

ORAL ARGUMENT SCHEDULED FOR MARCH 6, 2020
No. 19-5298

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MAKE THE ROAD NEW YORK, *et al.*,

Plaintiffs-Appellees,

v.

CHAD WOLF, ACTING SECRETARY OF THE DEPARTMENT OF
HOMELAND SECURITY, *et al.*

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA
No. 19-cv-02369, Hon. Ketanji Brown Jackson

**BRIEF FOR THE TAHIRIH JUSTICE CENTER, ASISTA
IMMIGRATION ASSISTANCE, INVIOLATE INITIATIVE,
FUTURES WITHOUT VIOLENCE,
ASIAN PACIFIC INSTITUTE ON GENDER-BASED VIOLENCE,
THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE,
AND THE NATIONAL IMMIGRANT JUSTICE CENTER
AS *AMICI CURIAE* IN SUPPORT OF
PLAINTIFFS-APPELLEES**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to District of Columbia Circuit Rule 28(a)(1), counsel for the Amici certify the following:

A. Parties and Amici

Except for the Tahirih Justice Center, Asista Immigration Assistance, the Inviolable Initiative, Futures Without Violence, the Asian Pacific Institute on Gender-Based Violence, the National Network to End Domestic Violence and the National Immigrant Justice Center, all parties, intervenors and amici appearing in this Court are listed in the Brief for the Appellants.

B. Rulings Under Review

Reference to the ruling under review appears in the Brief for the Appellants.

C. Related Cases

This case has not previously been before this or any other court. Counsel for Amici are aware of one related case within the meaning of D.C. Circuit Rule 28(a)(1)(C): *Centro Presente, Inc. v. Wolf*, No. 1:19-cv-02840 (D.D.C.) (Jackson, K.B., J.), pending before the same district judge.

Dated: January 24, 2020

/s/ Paul J. Nathanson

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CORPORATE DISCLOSURE, AUTHORSHIP, AND FINANCIAL CONTRIBUTION STATEMENTS

Pursuant to Rule 29(a)(4)(A) of the Federal Rules of Appellate Procedure and District of Columbia Circuit Rule 26.1, each amicus states that it is a private, non-profit organization that has no parent corporation and that no publicly held corporation holds more than 10% of the stock of any amicus.

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *amici curiae* state that no counsel to a party in the matter before the Court authored this brief in whole or in part; that no party or party's counsel contributed money intended to fund preparing or submitting this brief; and that no person contributed money to *amici curiae* that was intended to fund preparing or submitting this brief.

Pursuant to District of Columbia Circuit Rule 29(d), *amici curiae* certify that this separate *amici* brief is necessary and non-duplicative with any other brief that may be submitted. A separate brief is necessary to ensure that the unique interests of the *amici* organizations that provide social services to and advocate for the rights of victims of gender-based and other violence.

STATEMENT REGARDING CONSENT TO FILE

All parties have consented to the filing of this *amicus* brief.

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8 U.S.C. § 1158	4
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DHS, Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 23, 2019)	<i>passim</i>
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Violence Against Women Act of 2000, Pub. L. No. 106-386, Div. B, Title V, § 1513(a)(2)(A), 114 Stat. 1463, 1533 (2000)	28
Fed. R. App. P. 29(a)(2)	1
Fed. R. App. P. 29(a)(4)(E)	1

Other Authorities

Alana Mosley, <i>Re-Victimization and the Asylum Process: Jimenez Ferreira v. Lynch: Re-Assessing the Weight Placed on Credible Fear Interviews in Determining Credibility</i> , 36 Law & Ineq. 315 (2018)	21
Angela E. Waldrop & Patricia A. Resick, <i>Coping Among Adult Female Victims of Domestic Violence</i> , 19 J. Family Violence (2004).....	17
Anne L. Ganley, <i>Health Resource Manual</i> 16 (2008)	9
Catrina Brown, <i>Women’s Narratives of Trauma: (Re)storying Uncertainty, Minimization and Self-blame</i> , 3 Narrative Works 1 (2013)	17
Christine Sanderson, <i>Counselling Skills for Working with Trauma: Healing From Child Sexual Abuse, Sexual Violence and Domestic Abuse</i> 31 (2013).....	16, 17
DHS, <i>A Victim-Centered Approach</i> , https://www.dhs.gov/blue-campaign/victim-centered-approach	32
DHS, <i>U and T Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal & Territorial Law Enforcement, Prosecutors, Judges, & Other Government Agencies</i> 3 (2016), https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide_1.4.16.pdf	31, 32

- Edna Erez & Nawal Ammar, *Violence Against Immigrant Women and Systemic Responses: An Exploratory Study* (2003),
<https://www.ncjrs.gov/pdffiles1/nij/grants/202561.pdf>..... 10
- Edna Erez et al., *Intersection of Immigration and Domestic Violence: Voices of Battered Immigrant Women*, 4 *Feminist Criminology* 32, 46-47 (2009)..... 12, 13
- Family Violence Prevention Fund, *Intimate Partner Violence in Immigrant and Refugee Communities: Challenges, Promising Practices and Recommendations* 48 (2009),
https://www.futureswithoutviolence.org/userfiles/file/ImmigrantWomen/IPV_Report_March_2009.pdf 18, 19
- Giselle Aguilar Hass et al., *Battered Immigrants and U.S. Citizen Spouses*, *Legal Momentum*, Apr. 24, 2006,
http://www.ncdsv.org/images/LM_BatteredImmigrantsAndUSCitizenSpouses_4-24-2006.pdf 13
- Heather J. Clawson et al., U.S. Dep't of Health & Human Servs. Office of the Assistant Sec'y for Planning & Evaluation, *Treating the Hidden Wounds: Trauma Treatment & Mental Health Recovery for Victims of Human Trafficking* 3 (2008), at
<https://aspe.hhs.gov/system/files/pdf/75356/ib.pdf>..... 20
- H.R. Rep. No. 103-395 (1993)..... 25, 26
- H.R. Rep. 109-233 (2005) 30, 32
- Human Rights Watch, *Immigrant Crime Fighters: How the U Visa Program Makes US Communities Safer* 14 (July 3, 2018), at
https://www.hrw.org/sites/default/files/report_pdf/us0718_web.pdf..... 28, 29, 33
- Immigration & Customs Enforcement, *Information for Victims of Human Trafficking* (2016),
<https://www.ice.gov/sites/default/files/documents/Document/2017/brochureHtVictims.pdf> 13
- International Association of Chiefs of Police, *Sexual Assault Incident Reports: Investigative Strategies* 5,

