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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the matter of: ATALA DE JESUS LEIVA-MENDOZA. In removal proceedings.	File No. A# 097 653 566 In Removal Proceedings

AMICUS CURIAE BRIEF OF THE NATIONAL NETWORK TO END VIOLENCE AGAINST IMMIGRANT WOMEN, LEGAL MOMENTUM, THE FAMILY VIOLENCE PREVENTION FUND, AND ASISTA IMMIGRATION ASSISTANCE PROJECT IN SUPPORT OF RESPONDENT'S APPEAL ON REMAND FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PRELIMINARY STATEMENT AND THE INTEREST OF THE *AMICI*

Pursuant to the March 25, 2011 letter of the BIA authorizing the filing of this brief, the National Network to End Violence Against Immigrant Women (the "Network"), Legal Momentum, the Family Violence Prevention Fund and ASISTA Immigration Project (collectively, the "Amici") submit this amicus curiae brief in support of the appeal of Atala De Jesus Leiva-Mendoza (the "Respondent").

The Network is a coalition of domestic-violence survivors, immigrant women, advocates, activists, lawyers, educators and other professionals working together to end domestic abuse. The Network is co-chaired by The Immigrant Women Program of Legal Momentum, the Family Violence Prevention Fund, and the ASISTA Immigration Assistance Project. These leading national organizations – who participated in drafting the Federal Violence Against Women Act – share a deep understanding of domestic violence, the procedures for fighting it, and the particular dynamics of domestic violence experienced by immigrant victims.

ASISTA Immigration Assistance Project ("ASISTA"), founded in 2004, provides comprehensive, cutting-edge technical assistance regarding immigration and domestic violence. ASISTA seeks to enhance immigrant women's security, independence and full participation in society by promoting integrated holistic approaches and educating those whose actions and attitudes affect immigrant women who experience violence. In addition to serving as a clearinghouse for immigration law technical assistance, ASISTA staff train civil and criminal judges and system personnel in the best practices for working with immigrant survivors of violence. ASISTA works closely with Department of Homeland Security ("DHS") personnel to ensure they implement the law as Congress intended, and coordinates litigation to correct misapplications of the law by the Executive Office of Immigration Review ("EOIR"). Together

with the National Network to End Violence Against Immigrant Women and DHS, ASISTA contributed a section on VAWA to EOIR's 2005 training video for all immigration judges.

Legal Momentum is the nation's oldest legal defense and education fund dedicated to advancing the rights of all women and girls. For 39 years, Legal Momentum has made historic contributions through public policy advocacy and litigation to secure personal and economic security for women. Its Immigrant Women Program is a national expert on the rights and services available under immigration, family, public benefits, and language access laws for immigrant victims of domestic violence, sexual assault, human trafficking and other violence. It shares this expertise through training, comprehensive publications, and technical assistance for lawyers, advocates, justice, and health care professionals nationwide. As co-chair of the Network, Legal Momentum led the efforts to craft and assist in implementation of the immigration protections in the Violence Against Women Acts of 1994, 2000 and 2005 ("VAWA"), the Trafficking Victims Protection Acts of 2000 and 2008 and other federal laws including public benefits access for immigrant victims and access to federally supported services necessary to protect life and safety.

The Family Violence Prevention Fund ("FVPF") is a non-profit tax exempt organization founded in 1980. The FVPF is a national organization based in San Francisco. It focuses on domestic violence education, prevention and public policy reform. Throughout its history, the FVPF has pioneered prevention strategies for justice, public education, and health care. The FVPF's Battered Women's Rights Project expands access to legal assistance and culturally appropriate services for all women, including battered immigrant women. The FVPF was instrumental in developing the 1994 VAWA and has since worked to educate health care providers, police, judges, employers and others regarding domestic violence. In addition, the

FVPF has provided training and technical assistance to domestic violence shelters, legal assistance workers and other service providers on issues facing battered immigrant women.

ISSUES PRESENTED

1. Whether a noncitizen parent's application for special rule cancelation under VAWA based upon extreme cruelty to the applicant's child must be denied when the abused child dies subsequent to the merits hearing held by the Immigration Judge, but prior to the issuance of a decision in such case?

