

# 23-435

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IN THE  
*United States Court Of Appeals*  
FOR THE SECOND CIRCUIT

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**Cristian RODRIGUEZ,**  
*Appellant,*  
– against –

**Alejandro MAYORKAS, Secretary of Homeland Security, et al.,**  
*Appellees.*

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ON APPEAL FROM THE DISTRICT COURT FOR THE  
EASTERN DISTRICT OF NEW YORK

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**BRIEF OF IMMIGRANT DEFENDER ORGANIZATIONS AS AMICI  
CURIAE IN SUPPORT OF THE APPELLANT**

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## INTEREST OF AMICI CURIAE

*Amici curiae* Brooklyn Defender Services, The Legal Aid Society, and Prisoners’ Legal Services of New York are not-for-profit legal services organizations who represent indigent criminal defendants in New York and represent noncitizens within the Second Circuit applying for immigration relief before United States Citizenship and Immigration Services (“USCIS”) and before the immigration courts.<sup>1</sup> *Amici* have extensive experience in preparing applications for U nonimmigrant status (“U Visa”) and related waivers of inadmissibility, and we are uniquely familiar with the real-world impact of USCIS adjudications on immigrant communities. *Amici* have an interest in ensuring the fair, proper, and predictable adjudication of U visas in accordance with the scheme intended by Congress in the Victims of Trafficking and Violence Protection Act of 2000 (“TVPA”). Detailed statements of interest are included as Appendix A.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Just as in Plaintiff-Appellant Cristian Rodriguez’s (“Mr. Rodriguez”) application for a U visa, many of the people *amici* represent must file a waiver of

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(a)(4), *amici* state that none of *amici* are corporations, no party counsel authored any part of the brief, and no person or entity other than *amici* contributed money to prepare or file it. Neither the appellant nor the appellee opposes the filing of this brief, which is respectfully submitted on consent under Fed. R. App. P. 29(a)(2).

inadmissibility alongside their U visa application as a threshold to access the immigration relief for which they are eligible because of their assistance to law enforcement.<sup>2</sup> Our collective experience reflects that USCIS regularly commits legal, nondiscretionary errors in adjudicating U visa applications and waivers of inadmissibility, including failing to apply the distinct and broad standard Congress created specifically for these waivers, failing to comply with procedural requirements mandated by Congress, and failing to apply this Court's precedent. We provide the stories set forth below to show that judicial review of the government's denial of U visa waivers of inadmissibility is necessary to ensure that U visa applicants receive proper adjudication of their applications.

Insulating USCIS's U visa adjudications from judicial review will result in erroneous denials due to nondiscretionary legal errors and undermine the public safety goals of the U visa program. U visas are a transformative and stabilizing form of immigration relief. Eligible applicants, who have assisted law enforcement often at the risk to their own physical and emotional safety, must receive a fair adjudication in line with the congressional intent for the U visa scheme. Moreover, these errors are particularly common in cases where an applicant has been involved with the

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<sup>2</sup> Cf. USCIS, U Visa Demographic: Analysis of Data Through FY 2019 6-7 (2020), [https://www.uscis.gov/sites/default/files/document/reports/U\\_Visa\\_Report\\_-\\_Demographics.pdf](https://www.uscis.gov/sites/default/files/document/reports/U_Visa_Report_-_Demographics.pdf) (stating that 80 percent of U visa applicants request waivers of inadmissibility).

criminal legal system. USCIS's erroneous denials therefore compound the harms of disproportionate police surveillance and arrest on Black and brown immigrants, as well as survivors of gender-based violence and LGBTQ+ immigrants. For the U visa scheme to accomplish its purpose, all eligible immigrants must have a meaningful opportunity to show that their admission is in the public and national interest.

## ARGUMENT

### **I. In adjudicating U visa waivers of inadmissibility, USCIS's frequent legal errors foreclose an analysis that accords with Congressional intent.**

Congress intended for U visa applicants—survivors of crimes who have cooperated with law enforcement—to be considered under a unique and exclusive standard when they require a waiver of inadmissibility. Although this standard asks solely whether a U visa applicant's admission is in the national or public interest, USCIS often evaluates U visa waivers under a general nonimmigrant waiver provision. As shown in the stories set forth below, when USCIS fails to apply the U visa-specific standard, it denies applicants the full consideration that Congress intended and excludes eligible people from the U visa program.

Waivers of inadmissibility are statutory provisions that reflect Congress's intent to allow eligible people to obtain immigration relief even when they present a

barrier to admission to the United States.<sup>3</sup> Statutory waiver provisions, however, provide differing standards that agency adjudicators must apply. In creating the U visa scheme, Congress understood that many eligible applicants would be inadmissible for entering without inspection, for criminal convictions, or for other inadmissibility grounds that make them more vulnerable to deportation. *See* Amici Curiae Brief of ASISTA and Tahirih Justice Center (“ASISTA/Tahirih Brief”) at 13-18 (detailing Congress’s enactment of the U visa-exclusive waiver of inadmissibility).

