No. 23-35267

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Linda CABELLO GARCIA,
on behalf of herself and others similarly situated,

Plaintiff-Appellant,

v.

U.S. CITIZENSHIP AND IMMIGRATION SERVICES; Alejandro MAYORKAS, Secretary of Homeland Security; Ur M. JADDOU, Director, U.S. Citizenship and Immigration Services,

Defendants-Appellees.

On Appeal from the U.S. District Court for the Western District of Washington
No. 3:22-cv-05984 – Honorable Barbara J. Rothstein

BRIEF OF THE ASISTA IMMIGRATION ASSISTANCE AND THE NATIONAL IMMIGRATION LITIGATION ALLIANCE AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

I, Kristin Macleod-Ball, attorney for Amici Curiae, certify that Amici are non-profit organizations that do not have any parent corporation or issue stock and consequently there exists no publicly held corporation which owns 10% or more of their stock.

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Dated: June 23, 2023

STATEMENT PURSUANT TO FED. R. APP. P. 29(a)(4)(E)

Pursuant to Fed. R. App. P. 29(a)(4)(E), Amici Curiae state that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than Amici Curiae, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

s/ *Kristin Macleod-Ball*
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Dated: June 23, 2023

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I. INTRODUCTION

Recognizing the significant benefit that would ensue if noncitizen victims of violent crime more readily cooperated with law enforcement agencies investigating and prosecuting crimes in the immigrant community, Congress created a special nonimmigrant visa for such crime victims. These visas—commonly referred to as "U visas"[1]—afford noncitizens lawful, although temporary, nonimmigrant status. 8 U.S.C. § 1101(a)(15)(U). Noncitizens obtain protection in the U visa program through three interconnected forms of relief: 1) U visa petitions, 2) U visa waivers, and 3) U-based adjustments of status to that of a permanent resident, each of which have a distinct set of eligibility requirements. The path to permanent residence is a critical piece of this package. By including a specific adjustment of status provision for crime victims who are eligible for the temporary nonimmigrant U visa, Congress recognized that only permanent residence would afford much needed stability to these noncitizens and their families.

U.S. Citizenship and Immigration Services (USCIS), which adjudicates the petitions and applications associated with the U visa process,

[1] The term "U visa" is derived from the statutory subsection 8 U.S.C. § 1101(a)(15)(U), which lays out the eligibility criteria for noncitizen survivors to obtain nonimmigrant status.

is not free to add requirements or impose criteria from outside the U visa scheme at any stage of the process. But without access to judicial review throughout the U visa process, the agency will be able to do exactly that—as this case demonstrates. Unpublished decisions by USCIS officers will go unreviewed and uncorrected, to the detriment of countless U visa beneficiaries, their families, and communities across the United States.

Amici ASISTA Immigration Assistance (ASISTA) and the National Immigration Litigation Alliance (NILA) submit this brief in support of Plaintiff-Appellant to demonstrate that judicial review of the agency's adjustment of status decisions is critical. A decision finding that district courts lack subject-matter jurisdiction to review any agency error in a U adjustment of status decision would frustrate the entire U visa statutory scheme by forever insulating from review USCIS decisions that fail to comport with the statutory language and Congressional intent governing U visa-based adjustment to permanent residence. Amici, having special expertise in this area and a strong interest in proper review of applications by noncitizen survivors of violence, bring their expertise before this Court to demonstrate why judicial review can and, indeed, *must* exist for legal errors committed in U visa-based adjustment of status decisions.

II. INTEREST OF AMICI CURIAE

ASISTA is a national nonprofit 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 engages in policy advocacy and trains and provides technical support to 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 has previously filed amicus briefs with the U.S. Supreme Court and various federal courts of appeal. *See, e.g.*, *United States v. Castleman*, 134 S. Ct. 1405 (2014); *State of Washington v. Trump*, No. 15-35105 (9th Cir. 2017); *L.D.G. v Holder*, 744 F.3d 1022 (7th Cir. 2014).

NILA is a not-for-profit organization dedicated to championing the rights of noncitizens and to elevating the capacity and quality of those who represent them. NILA engages in impact litigation to extend the rights of noncitizens and to eliminate systemic obstacles noncitizens routinely face. In addition, NILA builds the capacity of immigration attorneys to litigate in

federal court by co-counseling individual federal court cases and by providing strategic advice and assistance. NILA has a direct interest in ensuring that noncitizens holding U visas have a federal court forum to challenge erroneous agency denials of their applications for immigration benefits.

