No. 23-583

IN THE

Supreme Court of the United States

AMINA BOUARFA,

Petitioner,

v.

ALEJANDRO MAYORKAS, SECRETARY OF HOMELAND SECURITY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE NATIONAL IMMIGRANT JUSTICE CENTER, ASISTA IMMIGRATION ASSISTANCE, OXFAM AMERICA, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT, ASIAN PACIFIC INSTITUTE ON GENDER-BASED VIOLENCE, AND NATIONAL NETWORK TO END DOMESTIC VIOLENCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The *Amici Curiae* are organizations which have many years of experience working with survivors of domestic violence and human trafficking and representing them in all stages of proceedings, including in this Court.

The National Immigrant Justice Center (NIJC) is a Chicago-based not-for-profit organization that provides legal representation and consultation to low-income noncitizens, including immigrant survivors of domestic violence and human trafficking. Alongside other immigration matters, *see Dep't of State v. Munoz*, No. 23-334, 2024 WL 3074425 (U.S. June 21, 2024), NIJC represents hundreds of survivors of domestic violence and human trafficking through its staff attorneys and its network of approximately 2000 pro bono attorneys. NIJC has a deep interest in ensuring that immigration statutes are properly interpreted.

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 now serves as liaison between those who represent immi-

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[1] No counsel for any party authored this brief in any part, and no person or entity other than amici, their members, or their counsel made a monetary contribution to fund its preparation or submission.

grant survivors and the Department of Homeland Security (DHS) personnel charged with implementing the laws at issue in this appeal, including Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and DHS's Office for Civil Rights and Civil Liberties. In addition, 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); *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.

Oxfam America is a non-profit development agency dedicated to developing lasting solutions to poverty and social injustice. A centerpiece of this work involves supporting the world's most vulnerable communities, including migrants. Oxfam supports displaced communities by tackling the drivers of migration, providing emergency humanitarian aid to those fleeing persecution, and advocating that governments protect and respect the human rights of migrants.

The National Immigrant Women's Advocacy Project, Inc. (NIWAP Inc.) is a nonprofit training, technical assistance, and public policy advocacy organization that develops, reforms, and promotes the implementation and use of laws and policies that improve legal rights, services, and assistance to immigrant

women and children who are victims of domestic violence, sexual assault, stalking, child abuse, human trafficking, and other crimes. As a national resource center, NIWAP offers technical assistance and training at the federal, state, and local levels to assist a wide range of professionals who work with immigrant crime victims. NIWAP's Director worked closely with Congress in the drafting of the immigration protections included in the Violence Against Women Acts (VAWA), both the original 1994 Act and VAWA amendments made in 1996, 2000, 2005 and 2013 and the Trafficking Victims Protection Acts (TVPA), the original Act of 2000 and the 2008 amendment. NIWAP provides direct technical assistance and training for attorneys, advocates, state family court judges, immigration judges, Board judges and judicial staff, police, sheriffs, prosecutors, Department of Homeland Security adjudication and enforcement staff, and other professionals. This case has the potential to impact access to the protections for immigrant victims of domestic violence, child abuse, sexual assault, stalking, and human trafficking that Congress specially created for immigrant victims and their children.

The Asian Pacific Institute on Gender-Based Violence is a national resource center on domestic violence, sexual violence, trafficking, and other forms of gender-based violence impacting Asian and Pacific Islander and immigrant communities. The Institute supports a national network of advocates and community-based service and advocacy programs that work with Asian and Pacific Islander and immigrant and refugee survivors of domestic violence, sexual assault, human trafficking, and other forms of gender-based violence, and provides analysis and consultation on

critical issues facing victims of gender-based violence in the Asian, Native Hawaiian, Pacific Islander, and immigrant and refugee communities, including training and technical assistance on implementation of legal protections in the Violence Against Women Act and the Trafficking Victims Protection Act for immigrant and refugee survivors. The Institute leads by promoting culturally relevant intervention and prevention, expert consultation, technical assistance and training; conducting and disseminating critical research. As co-chair of the Alliance for Immigrant Survivors, the Institute works to inform public policy to improve systemic and legal responses to survivors and to decrease the ability of abusers to leverage the legal system to further inflict harm.

The National Network to End Domestic Violence (NNEDV) represents the 56 U.S. state and territorial coalitions against domestic violence. NNEDV is dedicated to creating a social, political, and economic environment in which domestic violence no longer exists. NNEDV works to make domestic violence a national priority, change the way society responds to domestic violence, and strengthen domestic violence advocacy at every level. NNEDV was instrumental in the passage and implementation of the Violence Against Women Act. NNEDV has a strong interest in ensuring that immigrant abuse victims, including crime and trafficking victims, have real and practical access to the remedies Congress has created to protect them.

SUMMARY OF ARGUMENT

The Court's decision on the question presented in this case will have broad implications for the ability of noncitizens to access the courts when life-altering decisions are made regarding their immigration status.

The government's position in this case is that its decision to revoke a visa petition on the ground that it never should have been issued is unreviewable, even if a decision to *deny* on the same ground would have been reviewable. If the Court adopts that interpretation, noncitizens seeking vital forms of immigration relief designed to protect those who have been victims of crime or domestic violence, including U visas, T visas, and self-petitions under the Violence Against Women Act (VAWA), may also have their paths to the courthouse blocked, with no ability to challenge administrative legal and factual error.