2. Whether the Immigration Judge and BIA in its prior decision applied an incorrect legal standard by holding that "extreme cruelty" under VAWA requires evidence of "actual harm" to the child of a noncitizen parent facing deportation?

3. Whether the psychological abuse associated with a child witnessing intentional acts of domestic violence perpetrated by her father against her noncitizen mother constitutes "extreme cruelty" under VAWA as a matter of law?

SUMMARY OF ARGUMENT

There is no dispute from the record below that the Respondent's child, who was a United States citizen, witnessed physical violence against her mother which was intentionally committed by the child's permanent resident father in the child's presence. The VAWA cancellation provisions were specifically designed to, *inter alia*, protect from deportation, unmarried noncitizens whose children have been "battered or subjected to extreme cruelty" by a permanent resident parent.

While the purpose of VAWA is to provide broad humanitarian relief to battered women and children, the government takes a position which is cold, unsupported by the law and wholly antithetical to such purpose. According to the government, a parent's application must always be denied when a child who has been subjected to extreme cruelty dies prior to a determination of the application, even if the death, by happenstance, occurred subsequent to merits hearing but prior to the court's issuance of a decision on the application. The government cites no authority for its position, other than its own declaratory statement that as a result of her child's death, the Respondent is no longer the "parent of a child" who has been battered or subjected to extreme cruelty within the meaning of VAWA. The government's position is belied by the express terms of the statute, which make it clear that past events, and not what happens to the child in the future controls. The government's position is not only bad law, but is bad policy since it denies humanitarian relief to those most in need of it – parents of deceased, abused children.

Moreover, in the instant case, the Immigration Judge and the BIA in its previous decision erred by holding that "extreme cruelty" does not exist unless there is proof that the alleged abusive conduct resulted in "actual harm" to the child. VAWA does not, by its terms, require a showing of actual harm. In fact, since evidence of psychological harm to a child associated with extreme cruelty may only manifest years after witnessing one parent perpetrate domestic abuse against the other parent, it may not be possible to prove actual injury, specifically in the case of young children. Thus, by creating an actual harm requirement, the Immigration Judge below and the BIA in its previous decision made bad law, and turned VAWA on its head by punishing the victim.

The Immigration Judge and BIA should have recognized that which is self-evident – certain acts are so repulsive to society that they are, by their nature, extremely cruel. Forcing a

young child to witness her mother being brutally beaten by her father is such an act. Indeed, there is a plethora of research demonstrating the negative physical and psychological effects on children who have been exposed to domestic violence. *See infra* at pp. 16-18. Furthermore, exposing children to domestic violence perpetuates the intergenerational cycle of domestic violence since social science shows that child witnesses of domestic violence perpetuated by one parent against the other parent are more likely to become abusers in their adult life. Exposing children to domestic violence creates the foundation for children learning to use abusive behaviors as the norm, which is anathema to the underlying purpose of VAWA. Accordingly, the BIA should hold that intentionally exposing a child to parental domestic violence constitutes "extreme cruelty" as a matter of law.

Indeed, any other determination would result in the absurd and harmful situation where the abused noncitizen parent of a child who is a United States citizen could be required to make the "Hobson's Choice" of either leaving the country with the child, who will thereby lose the most basic fruits of her U.S. citizenship, or leave the child in the United States to be raised by an abusive parent, a result that state family laws have been designed to preclude for years. *See House Concurrent Resolution 172*, passed by both houses of Congress, October 26, 1990 ("It is the sense of Congress that, for purposes of child custody, credible evidence of physical abuse of a spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse.").[1] *See also Howard A. Davidson, A Report to the American Bar Association, The Impact of Domestic Violence on Children* (1994).[2] Neither result was contemplated by VAWA. In fact, the fear of such result was among the reasons Congress

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[1] House Concurrent Resolution 172 (the "1990 Congressional Resolution") is contained in the Amici's appendix of authorities which is being filed with this brief.

[2] The articles cited herein have been complied into an appendix of authorities, which is being filed concurrently with this brief.

enacted the special cancellation provisions of VAWA. Therefore, the decision below should be reversed.

