No. 22-666

In the Supreme Court of the United States

SITU KAMU WILKINSON, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR ORGANIZATIONS ASSISTING SURVIVORS OF DOMESTIC VIOLENCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are nonprofit organizations that advocate for and on behalf of immigrant survivors of domestic violence. Amici have a direct interest in ensuring that noncitizens facing removal—and, especially, noncitizens who have been victims of domestic violence—have access to meaningful judicial review.

The Asian Pacific Institute on Gender-Based Violence (formerly, Asian & Pacific Islander Institute on Domestic Violence) is a national resource center on

[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part and no person or entity other than *amici* or their counsel made a monetary contribution to its preparation or submission.

domestic violence, sexual violence, trafficking, and other forms of gender-based violence in the Asian and Pacific Islander communities. The Institute serves a national network of advocates and community-based service programs that work with Asian and Pacific Islander ("API") and immigrant survivors, and provides analysis on critical issues facing victims in the API and immigrant communities, including training and technical assistance on gender-based violence during the course of the life cycle, barriers facing API victims of gender-based violence in immigration proceedings and civil and criminal legal processes. The Institute promotes culturally relevant intervention and prevention, provides expert consultation, technical assistance and training, conducts and disseminates critical research, and informs public policy on issues facing immigrant survivors of gender-based violence, including through its leadership in partnerships through the Alliance for Immigrant Survivors (www.immigrantsurvivors.org), and the National Taskforce to End Sexual and Domestic Violence. Of particular concern for the Institute is that immigrant victims of gender-based violence have meaningful access to justice and critical protections against abuse and exploitation afforded to victims across all communities.

ASISTA Immigration Assistance ("ASISTA") is a national non-profit 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.

The **National Immigrant Justice Center ("NIJC")** is a Chicago-based national non-profit organization that provides free legal representation to low-income noncitizens. In collaboration with pro bono attorneys, NIJC represents hundreds of victims of domestic violence, human trafficking, and other specified criminal offenses at any given time, before the Asylum Office, the Immigration Courts, the Board of Immigration Appeals, and the Federal Courts.

National Immigrant Women's Advocacy Project, Inc. ("NIWAP") 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 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 involves ensuring access to VAWA cancellation of removal by abused immigrant spouses and children who suffered battering or extreme cruelty perpetrated by their U.S. citizen or lawful permanent resident spouses, parents or step-parents who have refused to sponsor the victim's application for lawful permanent residence. VAWA cancellation of removal was designed to help battered immigrant spouses and children escape their abuser's grasp. NIWAP attorneys were actively involved in drafting VAWA's protections for immigrant abuse victims. As such, NIWAP has a unique interest in ensuring that VAWA is interpreted and applied correctly to immigrant survivors of domestic and child abuse.

The **Tahirih Justice Center** 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 mutilation/cutting. 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 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.

SUMMARY OF ARGUMENT

To address challenges faced by immigrant victims of domestic violence, Congress enacted in the Violence Against Women Act ("VAWA") a "[s]pecial rule for [a] battered spouse or child" seeking cancellation of removal. 8 U.S.C. 1229b(b)(2). Cancellation of removal under VAWA requires a showing that "removal would result in extreme hardship" to the noncitizen or to her child or parent. 8 U.S.C. 1229B(b)(2)(A)(v). This determination is subject to judicial review under the same "Limited Review Provision" that is at issue in this case. *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1067 (2020) (citing 8 U.S.C. 1252(a)(2)(D)). While the reviewability of "extreme hardship" determinations under VAWA need not be resolved in this case, the government's position—which apparently seeks to foreclose review of *all* hardship determinations—risks also foreclosing or limiting review under VAWA.

The government's position thus risks harm to immigrant victims of domestic violence and child abuse, many of whom already "live trapped and isolated in violent homes, afraid to turn to anyone for help. They fear both continued abuse if they stay … and deportation if they attempt to leave." H.R. Rep. No. 103-395, at 26 (1993).