III. ARGUMENT

A. Congress Created the U Visa to Protect Noncitizen Survivors and Empower Law Enforcement Agencies in the Investigation of Serious Crimes.

1. History and purpose of the U visa.

Fear of deportation makes many noncitizens less likely to report crimes against them, greatly diminishing the ability of law enforcement to maintain public safety.[2] Noncitizens are especially vulnerable to exploitation and crime, including domestic violence, sexual assault, and human trafficking. *See* Victims of Trafficking and Violence Protection Act of 2000 (TVPA), Pub. L. No. 106-386, § 1513, 114 Stat. 1464, 1533 (2000) ("Immigrant women and children are often targeted to be victims of crimes committed against them in the United States, including rape, torture, kidnapping, trafficking, incest, domestic violence, sexual assault, female

[2] *See generally* Stefano Comino et al., *Silence of the Innocents: Undocumented Immigrants' Underreporting of Crime and Their Victimization*, 39 J. Pol'y Analysis & Mgmt. 1214 (2020).

genital mutilation, forced prostitution, involuntary servitude, being held hostage or being criminally restrained."). Congress sought to address these problems by creating the U nonimmigrant visa program, which aims to alleviate noncitizen victims' fear of assisting law enforcement and aid their recovery from harm by providing protection from deportation and temporary work authorization. *See* 8 U.S.C. § 1101(a)(15)(U).

The U visa program is distinctive in that it includes a generous waiver of inadmissibility prior to visa adjudication and, separately, does not require beneficiaries to establish inadmissibility when filing for adjustment of status to permanent residence (commonly known as a "green card") based on their approved U status. *See* 8 U.S.C. §§ 1182(d)(14), 1255(m)(1). The U visa opens a pathway to permanent residence and, ultimately, U.S. citizenship that is intended to ameliorate the devastating physical and emotional impact of crime and result in greater safety for all community members.

The U visa represents the culmination of a decades-long effort to ensure justice for noncitizen survivors of violent crime and enhance protection of the American public. In 1994, the passage of VAWA established legal immigration protections for noncitizens subjected to battery or extreme cruelty by a U.S. citizen or lawful permanent resident spouse. *See* 8 U.S.C. § 1154(a)(1). VAWA allowed noncitizen survivors to

"self-petition" for lawful permanent resident status without needing to rely on their spouse as a sponsor. *Id*. Thus, VAWA freed noncitizens from dependence on their abusive spouses and eliminated a significant source of control leveraged by their abusers.

However, VAWA was limited in its reach. Noncitizens who were abused, raped, kidnapped, or trafficked by strangers or family members without the prescribed immigration statuses were not protected by VAWA, leaving them at risk of removal. *See id.* As recently noted by Immigration & Customs Enforcement (ICE), the threat of deportation has a pronounced "chilling effect" on "the willingness and ability of noncitizen crime victims to contact law enforcement, participate in investigations and prosecutions, [and] pursue justice." ICE, *Directive 11005.3, Using a Victim-Centered Approach with Noncitizen Crime Victims* 1 (2021), https://www.ice.gov/doclib/news/releases/2021/11005.3.pdf; *see also* U.S. Department of Homeland Security (DHS), *U Visa Law Enforcement Resource Guide* 1 (2022), https://www.dhs.gov/publication/u-visa-law-enforcement-certification-resource-guide. Without some mechanism to address these fears, individuals who victimized noncitizens were left to act with relative impunity.

In 2000, Congress created U nonimmigrant status, believing that

"creating a new nonimmigrant visa classification [would] facilitate the reporting of crimes to law enforcement officials by . . . [noncitizens] who are not in lawful immigration status" and thus "strengthen the ability of law enforcement agencies to detect, investigate, and prosecute [crimes]." TVPA, Pub. L. No. 106-386 § 1513, 114 Stat. at 1534. Implementing regulations noted that "Congress wanted to encourage [noncitizens] who are victims of criminal activity to report the criminal activity to law enforcement and fully participate in the investigation and prosecution of the perpetrators of such criminal activity." New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,018 (Sept. 17, 2007) (citing TVPA § 1513(a)(1)(B)).

2. U visa petitioners must establish their admissibility to the United States in addition to helpfulness in the investigation or prosecution of certain criminal activity to which they were victim.

