No. 23-435

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

CRISTIAN RODRIGUEZ,

Plaintiff - Appellant,

v.

ALEJANDRO MAYORKAS, UR MENDOZA JADDOU,
CHIEF ADMINISTRATIVE SUSAN DIBBINS,

Defendants - Appellees.

On Appeal from the United States District Court
for the Eastern District of New York, No. 21-cv-3129

***AMICI CURIAE* BRIEF OF ASISTA AND TAHIRIH JUSTICE CENTER IN SUPPORT OF APPELLANT**

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, *Amici Curiae* ASISTA Immigration Assistance and Tahirih Justice Center state that there are no parent corporations or any publicly held corporation that owns 10% or more of their stock.

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INTRODUCTION[1]

The U-Visa program is designed to enhance law enforcement and to benefit and protect all persons present in the United States by removing barriers that prevent noncitizens who are victims of violent crimes from assisting law enforcement efforts. Congress, in creating the U-Visa program, set forth two different standards under which U.S. Citizenship and Immigration Services ("USCIS") could grant a waiver of waiver of inadmissibility for a U-Visa applicant. One standard, 8 U.S.C. § 1182(d)(14), is unique to U-Visa applicants and contains specific criteria for USCIS to consider that differ from the generally applicable standard set forth in 8 U.S.C. § 1182(d)(3). At issue in this case is whether the trial court erred in refusing to implement the specific U-Visa criteria that Congress overwhelmingly adopted on a bipartisan basis and, thus, take Congress at its word that it meant what it said when it created a separate standard under which to evaluate waivers of inadmissibility for U-Visa applicants. Although USCIS purported to evaluate the application for a waiver of inadmissibility under both standards, in substance it did not give any independent

[1] All parties have consented to the filing of this brief. *Amici* certify that this brief was authored entirely by counsel for *Amici* and not by counsel for any party, in whole or in part; no party or counsel for any party contributed money to fund preparing or submitting the brief; and, apart from *Amici*, their members, and their counsel, no other person contributed money to fund preparing or submitting the brief.

meaning to the text of § 1182(d)(14), but conflated this separate standard with how it interprets § 1182(d)(3). This cannot be sustained. When Congress adopts distinct statutory wording in separate statutes, those provisions cannot thereafter be equated to arrive at the same legal meaning. Doing so was a non-discretionary legal error which requires remand to USCIS to interpret and give meaning to the separate criteria set forth in § 1182(d)(14), and then to re-evaluate Mr. Rodriguez's application for a waiver of inadmissibility under that standard.

The trial court erred by uncritically accepting, without any analysis, the government's representation that it considered the application for a waiver of inadmissibility under § 1182(d)(14) without examining the substance of the agency action. *See generally* D. Ct. Dkt. No. 34. This was legal error. USCIS cannot perform an end run around its statutory obligation to consider the waiver under § 1182(d)(14) by only conducting the analysis applicable to a waiver sought under § 1182(d)(3). Giving lip service to § 1182(d)(14) but failing to consider separately or elucidate the provision's independent meaning does not pass muster or satisfy the agency's obligations. The trial court erroneously accepted the government's argument that it was inoculated from judicial review due to a lack of subject matter jurisdiction over the government's denial of a waiver of inadmissibility and, separately, its U-Visa adjudication. *Amici*, having special expertise in this area and manifest interests in the proper review of inadmissibility waivers and U-Visa

applications for survivors of violence, bring their expertise before this Court to demonstrate why judicial review can and, indeed, *must* exist for nondiscretionary legal errors committed in both inadmissibility waiver decisions and U-Visa decisions.

INTERESTS OF *AMICI CURIAE*

ASISTA Immigration Assistance ("ASISTA") 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 has previously filed amicus briefs with the United States Supreme Court and various federal courts of appeal. *See, e.g.*, *United States v. Castleman*, 572 U.S. 157 (2014); *State of Washington v. Trump*, 858 F.3d 1168 (9th Cir. 2017); *L.D.G. .v Holder*, 744 F.3d 1022 (7th Cir. 2014). ASISTA is a nonprofit organization, having no corporate parent, and is not publicly traded.

The Tahirih Justice Center ("Tahirih") is the largest multicity 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 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 32,000 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. Tahirih is a nonprofit organization, having no corporate parent, and is not publicly traded.

