No. 03-73928, 04-72581

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARMEN OBIAGA and ALVARO OSWALDO BERROCAL;
Petitioners,

versus

JOHN ASHCROFT, UNITED STATES ATTORNEY GENERAL;
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS

OF THE BOARD OF IMMIGRATION APPEALS

Agency Nos. A70-965-535, A74-352-263

BRIEF OF *AMICUS CURIAE* OF FAMILY VIOLENCE PREVENTION FUND, LEGAL MOMENTUM IMMIGRANT WOMEN'S PROJECT, AND THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD IN SUPPORT OF PETITIONERS

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AMICI'S MEMORANDUM IN SUPPORT OF PETITIONER'S APPEAL

Amici submit this memorandum in support of Petitioner Carmen Obiaga and her son, Alvaro Oswaldo Berrocal, seeking reversal and remand of the decision by the Board of Immigration Appeals ("BIA" or "the Board") denying her request for suspension of deportation under Section 244(a)(3) of the INA, the law in effect at the time Ms. Obiaga and her son sought relief from the immigration court as victims of domestic violence. Congress created this special form of suspension of deportation as one of the special forms of relief designed for domestic violence survivors in the 1994 Violence Against Women Act ("VAWA").[1] As in the *Hernandez* case, in which *amici* also submitted a brief, this court must act to rectify the Executive Office of Immigration Review's (EOIR) misapplication of the special laws Congress created for noncitizen survivors of domestic violence.

As in *Hernandez*, the Immigration Judge, supported by the BIA, rejected evidence proffered by Ms. Lopez in violation of the Congressionally mandated "any credible evidence" standard, applied an overly restrictive definition of "extreme cruelty" qualifying noncitizen victims for the relief Congress intended, and inserted an eligibility requirement not required by Congress. Over the

[1] In *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003), this court addressed several aspects of special suspension of deportation for victims of domestic violence, created by the Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902-55 (codified in scattered sections of 8 U.S.C., 18 U.S.C. and 42 U.S.C.).

objections of a cogent dissent with which *amici* agree, the BIA upheld all of these actions antithetical to the Congressional intent underlying the law. *Amici* ask this Court to insist, again, that EOIR implement the immigration provisions of the Violence Against Women Act in the ameliorative way Congress intended.

INTEREST OF AMICI

This brief *amici curiae* is submitted on behalf of the Family Violence Prevention Fund, Legal Momentum (the new name for NOW Legal Defense and Education Fund), and the National Immigration Project of the National Lawyers Guild. These organizations co-chair the National Network to End Violence Against Immigrant Women and work together to expand choices for noncitizen survivors of domestic violence, sexual assault and trafficking. We have substantial knowledge of the problem of domestic violence and the particular dynamics of domestic violence experienced by noncitizen victims, and helped shape the immigration provisions of the 1994 Violence Against Women Act (VAWA), Pub. L. No. 103-322, 108 Stat. 1902–55, 8 USC §§1151, 1154, 1186a, 1186a note, 1254, 2245 (1994), and its subsequent revisions and expansions contained in the Victims of Trafficking and Violence Prevention Act of 2000, 114 Stat. 1464, Pub. L. No. 106–386 (Oct. 28, 2000). We work closely with the Citizenship and Immigration Services (CIS) personnel charged with implementing the laws, seeking to identify and fix systemic problems before they erupt in litigation. We

assist and train attorneys, domestic violence advocates, civil and criminal justice system personnel and noncitizen survivors, and are recognized as the leading domestic violence, women's rights, and immigration law organizations in the field. We filed an *amicus* brief in *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003), the only precedent decision in this legal arena.

Pursuant to Federal Rule of Appellate Procedure 29(b), this brief is accompanied by a Motion for Leave to File, which more fully describes the interests of *amici*.