The U visa program developed by Congress has three main components with separate eligibility criteria: 1) the U visa petition, 2) the U visa waiver of inadmissibility, and 3) U visa-based adjustment of status to permanent residence. In addition to establishing eligibility for the U visa, petitioners must seek a waiver of inadmissibility for any applicable inadmissibility ground specified in 8 U.S.C. § 1182, including health related grounds at 8 U.S.C. § 1182(a)(1). *See* 8 U.S.C. § 1182(d)(14). After

three years of continuous physical presence in U nonimmigrant status, beneficiaries may apply for adjustment of status to permanent residence under a special provision for U nonimmigrant beneficiaries. *See* 8 U.S.C. § 1255(m).

The U visa is available to an admissible noncitizen survivor of a qualifying crime who "has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official . . . investigating or prosecuting [specified] criminal activity." 8 U.S.C. § 1101(a)(15)(U)(i)(III). The statute specifies a set of qualifying crimes for which a noncitizen may request a certification of helpfulness from an authorized law enforcement agency. *See* 8 U.S.C. § 1101(a)(15)(U)(iii) (listing qualifying crimes).

In addition, a noncitizen must establish that they experienced substantial harm from the offense. *See* 8 U.S.C. § 1101(a)(15)(U)(i)(I). The U visa itself is not a discretionary benefit; USCIS must issue a visa to any applicant who meets the criteria and is otherwise admissible to the United States. 8 U.S.C. § 1101(a)(15)(U) (providing for classification as nonimmigrants of individuals who file U visa petitions and meet the eligibility criteria).

Before USCIS can grant U visas, however, the statute requires that

petitioners establish their admissibility to the United States or obtain a waiver of inadmissibility for any applicable inadmissibility ground specified in 8 U.S.C. § 1182, including health related grounds at 8 U.S.C. § 1182(a)(1). *See* 8 U.S.C. § 1182(d)(14). This is so even if the noncitizen is already present in the country. Recent data shows that the majority of U visa petitioners were not lawfully admitted and thus required a waiver of inadmissibility on this basis alone. *See* USCIS, *U Visa Demographic: Analysis of Data Through FY 2019* 6-7 (2020), https://www.uscis.gov/sites/default/files/document/reports/U_Visa_Report_-_Demographics.pdf (stating that 80% of U visa applicants are inadmissible and 79% of approved primary applicants are present without admission).

Congress created a discretionary waiver of inadmissibility specifically for U visa petitioners that is distinctive in its breadth. 8 U.S.C. § 1182(d)(14). USCIS may waive *all grounds* of inadmissibility except for participation in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing. *See id*.; 8 U.S.C. § 1182(a)(3)(E). In contrast, waivers available to non-U visa petitioners are narrower. For example, 8 U.S.C. § 1182(h) waives several inadmissibility grounds as they relate to a single offense involving simple possession of under 30 grams of marijuana but requires a showing of hardship to a qualifying relative or 15 years

between the commission of the activity and the application. 8 U.S.C. § 1182(h)(1)(A)(i), (B). The U waiver contains no such requirements and waives these and additional grounds of inadmissibility in a single application. 8 U.S.C. § 1182(d)(14); *see also* USCIS, *Instructions for Advance Permission to Enter as a Nonimmigrant* 9 (2021), www.uscis.gov/sites/default/files/document/forms/i-192instr.pdf (advising applicant to list all grounds of inadmissibility because if granted, only the grounds listed will be waived). When adjudicating the U waiver, USCIS requests a medical exam from the petitioner if a ground of health-related inadmissibility is indicated. 8 U.S.C. § 1182(a)(1).

The U waiver is also unusually generous. It authorizes DHS to waive inadmissibility for "a nonimmigrant described in [8 U.S.C. 1101(a)(15)(U)]"—i.e., a U visa applicant—"if the Secretary of Homeland Security considers it to be in *the public or national interest* to do so." 8 U.S.C. § 1182(d)(14) (emphasis added). The generally applicable waiver provision found in 8 U.S.C. § 1182(d)(3), which applies to most other noncitizens entering the United States for temporary purposes, such as tourists and students, is more restrictive. It requires DHS to consider "the risk of harm to society if the applicant is admitted," "the seriousness of the applicant's immigration law, or criminal law, violations, if any," and "the

nature of the applicant's reasons for wanting to enter the United States." *Matter of Hranka*, 16 I. & N. Dec. 491, 492 (BIA 1978); *see also Matter of Khan*, 26 I. & N. Dec. 797, 803 (BIA 2016) (defining 8 U.S.C. § 1182(d)(14) as a "much broader waiver" than 8 U.S.C. § 1182(d)(3)).

3. The U visa program is burdened by limited visa availability and lengthy processing times, which has prompted DHS to create provisional forms of interim relief for U visa petitioners while their applications are pending.