Both ASISTA and Tahirih served as *Amici Curiae* in the trial court and in Mr. Rodriguez's previous suit in the Eastern District of New York. *See Rodriguez v. Johnson*, No. 16-CV-7092, ECF No. 47 (E.D.N.Y. Dec. 12, 2017).

SUMMARY OF POSITION OF *AMICI CURIAE*

Immigrant populations are particularly vulnerable to crime, especially the kinds of crimes that happen away from the public eye, inside people's homes, and often unreported. Mr. Rodriguez, specifically, suffered a home invasion, but immigrant communities are also particularly vulnerable to other violent crimes,

such as domestic violence, gang violence, sexual assault, and human trafficking. Perpetrators prey on immigrant populations because they are less likely to report crimes committed against them, in part because they fear being deported by law enforcement agencies if they seek their assistance. *See* Stefano Comino et al., *Silence of the Innocents: Undocumented Immigrants' Underreporting of Crime and Their Victimization*, 39 J. Pol'y Analysis & Mgmt. 1214 (2020). Furthermore, because noncitizens are hesitant to report crimes, law enforcement agencies are stifled in their ability to keep communities safe by detecting, investigating, and prosecuting criminals. This compromises public safety for the community as a whole.

Congress sought to limit the ability of abusers and criminals to leverage immigration laws and to exploit the fear of deportation against their victims by passing legislation to end a perpetrator's full and complete control over the survivor. In an act of bipartisan unity, Congress created the U-Visa program to alleviate noncitizens' fear of assisting law enforcement. *See* 8 U.S.C. § 1101(a)(15)(U)*; see also* National Immigrant Women's Advocacy Project (NIWAP), *Report: The Importance of the U-visa as a Crime-Fighting Tool for Law Enforcement Officials - Views from Around the Country* (December 3, 2012), https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Qref-UVisa

CrimeFightingTool-12.03.12.pdf (collecting testimonials of law enforcement officials endorsing the U-visa process as an important crime-fighting mechanism).

Although the U-Visa statute affords USCIS certain levels of discretion in ultimately granting or denying waivers of inadmissibility and U-Visa applications, Congress intentionally bound this discretion with specific statutory directives to which USCIS must adhere. *See, e.g.*, 8 U.S.C. § 1182(d)(14).[2] Congress—and U-Visa applicants—depend on judicial review by Article III courts to ensure agencies like USCIS are not exceeding the bounds of statutory authority and to ensure that agency action does not thwart congressional intent.

In the trial court here, the government did not seek to explain its alleged application of 8 U.S.C. § 1182(d)(14) or attempt to explain how the standard in that provision differed from its analysis under § 1182(d)(3). Instead, the government tried to shut the door to any judicial review by pointing to a jurisdiction-stripping statute, 8 U.S.C. § 1252(a)(2)(B). Applying this provision as the government proposed, the trial court accepted an interpretation that undermines the statutory purpose of the U-Visa program. Section 1182(d)(14) is uniquely

[2] Notably, USCIS's inadmissibility determinations involving nonimmigrants under the S-visa, T-visa, or U-visa statutes are fully reviewable, in part, because the statute states that the Secretary of Homeland Security "shall" make that determination. *See* 8 U.S.C. § 1182(d)(1) (S-visa), (d)(13) (T-visa), (d)(14) (U-visa). Each of these three programs are intended to help law enforcement, and the statutory language further demonstrates the nondiscretionary, reviewable nature of the inadmissibility determination as part of the U-visa application.

available to U-Visa applicants. *See* 8 U.S.C. § 1182(d)(14) (applicable to "nonimmigrant(s) described in section 1101(a)(15)(U)"). It has its own criteria distinct from other waivers of inadmissibility. *Id.* (setting forth element of "public or national interest"). Without meaningful judicial oversight of USCIS's application of the nondiscretionary components of 8 U.S.C. § 1182(d)(14), USCIS would be given essentially unbridled discretion selectively to apply certain provisions of the law while ignoring others. Such unbridled discretion eviscerates the framework that Congress so carefully laid out in the U-Visa program and exceeds the bounds of discretion so carefully stated in the statutory provisions.

