

partners, perpetrators of sexual assault, traffickers, or other abusers often exploit as a way to inflict further abuse and to keep victims silent.

Amici curiae are the following:

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 Asian and Pacific Islander and in immigrant communities. They serve as a national network of advocates and community-based service programs that work with Asian and Pacific Islander and immigrant and refugee survivors of domestic violence, sexual assault, and human trafficking, and provides analysis and consultation on critical issues facing victims of gender-based violence in the Asian and Pacific Islander and in immigrant and refugee communities, including training and technical assistance on implementation of the Violence Against Women Act and legal protections for immigrant and refugee survivors. They lead by promoting culturally relevant intervention and prevention, expert consultation, technical assistance, and training; conducting and disseminating critical research; and informing public policy.

ASISTA Immigration Assistance is a national organization, dedicated to helping attorneys in immigration matters concerning noncitizen survivors of violence. ASISTA has worked with Congress to create and expand routes to immigration status for survivors of domestic violence, sexual assault, and other violent crimes. These efforts culminated in the enactment of the groundbreaking Violence Against Women Act (“VAWA”) of 1994 and its progeny. ASISTA trains and provides technical support to local law enforcement officials, civil and criminal court judges, and domestic violence advocates, as well as nonprofit, pro bono, and private attorneys

working with noncitizen survivors. ASISTA is a nonprofit organization, having no corporate parents, and is not publicly traded.

Esperanza United (formerly, Casa de Esperanza National Latin@ Network) mobilizes Latinas and Latin@ communities to end gender-based violence (GBV). We are dedicated to advocating for policies that provide access to safety for Latin@ immigrant survivors of domestic violence and sexual assault. For 40 years, we have served a highly marginalized population in culturally relevant ways that translate to greater safety, community connectedness, and self-sufficiency for Latin@s who experience GBV, including trafficking. We reach approximately 13,000 individuals, families, and organizations across the US and Territories, sovereign lands, and Twin Cities metropolitan area. As a national resource center, Esperanza United advances gender-based violence prevention and intervention efforts with comprehensive strategies, intersectional approaches, and culturally relevant, community-driven leadership and solutions. We are recognized nationally for our public policy, research and evaluation, and training and technical assistance leadership.

The *Tahirih Justice Center* is the largest multi-city direct services and policy advocacy organization specializing in assisting immigrant survivors of gender-based violence. In five cities across the country, Tahirih offers legal and social services to women, girls, and other immigrants fleeing all forms of gender-based violence, including human trafficking, forced labor, domestic violence, rape and sexual assault, and female genital cutting/mutilation. Since its beginning in 1997, Tahirih has provided free legal assistance to more than 30,000 individuals, many of whom have experienced the significant psychological and neurobiological effects of that trauma. Through direct legal and social services, policy advocacy, and training and education, Tahirih protects immigrant survivors and promotes a world where they can live in safety and dignity.

Amici believe their input will assist the Board with its resolution of the issues identified in its amicus request, and have responded to the Board's question posed. This brief is timely submitted, in accord with the Board's March 31, 2022 letter to Jenny Kim of the Capital Area Immigrants' Rights Coalition granting an extension until April 27, 2022.

Amicus Invitation No. 22-16-03

BOARD OF IMMIGRATION APPEALS

On Amicus Invitation on Vacatur of a Criminal Conviction, Amicus Invitation No.
22-16-03

**BRIEF OF *AMICI CURIAE*
ASISTA IMMIGRATION ASSISTANCE,
ASIAN PACIFIC INSTITUTE ON GENDER-BASED VIOLENCE,
ESPERANZA UNITED, AND TAHIRIH JUSTICE CENTER IN SUPPORT
OF THE BOARD OF IMMIGRATION APPEALS' CONSIDERATION OF
THE IMPACTS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT,
HUMAN TRAFFICKING, OR OTHER FORMS OF GENDER-BASED
VIOLENCE WHEN DETERMINING WHETHER TO GRANT AN
UNTIMELY MOTION TO REOPEN PREMISED ON A VACATUR OF A
CRIMINAL CONVICTION**

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INTRODUCTION

The Board of Immigration Appeals (the “BIA”) should consider the impacts of domestic violence, sexual assault, human trafficking, or other forms of gender-based violence when determining whether to grant an untimely motion to reopen premised on a vacatur of a criminal conviction. The equitable tolling of the deadline to file a motion to reopen should be available to survivors of gender-based violence with vacated convictions, as the victimization of the abuse can give rise to extraordinary circumstances that warrant such tolling.