Only 10,000 U visas are statutorily available to principal applicants every fiscal year. 8 U.S.C. § 1184(p)(2). Because the number of new applicants has far exceeded the 10,000-visa annual cap in each year since 2011, a huge backlog of U visa petitions has developed—as of March 2023, there were 191,642 pending petitions for principal U visa status, all of which are subject to the annual cap. USCIS, *Number of Form I-918 Petitions for U Nonimmigrant Status By Fiscal Year, Quarter, and Case Status Fiscal Years 2009-2023* 1 (2023), https://www.uscis.gov/sites/default/files/document/data/I918_FY23_Q1.pdf.[3] Consequently, a U visa petition filed in 2023 may not reach final adjudication until 2033. Once a U

[3] The total number of pending U visa petitions is more than 300,000, but this includes the petitions of close family members, called derivative beneficiaries; their petitions are not subject to the annual cap. *See id.*; 8 U.S.C. § 1184(p)(2)(B).

visa is finally issued, it lasts for four years, during which time beneficiaries may live and work in the United States with authorization. *See* 8 U.S.C. § 1184(p)(3)(B), (p)(6).

For U visa petitions that cannot be granted solely due to the statutory cap, USCIS has adopted measures to provide provisional benefits to crime victims while their petitions are pending. USCIS may either place the petitioners on a waitlist or make a determination that their application is bona fide. 8 C.F.R. § 214.14(d)(2); USCIS, *Policy Manual*, Vol. 3, Part C, Ch. 5 (2023). In both instances, the applicant is issued provisional protection from removal—known as deferred action—and employment authorization. *Id*.

It is not uncommon for U visa petitioners to spend years on the waitlist or with interim relief through a bona fide determination while awaiting final adjudication and issuance of formal immigration status. During this time, noncitizen crime victims deepen their ties in the U.S., and contribute to the economy and social fabric of their communities.

4. Once granted, U visa beneficiaries enjoy four years of lawful nonimmigrant status and may apply for adjustment of status to permanent residence.

After many years of waiting, USCIS will issue a successful U visa petitioner a Form I-797 Notice of Approval evidencing lawful

nonimmigrant U visa status. Principal petitioners and their family members in the United States may already have been issued interim relief in the form of deferred action and work authorization, but final adjudication also allows family members residing abroad to reunite with their relatives in the United States. U.S. Dep't of State, Foreign Affairs Manual, Ch. 9, § 402.6-6(E) (2023). Persons in lawful U nonimmigrant visa status may work lawfully incident to their visas without requiring separate work authorization documents, which may also be backlogged. *See* 8 C.F.R. § 274a.12(a)(19), (20). After three years of continuous presence in the United States, U beneficiaries may apply for adjustment of status to permanent residence. *See* 8 U.S.C. § 1255(m)(1)(A).

By the time U beneficiaries apply for permanent residence under 8 U.S.C. § 1255(m), they may have lived in the United States for over a decade, amassed significant ties to their communities, and contributed to the economy. After a U nonimmigrant files for adjustment of status, they typically wait additional years for USCIS to adjudicate their application. The current processing time for U adjustment is 23 to 25 months. *See* USCIS, *Check Case Processing Times*, https://egov.uscis.gov/processing-times/ (last visited June 22, 2023) (showing U-based I-485 processing times at the Nebraska Service Center at 23 months, and Vermont Service Center

at 25 months). U status is automatically extended while the adjustment application is pending. *See* 8 U.S.C. § 1184(p)(6).

B. Adjustment of Status for U Nonimmigrants.

1. Congress created an easier path to lawful permanent residence for U nonimmigrants than for other adjustment applicants.

Congress' interest in ensuring a path to permanent legal status for noncitizen crime victims who cooperate with local law officials is evident in its creation of a special adjustment of status provision for U nonimmigrants. *See* 8 U.S.C. § 1255(m). By enacting this provision, Congress recognized that only permanent residence would provide long-term stability to noncitizen crime victims and their families. In contrast to the U nonimmigrant visa, which is temporary—generally lasting only 4 years plus the period in which the U nonimmigrant's adjustment application is pending, *see* 8 U.S.C. § 1184(p)(6)—permanent residence is indefinite. Moreover, and significantly, permanent residence is a necessary step to U.S. citizenship. 8 U.S.C. § 1427(a). Additionally, lawful permanent residents may, among other things, "accept an offer of employment without special restrictions, own property, receive financial assistance at public colleges and universities, and join the Armed Forces." USCIS, Lawful Permanent Residents (LPRs), https://www.dhs.gov/immigration-statistics/lawful-

permanent-residents (Feb. 13, 2023).