Furthermore, under the argument advanced by the government, many U-Visa petitioners will be caught in a cycle of inadmissibility wherein the erroneous denial of the petitioner's initial waiver (a petitioner can reapply for a waiver) effectively blocks the petitioner from seeking redress of subsequent errors in the adjudication of the U-Visa application. Essentially, as the court below allowed here, USCIS would be free to avoid an 8 U.S.C. § 1182(d)(14) analysis and, in doing so, insulate the agency against review of other errors committed in the denial of a U-Visa application. This is not the regulatory scheme that Congress intended.

If noncitizen crime survivors are led to believe that waiver determinations and visa adjudications are left to the unbridled discretion of USCIS agents who may misapply statutory directives, the very purpose of the U-Visa crumbles. If this

Court were to determine that there is no judicial review for Mr. Rodriguez's applications, it would be determining and sending a clear message that there will be no effective judicial oversight to ensure the fair and consistent application of the correct legal standards for either inadmissibility waivers or, by extension, U-Visa applications. This case has implications broader than Mr. Rodriguez's applications: it is about ensuring USCIS applies the law as written by Congress and ensures that the purposes of the U-Visa program—for law enforcement, for public safety, for victims, and for U-Visa applicants—are implemented. If the legal error here goes uncorrected, it will fundamentally undermine the purpose of 8 U.S.C. § 1101(a)(15)(U), since survivors will not be assured that cooperation with law enforcement will lead to legal protections.

When interpreting a statute, the Court should "interpret the relevant words not in a vacuum, but with reference to the statutory context, structure, history and purpose." *Abramski v. United States*, 573 U.S. 169, 179-83 (2014) (rejecting petitioner's reading of a statute because it would "undermine [the law's] core provisions," "defeat the point of [other provisions]," and "deny effect to the regulatory scheme," and because "no part of that [regulatory] scheme would work" under petitioner's interpretation). Defendants' interpretation of 8 U.S.C. § 1252(a)(2) would undermine the central purpose of the U-Visa program and would create a regulatory framework that Congress simply could not have

intended. This Court should reject the government's overbroad interpretation of 8 U.S.C. § 1252(a)(2) and remand this action to the district court for review of USCIS's misadjudication of Mr. Rodriguez's inadmissibility waiver application and U-Visa application.

ARGUMENT

I. Judicial review of nondiscretionary legal errors, made in adjudicating waivers of inadmissibility and U-Visa petitions, is necessary in order to effectuate the Congressional intent underlying 8 U.S.C. § 1101(a)(15)(U).

A. Congress created the U-Visa program to protect noncitizen survivors and empower law enforcement agencies in the investigation of serious crimes by incentivizing noncitizen survivors to report crimes committed against them.

1. The history of the U-visa reflects its public safety purpose.

The U-visa program is the culmination of decades of work between law enforcement, victim advocates, and legislators to protect non-citizen victims of violent crime and to protect the American public from the perpetrators of these violent acts. When creating the U-visa program, Congress recognized that fear of deportation makes many noncitizens less likely to report crimes against them, in turn greatly diminishing the ability of law enforcement to maintain public safety. 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, Pub. L. No. 106-386, § 1513, 114 Stat. 1464,

1533 (2000) (TVPA) ("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 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 both protects vulnerable survivors of violent crimes and the public generally by aiming 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 does not require beneficiaries to establish admissibility separately 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, improve effectiveness of and confidence in law enforcement, and result in greater safety for all community members.

The U-visa represents a decades-long effort to ensure justice for noncitizen survivors of violent crime and enhance protection of the American public and law enforcement cooperation. 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. These provisions were overwhelmingly approved by a bipartisan and nearly unanimous Congress. *See* U.S. SENATE: U.S. SENATE ROLL CALL VOTES 106TH CONGRESS - 2ND SESSION (2000), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1062/vote_106_2_00269.htm (last visited Jul 17, 2023) (approved by all 95 present for the vote); U.S. HOUSE OF REPRESENTATIVES ROLL CALL VOTES 106TH CONGRESS - 2ND SESSION (2000), https://clerk.house.gov/Votes/2000518?BillNum=H.R.3244 (last visited Jul 17, 2023) (approved by 371 of 372 present for the vote). Likewise, the 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 two main components: 1) the U-visa petition, and 2) the U-visa waiver of inadmissibility. 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. *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. *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.*; § 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).

