No. 19-72758

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AYLALIYA ASSEFA BIRRU,

Respondent-Appellant,

v.

ROBERT M. WILKINSON,

Petitioner-Appellee.

On Appeal from the U.S. Executive Office of Immigration Review
Board of Immigration Appeals, Docket No. A062-975-632,
Hons. Michael P. Baird, Garry D. Malphrus, and Ellen C. Liebowitz

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BRIEF OF *AMICUS CURIAE* NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT, INC. IN SUPPORT OF BIRRU AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, the National Immigrant Women's Advocacy Project, Inc. states that it is a nonprofit corporation organized under the laws of Maryland, that it has no stock, and therefore no publicly traded company owns 10 percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Federal Statutes

Public Laws

Legislative History

State Statutes

Articles

Miscellaneous

INTEREST OF AMICUS CURIAE

The National Immigrant Women's Advocacy Project, Inc. ("NIWAP") addresses the needs of immigrant women, immigrant children and immigrant victims of domestic violence, sexual assault, and other crimes by advocating for reforms in law, policy and practice. NIWAP is a national provider of training, legal and social science research, policy development, and technical assistance to advocates, attorneys, pro bono law firms, law schools, universities, judges, law enforcement, prosecutors, social service and health care providers, justice system personnel, and other professionals who work with immigrant women, children and crime victims. NIWAP's work supports those in the field and in government who work to improve laws, regulations, policies, and practices to enhance legal options and opportunities for immigrant women and children.

This case presents a question of significant importance to NIWAP: whether removal of an immigrant for a crime of domestic violence under section 237(a)(2)(E)(i) of the Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. § 1101 *et seq.*) ("Act"), 8 U.S.C. § 1227(a)(2)(E)(i), can be cancelled under Violence Against Women Act ("VAWA") cancellation of removal, section 240A(b)(2) of the Act, 8 U.S.C. § 1229b(b)(2)(A)(iv) ("VAWA Cancellation"), if the crime of domestic violence was otherwise waivable under section 237(a)(7) of the Act,

8 U.S.C. § 1227(a)(7) (the "DV Victim Waiver"), even if the crime of domestic violence constitutes an aggravated felony under section 101 of the Act, 8 U.S.C. § 1101(a)(43)(F).

CONSENT OF PARTIES

Both parties consent to the filing of this brief.

FED. R. APP. P. 29(a)(4)(E) STATEMENT

No party's counsel authored this brief in whole or in part, no party or its counsel contributed money intended to fund preparing or submitting the brief, and no person other than NIWAP, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

Respondent-Appellant Aylaliya Assefa Birru ("Liyah") is a U.S. legal permanent resident and a citizen of Ethiopia. Liyah married Silas D'Aloisio, an American citizen. Liyah was a victim of severe abuse by D'Aloisio during their marriage – abuse that was likely to lead to her death, *see* Section I.C., *infra*. In 2014, during a heated argument, Liyah grabbed her husband's pistol to protect herself from him. She thought it was unloaded, but there was a round in the chamber. The gun went off and D'Aloisio was injured, although he later recovered. Liyah was convicted of assault with a firearm under California Penal Code § 245(a)(2), with a

special enhancement for domestic violence under California Penal Code § 12022.7(e). The court sentenced her to six years in prison.

Thereafter, the government initiated removal proceedings. At her hearing before the Immigration Court, Liyah sought VAWA Cancellation, a cancellation of removal as a victim of domestic violence under section 240A(b)(2) of the Act. 8 U.S.C. 1229b(b)(2). However, the government argued that Liya's conviction constituted an aggravated felony that left her ineligible for VAWA Cancellation and, thus, removable. The Board of Immigration Appeals ("Board") agreed.

The Board erred in this holding for four separate reasons. First, social science supports a broad application of the DV Victim Waiver to allow battered immigrant women to benefit from VAWA Cancellation. Second, the DV Victim Waiver unambiguously applies to VAWA Cancellation based on the words of the statute. Third, legislative history supports that Congress intended the DV Victim Waiver to broadly protect battered immigrant victims. Fourth, the Board's proposed reading of VAWA Cancellation would leave virtually no victims of domestic violence eligible to claim VAWA Cancellation.

ARGUMENT

An immigrant is removable under section 237(a)(2)(E)(i) of the Act, 8 U.S.C. § 1227(a)(2)(E)(i), if the immigrant is convicted of "a crime of domestic

violence." A crime of domestic violence includes a crime of violence[1] committed by a spouse. *See id*.