Such a decision would be contrary to Congress' goals in establishing these forms of immigration relief, and contrary to the presumption of reviewability, which is well-rooted in our legal tradition and in this Court's jurisprudence interpreting the Immigration and Nationality Act (INA). That is particularly worrisome in the context of U-Visas, T-Visas, and VAWA relief, because adjudications for vulnerable individuals who have been victims of domestic abuse, child abuse, sexual assault, human trafficking, or other crime are more prone to error. Those decisions—even more so than others—should be subject to judicial review.

I. The revocation authority for U and T visas is implicated here because the government, by regulation, claims the power to revoke each type of relief, including on the ground that a visa was erroneously issued. *See* 8 C.F.R. § 214.14(h)(2) (U visas); 8 C.F.R. § 214.11(m)(2) (T visas). The government has the statutory power to revoke VAWA self-petitions under the same provision at issue in this case. *See* 8 U.S.C. § 1155. Thus, the Court's interpretation of 8 U.S.C. §

1252(a)(2)(B)(ii) will affect reviewability of government decisions to revoke these other forms of relief designed to offer life-saving protections for victims and their children. Further, the Court's decision implicates the scope of the jurisdictional rule of § 1252(a)(2)(B)(ii) as it applies to other forms of discretionary relief, many of which also affect survivors of domestic violence and human trafficking.

II. Congress' goals in establishing the U and T visas, and in allowing noncitizens to self-petition for relief in cases of domestic abuse and child abuse, strongly support reviewability. U visas were established to shield noncitizens who have been victims of crime from deportation, as well as to encourage cooperation with law enforcement in the investigation and prosecution of criminal activity. *See* Pub. L. No. 106-386, § 1513(a)(1). T visas were established to protect noncitizen victims of human trafficking who assist law enforcement, or are unable to do so because of the harm caused by the trafficking. *See* 22 U.S.C. § 7101(b). And the VAWA self-petition process was established so that noncitizens would not have to rely on an abusive U.S.-citizen or lawful permanent resident spouse, parent or stepparent in seeking immigration relief. *See* 8 U.S.C. § 1154(a)(1)(A), (B); *Bait It v. McAleenan*, 410 F. Supp. 3d 874, 880 (N.D. Ill. 2019) ("Congress sought to prevent the U.S. citizen-abuser 'from using the petitioning process as a means to control or abuse an alien spouse.'") (quoting H.R. Rep. No. 103–395). Congress' express findings regarding the importance of these forms of relief signal that Congress did not intend to give the government unreviewable authority to make eligibility determinations.

III. The presumption of judicial review applies with particular force here. This Court applies a "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480, 486 (2015) (quotation marks omitted). And this Court has "'consistently applied' the presumption of reviewability to immigration statutes." *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229 (2020). Nothing in the text of the INA displaces that presumption here. Congress knows how to clearly and unambiguously strip the courts of the authority to review visa revocation decisions, *see, e.g.*, 8 U.S.C. § 1201(i), but chose not to do so here, suggesting that Congress did not intend to displace the presumption. Allowing review is also consistent with this country's long tradition of judicial review of administrative action, which stands as a bulwark against arbitrary government power. Finally, the government has too often committed both legal and factual error in adjudicating cases where noncitizens seek these special victim-based forms of humanitarian immigration relief, requiring correction by the courts. Given that applicants are often subject to language or cultural barriers, and have been subjected to criminal acts and abusive treatment perpetrated against them in the U.S. and must face the traumatic impact of these events to seek immigration relief Congress created to protect them, the risk of error is especially acute. For that reason, too, the availability of judicial review over denials of protection from human trafficking and domestic violence is crucial.

ARGUMENT

I. The Revocation Authority for U and T Visas and VAWA Self-Petitions is Implicated by This Case.

At issue in this case is the extent of judicial review of government decisions to revoke visa petitions. Had Petitioner Amina Bouarfa's visa petition been originally denied based on a finding of marriage fraud, *see* 8 U.S.C. § 1154(c) (providing that "no petition shall be approved" if the individual seeking a visa has previously entered a marriage "for the purpose of evading the immigration laws"), that decision would have been reviewable in federal court. But the government contends that the decision to revoke on the very same ground is beyond the power of the courts to review. The Court's decision will have far reaching consequences because it will affect reviewability for a wide range of noncitizens seeking immigration relief.

The government has adopted regulations under which it claims discretionary authority over adjudication and revocation of both U and T visas. Given those regulations, the government's authority with respect to both types of visas is implicated by the Court's reviewability determination in this case. To be eligible for a U visa, a noncitizen must (1) have been a victim of a qualifying criminal activity (QCA), which resulted in substantial physical and mental abuse, and (2) provide a certification from a federal, state, tribal, or local law enforcement official, stating that the person has been or is being helpful in the investigation or prosecution of the QCA. *See* 8 U.S.C. § 1101(a)(15)(U); *id.* § 1184(p); 8 C.F.R. § 214.14(c)(2). The Ninth Circuit has held that denials of U visas are reviewable in federal court if the denial is based on a non-discretionary

determination. *See Perez Perez v. Wolf*, 943 F.3d 853, 868 (9th Cir. 2019) (holding that 8 U.S.C. § 1252(a)(2)(B)(ii) does not strip the courts of jurisdiction over challenges to the denial of U visas).