Consequently, USCIS' denial of an adjustment application "can have life life-changing consequences." *Patel v. Garland*, 142 S. Ct. 1614, 1627 (2022) (Gorsuch, J., dissenting). Where USCIS denies the adjustment application of a U nonimmigrant, the crime victim—who often would have had some form of lawful presence for close to a decade or more[4]—loses this authorized status along with their employment authorization. Similarly, any close family members who did not previously petition for and receive derivative U nonimmigrant status will be deprived of the opportunity to gain permanent resident status. *See* 8 U.S.C. § 1255(m)(3). Finally, upon the adjustment denial, the crime victim suddenly risks being placed in removal proceedings and becoming unable to care for or support their family.

Recognizing the importance of lawful permanent residence for U nonimmigrants and the harsh consequences of not gaining this status, Congress adopted less stringent requirements for these crime victims than those existing for other noncitizens seeking lawful permanent residence. *Compare* 8 U.S.C. § 1255(m) (adjustment of status for U nonimmigrants) *with* 1255(a), (c) (general adjustment of status provisions).

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4 U visa applicants who are granted deferred action do not accumulate unlawful presence while they are on the waitlist. 8 C.F.R. § 214.14(d)(3).

In general, adjustment applicants must be both admissible to the United States and not subject to a statutory bar to adjustment. 8 U.S.C. § 1255(a), (c). The same is not true for U nonimmigrants adjusting under 8 U.S.C. § 1255(m). First, the statutory bars to adjustment do not apply to U nonimmigrants, and thus they are able to adjust even if, for example, they failed to maintain lawful status continuously since entry to the United States, worked without authorization at any time, or violated the terms of a past visa. *See* 8 U.S.C. § 1255(m). Second, unlike other adjustment applicants, U nonimmigrants do not need to establish that they are admissible to the United States, having already done so when they were granted the U nonimmigrant status. *See* 8 U.S.C. § 1255(m)(1). Thus, they are not subject to the many grounds of inadmissibility, 8 U.S.C. § 1182, with one exception: they cannot have participated in Nazi persecution, genocide, torture, or extrajudicial killing. 8 U.S.C. §§ 1255(m)(1)(A), (2), 1182(a)(3)(E); *see also* 8 C.F.R. § 245.24(d)(11) ("U adjustment applicants are not required to establish that they are admissible."). As a result of these differences, USCIS may approve an adjustment application of a U nonimmigrant with certain past immigration or criminal violations where it would have to deny the application of someone else with the same history.

Consequently, U nonimmigrants are not subject to the health-related

grounds of inadmissibility found at 8 U.S.C. § 1182(a)(1). The sole purpose of the medical examination requirement at issue in this case is to demonstrate that noncitizens "are not inadmissible to the United States on health-related grounds." DHS, *Instructions for Report of Immigration Medical Examination and Vaccination Record* 1 (2023), https://www.uscis.gov/sites/default/files/document/forms/i-693instr.pdf. Neither 8 U.S.C. § 1255(m) nor its accompanying regulation, 8 C.F.R. § 245.24, require that U visa beneficiaries submit a medical examination to USCIS with their applications for adjustment of status.

A U nonimmigrant seeking to adjust must demonstrate only that she has been continuously physically present in the United States during the three-year period since receipt of the U visa, with limited absences permitted by statute, and that she is not inadmissible under the sole applicable inadmissibility ground, 8 U.S.C. § 1182(a)(3)(E). *See* 8 U.S.C. § 1255(m)(1). So long as affirmative evidence does not demonstrate that the U nonimmigrant unreasonably refused to assist law enforcement officials, *see id*., USCIS will adjust her status upon finding that her "continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest." 8 U.S.C. § 1255(m)(1)(B).

2. USCIS' U adjustment decisions are not subject to further review by an immigration judge.

Congress authorized only the DHS Secretary to decide the adjustment applications of U nonimmigrants. 8 U.S.C. § 1255(m)(1). In turn, the DHS Secretary delegated this authority to USCIS. *See* 8 C.F.R. §§ 2.1, 103.2, 103.3. Non-attorney USCIS immigration officers adjudicate these cases. *See* USA JOBS, Immigration Services Officer, https://www.usajobs.gov/job/730442700 (last visited June 22, 2023) (requiring 3 years of progressively responsible experience, 1 year of which is equivalent to the GS-04 grade level, or a bachelor's degree, for USCIS officer position).