To further the program’s goals of encouraging cooperation with law enforcement and reducing the potential for threats of immigration enforcement and deportation, Congress created a particularly broad waiver of inadmissibility exclusive to U nonimmigrant status applicants. *See* 8 U.S.C. § 1182(d)(14); ASISTA/Tahirih Brief at 14-15 (detailing breadth of waiver). Congress enacted this U visa-exclusive waiver even though a general waiver for all nonimmigrant visas had already existed for nearly fifty years.<sup>4</sup> *Cf. Matter of Khan*, 26 I&N Dec. 797,

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<sup>3</sup> *See, e.g., Matter of Hranka*, 16 I&N Dec. 491, 491 (BIA 1978) (“Congress provided this procedure [*i.e.*, 8 U.S.C. § 1182(d)(3)(B)] because it recognized that there are cases where the temporary admission of otherwise inadmissible aliens is desirable for humane reasons or for reasons of public interest.”).

<sup>4</sup> *See* Immigration and Nationality Act of 1952, Pub. L. No. 414 § 212(d)(3), 66 Stat. 163, 187 (1952).

803 (BIA 2016) (describing the U visa-exclusive waiver as “much broader” than the general waiver).

The U visa-exclusive waiver provision requires adjudicators to answer a single question: whether an applicant’s admission is in the “public or national interest.” 8 U.S.C. § 1182(d)(14). In contrast, 8 U.S.C. § 1182(d)(3), the general waiver provision applicable to all nonimmigrant visas, requires adjudicators to balance three different factors: the risk of harm to society if the applicant is admitted, immigration violations, and the reasons for wishing to be admitted to the United States. *See Matter of Hranka*, 16 I&N Dec. 491, 492 (1978) (providing guidance on applying the (d)(3) waiver). These two waiver provisions, thus, are plainly distinct.

Yet, when USCIS adjudicates waivers of inadmissibility for U visa applicants, it often fails to apply the U visa-specific (d)(14) waiver or distinguish the (d)(14) standard from the general (d)(3) waiver standard. As the stories below show, USCIS variously treats the (d)(3) factors as if they have the same meaning as the (d)(14) factors, fails to discuss the (d)(14) factors at all, or provides such a vague explanation as to make it impossible to determine the factors USCIS applied. Because the two waivers require the evaluation of distinct, non-overlapping factors, USCIS cannot simply disregard the (d)(14) waiver or treat it as coterminous with a different waiver provision. *See, e.g., Hibbs v. Winn*, 542 U.S. 88, 89 (2014) (discussing the “cardinal rule” that courts must “interpret a statute to effectuate all its provisions, so that no

part is rendered superfluous”). Yet, in *amici*’s collective experience, that is exactly what the agency does. In doing so, it commits clear legal errors. *See* ASISTA/Tahirih Brief at 19-20.

By ignoring the (d)(14) standard, USCIS not only fails to give effect to statutory language, but also permits itself to focus—often speculatively—on past conduct and to minimize factors squarely relevant to the national or public interest, such as the extent of the applicant’s cooperation with law enforcement and their contribution to public safety. *Cf.* Brief of Plaintiff-Appellant at 24-25 (discussing these and other factors relevant to the “national interest” as defined by USCIS in the context of waivers of inadmissibility for T nonimmigrant visas available to survivors of trafficking). In this way, USCIS undercuts the purpose of the U visa program to encourage immigrants in assisting law enforcement by insulating vulnerable survivors from the threat of deportation.<sup>5</sup>

In addition to failing to apply the U visa-specific waiver to U visa applicants, USCIS frequently commits separate legal errors that prejudice applicants applying for a waiver of inadmissibility. As the stories below show, these errors are varied.

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<sup>5</sup> *See, e.g.*, Violence Against Women Act of 2000 (“VAWA”), Pub. L. 106-386 § 1513(a)(2)(A)-(B), 114 Stat. 1466, 1533 (describing purpose of the U visa); New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,014-15 (Sept. 17, 2007) (codified at 8 C.F.R parts 103, 212, 214, 248, 274a, and 299).

Some involve misapplication of judicial precedent, including of this Court, to determinations about inadmissibility. Others involve substituting state court determinations with the agency's reasoning. Such legal errors involve no discretion and are therefore reviewable agency action notwithstanding the jurisdiction-stripping provision of the Immigration and Nationality Act, 8 U.S.C. § 1252(a)(2)(B)(ii). *See, e.g., Mantena v. Johnson*, 809 F.3d 721, 728-30 (2d Cir. 2015); *Sepulveda v. Gonzales*, 407 F.3d 59, 62-64 (2d Cir. 2005) (Sotomayor, J.); *Coniglio v. Garland*, 556 F. Supp. 3d 187, 199 (E.D.N.Y. 2021) (“The ‘decision’ to follow relevant circuit precedent is not discretionary.”).

The federal courts play a vital role in providing course correction to administrative agencies that misapprehend the law. The rule adopted by the district court, which insulates the agency entirely from judicial review, increases the likelihood that USCIS will continue to repeat these same errors, at great harm to the individuals that Congress sought to protect under the U visa scheme.

## II. Stories of U visa applicants<sup>6</sup>

### A. Unchecked by the federal courts, USCIS frequently conflates the (d)(3) and (d)(14) standards.

In *amici*'s experience, USCIS often conflates the standards under (d)(3) and (d)(14) when adjudicating waiver applications. This practice not only violates the statute, but it confuses and harms the immigrant survivors that Congress intended to protect through the U visa scheme. As reflected in the stories detailed below, individuals who might very well be granted waivers under a properly articulated and applied (d)(14) standard are instead denied access to the U visa program and, under the district court's ruling, have no recourse for challenging such denials in court.