The Immigration and Nationality Act’s (the “INA”) default time limit of ninety (90) days after the entry of a final administrative order of removal to file a motion to reopen can be extremely daunting to navigate, especially in light of the various challenges that survivors of gender-based violence may face, such as recovering from the abuse itself, the lack of counsel, and the inability to access other effective resources during their immigration proceedings. While there are some limited exceptions to the ninety (90) day deadline, these exceptions may not apply to all survivors of gender-based violence if they are not seeking relief under these designated provisions. For instance, noncitizens who later become eligible for relief, such as immigrant survivors who obtain an approved U-visa, an approved application for SIJS status, or derivative asylum status through a spouse or parent, would be foreclosed from reopening their removal orders. Indeed, in the interest of fairness, the legislative intent of the INA was to provide equitable tolling for all survivors of gender-based violence to file a motion to reopen. This intent can be further gleaned from the statute itself, as domestic violence is considered an “exceptional circumstance” that can excuse the failure to appear at a removal hearing.

Accordingly, there are several factors that the BIA should weigh when considering an untimely motion to reopen based on a vacatur of a criminal conviction.

First, the BIA should consider the circumstances surrounding the criminal conviction. The hard truth is that criminal convictions for survivors of human trafficking, domestic violence, sexual assault, and other gender-based violence are often the result of the victimization itself. Traffickers often compel or force victims to commit crimes, causing trafficking survivors to accumulate criminal convictions for crimes, such as prostitution, drug use, drug sales, theft, illegal peddling, resisting arrest, using false identification, gang activity, and recruiting other victims for the trafficker.¹ Likewise, survivors of gender-based violence may have criminal convictions that resulted from acts of self-defense, or may be arrested under false charges made by their abusers. The underlying reasons for these criminal acts – a direct result of the victimization itself – are often ignored, resulting in faulty criminal convictions that can have a real impact on the lives of survivors of gender-based violence.

Second, the BIA should consider the reasons why survivors may need more time to file motions to reopen. Faulty criminal convictions can often perpetuate the trauma of gender-based violence by creating barriers to recovery and reintegration into society, thereby causing a never-ending cycle of victimization that can prevent survivors from filing a timely motion to reopen. Furthermore, survivors of gender-based violence often face barriers in accessing the complicated state or federal vacatur process, as well as the motion to reopen process before their EOIR is tied to the harm that they have experienced. Survivors of abuse, who are often unrepresented by counsel in their initial proceedings, are left to navigate a complex legal system on their own. The ninety (90) day window to file a motion to reopen from a final decision is an immense obstacle to overcome when faced with difficult language barriers, a lack of resources, and a lack of

¹ Human Trafficking and the State Courts Collaborative, *Post-Conviction Relief for Human Trafficking Victims Convicted of Crimes Coerced By a Trafficker*, at 1 (Aug. 2015), http://www.htcourts.org/wp-content/uploads/150904_PostConviction_Relief_forHTvictims_v05.pdf.

understanding of the justice system – all while navigating their victimization and isolation at the hands of their abusers.

Third, the BIA should consider the various federal and state immigration laws that have already provided more comprehensive protections to survivors of abuse. Many of these federal immigration laws recognize the impact of gender-based violence on removal proceedings by providing for longer and more flexible deadlines. Likewise, many states have enacted vacatur statutes that do not provide time limitations for survivors to file motions to vacate. As such, not permitting survivors of gender-based violence to file motions to reopen past the ninety (90) day deadline is inconsistent with both the current federal and state immigration laws that have already provided such protections to survivors.

DISCUSSION

I. The BIA Should Consider The Fact That Survivors’ Criminal Convictions Are Often The Result Of The Victimization

Survivors of human trafficking, domestic violence, and other gender-based violence often have criminal convictions or arrests on their criminal record for acts committed outside of their control at the compulsion of their abusers. Survivors’ criminal records often result directly from their victimization and follow survivors throughout their lives, often revictimizing them all over again. Indeed, survivors often end up with criminal records for actions committed under the coercion of their abusers, or committed in self-defense, but survivors are also rarely identified as “survivors” at the time of their arrest or conviction.² Survivors of abuse may have convictions

² *Post-Conviction Relief*, *supra* at 1; *Reasons for Intimate Partner Violence Perpetration Among Arrested Women*, 12 *Violence Against Women* 609 (2006); *see also* DeLeon-Granados et al., *Arresting developments: Trends in female arrests for domestic violence and proposed explanations*, 12 *Violence Against Women* 355 (2006); Crager et al., *Victim-Defendants: An Emerging Challenge in Responding to Domestic Violence in Seattle and the King County Region* (2003); Bierria & Lenz, *Defending Self-Defense*, *Survived & Punished*, at 3 (Mar. 2022), <https://survivedandpunished.org/wp-content/uploads/2022/03/DSD-Report-Mar-21-final.pdf>.