The U waiver is also unusually generous and requires USCIS to consider and weigh different factors in the exercise of discretion. 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, is more restrictive and has been interpreted to require DHS to consider "the risk of harm to society if the applicant is

admitted," "the seriousness of the applicant's prior 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). The text of the two waiver provisions is not the same, and therefore USCIS cannot treat them as equivalent. If USCIS interprets the discretion under 8 U.S.C. § 1182(d)(3) within the parameters set forth in *Matter of Hranka*, it cannot interpret the separate and distinct statutory language in § 1182(d)(14) identically.

This language—directing the Secretary of Homeland Security to consider "the public or national interest"—is present in the U-Visa-specific provision and is conspicuously absent in the general waiver provision. It is fundamental that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). Therefore, Congress clearly intended for U-Visa petitioners to be evaluated under a separate, substantively distinct standard compared to the general population.

Indeed, Congress would not have gone to the trouble of enacting an entirely distinct provision specific to U-Visa petitioners if it had intended for those applicants to be evaluated under the general standard which already existed. Under the "canon against surplusage," a court should not adopt an interpretation of one

provision that would render meaningless another provision of that same statutory scheme. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 26 (2012) ("If possible, every word and every provision is to be given effect . . . . None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."). Thus, the only reasonable interpretation is that Congress intended for 8 U.S.C. §§ 1182(d)(3) and 1182(d)(14) to impose different standards, and that the U-Visa-specific standard is intended to effectuate the overall purpose of the U-Visa scheme.

Not only does the plain meaning of the text require that USCIS consider applications for a waiver of inadmissibility pursuant to 8 U.S.C. § 1182(d)(14) differently than the *Matter of Hranka* standard applicable to § 1182(d)(3) waivers, but there is also authority suggesting that Congress intended the U-Visa–specific provision to be more lenient than the general waiver standard. *See Matter of Khan*, 26 I&N Dec. 797, 803 (B.I.A. 2016) (defining 8 U.S.C. § 1182(d)(14) as a "much broader waiver" than 8 U.S.C. § 1182(d)(3)). Simply put, recognizing that the vast majority of U-Visa petitioners would require waivers, Congress enacted a separate, substantively distinct and arguably more lenient waiver provision for U-Visa applicants. This is consistent with Congressional intent to make the U-Visa

broadly accessible to undocumented immigrants so as to foster cooperation with law enforcement.

B. 8 U.S.C. § 1252(a)(2)(B) does not preclude this Court from reviewing the nondiscretionary legal errors made by USCIS in its adjudication of Mr. Rodriguez's wavier application.

1. USCIS conflated two separate legal standards in reviewing Mr. Rodriguez's waiver application, thus committing plain legal error which is reviewable by this Court.

Mr. Rodriguez applied for a waiver of inadmissibility under *both* 8 U.S.C. § 1182(d)(3), which is the general waiver provision, *and* 8 U.S.C. § 1182(d)(14), which is the provision specifically created for U-Visa petitioners. Contrary to Congressional intent, USCIS failed to evaluate Mr. Rodriguez's application separately under each standard. Specifically, the government failed separately to evaluate his application under the more lenient 8 U.S.C. § 1182(d)(14) standard. Although the government claimed that it applied the 8 U.S.C. § 1182(d)(14) standard because it was cited in the denial letter and the phrase "public or national interest" was referenced, in substance USCIS only applied the *Matter of Hranka* standard and considered the factors it applies in a § 1182(d)(3) analysis. *See* D. Ct. Dkt. No. 26-1 at 5.[3] The district court likewise accepted without question the government's cursory explanation that because there was a passing reference to § 1182(d)(14) it was considered and applied. But there was no discussion of a

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separate standard for the waiver under 8 U.S.C. § 1182(d)(14) or analysis under that separate standard. USCIS has no discretion to omit a statutory vehicle to obtain a waiver of inadmissibility that was provided to Mr. Rodriguez by Congress. Nor can it omit the § 1182(d)(14) standard by claiming it combined the analysis with the § 1182(d)(3) analysis. An agency is not free to disregard the statutory scheme that Congress created, and here, Congress made clear that U-visa applicants have a separate statutory path to obtain a waiver. USCIS, thus, was not free to disregard the statutory language that creates broader discretion to waive inadmissibility when it is the "public or national interest" for U-Visa applicants and only substantively consider the *Matter of Hranka* factors with a cursory citation to the separate 8 U.S.C. § 1182(d)(14) standard. This violates the fundamental administrative law principle that "[i]f the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable." *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Here, USCIS did not set forth any standard or analysis under 8 U.S.C. § 1182(d)(14) that was discernible, let alone distinct, from the § 1182(d)(3) standard on which this Court can find that USCIS actually exercised the discretion conferred by § 1182(d)(14).