However, removal can be cancelled under VAWA Cancellation, created by the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, 114 Stat. 1464 ("VAWA 2000"). The VAWA Cancellation statute says:

> (A) Authority. The Attorney General may cancel removal of…an alien who is inadmissible or deportable from the United States if the alien demonstrates that—
>
> (i) (I) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen…;
>
> (ii) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application…;
>
> (iii) the alien has been a person of good moral character during such period…;
>
> (iv) the alien is not inadmissible under paragraph (2) or (3) of section 212(a), is not deportable under paragraphs (1)(G) or (2) through (4) of section 237(a), subject to paragraph (5), and has not been convicted of an aggravated felony; and
>
> (v) the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

[1] A crime of violence is (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. 8 U.S.C. § 1227(a)(2)(E)(i), citing 18 U.S.C. § 16.

8 U.S.C. § 1229b(b)(2)(A). At the merits hearing before the immigration judge, paragraphs (i), (ii), (iii), and (v) of VAWA Cancellation were not at issue. However, the government argued that Liya's conviction for assault, with a special enhancement for domestic violence, constituted an aggravated felony under paragraph (iv) of VAWA Cancellation ("Paragraph (iv)"), leaving her ineligible for VAWA Cancellation and, thus, rendering her removable.

For clarity, there are three separate requirements under Paragraph (iv):

1. That the immigrant is not inadmissible under section 212(a)(2) or (3) of the Act (the "Inadmissibility Provision");
2. That the immigrant is not deportable under section 237(a)(1)(G) or (2) through (4) of the Act (the "Deportability Provision"), subject to paragraph (5); and
3. That the immigrant "has not been convicted of an aggravated felony," (the "Aggravated Felony Provision").

See 8 U.S.C. 1229b(b)(2)(A)(iv). "Aggravated felony" is defined under the Act, in relevant part, as a crime of violence for which the term of imprisonment is at least one year. 8 U.S.C. § 1101(a)(43)(F).

VAWA Cancellation contains one additional pertinent provision added by section 813(c) of the Violence Against Women and Department of Justice Reauthorization Act of 2005, 109 Pub. L. 162, 119 Stat. 2960 ("VAWA 2005"), in section 240A(b)(5) of the Act. 8 U.S.C. § 1229b(b)(5) (the "VAWA Incorporation Provision"). The VAWA Incorporation Provision states, in full:

> (5) Application of domestic violence waiver authority. The authority provided under section 237(a)(7) may apply under paragraphs (1)(B), (1)(C), and **(2)(A)(iv)** in a cancellation of removal and adjustment of status proceeding.

(Emphasis added.) Thus, the DV Victim Waiver provision of section 237(a)(7) of the Act applies to Paragraph (iv) through the VAWA Incorporation Provision. 8 U.S.C. § 1229b(b)(5). The DV Victim Waiver says that removability can be waived if the immigrant was acting in self-defense. 8 U.S.C. § 1227(a)(7).

Before the Immigration Court, Petitioner conceded that Liyah was acting in self-defense when she fired the gun, the act that led to her conviction for assault and domestic violence. However, Petitioner argued that the DV Victim Waiver does not apply to Paragraph (iv). The Immigration Judge and the Board found the same. The reason, as explained by the Board:

> As observed by the Immigration Judge, the statute specifically references section 240A(b)(5) of the Act after listing the inadmissibility grounds under sections 212(a)(2)-(3) of the Act, 8 U.S.C. §§ l 182(a)(2)-(3), and removal grounds under sections 237(a)(l)(G), and (2)-(4) of the Act that are subject to the waiver but before concluding, "**and** has not been convicted of an aggravated felony" (emphasis added) (IJ at 3). The inclusion of the word "and" before addressing aggravated felony convictions is significant here because it signals congressional intent to separate those offenses that qualify as aggravated felonies and create an absolute bar to special rule cancellation of removal.

R. at 000004. The Board held that, while the DV Victim Waiver applies to the Inadmissibility and Deportability Provisions of Paragraph (iv), the DV Victim Waiver does not apply to the Aggravated Felony provision.

I. Social science research demonstrates that applying the DV Victim Waiver to the Aggravated Felony Provision under VAWA Cancellation is important in protecting battered immigrant women.

A. Battered women who acted in self-defense should be entitled to the protection of VAWA Cancellation regardless of their conviction of an aggravated felony.