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Janna Ataiants et al., <i>Unaccompanied Children at the United States Border, a Human Rights Crisis That Can Be Addressed With Policy Change</i> , 20 <i>J. Immigrant Minority Health</i> 1000 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5805654/	33
Julieta Barcaglioni, <i>Domestic Violence in the Hispanic Community</i> (Aug. 31, 2010), at https://safeharborsc.org/domestic-violence-in-the-hispanic-community	11
Kathryn Finley, Center for Migration Studies, <i>Access to Justice in a Climate of Fear: New Hurdles and Barriers for Survivors of Human Trafficking and Domestic Violence</i> (2019), https://cmsny.org/publications/finley-climate-of-fear	34
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Mark S. Silver, <i>Handbook of Mitigation in Criminal and Immigration Forensics: Humanizing the Client Toward a Better Legal Outcome</i> 6–7 (6th ed. 2017)	19
Memorandum from INS Office of Programs to Regional Directors, District Directors, Officers-in-Charge and Service Center Directors (May 6, 1997), at 2, 7, https://asistahelp.org/wp-content/uploads/2018/10/DOJ-Memorandum-Supplemental-Guidance-on-Battered-Alien-Self-Petitioning-Process-and-Related-Issues.pdf	32, 33
Memorandum from Paul Virtue, General Counsel, Immigration & Naturalization Service (Oct. 16, 1998), https://asistahelp.org/wp-content/uploads/2018/10/Virtue-Memo-on-Any-Credible-Evidence-Standard-and-Extreme-Hardship.pdf	11, 12, 30
Misty Wilson Borkowski, <i>Battered, Broken, Bruised, or Abandoned: Domestic Strife Presents Foreign Nationals Access to Immigration</i>	

<i>Relief</i> , 31 U. Ark. Little Rock L. Rev 567 (2009)	10
Nancy E. Shurtz, <i>Seeking Citizenship in the Shadow of Domestic Violence: The Double Bind of Proving “Good Moral Character,”</i> 62 St. Louis U. L.J. 237, 246 (2017)	12, 13
Nat’l Domestic Violence Hotline, <i>Abuse and Immigrants</i> , https://www.thehotline.org/is-this-abuse/abuse-and-immigrants-2 (last visited Jan. 14, 2019)	10
National Sexual Violence Resource Center, <i>Assisting Trafficking Victims: A Guide for Victim Advocates 2</i> (2012), at https://www.nsvrc.org/sites/default/files/publications_nsvrc_guides_human-trafficking-victim-advocates.pdf	13
Nik Theodore, <i>Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement</i> 6 (2013)	20
Office on Violence Against Women, Dep’t of Justice, <i>The Importance of Understanding Trauma-Informed Care and Self-Care for Victim Service Providers</i> (July 30, 2014), https://www.justice.gov/archives/ovw/blog/importance-understanding-trauma-informed-care-and-self-care-victim-service-providers	17, 18, 23
Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267	7
Rachel Louise Snyder, <i>No Visible Bruises: What We Don’t Know About Domestic Violence Can Kill Us</i> 36 (2019)	9, 19
Stephen Paskey, <i>Telling Refugee Stories: Trauma, Credibility and the Adversarial Adjudication of Claims for Asylum</i> , 56 Santa Clara L. Rev. 457 (2016)	21
Substance Abuse & Mental Health Servs. Admin, <i>Treatment Improvement Protocol 57: Trauma-Informed Healthcare in Behavioral Health Services</i> 61 (2014), https://store.samhsa.gov/system/files/sma14-4816.pdf	17, 19

Tahirih Justice Center, <i>Survey of Advocates Reveals Immigrant Survivors Fear Reporting Violence</i> (June 4, 2019), https://www.tahirih.org/news/survey-of-advocates-reveals-immigrant-survivors-fear-reporting-violence/	20, 31, 34
United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, art. 3.....	7
United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, art. 33	7
USCIS, <i>Lesson Plan Overview</i> 18 (Feb. 28, 2014), https://www.uscis.gov/sites/default/files/files/nativedocuments/Asylum_and_Female_Genital_Mutilation.pdf	25
USCIS, <i>Lesson Plan Overview</i> (Apr. 30, 2019), https://fingfx.thomsonreuters.com/gfx/mkt/11/10239/10146/2019%20training%20document%20for%20asylum%20screenings.pdf	23, 26
USCIS, <i>Policy Memorandum: Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-</i> (July 11, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf	23
<i>Violence Against Women Act of 2000 Section-by-Section Summary</i> , 146 Cong. Rec. S10188-03 (2000)	10, 25, 26
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INTEREST OF AMICI CURIAE

Amicus curiae the Tahirih Justice Center is the largest multi-city direct services and policy advocacy organization specializing in assisting immigrant women and girls struggling to survive gender-based violence. Since its beginning in 1997, Tahirih has provided free legal assistance to more than 27,000 individuals, many of whom have applied for asylum, applied for T and U visas, and filed for lawful permanent residency status under the Violence Against Women Act. Through direct legal and social services, policy advocacy, and training and education provided in five cities across the country, Tahirih protects immigrant women and girls and promotes a world where they can live in safety and dignity.

Amicus ASISTA Immigration Assistance (“ASISTA”) worked with Congress to create and expand routes to secure immigration status for survivors of domestic violence, sexual assault, and other crimes, which were incorporated in the 1994 Violence Against Women Act and its progeny. ASISTA serves as liaison for the field with Department of Homeland Security personnel charged with implementing these laws, most notably U.S. Citizenship and Immigration Services, Immigration

and Customs Enforcement, and DHS's Office for Civil Rights and Civil Liberties. ASISTA also trains and provides technical support to local law enforcement officials, civil and criminal court judges, domestic violence and sexual assault advocates, and legal services, non-profit, pro bono, and private attorneys working with immigrant crime survivors. ASISTA has previously filed amicus briefs to the Supreme Court and to numerous federal courts of appeal.