PRELIMINARY STATEMENT

Amici agree with Ms. Obiaga's arguments on good faith marriage and due process. The BIA dissent is correct: Congress did not require that VAWA suspension of deportation applicants demonstrate good faith marriage. Nevertheless, had EOIR examined the evidence of good faith under the any credible evidence standard, it should have found that Ms. Obiaga did, in fact, marry her abusive husband in good faith. EOIR's failure to apply this standard is but one aspect of the egregious ignorance of domestic violence and the intent of VAWA permeating the record. This ignorance, combined with that of the series of attorneys who failed to adequately represent Ms. Obiaga, amounted to a violation of Ms. Obiaga's due process rights. Since Ms. Obiaga successfully addresses these

concerns, *amici*'s brief focuses on how Ms. Obiaga met the Congressional standards for obtaining relief as victims of domestic violence.

As this Court noted in *Hernandez,* Congress enacted the Violence Against Women Act ("VAWA") to combat domestic violence within the United States.[2] For noncitizens in proceedings, it created a special form of suspension of deportation that allowed those who had suffered "extreme cruelty" as well as physical battery to gain status. Mindful of the difficulties domestic violence survivors often encounter in marshalling "primary evidence" to support their cases, often because abusers control much of that information, Congress created the most liberal evidentiary standard in the immigration laws: the "any credible evidence" standard. Both the immigration judge and the BIA ignored this standard in Ms. Obiaga's case, and applied a narrow definition of extreme cruelty that violates Congressional intent and this Court's findings in *Hernandez*. Had EOIR construed the law correctly and applied the any credible evidence standard to the evidence of abuse in the record it should have granted VAWA suspension of deportation to Ms. Obiaga and her son.

ARGUMENT

I. EOIR MUST IMPLEMENT THE AMELIORATIVE INTENT OF VAWA'S IMMIGRATION PROVISIONS

[2] Despite the gender-specific title, the VAWA immigration provisions offer protection to noncitizen spouses of either gender.

This Court has noted that the goal of the VAWA immigration provisions "was to eliminate barriers to women leaving abusive relationships." *Hernandez v. Ashcroft*, 345 F.3d 824, 841 (9th Cir. 2003). The special VAWA suspension of deportation provisions, initially codified as section 244(a)(3) of the Immigration and Nationality Act (INA), 8 U.S.C. §1254(a)(3), "was a generous enactment, intended to ameliorate the impact of harsh provisions of immigration law on abused women." *Hernandez,* 345 F.3d at 840. Interpretation of VAWA suspension must follow "'the general rule of construction that when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion.... This is particularly so in the immigration context where doubts are to be resolved in favor of the alien.'" *Hernandez,* 345 F.3d at 841.

A. CONGRESS MANDATED A SPECIAL 'ANY CREDIBLE EVIDENCE' STANDARD IN VAWA IMMIGRATION CASES

Congress created the most liberal evidentiary standard in the immigration laws for VAWA cases: the "any credible evidence" standard. *See, e.g.,* INA § 244(a)(3) (as in existence before 1997); INA § 240A(b)(2)(D), 8 USC § 1229(b)(2)("[i]n acting on applications under this paragraph, the Attorney General *shall* consider any credible evidence relevant to the application," emphasis supplied). Although Congress intended the Attorney General to interpret the "any credible evidence" standard, that interpretation must give the statute its intended

ameliorative effect. *See* H.R. Rep. No. 395, 103rd Cong., 1st Sess., at 25.(1993). Neither the immigration judge nor the BIA referenced this special evidentiary standard. *See, e.g.*, AR at 259; AR at 96 (implying a higher evidentiary standard). This failure fatally flaws their decisions.

The "legacy" INS General Counsel's office articulated an "any credible evidence" standard in the context of VAWA self-petitions reflecting VAWA's purposes, permitting but not requiring that petitioners demonstrate that preferred primary or secondary evidence is unavailable.[3] *See, e.g.*, 8 C.F.R. §§ 103.2(b)(2)(iii) & 204.1(f)(1); s*ee also* Paul W. Virtue, Office of General Counsel, *"Extreme Hardship" and Documentary Requirements Involving Battered Spouses and Children*, Memorandum to Terrance O'Reilly, Director, Administrative Appeals Office (Oct. 16, 1998), at 7, *reprinted in* 76(4) Interpreter Releases 162 (Jan. 25, 1999) (hereinafter "Virtue Memo"). The purpose of such flexibility is to take into account the experience of domestic violence:

> This principle recognizes the fact that battered spouse and child self-petitioners are not likely to have access to the range of documents available to the ordinary visa petitioner for a variety of reasons. Many self-petitioners have been forced to flee from their abusive spouse and do not have access to critical documents for that reason.