ARGUMENT

Under VAWA, a noncitizen facing deportation may obtain special cancellation under VAWA of an order of removal ("VAWA Cancellation") by establishing that: (i) the noncitizen is the parent of a United States citizen who has been subjected to "extreme cruelty" by the child's other parent who is a citizen or permanent resident of the United States; (ii) the noncitizen has been continuously in the United States for a period of three years prior to the filing of their application; (iii) the noncitizen is a person of good moral character; (iv) the noncitizen is not subject to deportment under *8 U.S.C. § 1182(a)(2) or (3)* or *8 U.S.C. § 1227(a)(1)(G)* or *(2)* through *(4)*; and (v) removal of the noncitizen would result in extreme hardship to the noncitizen or her child. *8 U.S.C. § 1229b.*

There is no dispute that the Immigration Judge found that each of the last four requirements had been met in this case, and that the Respondent had introduced "credible evidence" that her young child had witnessed Respondent being physically beaten by the child's father. (BIA Decision at p. 1; Immigration Judge Decision at p. 14). However, both the Immigration Judge and the BIA on its initial review of this matter erred in holding that "extreme cruelty" did not exist because there was no evidence of "actual harm" to the Respondent's child. (BIA Decision at p. 2; Immigration Judge Decision at p. 16). Compounding these errors, the government now asserts on appeal that Respondent's application for VAWA Cancellation should also be denied because Respondent's child tragically died subsequent to the merits hearing by the Immigration Judge, but prior to the issuance of a decision in this matter. For the reasons set forth below, the decision denying VAWA Cancellation should be reversed.

POINT I

NONCITIZEN PARENTS OF CHILDREN WHO HAVE BEEN SUBJECTED TO EXTREME CRUELTY BY THEIR U.S. RESIDENT PARENT REMAIN ELIGIBLE FOR VAWA CANCELLATION REGARDLESS OF THE SUBSEQUENT MORTALITY OF THEIR CHILDREN

"Congress expresses its intent with the language that it chooses." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 433, n. 12 (1987). Thus, the first step in interpreting a statute is to look at the express language enacted by Congress. Where the language of a statute is unambiguous, the Court is required to enforce the statute as enacted by Congress.

A request for VAWA Cancellation may be brought by a parent of a child of a United States citizen where the child "has been" battered or subjected to extreme cruelty by its U.S. citizen parent. 8 U.S.C. § 1229b(b)(2).

In the instant case, the government wrongly contends that the express language of the statute somehow precludes the parent of a child who subsequently dies from maintaining an application for VAWA Cancellation. The express terms of the statute belie the government's position. Specifically, the statute is written in the past tense. All it requires is that the applicant be the parent of a child who "has been" battered or subjected to extreme cruelty. Thus, the statute is clear that eligibility is based upon actions which have occurred in the past (*i.e.*, previously battered or previously subjected to extreme cruelty). There is no language in the statute which even suggests that the Immigration Judge or BIA is permitted to take a forward looking approach and rely upon the mortality of the child at some time in the future.

For example, earlier this year, in *Lopez-Birrueta v. Holder*, 2011 U.S. App. 2820 (9th Cir. Jan. 13, 2011), the Ninth Circuit emphasized Congress' use of the past tense in 8 U.S.C. § 1229b(2), and rejected the government's argument that future events can result in the denial of an application for VAWA Cancellation. In *Lopez-Birrueta*, the government asserted that a

request for VAWA Cancellation brought by the noncitizen parent of children who had been battered should be rejected because the children subsequently developed a loving relationship with their formerly abusive father. The government relied upon the testimony of one of the children that "he has not had any problems with his father occur over the past few years," and concluded that the incidents of battering by the father no longer occurred.

In reversing the BIA and Immigration Judge's decision denying VAWA Cancellation to the noncitizen parent, the Ninth Circuit emphasized that Congress intentionally used the past tense - "has been" - in the statute, and held: "The BIA's suggestion that no battery occurred *in the past* because of the state of the relationship *today* is irrelevant under the plain text of the statute." (emphasis in the original). Accordingly, since the applicant was a noncitizen parent of children who had been previously battered, the Ninth Circuit held that the mother remained eligible for VAWA Cancellation, notwithstanding that the children were no longer being battered or subjected to extreme cruelty by their father.