Amicus Inviolate Initiative ("Inviolate") is a project of the Center for Transformative Action, a 501(c)(3) organization. Inviolate expands access to mental health services for immigrant survivors of domestic abuse and trafficking. By doing so, Inviolate strengthens survivors' immigration cases and provides necessary and beneficial mental health services. Inviolate's mission is to connect undocumented survivors to their own power, agency, and possibility as they heal from the cruelty they have suffered, and as they move beyond to build their own lives, on their own terms. Inviolate works with legal service providers to match their immigration clients with mental health professionals. Inviolate's work includes case placement and case management to ensure smooth and timely provision of psychological evaluations in the context of T

visa cases, U visa cases, VAWA-based cases, and asylum cases based on domestic abuse. Inviolata also provides workshops regarding best practices for collaboration between mental health professionals and attorneys on immigration cases. Founded by an immigration attorney who is a first-generation daughter of immigrants, Inviolata relies on interdisciplinary and inter-organizational collaboration to strengthen the movement to uphold immigrants' rights.

Amicus Futures Without Violence (“FUTURES”) is a national nonprofit organization that has worked for over thirty years to prevent and end violence against women and children around the world. FUTURES mobilizes concerned individuals; children’s, women’s, and civil rights groups; allied professionals; and other social justice organizations to end violence through public education and prevention campaigns, public policy reform, training and technical assistance, and programming designed to support better outcomes for women and children experiencing or exposed to violence.

FUTURES joins with the other amici because it has a long-standing commitment to supporting the rights and interests of women and children who are victims of violence regardless of their

immigration, citizenship, or residency status. FUTURES co-founded and co-chaired the National Network to End Violence Against Immigrant Women working to help service providers, survivors, law enforcement, and judges understand how best to work collaboratively to bring justice and safety to immigrant victims of violence. Using this knowledge, FUTURES helped draft legislative recommendations that were ultimately included in the Violence Against Women Act and the Trafficking Victims Protection Act to assist immigrant victims of violence. FUTURES co-chairs the Coalition to End Violence Against Women and Girls Globally, partnering with other national organizations to reduce sexual and domestic violence against women and children.

Amicus Asian Pacific Institute on Gender-Based Violence (formerly, Asian & Pacific Islander Institute on Domestic Violence) is a national resource center on domestic violence, sexual violence, trafficking, and other forms of gender-based violence in 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 and immigrant survivors, and is a leader in

providing analysis on critical issues facing victims of gender-based violence in the Asian and Pacific Islander and immigrant communities. The Institute leads by promoting culturally relevant intervention and prevention, expert consultation, technical assistance, and training; conducting and disseminating critical research; and informing public policy.

Amicus National Network to End Domestic Violence (“NNEDV”) is a not-for profit organization incorporated in the District of Columbia in 1994 to end domestic violence. As a network of the 56 state and territorial domestic violence and dual domestic violence and sexual assault coalitions and their over 2,000 member programs, NNEDV serves as the national voice of millions of women, children and men victimized by domestic violence, and their advocates. NNEDV was instrumental in promoting Congressional enactment and implementation of the Violence Against Women Act. Immigrants are particularly vulnerable to domestic abuse and other gender based crimes. NNEDV has a strong interest in ensuring that immigrant victims are not erroneously removed before they are able to access the U visa, T visa, and VAWA protections that Congress put in place.

Amicus National Immigrant Justice Center (“NIJC”), a program of the Heartland Alliance for Human Needs and Human Rights, is a Chicago-based not-for-profit organization that provides legal representation and consultation to immigrants, refugees and asylum-seekers of low-income backgrounds. Each year, NIJC represents hundreds of survivors of domestic violence before the immigration courts, Board of Immigration Appeals (“BIA”), Federal Courts of Appeals, and the Supreme Court of the United States through its legal staff and network of nearly 1,500 pro bono attorneys.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Under the Notice challenged here, DHS seeks to dramatically expand expedited removal. It will now operate nationwide, it requires two years of continuous presence of any non-citizen, and it applies a novel and amorphous evidentiary standard to prove that presence. *See* DHS, *Designating Aliens for Expedited Removal*, 84 Fed. Reg. 35,409 (July 23, 2019) (“Notice”).

Amici submit this brief to highlight that DHS ignored the impact of the Notice on a particularly vulnerable community—survivors of domestic violence and gender-based violence, especially violence

experienced in this country—who will be disproportionately affected by the agency’s failure to consider these crucial aspects of the problem. Such survivors will be routinely subject to erroneous removals under the Notice for two reasons. First, survivors of abuse in this country will be unable to provide documentary evidence of continuous presence, because that evidence is in the hands of their abusers. And second, the effects of trauma make it impossible for many survivors of violence experienced either inside or outside the United States to fully discuss their experiences in the context of a law enforcement encounter. In promulgating the Notice, the government failed to consider that survivors face a heightened risk of erroneous removal for these reasons.

The Notice also undermines Congress’s carefully considered and extensive efforts to protect survivors of gender-based violence while bringing traffickers and abusers to justice. In the Violence Against Women Act (“VAWA”), Congress established an “any credible evidence” standard for continuous presence because it recognized that typical documentary evidence could well be in the control of an abuser. The Notice, however, subjects domestic violence survivors to immediate deportation unless they can satisfy any particular immigration officer’s

evidentiary demands. The Notice also fails to account for the fact it will undercut the T visa and U visa programs, which Congress enacted to protect survivors of trafficking and serious crimes who work with law enforcement to investigate or prosecute traffickers and abusers.