The government argued and the trial court agreed that it was powerless to redress this wrong. However, 8 U.S.C. § 1252(a)(2)(B) does not strip this Court of

jurisdiction to review USCIS's adjudication of Mr. Rodriguez's waiver application because the statute does not preclude the Court from reviewing nondiscretionary errors of law. *See Sepulveda v. Gonzales*, 407 F.3d 59, 62-64 (2d Cir. 2004); *Mantena v. Johnson*, 809 F.3d 721, 728-29 (2d Cir. 2015). Indeed, although 8 U.S.C. § 1252(a)(2)(B) prohibits judicial review of purely discretionary matters that are left to USCIS, the statute does not strip this court of its power to review legal errors such as this one. *See* Appellant's Opening Brief at 29-33.

It is the fundamental duty of this Court to say what the law is and determine whether the law has been followed. The government's interpretation of 8 U.S.C. § 1252(a)(2)(B) would deprive this Court of its ability to ensure that agency action is consistent with the law, thus preventing the Court from performing its most important role. The government committed clear legal errors by conflating different provisions of the law and misapplying the relevant legal standards, in direct opposition to Congressional intent. While the government may have some "discretion" in ultimately granting or denying the waiver application, it does not have discretion to selectively disregard provisions of the law and to choose to apply one legal standard while completely ignoring other relevant statutory dictates. This Court has the capacity—and indeed the duty—to correct these legal errors. Foreclosing judicial review for Mr. Rodriguez, however, also sets dangerous legal precedent for so many others in the same administrative posture—

seeking a waiver of inadmissibility under 8 U.S.C. § 1182(d)(14) in order meaningfully to apply for a U-Visa.[4] Indeed, a majority of applicants could be deprived of a right established by Congress, to the detriment of crime victims, law enforcement, and communities.

2. Accepting the government's interpretation of 8 U.S.C. § 1252(a)(2)(B) would contravene congressional intent by allowing the government to conflate separate legal standards that Congress meant to be kept separate.

As discussed above, by enacting 8 U.S.C. § 1182(d)(14), Congress deliberately intended for U-Visa petitioners to be eligible for an inadmissibility waiver under a separate, distinct legal standard. This is evidenced by the fact that 8 U.S.C. § 1182(d)(14) directs the Attorney General to consider "the public or national interest" while 8 U.S.C. § 1182(d)(3) contains no such language. *See Cardoza-Fonseca*, 480 U.S. at 432 ("[w]here Congress includes particular

[4] The government cannot just claim it would have reached the same result under both standards without analyzing and weighting the factors differently as directed under § 1182(d)(14)'s text. USCIS must actually articulate those standards and then apply them to the unique facts of Mr. Rodriguez's case. Any views on the merits of Mr. Rodriguez's particular application for a waiver under § 1182(d)(14) may be fairly considered in the context of that fact-specific analysis. It is of the utmost importance given the broader impact that this Court clarify that under the statutory text Congress set forth a different, broader standard of discretion for U-Visa applicants seeking waivers of inadmissibility, and a requirement to engage in a fact-specific analysis of that specialized standard. Anything less eviscerates the § 1182(d)(14) waiver provision and undermines the entire statutory scheme.

language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely").

In other contexts, the Supreme Court has been increasingly signaling that administrative agencies may not take it upon themselves to legislate by attempting to re-write Congressional intent through rules or application of statutes and courts should not hesitate to exercise judicial review where an agency has strayed from the statutory text. *Cf. Biden v. Nebraska*, 143 S.Ct. 2355, 2375-76 (2023) (holding that ordinary tools of statutory interpretation did not support the agency's interpretation of the statute at issue and that no deference was owed to the agency under the major questions doctrine); *Sackett v. Envt'l Prot. Agency*, 143 S. Ct. 1322, 1341 (2023) (refusing to defer to the agency's statutory interpretation where that "interpretation is inconsistent with the text and structure of the [statutory scheme]"); *W. Va. v. Envt'l Prot. Agency*, 142 S. Ct. 2587, 2609 (2022) (applying the major questions doctrine to reject agency's argument that courts should defer to the agency's statutory interpretation); *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022) (explaining that "[a]dministrative agencies are creatures of statute" and "[t]hey accordingly possess only the authority that Congress has provided" in rejecting agency's statutory interpretation); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) ("the possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use