[3] *Amici* note that, in *Hernandez*, this court considered DHS' administrative approach to VAWA cases in evaluating eligibility requirements for VAWA suspension and suggest that, in the absence of regulations or case law governing EOIR's interpretation of the phrase, the court similarly consider DHS implementation of the special evidentiary standard in the administrative context. *See Hernandez v. Ashcroft*, 345 F.3d 824, 838-39 (9th Cir. 2003).

> Some abusive spouses may destroy documents in an attempt to prevent the self-petitioner from successfully filing. Other self-petitioners may be self-petitioning without the abusive spouse's knowledge or consent and are unable to obtain documents for that reason. Adjudicators should be aware of these issues and should evaluate the evidence submitted in that light.

Virtue Memo at 7-8.

Thus, the General Counsel categorically stated:

> A self-petition *may not be denied 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.

Virtue Memo at 7 (emphasis supplied).

The General Counsel applied indicia of credibility familiar to this court. Evidence may be "credible or incredible on either an internal or an external basis." It is internally consistent if it does not conflict with other evidence presented by the applicant; it is externally credible when objectively corroborated. "Adjudicators should carefully review evidence in both these regards before making a credibility determination." In addition, given the difficulties in collecting evidence confronting victims of domestic violence, adjudicators should give VAWA applicants "ample opportunity to add to the evidence submitted in support of the petition if necessary." Virtue Memo at 7-8.

Affidavits and testimony from those with whom victims have shared their experience and who have witnessed abuse are credible evidence. They are standard

forms of corroboration in both the administrative and EOIR context. System documents, such as police reports, protection orders and medical reports, are considered "primary" evidence. They are helpful but not required under the any credible evidence standard. The applicant's testimony is central, and may, alone, satisfy the standard.

III. MS. OBIAGA'S PROFERRED EVIDENCE MET THE ANY CREDIBLE EVIDENCE STANDARD

Contrary to EOIR's findings, Ms. Obiaga presented ample evidence that she was subjected to battery and extreme cruelty.[4] She was raped, threatened with physical violence, isolated, controlled economically, subjected to inane jealousy, belittled and humiliated. AR 148-51. Her abuser threatened to take her children away from her and to get her deported if she resisted him. As noted by the BIA dissent, her child, Oswaldo, also suffered extreme cruelty. This also qualifies his mother for suspension of deportation.

Instead of recognizing these forms of domestic violence, however, the immigration judge seemed to assume sexual violence and verbal and mental cruelty as marital norms, see AR at 260-64. The Board failed to correct his misunderstanding of Congressional intent and his ignorance of domestic violence.

[4] *Amici* incorporate by reference the statement of facts and procedural history in Ms. Obiaga's brief

Following its own guidance in *Hernandez, amici* urge this Court to find that Ms. Obiaga has provided credible evidence of both battery and extreme cruelty.

This court noted that INS regulations acknowledge "any act of physical abuse is deemed to constitute domestic violence without further inquiry while "extreme cruelty" describes all other manifestations of domestic violence." *Hernandez,* 345 F.3d at 840-43. Marital rape is a form of battery; the rest of the abuse Ms. Obiaga suffered are forms of extreme cruelty, part of an overall pattern of violence.5 *See Hernandez,* 345 F.3d at 840-43; *see also* United Nations definition in *Report of the Special Rapporteur on Violence Against Women, A Framework for Model Legislation on Domestic Violence* ¶ 11 (Feb. 1996) ("all acts of gender-based physical, psychological, and sexual abuse," including, inter alia, "threats, intimidation, coercion, … humiliating verbal abuse, … [and] marital rape."