In the instant case, as set forth below, the Respondent's child was subjected to extreme cruelty prior to her death. Under the express language of the statute and the Court's decision in *Lopez-Birrueta*, the Respondent remains eligible for VAWA Cancellation because she is a noncitizen parent of a child who had been previously subjected to extreme cruelty by her resident father.

Indeed, a decision to the contrary would mean that pure happenstance as to when events occurred could affect a respondent's application for VAWA Cancellation. The dates of events, rather than policy results intended by Congress would control, which would lead to absurd decisions. For example, in this case, there was an approximately two year gap between the merits hearing and the date that the Immigration Judge ultimately ruled. Under the government's

position in this case, if the Immigration Judge had ruled promptly, which would have been shortly after the merits hearing and prior to the child's death, then the Respondent would have remained eligible for VAWA Cancellation. However, under the government's position, the fact that the Immigration Judge took an extraordinary time to rule (two years), should have a negative impact on the Respondent and her application, because during such extended period of time, the Respondent's child died. Such a result is contrary to all concepts of fundamental fairness. A decision on an application should not be governed, in whole or in part, by the date that the Court rules, it should be determined by the merits of the application.

Additionally, VAWA was intended to be broadly construed for the purpose of providing humanitarian relief to battered women and children. *See, e.g., Hernandez v. Ashcroft*, 345 F.3d 824, 840 (9th Cir. 2003). This purpose would be wholly subverted if VAWA Cancellation is automatically denied to those who need such humanitarian aid the most – the parents of deceased, abused children. For example, the noncitizen parent of a child who has been severely beaten and survived would be entitled to remain in the country; whereas, the noncitizen parent who has suffered an even greater loss as a result of the death of such child would not be entitled to remain in the country. Indeed, in the most extreme circumstance, the murder of a child could become a vengeful abuser's new device for ensuring the deportation of the child's noncitizen parent. A civilized society has no use for such perverse and draconian results. Accordingly, the BIA should rule that the subsequent death of a child should not result in the automatic denial of an application for VAWA Cancellation.

POINT II

THE IMMIGRATION JUDGE APPLIED AN INCORRECT LEGAL STANDARD BY REQUIRING EVIDENCE OF "ACTUAL HARM" AS A PREREQUISITE TO A DETERMINATION OF "EXTREME CRUELTY"

The decision below should be reversed because the Immigration Judge wrongly held that the Respondent had not established that her daughter had been subjected to "extreme cruelty" by her father. In reaching this result, the Immigration Judge and the BIA in its previous decision applied an erroneous legal standard, requiring proof of actual injury as a prerequisite for finding extreme cruelty, notwithstanding that the express language of VAWA does not contain any requirement of actual injury.

As the Supreme Court has stated on numerous occasions, Congress "says in a statute what it means and means in a statute what it says there." *Connecticut General Bank v. Germain, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149 (1992). See also United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241-42, 109 S. Ct. 1026, 1030-31* (1989); *United States v. Goldenberg,* 168 U.S. 95, 102-103, 185 Ct. 3, 4 (1897). As such, a court may not substitute its own judgment for that of Congress by imposing additional requirements or conditions in a statute that were not enacted by the legislature.

For example, in *Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 107 S. Ct. 1207 (1987),* the decision of the Immigration Judge and BIA was reversed in connection with a noncitizen's application for asylum as a refugee. While the statute at issue provided that a person may qualify as a refugee if he or she "has a well-founded fear of future persecution," the BIA held, and the government argued, that the only way that a noncitizen can establish a "well founded fear" is if she can establish that persecution is "more likely than not." *480 U.S. at 430-31, 107 S. Ct. at 1212-13.* The Ninth Circuit reversed the BIA and the Supreme

Court affirmed the Ninth Circuit's ruling. The Supreme Court rejected the immigration judge's attempt to impose a "more likely than not" standard into the statute, and held that "[t]he statutory language does not lend itself to [the immigration judge's] reading." *Id. See also Jama v. Immigration and Customs Enforcement,* 543 U.S. 335, 341, 125 S. Ct. 694, 700 (2005) ("We do not lightly assume that Congress omitted from its adopted text requirements that it nonetheless intends to apply.")