Consider a noncitizen who faces deportation because her abusive U.S. citizen spouse subjected her or her children to extreme cruelty and then turned her in to immigration authorities who initiate removal proceedings against her (using the immigration system as a tool for further abuse), and where removal would cause hardship to her and her children. And the noncitizen—despite it all—manages to prepare and present a meritorious case for cancellation of removal under VAWA. She

could nonetheless be deported if an immigration judge and a single judge on the Board of Immigration Appeals ("BIA") erroneously conclude that she failed to show extreme hardship—perhaps because of a systemic misinterpretation of the statutory standard or a misapplication of law to fact. Denying review would exclude any Article III review of a vitally important determination, preventing courts from providing any relief for the agency's error. And it would deny the immigrant victim the opportunity to plead her case in court that she merits the heightened protections Congress promised.

ARGUMENT

I. As Congress Has Recognized, Immigrant Victims Of Domestic Violence Face Distinctive And Devastating Challenges

A. Immigrant Victims Of Domestic Violence Face Devastating Hardships

Immigrant victims of domestic violence face not only the already overwhelming challenges faced by victims of domestic violence and by noncitizens, but also harrowing challenges caused by the intersection of the two, which can make it particularly difficult for immigrant victims of domestic violence and child abuse to access the help they need.

1. Domestic violence has long been a pervasive and tragically misunderstood problem in the United States. See *Georgia* v. *Randolph*, 547 U.S. 103, 117 (2006) ("[W]e recognize that domestic abuse is a serious problem in the United States"); see generally Nancy K.D. Lemon, *Domestic Violence Law* (5th ed. 2018).

Over 10 million adults in the United States are estimated to be victims of domestic violence each year. See Ruth W. Leemis et al., Nat'l Center for Inj. Prevention

& Control, *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Intimate Partner Violence* 4 (2022).[2] Over their lifetimes, 41% of women and 26% of men experience sexual violence, physical violence, and/or stalking, and 47% of adults experience psychological aggression perpetuated by an intimate partner. *Ibid.*

Children, too, are victims of domestic violence. About 16 million women and 11 million men who reported experiencing sexual violence, physical violence, or stalking by an intimate partner first experienced these forms of violence before the age of 18. Ctrs. for Disease Control & Prevention, *Fast Facts: Preventing Intimate Partner Violence* (Oct. 11, 2022).[3] And approximately 10% of all children in the United States are exposed to domestic violence annually, which comes with an increased risk of a variety of adverse consequences, including post-traumatic stress disorder, academic problems, and increased substance abuse. See Martin R. Huecker et al., *Domestic Violence*, StatPearls (Apr. 9, 2023).[4] Additionally, 1 in 7 children experience child abuse annually in the United States. Ctrs. for Disease Control & Prevention, *Fast Facts: Preventing Child Abuse & Neglect* (Apr. 6, 2022).[5]

Despite its prevalence, however, domestic violence is often missed or misunderstood. No one common trait

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[2] https://www.cdc.gov/violenceprevention/pdf/nisvs/NISVSReportonIPV_2022.pdf.

[3] https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html.

[4] https://www.ncbi.nlm.nih.gov/books/NBK499891/.

[5] https://www.cdc.gov/violenceprevention/childabuseandneglect/fastfact.html.

identifies victims of domestic violence. See Janice Kaguyutan et al., Am. Bar Ass'n, Comm'n on Domestic Violence & Ayuda, *Domestic Violence & Immigration*, at 10 (Bette Garlow et al. eds., 2000)[6] (hereinafter "ABA Manual"). People of all races, ethnicities, ages, socioeconomic statuses, national origins, and sexual orientations face domestic violence. *Ibid.* Women and racial and ethnic minority groups, however, face domestic violence at higher rates than other demographic groups. Michele C. Black et al., Nat'l Ctr. for Inj. Prevention & Control, *The National Intimate Partner and Sexual Violence Survey* 39 (2011). And abuse may be difficult to recognize—and the hardship it causes difficult to accurately assess—because of the diverse forms it may take, including (among others) physical and sexual violence, psychological abuse, and/or economic abuse. See ABA Manual at 11-13.