ARGUMENT

I. THE EXPANSION OF EXPEDITED REMOVAL WILL RESULT IN THE ERRONEOUS REMOVAL OF COUNTLESS SURVIVORS OF TRAFFICKING AND GENDER-BASED VIOLENCE

As plaintiffs' brief demonstrates, the expedited removal process has, since its inception, systematically resulted in the erroneous removal of asylum seekers and other immigrants to their home countries. *See* Br. for the Appellees 8-12, 37. These erroneous removals violate the government's *non-refoulement* obligations.¹ And the

¹ The U.S. government has an unambiguous obligation, imposed by both treaties and the INA, not to *refoul* asylum seekers—which is to say, not to return them to countries in which they will face persecution. *See* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, Title XXII, § 2242, 112 Stat. 2681, 2681-822 (1998) (codified at 8 U.S.C. § 1231); United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, art. 33; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, art. 3.

dramatic expansion of expedited removal will, logically, expand the number of erroneous and illegal removals.

This increase in erroneous removals will disproportionately harm survivors of trafficking and gender-based violence for two reasons that the Notice ignores. If they were abused in, or trafficked into, the United States, survivors are unlikely to have access to documents showing continuous presence. And the effects of trauma render it effectively impossible for survivors—including survivors of gender-based persecution in another country—to meet their burdens of establishing either continuous presence or credible fear in the context of an encounter with law enforcement officers.

A. Many Survivors Lack Access to Documentary Evidence of Continuous Presence

Under the Rule's novel and vague standard, noncitizens are required to prove, upon being stopped or detained, that they have been present in the United States for more than two years. And they must prove this "to the satisfaction" of an immigration officer. But survivors—especially survivors of domestic violence and trafficking—are unlikely to have access to the kinds of documents that immigration officers might expect to see, such as leases, bank records, utility bills,

school or church records, or other documentation from third parties. In fact, in creating forms of immigration relief for such survivors, Congress has expressly provided that they *need not* provide such documentation, precisely because they are unlikely to have it. *See infra* pp. 29-31.

Abusers who engage in domestic violence seek “compliance from or control over the victim.” Anne L. Ganley, *Health Resource Manual* 16 (2008); *see also, e.g.*, Rachel Louise Snyder, *No Visible Bruises: What We Don’t Know About Domestic Violence Can Kill Us* 36 (2019) (abusers seek to “dominate and control every aspect of a victim’s life”); Zlatka Rakovec-Felser, *Domestic Violence and Abuse in Intimate Relationships from Public Health Perspective*, 2:1821 *Health Psych. Research* 62, 63 (2014) (abuse is “an expression of social power” typically used by men “to control and dominate their female partners”). To achieve control, abusers resort to a variety of tactics, including the denial of access to, or even the destruction of, documents which might allow their victims to escape or seek help. *See, e.g.*, Ganley, *Health Resource Manual* 37; Snyder, *No Visible Bruises*.

Immigrant survivors are particularly vulnerable to this tactic. Abusers almost never affirmatively seek status on the survivors’ behalf,

and they regularly destroy or withhold documents that survivors could use to protect themselves from removal and other immigration consequences. *See, e.g.*, Margaret E. Adams & Jacquelyn Campbell, *Being Undocumented & Intimate Partner Violence (IPV): Multiple Vulnerabilities Through the Lens of Feminist Intersectionality*, 11 *Women's Health & Urb. Life* 15, 21-24 (2012); Misty Wilson Borkowski, *Battered, Broken, Bruised, or Abandoned: Domestic Strife Presents Foreign Nationals Access to Immigration Relief*, 31 *U. Ark. Little Rock L. Rev.* 567, 569 (2009); Nat'l Domestic Violence Hotline, *Abuse and Immigrants*, <https://www.thehotline.org/is-this-abuse/abuse-and-immigrants-2> (last visited Jan. 14, 2019); *see also Violence Against Women Act of 2000 Section-by-Section Summary*, 146 *Cong. Rec.* S10188-03, at S10195 (2000) (noting that, before VAWA, abusive U.S. citizen and lawful permanent resident ("LPR") spouses used their ability to petition for a permanent visa for their abused spouses "as a means to blackmail and control the spouse"). In fact, given that "[d]eportation is an omnipresent weapon with which abusers threaten their immigrant partners," Edna Erez & Nawal Ammar, *Violence Against Immigrant Women and Systemic Responses: An Exploratory*

Study (2003), <https://www.ncjrs.gov/pdffiles1/nij/grants/202561.pdf>, an abuser who knows that documentation showing continuing presence is all that stands between a survivor and deportation will be more likely to restrict access to those documents. *See, e.g.*, Julieta Barcaglioni, *Domestic Violence in the Hispanic Community* (Aug. 31, 2010), at <https://safeharborsc.org/domestic-violence-in-the-hispanic-community> (noting abusers' use of the "threat of deportation").

DHS and its predecessor agencies have recognized this dynamic for decades. A 1998 memorandum from the General Counsel of the Immigration and Naturalization Service made clear that "battered spouse and child self-petitioners are not likely to have access to the range of documents available to the ordinary visa petitioner for a variety of reasons." Memorandum from Paul Virtue, General Counsel, Immigration & Naturalization Service (Oct. 16, 1998), at 7-8 ("Virtue Memo"), <https://asistahelp.org/wp-content/uploads/2018/10/Virtue-Memo-on-Any-Credible-Evidence-Standard-and-Extreme-Hardship.pdf>. The memorandum also acknowledged the reasons for this lack of access—that many survivors "have been forced to flee from their abusive spouse," that "[s]ome abusive spouses may destroy documents,"

and that other survivors seek relief “without the abusive spouse’s knowledge or consent.” *Id.* at 8. “Adjudicators,” the memorandum concluded, “should be aware of these issues and should evaluate the evidence submitted in that light.” *Id.*

Amici’s clients routinely encounter this control dynamic. To take one example, Marta² was married to an abusive U.S. citizen who kept important documents, including the birth certificate of their U.S. citizen child, in a lockbox. Marta’s husband repeatedly threatened to have her deported and to separate her from her child, and he refused to grant her access to the lockbox key. When Marta finally found the key and placed the key into the lock, her husband put her in a chokehold with so much force that the key broke in the lock.