#### B.A.

Ms. B.A., a mother of three, has resided in the United States since she was a teenager. She rebuilt her life after having been trafficked as a child and subjected to domestic violence for many years. The basis for Ms. B.A.'s application was an incident of domestic violence by her former partner. Despite the trauma of her victimization and fear of her abuser's retaliation, Ms. B.A. fully cooperated with the prosecutor's office.

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<sup>6</sup> Pseudonym initials have been used to protect the identity and confidentiality of these U visa applicants. The facts of these individuals' stories are detailed in declarations by their attorneys and are available on file with counsel for *amici*.

Ms. B.A. filed a waiver of inadmissibility in part because two decades prior, she was convicted of attempted abandonment of a child and attempted petit larceny arising out of an incident that occurred in the aftermath of the trafficking she experienced as a teenager. Still young and reeling from its psychological implications, Ms. B.A. again found herself vulnerable to ongoing exploitation when her employer refused to pay her as a live-in nanny. Ms. B.A. informed her employer she was quitting and asked to be paid. Her employer flatly refused, leaving Ms. B.A. with her child, expecting her to continue in the job without any commitment to pay her. In a rash decision, Ms. B.A. took items from the home as payment for her wages and left. In support of her waiver, Ms. B.A. expressed deep remorse for her actions and relayed the connection between her trafficking and these two-decades old convictions.

USCIS denied her application. In its waiver decision, USCIS declined to adjudicate Ms. B.A.'s application under the U visa specific standard set forth in (d)(14), which requires the agency to determine whether the waiver would serve the "national or public interest." Instead, USCIS determined it would be reasonable to embrace the (d)(3) criteria for purpose of adjudicating the (d)(14) waiver, conflating the two distinct standards.

Explaining its decision to apply only the (d)(3) factors, USCIS reasoned that it could not separately consider the national or public interest in part because, "[t]o

the best of USCIS's knowledge, [the (d)(14)] waiver has not been tested before an appellate authority." But USCIS's waiver determinations are not even subject to administrative appeal (only reopening or reconsideration before the same USCIS office). Moreover, when individuals challenge their waiver denials in federal court, as Mr. Rodriguez did in the present case, the government objects to judicial review. The result is a continued practice by USCIS of misapplying the law by conflating the (d)(3) and (d)(14) waivers.

**M.Z.**

Ms. M.Z. has been the primary caretaker of her five U.S. citizen children, and she advocates fiercely for her two children with developmental disabilities. Ms. M.Z. was denied a waiver in a similarly flawed decision. The basis for Ms. M.Z.'s U visa was an incident in which a man attempted to rape her. After she was able to run from him, he caught up with her and beat her with his fists until she was once again able to free herself. Her face bloodied and her clothes in tatters, Ms. M.Z. called the police and subsequently assisted in prosecuting the crime, including by testifying before a grand jury. Her assailant eventually pleaded guilty.

When she applied for a U visa, Ms. M.Z. applied for a waiver of inadmissibility because she was concededly inadmissible on non-criminal grounds. She also disclosed that she had a conviction for trafficking in a controlled substance, which she received after she gave a ride to someone who was selling drugs. This

was, and remains, her sole arrest and conviction, and there was no allegation that Ms. M.Z. had other involvement in the sale. In support of her waiver, she described her profound remorse for her mistake and submitted numerous letters of support and certificates of completion from vocational and rehabilitative programs she had attended.

USCIS denied her request for a waiver. Despite stating that Ms. M.Z.'s waiver was evaluated under the (d)(14) standard, USCIS explicitly listed the factors it considered as the three (d)(3) factors, without explaining why those factors provided the proper test.

Ms. M.Z. filed three motions to reopen or reconsider, each erroneously denied, at a cumulative cost of thousands of dollars.<sup>7</sup> Each of these motions addressed the agency's obligation to apply the (d)(14) standard. In response to her motions, USCIS continually declined to apply distinct (d)(14) factors or clarify the (d)(14) test. In one decision, the government stated that she had not shown that she "no longer pose[d] a risk to the public safety of the United States"—phrasing that mixed elements of the (d)(3) harm to society factor and the (d)(14) public interest

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<sup>7</sup> Currently, U visa applicants seeking a waiver of inadmissibility must pay a filing fee of \$930, unless granted a fee waiver. *See* Instructions, Form I-192, *available at* <https://www.uscis.gov/sites/default/files/document/forms/i-192instr.pdf>. Each motion to reconsider costs \$675, if no fee waiver is granted. *See* Instructions, Form I-290B, *available at* <https://www.uscis.gov/sites/default/files/document/forms/i-290binstr.pdf>.

factor. In another decision, the government failed entirely to indicate the standard it applied.

Concluding that it was impossible to meet USCIS' standard for a waiver—and unsure of what standard USCIS had applied, Ms. M.Z. gave up on filing motions to reopen or reconsider after years of seeking a recourse to challenge USCIS' legal errors.