If the default rule is that an immigrant victim of domestic abuse cannot claim VAWA Cancellation of removal as a form of relief if convicted of an aggravated felony committed in the process of protecting herself, that rule would preclude the opportunity to consider the full context of the harm she faced and the reasonableness of her actions. The goal of VAWA's immigration relief is to "to remove immigration laws as a barrier that kept battered immigrant women and children locked in abusive relationships." VAWA 2000, § 1502, 114 Stat. 1518. In particular, the legislative intent behind the DV Victim Waiver reflects the concern that the criminal system may pose a rigid trap for immigrant victims of domestic violence who were unable to successfully navigate the system. *See Congressional Record* 146:126 (October 11, 2000) p. S10170 ("battered immigrant women acting in self-defense are often convicted of domestic violence crimes"). This rationale is reflected in the statutory regime of section 237(a)(7)(A), which confers on the Attorney General the authority to look beyond the criminal court record and waive the application of section

237(a)(2)(E)(i) of the Act for certain victims of domestic violence. The Board's refusal to apply the DV Victim Waiver to convictions of aggravated felony thwarts the goal of protecting battered immigrant victims by ignoring the challenges the victims who defend themselves against their abusers face in the criminal legal system. The Board's refusal also disregards the history preceding, and the context surrounding, the crime.

Battered women who are forced to resort to violence in order to protect themselves frequently face discrimination in criminal proceedings. *See, e.g.*, Carol Jacobsen et al., *Battered Women, Homicide Convictions and Sentencing: The Case for Clemency*, 18 HASTINGS WOMEN'S L.J. 31, 31-32 (2007) (hereinafter "*Battered Women*") (describing higher conviction rates and longer sentences for domestic violence victims than all homicide defendants, including those with violent criminal records). This discrimination can take the form of stringent requirements for application of fundamental defenses to criminal liability. One example is the self-defense doctrine, which generally requires a reasonable belief that the danger of bodily harm is imminent and that force is necessary to avoid the danger. *See, e.g.*, CALCRIM No. 3470. Right to Self-Defense or Defense of Another (Non-Homicide) (2020) (describing jury instructions in California for self-defense that require "imminence" and "reasonable belief"). However, the nature of the danger that a battered woman faces is different than that presented in a traditional self-defense

scenario. The requirements of imminence and necessity disregard a battered woman's personal experience and the history of abuse suffered in the relationship. Carol Jacobsen & Lynn D'Orio, *Defending Survivors: Case Studies of the Michigan Women's Justice & Clemency Project*, 18 U. PA. J.L. & SOC. CHANGE 1, 25 (2015) (hereinafter "*Defending Survivors*") (citations omitted). The history of abuse, intimate knowledge of her abuser, and signs of escalating violence shape the victim's reasonable fear of imminent harm and necessity to defend herself.

The law of self-defense in the criminal context also "embod[ies] the notion of a fair fight between persons of equal size and strength duking it out…." Carol Jacobsen, *Battered Women,* at 32-33 (citation omitted) (explaining that most of the battered women observed in a study who killed their abusive partners were convicted despite abundant evidence of severe abuse because they were not able to meet the requirements of self-defense). The victim's aggravated felony conviction resulted from Liya's use of weapon to defend herself against her husband and his acts of domestic violence. There can be no "fair fight" between a domestic violence victim and her abuser, who perpetrates severe abuse even without the use of a weapon. Around three-quarters of female victims of intimate partner violence are injured by their male partners' physical force that relies on, for example, the use of hands, fists, and feet. *See* Erica L. Smith & Donald J. Farole, Jr., *Profile of Intimate Partner*

Violence Cases in Large Urban Counties, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics (2009).

A battered woman who has in the past relied only on her own strength to protect herself may know that her efforts further intensify the violence and may be forced to use weapons in defense of herself. Jacobsen, *Battered Women*, at 34. Indeed, a U.S. Department of Justice study suggests that battered women's response to violence is not an overreaction as it found that almost half of women who were slain at the hands of their male partners had underestimated the imminent nature of the threat. Jacobsen, *Defending Survivors*, at 26-27 (citation omitted). However, when victims defend themselves from their abusive male partners in physical confrontations using a weapon, they are routinely convicted of a crime that constitutes an aggravated felony. *See id.* at 10-11 (observing that all 21 women who applied to a clemency project were convicted and sentenced to three years or more in prison for killing or injuring their partners with a weapon in direct confrontations even though they acted in self-defense).

In order to effectively protect battered immigrant victims as Congress intended, immigration judges and the Board must not exclude convictions of aggravated felonies from the scope of the DV Victim Waiver and must allow the opportunity to examine the full context of the victims' acts of self-defense in the context of the history of domestic violence in the relationship.

B. VAWA Cancellation relief is critical for immigrant victims who are especially vulnerable to domestic violence and the criminal consequences of defending themselves.