With respect to T visas as well, agency regulations invoke government discretion in its adjudication decision. To be eligible for a T visa, a noncitizen must (1) have been the victims of a severe form of trafficking in persons, and (2) have complied with any reasonable request from law enforcement for assistance in the investigation or prosecution of human tracking, or are unable to cooperate because of physical or psychological trauma. *See* 8 U.S.C. § 1101(a)(15)(T); *id.* § 1184(o); 8 C.F.R. § 214.11. If the noncitizen is inadmissible under the INA, as the majority of T-visa applicants are, they must seek a discretionary waiver of the inadmissibility ground before the visa can be approved. *See* 8 U.S.C. § 1182(d)(3) & (d)(13).

In general, applications for U and T visas never get before either an immigration judge (IJ) or the Board of Immigration Appeals (BIA), rendering judicial review all the more crucial. By regulation, U.S. Citizenship and Immigration Services (USCIS) "has sole jurisdiction over all petitions for U nonimmigrant status." 8 C.F.R. § 214.14(c). Even a noncitizen in removal proceedings or with a final order of removal entered against him or her may only apply for a U visa directly with USCIS. *See id.* USCIS "in its sole discretion" determines the evidentiary value of submitted evidence. 8 C.F.R. § 214.14(c)(5). If a petition is denied, the noncitizen's appeal is to the Administrative Appeals Office of USCIS, not to an IJ or the BIA. 8 C.F.R. § 214.14(c)(5)(ii). With regard to revocation,

USCIS may, on notice to the noncitizen, revoke an approved petition for U nonimmigrant status based on, among other things, error in approval of the petition or fraud in the petition. 8 C.F.R. § 214.14(h)(2). Appeals of such revocations also are filed with the Administrative Appeals Office, not with an IJ or the BIA. 8 C.F.R. § 214.14(h)(3).

In the same vein, "USCIS has sole jurisdiction over all applications for T nonimmigrant status." 8 C.F.R. § 214.11(d). As with denials of U visas, denials of T visas are appealed to USCIS' Administrative Appeals Office. 8 C.F.R. § 214.11(d)(10); *see also* 8 C.F.R. § 214.11(m) (revocations are appealed to the Administrative Appeals Office).

VAWA self-petitions are also not presented to an IJ. "[T]he VAWA self-petitioning process allows an alien spouse of an abusive United States citizen to seek classification as an immediate relative or a preference immigrant by filing a Form I-360 with USCIS." *Franjul-Soto v. Barr*, 973 F.3d 15, 17 (1st Cir. 2020) (citing 8 C.F.R. § 204.1). "The self-petition must 'demonstrate[ ] to the Attorney General that ... during the marriage ... the alien ... has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse.'" *Id.* (quoting 8 U.S.C. § 1154(a)(1)(A)(iii)(I)) (alteration in original). "If, '[a]fter an investigation ... the Attorney General ... determines that the facts stated in the petition are true,' he 'shall ... approve the petition' and award classification as an immediate relative or preference immigrant, and the alien may thereafter be eligible for a visa." *Id.* at 17-18 (quoting 8 U.S.C. § 1154(b)). Denials of VAWA self-petitions are also appealed to the USCIS' Administrative Appeals Office. *See* 8 C.F.R. § 103.3.

The government exercises revocation authority with respect to U visas, T visas, and VAWA self-petitions. With respect to U visas, the Department of Homeland Security (DHS) has adopted regulations that allows it to revoke such visas. *See* 8 C.F.R. § 214.14(h)(2). DHS has argued—and at least one court has deferred to it on this point—that its power to do so is authorized by statute. *See Chaparro Navarro v. Dep't of Homeland Sec.*, 612 F. Supp. 3d 986, 995 (N.D. Cal. 2020). Section 1184(a)(1) gives the Secretary of Homeland Security the authority to prescribe, by regulation, the time and conditions of admission of any nonimmigrant. A decision that 8 U.S.C. § 1252(a)(2)(B)(ii) proscribes judicial review of the marriage-fraud determination at issue in this case could equally apply to bar judicial review where USCIS revokes a visa under 8 C.F.R. § 214.14(h)(2)(i)(B) on the ground that the noncitizen was not eligible for a U visa in the first place.

DHS has also adopted regulations authorizing it to revoke T visas. *See* 8 C.F.R. § 214.11(m). A decision that 8 U.S.C. § 1252(a)(2)(B)(ii) proscribes judicial review of the marriage-fraud determination at issue in this case could equally apply to bar judicial review where USCIS revokes a visa that it unilaterally determines was approved in error under 8 C.F.R. § 214.11(m)(2)(i)[2] because the noncitizen was not eligible for a T visa in the first place.

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[2] This provision will be redesignated as 8 C.F.R. § 214.213(b)(1) effective August 28, 2024. *See* Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status, 89 Fed. Reg. 34864, 34940 (Apr. 30, 2024).