Marta’s story is one among many: between one-third and one-half of immigrant women in the United States experience domestic violence in this country. Nancy E. Shurtz, *Seeking Citizenship in the Shadow of Domestic Violence: The Double Bind of Proving “Good Moral Character,”* 62 St. Louis U. L.J. 237, 246 (2017). In one study, seventy-five percent

² For the safety and privacy of *amici*’s clients, all names used in this brief are pseudonyms.

of immigrant interviewees reported that their abusers used their immigration status as a means of control. Edna Erez et al., *Intersection of Immigration and Domestic Violence: Voices of Battered Immigrant Women*, 4 *Feminist Criminology* 32, 46-47 (2009). And the control that a survivor's immigration status gives abusers prevents a quarter of all immigrant domestic survivors from leaving the abusive relationships. Giselle Aguilar Hass et al., *Battered Immigrants and U.S. Citizen Spouses*, *Legal Momentum*, Apr. 24, 2006, at 2-3, http://www.ncdsv.org/images/LM_BatteredImmigrantsAndUSCitizenSpouses_4-24-2006.pdf.

Further, as DHS has acknowledged, many trafficking survivors entered the country under the control of traffickers who retain control of the survivors' identification and immigration documents. See Immigration & Customs Enforcement, *Information for Victims of Human Trafficking* (2016), <https://www.ice.gov/sites/default/files/documents/Document/2017/brochureHtVictims.pdf>; see also National Sexual Violence Resource Center, *Assisting Trafficking Victims: A Guide for Victim Advocates 2* (2012), <https://www.nsvrc.org/sites/default/files/>

publications_nsvrc_guides_human-trafficking-victim-advocates.pdf

(noting that traffickers often hide travel and identification documents from their victims). Fanya, for example, was subjected to forced labor in the home of a diplomat, who kept all of her identification and immigration documents. Another of *amici*'s clients, Luisa, was trafficked into the United States by her partner, who pretended he wanted to marry her in this country but instead subjected her to years of forced labor and abuse. Given that Luisa was forcibly locked in various houses while in the control of her trafficker, she has, and can have, no documentary evidence to prove her presence in the United States during that time. In fact, she does not even know when or where she entered this country because her abuser confiscated her phone and restricted her access to information before she arrived in the United States.

Moreover, trafficking survivors who manage to escape from their traffickers are often forced through so many government agencies, and so many different living situations, that compiling a two-year paper trail is effectively impossible. Ramon, for example, is a survivor of sex trafficking at the hands of his mother. Child Protective Services

eventually removed him from her custody—but he was then shuffled between a relative, an inpatient facility, and two foster families, one of whom moved Ramon to a different city, before being taken in by a teacher. And as *amici* know all too well, Ramon’s experience is far from unique.

In short, many—perhaps most—survivors of domestic abuse and trafficking will lack documentary evidence to prove continuous presence in the United States to the satisfaction of immigration officers. And they will lack that evidence *because* they have been subjected to abuse or trafficking. In the Notice, however, DHS has nevertheless placed the burden on survivors to prove continuous presence to the satisfaction of immigration officers, largely via the very documents that survivors cannot access. Notice, 84 Fed. Reg. at 35,414. Moreover, DHS did so without even acknowledging the effect that this requirement would have on the survivors of abuse and trafficking. *See id.* The failure to consider this critical “aspect of the problem” renders the Notice arbitrary and capricious in violation of the APA. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

B. The Effects of Trauma Prevent Many Survivors of Gender-Based Violence from Discussing Their Experiences in the Context of Expedited Removal

The negative effects of the Notice on survivors are heightened by the narrow nature of the credible fear process.³ Assuming that an abruptly-detained survivor who has been in the country for years manages to prove continuous residence even without access to documents, she is then detained and catapulted directly into a credible fear hearing in which she has the burden to show a credible fear of being returned to her country of origin, often without the ability to obtain documents due to her abuse. That showing will require recounting and revisiting the trauma from which she fled. Even survivors who suffered persecution outside the United States—and who are therefore eligible for asylum and related relief—often “fail” their credible-fear interviews because of the effects of trauma.

It is well-documented that many survivors of trauma, including survivors of gender-based violence, experience emotional numbness,

³ The credible fear process provides no protection at all for survivors whose abuse occurred in the United States. Those survivors may be eligible for various types of immigration relief, *see infra* pp. 25-29, but they are not eligible for asylum.

withdrawal, difficulty in expressing themselves, and particular reluctance to recount disturbing memories. *See, e.g.*, Catrina Brown, *Women's Narratives of Trauma: (Re)storying Uncertainty, Minimization and Self-blame*, 3 Narrative Works 1, 11-12, 17 (2013); Christine Sanderson, *Counselling Skills for Working with Trauma: Healing From Child Sexual Abuse, Sexual Violence and Domestic Abuse* 31 (2013); Angela E. Waldrop & Patricia A. Resick, *Coping Among Adult Female Victims of Domestic Violence*, 19 J. Family Violence (2004); International Association of Chiefs of Police, *Sexual Assault Incident Reports: Investigative Strategies* 5, <https://www.theiacp.org/sites/default/files/all/s/SexualAssaultGuidelines.pdf>. And even if survivors overcome the “dissociation, withdrawal, and isolation” that can prevent them from discussing their experiences at all, Sanderson, *supra*, at 31, they are “often ambivalent in telling their stories of abuse” and “minimize[] the seriousness of the abuse,” Brown, *supra*, at 11, 17.