The Board must apply VAWA Cancellation and the DV Victim Waiver, as intended by Congress, in a manner that provides maximum protection for battered immigrant women, who are particularly vulnerable to domestic violence due, in large part, to their status as an immigrant. *See* Edna Erez et al., *Intersections of Immigration and Domestic Violence: Voices of Battered Immigrant Women*, 4 Feminist Criminology 32, 36, 46-47 (2009). Immigrant women face many obstacles in escaping abusive relationships because language barriers, fear of unresponsiveness from law enforcement, and lack of understanding of the legal system often prevent them from seeking help. *See* Leslye Orloff & Olivia Garcia, "Dynamics of Domestic Violence Experienced by Immigrant Victims," *Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants*, The National Women's Advocacy Project, American University, Washington College of Law and Legal Momentum (2013), at 3 (hereinafter "*Breaking Barriers*"); Mary B. Clark, *Falling Through the Cracks: The Impact of VAWA 2005's Unfinished Business on Immigrant Victims of Domestic Violence*, 7 U. MD. L.J. RACE RELIG. GENDER & CLASS 37, 38-41 (2007).

In addition, immigrant victims' fear of jeopardizing their immigration case or removal from the United States often traps them in abusive relationships. Orloff,

Breaking Barriers, at 6. Therefore, immigrant survivors of domestic violence should not be held to a rigid view on appropriate responses to violence without considering the challenges unique to immigrant women, including their vulnerability, history of abuse, and lack of access to help.

When a battered immigrant woman finally fights back to protect herself, arrest and criminal prosecution is likely, especially if she is unable to communicate with police due to their limited proficiency in English. The police and prosecution will instead place greater weight on her abuser's words. *See* Nawal H. Ammar et al., *Calls to police and police response: A case study of Latina immigrant women in the USA*, 7(4) International Journal of Police Science & Management 230, 238 (2005). These factors make immigrant victims particularly vulnerable to domestic violence and fallout from trying to defend themselves. Therefore, the DV Victim Waiver should broadly apply to adequately protect battered immigrant victims including those who are convicted of an aggravated felony in connection with their abuse.

C. Liyah was at a high risk of homicide when she defended herself from her abuser.

To help determine whether homicide is a potential reality in any given case, social scientists have created the "Danger Assessment." *See* Jacquelyn C. Campbell et al., *The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide*, 24 J. INTERPERSONAL VIOLENCE 653 (2009). The Danger Assessment "accurately identif[ies] the vast majority of abused women who

are at increased risk of femicide or attempted femicide." *Id*. at 655, 669. The Danger Assessment uses 20 indicators designed to assist battered women in assessing their danger of being murdered (or seriously injured) by their intimate partner. *Id*. at 657-658. As outlined below, at least 12 of these 20 factors are present in Liya's case. *See id*. at 655 (listing all the factors).

Factor 1: Whether the physical violence increased in severity or frequency.

Liya's husband's verbally and physically abused her.[2] Her husband, who was twice her size, routinely punched her, threw things at her, slammed her head into a wall, choked her, threatened her with a handgun, and sexually assaulted her. On the day of the shooting, her husband struck her in the ribs with the palm of his hand and slammed her against a wall, causing pain, contusion, swelling, and a laceration.

Factor 2: Whether the abuser owns a gun.

Liya's husband purchased a handgun and kept it in the bedroom closet, unloaded. He also kept loaded magazines. He began to brandish a loaded handgun during arguments.

Factor 3: Whether the victim left the abuser after living together.

Liyah tried but failed to leave her husband. Living in a rural part of California without a car, Liyah was unable to leave or flee on her own. However, when Liyah

[2] Facts cited in this section are from the Respondent's briefs before the Immigration Court and the Board of Immigration Appeals, as well as the decision of the Court of Appeal of the State of California from the criminal proceeding. *See* R. at 000035-000036, 000354-000362, and 000375-000376.

told her husband that she wanted to leave and asked him to take her to a domestic violence shelter, he refused to do so. Liyah had no escape.

Factor 5: Whether the abuser ever used or threatened to use a weapon against the victim.

Liya's husband brandished a loaded handgun during arguments

Factor 6: Whether the abuser threatened to kill the victim.

Liya's husband threatened Liyah during arguments by brandishing a loaded handgun.

Factor 7: Whether the abuser avoided being arrested for domestic violence.

Liyah threatened to call the police when her husband abused her but he convinced her that the police would not believe her, given his fluent English and citizenship. As a result, her husband managed to avoid arrest for domestic violence despite subjecting Liyah to relentless physical, verbal, and emotional abuse since her relocation to the United States.

Factor 9: Whether the abuser ever forced the victim to have sex when the victim did not wish to do so.

After several months of verbal and emotional abuse, Liya's husband began to sexually assault her.

Factor 10: Whether the abuser ever tried to choke or strangle the victim or cut off the victim's breathing.

Liya's husband, who was twice her size, routinely choked her in addition to punching her, slamming her head into a wall, threatening her with a handgun, and sexually assaulting her.