**K.S.**

Mr. K.S. came to the United States fleeing persecution on account of his family background. The father of U.S. citizen children, Mr. K.S. has a single federal conviction for conspiracy to traffic a controlled substance that arose after he played a courier role in a family member's drug business. Almost immediately after his arrest over a decade ago, Mr. K.S. began cooperating with federal prosecutors, who were investigating and prosecuting drug traffickers and intercepting drug shipments. Mr. K.S. provided critical testimony at two federal criminal trials. As a result of his cooperation, Mr. K.S. began receiving death threats from drug traffickers. He was placed under protective custody, and his wife and children were temporarily relocated. A short time after the conviction of a trafficker against whom he had testified, Mr. K.S. was the victim of an attempted murder. Mr. K.S. reported the

attempted murder to the police, assisted officers in identifying his assailant, and testified at the trial.

When Mr. K.S. applied for a U visa and a waiver of inadmissibility, he submitted extensive evidence of his rehabilitation and his contribution to law enforcement. A letter from the United States Attorney's Office described Mr. K.S.'s cooperation as "substantial," and explained that the information he provided facilitated the seizures of drugs in both the United States and overseas. Mr. K.S. cooperated in multiple criminal prosecutions at great risk to the safety of himself and his family, to the significant benefit of law enforcement and public safety.

Yet when USCIS adjudicated Mr. K.S.'s waiver application, USCIS applied only the (d)(3) waiver. Without reference to the record, the agency speculated as to the harm his past conduct may have caused and may continue to be causing, and entirely omitted any analysis of whether his admission would be in the "national or public interest." Accordingly, Mr. K.S.'s waiver was denied, as was his subsequent motion to reopen and reconsider.

**B.P.**

Mr. B.P. is the father of two United States citizen children. Mr. B.P. worked in construction, and hoped his U visa would help him accomplish his goals of supporting his family and learning English.

Mr. B.P. applied for a U visa after he survived a random slashing and stabbing attack. Mr. B.P. provided a statement to police while hospitalized, identified his attacker after his release, and testified before the grand jury. In certifying that Mr. B.P. was the victim of a qualifying crime, the prosecutor noted that Mr. B.P. had been instrumental in securing his attacker's conviction.

USCIS failed to apply the (d)(14) standard to Mr. B.P.'s waiver of inadmissibility. The government instead stated that the Board of Immigration Appeals ("BIA") had pronounced a three-factor test for what the decision calls a "related nonimmigrant waiver." Accordingly, USCIS analyzed Mr. B.P.'s evidence solely under the (d)(3) rubric to determine that he did not merit a waiver of inadmissibility. Illustrating the practical effects of failing to consider the national or public interest, USCIS did not even consider as a positive factor Mr. B.P.'s avowedly instrumental role in securing a conviction. *See* Brief of Plaintiff-Appellant at 24-25 (noting that USCIS explicitly considers contributions to law enforcement as a positive factor in the "national interest" evaluation for T visa applicants).

**B. USCIS commits other legal errors that require meaningful review.**

In addition to conflating legal standards, USCIS also misapplies this Court's precedents and commits legal errors that are difficult or impossible to remedy before

the agency. Judicial review is essential to correcting these errors in those individual cases and ensuring a basic level of accountability by USCIS.

For example, in Ms. M.Z.'s case, *see supra*, at 10-12, USCIS determined that her conviction under N.Y. Penal Law § 220.31 was a controlled substance violation under immigration law, despite this Court's holding in *Harbin v. Sessions*, 860 F.3d 58, 68 (2d Cir. 2017), that the crime of which Ms. M.Z. was convicted was categorically *not* a controlled substance offense. Ms. M.Z. brought *Harbin* to USCIS's attention in each of her motions to reopen and reconsider. USCIS persisted in ignoring this Court's precedent in *Harbin* in its first three decisions and maintained that Ms. M.Z.'s conviction was a controlled substance offense. Finally, in its fourth decision, USCIS acknowledged its error and determined that Ms. M.Z. did not have a criminal ground of inadmissibility.<sup>8</sup>

Similarly, in denying Ms. B.A.'s case, USCIS not only conflated the relevant legal standards, *see supra*, at 8-10, but also egregiously mischaracterized the record by misstating the dates of her arrests. USCIS described one as being in 2009, when in fact it was 1999, and USCIS described the other as being in 2013 when in fact it was in 2006. The latter mistake was particularly harmful because USCIS relied upon

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<sup>8</sup> Ms. M.Z. nevertheless required a waiver because she was inadmissible for civil violations of immigration law. USCIS declined to waive those grounds of inadmissibility as a discretionary matter, employing the same reasoning that it had articulated in its first three decisions.

it to conclude that Ms. B.A. had not shown sufficient rehabilitation. USCIS also faulted Ms. B.A. for submitting no records of an arrest on a date for which she was never actually arrested.

As defender organizations, *amici* are particularly concerned about USCIS's practice of relying on dismissed charges to conclude that an individual presents a harm to society. For example, even though Mr. B.P., *supra*, at 13-14, was not inadmissible for a criminal conviction, USCIS counted a dismissed charge as evidence that he was a risk to society.<sup>9</sup> Disparagingly stating that the dismissal was "apparently due simply to the lack of a speedy trial," the agency disregarded the fundamental interests that the right to a speedy trial protects<sup>10</sup> and the right's basis

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<sup>9</sup> *Cf. Matter of Sotelo-Sotelo*, 23 I&N Dec. 201, 205 (BIA 2001) (in the absence of a conviction, an outstanding warrant should not be considered an adverse factor in a discretionary analysis); *Schware v. Bd. of Bar Examiners*, 353 U.S. 232, 241 (1957) ("The mere fact that a man has been arrested has very little, if any, probative value in showing that he engaged in any misconduct."); *Darboe v. Garland*, Nos. 19-3956 (L), 20-2427 (Con), 2023 WL 4759250, at \*2 (2d Cir. July 26, 2023) (noting that "arrests . . . that did not lead to convictions or adjudications have virtually no probative value in and of themselves").