The difficulty of recognizing and addressing domestic violence is exacerbated because the fear of further harm often prevents victims of domestic violence from seeking help or trying to leave an abusive relationship. See *id.* at 21. Victims of domestic abuse often do not report the abuse and stay in abusive relationships out of concern for themselves or their children or any number of psychological, cultural, religious or economic reasons. *Ibid.*

2. These challenges are compounded for immigrant victims of domestic violence.

Specifically, abusers frequently use various systems to gain and maintain power and control over immigrant domestic partners by exploiting the immigrant's status. These include, among many other forms of abuse:

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[6] https://niwaplibrary.wcl.american.edu/pubs/abavawamanual2000.

- Threatening to report the immigrant victim and get her deported;
- Threatening to gain custody over her children or abduct them from the United States;
- Refusing to take steps to legalize her immigration status;
- Forcing her to sign papers she does not understand;
- Controlling her ability to work or forcing her to work illegally; and
- Isolating her from friends, family members, or other members of her community or culture.

ABA Manual at 13-15 (listing these and other forms of abuse that immigrant victims face).

Immigrant women face a heightened risk of severe domestic violence victimization, including intimate partner homicide. Immigrant women in the U.S. experience domestic violence rates of between 30-50%, which rise to 59.5% among immigrant women who are married or formerly married. See Giselle Aguilar Hass et al., *Battered Immigrants and U.S. Citizen Spouses* 2 (2006).[7] Among intimate partner homicide victims in the United States, immigrant victims are disproportionately represented compared to their representation in the population. See Michael Runner et al., Fam. Violence Prevention Fund, Robert Wood Johnson Found., *Intimate Partner Violence in Immigrant and Refugee Communities: Challenges, Promising Practices and Recommendations* 11 (2009).[8] Immigrants whose immigration status depends on their citizen-spouse-abuser often

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[7] https://niwaplibrary.wcl.american.edu/pubs/battered-immigrants-u-s-citizen-spouses.

[8] https://www.futureswithoutviolence.org/userfiles/file/ImmigrantWomen/IPV_Report_March_2009.pdf.

find themselves in a double bind, either forced to endure continued abuse or else risk compromising their and their children's immigration status.

Immigrant victims of domestic violence also face particular hurdles in seeking support and in building a successful immigration case. See generally ABA Manual at 15-20 (collecting sources). Many immigrants are socially alienated due to the difficulties of acclimating to a new community, culture, and language. *Id.* at 16. Immigrants may also have limited financial resources and difficulty securing employment due to lack of education, skills, or legal authorization to work, and may face additional discrimination as a result of their minority status. *Ibid.* Language barriers can further exacerbate the challenges of abuse, as immigrants who do not speak English may have a difficult time communicating with law enforcement responding to an emergency and thus building an accurate and complete record of their abuse—and abusers may use this as an opportunity to lie to the police and portray the victim as the abuser. *Id.* at 17.

B. With VAWA, Congress Sought To Protect Immigrant Victims

Congress sought to address the challenges faced by immigrant victims of domestic violence when, in a bipartisan effort, it enacted VAWA in 1994 and reauthorized it in 2000, 2005, and 2013. See generally Katrina Castillo et al., *Legislative History of VAWA (94, 00, 05), T and U-Visas, Battered Spouse Waiver, and VAWA Confidentiality* (2023).[9]

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[9] https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/ VAWA_Leg-History_Final.pdf.

1. Congress has recognized, in describing VAWA's purpose, the particular challenges faced by immigrant victims of domestic violence:

> [T]he goal of the immigration protections for battered immigrants included in the Violence Against Women Act of 1994 was to remove immigration laws as a barrier that kept battered immigrant women and children locked in abusive relationships[.] [P]roviding battered immigrant women and children… with protection … frees them to cooperate with law enforcement and prosecutors in criminal cases brought against their abusers and the abusers of their children without fearing that the abuser will retaliate by withdrawing or threatening withdrawal of access to an immigration benefit under the abuser's control[.]

