[redacted]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[redacted]

Petitioners,

v.

LAURA B. ZUCHOWSKI, Director, Vermont Services Center, United States Citizenship and Immigration Services; CHAD F. WOLF, Acting Secretary, Department of Homeland Security; WILLIAM P. BARR, Attorney General,

Respondents.

Appeal from the United States District Court
for the District of Oregon
Honorable Anna J. A. Brown, District Judge

BRIEF OF *AMICUS CURAIE* ASISTA IMMIGRATION ASSISTANCE SUPPORTING PETITIONERS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae ASISTA Immigration Assistance ("ASISTA") is a nonprofit corporation with no parent and is not publicly traded.

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Pursuant to Circuit Rule 29-2, ASISTA Immigration Assistance ("ASISTA") respectfully submits this Brief *Amicus Curiae* in support of Petitioners and Reversal in the pending rehearing *en banc* of the above-captioned case. The filing of this brief was authorized by the Executive Director of ASISTA, who has the requisite authority. Pursuant to Fed. R. App. 29(c)(5), no party's counsel authored the brief in whole or part, nor contributed money that was intended to fund preparing or submitting the brief. No other person contributed money that was intended to fund preparing or submitting the brief. All parties have consented to this filing.

I. STATEMENT OF INTEREST

This case concerns the U visa, a statutory category that allows victims of serious criminal activity who help law enforcement investigate or prosecute the perpetrators to petition for temporary nonimmigrant visa status. Congress enacted the U visa with overwhelming bipartisan support as part of the Victims of Trafficking and Violence Protection Act of 2000, which reauthorized and extended the landmark Violence Against Women Act of 1994.

There is no dispute that Petitioner [redacted] is an archetype of the category of persons Congress enacted the U visa to cover. At age 12, she was raped at knifepoint by an intruder who threatened to kill her family, yet assisted law enforcement even as her assailant continued to threaten her with violence. Befitting Ms. [redacted] bravery, the United States Citizenship & Immigration Service ("USCIS") granted her U visa petition.

Congress recognized that the families of victims such as Ms. [redacted] also merited temporary visa consideration. It did so by allowing victims who qualify for U visa protection to seek derivative status for their qualifying relatives (including spouses) who are "accompanying, or following to join" them. 8 U.S.C. §1101(a)(15)(U)(ii). Under this statutory authority, after Ms. [redacted] obtained her U visa, she petitioned for U visa status for Petitioner [redacted], whom she had married two years into the pendency of her original U visa petition (but before it had been granted).

The USCIS denied the petition based on a Department of Homeland Security ("DHS") regulation purporting to limit the scope of Congress' statutory protection only to spouses who are married to a victim at the time she or he files her or his original U visa petition. 8 C.F.R. §214.14(f)(4) (the "DHS Regulation"). After a divided panel of this Court affirmed summary judgment in Petitioners' lawsuit challenging that decision, this Court granted *en banc* review.

ASISTA has extensive interest in and knowledge about the legal protections for immigrant victims of abuse such as Ms. [redacted] contained in VAWA and its progeny, including the U visa. ASISTA worked with Congress to create and expand the routes to secure immigration status for survivors of domestic violence, sexual assault, and other crimes. ASISTA serves as liaison for the field with DHS personnel charged with implementing these laws, most notably Citizenship and Immigration Services, Immigration and Customs Enforcement, and Department of Homeland Security's Office for Civil Rights and Civil Liberties. ASISTA 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.

Consistent with ASISTA's mandate and expertise, this brief seeks to assist the Court by explaining why the DHS Regulation is inconsistent with VAWA and the U Visa.[1] To not burden the Court, the brief does not repeat the statutory construction and *Chevron* arguments already made by the parties.

II. ARGUMENT

A. The DHS Regulation Conflicts With The Policy To Support Healthy Marital Relationships For Nonimmigrant Victims Of Serious Abuse Inherent In U Visa's Origins In VAWA

Congress enacted the U visa statute as part of a long effort to encourage nonimmigrant (and all) victims of serious abuse in marital relationships to seek justice.

This effort began in 1994 with the watershed Violence Against Women Act, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (Sept. 13, 1994) ("VAWA 1994"). VAWA 1994 represented our nation's first systems-wide attempt to halt and address violence against all women in this country, including noncitizens. It was enacted with widespread bipartisan support after four years of investigation focusing on the extent and severity of domestic violence and other crimes.