In the instant case, the express language of the statute at issue provides that it applies to "the parent of a child of an alien who is or was a lawful permanent resident and the child has been battered or subjected to extreme cruelty by such permanent resident parent." *8 U.S.C. § 1229b(b)(2)(A)(i)(II).* Nowhere in that statute is there a requirement that an applicant is required to prove that the extreme cruelty resulted in actual harm to their child or themselves.

Indeed, the government's own regulations concerning VAWA support Respondent's position that "actual injury" is not a prerequisite to a finding of "extreme cruelty." Specifically, 8 C.F.R. § 204.2(c)(vi) provides:

> Battery or extreme cruelty. For purposes of this chapter, the phrase "was battered or was the subject of extreme cruelty" includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which **threatens** to result in physical or mental injury.

(emphasis supplied).

The regulation's express acknowledgement that extreme cruelty includes actions which merely "threaten" to result in physical or mental injury is wholly inconsistent with the prior determinations in this case that "actual harm" is required for a finding of extreme cruelty.

The legislative history to VAWA similarly supports the Respondent's position that "actual harm" is not required for a finding of "extreme cruelty." The House Report

accompanying VAWA stated that it was modifying the existing law which required applications based upon "extreme cruelty" to be supported by an affidavit from a mental health professional. The House Report noted that this requirement was being eliminated because, *inter alia*, the existing regulation "*focuses the inquiry on the effect of the cruelty on the victim rather than on the violent behavior of the abuser.*" H. Rep. 103-395 at p. 38 (1998) (emphasis supplied). Thus, harm to the victim (*i.e.*, the effect of the cruelty) is not the appropriate focus on an extreme cruelty determination under VAWA; rather, the focus is on the nature of the abuser's behavior.

In this case, the decision of the Immigration Judge below and prior decision of the BIA acknowledged that the Respondent had introduced evidence of threatened harm to her child as a result of the abuser committing domestic violence against the Respondent in the child's presence. *See* BIA Decision at p. 2. ("expert witness, Dr. Matthews testified that a young child may suffer significant psychological harm if exposed to abuse of that child's caregiver"); Immigration Decision at p. 16. ("[Dr. Matthews] provided testimony that a young child may suffer significant psychological harm if exposed to abuse of that child's caregiver. The Court finds this to be a very plausible position, as an exposure to serious trauma being inflicted on a parent/caregiver may result in consequences to the child.").

However, the previous decision wrongly held that extreme cruelty did not exist in this case because of the lack of evidence of actual, as opposed to potential or threatened, harm to the child. *See* BIA Decision at p. 2. ("We agree with the Immigration Judge's finding that it is speculative to say that Naiela suffered any negative effects from witnessing Naiel's abuse of respondent."); Immigration Decision at p. 16. ("So while we have testimony that it is possible that Naiela may suffer some negative effects of seeing Respondent abused by Naeil, it is entirely speculative at this point whether or not any negative effects have actually taken or will take

place."). VAWA does not require the Respondent to introduce any evidence of "actual injury" and the Immigration Judge's requirement of proof of "actual injury" was clear error.[3]

The insistence on evidence of actual injury subverts the purpose of VAWA, which is part of a national effort to prevent domestic violence. The Immigration Judge's opinion acknowledges that a child's witnessing of domestic abuse perpetrated by one parent against the other can result in harm to the child and that such damage may manifest at some time in the future. (Immigration Judge Decision at p. 18). The social science research on a child's witnessing of parental abuse is clear that such damage may take years to show. *See infra,* at pp. 15-17. There is not a scintilla of authority to support the proposition that it was Congress' intent simply to ignore those victims of extremely cruel behavior solely because, by chance, they had the fortune or misfortune of having the effects of their abuse manifest only after an application has been made for VAWA Cancellation.