<sup>10</sup> *See, e.g., Klopfer v. North Carolina*, 386 U.S. 213, 223-26 (1967) (recounting the history of the speedy trial right and referring to it as "one of the most basic rights preserved by our Constitution"); *Barker v. Wingo*, 407 U.S. 514, 532 (1972) ("Of [the interests that speedy trial protects,] the most serious is [preventing the impairment of the defense] because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.").

in the presumption of innocence.<sup>11</sup> Not only does the agency fail to apply the (d)(14), but USCIS’s manipulation of the (d)(3) waiver excludes people, largely from marginalized communities, who have had contact with the criminal legal system.

**III. If applicants have no meaningful opportunity to seek review of USCIS’s legal errors, the U visa program risks compounding harms on immigrant survivors and undermining the purposes of the U visa scheme.**

In *amici’s* experience, USCIS is more likely to commit legal error when adjudicating waiver applications from individuals who have had some contact with the criminal legal system. These errors compound the injustices of the criminal legal system and work against the U visa program’s goal of encouraging immigrant survivors to report crimes. Like the majority of people that *amici* serve, the U visa applicants in the stories above are people of color. We know that Black and brown communities, LGBTQ+ immigrants, and undocumented immigrants are disproportionately targeted and harmed by systemic overpolicing and assumptions of culpability. For example, one in four people arrested for drug law violations in the U.S. in 2016 was Black, even though studies consistently show drug use rates do

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<sup>11</sup> See, e.g., *Betterman v. Montana*, 578 U.S. 437, 442 (2016) (“The Speedy Trial Clause implements that presumption [of innocence].”); *Cain v. Smith*, 686 F.2d 374, 384 (6th Cir. 1982) (“This constitutional right [to a speedy trial] also preserves the presumption of innocence.”); *Heiser v. Ryan*, 15 F.3d 299, 305 (3d Cir. 1994) (“[T]he presumption of innocence . . . underlies the societal concerns expressed in the Speedy Trial Clause.”).

not differ substantially among racial and ethnic groups.<sup>12</sup> In New York City, between 2003 and 2013, Black and Latino men constituted 40.5 percent of those subject to stop and frisk by the New York Police Department (“NYPD”) despite accounting for only 4.7 percent of the city’s population.<sup>13</sup> During that time, approximately 44 percent of young Black people reported having been subject to stop-and-frisk 9 times or more.<sup>14</sup> Overpolicing not only ensnares more people of color and other marginalized individuals. It also leads to disproportionate rates of conviction and related collateral consequences.<sup>15</sup>

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<sup>12</sup> See Innocence Project, Racial Disparities Evident in New York City Arrest Data for Marijuana Possession, May 14, 2018, <https://innocenceproject.org/news/racial-disparities-in-nyc-arrest-data-marijuana-possession/> (citing FBI statistics).

<sup>13</sup> See New York Civil Liberties Union, Stop-And-Frisk During the Bloomberg Administration 2002-2013, at 6 (2014), <https://www.nyclu.org/en/publications/stop-and-frisk-during-bloomberg-administration-2002-2013-2014>; see also *Floyd v. City of New York*, 959 F. Supp. 2d 540, 659-60 (S.D.N.Y. 2013) (finding that the NYPD’s policy of stopping and frisking Black and Latine young men constituted indirect racial profiling in violation of the Equal Protection Clause of the Fourteenth Amendment).

<sup>14</sup> See Vera Institute of Justice, Coming of Age with Stop and Frisk: Experiences, Perceptions, and Public Safety Implications, at 30 (2013), <https://www.vera.org/publications/coming-of-age-with-stop-and-frisk-experiences-self-perceptions-and-public-safety-implications>.

<sup>15</sup> See, e.g., Center for Constitutional Rights, Stop and Frisk: The Human Impact: the Stories Behind the Numbers, the Effects on Our Communities, at 3, 5-10 (2012), <https://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf>.

*Amici* also see this compounding effect among LGBTQ+ immigrants of color, who are particularly vulnerable to police encounters because of increased rates of homelessness, trafficking, and substance abuse.<sup>16</sup> Large numbers of LGBTQ+ people,<sup>17</sup> including immigrants,<sup>18</sup> report widespread patterns of discrimination, harassment, and bias by police, which is particularly heightened for trans people of color.<sup>19</sup> Notably, “dual arrests”—where police arrest both the abuser and the

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<sup>16</sup> See, e.g., Sharita Gruberg, “How Police Entanglement with Immigration Enforcement Puts LGBTQ Lives at Risk,” *Center for American Progress*, April 12, 2017, <https://www.americanprogress.org/issues/lgbtq-rights/reports/2017/04/12/430325/police-entanglement-immigration-enforcement-puts-lgbtq-lives-risk/>; Chinyere Ezie, *Dismantling the Discrimination-to-Incarceration Pipeline for Trans People of Color*, 19 *Univ. of St. Thomas L. J.* 276, 309 (2023), <https://ir.stthomas.edu/cgi/viewcontent.cgi?article=1564&context=ustlj>. In New York, prior to the repeal of the state’s so-called “Walking While Trans” law in 2021, transgender women of color were frequently subject to arbitrary arrest based on biased perceptions that their mere presence in public meant they were engaging in prostitution. See Ezie, *supra*, at 298-99 (discussing phenomenon and collecting sources).