Factor 13: Whether the abuser controlled most or all of the victim's daily activities.

Liya's husband exhibited a pattern of coercive control, dictating who she could speak with and where she could go. He forbid her from talking to her parents. Her husband also prevented her from leaving the house to find a job or go to school, despite her wish to work.

Factor 18: Do you believe he is capable of killing you?

After Liya's husband began to wield a loaded handgun during arguments, Liyah believed that he would kill her during an argument.

Factor 19: Whether the abuser followed or spied on the victim, left threatening notes or messages, destroyed her property, or called her when she did not want him to.

Liya's husband destroyed her property by, for example, going into her closet and cutting up her clothing.

When scored in total, the presence of the above **12 factors** places Liyah at the level of "increased danger" for femicide at the hands of her husband. Further, an analysis found that the most significant risk factors for intimate partner homicide by a male perpetrator are (i) direct access to a gun; (ii) previous nonfatal strangulation; (iii) previous rape of the victim; (iv) previous threat with a weapon; (v) demonstration of controlling behaviors; and (vi) previous threats to harm the victim, all of which were present in Liya's case. *See* Chelsea M. Spencer & Sandra M. Stith, *Risk Factors for Male Perpetration and Female Victimization of Intimate Partner Homicide: A Meta-Analysis*, 21(3) Trauma, Violence & Abuse 527, 534-35 (2018).

The risk assessment instruments demonstrate the heightened risk that Liyah would die from her husband's abuse.

II. The VAWA Incorporation Provision unambiguously applies the DV Victim Waiver to Paragraph (iv) of VAWA Cancellation based on the words of the statute.

The Board has wrongly concluded that the incorporation of the DV Victim Waiver to VAWA Cancellation does not apply to the Aggravated Felony provision. The reason for this is simple: the Board is interpreting the wrong provision of the law. The relevant provision to interpret is *not* Paragraph (iv). Instead, the Board should have interpreted the provision that applies the DV Victim Waiver to VAWA Cancellation, namely, the VAWA Incorporation Provision.

The VAWA Incorporation Provision added to the statute by VAWA 2005[3] states, in full:

> (5) Application of domestic violence waiver authority. The authority provided under section 237(a)(7) may apply under paragraphs (1)(B), (1)(C), and **(2)(A)(iv)** in a cancellation of removal and adjustment of status proceeding.

8 U.S.C. § 1229b(b)(5) (emphasis added.) The VAWA Incorporation Provision does not specify that it applies to, for example, **a portion of** Paragraph (iv), or Paragraph (iv), **with the exception of** the Aggravated Felony provision. The VAWA

[3] The Violence Against Women and Department of Justice Reauthorization Act of 2005, 109 Pub. L. 162, 119 Stat. 2960, § 813(c). The title of this paragraph is "Clarifying Application of the Domestic Violence Waiver Authority in Cancellation of Removal."

Incorporation Provision plainly applies to the entirety of Paragraph (iv), and not just to the Inadmissibility and Deportability Provisions.

The Board seems to have been distracted from interpreting the VAWA Incorporation Provision by another reference to the VAWA Incorporation Provision contained in Paragraph (iv):

> (A) Authority. The Attorney General may cancel removal of…an alien… if the alien demonstrates that—
>
> …
>
> (iv) the alien…is not deportable under paragraphs (1)(G) or (2) through (4) of section 237(a), **subject to paragraph (5)** ….

8 U.S.C. § 1229b(b)(2)(A) (emphasis added). The "subject to paragraph (5)" language refers to the VAWA Incorporation Provision. However, the "subject to paragraph (5)" language does not mean that the VAWA Incorporation Provision only applies the DV Victim Waiver to the first two requirements of Paragraph (iv), excluding the third. The VAWA Incorporation Provision says that it applies the DV Victim Waiver to the entirety of Paragraph (iv). The Board's reading of Paragraph (iv) of VAWA Cancellation ignored the plain meaning of the VAWA Incorporation Provision.

III. The legislative history of the provisions at issue supports that Congress intended the DV Victim Waiver to apply to Paragraph (iv) of VAWA Cancellation via the VAWA Incorporation Provision.

The legislative history of sections 237(a)(7) and 240A(b)(2) of the Act supports the plain meaning of the VAWA Incorporation Provision, and the application of the DV Victim Waiver to VAWA Cancellation.

When the Violence Against Women Act ("VAWA") was first signed in 1994, Congress created a suspension of deportation that gave battered immigrant spouses a special VAWA remedy in immigration court proceedings. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 ("IIRAIRA 1996") added VAWA Cancellation as a remedy for this same group of battered immigrant spouses, *see* IIRAIRA 1996, § 304(a)(3), 110 Stat. 3009-594, but also created section 237(a)(2)(E) of the Act as a ground for deportation, *id*. at § 350(a), 110 Stat. 3009-639-40.