The U.S. government routinely recognizes these effects of trauma. *See, e.g.*, Substance Abuse & Mental Health Servs. Admin. (“SAMHSA”), *Treatment Improvement Protocol 57: Trauma-Informed*

Healthcare in Behavioral Health Services 61 (2014), <https://store.samhsa.gov/system/files/sma14-4816.pdf>; Office on Violence Against Women, Dep't of Justice, *The Importance of Understanding Trauma-Informed Care and Self-Care for Victim Service Providers* (July 30, 2014), <https://www.justice.gov/archives/ovw/blog/importance-understanding-trauma-informed-care-and-self-care-victim-service-providers> (hereinafter "*Trauma-Informed Care*"). It has also recognized that the aftereffects of trauma can be particularly intense for immigrant survivors, who are often not fleeing a single act of traumatic violence. As the Department of Justice explained, immigrant survivors have suffered "[e]xposure to cumulative emotional and psychological wounding over the lifespan and across generations, emanating from massive group trauma experiences such as colonization, war, or genocide." *Id.* This "historical trauma" operates to "magnify an already devastating crime" by forcing survivors "to confront multiple layers of traumatic experiences as they recover and heal." *Id.*; see also Family Violence Prevention Fund, *Intimate Partner Violence in Immigrant and Refugee Communities: Challenges, Promising Practices and Recommendations* 48 (2009),

https://www.futureswithoutviolence.org/userfiles/file/ImmigrantWomen/IPV_Report_March_2009.pdf (noting the “stressors” immigrants face that “intensify” the “sense of isolation and loneliness” abuse creates).

Although avoidance, withdrawal, ambivalence, and minimization are well-recognized effects of trauma, they can be routinely misinterpreted by people with whom trauma survivors interact. “[F]amily members, counselors, and other behavioral health staff” often “assess levels of traumatic stress symptoms and the impact of trauma as less severe than they actually are.” SAMHSA, *supra*, at 63-64. Worse still, survivors may “sound like liars,” Snyder, *supra*, at 70, because the effects of trauma can cause them to present their history of abuse in a “matter of fact way” or to “den[y] having feelings about [the] abuse,” SAMHSA, *supra*, at 64.

The effects of trauma are often heightened during encounters with law enforcement. *See, e.g.*, Mark S. Silver, *Handbook of Mitigation in Criminal and Immigration Forensics: Humanizing the Client Toward a Better Legal Outcome* 6-7 (6th ed. 2017). Survivors’ difficulty in telling their stories is especially magnified for noncitizens encountering government agents. The reason is straightforward: Immigrant survivors

“fear[] that connections with law enforcement * * * can compromise their physical safety,” either because their abuser or trafficker might find them, they might be deported, or they might be returned to an abusive home. Heather J. Clawson et al., U.S. Dep’t of Health & Human Servs. Office of the Assistant Sec’y for Planning & Evaluation, *Treating the Hidden Wounds: Trauma Treatment & Mental Health Recovery for Victims of Human Trafficking* 3 (2008), <https://aspe.hhs.gov/system/files/pdf/75356/ib.pdf>. A 2013 survey found that two-thirds of individuals without status “would be less likely to offer information or report a crime because they are afraid that police will ask them or someone they know about their immigration status.” Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* 6 (2013). And a 2019 survey of service providers found that more than half had worked with a survivor who decided to forgo or drop a civil or criminal case for fear of personal repercussions. Tahirih Justice Center, *Survey of Advocates Reveals Immigrant Survivors Fear Reporting Violence* (June 4, 2019), <https://www.tahirih.org/news/survey-of-advocates-reveals-immigrant-survivors-fear-reporting-violence/>.

The known stakes of the initial encounter with law enforcement officers (which may also involve family separation and overriding concern for children) and of the credible fear interview further compound the effects of trauma. In these settings, many survivors are acutely aware of the “uncertainty of whether they will be believed by others.” Alana Mosley, *Re-Victimization and the Asylum Process: Jimenez Ferreira v. Lynch: Re-Assessing the Weight Placed on Credible Fear Interviews in Determining Credibility*, 36 *Law & Ineq.* 315, 322 (2018). Survivors in credible fear interviews also “fear for their future due to the possibility of being forced to return to the persecution in their homeland.” *Id.* The result is that the stories survivors tell in credible-fear interviews may appear to have “a large degree of uncertain[t]y, even with regard to * * * central details.” Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility and the Adversarial Adjudication of Claims for Asylum*, 56 *Santa Clara L. Rev.* 457, 483-84 (2016).

Given that the typical effects of trauma lead even survivors’ trusted confidantes and behavioral health experts astray, it is no surprise that the law enforcement officers who determine continuous presence and the asylum officers who conduct credible fear interviews

likewise may erroneously discount what survivors say. Thus, even though credible-fear interviews nominally involve a very low standard—asylum seekers must effectively show only a significant possibility of a 10% chance of future persecution, *see* 8 U.S.C. § 1225(b)(1)(B)(v); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987)—survivors are often rejected at that stage.

To take one of countless examples, Alma, one of *amici*'s clients, fled with her son from her abusive husband in Honduras. When she reached the United States and underwent a credible fear interview, the asylum officer kept Alma's son in the room with her. Alma was not comfortable discussing the years of physical and sexual abuse inflicted by her husband—much less the specific fact that her son was conceived as a result of marital rape—in front of her son. She therefore provided only an abbreviated version of her story, and as a result, the asylum officer found that she lacked a credible fear of persecution.

The Notice expanding expedited removal also takes effect in the context of a significantly diminished focus on the effects of trauma for law enforcement and asylum officers involved in the expedited process, yet the Notice fails to consider this context in any way. For example,

although the government recognizes that “understanding trauma can be complicated,” Office of Violence Against Women, *Trauma-Informed Care, supra*, recent training for asylum officers has sharply reduced its former guidance about how to take trauma into account during expedited removal. *See generally* USCIS, *Lesson Plan Overview* (Apr. 30, 2019), <https://fingfx.thomsonreuters.com/gfx/mkt/11/10239/10146/2019%20training%20document%20for%20asylum%20screenings.pdf>. (removing longstanding guidance about how trauma may affect testimony from credible fear interview training). Likewise, the United States Citizenship and Immigration Services (“USCIS”) has recently emphasized that its asylum officers must treat all inconsistencies or inaccuracies in a survivor’s testimony as indicative of a lack of credibility, even though minimization, avoidance, and other psychological effects of trauma often result in statements that may appear inconsistent. *See* USCIS, *Policy Memorandum: Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-*, at 7 (July 11, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf>. In

this context, the expansion of expedited removal will result in the removal of survivors of severe trauma—who will be subject to continued persecution in their home countries. And their removal will be *because* they are survivors of severe trauma.