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[1] ASISTA has previously filed amicus briefs on these and related statutes. *See*, *e.g.*, *United States v. Castleman*, 134 S. Ct. 1405 (2014); *State of Washington v. Trump,* No. 17-35105 (9th Cir. 2017); *L.D.G. v. Holder*, 744 F.3d 1022 (7th Cir. 2014); *Torres-Tristan v. Holder*, 656 F.3d 653 (7th Cir. 2011); *Lopez-Birrueta v. Holder*, 633 F.3d 1211 (9th Cir. 2011); *Rosario v. Holder*, 627 F.3d 58 (2d Cir. 2010).

A crucial element added to the nation's law by VAWA 1994 is the "self-petitioning" option for persons subjected to battery or extreme cruelty by a United States citizen or lawful permanent resident spouse or parent. VAWA 1994, §40701; *see* 8 U.S.C. §§1154(a)(1)(A)(ii), (B)(ii). These statutes allow noncitizen victims of domestic violence to petition for immigrant visa status on their own, without the need for a citizen or legal permanent resident sponsor-spouse to petition for a visa on the victim-spouse's behalf.

The protections and provisions of VAWA 1994 were reenacted, re-funded, expanded and improved—again with overwhelming bipartisan support—in the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386 (Oct. 28, 2000) ("TVPA"). Congress recognized that in enacting the TVPA it was carrying on VAWA 1994's legacy in protecting noncitizen victims. The statement of the joint managers began in substantive part:

> The enactment of the Violence Against Women Act in 1994 signaled the beginning of a national and historic commitment to the women and children in this country victimized by family violence and sexual assault. Today we renew that national commitment.

146 CONG. REC. S10191 (Oct. 11, 2000).

The joint managers continued by explaining that "[s]everal points regarding the provisions of Title V, the Battered Immigrant Women Protection Act of 2000, bear special mention." *Id.* at S10192.

> Title V continues the work of the Violence Against Women Act of 1994 ("VAWA") in removing obstacles inadvertently interposed by our immigration laws that many hinder or prevent battered immigrants from

> fleeing domestic violence safely and prosecuting their abusers by allowing an abusive citizen or lawful permanent resident to blackmail the abused spouse through threats related to the abused spouse's immigration status.

Id. To similar end, in the floor debate on the reauthorization of VAWA, Senator Sarbanes stated that the expansion of VAWA 1994 "will also make it easier for battered immigrant women to leave their abusers without fear of deportation…." 146 CONG. REC. S8571. Senator Leahy added in the debate on the TVPA: "In 1994, we designed VAWA to prevent abusive husbands from using control over their wives' immigration status to control them. Over the ensuing six years we have discovered additional areas that need to be addressed to protect immigrant women from abuse, and have attempted to do so in this legislation." 146 CONG. REC. S10185.

Among the "additional areas" to "protect immigrant women from abuse" in the Battered Immigrant Women Protection Act is Section 1513 of the TVPA. 146 CONG. REC. S10195 (Section-by-Section Summary of legislation), *id.* S10196 (Summary of Section 1513). Section 1513 "[c]reates new nonimmigrant visa for victims of certain serious crimes that tend to target vulnerable foreign individuals without immigration status if the victim has suffered substantial physical or mental abuse as a result of the crime, the victim has information about the crime, and a law enforcement official or a judge certifies that the victim has been helpful, is being helpful, or is likely to be helpful in investigating or prosecuting the crime." *Id.*

Section 1513 was codified as 8 U.S.C. §1101(a)(15)(U), and hence is referred to as the U visa. Significantly, Congress not only allowed

noncitizen, law enforcement-cooperating victims such as Ms. [redacted] to petition for U visas themselves. Congress also enacted a separate clause to confer U-visa status for victims' qualifying relatives—spouses such as Mr. [redacted]—"accompanying, or following to join" the principal alien-victim. 8 U.S.C. §1101(a)(15)(U)(ii).

Viewed in this historical context and the facts of this case, the inconsistency between the DHS Regulation and the policies underlying the U visa statute is clear.