<sup>17</sup> See, e.g., Williams Institute, *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community* (2015), <https://williamsinstitute.law.ucla.edu/publications/lgbt-discrim-law-enforcement/>.

<sup>18</sup> See, e.g., Ezie, *supra*, n.16 at 299-301 (discussing the specific effects of overpolicing on immigrant transgender people).

<sup>19</sup> *Id.* at 278 (explaining how societal exclusion leads to overpolicing and criminalization of transgender people of color); see also Joey L. Mogul, et al., *Queer (In)Justice: The Criminalization of LGBT People in the United States* (2011) (documenting disproportionate police action against LGBT people of color).

survivor—occurred significantly more frequently in domestic violence incidents involving same-sex partners compared to heterosexual partners.<sup>20</sup>

Similarly, law enforcement agencies have specifically targeted immigrant communities color for police action, often based on impermissible assumptions about their beliefs and affiliations.<sup>21</sup> Examples include intense surveillance and arbitrary arrests in Muslim communities in the name of counterterrorism efforts, and erroneously placing Latine youth in gang databases because of their race or national origin.<sup>22</sup>

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<sup>20</sup> Center for American Progress, *Unjust: How the Broken Criminal Justice System Fails LGBT People of Color* 21 (2016), <https://www.lgbtmap.org/file/lgbt-criminal-justice-poc.pdf>.

<sup>21</sup> *See, e.g.*, The Muslim American Civil Liberties Coalition, *Mapping Muslims: NYPD Spying and its Impact on American Muslims* 4 (2012), <https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/clinics/immigration/clear/Mapping-Muslims.pdf> (noting that the NYPD’s secret surveillance program “marginalized and criminalized a broad segment of American Muslims”); Saher Khan and Vignesh Ramachandran, *Post-9/11 surveillance has left a generation of Muslim Americans in a shadow of distrust and fear*, PBS (Sep. 16, 2021), <https://www.pbs.org/newshour/nation/post-9-11-surveillance-has-left-a-generation-of-muslim-americans-in-a-shadow-of-distrust-and-fear> (discussing the chilling effects of law enforcement presumptions of culpability among Muslim Americans); New York Immigration Coalition, *Swept Up in the Sweep: The Impact of Gang Allegations on Immigration New Yorkers* (2018), [https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/clinics/immigration/SweptUp\\_Report\\_Final-1.pdf](https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/clinics/immigration/SweptUp_Report_Final-1.pdf) (discussing how gang policing of Latine immigrants and community members based on vague and uncorroborated gang allegations disproportionately impacts black and brown men and leads to eventual arrests).

<sup>22</sup> *Id.*

USCIS's errors amplify the "powerful relational message[]"<sup>23</sup> conveyed by these patterns of overpolicing and biased law enforcement action: that, in the eyes of the legal system, communities of color are worthy of continued marginalization and constant suspicion.<sup>24</sup> Both explicit and implicit bias in the judicial system further reinforce the message that law enforcement, judges, and attorneys can sidestep the due process rights of defendants from subordinated groups, particularly when they are Black and brown.<sup>25</sup> As several courts have noted, overpolicing and systemic bias

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<sup>23</sup> Jonathan Jackson, et al., *Centering Race in Procedural Justice Theory: Structural Racism and the Under- and Overpolicing Black Communities*, 47 L. and Human Behavior 68, 69 (2023), <https://psycnet.apa.org/fulltext/2023-54964-006.pdf> (discussing negative outcomes associated with excessive police contact in targeted communities).

<sup>24</sup> See, e.g., *id.*; Amanda Geller, et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 Am. J. Pub. Health 2231, 2324 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4232139/> (discussing the increased anxiety and trauma associated with repeated police contact).

<sup>25</sup> See Johnson, Jeh Charles, Report from the Special Advisor on Equal Justice in the New York State Court, Oct. 1, 2020, at 36, 60-62, <http://nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf>; L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 Yale L. J. 564 (2017), <https://www.yalelawjournal.org/article/systemic-triage-implicit-racial-bias-in-the-criminal-courtroom> (discussing courtroom practices by judges, court officers, and attorneys that create an environment of de facto racism and influence their behaviors and decisions on an unconscious level); Jerry Kang, et al., *Implicit Bias in the Court Room*, 9 U.C.L.A. L. Rev. 1124, 1186 (2012), <https://law.ucla.edu/news/implicit-bias-courtroom> (noting "a robust research basis suggesting the widespread effects of bias on decisionmaking" in both criminal and civil court proceedings); see also Carrie Rosenbaum, *Priorities and the State of Implicit Bias in Crimmigration*, The Regulatory Review (Apr. 13, 2022), <https://www.theregreview.org/2022/04/13/rosenbaum-implicit-bias-in->

in the criminal legal system foster mistrust of law enforcement among members of communities of color and discourages them from cooperating with police.<sup>26</sup>