Pub. L. No. 106-386 § 1502, 114 Stat. 1464 (2000).

As the House Judiciary Committee Report explained, "[d]omestic battery problems can become terribly exacerbated in marriages where one spouse is not a citizen, and the non-citizen's legal status depends on his or her marriage to the abuser." H.R. Rep. No. 103-395, at 25-28 (1993). "Consequently," the Report went on, "a battered spouse may be deterred from taking action to protect himself or herself … because of the threat or fear of deportation." *Ibid.* The Report cited a survey that "found the rate of domestic violence among [noncitizen] Latina

women married to U.S. citizens or lawful permanent residents to be 77%." *Ibid.*[10]

2. In VAWA, Congress accordingly enacted (and subsequently reauthorized) several special provisions that provide immigration relief for victims of domestic violence. These include a "self-petition" process that allows certain abused spouses, children, or parents of abused children to file petitions to obtain lawful permanent residency without being sponsored by their citizen (or lawful permanent resident) abuser. See 8 U.S.C. 1154(a)(1)(A)(iii).

Most relevant here, VAWA also provides a special regime for cancellation of removal for immigrant victims of domestic violence. 8 U.S.C. 1229b(b)(2).[11] "VAWA cancellation of removal is 'intended to ameliorate the impact of harsh provisions of immigration law on abused women.'" *Da Silva* v. *Att'y Gen.*, 948 F.3d 629,

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[10] Congress reauthorized and amended VAWA in 2000, similarly guided by the principle that "battered immigrant women should not have to choose to stay with their abusers in order to stay in the United States." 146 Cong. Rec. S10185 (2000) (Statement of Sen. Patrick Leahy). Legislators aimed to "remov[e] obstacles currently hindering the ability of battered immigrants to escape domestic violence safely and prosecute their abusers. *Id.* at S10170 (Statement of Sen. Edward M. Kennedy). And they aspired to "improve the lives of battered immigrants and send them on a path to rebuilding their lives and the lives of their children." 146 Cong. Rec. H9042 (2000) (Statement of Rep. Sheila Jackson-Lee).

[11] The provision was initially enacted as part of VAWA in 1994 as "suspension of deportation," and was modified and renamed "cancellation of removal" and VAWA "cancellation of removal" with the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (1996). See generally Leslye E. Orloff & Janice V. Kaguyutan, *Offering A Helping Hand: Legal Protection For Battered Immigrant Women: A History of Legislative Responses*, 10 J. Gender, Soc. Pol'y & L. 95 (2002).

636 (3d Cir. 2020) (quoting *Hernandez* v. *Ashcroft*, 345 F.3d 824, 840 (9th Cir. 2003)). "[T]he purpose … was to permit battered spouses to leave their abusers without fear of deportation or other immigration consequences." *Henton* v. *U.S. Atty. Gen.*, 520 F. App'x 801, 804 (11th Cir. 2013) (internal citations omitted).

VAWA cancellation of removal is available to, among others, abused spouses, former spouses, children, current or former stepchildren of U.S. citizens or lawful permanent residents, as well as parents of children who are abused by the children's other parent who is a U.S. citizen or lawful permanent resident. 8 U.S.C. 1229b(b)(2)(A)(i). To be eligible for VAWA cancellation, a removable noncitizen must (1) have accrued three years of continuous residence or physical presence in the United States; (2) have been subjected to battering or extreme cruelty while in the United States by their U.S. citizen or lawful permanent resident spouse, former spouse, parent, or stepparent; (3) be of good moral character; and, as most relevant here, (4) show that "removal would result in extreme hardship" to the noncitizen, their child, or their parent. 8 U.S.C. 1229b(b)(2)(A)(i)-(v).