With respect to VAWA self-petitions, the government also retains the authority to revoke a petition grant. Since 8 U.S.C. § 1155 allows the revocation of any petition approved under 8 U.S.C. § 1154, it also permits the revocation of a VAWA self-petition under 8 U.S.C. § 1154(a)(1)(A)(iii). Thus, a decision that the marriage-fraud determination is unreviewable because Section 1155 gives unfettered and unreviewable discretion to the agency would equally bar review with regard to a VAWA self-petitioner whose status the agency wishes to revoke. *See, e.g.*, *Manguriu v. Lynch*, 794 F.3d 119, 122 (1st Cir. 2015) ("USCIS revoked the petitioner's VAWA petition on the basis of marriage fraud."); Revocation of VAWA-Based Self-Petitions (Aug. 5, 2002), 9 Immigration Law Service 2d PSD Selected DHS Document 4810 ("[E]ffective the date of this memorandum, the [Vermont Service Center] shall have sole authority to revoke an approved VAWA-based self-petition."); *see also* Revocation of VAWA Self-Petitions, 2 Immigration Law Service 2d § 7:169. USCIS recognizes that marriage fraud findings are particularly fraught because these findings will often rely at least in part on perpetrator-provided information. Reliance solely on that information to reach a marriage-fraud finding in a domestic violence case usually implicates the confidentiality provisions of VAWA. *See* 8 U.S.C. § 1367. As a result, USCIS' VAWA self-petition policy manual gives VAWA self-petition adjudicators the ability to decide *de novo*, considering the totality of the circumstances and facts in the self-petitioner's case, whether there was marriage fraud at all. *See* USCIS Policy Manual, Chapter 3 – Effect of Certain Life Events, ("Officers may not rely solely on a prior finding of marriage fraud but must make a

separate and independent determination that the self-petitioner previously engaged in marriage fraud."), *available at* https://www.uscis.gov/policy-manual/volume-3-part-d-chapter-3.

II. Congressional Goals as Embodied in the Statutory Provisions and the Overall Statutory Scheme for U and T Visas and VAWA Self-Petitions.

The importance of judicial review of administrative determinations with respect to U and T visas, as well as VAWA self-petitions, is evident from Congress' goals in enacting each type of immigration relief.

In establishing the U visa, Congress sought to encourage immigrant victims of domestic violence, child abuse, and other specified criminal activity to cooperate with police and prosecutors, both to provide relief to the victims of such crimes, and to facilitate their investigation and criminal prosecution. U visas were established as part of the Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106–386 (Oct. 28, 2000). Congress made explicit findings and expressions of purpose in the Act. Specifically, Congress found that "[i]mmigrant women and children are often targeted to be victims of crimes committed against them in the United States, including rape, torture, kidnaping, trafficking, incest, domestic violence, sexual assault, female genital mutilation, forced prostitution, involuntary servitude, being held hostage or being criminally restrained." Pub. L. No. 106-386, § 1513(a)(1)(A). "All women and children who are victims of these crimes committed against them in the United States," Congress explained, "must be able to report these crimes to law enforcement and fully participate in the investigation of the crimes committed

against them and the prosecution of the perpetrators of such crimes." *Id.* § 1513(a)(1)(B).

Accordingly, Congress created the U visa "to 'strengthen the ability of law enforcement agencies to detect, investigate, and prosecute' the specified crimes, and to 'offer[ ] protection to victims of such offenses in keeping with the humanitarian interests of the United States.'" *Contreras Aybar v. Sec'y U.S. Dep't of Homeland Sec.*, 916 F.3d 270, 272 (3d Cir. 2019) (quoting Pub. L. No. 106-386, § 1513(a)(2)(A)) (alterations in original). "Creating a new nonimmigrant visa classification will facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status." Pub. L. No. 106-386, § 1513(a)(2)(B). At the same time, it "gives law enforcement officials a means to regularize the status of cooperating individuals during investigations or prosecutions." *Id.* Finally, Congress explained that "[p]roviding temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States." *Id.* The method by which these petitions must be adjudicated also reflects the humanitarian purpose served by U visas. As part of the statutory scheme, Congress directed the government to consider "any credible evidence" relevant to the petition. 8 U.S.C. § 1184(p)(4). In other words, the government is not permitted to demand specific types of evidence of a noncitizen who seeks a U visa, which types may ordinarily be difficult for noncitizens to obtain when they are suffering abuse or their safety is at risk, but must consider the totality of the evidence provided in assessing the noncitizen's eligibility.

In establishing the T visa, Congress also sought to serve important goals: providing relief to survivors of human trafficking and facilitating the investigation and criminal prosecution of traffickers. T visas were established as part of the Trafficking Victims Protection Act, 22 U.S.C. § 7101 *et seq*. (2000). As Congress explained, its purpose was "to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims." 22 U.S.C. § 7101(a). Congress included over 24 paragraphs of findings. 22 U.S.C. § 7101(b). Most notably, Congress found that:

- "Traffickers primarily target women and girls, who are disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities in countries of origin." *Id.* § 7101(b)(4);
- "Victims are often forced through physical violence to engage in sex acts or perform slavery-like labor. Such force includes rape and other forms of sexual abuse, torture, starvation, imprisonment, threats, psychological abuse, and coercion." *Id.* § 7101(b)(6);
- "Trafficking also involves violations of other laws, including labor and immigration codes and laws against kidnapping, slavery, false imprisonment, assault, battery, pandering, fraud, and extortion." *Id.* § 7101(b)(10);
- "Existing laws often fail to protect victims of trafficking, and because victims are often illegal immigrants in the destination country, they are repeatedly punished more harshly

than the traffickers themselves." *Id.* § 7101(b)(17);