that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation."). These doctrinal trends caution against this Court accepting the government's claim that the agency action is unreviewable. Here too, Congress's clear language creating two different waiver standards, as set forth in both 8 U.S.C. §§ 1182(d)(3) and 1182(d)(14), should control. The agency was not free to elide the statutory provisions. Nor can the executive branch eliminate this Court's function as providing independent judicial review of agency action.

Under the government's interpretation of 8 U.S.C. § 1252(a)(2)(B), USCIS would be free to conflate these two standards—avoiding Congress's clear instruction that these are two different standards—without any judicial review. Indeed, that is precisely what occurred in Mr. Rodriguez's case. The administrative agency completely ignored the fact that Congress had created a separate U-Visa–specific provision for waiver applicants, and instead chose to selectively apply the general waiver standard. The government now offers an interpretation of 8 U.S.C. § 1252(a)(2)(B) that would enable it to continue nullifying the express intent of Congress. This Court should effectuate Congressional intent by exercising judicial review to ensure that USCIS observes and applies the separate legal standards so carefully laid out by Congress.

C. Even if this Court finds that it lacks jurisdiction to review Mr. Rodriguez's waiver of inadmissibility, it still retains authority to review his U-Visa application.

Concurrently with his waiver application, Mr. Rodriguez also filed a U-Visa petition, which he contends was erroneously denied. The government does not contend that this Court lacks jurisdiction to review the denial of Mr. Rodriguez's U-Visa application. Indeed, such a position would be untenable. *See Perez v. Wolf*, 943 F.3d 853, 866-67 (9th Cir. 2019) (holding that judicial review of U-Visa petitions is not prohibited under 8 U.S.C. § 1252(a)(2)(B)). Instead, the government makes the unsupported argument that if the Court is precluded from reviewing the waiver application, it must also be barred from considering the U-Visa petition itself. This overbroad and ungrounded interpretation of 8 U.S.C. § 1252(a)(2)(B) would directly contravene Congressional intent by undermining the entire regulatory scheme.

1. Consistent with its attempts to incentivize broad and continued cooperation with law enforcement, Congress intended that U-Visa petitioners would be able to refile their waiver applications.

When promulgating the governing regulations for the U-Visa program, the agency specifically provided that U-Visa petitioners may refile their waiver applications. *See* 8 C.F.R. § 212.17(b)(3) ("nothing in this paragraph is intended to prevent an applicant from re-filing a request for a waiver of ground of inadmissibility"). Thus, the agency itself promulgated a regulation to ensure that a

waiver denial would not permanently foreclose an immigrant's eligibility for a U-Visa.

This is consonant with the underlying intent behind the U-Visa program as a whole. If a single waiver denial could permanently close the door to U-Visa eligibility, an immigrant who had once been denied would no longer have any incentive to cooperate with law enforcement, notwithstanding an ongoing investigation and prosecution. This would undercut the fundamental purpose of the regulatory scheme, which is to ensure noncitizen survivors' broad, consistent, and continued cooperation with law enforcement. *See* New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. at 53,019 (the statute "recogniz[es] that [a noncitizen] may apply for U nonimmigrant status as different [parts] of the investigation or prosecution" and if an applicant "refuses to continue to provide assistance to an investigation or prosecution, the purpose of the [the Battered Immigrant Women Protection Act of 2000] is [undercut]"). For this very reason, the agency provided for the refiling of waiver applications, thus ensuring a continued incentive for cooperation based on the potential for a waiver determination to be reevaluated later.

Both ASISTA and Tahirih have witnessed firsthand the chilling effect that USCIS's nondiscretionary, legal errors have had on survivors of the violent crimes qualifying for U-Visa protections, many of whom do not have the resources to

continue to challenge USCIS's denials of waivers of inadmissibility and U-Visa applications in the face of the government's repeated obstacles to meaningful review. In other words, the government's position and continued conduct has already had a negative impact on survivors seeking to avail themselves of protections that Congress made available by statute.