The U visa's antecedents are in VAWA, which includes the self-petitioning option. That option frees persons subjected to battery or extreme cruelty from the inherent power and control over immigration status their abusive spouses would otherwise possess by the threat of foregoing or withdrawing a sponsored petition for a visa if the victim objected to the abuse. As this Court put it: "With the passage of VAWA, Congress provided a mechanism for women who have been battered or subjected to extreme cruelty to achieve lawful immigration status independent of an abusive spouse." *Hernandez v. Ashcroft*, 345 F.3d 824, 827 (9th Cir. 2003).

While Ms. [redacted] was not subject to jeopardy on the basis of her immigration status as a victim of battery or extreme cruelty in an abusive marital relationship—a predicament Congress remedied in VAWA—she was subject to jeopardy on the basis of her immigration status as a victim of a heinous crime. Congress addressed that predicament in the course of reenacting VAWA, and recognized it was dealing with the same type of problem. As the DHS itself acknowledged in its initial interim rule on U visa procedures, Congress enacted the U visa to address the fears of noncitizen victims of serious abuse such as

Ms. [redacted]—victims of crimes similar to (if not even worse than) the domestic abuse combatted by VAWA—that contacting law enforcement would result in their deportation. *See* Department of Homeland Security, New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status: Interim Rule, 72 FED. REG. 53,013, 53,014 (Sept. 17, 2007); *accord*, Petitioners' Brief In Support Of Rehearing En Banc filed Mar. 30, 2020 ("Petitioners' En Banc Brief") at 4-5, *citing Perez Perez v. Wolf*, 943 F.3d 853, 869 (9th Cir. 2019) (Congress recognized necessity for U visa because "alien victims may not have legal status and may be reluctant to report being victims to a crime … due to fear of removal.") (Callahan, J., dissenting).

Congress' recognition of the problem facing Ms. [redacted] and other unfortunately similarly situated noncitizens was sound. Immigrant populations are particularly vulnerable to crimes such as domestic violence, sexual assault, and human trafficking because, if they fear they will be deported for contacting law enforcement, they are unlikely to report domestic abuse and sexual assault. *See* Stacey Ivie *et al.*, Overcoming Fear and Building Trust with Immigrant Communities and Crime Victims, POLICE CHIEF (Apr. 2018) ("Ivie 2018") (https://www.policechiefmagazine.org/ overcoming-fear- building-trust-immigrant-communities/) ("One of the most intimidating tools abusers and traffickers of undocumented immigrants use is the threat of deportation. Abusers and other criminals use it to maintain control over their victims and to prevent them from reporting crimes to the police.") To remedy this problem, the U visa offers a pathway to secure immigration status for victims of violent crimes who are helpful to law enforcement in the investigation or prosecution of their perpetrators.

Ms. [redacted] undisputably is within the category. Consider, then, her situation at the time she filed her U visa petition. She had been a rape victim who had cooperated with the authorities despite her assailant's threat of continuing retaliation. She filed a petition as Congress contemplated she might on June 18, 2013. She was notified that she apparently qualified for a U visa and was placed on a waiting list approximately 8 months later (February 26, 2014), yet waited an additional 17 months (until November 24, 2015), for a 29 months total wait, for her petition to be approved.

Today, this limbo period is even longer. By statute, only 10,000 original victim U visas may be granted annually. 8 U.S.C. §1184(p)(2)(A). Thus, tens of thousands of U visa applicants are on or waiting to be put on the waitlist and, short of mandamus in federal court, have no control over the timing of that decision. Indeed, USCIS currently estimates it will take over four years (55.5 to 56 months) to process U visas in both of its Service Centers. *See* USCIS, "Check Case Processing Times" (https://egov.uscis.gov/ processing-times), wheel to Form 1-918 Petition For U Nonimmigrant Status.

According to the DHS Regulation, however, Ms. [redacted] and the many other U visa petitioners unmarried at the time of their abuse must place their marital status on hold during this lengthy limbo period with no certainty that even if their petition is granted, they will be able to petition for a derivative U visa for a person they married during that period.[2] The DHS Regulation thus discourages

[2] Alternatively, a victim potentially qualifying for a U visa such as Ms. [redacted] who was at all contemplating marriage with a noncitizen

nonimmigrant victims of serious abuse such as Ms. [redacted] who assist law enforcement from subsequently entering into *healthy* marital relationships—even as the U visa is a product of Congress' effort started in VAWA to redress *unhealthy* and abusive marital relationships, and even as Congress explicitly extended the U Visa to cover noncitizen spouses of victims such as Ms. [redacted].