The removal of such survivors would violate the government's *non-refoulement* obligations and may lead to the unnecessary persecution, torture, and death of survivors. In many cases, it would leave the children of removed survivors in the hands of their abusers. And it would, as the district court correctly recognized, have negative ripple effects for survivors' entire communities. *Make the Road*, 405 F. Supp. 3d at 11. DHS, however, considered none of this—and that failing, too, renders the Notice arbitrary and capricious.

II. THE NOTICE UNDERMINES NUMEROUS STATUTORY PROVISIONS INTENDED TO PROTECT SURVIVORS AND AID LAW ENFORCEMENT

The Notice also stands in strong tension with a variety of statutory provisions that Congress enacted to protect survivors and improve public safety. The “satisfaction of the immigration officer” standard in the Notice directly conflicts with the evidentiary standard Congress set in VAWA for survivors of abuse by U.S.-citizen or LPR

spouses to meet in order to receive LPR status themselves. And the Notice's unreasoned expansion of expedited removal undermines the protections that Congress provided to survivors—and the aid it provided to law enforcements—when it enacted the T visa and U visa programs.

A. Statutory Forms of Relief for Survivors of Violence

Congress has enacted several specific non-asylum provisions for immigration status to survivors of domestic and other gender-based violence. We outline the three most relevant here.

VAWA Self-Petition. An immigrant married to a U.S. citizen or LPR may obtain legal immigration status in the United States, based on that marriage. However, “the non-citizen’s legal status depends on his or her marriage,” even if the citizen or LPR spouse is abusive. H.R. Rep. No. 103-395, at 26 (1993). In fact, before the enactment of VAWA, the immigration laws “plac[ed] full and complete control of the [non-citizen] spouse’s ability to gain permanent legal status in the hands of the citizen” or LPR spouse. *Id.* Only the citizen or LPR spouse had the authority to “petition for [the survivor] spouse to be granted a permanent resident visa.” *Violence Against Women Act of 2000 Section-*

by-Section Summary, 146 Cong. Rec. S10188-03, at S10195 (2000). As Congress affirmed when it reauthorized VAWA in 2000, this authority made abusers “virtually immune from prosecution,” because their spouses could “be deported as a result of action by their abusers.” Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1518 (2000). Congress’s express purpose in enacting VAWA was to “permit[] battered immigrant women to leave their batterers without fear of deportation.” H.R. Rep. No. 103-395, at 26 (1993).

Congress recognized that this aspect of immigration law “foster[ed] domestic violence” by standing “as a barrier that [keeps] battered immigrant women and children locked in abusive relationships.” *Id.* To remove that barrier, Congress allowed abused non-citizen spouses, parents, and children to file self-petitions for LPR status. VAWA, Pub. L. 103-322, §§ 40701-03, 108 Stat. 1796, 1953-55, *codified at* 8 U.S.C. § 1154(a)(1)(A)(iii)-(iv) & (a)(1)(B)(ii)-(iii); *see also*, *e.g.*, *Hernandez v. Ashcroft*, 345 F.3d 824, 840–41 (9th Cir. 2003) (recognizing this congressional motivation).

T Visa. The T visa is available to survivors of “a severe form of trafficking in persons” (a term defined to include both labor and sex trafficking) who are “physically present in the United States * * * on account of such trafficking,” and who comply with reasonable requests for assistance in investigating the trafficking or are unable to do so because of trauma. 8 U.S.C. § 1101(a)(15)(T)(i)(I)-(III); *see also* 22 U.S.C. § 7102(11) (defining “severe forms of trafficking in persons”).

Congress created the T visa out of the recognition that “[e]xisting laws often fail to protect victims of trafficking” and that undocumented immigrants trafficked into the United States “are repeatedly punished more harshly than the traffickers themselves.” Trafficking Victims Protection Act of 2000 (“TVPA”), Pub. L. 106-386, Div. A, § 102(b)(17), 114 Stat. 1463, 1468 (2000). Moreover, Congress recognized that trafficking survivors “often find it difficult or impossible to report the crimes committed against them,” in part “because they often fear retribution and forcible removal to countries in which they will face retribution or other hardship.” *Id.* § 102(b)(20), 114 Stat. at 1468. Congress therefore intended that the T visa would both “protect” trafficking survivors and “ensure just and effective punishment of

traffickers” with the assistance of survivors. *Id.* § 102(a), 114 Stat. at 1466.

U Visa. The U visa serves similar goals. An immigrant survivor of certain serious crimes—including domestic violence and other gender-based crimes—that occurred in the United States can be eligible for a U visa if the survivor receives a sworn certification from a law enforcement official, prosecutor, or judge stating that she has aided in the investigation or prosecution of the crime. *See* 8 U.S.C. § 1101(a)(15)(U); *id.* § 1184(p)(1). Like the T visa, the U visa has dual goals: It “offer[s] protection to” survivors of serious crime “in keeping with the humanitarian interests of the United States.” Violence Against Women Act of 2000, Pub. L. No. 106-386, Div. B, Title V, § 1513(a)(2)(A), 114 Stat. 1463, 1533 (2000). And by making it possible for immigrants without status to report crimes and “fully participate” in the investigation and prosecution of those crimes, the U visa aids law enforcement. *Id.* § 1513(a)(1)(B) & (a)(2)(B), 114 Stat. at 1533–34. That, in turn, makes the United States a safer place for everyone. *See, e.g.,* Human Rights Watch, *Immigrant Crime Fighters: How the U Visa*

Program Makes US Communities Safer 14 (July 3, 2018), at

https://www.hrw.org/sites/default/files/report_pdf/us0718_web.pdf.

B. The Notice Ignores and Is Contrary To the Violence Against Women Act

When Congress acted to protect immigrant spouses from abuse by allowing them to self-petition for legal status in VAWA, it also consciously chose to apply a new and relaxed evidentiary standard.

Most petitions for status submitted by a U.S. citizen or LPR on behalf of a relative must be supported with “primary” or “secondary” evidence of the petitioner’s status. 8 C.F.R. § 204.1(g)(1)-(2). This evidence is documentary: birth certificates, passports, certificates of naturalization, baptismal certificates, school records, census records, and the like. *Id.* Congress, however, chose *not* to require survivors to present such documentary evidence in support of VAWA self-petitions.