Where the USCIS officer reviewing the applicant's file has questions or believes that additional evidence is needed, he may—but is not required to—either request additional evidence or notify the applicant of USCIS' intent to deny the application; alternatively, he can deny the application without providing any opportunity to the applicant to supplement the record. 8 C.F.R. § 103.2(b)(8). USCIS issues its decisions in unpublished letters to the applicant. *See* 8 C.F.R. § 103.3(a), (c).

An administrative appeal of a denial of a U adjustment application to USCIS' Administrative Appeals Office (AAO) is available. 8 C.F.R. § 245.24(f)(2). The AAO is not independent of USCIS and is bound by the

policies and legal interpretations of its parent agency. USCIS, *Administrative Appeals Office Practice Manual* § 1.2 (2018). Its decisions also generally are issued in unpublished, nonprecedential letters to the applicant. *Id*. § 3.15(a). USCIS officers are prohibited from citing unpublished AAO decisions in other cases, thus discouraging any cohesive agency interpretation and application of the law. *Id.* ("DHS officers may not rely upon or cite to non-precedent decisions as legal authority in other decisions.").

Immigration judges, who conduct removal proceedings and are employees of the U.S. Department of Justice's Executive Office of Immigration Review, have no authority to decide the adjustment applications of U nonimmigrants in removal proceedings. 8 C.F.R. §§ 1001.1(l), 1003.0; *see also* 8 C.F.R. § 245.24(f). In contrast, the majority of other adjustment applicants can renew their applications before an immigration judge upon initiation of removal proceedings—thus having the opportunity for a second review of their application by an independent adjudicator. *See* 8 C.F.R. § 245.2(a)(5)(ii). Instead, for U nonimmigrants in removal proceedings, USCIS remains the sole adjudicator and will decide the application on a parallel track with the removal proceeding.

3. Judicial review of denied U adjustment applications is available only in district court.

The only avenue for judicial review of a denied U adjustment of status

is through an Administrative Procedure Act (APA) claim brought in a U.S. district court. Unlike for other adjustment applicants who may be placed in removal proceedings upon USCIS' denial of their application, the adjustment application of a U nonimmigrant in removal proceedings will never be subject to review by a Court of Appeals through a petition for review. *See* 8 U.S.C. § 1252(a)(5), (b); *see also* Section III.B.2, *supra*. As a result, such applicants will not have the benefit of the jurisdictional savings clause found in 8 U.S.C. § 1252(a)(2)(D), which restores review over legal and constitutional questions that otherwise would be barred by, inter alia, 8 U.S.C. § 1252(a)(2)(B), as this savings clause applies only to claims "raised upon a petition for review" of a final removal order. 8 U.S.C. § 1252(a)(2)(D). Without district court review through an APA action, "[a]n agency may err about the facts, the law, or even the Constitution and *nothing* can be done about it." *Patel*, 142 S. Ct. at 1636 (Gorsuch, J., dissenting).

The majority in *Patel* left open the question of whether jurisdiction exists in an APA district court challenge of a denied adjustment application brought by a noncitizen who is not in removal proceedings. Instead, in dicta, the Court speculated without full analysis that Congress may have intended to bar such review. *Patel*, 142 S. Ct. at 1626. In this case, Ms. Cabello demonstrates why § 1252(a)(2)(B) does not apply to review of USCIS

adjustment of status decisions that do not and cannot be decided in the removal process. Appellant's Opening Brief, Dkt. 11, at 15-33. As the case examples discussed below demonstrate, such review is necessary to check agency errors, ensure consistency in the interpretation and application of the law by the agency, and guarantee that U nonimmigrants have a full and fair opportunity to gain permanent legal status, as Congress intended.

C. USCIS Adjudicative Errors That Are Left to Stand Undermine Congress' Intent and Will Harm Both Noncitizen Crime Survivors and the U Visa Program.

The importance of judicial review of USCIS' implementation of survivor-based immigration relief is underscored by this court's *en banc* decision in *Medina Tovar v. Zuchowski*, 982 F.3d 631, 637 (9th Cir. 2020), which invalidated USCIS' regulation as *ultra vires* in so far as it required a derivative U-visa spouse to have been married to the principal petitioner when the application was filed, as well as district court decisions correcting stark errors in USCIS' adjudication of U visa petitions. *See*, *e.g.*, *Gomez v. Mayorkas*, No. 21-civ-09232-JSC, 2022 WL 2276896, *6 (N.D. Cal. June 23, 2022) (granting summary judgment to plaintiff where USCIS' U visa denial failed to address the criminal statute certified by the law enforcement agency to be the crime it investigated); *Chuil Chulin v. Zuchowski*, No. 21-civ-00016-LB, 2021 WL 3847825 (N.D. Cal. Aug. 27, 2021) (denying