Consistent with Congress's efforts to protect immigrant victims of domestic violence, the standard for cancellation of removal under VAWA is intended to make it easier for victims of domestic violence to secure cancellation of removal than it would be for otherwise similarly situated non-victims. For example, an applicant for VAWA cancellation need show only "extreme hardship" from removal, whereas an applicant otherwise seeking cancellation of removal needs to meet a stricter standard of "exceptional and extremely unusual hardship," 8 U.S.C. 1229b(b)(1)(D). See ABA Manual at 114

(comparing these standards). Moreover, VAWA cancellation applicants can satisfy the hardship requirement by demonstrating hardship to themselves, even without showing hardship to a qualifying relative. See, *e.g.*, *In re Monreal*, 23 I. & N. Dec. 56, 59 (B.I.A. 2001).

II. This Court Should Reverse And Preserve Review For Immigrant Victims of Domestic Violence

A. While VAWA Hardship Determinations Are Reviewable, The Question Is Not Presented In This Case

The question presented in this case is whether an agency application of the "exceptional and extremely unusual hardship" standard in non-VAWA cancellation of removal proceedings is a "question[] of law" reviewable under 8 U.S.C. 1252(a)(2)(D) as interpreted by this Court in *Guerrero-Lasprilla*, 140 S. Ct. at 1067. See Pet. i. This case does not present the question of whether VAWA "extreme hardship" determinations are reviewable under the same provision, 8 U.S.C. 1252(a)(2)(D)—a question that few courts of appeals have addressed since this Court's decision in *Guerrero-Lasprilla*. Compare, *e.g.*, *Kioko* v. *Garland*, No. 20-3105, 2021 U.S. App. LEXIS 9868, at *6 (6th Cir. Apr. 5, 2021) (finding VAWA hardship determinations to be reviewable), with, *e.g.*, *Garcia-Avila* v. *Garland*, No. 20-60406, 2022 U.S. App. LEXIS 13155, at *10 (5th Cir. May 16, 2022) ("[W]e have yet to decide whether any questions related to eligibility for VAWA cancellation under 8 U.S.C. § 1229b(b)(2) are subject to § 1252(a)(2)(B)'s jurisdictional bar.").

Both varieties of hardship determinations are reviewable for largely the same reasons. As petitioner ably explains, this case is governed by *Guerrero-Lasprilla*:

The statutory "exceptional and extremely unusual hardship" standard is a "legal standard" whose "application … to undisputed or established facts is a 'question[] of law' within the meaning of § 1252(a)(2)(D)." *Guerrero-Lasprilla*, 140 S. Ct. at 1069, 1072; see Pet Br. 23-32. That conclusion is buttressed by the presumption of judicial review of agency action and the canon favoring clear jurisdictional rules—and rejecting it risks uncertain and inconsistent adjudication of cancellation cases. See Pet. Br. 21-23.

"Extreme hardship" determinations under VAWA are reviewable for much the same reasons. Like the "exceptional and extremely unusual hardship" standard, VAWA's "extreme hardship" standard is a "legal standard" whose application to the facts of any particular case likewise raises a mixed question of the sort this Court held is reviewable in *Guerrero-Lasprilla*. 140 S. Ct. at 1072. And the same presumptions in favor of judicial review and against unclear jurisdictional boundaries apply with equal force to VAWA. See Pet. Br. 21-23.

The government's position in this case is not only wrong, it is also needlessly broad, as the government appears to seek a ruling holding any and all hardship determinations unreviewable. Throughout its brief in opposition to certiorari, the government refers indiscriminately to "hardship determinations" of all stripes (*e.g.*, Pet. Opp. 6), and argues—without further specification—that "the term 'hardship' can have multiple manifestations and inherently introduces an element of subjectivity into this statutory phrase.'" Pet. Opp. 7 (quoting *Monreal*, 23 I. & N. Dec. at 59). The government also relies on a predecessor provision to the provision at issue in this case, which required a finding of "extreme hardship"—the standard currently required for VAWA

cancellation. See Pet. Opp. 10 (quoting 8 U.S.C. 1254(a)(1) (1994)). The government's position would thus seem to sweep in the reviewability of VAWA hardship determinations, to the extent it seeks a broad ruling foreclosing review of all hardship determinations. This Court should reject the government's position.