2. Under the government's interpretation of 8 U.S.C. § 1252(a)(2)(B), this refiling of waiver applications would be futile for many applicants.

To illustrate the absurdity of the government's position, consider what would happen to an applicant like Mr. Rodriguez. Under the government's interpretation, USCIS would be free to misapply the law and the threshold waiver determination, and this erroneous misadjudication would be unreviewable by any court.

Then, having been erroneously denied a waiver, Mr. Rodriguez might seek to refile his waiver application later. Importantly, however, in Mr. Rodriguez's case the government concurrently denied *both* his waiver application *and* his U-Visa application. And, under USCIS regulations, only individuals who are "petitioner[s] for . . . U nonimmigrant status" may resubmit their waiver applications. *See* DHS, *Form I-192, Instructions for Application for Advance Permission to Enter as a Nonimmigrant*.[5] Of course, if an applicant's U-Visa

[5] https://www.uscis.gov/sites/default/files/document/forms/i-192instr.pdf.

petition has already been denied on the merits, then he is no longer a "petitioner for . . . U nonimmigrant status." Thus, anyone whose U-Visa petition was erroneously denied on the merits—as Mr. Rodriguez contends happened here—would be unable to refile.

In sum, under the interpretation advanced by the government, the erroneous denial of his waiver application would be unreviewable by this Court. And, so the argument goes, the denial of the waiver (which stands unreviewable by the Court) would preclude the Court from reviewing legal errors in the U-Visa denial as well. And, the denial of the U-Visa (which also stands unreviewable by this Court) would preclude Mr. Rodriguez from refiling his waiver application for reconsideration. Consequently, because he cannot refile his waiver application, he—and any U-Visa applicant facing this quagmire—has no way of receiving the due process put in place by Congress for U-Visa applicants.

The initial erroneous denial of the waiver application prevents Mr. Rodriguez from seeking correction of a second erroneous determination (the denial of his U-Visa application), and the inability to correct the erroneous denial of the U-Visa prevents Mr. Rodriguez from refiling the waiver application. Thus, Mr. Rodriguez, and those like him, are caught in an endless cycle of misadjudication. Surely this cannot be the situation that Congress intended.

When interpreting a statute, the Court should "interpret the relevant words not in a vacuum, but with reference to the statutory context, structure, history, and purpose." *Abramski*, 573 U.S. at 179-83 (rejecting petitioner's reading of a statute because it would "undermine [the law's] core provisions," "defeat the point of [other provisions]," and "deny effect to the regulatory scheme," and because "no part of that [regulatory] scheme would work" under petitioner's interpretation). The government's interpretation of 8 U.S.C. § 1252(a)(2) would undermine the central purpose of the U-Visa program, since the initial (and erroneous) denial of an applicant's waiver could permanently foreclose the applicant's ability to seek a U-Visa, thus removing any continued incentive to cooperate with law enforcement. Nor should the government be allowed to thwart judicial review and oversight of the agency's actions and ability to ensure fidelity and adherence to the statutory language—this Court should exercise caution as such an interpretation of the statutory scheme raises serious separation of powers concerns. Agencies should not be empowered to run amok and trample Congressional intent as set forth in the statutory text, all while being insulated from judicial review. None of this is intended under our Constitutional system and the statutory scheme here cannot bear the interpretation the government has propounded in this matter.

CONCLUSION

In enacting 8 U.S.C. § 1101(a)(15)(U), Congress intended to encourage noncitizen survivors' cooperation with law enforcement agencies as made clear through the text and protections specific to U-Visa applicants. To facilitate that objective, Congress enacted a special, U-Visa–specific waiver provision in 8 U.S.C. § 1182(d)(14). This provision was enacted in recognition of the fact that many U-Visa applicants would require a waiver before applying for a U-Visa and that a special, more lenient standard was needed to ensure broad accessibility of the U-Visa program. The government offers an interpretation of 8 U.S.C. § 1252(a)(2)(B) that would undermine this Congressional intent by enabling the government to ignore completely the special waiver provision, without any judicial review. This Court should reverse the trial court's determination that it lacked subject matter jurisdiction over this case.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Cir. R. 29.1(c) because this brief contains 6,462 words (according to the Microsoft Word for Microsoft 365 MSO count function), excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that 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 for Microsoft 365 MSO in 14-point Times New Roman type for text and footnotes.

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