A. Marital Rape

Ms. Obiaga testified that she was subjected to forced sex, which is marital rape. AR 149-50, 335-36. Although the immigration judge acknowledged that she was slapped and forced to engage in "unwanted sexual relations" (AR 263), he found that such "physical mistreatment" may be part of a "normal" marriage and

did not make her eligible under VAWA. AR 261-63. This attitude is exactly what Congress sought to change when it enacted the Violence Against Women Act.

INS regulations specifically define the term "sexual abuse" to include "rape." 8 C.F.R. § 204.2(c)(1)(vi). Under California Penal Code § 262(a), spousal rape occurs when a "it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury" or "is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat." Cal. Penal Code §§ 262(a)(1) & (a)(4). "Duress" is defined to include a "direct or implied threat of force, violence, danger, or retribution" and "menace" includes "any threat, declaration, or act that shows an intention to inflict an injury upon another." Cal Penal Code §§ 262(c)-(d). Forcing a spouse to engage in nonconsensual sexual relations through such means is battery under INA § 244(a)(3).

B. Manipulative Threats

Abusers use threats of various sorts to manipulate and control their victims. In Ms. Obiaga's case, her abuser threatened to take her child away from her once he was born, AR 333, and that if she called the police on him, he would take their child from her and have her deported. AR 149-50, 333. These threats were aimed at keeping her from seeking safety from his abuse.

Threatening to take away a child, in the context of domestic violence, is extreme cruelty. *Keller v. Keller*, 763 So.2d 902, 908 (Miss. Ct. App. 2000) (husband's threat to leave unless wife gave up custody of son contributed to finding of cruel and inhuman treatment); Hart, *Children of Domestic Violence: Risks and Remedies*, 8 Protective Service Q. (Winter 1993) (abuser's threats may be directed not only at victim, but also against people and things the victim cares about, such as children, family members, pets, and property); Family Violence Prevention Fund, *Domestic Violence in Civil Court Cases* (1992) at 23-24.

Abusers also often use threats of deportation to ensure their dominance and control. Leti Volpp, *Working with Battered Immigrant Women: A Handbook to Make Services Accessible* 6 (1995); Giselle Aguilar Hass et al., *Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications*, Domestic Violence: Global Responses, 93, 105-07 (2000) (*hereinafter* "Hass, *Lifetime Prevalence*"); Mary Arm Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 Geo. J. Pov. L.& Pol'y. 245, 259 (2000) (hereinafter Dutton, *Help-Seeking Behaviors*). To maintain this control, many abusers fail to file family visa petitions for their spouses, while others subject their abused spouses to lengthy delays. Dutton, *Help-Seeking Behaviors*, *supra*, at 259. Abusers typically control access to information and provide misinformation to

their spouses about their legal rights in this country, including access to the civil and criminal justice systems. This is why, contrary to EOIR's assumptions in this case, many noncitizen abuse victims never access justice, or decline to do so until they've achieved secure immigration status.

C. Belittling and Humiliation

Ms. Obiaga's spouse frequently verbally abused her and her children with profanity. AR 334, 336. He made her make dinner and then told her the food was unfit for a dog, AR 149. He said she worthless and would accomplish nothing in life. AR 293

Belittling, demeaning, berating, degrading and humiliating are typical forms of extreme cruelty. *See, e.g., K. v. B.*, 784 N.Y.S.2d 76, 79 (N.Y.A.D. 2004) (finding that husband yelled at wife and stated she was mentally unstable and incapable of making decisions, demeaning and berating her all supported wife's cause of action for cruel and inhuman treatment); *Pompa v. Pompa*, 259 A.D.2d 338, 338 (N.Y.App.Div. 1999) (false, insulting accusations are cruel and inhuman treatment); *Richard v. Richard*, 711 So.2d 884, 886 (Miss. 1998) (habitual, wrongful accusations are cruel and inhuman treatment); *Gilliam v. Gilliam*, 776 S.W.2d 81, 85 (Tenn. Ct. App. 1988) (husband's frequent use of "rude, ill-tempered, grossly indecent and offensive language" contributed to finding of cruel and inhuman treatment by him).