As battered immigrant spouses applied for relief, it became clear that there was a need for a waiver for domestic violence victims so that those victims were not subject to the new domestic violence ground of deportation created by IIRAIRA 1996. When Congress reauthorized VAWA in 2000, Congress addressed this problem by drafting the DV Victim Waiver provision. *See* VAWA 2000, § 1505(b). The DV Victim Waiver ensures that the Attorney General is "not limited by the criminal court record" in adjudging battered immigrant victims who acted in self-

defense, and is able to consider the full context of the abuse suffered in the relationship considered by the court adjudicating their eligibility for the DV Victim Waiver. *See id.*

VAWA 2000 contained the first attempt by Congress to amend VAWA Cancellation to incorporate the DV Victim Waiver to VAWA Cancellation. *See* VAWA 2000, § 1504(a). But in VAWA 2000, VAWA Cancellation did not refer to a paragraph (5) (which was not created until VAWA 2005). Instead, Paragraph (iv) stated:

> (iv) the alien is not inadmissible under paragraph (2) or (3) of section 212(a), is not deportable under paragraphs (1)(G) or (2) through (4) of section 237(a) **(except in a case described in section 237(a)(7) where the Attorney General exercises discretion to grant a waiver)**, and has not been convicted of an aggravated felony;…

Id. (emphasis added). Instead of referring to another paragraph that contained reference to the DV Victim Waiver, VAWA Cancellation referred directly to the DV Victim Waiver itself. The text of the statute clearly referenced the Deportability Provision of Paragraph (iv) by using parentheses.

Congress incorporated the DV Victim Waiver in VAWA Cancellation to allow battered immigrant women the opportunity to "use any credible evidence to prove abuse continues to apply… **to the various domestic violence discretionary waivers in this legislation**…." Senator Hatch (UT), "Trafficking Victims Protection Act of 2000 – Conference Report." *Congressional Record* 146:126

(October 11, 2000) p. S10192 (emphasis added.) By allowing "any credible evidence" to support the domestic violence discretionary waivers, including the DV Victim Waiver, Congress evinced its intent that the DV Victim Waiver broadly apply and assure that immigration judges hearing DV Victim Waiver requests would be required to hear evidence about the totality of the battering in the relationship in determining that the victim should be granted the DV Victim Waiver in her VAWA Cancellation case.

However, by 2005, it was apparent that battered immigrant victims were unable to gain access to waivers they needed to claim the protection of VAWA Cancellation. The Report of the House Judiciary Committee to VAWA 2005 noted, "VAWA 2000 created several new waivers and exceptions to deportation and grounds of inadmissibility that might otherwise bar domestic violence victims from gaining immigration status. **Due to a drafting error, immigration judges could not utilize many of these waivers and exceptions**." H. Comm. on the Judiciary, 109th Cong., Dep't of Justice Appropriation Authorization Act, Fiscal Years 2006-2009, H.R. Rep. No. 109-233, at 125 (emphasis added).

Congress took two separate steps in order to enable the original intent behind the addition of the DV Victim Waiver. First, Congress added the VAWA Incorporation Provision in the form of paragraph (5). VAWA 2005, § 813(c)(1)(C), 119 Stat. at 3058. As explained above, the VAWA Incorporation Provision broadly

applies the DV Victim Waiver to the entirety of Paragraph (iv). Second, Congress changed the reference within Paragraph (iv) from referring directly to the DV Victim Waiver in VAWA 2000, on the one hand, to referring to the VAWA Incorporation Provision in VAWA 2005, on the other. VAWA 2005, § 813(c)(1)(A), 119 Stat. at 3058.

The intent behind VAWA 2005 section 813(c)(1)(C) – the VAWA Incorporation Provision – was to allow the DV Victim Waiver to apply as broadly as possible to allow battered immigrant victims to claim the benefit of VAWA Cancellation. Senator Biden (DE), "Department of Justice Appropriations Authorization Act, Fiscal Years 2006-2009." *Congressional Record* 151:162 (December 16, 2005) p. S13765 ("[Section 813 of VAWA 2005] corrects drafting errors that have made these waivers procedurally unavailable to battered immigrant victims."), *and* Representative Conyers (MI), "Department of Justice Appropriations Authorization Act, Fiscal Years 2006-2009," *Congressional Record* 151:164 (December 18, 2005) p. E2606 ("Section 813 is designed to address a number of problems for immigrant victims in removal proceedings…. Important clarifications are made to assure that immigration judges can grant victims the domestic violence victim waivers we created in VAWA 2000."). Congress wanted battered immigrant victims to be able to claim VAWA Cancellation in as many cases as possible. *See* H. Comm. on the Judiciary, 109th Cong., Dep't of Justice Appropriation

Authorization Act, Fiscal Years 2006-2009, H.R. Rep. No. 109-233, at 125 ("Section [813] clarifies that immigration judges can utilize these waivers and exceptions to provide relief for VAWA applicants…. **Judges are expected to continue to exercise discretion, where appropriate, in determining ultimate eligibility for the waivers and exceptions, taking into account the ameliorative intent of these laws**.") (emphasis added).