from using violence in retaliation or in self-defense or may be arrested without using violence at all but in furtherance of an abuser's manipulation or lies to law enforcement.³

Incarcerated women and girls report alarmingly high rates of childhood abuse and domestic violence when compared to incarcerated men and non-incarcerated women.⁴ More than 80% of incarcerated women have experienced domestic or sexual violence abuse or victimization at some point prior to custody,⁵ with the majority of abused women reporting both childhood abuse at home and then further abuse in later intimate partner relationships.⁶ Victimization is a common pathway to criminal offending behavior for women and girls; approximately half of incarcerated women report being first arrested as juveniles, typically when they ran away to escape abuse.⁷

Immigrant domestic violence survivors, and survivors of other gender-based violence, can get swept into the criminal justice system when perpetrators of abuse utilize the system as a tactic of control.⁸ Indeed, batterers are often more well-versed in the U.S. legal system than noncitizen victims.⁹ Survivors are thus left to navigate, often unfairly, a foreign legal system while they weigh the needs of their family and the potential of continued violence from their abuser. For these

³ *Post-Conviction Relief*, *supra* at 1.

⁴ Green, B. L., Dass-Brailsford, P., Hurtado de Mendoza, A., Mete, M., Lynch, S. M., DeHart, D. D., & Belknap, J. (2016). *Trauma experiences and mental health among incarcerated women*. *Psychological Trauma: Theory, Research, Practice, and Policy*, 8(4), 455–463. doi:10.1037/tra0000113.

⁵ Kennedy, S. C., Tripodi, S. J., Pettus-Davis, C., & Ayers, J. (2015). Examining dose-response relationships between childhood victimization, depression, symptoms of psychosis, and substance misuse for incarcerated women. *Women & Criminal Justice*, 26:2, 77-98, doi:10.1080/08974454.2015.1023486; Radatz, D. L. & Wright, E. M. (2015). *Does polyvictimization affect incarcerated and non-incarcerated adults women differently? An exploration into internalizing problems*. *Journal of Interpersonal Violence*. 2017 May;32(9):1379-1400.doi:10.1177/0886260515588921.

⁶ Fuentes, C. M. (2014). *Nobody's child: The role of trauma and interpersonal violence in women's pathways to incarceration and resultant service needs*. *Medical Anthropology Quarterly*, 28(1), 85–104. doi:10.1111/maq.12058; Chesney-Lind, M. & Shelden, R. G. (2014). *Girls, delinquency, and juvenile justice* (4th ed.). West Sussex, UK: Wiley Blackwell.

⁷ Chesney-Lind & Shelden, *supra*, at 6.

⁸ See, e.g., Lewis, *The Mills of Cruelty*, *New York Times*, Dec. 14, 1999 (“[F]or biting an abusive husband during a domestic dispute, Ms. Flores is to be deported.”).

⁹ Gael B. Strack, “She hit me, too” Identifying the Primary Aggressor: A Prosecutor's Perspective 3, 5, available at http://www.ncdsv.org/images/she_hit_me.pdf; Miller, *The Paradox of Women Arrested for Domestic Violence: Criminal Justice Professionals and Service Providers Respond*, 7 *Violence Against Women* 1339, 1351–63 (2001).

reasons, the First Circuit acknowledged in *United States v. Booker* that domestic violence cases in particular can contain complexities that are not well suited to the binary opposition of survivor and offender.¹⁰ As a result, meaningful access to the legal system becomes a barrier for survivors of gender-based violence on top of the social, cultural, and economic barriers discussed above. When an instance of abuse is reported to law enforcement, it is not uncommon for both the survivor and the perpetrator to be arrested.¹¹ In addition to the language and cultural barriers in communicating with the police for the arrest at hand, the survivor is now in custody and subsequent charges will now become part of the survivor's immigration file.

Whether in custody or in trial, survivors of domestic abuse and sexual exploitation often feel tremendous pressure to accept pleas and return to their children and/or jobs.¹² Without a complete understanding of immigration laws and effective counsel, these decisions can be made in fear and outside of the survivor's best interest. That criminal conviction may then be used as grounds for deportation under 8 U.S.C. §§ 1227(a)(2), 1182(a)(2).