D. Social Isolation

Ms. Obiaga's husband isolated his wife and controlled her access to the outside world. He banned her friends from the house, AR 70, 148, and forbade her from getting a job. AR 71. Socially isolating victims helps control them. Strategies include limiting their ability to contact family or friends (Atkinson v. Atkinson, 730 A.2d 667, 670 (D.C. 1999); Robison v. Robison, 722 So.2d 601, 603 (Miss. 1998); McFall v. McFall, 136 P.2d 580, 582 (Cal. Ct. App. 1943)); preventing them from using the phone (Atkinson v. Atkinson, 730 A.2d 667, 670 (D.C. 1999)); and prohibiting them from going to work or school (Family Violence Prevention Fund, Domestic Violence in Civil Court Cases, at 23 (1992)). Noncitizen women are often living in a new country with no supportive community, family, and friends. Leslye E. Orloff et al., *With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 Family L.Q. 313, 316-17 (1995). Some noncitizens speak little or no English, and abusers may prevent their spouses from learning English, thereby making it extremely difficult for them to access health care, social services, support services, police, and courts. Deanna Kwong, *Removing Barriers for Battered Immigrant Women,* 17 Berkeley Women's L.J. 137, 137 (2001); *Orloff*, 29 Family L.Q. at 316-17; *see also* Dutton, *Help-Seeking Behaviors*, *supra*, at 265 (isolation from female friends and relatives in particular may prevent a battered noncitizen woman from seeking help).

E. Economic Control

Ms. Obiaga's husband forbade her from getting a job, and when he went on drinking binges, she had no money to feed herself and her children. AR 71. She felt she had to stay with him because she didn't know how to support herself without him. AR 150-51. Economic control is a common weapon in the abuser's arsenal. Peters v. Peters, 2004 WL 2795722, at *2 (Miss. Ct. App. Dec 7, 2004) (husband canceling wife's credit cards without informing her); Goodfellow v. Goodfellow, 2002 WL 31769028, at *3-*4 (Tex. Ct. App. Dec. 12, 2002) (husband's control over wife's spending contributed to finding of cruel treatment); Veach v. Veach, 392 P.2d 425, 429 (Idaho 1964) ("unusual domination" of household affairs deemed "an unjustifiable and long-practiced course of conduct … which utterly destroys the legitimate ends and objects of matrimony [and] constitutes extreme cruelty.").

Noncitizen women report that lack of access to economic resources "is the single largest barrier to leaving an abusive relationship." Leslye Orloff, *Lifesaving Welfare Safety Net Access for Battered Immigrant Women and Children: Accomplishments and Next Steps*, 7 Wm. & Mary J. Women & L. 597, 617-21 (2001) (reporting that domestic violence survivors who leave their abuser have a 50% chance of living below the poverty line once on their own); Dutton, *Help-Seeking Behaviors*, *supra*, at 269-70 (study of Latina noncitizens showing

that the most cited reason for not leaving abusive spouse was fear of not having money). Many abusers prevent their spouses from working or sabotage their employment. *New York Victim Service Agency Report on the Costs of Domestic Violence* (1987); Susan Schechter & Lisa T. Gray, *A Framework for Understanding and Empowering Battered Women, in Abuse and Victimization Across the LifeSpan* 242 (1988). Moreover, many abusers take away their spouses' paychecks and deny them access to bank accounts.

CONCLUSION

Ms. Obiaga's is a classic VAWA case, and she suffered at the hands of an ignorant immigration judge and an apparently apathetic Board. As this Court has previously noted, such EOIR decisions "provide[] belated support for Congress's assessment that the INS's hostility to battered women results in unnecessary barriers to relief to which they appear entitled." *Hernandez,* 345 F.3d at 841. *Amici* ask this court to again fulfill VAWA's intent by remanding this case to the Board with findings (or instructing it on how to make findings) that Ms. Obiaga has met the any credible evidence standard on all elements of eligibility for relief under VAWA suspension of deportation.

_____ May 3, 2005

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

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I hereby certify that on this 4th day of May, 2005, true copies of the foregoing Motion were sent by First-Class Mail to the Clerk of this Court, to Counsel for Appellee listed below, and to other Counsel for Appellant listed below.

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