- "[V]ictims often find it difficult or impossible to report the crimes committed against them or to assist in the investigation and prosecution of such crimes." *Id.* § 7101(b)(20);
- "Current practices of sexual slavery and trafficking of women and children are … abhorrent to the principles upon which the United States was founded," including the principle of the inherent dignity and worth of all people. *Id.* § 7101(b)(22);
- "The United States and the international community agree that trafficking in persons involves grave violations of human rights and is a matter of pressing international concern." *Id.* § 7101(b)(23); and
- "Trafficking in persons is a transnational crime with national implications. To deter international trafficking and bring its perpetrators to justice, nations including the United States must recognize that trafficking is a serious offense. This is done by prescribing appropriate punishment, giving priority to the prosecution of trafficking offenses, and protecting rather than punishing the victims of such offenses." *Id.* § 7101(b)(24).

The upshot is clear: trafficking in persons is a scourge, and the United States must offer refuge to noncitizen victims willing to help combat it by providing assistance to law enforcement.

Finally, the VAWA self-petition process exists to

protect noncitizens from abuse from their U.S. citizen and lawful permanent resident spouses and parents. *See* 8 U.S.C. § 1154(a)(1)(A), (B); *Bait It*, 410 F. Supp. 3d at 880 ("Congress sought to prevent the U.S. citizen-abuser 'from using the petitioning process as a means to control or abuse an alien spouse.'") (quoting H.R. Rep. No. 103–395). VAWA was designed "to permit battered spouses to leave their abusers without fear of deportation or other immigration consequences." *Henton v. U.S. Att'y Gen.*, 520 F. App'x 801, 804 (11th Cir. 2013) (per curiam).

Congress' express purpose and findings establish that U visas, T visas, and the VAWA self-petition process are critical to protect noncitizens from severe harm and facilitate the solving and punishment of crime and abuse. Recognizing the special nature of these types of immigration relief, Congress even removed authority over some applications from regular USCIS adjudicators, and mandated that these applications be adjudicated in a specialized unit. In 1997, the Immigration and Naturalization Service (INS) consolidated adjudication of VAWA self-petitions and VAWA-related cases in one specially trained unit that adjudicates all VAWA immigration cases nationally. T-visa and U-visa adjudications were also consolidated in the specially trained VAWA unit. *See* H.R. Rep. 109-233, 114, 120, 2005 U.S.C.C.A.N. 1636, 1666, 1672 (2005). Congress acknowledged the potentially higher risk of error in these cases, and has strongly supported the creation of a specially trained unit to adjudicate each of the victim-based forms of immigration relief created by VAWA and the TVPA. *See* H.R. Conf. Rep. 107-278, 79, 2002 U.S.C.C.A.N. 793, 808

(2001) ("[T]he conferees adopt by reference Senate direction to provide $5,500,000 to the Eastern Adjudication Service Center to process immigration self-petitions and U visas under the Violence Against Women Act, and T visas under the Victims of Trafficking and Violence Protection Act, and agree that of this amount, $500,000 shall be for the Eastern Adjudication Center as directed by the Senate.").

III. The Presumption of Judicial Review Applies with Particular Force Here, in this Immigration Context, where Congress Singled Out Particular Vulnerable Groups for Protection.

The Court's decision in this case will also have important implications for courts' understanding of the presumption of reviewability. The Court has repeatedly recognized the importance of judicial review, especially in the immigration context. "Congress rarely intends to prevent courts from enforcing its directives to federal agencies. For that reason, this Court applies a strong presumption favoring judicial review of administrative action." *Mach Mining*, 575 U.S. at 486 (quotation marks omitted). That presumption is rebuttable "when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct." *Id.* But an executive agency bears a heavy burden in trying to establish the nonreviewability of its actions. *Id.*

This Court has "'consistently applied' the presumption of reviewability to immigration statutes." *Guerrero-Lasprilla*, 589 U.S. at 229 (quoting *Kucana v. Holder*, 558 U.S. 233, 251 (2010)). In *Kucana*, for example, the Court applied the presumption and held that "[a]ction on motions to reopen … remain subject to judicial review" notwithstanding 8 U.S.C. §

1252(a)(2)(B)(ii). 558 U.S. at 253. In *Guerrero-Lasprilla*, the Court again applied the presumption and held that mixed questions of law and fact are reviewable under the Limited Review Provision, 8 U.S.C. § 1252(a)(2)(D). 589 U.S. at 229-30.