Throughout the process, survivors of gender-based violence are asked to recount traumatic and painful events to strangers in a legal setting, and potentially with an uncertified or unofficial interpreter or translator. Further, the survivor may struggle to obtain evidence if it is under the control of the abuser or trafficker. These factors often lead to survivors taking less than favorable plea deals.¹³

Survivors of human trafficking face very similar problems. Trafficking survivors are

¹⁰ Cf. *United States v. Booker*, 644 F.3d 12, 20–21 (1st Cir. 2011).

¹¹ See, e.g., Editorial, *Secure Communities Program: A Flawed Deportation Tool*, L.A. Times, May 23, 2011, <http://articles.latimes.com/2011/may/23/opinion/la-ed-secure-20110523>.

¹² National Clearinghouse for the Defense of Battered Women, *The Impact of Arrests and Convictions on Battered Women*, at 2 (2008), http://www.bisemi.org/wshh/NCDBW_%20Impact_of_Arrest.pdf.

¹³ *Id.*

frequently forced to sell or transport illegal weapons or drugs or are forced into prostitution.¹⁴ They frequently come into contact with law enforcement and are arrested, detained, prosecuted, and even deported in some cases without being identified as a survivor.¹⁵ However, many reports have concluded that trafficking survivors with repeated arrests for prostitution or prostitution-related offenses have never been identified as trafficking survivors.¹⁶

Furthermore, both labor and sex trafficking survivors may be arrested for lesser offenses, such as possession of false identification documents or trespassing without being identified as a victim.¹⁷ Trafficked children are also charged with offenses, such as truancy and running away, without identifying them as trafficking survivors.¹⁸ Young victims of abuse can also be criminalized for running away from their abusers.¹⁹ Despite the fact that these crimes are often forced or coordinated by the abuser, survivors have criminal records attached to them, which create large barriers that impact every aspect of their lives from their employment prospects, livelihood, housing, health, family, education, and psychological well-being.

In sum, the victimization of survivors of gender-based violence and their criminalization often go hand-in-hand. Because the victimization itself often gives rise to criminal activity – whether at the insistence of their abusers or committed in self-defense – the circumstances surrounding survivors of gender-based violence should be considered as “extraordinary circumstances” warranting tolling of the deadline to file a motion to reopen.

¹⁴ Marsh, Anthony, Emerson, & Mogulescu, *State Report Cards: Grading Criminal Record Relief Laws for Survivors of Human Trafficking*, 5, Polaris Project (2019) <https://polarisproject.org/wp-content/uploads/2019/03/Grading-Criminal-Record-Relief-Laws-for-Survivors-of-Human-Trafficking.pdf>.

¹⁵ *Clearing the State: Seeking Effective Remedies for Criminalized Trafficking Victims*, 16, CUNY School of Law, (June 2017) <https://mvslaw.org/wp-content/uploads/2017/06/Effective-Remedies-for-Criminalized-Trafficking-Victims-CUNY-2014.pdf>.

¹⁶ *Id.* at 17.

¹⁷ Marsh, Anthony, Emerson, & Mogulescu, *supra* at 5.

¹⁸ *Id.*

¹⁹ Bierria & Lenz, *supra* at 7.

II. The BIA Should Consider Why Survivors Of Gender-Based Violence Might File Untimely Motions to Reopen

There are many compelling reasons why survivors of gender-based violence do not (or cannot) file motions to reopen within the ninety (90) day deadline. Criminal convictions can often perpetuate a never-ending cycle of victimization, which prevent survivors from coming forward in a timely manner to reopen their immigration proceedings. What is more, survivors are often left to navigate the justice system on their own, as they are frequently unrepresented by counsel, uneducated in the complexities of the U.S. legal system, and face insurmountable language barriers, all while trying to overcome the immense trauma they have faced as survivors of abuse.

A. The Legal System Perpetuates the Trauma of Gender-Based Violence

Criminal convictions ultimately perpetuate the trauma that survivors of gender-based violence have faced. Indeed, the arrest and conviction histories of survivors create barriers to recovery and reintegration, coloring every aspect of their lives. Criminal records prevent survivors from moving forward and from healing from their trauma and reinforce systemic racial disparities.²⁰ The long-term consequences of having a criminal record stretch beyond social and practical barriers, often impacting survivors' psychological health. Criminal records "continue to restrict survivors' self-determination and ability to put the past behind them."²¹ The social barriers created by a criminal record have significant psychological and emotional impact on survivors that may cause survivors to untimely file.²²

²⁰ K.B. White, *Impact of Arrest and Conviction Histories on Trafficking Survivors*, Freedom Network USA, (Dec. 6, 2021) <https://freedomnetworkusa.org/2021/11/10/impact-of-arrest-and-conviction-histories-on-trafficking-survivors/>.

