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Ms. Amanda Baran
Mr. Peter Mina
Co-Chairs, Commission on Combating Gender-Based Violence
Department of Homeland Security

Via email to CCGBV-Engagement@uscis.dhs.gov

Re: Additional feedback on access to immigration protections for LGBTQ+ survivors of gender-based violence

Dear Ms. Baran and Mr. Mina:

On behalf of ASISTA, we respectfully submit this feedback to the DHS Commission on Combating Gender-Based Violence (“the Commission”). This feedback is being submitted in response to the LGBTQ+ listening session that the Commission held on June 22, 2022. ASISTA thanks the Commission for holding the listening session and for its commitment to addressing gender-based violence in all its forms.

ASISTA is a 501(c)3 nonprofit organization whose mission is to advance the dignity, rights, and liberty of immigrant survivors of violence. For over 15 years, ASISTA has been a leader on policy advocacy to strengthen protections for immigrant survivors of domestic violence, sexual assault, human trafficking and other crimes identified in the Violence Against Women Act (VAWA) and the Trafficking Victims Protection Act (TVPA). We assist advocates and attorneys across the United States in their work on behalf of immigrant survivors and submit this letter based on our guiding principles and our extensive experience.

At the listening session, ASISTA suggested that the possibility of wrongful arrest, connection between the offense and victimization, and discrimination against LGBTQ+ survivors should be considered when assessing the impact of arrests and convictions in discretionary immigration cases. In addition, another attendee asked USCIS to step back from requesting and demanding police reports given continued police harassment of the LGBTQ+ community. ASISTA would like to expand on our previous comments and to highlight our agreement with the other attendee’s statement about police reports.

I. Reliance on Arrest Reports for LGBTQ+ Immigrant Survivors of Violence with Criminal System Contacts is Harmful and Fails to Account for the Bias in Policing of LGBTQ+ Communities:

DHS often deems the fact of an arrest to be an indication that the person committed the alleged crime, even if the person was not convicted of the crime. Despite BIA precedent that cautions against according significant weight to uncorroborated police reports,¹ police reports are frequently requested and the agency considers them to be reliable evidence, even if the noncitizen was not convicted of the crime for which they were arrested.

Given ongoing concerns with police harassment and discrimination against LGBTQ+ people, DHS's consideration of police reports as reliable evidence is particularly troubling for LGBTQ+ noncitizen survivors. As Christy Mallory and others from the Williams Institute stated, "[d]iscrimination and harassment by law enforcement based on sexual orientation and gender identity is an ongoing and pervasive problem in LGBT communities," and "the United States has had a significant history of mistreatment of LGBT people by law enforcement, including profiling, entrapment, discrimination, and harassment by officers."² In a report that surveyed LGBT survivors of violence who interacted with the police, 48% of respondents reported "police misconduct" (including 57% who reported experiencing "unjustified arrest.")³ Further, a national survey of LGBT people and people living with HIV found that transgender and gender non-conforming respondents, as well as respondents of color, "consistently" reported "[p]olice abuse, neglect and misconduct" at higher frequencies.⁴ As a more particularized example of this phenomenon, in a 2012 report on law enforcement's interactions with Latina transgender women in Los Angeles County, two-thirds of respondents reported verbal harassment by law enforcement officers.⁵

The ongoing problem of police harassment and discrimination against LGBTQ+ people (particularly of color), coupled with the history of law enforcement mistreatment of this population, demonstrates that the content of police reports is often not a reliable indicator of an LGBTQ+ noncitizen survivor's character.

In addition to the issues with police reports, DHS often requires the noncitizen to take responsibility for an offense as evidence of "rehabilitation." Given that abusers may blame survivors⁶—and that survivors may already blame themselves⁷—requiring a survivor, as evidence of "rehabilitation," to admit fault for behavior that they are not responsible for is a particularly harmful practice.

¹ *Matter of Arreguin de Rodriguez*, 21 I&N Dec. 38, 42 (BIA 1995).

² Christy Mallory et al., *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community* 1, THE WILLIAMS INSTITUTE, UCLA SCHOOL OF LAW (2015), available at <https://williamsinstitute.law.ucla.edu/publications/lgbt-discrim-law-enforcement/> (hereinafter Mallory et al., *Discrimination and Harassment*.)

³ *Id.* at 7.

⁴ *Id.* at 6-7.

⁵ *Id.* at 8.

⁶ See *Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROGRAMS, <https://www.theduluthmodel.org/wheel-gallery/> (last visited June 29, 2022).