The text of the INA militates against the government's assertion of non-reviewability. "Congress knows how to" clearly rebut the presumption of judicial review in the INA—but it did not do so here. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252 (2010). If Congress had wanted to bar judicial review of revocation decisions pursuant to Section 1155, it could have used language similar to other provisions of the INA that unambiguously bar such review. For example, Congress has provided that visa revocation decisions by consular officers or the Secretary of State are unreviewable. *See* 8 U.S.C. § 1201(i) (providing that "[a]fter the issuance of a visa or other documentation to any alien, the consular officer or the Secretary of State may at any time, in his discretion, revoke such visa or other documentation. … There shall be no means of judicial review (including review pursuant to section 2241 of title 28 or any other habeas corpus provision, and sections 1361 and 1651 of such title) of a revocation under this subsection, except in the context of a removal proceeding if such revocation provides the sole ground for removal under section 1227(a)(1)(B) of this title."). Congress' decision not to include similar language in Section 1155 suggests that it did not intend to bar review of revocation decisions. At least, the failure of Congress to expressly shield such decisions from review suggests that the government has not carried its heavy burden to rebut the presumption of reviewability.

A. There is a Long Tradition of Judicial Review in Immigration Matters, Which has Many Salutary Effects.

Judicial review in the immigration context has a long history, and is essential in correcting agency misinterpretation of law. More than a century ago, this Court overturned a determination that a noncitizen was a "public charge," which determination was grounded in agency misreading of statute. *See Gegiow v. Uhl*, 239 U.S. 3, 10 (1915). *See also* Louis L. Jaffe, *The Right to Judicial Review I*, 71 Harv. L. Rev. 401, 425-26 (1958) (deeming the Court's *Gegiow* decision a "strong manifestation of a general presumption of reviewability"). As Professor Jaffe observed a half-century ago when detailing the history of the right to judicial review, justices of the peace in 18th Century England engaged in administrative activities "within well-defined areas: laws relating to the poor, to liquor licensing, to apprentices, and to game protection, and to the levy of rates to support these minimum functions." *Id.* at 404. This is the "tradition which we inherited in colonial times and which we carried over more or less intact into the states and the nation. Our Revolution emphasized once more the themes of a limited government and a limited executive." *Id.*

This tradition came under aggressive attack in Professor Jaffe's time: "[D]uring the New Deal, our courts, belabored for their hostility to administration (and quite correctly belabored), appeared to yield somewhat to the arguments for executive autonomy and omnipotence." *Id.* "But the conservative interest in this country showed more elasticity, more vigor and self-assurance; the courts, backed by a written Constitution, recovered from their sense of guilty usurpation,

and in these latter days even the New Deal liberals have rushed to the defense and reinvigoration of judicial review." *Id.* It is "the teaching of our history and tradition" that "an individual whose interest is acutely and immediately affected by an administrative action presumptively has a right to secure at some point a judicial determination of its validity." *Id.* at 420. That right can be no more urgent than where individuals face severe harm from domestic violence, child abuse, sexual assault, human trafficking, and other violent crimes, and uncorrected administrative error threatens to sustain or even exacerbate such harm, while at the same time undermining the ability of law enforcement and prosecutors to successfully prosecute perpetrators.

In addition to being part of the American tradition, judicial review in the immigration context has numerous salutary effects. Federal courts possess "independence and generalist legal knowledge," which "effectively improve the quality of the decisions that actually are reviewed in court." Stephen H. Legomsky, *Political Asylum and the Theory of Judicial Review*, 73 Minn. L. Rev. 1205, 1210 (1989). Moreover, "judicial review also serves another function, one that operates even in cases that never reach court": to encourage administrative decisionmakers to make more logical, carefully reasoned decisions. *Id.* "The mere *possibility* that an alien will seek judicial review of an asylum decision encourages the various administrative authorities to study the case carefully and to state their reasoning intelligibly. The process of drafting reasoned dispositions can help administrative decisionmakers expose and resolve analytical problems on

their own." *Id.* at 1210-11. "[J]udicial review in federal court" also "provides a structure for the gradual development of legal doctrine." *Id.* at 1211. Finally, judicial review "may have its own efficiency value," allowing courts to clarify the meaning of statutory text and thus promote greater predictability in immigration law. Lenni B. Benson, *You Can't Get There from Here: Managing Judicial Review of Immigration Cases*, 2007 U. Chi. Legal F. 405, 431-32 (2007).

Judicial review is especially important in the immigration context given that vulnerable immigrants could suffer greatly from uncorrected administrative errors. *See Mia v. Renaud*, No. 22-CV-2098 (FB), 2023 WL 7091915, at *5 (E.D.N.Y. Oct. 26, 2023) (rejecting "a broad construction § 1252(a)(2)(B)(ii)" because it "would suppose that, for the past twenty-five years, Congress has been silent about its intent to deprive numerous, vulnerable people of the opportunity for a federal court to review blatant administrative errors"); *Wanrong Lin v. Nielsen*, 377 F. Supp. 3d 556, 565 (D. Md. 2019) (explaining that it is in the public interest for courts to bar "arbitrary and capricious agency action towards vulnerable undocumented immigrants"). Recognizing this, Congress has repeatedly intervened to correct agency errors in this area, including, as mentioned above, through supporting the creation of a specialized unit to handle certain types of immigration cases.