motion to dismiss where USCIS based U visa denial on uncorroborated information which the petitioner had no opportunity to rebut); *Morris v. Nielsen*, 374 F. Supp. 3d 239 (E.D.N.Y. 2019) (granting plaintiff summary judgment where USCIS denied U visa based on erroneous interpretation of regulations). Just as judicial oversight was necessary to prevent USCIS from enforcing its *ultra vires* interpretation of 8 U.S.C. § 1101(a)(15)(U)(ii) in *Medina Tovar*, judicial oversight is necessary to prevent USCIS from enforcing its *ultra vires* interpretation of 8 U.S.C. § 1255(m) and from otherwise violating the law. *See* 5 U.S.C. § 706.

The following case examples[5] illustrate the many ways that USCIS can err in its decision-making and the profound impact that these errors have on the noncitizen crime victims seeking to stabilize their lives.

1. Z.R.

Z.R., a longtime resident of the United States, was granted a U visa in October 2014, due to a serious assault by her former domestic partner. Years prior, Z.R. struggled with substance abuse and experienced homelessness because of domestic violence; she received several convictions for nonviolent offenses, including petty theft and forgery, and was deported and

[5] All information related to the case examples is on file with amici curiae.

repeatedly reentered the United States to flee domestic violence and be reunited with her children. But, prior to seeking the U visa, Z.R. became sober and worked to rehabilitate herself.

As part of the U visa process, Z.R. revealed the entirety of her criminal and immigration history to USCIS and sought a waiver of applicable grounds of inadmissibility by filing a Form I-192 Application for Advance Permission to Enter as Nonimmigrant. USCIS granted the waiver, finding that it was "in the public or national interest" to do so under 8 U.S.C. § 1182(d)(14), with full knowledge of Z.R.'s criminal and immigration history.

In 2018, Z.R. sought to adjust status based on her U visa, again disclosing to USCIS her criminal and immigration history, and also providing extensive evidence of the positive equities in her case, including her rehabilitation, family ties, and extensive involvement in her church and community. USCIS denied her adjustment application in January 2020, based on her criminal and immigration history, although she had not committed or been convicted of any crime nor had further immigration violations since USCIS had granted her U visa and inadmissibility waiver. USCIS' decision erroneously found that Z.R. received an I-192 waiver solely so that she could temporarily remain in the United States to assist in

the investigation and prosecution of a crime; in fact, the case against the perpetrator of the crime that underlay her U visa had long been resolved when USCIS granted the waiver. Z.R. subsequently filed two motions to reopen the decision; USCIS dismissed both. She lost her work authorization, leaving her husband as the sole financial support for their family, including two of Z.R.'s U.S. citizen children, and the entire family feared that Z.R. would be deported.

With no other option to correct USCIS' error, Z.R. filed a complaint in U.S. district court, arguing that the adjustment denial, based on criminal and immigration history which predated Z.R.'s U visa and inadmissibility waiver grants, was arbitrary, capricious, and contrary to law. Subsequently, USCIS reopened Z.R.'s adjustment application and, in March 2023, granted the application. Absent district court jurisdiction over U visa adjustment claims, Z.R. and her family would have had no recourse to correct USCIS' inconsistent treatment of her adjustment of status application, leaving her a domestic abuse survivor depressed and at risk of deportation, and her family in financial and emotional peril.

2. E.L.M.

E.L.M. had lived in the United States for more than 15 years when she was granted a U visa in October 2016, as a result of domestic violence at the hands of her partner.

E.L.M. sought adjustment of status in 2020, which USCIS denied because she had failed to provide a copy of several pages of her expired passport, as required by 8 C.F.R. § 245.24(d)(4). On appeal, E.L.M. corrected this inadvertent error, providing a copy of each of the requested passport pages as required by the regulations. Yet the AAO denied the appeal, stating that certain non-identification pages were "too faint" to discern text, images, or page numbers, and faulting E.L.M. for not "provid[ing] clearer copies, as previously submitted" or indicating "whether she possesses or can access the original" passport, even though she had submitted additional evidence of her continuous presence in the United States during the required period, which was not contested by USCIS. Subsequently, E.L.M. sought reconsideration of the denial, again providing copies of all the pages of her expired passport and affirming that she possessed the original passport; however, her attorney erroneously labelled the motion as a second appeal and USCIS denied this for procedural reasons without ever addressing the substance of her filing.