IV. The Board's proposed reading of Paragraph (iv) would render the DV Victim Waiver to VAWA Cancellation meaningless.

Congress added the VAWA Incorporation Provision for the purpose of allowing battered immigrant victims to claim the benefits of VAWA Cancellation. The plain language of the statute clearly meets that goal. The Board's reading of VAWA Cancellation would effectively moot the purpose of incorporating the DV Victim Waiver into VAWA Cancellation. If any battered immigrant victim who is convicted of a domestic violence-related aggravated felony is ineligible for VAWA Cancellation, then virtually no one would be eligible for VAWA Cancellation.

The reason for this is because of the construction of the definitions of "aggravated felony" and "crime of domestic violence." Both definitions incorporate the same definition of "crime of violence" from 18 U.S.C. § 16. *Cf.* 8 U.S.C. § 1101(a)(43)(F) *and* 8 U.S.C. § 1227(a)(2)(E)(i). A "crime of violence" directed against a spouse makes an immigrant removable (and in need of the DV Victim Waiver to apply VAWA Cancellation).

See 8 U.S.C. § 1227(a)(2)(E)(i). But a "crime of violence" that carries a sentence of a year or more would make the immigrant ineligible for VAWA Cancellation under the Board's interpretation. *See* 8 U.S.C. § 1229b(b)(2)(A)(iv), *and* R. at 000004.

To determine whether there are any potential convictions that (1) constitute a crime of domestic violence, but (2) do not constitute an aggravated felony, it is necessary to examine the case law around how crimes are categorized for purposes of immigration law. In analyzing whether a conviction is for a "crime of violence," the Ninth Circuit first applies the categorical approach set forth by the U.S. Supreme Court in *Taylor v. United States*. *Perez v. Mukasey*, 512 F.3d 1222, 1225 (9th Cir. 2008), citing *Taylor*, 495 U.S. 575 (1990). "The categorical approach requires us to compare the elements of the statute of conviction….to the generic crime, a 'crime of violence' under 18 U.S.C. § 16(a), and then to determine whether the 'full range of conduct' covered by [the criminal statute] falls within the meaning of that term." *Perez*, 512 F.3d at 1225, citing *Chang v. INS*, 307 F.3d 1185, 1189 (9th Cir. 2002). For instance, the Ninth Circuit has held that the State of Washington's statute for fourth degree assault is not categorically a crime of violence because, under Washington law, fourth degree assault can be committed by an act of nonconsensual offensive touching, and that does not rise to the level of a crime of violence under 18 U.S.C. § 16. *Perez*, 512 F.3d at 1226. If the full range of conduct does not fall within the meaning of a crime of violence, then a conviction is not categorically a

conviction for a crime of violence. *Id*. The same categorical analysis can be conducted to see if a statute constitutes a "crime of domestic violence." *See Cisneros-Perez v. Gonzalez*, 465 F.3d 386, 391 (9th Cir. 2006) (holding that California's battery statute under California Penal Code § 242 is not categorically a "crime of domestic violence" under 8 U.S.C. § 1227(a)(2)(E)(i) because "the statute of conviction here…criminalizes conduct that falls within the definition of **domestic** activity as well as conduct that does not.") (emphasis in original).

In California, it is clear that the crime with which Liyah was charged was categorically a crime of domestic violence. The special enhancement she was charged with applies specifically to any person "who personally inflicts great bodily injury under circumstances involving domestic violence." Cal. Pen. Code § 12022.7(e). Furthermore, if a defendant is convicted under section 12022.7(e), the minimum sentence enhancement is three years – long enough for this sentence enhancement, on its own, to make any underlying crime an "aggravated felony" for purposes of VAWA Cancellation. For that reason, under the Board's interpretation, any battered immigrant victim in California is ineligible for VAWA Cancellation if convicted with a special enhancement under section 12022.7(e).