B. Judicial Review is Essential to Correct Legal and Systemic Analytical Errors.

The government's adjudication of U-visa and VAWA self-petition cases has too often been affected by legal error. For example, in *Arguijo v. United States Citizenship & Immigr. Servs.*, 991 F.3d 736 (7th

Cir. 2021), the Seventh Circuit held that "in the context of the Violence Against Women Act 'stepchild' status survives divorce." *Id.* at 740. Its ruling repudiated USCIS' narrow construction of VAWA, which would have "defeat[ed] application of the substantive rule that abused stepchildren are entitled to an immigration benefit." *Id.* at 739. Another example is *Medina Tovar v. Zuchowski*, 982 F.3d 631 (9th Cir. 2020) (en banc). There, the Ninth Circuit held that USCIS had gone beyond its statutory authority in requiring U-visa applicants who wished to include their spouses as U-visa derivatives to show their marriage existed at the time of the U-visa application instead of just at the time of adjudication. *Id.* at 644. And in *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003), the Ninth Circuit rejected the government's misinterpretation of the term "extreme cruelty" as used in the VAWA. *Id.* at 838-41. Without judicial review, these agency errors would have gone uncorrected and survivors of abuse would have lost lifechanging immigration outcomes granted to them by Congress. And the government's circumscribed view of judicial review here would potentially render future errors beyond the power of the courts to fix.

Removing judicial review would also leave uncorrected systematic analytical errors made by the agency. Domestic abuse issues, which often arise in the context of VAWA self-petitions and U visa cases, pose special challenges of adjudication that may increase the risk of such errors. *See, e.g., Khawam v. Wolfe*, 214 A.3d 455, 461-62 (D.C. 2019) (explaining that "implicit bias is a matter of real concern" where claims of domestic violence are raised and "in the particular context of family law," and citing D. Epstein &

L. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. Pa. L. Rev. 399 (2019)). T-visa petitions may also be implicated to the extent that language or cultural barriers, misunderstood trauma response, fundamental misunderstanding of the nature of coercion often used on trafficking victims, or similar factors, make agency factual determinations less reliable. A brief explanation of some of those aspects may help both to illuminate Congress' decision to establish a specialized adjudication unit for these cases, and to explain the need for some review. *See* H.R. Rep. 109-233, 114, 120, 2005 U.S.C.C.A.N. 1636, 1666, 1672 (2005).

Research demonstrates the heightened risk of error where an individual has experienced trauma as a result of being a victim of domestic violence. Many domestic violence victims are unable to recount their experiences in an internally consistent manner. That is because domestic violence frequently results in both neurological and psychological trauma, either or both of which can severely hamper memory and comprehension. The scientific literature shows that trauma often causes survivors' testimony to be disjointed, nonlinear, and fragmented, which makes it appear to be internally inconsistent and implausible.[3] Thus, the

[3] Like traumatic brain injury, psychological trauma and extreme stress severely undermine survivors' ability to remember all of the details of their experiences or to recount them in a linear manner. Sarah L. Halligan et al., *Cognitive Processing, Memory, and the Development of PTSD Symptoms: Two Experimental Analogue Studies*, 33 J. Behav. Therapy & Experimental Psychiatry 73, 73–74 (2002). Traumatic memories are "pro-
(continued)

fragmented nature of testimony about abuse—the very factor that would demonstrate to an expert the *truth* of the alleged trauma—is sometimes mistakenly used to discount, rather than corroborate, a survivor's credibility.

More specifically, a large number of domestic violence victims experience some form of traumatic brain injury, often from blunt force trauma to the head or from reduced oxygen to the brain from strangulation. For example, in one study of women in New York domestic violence shelters, 92% responded that they had been hit in the head more than once by their partners, with 8% having been hit in the head more than twenty times in the previous year. 40% of respondents had lost consciousness as a result of these assaults. Helene Jackson et al., *Traumatic Brain Injury: A Hidden Consequence for Battered Women*, 33 Prof. Psychol. 39, 41 (2002).

Traumatic brain injury, which is commonly associated with impaired memory of the event, or "retrograde amnesia," *see* Sharon Gil et al., *Review Article,*

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cessed differently than ordinary memories. This results in a failure to organize the traumatic event into a coherent verbally represented narrative. The *abnormal* nature of traumatic memories is considered to be a *central* feature of PTSD." Sharon Gil et al., *Review Article, Memory of the Traumatic Event as a Risk Factor for the Development of PTSD: Lessons from the Study of Traumatic Brain Injury*, 11 CNS Spectrums 603, 604 (2006) (emphases added) (endnotes omitted). Such memories may first arise as mere fragments of a sound, a feeling, or a touch. Halligan, *supra*, at 74. This phenomenon is well-established in the scientific literature, and may be explained by the way the brain focuses on "sensory impressions" during a traumatic event, rather than processing the context and meaning of what is occurring. *Id.* at 74, 87.

Memory of the Traumatic Event as a Risk Factor for the Development of PTSD: Lessons from the Study of Traumatic Brain Injury, 11 CNS Spectrums 603, 605 (2006), can have a profound effect on a victim's ability to recall what occurred in a linear sequence or to clearly recall the details of an event. "Even mild [traumatic brain injury]—which can occur after only a short period without oxygen to the brain—can result in a significant and profound impact on memory and behavior, inducing symptoms such as confusion, poor recall, inability to link parts of the story together or to articulate a logical sequence of events, uncertainty about detail, and even recanting of stories." Epstein, *Discounting Women*, *supra*, at 408.

