *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 *UCLA Women's Law Journal*, 44-99 (2003).

community.²⁰ They often serve as the sole source of information about our legal systems and intentionally limit survivor access to services, including immigration legal support.²¹ As noted above, it was because of this manipulation and threat of deportation that Congress created special motions to reopen for immigrant domestic violence survivors and insisted that the government allow them to overcome reinstatement.

Reinstatement of removal, if read as urged by the Government, would in effect cast in stone a prior removal order. This would prevent survivors of domestic violence from reopening cases to remedy past abuse, and would place them in a position of permanent fear, subject at any time to immediate detention and removal. If anything is clear in the history of Congressional legislation in this area, it is that Congress did not wish to allow abusive spouses to enlist the immigration authorities to further victimize survivors of domestic violence.

²⁰ R. Bhuyan, & K. Senturia, *Understanding Domestic Violence Resource Utilization and Survivor Solutions Among Immigrant and Refugee Women*, 20 *Journal of Interpersonal Violence* 8, 895-901 (2005).

²¹ A. Reina, B. Lohman, and M. Maldonado, “*He Said They’d Deport Me*”: *Factors Influencing Domestic Violence Help-Seeking Practices Among Latina Immigrants*, 29 *Journal of Interpersonal Violence* 593–615 (2014).

CONCLUSION

Now, when heightened fear of deportation is discouraging immigrant survivors from accessing safety and security,²² it is more imperative than ever that our immigration system not become a tool for abusers. Amici respectfully request that this Court vindicate Congress' policy against domestic violence by upholding the ability of VAWA cancellation applicants to overcome reinstatement of removal. Let immigrant survivors have their day in court.

Dated: December 13, 2018

Respectfully submitted,

/s/ Charles Roth

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²² See Tahirih Justice Center, Key Findings: 2017 Advocate and Legal Service Survey Regarding Immigrant Survivors, <https://www.tahirih.org/pubs/key-findings-2017-advocate-and-legal-service-survey-regarding-immigrant-survivors/>.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned attorney for Petitioner certifies that the foregoing brief

(i) complies with the type-volume limitation of Circuit Rule 29-2(c), because it contains 3745 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

(ii) has been prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman.

Dated: December 13, 2018

/s/ Charles Roth

Charles Roth

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December 2018, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth 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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