Moreover, it is particularly harmful to recreate these effects in a visa scheme intended to reduce immigrants' fears of interacting with law enforcement. For the majority of undocumented U visa applicants, the repercussions of overpolicing uniquely compound the fear that law enforcement contact will act as a funnel into the deportation pipeline. Leslye Orloff, a noted scholar and advocate who participated in drafting the TVPA, has emphasized that this fear is a significant barrier to "protect[ing]" crime victims.<sup>27</sup> In a 2019 survey of nearly 600 advocates for survivors of domestic and sexual violence, 76.25 percent of respondents reported

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crimmigration/ ("A lack of specified enforcement priorities [for immigration officers] almost certainly devolves discretion, undermines transparency and due process, and masks implicit bias and racial discrimination in enforcement.").

<sup>26</sup> See, e.g., *Petit v. City of Chicago*, 352 F.3d 1111, 1115 (7th Cir. 2003) (observing that the "reality of urban policing is that minorities are frequently mistrustful of police," which can "reduce the willingness of some community members to cooperate with the police."); *Parada v. Anoka Cty.*, 332 F. Supp. 3d 1229, 1235-36 (D. Minn. 2018) ("While the U.S. immigrant population is extremely vulnerable to crime, police mistrust is common within immigrant communities.") (citations and footnotes omitted).

<sup>27</sup> Andrew Kreighbaum, *Immigrant Crime Victims Struggle as Special Visa Delays Mount*, Bloomberg Law (Apr. 19, 2023), <https://news.bloomberglaw.com/daily-labor-report/immigrant-crime-victims-struggle-as-special-visa-delays-mount>; see also Nicole Chavez, *Mistrust in police among Latinos may hinder search for suspect in Texas mass shooting, advocates say*, CNN (May 2, 2023), <https://www.cnn.com/2023/05/02/us/latinos-cleveland-texas-mass-shooting-reaj/index.html>.

that immigrant survivors have concerns about contacting police because of “increased fear of deportation, retaliation by their abusers, and separation from their children.”<sup>28</sup> Another study of Latine immigrants in Chicago, Los Angeles, Houston, and Phoenix revealed that “[a]pproximately half of the respondents reported an unwillingness to contact the police, even if they were victims of crime, because they or other people they knew could be asked about their immigration status.”<sup>29</sup> People with friends or family who had been deported in the past two years were particularly unwilling to contact police.<sup>30</sup>

For the U visa program to accomplish its goal of protecting vulnerable immigrants and encouraging assistance to law enforcement, it must mitigate—rather than reinforce—the above harms which create mistrust of the legal system among immigrant survivors. It cannot do so if U visa applicants like Mr. Rodriguez and those in the above stories do not have access to judicial recourse when USCIS

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<sup>28</sup> Tahirih Justice Center et al., *May 2019 Findings: Immigrant Survivors Fear Reporting Violence* (June 2019), <https://www.tahirih.org/wp-content/uploads/2019/06/2019-Advocate-Survey-Final.pdf>, archived at <https://perma.cc/T2MH-KUPN>; see also Cora Engelbrecht, *Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of Deportation.*, N.Y. Times (June 3, 2018), <https://www.nytimes.com/2018/06/03/us/immigrants-houston-domestic-violence.html>.

<sup>29</sup> Cecilia Menjivar, *Immigration Enforcement, the Racialization of Legal Status, and Perceptions of Police: Latinos in Chicago, Los Angeles, Houston, and Phoenix in Comparative Perspective*, 15 DuBois R. 107, 122 (2018) (on file with author).

<sup>30</sup> See *id.*

unlawfully denies U status. Left unchecked, these erroneous decisions compound systemic biases and reinforce the fear of deportation that hinders the protection of vulnerable immigrants. This functionally eviscerates Congress's intended humanitarian framework for the U visa program.

In the district court's view, individuals who have received unlawful denials from USCIS have no power "to call [those] who they believe have wronged them to account."<sup>31</sup> Yet it is exactly that ability to redress harms that fosters trust in the legal system. When an individual is able to challenge unlawful government action in court, they are more likely to experience a sense of empowerment and increased confidence in the legal system.<sup>32</sup> The ability to challenge wrongful agency action can be particularly meaningful for individuals victimized or marginalized through other aspects of the system.<sup>33</sup> By contrast, a court's refusal to provide relief when an agency has acted unlawfully is met with feelings of disempowerment and

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<sup>31</sup> Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 Emory L.J. 1657, 1690 (2016).

<sup>32</sup> *See, e.g.*, Varda Bondy, Lucina Platt, and Maurice Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences* 38, 40 (The Pub L. Project Oct. 2015), <https://repository.essex.ac.uk/18455/1/Value-and-Effects-of-Judicial-Review.pdf>.

<sup>33</sup> *Id.* at 41 (describing the sense of empowerment by asylum seekers who "couldn't believe how they were able to challenge that the way they were treated was wrong . . . They felt empowered by being able to voice their experiences . . . and to make a difference. . . .").

frustration.<sup>34</sup> Denying judicial review thus not only allows USCIS to engage unchecked in arbitrary decision-making, but it increases the marginalization of immigrant survivors of crime within the legal system—precisely the *opposite* of what Congress intended.