To those familiar with traumatic brain injury, the impressionistic character of a survivor's testimony about an abusive incident is perfectly consistent with her allegations; indeed the fragmented way she presents her story makes her account more plausible. However, to most adjudicators, such testimony fails to meet the traditional standards of internal consistency and coherence used to determine credibility in other contexts. To them, the disjointed nature of the survivor's testimony makes it sound *im*plausible. Thus, the more careful a survivor is to provide details in her application about what she actually does and does not recall about the trauma she experienced, the less plausible she may appear to an adjudicator, causing her testimony to be mistakenly—and unfairly—discounted.

Trauma also affects the demeanor of domestic violence victims in ways that predictably lead to credibility discounting. *See* Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding*

Judicial Resistance and Imagining the Solutions, 11 Am. U. J. Gender Soc. Pol'y & L. 657, 691-92 (2003). For example, flashbacks—intrusive memories experienced as happening in the "here and now," Oliver Sundermann et al., *Perceptual Processing During Trauma, Priming and the Development of Intrusive Memories*, 44 J. Behav. Therapy & Experimental Psychiatry 213, 213 (2013)—can impair a survivor's ability to testify in a "normal" sequential fashion, Epstein, *Discounting Women*, *supra*, at 422.

Even if a survivor is able to testify coherently about her experience, a significant disconnect may exist between her demeanor and an adjudicator's expectations of how a credible witness would present on the stand. For example, one symptom of PTSD is emotional numbness, causing survivors to testify about their experience of abuse with an entirely flat affect. *Id.* at 421. A witness' unemotional demeanor when testifying about a harrowing experience, such as a sexual assault, may be jarring to an adjudicator expecting a strong emotional reaction. Similarly, hyperarousal, another core element of PTSD, "can cause a victim to seem highly paranoid or subject to unexpected outbursts of rage," and thus to seem less trustworthy. *Id.* Both categories of PTSD symptoms may therefore result in the imposition of an erroneous credibility discount. This substantial body of research about the effect of trauma on crime victims underscores the need for judicial review as a backstop against erroneous factual determinations in agency adjudications.

Moreover, there are several persisting and widespread assumptions about abuse which diverge from the actual experience of most survivors, resulting in

discounting nonconforming testimony as implausible and thus, leading to incorrect credibility assessments and decisions in U visa, T visa, and VAWA petitions and revocations. *First*, if the abuse was serious, a woman would not continue her relationship with her abuser. However, many have nowhere to go or lack resources or believe there will be retribution by the abusive partner for leaving, including harming their children. *See, e.g.*, Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 Am. J. Pub. Health 1089, 1092 (2003).

Second, physical abuse might seem worse than psychological abuse and, thus, a "real" victim would focus her testimony primarily on the former. However, many women experience psychological harm as more salient and more damaging than physical abuse. Epstein, *Discounting Women*, *supra*, at 418. In addition, research shows that psychological abuse, not physical violence, plays the largest role in the development of PTSD symptoms and depression. *See, e.g.*, Mary Ann Dutton, Lisa A. Goodman & Lauren Bennett, *Court-Involved Battered Women's Responses to Violence: The Role of Psychological, Physical, and Sexual Abuse*, 14 Violence & Victims 89 (1999); Maria Angeles Pico-Alfonso, *Psychological Intimate Partner Violence: The Major Predictor of Posttraumatic Stress Disorder in Abused Women*, 29 Neuroscience & Biobehav. Revs. 181, 188 (2005). Research also shows that immigrant survivors stay in abusive relationships longer and suffer more harm, in part because many do not leave the relationship until they are able to obtain legal work authorization. *See generally* Giselle Aguilar Hass, Nawal Ammar, & Leslye Orloff, *Battered Immigrants*

and U.S. Citizen Spouses, *available at* https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/BB_RSRCH_ImmVictims_Battered_Imm.pdf.

Third, victims of physical and sexual abuse always report the abuse and possess external evidence corroborating their allegations. In fact, lack of physical evidence and the absence of contemporaneous reports of domestic violence is the norm. "Proof of domestic violence is extremely difficult because of the nature and effects of the violence itself. Because of the effects of the violence on its victims, they have a tendency to react in ways that make the violence invisible. It is rarely reported to officials who might keep records." Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. Ill. U. L. Rev. 403, 415 (2005). These sorts of misconceptions about the experiences and evidence available to noncitizen survivors have the propensity to lead to erroneous denials or revocations of any immigration benefit submitted by a survivor. This could include marriage-based petitions submitted by people who happen to be survivors of abuse or crime, and could especially include U visa, T visa, or VAWA petitions, which are forms of relief that Congress found were of utmost importance for humanitarian, law enforcement, and public safety reasons.

If judicial review of decisions to revoke these forms of relief is not preserved, these vulnerable individuals will have no way to address erroneous adverse actions, and the will of Congress to provide special protections that account for their special vulnerabilities will have been thwarted.

Finally, revocation on the ground that the visa petition was erroneously granted could occur in problematic circumstances, such as a criminal conviction linked to trafficking or domestic violence or immigration officials revoking an approved self-petition relying solely upon information provided by a domestic violence or child abuse perpetrator in violation of 8 U.S.C. § 1367 (the VAWA confidentiality protections). This raises the risk of factual error due to bias and underscores the need for judicial review.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

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Respectfully submitted,

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