²¹ *Clearing the State*, *supra* at 25 (In an interview, a trafficking survivor recounted:

"My experience and my criminal record affect me emotionally as well. I have many nightmares. Sometimes, I dream about passing by the house where [my trafficker] held me captive. Other times, I fear that the police are coming to arrest me. ... This is the burden I have carried around every day, marking me that I was in this type of work.")

²² *Id.* (Another survivor stated, "I began to get incredibly depressed and felt almost as stuck as I did when I was [being trafficked].").

Criminal convictions also expose survivors to discrimination and stigmatization as “criminals.”²³ Trafficking survivors often experience feelings of shame and humiliation resulting from their criminal record, leading not only to societal stigmatization, but also self-stigmatization.²⁴ The psychological trauma from a survivor’s exploitation is serious and long-term, and their criminal records serve as an emblematic reminder of the trauma they have suffered.²⁵ Crucially, the arrest or conviction of survivors create social barriers in their lives, as well as reinforce their trauma, which can return survivors back to their vulnerable situations, exposing them to re-trafficking and further exploitation.²⁶ This can result in a never-ending cycle of victimization, which ultimately can prevent survivors from being able to file a timely motion to reopen.

B. Survivors Are Forced to Navigate a Foreign and Complicated Justice System on Their Own

Even if the survivor is not immediately subject to removal based upon the conviction, convictions significantly complicate immigration status applications that survivors may have filed based on having been a victim of domestic violence, sexual assault, human trafficking, or another crime. Survivors who find themselves in removal proceedings, either immediately after conviction or at some subsequent juncture, will likely be unrepresented.²⁷ Allowing survivors to untimely reopen on the premise of a criminal conviction being vacated provides survivors with sufficient time to correct the record and ensure the just resolution of their immigration status application.

²³ *Id.* at 21.

²⁴ *Id.* at 25 (One survivor explained, “I always felt like a criminal. I never felt like a victim at all. Victims don’t do time in jail, they work on the healing process. I was a criminal because I spent time in jail.”).

²⁵ *Id.*

²⁶ *Id.* at 43.

²⁷ American Bar Association Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* 5-8 (2010) (noting that most immigrants go unrepresented in removal proceedings).

This means that immigrants, specifically survivors, are navigating complex filing and other legal requirements without the assistance of counsel. If a survivor does decide to engage counsel to assist in their application or motion to reopen, the survivor must act quickly to secure representation in order to meet all codified deadlines.

Considering whether an immigrant is a survivor of gender-based violence when deciding untimely motions to reopen ensures that the BIA makes immigration status application decisions based on complete and accurate information. The circumstances surrounding conviction of survivors of gender-based violence coupled with the challenges noncitizen survivors face in the criminal justice system provide a reasonable basis for allowing untimely motions to reopen.

III. The BIA Should Consider Other Immigration Laws That Have Expanded Protections To Survivors Of Gender-Based Violence

The BIA should also consider the ameliorative intent and purpose of protections under both federal and state law afforded to survivors of domestic violence, sexual assault, and human trafficking when considering an untimely motion to reopen that is premised on a vacatur of a criminal conviction.

A. Federal Immigration Laws Provide Additional Assistance to Survivors of Domestic Violence, Sexual Assault, and Human Trafficking

The BIA should consider certain federal laws that provide expanded protections to survivors of gender-based violence. Relevant federal laws include the Immigration Act of 1990 Pub. L. No. 101-649, 104 Stat. 4978, codified at 8 U.S.C. § 1186a(c)(4) (the “Immigration Act”), the Violence Against Women Act of 1994 Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (Sept. 13, 1994) (“VAWA”), and the Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464–1548 (Oct. 28, 2000) (the “Victims of Trafficking and Violence Prevention Act”).