**IV. When it properly adjudicates U visas, USCIS offers applicants a fair chance to receive a powerful and life-changing form of immigration relief.**

Federal court review is essential to ensuring that USCIS follows the law when it adjudicates U visa petitions, and the benefits are not merely jurisprudential—proper application of the U visa scheme can transform people’s lives. For survivors of gender-based violence, U visa grants are associated with “significant reductions in immigration-related threats and abuse, threats of child abduction, threats to gain sole custody of children, and workplace-based abuse,” as well as “greater trust and faith in the law enforcement and justice systems of the U.S.”<sup>35</sup> One study of fifteen U visa recipients concluded “[t]he receipt of the U-Visa transformed the women’s

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<sup>34</sup> *Id.* at 39, 40.

<sup>35</sup> Leslye E. Orloff, et al., *Transforming Lives: How the VAWA Self-petition and U Visa Change the Lives of Survivors and their Children After Employment Authorization and Legal Immigration Status 1*, Nat’l Immigrant Women’s Advocacy Project (2021), <https://niwaplibrary.wcl.american.edu/wp-content/uploads/Transforming-Lives-Final-6.8.21-Final.pdf> (reviewing results of a study involving 11,171 immigration clients who had received U visas or relief under the VAWA).

lives,” enabled them “to express agency [and] trust local service providers,” and “gave [them] a new sense of self-worth and confidence.”<sup>36</sup>

These positive benefits are reflected in the experiences of U visa recipients *amici* have assisted in successful applications. Ms. L.W. and Ms. Y.G. are both survivors of years-long patterns of domestic abuse. Both women were arrested in incidents related to their abuse: Ms. L.W.’s for allegedly harassing an abuser, and Ms. Y.G.’s for theft after she separated from her abuser and lost his financial support. Both women were separated from their families when immigration authorities asked local law enforcement to hold them in jail pending the completion of criminal proceedings. Their legal teams identified them while in jail as survivors of domestic violence eligible for U visas. In both cases, U visas allowed the women and their children to break free from the abuse they experienced, achieve financial and emotional stability, avoid the catastrophic consequences of deportation and permanent separation from family, and put themselves on the path to citizenship in the United States.

The U visa program has the potential to protect and empower immigrant survivors who cooperate with law enforcement. However, in our collective

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<sup>36</sup> Shireen Rajaram, et al., “*It has given me life.*” *Latinas and the U-Visa: A Qualitative Study*, 37 *Gender Issues* 187, 199, 201 (2020), <https://link.springer.com/article/10.1007/s12147-019-09243-1>.

experience, the program does not realize that potential because of USCIS's pattern of legal errors in adjudicating waivers of inadmissibility. Applicants must have the recourse of judicial review when confronted with arbitrary and erroneous adjudications that fail to follow the standards set forth by Congress.

### CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the judgment of the district court.

Dated: August 2, 2023  
Brooklyn, NY

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) and Local Rules 29.1(c) and 32.1(a)(4), because the brief contains 6,131 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14 point Times New Roman.

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## **APPENDIX A:**

### **STATEMENTS OF INTEREST OF AMICI CURIAE**

**Brooklyn Defender Services** (“BDS”) is a public defender organization that represents low-income people in nearly 22,000 criminal, family, civil, and immigration proceedings each year. Since 2009, BDS has counseled more than 16,000 people in immigration matters, including removal proceedings before immigration judges, affirmative applications before USCIS, advisals, and immigration consequence consultations in Brooklyn’s criminal court system. Since 2013, BDS has provided removal defense services through the New York Immigrant Family Unity Project, New York’s first-in-the-nation assigned counsel program for detained New Yorkers facing deportation. BDS also litigates immigration cases in U.S. federal courts, including habeas, mandamus, and petitions for review before this Court.

**The Legal Aid Society** is the nation’s oldest and largest not-for-profit provider of legal services to low-income clients. Legal Aid’s Immigration Law Unit (the “ILU”) is a recognized leader in the delivery of free, comprehensive, and high-caliber legal services to low-income immigrants in New York City and surrounding counties. ILU provides critical support for criminal defense attorneys, advising them of the impact of criminal prosecutions on non-citizen clients, including the immigration consequences of pleas. Part of the ILU’s work also consists of

representing detained individuals in removal proceedings before immigration judges, on appeals to the BIA and the United States Court of Appeals for the Second Circuit, and representing individuals seeking immigration benefits before USCIS.

**Prisoners' Legal Services of New York** ("PLS") is a nonprofit organization that has provided civil legal services for over forty-five years to indigent individuals incarcerated in New York State. As part of the New York Immigrant Family Unity Project, PLS provides free legal representation to noncitizens incarcerated in New York State prisons facing immigration removal proceedings within the Institutional Hearing Program, in addition to noncitizens held in immigration detention in Albany, Batavia, and Plattsburgh, New York. PLS also provides representation in habeas corpus proceedings to detained immigrants in U.S. district courts and on petitions for review and civil appeals before the U.S. Court of Appeals for the Second Circuit. PLS has a strong interest in promoting fairness and predictability in the administration of immigration law.