Instead, it allowed survivors to support self-petitions with “any credible evidence.” 8 U.S.C. § 1154(a)(1)(J). This standard means, among other things, that self-petitioners need *not* present documentary proof of residency for a particular time period. The reason for this change, as DHS itself has long recognized, was that “battered spouse and child self-petitioners are not likely to have access to the range of

documents available to the ordinary visa petitioner.” Virtue memo, *supra*, at 7–8; *see also* H.R. Rep. 109-233, at 114 (2005) (any credible evidence standard “ensure[s] sensitive and expeditious processing” of self-petitions and “enhance[s] DHS’s ability to be more responsive to inquiries from these applicants”).

DHS has promulgated the Notice at issue here without any consideration or acknowledgment of this starkly different standard, or of how the Notice will affect this vulnerable population. To the contrary, the Notice upends that VAWA statutory protection; it requires survivors to prove continuous residence essentially on the spot “to the satisfaction of an immigration officer” to avoid immediate deportation from the United States. This effective raising of the evidentiary standard that applies to VAWA self-petitioners—which the Notice fails to acknowledge—is contrary to both VAWA and the APA.

C. The Notice Undermines the T and U Visa Programs

The Notice also conflicts with the purposes of the T and U visa programs. As shown above, the T and U visa programs have succeeded because they support dual goals of prosecuting crimes and encouraging immigrant victims of crimes to come forward. Law enforcement can

investigate and prosecute community crime effectively only if survivors come forward. And the possibility of immigration consequences makes immigrant survivors less likely to come forward than others. In fact, up to seventy-six percent of immigrant victims of crimes are hesitant to reach out to the police for assistance. *See* Tahirih Justice Center, *Survey of Advocates Reveals Immigrant Survivors Fear Reporting Violence* (June 4, 2019), <https://www.tahirih.org/news/survey-of-advocates-reveals-immigrant-survivors-fear-reporting-violence/>. Thus, as DHS itself has recognized, the availability of T and U visas gives immigrant survivors a “sense of security” that working with law enforcement will not have immigration consequences. DHS, *U and T Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal & Territorial Law Enforcement, Prosecutors, Judges, & Other Government Agencies 3* (“*U and T Visa Law Enforcement Guide*”) (2016), https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide_1.4.16.pdf. And this sense of security in turn aids law enforcement, because survivors “who can tell their story and testify as a witness are key” to successful prosecutions.

DHS, *A Victim-Centered Approach*, <https://www.dhs.gov/blue-campaign/victim-centered-approach>.

The Notice, however, undermines both the protective goal of the T visa and U visa programs and the public safety goal of those programs. It undermines Congress's goal of protecting immigrant survivors because, as shown above, the Notice places power over survivors back in the hands of the abusers and traffickers who control survivors' proof of residency.

Furthermore, survivors who are potentially subject to expedited removal as a result of the Notice will have to prove continuous presence to the satisfaction of Immigration and Customs Enforcement ("ICE") or Customs and Border Protection ("CBP"). These agencies are not accustomed to dealing with survivors, because the petitions for relief that survivors submit go to USCIS. *See* 8 C.F.R. § 214.14(c)(1); *U and T Visa Law Enforcement Resource Guide*, *supra*, at 3. This is no accident: USCIS has authority over survivors' petitions because that agency is better placed (and better trained) to understand the effects of trauma. *See, e.g.*, H.R. Rep. 109-233, at 112 (2005); Memorandum from INS Office of Programs to Regional Directors, District Directors, Officers-in-

Charge and Service Center Directors (May 6, 1997), at 2, 7, <https://asistahelp.org/wp-content/uploads/2018/10/DOJ-Memorandum-Supplemental-Guidance-on-Battered-Alien-Self-Petitioning-Process-and-Realated-Issues.pdf>. The Notice, however, requires survivors to prove presence to ICE and CBP agents who have likely never been trained in trauma awareness and who therefore are exceedingly unlikely to recognize the effects of trauma on survivors or survivors' inability to access documentary proof of continuous presence. *See, e.g.,* Janna Ataiants et al., *Unaccompanied Children at the United States Border, a Human Rights Crisis That Can Be Addressed With Policy Change*, 20 *J. Immigrant Minority Health* 1000 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5805654/> (discussing CBP).

The effect of the Notice on public safety is indirect but equally severe. The success of the T visa and U visa programs in assisting law enforcement hinges on the ability of immigrant survivors to trust that “law enforcement will help rather than hurt” them if they come forward to report crimes. *See, e.g.,* Human Rights Watch, *Immigrant Crime Fighters, supra*, at 13–14. Policies that create a climate of fear in the

immigrant community decrease the number of immigrants who are willing to work with law enforcement. *See* Kathryn Finley, Center for Migration Studies, *Access to Justice in a Climate of Fear: New Hurdles and Barriers for Survivors of Human Trafficking and Domestic Violence* (2019), <https://cmsny.org/publications/finley-climate-of-fear>; Tahirih Justice Center, *Survey of Advocates Reveals Immigrant Survivors Fear Reporting Violence*, *supra*.

There can be no doubt that the Notice, which makes immigrant survivors who are already settled in the United States vulnerable to immediate deportation without the chance to appear before an immigration judge, will have that chilling effect. The result is that Congress's careful work in enacting the T and U visa programs will be undermined, survivors will be removed to persecution, and their communities will become less safe. Once again, however, DHS failed to acknowledge, much less consider, these effects, and the Notice accordingly violates the APA.

CONCLUSION

The district court's order granting plaintiffs' motion for a preliminary injunction should be affirmed.

Dated: January 24, 2020

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the length limitations of Fed. R. App. P. 29(a)(5) because it contains 6453 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), which is less than one-half the maximum length authorized for a principal brief under Fed. R. App. P. 32(a)(7)(B).

I further certify that the attached *amici* 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2016, 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on January 24, 2020. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Executed this 24th of January 2020.

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