In the Immigration Act, a bipartisan majority in Congress sought to limit the ability of abusers to leverage immigration laws and the fear of deportation against their victims, creating the battered spouse waiver of the Immigration Act. 8 U.S.C. § 1186a(c)(4). The battered spouse waiver allows survivors of domestic abuse with conditional permanent residency based on marriage to a U.S. citizen to apply for removal of the conditionality without the assistance of their spouse if they are in an abusive relationship.²⁸ The battered spouse waiver marked the beginning of a trend towards protecting the interests of noncitizen survivors of abuse. Indeed, Representative Louise Slaughter, a major supporter of the legislation, explained Congress' intent to separate someone's immigration status from his or her abuse, and in the case of the battered spouse waiver specifically from the abuser, stating "a battered foreign spouse may be forced to choose between remaining in an abusive relationship or facing possible deportation to a country that is no longer his or her home."²⁹

Congress affirmed its commitment to survivors with the passage of VAWA in 1994, representing our nation's first system-wide attempt to halt and address violence against women in this country, including noncitizens. As stated above, immigrant populations are particularly vulnerable to crimes such as domestic violence, sexual assault, and human trafficking, in part because people who fear deportation are less likely to report abuse.³⁰ One of the most intimidating tools of power and control abusers use is threatening to get their victims deported if they seek help.³¹ This is only one aspect of the tremendous barriers all noncitizen victims of these crimes face in using the U.S. justice system to respond to the violence in their lives, including the legal

²⁸ Immigration Act of 1990. 8 U.S.C. § 1186a(c)(4).

²⁹ Representatives Family Unity and Employment Opportunity Immigration Act, 136 Cong. Rec. H8642 (Oct. 2, 1990) (Statement of Rep. Slaughter).

³⁰ See Ivie et al., *Overcoming Fear and Building Trust with Immigrant Communities and Crime Victims*, 85 THE POLICE CHIEF 4, 34–36 (Apr. 2018), http://library.niwap.org/wp-content/uploads/PoliceChief_April-2018_Building-Trust-With-Immigrant-Victims.pdf.

³¹ *Id.* at 34.

barriers described above. VAWA is a direct response to these issues.

VAWA included provisions that allowed immigrants who were subjected to “battery or extreme cruelty” by a United States citizen or lawful permanent resident spouse or parent to “self-petition” for legal status, without relying on their abusers, recognizing that “a battered spouse may be deterred from taking action to protect himself or herself, such as filing a protection order, filing criminal charges or calling the police, because of the threat or fear of deportation.”³² By freeing many noncitizen domestic violence survivors from one element of control that their abusers otherwise possessed over them, this law continues the trend toward protecting certain more vulnerable groups of noncitizens.

Congress reauthorized and reinforced VAWA’s protections for survivors in 2000 as part of the Victims of Trafficking and Violence Protection Act and created two new forms of immigration relief for survivors of trafficking and violence: U and T nonimmigrant status, more commonly known as the “U visa” and “T visa.”³³ These visa forms offer temporary protection from deportation for qualifying immigrant crime survivors.³⁴ To qualify for a U visa, the noncitizen must demonstrate that he or she has been the victim of a “qualifying criminal activity.”³⁵ The majority of listed qualifying criminal activities are gender-based violence, and the law specifically includes trafficking, domestic violence, and sexual abuse and exploitation.³⁶ Furthermore, the immigration provisions of the Victims of Trafficking and Violence Prevention Act demonstrate Congress’ widespread desire to protect survivors of gender-based violence.³⁷

³² See 8 U.S.C. §§ 1154(a)(1)(A)(ii), 1154(a)(1)(B)(ii); Castillo et al., *Legislative History of VAWA (94, 00, 05), T and U-Visas, Battered Spouse Waiver, and VAWA Confidentiality*, Nat’l Immigrant Women’s Advocacy Project (June 17, 2015), https://niwaplibrary.wcl.american.edu/pubs/vawa_leg-history_final-6-17-15-sji.

³³ Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464–1548 (Oct. 28, 2000).

³⁴ See 8 U.S.C. §§ 1101(a)(15)(T)–1101(a)(15)(U).

³⁵ See 8 U.S.C. § 1101(a)(15)(U)(iii).

³⁶ *Id.*

³⁷ Pub. L. No. 106–386, 114 Stat. 1464–1548 (Oct. 28, 2000).

Congress maintained its support for survivor pathways by reauthorizing VAWA a second time in 2013.³⁸

Congress has also already recognized the impact of domestic violence on removal proceedings and has shown clear intent to alleviate that impact through longer and more flexible deadlines. For example, VAWA provides survivors with more flexibility in filing motions to reopen removal proceedings by implementing a one-year deadline for filing, as opposed to ninety (90) days.³⁹ VAWA further allows for discretionary excusal of the one-year deadline if the noncitizen survivor can show “extraordinary circumstances” or extreme hardship to their child.⁴⁰ In addition to the flexibility provided in VAWA, motions to reopen to rescind an in absentia order based on exceptional circumstances can be filed 180 days after entry of the final order.⁴¹ Exceptional circumstances include battery or extreme cruelty, thus providing survivors with more time to file a motion to reopen.⁴²

Notably, it remains the stated policy of ICE that in removal cases involving crime victims and witnesses, ICE “should exercise all appropriate prosecutorial discretion to minimize any effect that immigration enforcement may have on the willingness and ability of victims, witnesses, and plaintiffs to call police and pursue justice.”⁴³ Considering whether a noncitizen is a victim of certain crimes when deciding whether to grant an untimely motion to reopen based upon a criminal vacatur is consistent with this stated policy. It encourages full trust and cooperation with the U.S.