⁷ See Catherine M. Reich et al., *Does Self-Blame Moderate Psychological Adjustment Following Intimate Partner Violence?*, 30 J. OF INTERPERSONAL VIOLENCE 1493, 1495 (2015).

DHS's practices of considering an arrest as near-automatic evidence of criminal activity and criminality; demanding police reports; and requiring noncitizens to take responsibility for offenses are particularly problematic for LGBTQ+ survivors who may have been arrested due to police harassment; discriminatory over-policing;⁸ or wrongful arrest after an intimate partner violence incident. Wrongful arrests are particularly likely in LGBTQ+ intimate partner violence situations. A 2021 study using National Incident-Based Reporting System data from 2000-2009 stated: "Same-sex couples are substantially more likely to see incidents result in dual arrest than opposite-sex couples."⁹ 54.8% of incidents with female couples and 61.9% of incidents with male couples resulted in a dual arrest, while 2.9% of incidents with opposite-sex couples resulted in dual arrest.¹⁰ Law enforcement bias may be the reason for the differential treatment. According to the study, "[i]t is possible that stereotyping is impacting the decision to arrest both parties in a same-sex IPV incident," and that "[n]egative attitudes held by police officers toward same-sex couples... may well contribute to the differential response to same-sex couples."¹¹

For evidence to be admissible in immigration proceedings, "its admission" must be "fundamentally fair."¹² Circuit precedent casts serious doubt on the reliability of police reports. Thus, the admission of police reports is *not* fundamentally fair. For decades, multiple circuits have raised serious questions about the reliability of police reports. Most significantly, the Ninth Circuit held that "[u]nsworn verbal allegations are, in general, the least reliable type of hearsay."¹³ These are exactly the types of allegations that are contained in police reports. When discussing the diminished reliability of police reports, the Eighth Circuit highlighted the "personal and adversarial" relationship between police officers and the people they arrest and held that "[c]ongress exhibited similar doubts about the reliability of such reports when it specifically excluded them from the public records exception to the hearsay rule in criminal cases."¹⁴ The District of Columbia Circuit held that "police statements are less reliable to the extent that they are unsworn."¹⁵ The Eleventh Circuit held that "the reliability of police reports is far from absolute."¹⁶ The Third Circuit held that police reports are not "inherently reliable."¹⁷ In the Third Circuit, lack of corroboration is a "factor weighing against reliability."¹⁸ The Third

⁸ See Mallory et al., *Discrimination and Harassment* at 8 (The U.S. Department of Justice found in 2011 that "LGBT people were often the victims of discriminatory policing by the New Orleans Police Department (NOPD)." Further a 2011 study "found that LGB youth and young adults were...60% more likely to be arrested" as a juvenile relative to their non-LGB counterparts, with more pronounced disparities for LGB young women.) The youth statistics are concerning because DHS often considers contact with the juvenile justice system a negative discretionary factor, even though BIA precedent holds that juvenile adjudications of delinquency are not "convictions" for immigration purposes. *Matter of Devison-Charles*, 22 I&N Dec. 1362, 1373 (BIA 2000).

⁹ David Herschel and Philip D. McCormack, *Same-Sex Couples and the Police: A 10-Year Study of Arrest and Dual Arrest Rates in Responding to Incidents of Intimate Partner Violence*, 27 VIOLENCE AGAINST WOMEN 1119, 1138 (2021).

¹⁰ *Id.* at 1135.

¹¹ *Id.* at 1141.

¹² See, e.g., *Matter of Y-S-L-C*, 26 I&N Dec. 688, 690 (BIA 2015).

¹³ *U.S. v. Comito*, 177 F.3d 1166, 1171 (9th Cir. 1999).

¹⁴ *United States v. Bell*, 785 F.2d 640, 643-44 (8th Cir. 1986).

¹⁵ *Crawford v. Jackson*, 323 F.3d 123, 129 (D.C. Cir. 2003) (citing *Comito*, 177 F.3d at 1172 n.9).

¹⁶ *U.S. v. Richardson*, 230 F.3d 1297, 1300 (11th Cir. 2000).

¹⁷ See *U.S. v. Lloyd*, 566 F.3d 341, 346 (3d Cir. 2009) (quoting *United States v. Leekins*, 493 F.3d 143, 149 (3d Cir. 2007)).

¹⁸ See *Lloyd*, 566 F.3d at 346.

Circuit’s concern about uncorroborated reports is consistent with BIA precedent that cautions against according significant weight to uncorroborated police reports.¹⁹ Police reports that are uncorroborated are especially unreliable,²⁰ and DHS should not rely on them to deny relief.