VAWA hardship determinations are reviewable for all the same reasons as non-VAWA hardship determinations—and more. In particular, VAWA hardship determinations incorporate a host of additional, distinct considerations from non-VAWA hardship determinations. See 8 C.F.R. 1240.58; see generally ABA Manual at 69-71.[12] These VAWA-specific considerations include an assessment of the "nature and extent of the physical or psychological consequences of abuse,"[13] the availability of legal and non-legal sources of support for victims of domestic violence in the United States and the home country,[14] the risk of harm in the home country from the

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[12] VAWA cancellation separately requires that the noncitizen be "battered or subjected to extreme cruelty," which involves a different set of considerations from VAWA's "extreme hardship" standard. 8 U.S.C. 1229b(b)(2)(A)(i).

[13] 8 C.F.R. 1240.58(c)(1).

[14] See 8 C.F.R. 1240.58(c)(2) ("The impact of loss of access to the United States courts and criminal justice system (including, but not limited to, the ability to obtain and enforce orders of protection, criminal investigations and prosecutions, and family law proceedings or court orders regarding child support, maintenance, child custody, and visitation)"); 8 C.F.R. 1240.58(c)(4) ("The applicant's needs and/or needs of the applicant's child(ren) for social, medical, mental health or other supportive services for victims of domestic violence that are unavailable or not reasonably accessible in the home country")

abuser and those acting on his behalf,[15] and "[t]he existence of laws and social practices in the home country that punish the applicant or the applicant's child(ren) because they have been victims of domestic violence or have taken steps to leave an abusive household."[16] The relevance of these questions to VAWA hardship determinations illustrates the legal questions that may arise in the context of hardship determinations and underscore the importance of preserving judicial review.

B. The Government's Position Would Harm Immigrant Victims Of Domestic Violence

Although this case does not squarely present the question, the ruling the government seeks from this Court will likely limit review of VAWA hardship determinations. Courts of appeal considering the reviewability of VAWA hardship determinations rely on cases addressing the reviewability of non-VAWA hardship determinations—and are likely to do so in the wake of even a narrow affirmance by this Court. See, *e.g.*, *Hamilton* v. *Holder*, 680 F.3d 1024, 1027 (8th Cir. 2012) (holding VAWA hardship determination non-reviewable in reliance on non-VAWA reviewability case law).

Because of the diversity of forms that domestic violence can take and the frequency with which such abuse and its consequences is misunderstood or overlooked, the risk of agency error in this context is significant. See

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[15] See 8 C.F.R. 1240.58(c)(3) ("The likelihood that the batterer's family, friends, or others acting on behalf of the batterer in the home country would physically or psychologically harm the applicant or the applicant's child(ren)"); 8 C.F.R. 1240.58(c)(6) ("The abuser's ability to travel to the home country and the ability and willingness of authorities in the home country to protect the applicant and/or the applicant's children from future abuse").

[16] 8 C.F.R. 1240.58(c)(5).

pp. 6-8, *supra*. As the original Senate Report on VAWA explained, an adjudicator "who is confident in controlling his or her own life and circumstances … may find it difficult to understand the circumstances and responses of a battered woman." S. Rep. No. 103-138, at 46 (1993). This risk is heightened given single-judge review by the BIA—as compared to a three-judge panel in the court of appeals—which has a burgeoning pending caseload. See 8 C.F.R. 1003.1(e).