³⁸ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified in scattered sections of 42 U.S.C.).

³⁹ Pub. L. 106-386, div. B, tit. V, § 1506(c)(2), Oct. 28, 2000, 114 Stat. 1528, as amended by Pub. L. 109-162, title VIII, §§814(a), 825(b), Jan. 5, 2006, 119 Stat. 3058, 3064.

⁴⁰ *Id.*

⁴¹ 8 C.F.R. § 1003.23(b)(4)(ii).

⁴² *Id.*

⁴³ U.S. Immigration and Customs Enforcement, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf>.

legal process.

The BIA should act consistently with the legitimate goals of Congress in this instance and provide survivors with more time to file motions to reopen. This is especially necessary due to the prevalence of domestic and sexual violence in certain immigrant communities.

B. State Laws Similarly Provide Additional Assistance to Survivors of Domestic Violence, Sexual Assault, and Human Trafficking

Likewise, the BIA should also consider other protections under state law afforded to survivors of domestic violence, sexual assault, and human trafficking when considering an untimely motion to reopen that is premised on a vacatur of a criminal conviction. Vacatur of criminal convictions provides important redress for survivors of human trafficking, domestic abuse, sexual assault, and other forms of gender-based violence. Vacatur provides survivors with a clean slate and an opportunity for a second chance. Vacatur statutes offer relief to survivors after their conviction and after the system improperly labeled victims as “criminals.” The need for survivors to vacate their convictions is crucial to remove the barriers to recovery and reintegration of survivors created by their criminal record.

These protections are widespread in the trafficking context. All fifty (50) states have enacted laws criminalizing human trafficking,⁴⁴ and thirty-eight (38) states have laws that explicitly provide an affirmative defense for trafficking survivors.⁴⁵ Since New York enacted a vacatur statute for survivors in 2010, the majority of other states have followed suit. For example, forty-four (44) states have enacted a criminal record relief statute for survivors of human

⁴⁴ Coppedge, *Stop Criminalizing the Victims*, CNN (Mar. 17, 2016) https://www.cnn.com/2016/03/17/opinions/coppedge-freedom-project-new-lives/index.html?eref=rss_latest.

⁴⁵ Richert, *Failed Interventions: Domestic Violence, Human Trafficking, and the Criminalization of Survival*, 120 Mich. L. Rev. 315, 327 n.93 (2021).

trafficking.⁴⁶ Thirty-five (35) states have gone a step beyond criminal record relief, enacting some variation of New York’s vacatur law.⁴⁷

Laws that make relevant a survivor’s history of domestic violence, abuse, or human trafficking are crucial for protecting against the criminalization of these survivor-defendants. However, only three (3) states (New York, California, and Illinois) have passed explicit laws to this effect that provide some type of relief to survivors of domestic violence or abuse.⁴⁸

The growing trend in states to enact vacatur statutes reflects an awareness of the public and the government that “some of the very people being criminalized are those that need the most protection...”⁴⁹ Vacatur provides greater opportunities for survivors to rebuild their lives by finding work, reducing their financial or economic vulnerabilities, as well as lowers the risk of being re-trafficked.⁵⁰

The purpose of statutory remedies in this context—to recognize that survivors’ criminal records are driven by their abuse—will provide survivors with a way forward to heal without

⁴⁶ Marsh, Anthony, Emerson, & Mogulescu, *supra* at 10 (The six states lacking relief for victims of human trafficking include Alaska, Iowa, Maine, Minnesota, South Dakota, and Virginia).