The "actual harm" legal standard relied upon below leads to results which are dangerous and antithetical to the purposes underlying VAWA. VAWA did not intend perpetrators to be excused for their violence in instances where their victims were particularly resilient or where they were fortunate enough to obtain quality interventions before serious injury has manifested. For example, common sense dictates that a parent who points a gun at a child's head has engaged in extreme cruelty towards the child. However, under the rationale of the decisions on appeal, such heinous activity does not constitute "extreme cruelty" under VAWA unless it can be shown

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3 Under VAWA, the Respondent was only required to proffer "any credible evidence" to support her petition. 8 U.S.C. § 1229(b)(2)(D). Under the "any credible evidence" standard, the immigration judge may not deny a petition for failure to submit particular evidence. It may only be denied on evidentiary grounds if the evidence that was submitted is not credible or otherwise fails to establish eligibility. Leslye E. Orloff, et al., *Mandatory U-Visa Certification Unnecessarily Undermines The Purpose of the Violence Against Women's Act's Immigration Protections and its "Any Credible Evidence Rules – A Call for Consistency,"* 11 Georgetown J. Gender & L. 619, 627 (2010). In this case, the Respondent satisfied the "any credible evidence" standard by introducing the unopposed, expert testimony of Dr. Matthews. *Amici* submits that such testimony, which the Immigration Judge stated was "very plausible" satisfied Respondent's evidentiary burden.

that the child has been actually harmed. In other words, unless and until the trigger is pulled or the child manifests evidence of emotional damage or harm, VAWA Cancellation is unavailable.

This reasoning stands VAWA on its proverbial head, and is not what Congress intended when it created VAWA immigration relief including VAWA Cancellation of removal. VAWA was enacted to help stop the continuation of domestic violence and possible resultant injuries from patterns of continued abuse. Congress designed immigration protection under VAWA to offer help to immigrant victims of battering *or extreme cruelty.* Congress, recognizing the escalating nature of abuse in violent relationships, provided access to VAWA immigrant relief when there was battering *or extreme cruelty* without requiring that the abuse escalate to the point where the victim actually suffers the first physical beating.[4] Under the rationale of the Immigration Judge and the BIA in its prior decision, VAWA Cancellation only comes into play after it is too late and harm from domestic violence has already occurred.

Moreover, under that rationale, the noncitizen parent of a child who is a United States citizen and who has been psychologically or emotionally abused, may be required to make a Hobson's Choice between leaving the United States with the child who will thereby lose the most basic fruits of her citizenship, or leave the child in the United States to be raised by an abusive parent or to be placed in the foster care system. VAWA was enacted to prevent the noncitizen parent from making such a "choice," not to force the noncitizen parent into making that "choice." Thus, the ruling below undermines the statutory protections enacted by Congress in VAWA. Accordingly, the previous decisions should be reversed.[5]

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[4] *See, generally*, Leslye E. Orloff & Janice V. Kaguyutan, *Offering A Helping Hand: Legal Protections For Battered Immigrant Women: A History Of Legislative Responses,* 10 Am. U.J. Gender Soc. Pol'y & L. 95, 107 (2001).

[5] In affirming the Immigration Judge, the BIA also wrongly held that "the respondent had failed to establish that two instances of potential psychological harm to her daughter are sufficient to constitute extreme cruelty." (A-23). The number of instances of violence is irrelevant. As noted in the social science literature: "Even a single

POINT III

THE PSYCHOLOGICAL ABUSE ASSOCIATED WITH A CHILD WITNESSING INTENTIONAL ACTS OF DOMESTIC VIOLENCE AGAINST HER MOTHER CONSTITUTES "EXTREME CRUELTY" AS A MATTER OF LAW

In addition to committing clear error by improperly requiring the Respondent to establish actual harm to her child, the previous decisions are also wrong because the psychological abuse associated with exposing a child to intentional acts of domestic violence against her mother constitutes "extreme cruelty" under VAWA as a matter of law.

The government's regulations underlying VAWA recognize that certain types of behavior are so heinous by their nature that they constitute "extreme cruelty" *as a matter of law*. This proposition is made evident by 8 C.F.R. § 204.2(c)(vi), which addresses the "extremely cruelty" standard, and which provides, in part:

> Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution ***shall*** be considered acts of violence. Other abusive actions ***may*** also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence.

(emphasis added).

This regulation divides all abusive behaviors into two categories: (i) acts which "shall" be considered violent and thus are, *per se*, extremely cruel; and (ii) acts that "may" be considered extremely cruel behavior under some, but not all, circumstances.