Absent jurisdiction, no federal court will be able to correct USCIS' denial of E.L.M.'s adjustment application. E.L.M. will be unable to gain permanent legal status—and ultimately U.S. citizenship—simply due to an inadvertent error in her original submission of evidence, an error that she subsequently corrected on two occasions in compliance with the regulations. Without federal court intervention, E.L.M. will never be afforded a proper, substantive agency review of her application. She and her 15-year-old U.S. citizen daughter remain fearful that she will be deported despite her eligibility to adjust status.

3. *Doe v. Mayorkas*, No. 20-cv-985, 2021 WL 411206 (D. Minn. Feb. 5, 2021).

After receiving U-certification from law enforcement officers in 2010, John Doe sought U visas and inadmissibility waivers from USCIS for himself and his wife, Jane Doe. The couple were long-time residents of the United States. USCIS granted both of their U visas and inadmissibility waivers.

In 2016, both Mr. and Mrs. Doe sought to adjust their status. Mrs. Doe's application was granted, but Mr. Doe received no substantive response to his application until 2018, despite multiple inquiries to USCIS about the status of his case. Then, USCIS contacted him, but not because it had adjudicated the adjustment application; instead, the agency informed Mr.

Doe that it intended to revoke his U visa and, later, his inadmissibility waiver, because USCIS erroneously understood that Mr. Doe had committed the crime of which he was actually the victim. Later, USCIS purported to find additional bases justifying revocation of the U visa and inadmissibility waiver. The agency then revoked the visa and waiver and thereafter revoked Mrs. Doe's U visa and inadmissibility waiver since she received the visa as a derivative of Mr. Doe. USCIS then denied Mr. Doe's adjustment of status application.

Mr. and Mrs. Doe filed a suit to challenging the visa and waiver revocations in the U.S. District Court for the District of Minnesota. After Mr. Doe's adjustment application was denied, the couple amended the complaint to challenge this decision. Within two months of the filing of the complaint, USCIS agreed to withdraw the revocations, reinstate the U visas and inadmissibility waivers, and reopen and approve Mr. Doe's adjustment application. The district court dismissed the case as moot after both Mr. and Mrs. Doe became lawful permanent residents. Absent access to federal court review—including review of the denial of their adjustment applications—Mr. and Mrs. Doe would have lost their immigration status and their opportunity to become lawful permanent residents based solely on USCIS' error regarding Mr. Doe's criminal history.

4. *Hernandez v. USCIS*, _ F.Supp.3d _, 2022 WL 17338961 (W.D. Wash. 2022).

In 2014, USCIS granted Jose Rubio Hernandez's U visa after he assisted law enforcement officers with their investigation into the domestic violence and assault that he suffered. USCIS also granted a waiver of inadmissibility after he disclosed evidence related to prior arrests, including arrests which did not lead to any criminal charge or led to charges of which he was found not guilty.

Mr. Hernandez applied to adjust his status in 2017. USICS requested evidence about his criminal history, including police reports for specified arrests. Mr. Hernandez provided additional information to the extent it was available and provided yet more information following USCIS' issuance of notice that it intended to deny his case. He explained that certain of the requested records did not exist or were not available and further noted the inherent unreliability of police reports. USCIS ultimately denied the application and the AAO affirmed that denial, relying in part on criminal charges which were dismissed or of which Mr. Hernandez was acquitted.

Mr. Hernandez then filed suit in the U.S. District Court for the Western District of Washington, challenging the denial as arbitrary, capricious, and contrary to law. Finding jurisdiction, the court denied the defendants' motion to dismiss the case. The case is now at the summary

judgment stage. Absent the availability of federal court review, Mr. Hernandez would have had no venue in which to raise important legal questions regarding the type of evidence USCIS may consider when adjudicating adjustment of status applications.

IV. CONCLUSION

Amici urge the Court to reverse the decision of the District Court and hold that there is jurisdiction to review Plaintiff-Appellant's claims.

Respectfully submitted,

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Dated: June 23, 2023

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify the following:

1. This brief complies with the type-volume requirements of Fed. R. App. P. 32(a)(5) because this brief contains 5,782 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman 14-point font.

s/ *Kristin Macleod-Ball*
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CERTIFICATE OF SERVICE FOR ELECTRONIC FILINGS

I, Kristin Macleod-Ball, hereby certify that I caused the foregoing Brief of Amici Curiae to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 23, 2023. I certify that Respondent's counsel and all participants in the case are registered CM/ECF users and will be served via the Notice of Docket Activity through this Court's CM/ECF system.

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Date: June 23, 2023