Given circuit precedent that casts doubt on the reliability of hearsay when the witness has an “ulterior motive,” the reliability of a police report when a noncitizen survivor is arrested alongside their abuser is particularly suspect if the report contains assertions from the abuser.²¹ An abuser who is attempting to manipulate the legal system by portraying the survivor as the primary aggressor by definition has an “ulterior motive.” Thus, DHS should not rely on police reports to deny relief to noncitizen survivors of gender-based violence—including LGBTQ+ survivors—in these situations.

II. Recommendations:

DHS should consider the above context when reviewing an LGBTQ+ survivor's criminal record. In these instances, the agency should not treat a mere arrest as evidence of criminal activity, nor should the noncitizen survivor be required to take "responsibility" for their behavior when the arrest was the result of police harassment or a wrongful arrest in a domestic violence situation.

Going forward, DHS should not request or demand police reports when a noncitizen has a criminal record. In addition to particularized concerns about the reliability of police reports made against LGBTQ+ survivors, general concerns about the reliability of police reports caution against their use in all immigration cases, where the outcome in the case of denial–removal–may be as serious, or even or more serious, for the noncitizen than a criminal sanction.²² The fact that removal may be more devastating to a noncitizen than a criminal sanction,²³ coupled with the Executive Branch’s recognition of the unique hardships of removal for survivors of gender-based violence,²⁴ indicate that Congress’s concerns about the use of police reports in criminal contexts are equally applicable to the immigration context.²⁵ USCIS should take these congressional

¹⁹ See *Matter of Arreguin de Rodriguez*, 21 I&N Dec. 38, 42 (BIA 1995).

²⁰ Cf. *Lloyd*, 566 F.3d at 346.

²¹ See *United States v. Alvear*, 959 F.3d 185, 191 (5th Cir. 2020) (“Finally, we have expressed concern about the reliability of hearsay when there is evidence the witness made the statements with ulterior motives.”)

²² See *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) (“deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”) Further, the Supreme Court has held that “deportation is a drastic measure and at times the equivalent of banishment or exile.” *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (citing *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947)).

²³ See *Padilla*, 559 U.S. at 364, *Fong Haw Tan*, 333 U.S. at 10, and *Delgado*, 332 U.S. at 391.

²⁴ See 8 C.F.R. § 1240.58(c) (listing unique hardship factors associated with removal for gender-based violence survivors.)

²⁵ Congress and DHS have already recognized that survivors of gender-based violence may be arrested or convicted of crimes for reasons that are connected to their victimization. For example, INA § 204(a)(1)(C) allows a domestic violence survivor with a bar to good moral character to nevertheless be considered a person of good moral character for VAWA Self-Petition purposes if their conditional bar is “connected to” being a victim of battery or extreme cruelty. Similarly, INA § 237(a)(7)(A) allows for waiver of the domestic violence, stalking, and violation of protection order grounds of removability when a noncitizen victim of battery or extreme cruelty was acting in

concerns seriously and should not consider police reports reliable evidence of criminality or character in immigration cases.

Moreover, ICE already recognizes the existence of victimization-related criminal records and requires officers to engage in a careful analysis of charges and convictions in these cases. ICE Directive 11005.3 states: “[s]ome convictions for domestic violence may be [the] result of self-defense by a victim of domestic violence against an abuser, and the context of any arrests should be carefully evaluated if such charges or convictions are a part of determining the existence of exceptional circumstances.” USCIS should apply the approach of its sister agency not only in self-defense cases, but in all cases where the survivor has stated that there is a connection between the abuse and the criminal record. Such survivor-centered “careful evaluat[ion]” requires USCIS to seriously engage with a survivor’s evidence of connection to the abuse, rather than relying on a police report—particularly an uncorroborated report—to deny relief.

Despite circuit precedent that raises serious concerns about the reliability of police reports, and guidance from ICE requiring greater scrutiny of certain charges made against immigrant survivors, USCIS often treats the information in police reports as true and uses this information to deny life-saving relief to noncitizens. Given the immense hardship of removal for survivors of gender-based violence—including LGBTQ+ survivors—USCIS should no longer request police reports from noncitizens, and should stop using them as a basis for denying immigration relief.

We thank DHS for this opportunity for engagement, and we look forward to opportunities for continued engagement in the future.

Sincerely,

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self-defense or “was arrested for, convicted of, or pled guilty to committing a crime” “where there was a connection between the crime” and being a victim of battery or extreme cruelty.