The use of both "shall" and "may" in close proximity to each other in the same regulation triggers the long standing principle that "shall" has a mandatory connotation, while "may" means discretionary treatment. *Jama*, 543 U.S. at 346, 125 S.Ct. at 702-03; (the word "may"

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episode of violence can produce posttraumatic stress disorder in the children." Daniel G. Saunders, *Child Custody Decisions in Families Experiencing Women Abuse*, 39 Social Work 1, 51-52 (1994). Moreover, the Respondent asserts in its brief that the record shows that there were more than two instances of violence witnessed by her child.

customarily connotes discretion, and that connotation is particularly apt where "may" is used in contraposition to the world "shall"); *Alabama v. Bozeman*, 533 U.S. 146, 153, 121 S. Ct. 1079 (2001) ("The word 'shall' is ordinarily 'the language of command.'"), *quoting Anderson v. Yungkau,* 329 U.S. 482, 485, 67 S. Ct. 428 (1947). The regulation at issue in this case, by its very terms, provides that psychological abuse falls within the category of mandatory types of violent behavior which are extremely cruel. 8 C.F.R. § 204.2(c)(vi). Thus, if a child is subjected to psychological abuse, such activity requires a finding of "extreme cruelty" under the VAWA Cancellation provisions. *See also* Anna Byrne, *What Is Extreme Cruelty? Judicial Review of Deportation Cancellation Decisions for Victims of Domestic Abuse*, 60 Vand. L. Rev. 1815 (2007) (advocating that certain types of abuse should be considered extreme cruelty as a matter of law).

Both the extensive and accepted social science research on "child witnessing" and the uncontradicted testimony of Respondent's expert witness below unequivocally establish that requiring a child to witness one parent committing violent domestic abuse upon the other parent constitutes psychological abuse.

"There is no doubt that children are harmed in more than one way – cognitively, psychologically, and in their social development – merely by observing or hearing the domestic terrorism of brutality against a parent at home." Howard A. Davidson, *A Report to the American Bar Association, The Impact of Domestic Violence on Children*, p. 1 (1994). This point was recognized by Congress in the 1990 Congressional Resolution which, stated that "children are emotionally traumatized by witnessing physical abuse of a parent" and "the effects of physical abuse of a spouse on children include actual and potential emotional and physical harm, the

negative effects of exposure to an inappropriate role model, and the potential for future harm where contact with the batterer continues." *See* 1990 Congressionsl Resolution at p. 2.[6]

"The impact of violent environments on very young children suggests that permanent negative changes in the child's brain and neural development can occur, such as altering the development of the central nervous system, predisposing the individual to more impulsive, reactive, and violent behavior." Peter G. Jaffe *et al.*, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 Juvenile and Family Court Journal 4, 57, 60-61 (2003). Indeed, infants who have witnessed domestic abuse may not develop the attachment to caretakers that is critical to their development and may suffer from "failure to thrive." Janet Carter, *Domestic Violence, Child Abuse, and Youth Violence: Strategies For Prevention and Early Intervention,* p. 2 (2005).[7] In addition to emotional and behavioral problems, difficulties experienced by child witnesses can encompass a variety of trauma symptoms, including nightmares, flashbacks, hypervigilance, depression, and regression to earlier stages of development." *See* Peter G. Jaffe *et al.*, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 Juvenile & Family Ct. J. 4, 57, 60 (2003). "[W]itnessing violence as a child has also been associated with adult reports of depression, trauma-related symptoms and low self-esteem among women." Jeffrey L. Edleson, *Children's Witnessing of Adult Domestic Violence*, p. 11(1997).[8]

It is further recognized that the effects of this psychological abuse may not manifest until years later. Witnessing domestic abuse at a young age lays the foundation for long-term effects to become apparent. In *Problems Associated with Children's Witnessing of Domestic Violence*,

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[6] This point has also been recognized in numerous states' laws, which have been "moving toward supporting a presumption against awarding custody to a batterer where there is evidence of abuse." Catherine F. Klein and Leslye E. Orloff, *Providing Legal Protection for Battered Women: An analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 801 (1993).

[7] Available at http://www.mincava.umn.edu/link/documents/fvpf2/fvpf2.shtml.

[8] Available at http://www.ncdsv.org/images/ChildrenWitnessingAdultDV.pdf.