The DHS Regulation harms more than just the noncitizen victims of violent crime: it harms the national interest in effective law enforcement. Congress explicitly stated that in enacting the U visa. Its purposes included to "facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status," TVPA, §1513(a)(2)(B), and to "strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic assault" and other serious crimes. *Id.* §1513(a)(2)(A).

Congress' reasoning again was sound. When immigrant crime victims fear accessing the U.S. criminal justice system, everyone suffers. Criminals target vulnerable populations such as immigrants. Pauline Portillo, Undocumented Crime Victims: Unheard, Unnumbered, And Unprotected, 20 THE SCHOLAR 345, 354-56 (2018) (https://commons.stmarytx.edu/cgi/viewcontent.cgi?article=1006&context=thescholar). Victim fear generated by deportations fetters the ability of law enforcement to take dangerous criminals off the street. Lindsey Bever, Hispanics "are going further into the shadows" amid chilling

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would be compelled to marry before filing her original petition—hardly a situation conducive to good marital decisions.

immigration debate, police say, WASH. POST (May 12, 2017) (https://www.washingtonpost.com/news/post-nation/wp/2017/05/12 immigration-debate-might-be-having-a-chilling-effect-on-crime-reporting) ("It looks like they're going further into the shadows, and there appears to be a chilling effect in the reporting of violent crime by members of the Hispanic community….") (quoting Houston Police Chief Art Acevedo).

In contrast, when victims such as Ms. [redacted] are not afraid to report violent crimes to the authorities, perpetrators may be apprehended and brought to justice and everyone (other than the criminals) wins. *See* Ivie 2018 ("However, to combat this problem, the U.S. Congress created two powerful tools designed to help law enforcement agencies detect, investigate, and prosecute crimes committed against immigrant crime victims: the U and T Visas. These visas were included in the Violence Against Women Act (VAWA) and the Trafficking Victims Protection Act (TVPA). The two acts are 'important bipartisan pieces of legislation that together advance the cause of justice for crime victims and truly offer the prospect of improving public safety'.").

In sum, amicus contends that, whether intentional or not, USCIS' narrow interpretation of the U visa statute harms and discourages crime victims from pursuing the relief Congress created for them. We all benefit when those who are raped in our country are able to transition from being "victims" to "survivors" and, in Ms. [redacted]'s case, to a "thriver" who has found a loving relationship despite her horrific experiences at the hands of a man when she was only 12 years old. Amicus asks this Court to ensure that the Executive implements this

law as Congress intended, which includes encouraging U crime victims to find the safety, security and support of a loving marital relationship.

B. The Government's Assertion That The DHS Regulation Guards Against Marital Fraud Does Not Justify The Policy Conflict

One further policy argument warrants mention. The government has sought to justify the DHS Regulation as consistent with immigration policy on the grounds that it guards against persons obtaining visa status through "sham marriages." *See* Answering Brief Of Defendants/Appellees filed June 22, 2018 ("Gov't Brief") at 16 (summarizing point as follows: "The regulation at issue guards against fraud in U-nonimmigrant petitions by requiring the marriage to exist at the time of filing.").

Petitioners' reply brief in the panel briefing challenges this argument as pretextual and as not supported by empirical data. Apart from these criticisms, the government's argument also is flawed because—as the government admits—there already are civil and criminal statutes that prohibit and punish marital fraud if it occurs. *See* Gov't Brief at 15-16. Thus, the DHS Regulation is not necessary to advance the policy interest in preventing abuse. Indeed, the regulation goes beyond existing anti-fraud statutes (and hence the government's policy reliance on them) by adopting a blanket, categorical refusal on the government's part to even consider whether a marriage is legitimate when proffered as a basis for a derivative U visa.

III. CONCLUSION

The Court *en banc* should reverse the panel decision.

Respectfully submitted,

Dated: May 28, 2020

DLA PIPER LLP (US)

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CERTIFICATE OF COMPLIANCE (Circuit Rule 29-2(c)(3))

1. This brief complies with the type-volume limitations of Ninth Circuit Rule 29-2(c)(3) because:

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May 28, 2020

Respectfully submitted,

DLA PIPER LLP (US)

/s/ David Priebe

David Priebe
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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the e-mail addresses denoted on the Service List with an ECF Filing Status of Active.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed on May 28, 2020 in Sunnyvale, California.

/s/ David Priebe

DAVID PRIEBE