⁴⁷ *National State Law Survey: Expungement and Vacatur Laws*, Shared Hope Int’l (2017), https://sharedhope.org/wp-content/uploads/2016/03/NSL_Survey_Expungement-and-Vacatur-Laws.pdf. The following is a list of state statutes that contain a vacatur provision for victims of human trafficking: Arizona (Ariz. Rev. Stat. Ann. § 13-909); California (Cal. Penal Code § 236.14); Connecticut (Conn. Gen. Stat. Ann. § 54-95c); Delaware (Del. Code Ann. tit. 11, § 787); Florida (Fla. Stat. Ann. § 943.0583); Georgia (O.C.G.A. § 15-11-32); Hawaii (HRS § 712-1209.6); Idaho (Idaho Code Ann. § 67-3014); Illinois (725 Ill. Comp. Stat. Ann. 5/116-2.1); Indiana (Ind. Code Ann. § 31-37-22-11); Kentucky (Ky. Rev. Stat. Ann. § 610.330); Louisiana (LA. Child Code Ann. Art. 923); Maryland (MD. Code Ann., Crim. Proc. § 8-302); Michigan (Mich. Comp. Laws Ann. § 712A.18e); Mississippi (Miss. Code Ann. § 97-3-54.6); Montana (Mont. Code Ann. § 46-18-608); Nevada (S. Res. 243, 2017 Leg., 79th Sess. (Nev. 2017); New Hampshire (N.H. Rev. Stat. Ann. § 633.7); New Jersey (N.J. Stat. Ann. §2C:44-1.1); New Mexico (N.M. Stat. Ann. § 32A-3B-21); New York (N.Y. Crim. Proc. Law § 440.10); North Carolina (N.C. Gen. Stat. Ann. § 15A-1416.1); North Dakota (N.D. Cent. Code Ann. § 12.1-41-14); Ohio (Ohio Rev. Code Ann. § 2151.358); Oregon (S. B. 249, 80th Gen. Assemb., Reg. Sess. (Or. 2019)); Pennsylvania (18 PA. Cons. Stat. § 3019); Rhode Island (R.I. Gen. Laws Ann. § 11-67.1-17); South Carolina (S.C. Code Ann. § 16-3-2020); Texas (Tex. Fam. Code Ann. § 58.003); Utah (Utah Code Ann. § 78B-9-104); Vermont (Vt. Stat. Ann. Tit. 13, § 2658); Washington (Wash. Rev. Code Ann. § 9.96.060); West Virginia (W. Va. Code Ann. § 61-14-9); Wisconsin (Wis. Stat. Ann. § 973.015); and Wyoming (WYO. Stat. Ann. § 6-2-708).

⁴⁸ N.Y. Penal Law § 60.12(1) (2021); Cal. Penal Code § 4801(a) (2021); 730 I.L.C.S. 5/5-5-3.1 (2020); 735 I.L.C.S. 5/2-1401 (2020).

⁴⁹ Coppedge, *supra*.

⁵⁰ *Id.*

carrying the weight of a criminal record. An important part of this relief for survivors is built in flexibility on the time limitations for survivors to move for vacatur.

States that do not restrict motions to vacate with time limitations have helped survivors move forward with their lives. For example, Illinois' vacatur statute allows survivors to file motions to vacate a conviction "at any time" (provided the motion is filed with due diligence).⁵¹ The statute's lack of time constraints on its vacatur motions has helped trafficking survivors clear their criminal records, clearing their labels as "criminals" after over twenty years.⁵²

In short, denying consideration of the untimely motion to reopen of a noncitizen victim of violent crime, specifically domestic abuse, sexual assault, and human trafficking, creates another avenue for perpetrators of abuse to weaponize the immigration legal system against their victims. Further, it is inconsistent with the intent of years of bipartisan Congressional efforts to support immigrant survivors and encourage cooperation with the U.S. legal system. Punishing survivors of these crimes for vacated criminal convictions is inconsistent both with the current scheme of immigration law and the intent of Congress.⁵³

CONCLUSION

In sum, the BIA should consider the aforementioned social, economic and legal factors when determining whether to consider an untimely motion to reopen that is premised on a vacatur of a criminal conviction.

⁵¹ 725 ILCS 5/116-2.1.

⁵² Ulrich, J.D., *Vacatur Statutes for Survivors of Sex Trafficking*, *Amara Legal Center* 5 (2016), <https://www.amaralegal.org/wp-content/uploads/2016/06/Vacatur-Statutes-for-Survivors-of-Sex-Trafficking.pdf>.

⁵³ For the purposes of this brief, amici do not address the validity of a conviction that has been vacated for reasons other than procedural or substantive defects for immigration purposes.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April 2022, I filed the foregoing with the Amicus Clerk at the Board of Immigration Appeals. Pursuant to Amicus Invitation No. 22-16-03, on this 27th day of April 2022, a copy of the foregoing was sent via courier to:

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