The Ninth Circuit's decision reviewing a VAWA cancellation of removal case in *Lopez-Umanzor* v. *Gonzales*, 405 F. 3d 1049 (9th Cir. 2005), is illuminating on this score. There, the court of appeals held that an Immigration Judge's "assessment of Petitioner's credibility," which had been affirmed by the BIA, "was skewed by prejudgment, personal speculation, bias, and conjecture." *Id.* at 1054. Specifically, the Immigration Judge "repeatedly expressed doubts about Petitioner's account of domestic violence," "doubted that Petitioner would stay with, or return to, [her abuser] if he were abusive," and "asked: 'Well, why didn't you escape then?'" *Ibid.* More, the Immigration Judge "refus[ed] to hear expert testimony, from professionals who had worked with [the victim] regarding the dynamics of abusive relationships" based on the "preconceived view that expert testimony could do no more than repeat, uncritically, the victim's consistent—but potentially fabricated—story." *Id.* at 1055-56.

Nor is that an isolated incident. In another VAWA cancellation case, the court of appeals corrected the failure of an Immigration Judge and the BIA to acknowledge "a well-recognized stage within the cycle of violence," thereby undermining "Congress's intent that

domestic violence be evaluated in the context of professional and clinical understandings of violence within intimate relationships." *Hernandez*, 345 F.3d at 828. The court of appeals concluded: "[I]n enacting VAWA, Congress recognized that lay understandings of domestic violence are frequently comprised of 'myths, misconceptions, and victim blaming attitudes,' and that background information regarding domestic violence may be crucial in order to understand its essential characteristics and manifestations." *Id*. at 836 (citing H.R. Rep. No. 103-395, at 24).

As these cases (and others) demonstrate, prejudices and misunderstandings about domestic violence may influence agency decision-making in ways large and small—and in ways that could be insulated from judicial review. As one scholar has explained, based on an analysis of hundreds of domestic-violence immigration cases: "[W]hether a woman fleeing domestic violence will receive protection in the United States seems to depend not on the consistent application of objective principles, but rather on the view of her individual judge, often untethered to any legal principles at all." Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 Hastings Women's L.J. 107, 147-48 (2013).

The consequences of the lack of judicial oversight thus could be severe. If an Immigration Judge and a single judge on the BIA (who lack sufficient training on domestic violence dynamics, VAWA protections, or trauma victimization) fail to recognize extreme hardship and erroneously deny cancellation on that basis, and no court can review that error, the immigrant victim or her children will be forced to suffer that hardship

even though they did everything right to secure the relief that Congress promised in VAWA. 8 U.S.C. 1229b(b)(2)(A)(v).

Worse yet, the agency's own failure to recognize the consequences of the victim's abuse could in turn deepen that abuse. For example, the agency's error might result from its failure to properly recognize extreme hardship caused by "laws and social practices in the home country that punish the [victim] *because* they have been victims of domestic violence." 8 C.F.R. 1240.58(c)(5) (emphasis added); see generally 8 C.F.R. 1240.58(c) (listing other VAWA-specific hardships that would result upon deportation as a result of an erroneous and unreviewable agency decision). In such cases, the agency's error would newly traumatize victims precisely *because* they are victims of domestic violence and turn the immigration system into a tool of further abuse that federal courts would be powerless to review. The practical effect is government reinforcement of abusers in perpetrating harms against their victims.

Congress promised better for immigrant victims of domestic violence. In enacting VAWA, Congress's concern for immigrant victims of domestic violence did not stop at the courthouse doors: To the contrary, Congress recognized that the immigration system itself could act "as a barrier that kept battered immigrant women and children locked in abusive relationships" and sought to remove those barriers—not to strengthen them by depriving the judiciary of the power to prevent the infliction of extreme hardship on immigrant victims of domestic violence by the executive. Pub. L. No. 106-386, § 1502, 114 Stat. 1464 (2000). Ensuring reviewability of hardship determinations "accords with traditional un-

derstandings and basic principles: that executive determinations generally are subject to judicial review." *Guerrero-Lasprilla*, 140 S. Ct. at 1069 (quoting *Kucana* v. *Holder*, 558 U.S. 233, 251 (2010)).

CONCLUSION

For the foregoing reasons, the Court should reverse.

Respectfully submitted.

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