Another crime in California that qualifies as a categorical crime of domestic violence under federal law is California Penal Code section 273.5. Under that section, "[a]ny person who willfully inflicts corporal injury resulting in a traumatic

condition upon a victim," including a spouse, "is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years." Cal. Pen. Code § 273.5(a). Again, this qualifies as a categorical "crime of domestic violence" for purposes of federal law; again, it is punishable by over a year in prison, making it an "aggravated felony" for purposes of VAWA Cancellation. Even if a prosecutor uses discretion to charge a battered immigrant victim with a lesser offense, the crime still constitutes an "aggravated felony." *See Maya-Cruz v. Keisler*, 252 Fed. Appx. 136, 138, 2007 U.S. App. LEXIS 25108 at *2-3 (9th Cir. Oct. 23, 2007) (holding that Cal. Pen. Code § 273.5 constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43)(F), even if only charged as a misdemeanor). Under the Board's interpretation, the DV Victim Waiver is meaningless because it cannot help any battered immigrant victims because without the DV Victim Waiver any crime that renders them removable also renders them ineligible for VAWA Cancellation. This result is contrary to Congressional intent.

While certain crimes qualify as a categorical "crime of domestic violence," there are other California crimes that **could** be a crime of domestic violence depending on the underlying facts and circumstances. "If a crime is categorically overbroad, we proceed to a modified categorical approach in which we look beyond the statute of conviction and consider a narrow, specified set of documents that are part of the record of conviction to determine whether the defendant was convicted

of the necessary elements of the generic crime." *Perez*, 512 F.3d at 1226, citing *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004). Under the modified categorical approach, it is possible that other California crimes could be a "crime of domestic violence" for purposes of federal law. However, any crime that could be found to be a "crime of domestic violence" under the modified categorical approach results in a conviction that constitutes an "aggravated felony." *See, e.g.*, Cal. Pen. Code § 220 ("assault with intent to commit mayhem or specified sex offenses," punishable by a minimum of two years in prison). If a crime does not constitute an "aggravated felony" under federal law, it is not severe enough to also constitute a "crime of domestic violence" under the modified categorical approach. *See, e.g.*, Cal. Pen. Code §§ 240, 241 ("assault," punishable by six months in prison but not requiring violent force and, thus, not a crime of violence). It's a "chicken and egg" scenario that renders the DV Victim Waiver ineffective in helping any battered immigrant spouse victims in California. VAWA Cancellation and the DV Victim Waiver were designed to provide a remedy for abused immigrant spouses who acted in self-defense against the primary perpetrators of violence in the relationship.

Even when a crime like battery threads the needle of requiring physical force, *see* Cal. Pen. Code § 242, but resulting in a maximum sentence of six months, *see* Cal. Pen. Code § 243, the court must be able to look to the charging documents in conjunction with a plea agreement, the transcript of the plea proceeding, or the

judgment to determine whether the defendant pled guilty to the elements of the generic crime. "Inferences…are insufficient under the modified categorical approach." *Cisneros-Perez*, 465 F.3d at 393; *see also Shepard v. United States*, 544 U.S. 13 (2005); *Taylor*, 495 U.S. at 602; *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002). If a battered immigrant victim has been charged with a crime that is not a categorical "crime of domestic violence," and also cannot be shown with necessary documentary evidence to be a "crime of domestic violence" under the modified categorical approach, then the battered immigrant victim is not removable for having committed a crime of domestic violence. *See Tokatly*, 371 F.3d at 620-21 ("[W]hen the documents that we may consult under the 'modified' approach are insufficient to establish that the offense the petitioner committed qualifies as a basis for removal under section 237(a)(2)(E)(i), we are compelled to hold that the government has not met its burden of proving that the conduct of which the defendant was convicted constitutes a predicate offense, and the conviction may not be used as a basis for removal.").

As the examples under California law demonstrate, battered immigrant victims would be unable to claim the protection of VAWA Cancellation if the Board's interpretation of the VAWA Incorporation Provision and the DV Victim Waiver applies. There is seemingly no crime that a battered immigrant victim can be convicted of that renders her removable for a crime of domestic violence **and** able

to claim VAWA Cancellation. The Board's proposed reading of VAWA Cancellation would render the amendments made in VAWA 2005 unavailable to the very people they were intended to protect. Instead, the clear language of the VAWA Incorporation Provision applies, with the logical result that battered immigrant victims can claim the protection of VAWA Cancellation because their convictions for aggravated felonies do not render them ineligible for protection.

CONCLUSION

For the reasons set forth above, the Amicus respectfully requests that this Court reverse the Board's decision. The Board's position would render the DV Victim Waiver and VAWA Cancellation meaningless for many of the battered immigrant victims that these provisions were designed to help. Writing VAWA Cancellation out of the statutory framework would result in fundamental injustice against immigrant victims.

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