No. 18-35072

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARIA DEL CARMEN MEDINA TOVAR;
ADRIAN JOVAN ALONSO MARTINEZ,

Petitioners,

v.

LAURA B. ZUCHOWSKI, Director, Vermont Service Center, United States Citizenship and Immigration Services; CHAD F. WOLF, Acting Secretary, Department of Homeland Security; WILLIAM P. BARR, Attorney General,

Respondents.

On Appeal from the United States District Court
for the District of Oregon
Anna J. A. Brown, District Judge, Presiding

PETITIONERS' BRIEF IN SUPPORT OF REHEARING EN BANC

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Table of Contents

Page

Table of Authorities

Page

Cases

Statutes

Other Authorities

Introduction and Rule 35(a) Statement

This case hinges on a "chink in *Chevron*'s armor"—a flaw that "prevents it from being an absolutely clear guide to future judicial decisions." A. Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 520 (1989) (citing *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). The *Chevron* doctrine, which turns on whether a statute is deemed "clear" or "ambiguous," leaves a critical question unanswered: "How clear is clear?" *Id.*

This riddle is what makes *Chevron* so "dangerous": its answer is "easily biased by [judges'] strong policy preferences." B. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2139–40 (2016) (citation omitted). And the scope of this danger is potentially immense: "virtually any phrase can be rendered ambiguous if a judge tries hard enough." *Id.* & n.109 (citation omitted).[1]

This case presents an opportunity to mend *Chevron*'s flaw. The solution resides in what several Justices have called the "footnote 9 principle." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2448 (2019) (Kavanaugh and

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[1] As Justice Kavanaugh observed, this may be "one reason that many people hate lawyers." 129 Harv. L. Rev. at 2139 n.105 (citation omitted).

Alito, JJ., concurring) (citing *Chevron*, 467 U.S. at 843 n.9). Under this principle, a court may not find ambiguity unless it first "exhaust[s] all the 'traditional tools' of construction." *Id.* at 2415 (citing same). Put bluntly, courts should not defer until "that legal toolkit is empty." *Id.*[2]

Here, the majority—over Judge Watford's dissent—violated this principle in three ways: **First**, the majority failed to apply the traditional canon regarding statutory terms with settled meanings. **Second**, the majority failed to apply the longstanding canon that statutes must be construed as a whole. **Third**, the majority reflexively concluded that the relevant statutory phrase was ambiguous simply because it was undefined—thereby ignoring the canon that undefined words must be given their plain meaning.

In fairness to the majority, "[t]he relationship between *Chevron* deference and the canons ... remains one of the most uncertain aspects of the *Chevron* doctrine." *Arangure v. Whitaker*, 911 F.3d 333, 339 (6th Cir. 2018) (Thapar, J.) (citations omitted). But this is no academic exercise—if judges find ambiguity where none exists, they "abdicat[e]

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[2] Though *Kisor v. Wilkie* involved a separate doctrine known as "*Auer* deference," the Court noted that *Chevron* "adopt[ed] the same approach for ambiguous statutes." 139 S. Ct. at 2415.

their judicial duty" in a way "misuses *Chevron*" and "abrogates" the constitutional separation of powers. *Id.* (quotation marks and citations omitted); *accord Pereira v. Sessions*, 138 S. Ct. 2015, 2020–21 (2018) (Kennedy, J., concurring) (chiding lower courts for "engag[ing] in cursory analysis" at *Chevron* step one and rushing to "reflexive deference" in a way that conflicts with "separation-of-powers principles").

"Given these separation-of-powers concerns," it is "critical" for this Court to "rigorously enforce" *Chevron*'s limits. *See Szonyi v. Barr*, 942 F.3d 874, 876 (9th Cir. 2019) (Collins and Bea, JJ., dissenting from denial of rehearing en banc). Specifically, this means "rigorously applying footnote 9." *Kisor*, 139 S. Ct. at 2448 (Kavanaugh and Alito, JJ., concurring). Here, the majority's failure to do so warrants rehearing en banc.

En banc review is also needed because the panel's decision conflicts with three prior decisions from this Court. The first is *The Wilderness Society v. U.S. Fish & Wildlife Service*, 353 F.3d 1051 (9th Cir. 2003), where en banc review was needed to correct a similar misapplication of *Chevron*. The second and third are *Santiago v. I.N.S.*, 526 F.2d 488 (9th Cir. 1975) (en banc), and *Landin-Molina v. Holder*, 580 F.3d 913 (9th Cir. 2009), where this Court interpreted the exact same statutory language in a very different fashion.

Moreover, en banc review is needed because this issue is extremely important. As Judge Watford pointed out, the panel discovered ambiguity in a statutory phrase that appears in "dozens" of statutes. Opinion at 26.

Finally, the panel's decision is inexplicably cruel. Maria Medina Tovar was raped at knifepoint by a stranger who threatened to kill her and her family. Though she assisted law enforcement and ultimately proved that she deserved U-visa protection, the government did not process her petition for several years. And though the *government* was responsible for dragging its feet and leaving Tovar in limbo, the government now claims *Tovar and her husband* should be penalized for marrying in the interim. Nothing in the U-visa statute indicates that Congress intended such a punitive result.

Background

Congress enacts protections for noncitizens who are severely victimized by criminal activity and assist law enforcement. Congress created the U visa as a way to give "temporary legal status to aliens who have been severely victimized by criminal activity." *Perez Perez v. Wolf*, 943 F.3d 853, 869 (9th Cir. 2019) (citation omitted); *see generally* 8 U.S.C. § 1101(a)(15)(U). Congress recognized that U-visa relief was necessary because "alien victims may not have

legal status and may be reluctant to report being victims to a crime … due to fear of removal." *Perez Perez*, 943 F.3d at 869.

When Congress enacted this law, it also allowed individuals who obtain U-visa protection to seek derivative status for their qualifying relatives—like spouses—who are "accompanying, or following to join," the principal alien. 8 U.S.C. § 1101(a)(15)(U)(ii). This phrase, which appears in dozens of immigration statutes, is designed to keep families intact. *See Santiago v. I.N.S.*, 526 F.2d 488, 490–91 (9th Cir. 1975) (en banc) ("Congress clearly intended to preserve family unity" by using the words "accompanying, or following to join"); *Landin-Molina*, 580 F.3d at 918 (same).

The Department of Homeland Security limits the availability of U-visa relief. After Congress passed the U-visa statute, the DHS issued a regulation that limits noncitizens' ability to obtain relief for their spouses. *See generally* 8 C.F.R. § 214.14. The regulation imposes severe timing restrictions: whereas the statute indicates the marital relationship must exist when the initial petition is **adjudicated**, the regulation requires the marital relationship to exist earlier, when the initial petition is **filed**. *Id.* § 214.14(f)(4).

This distinction (time of filing versus time of adjudication) is consequential because of recurring and protracted bureaucratic delays: the average processing time for a U visa is more than 54 months. *See Check Case Processing Times*, https://egov.uscis.gov/processing-times/

(last visited March 27, 2020). So if a noncitizen marries during this multi-year waiting period, the regulation makes it much more difficult for her to obtain derivative status for her spouse. *See* 8 U.S.C. § 1255(m)(1), (m)(3) (derivative status unavailable for individuals like Tovar unless couple waits an additional three years and can demonstrate they would suffer "extreme hardship").

Procedural History. Maria Medina Tovar was born in Mexico, but was brought to this country when she was six. *See* Case No. 17-cv-719 (D. Or.), Docket No. 1-2 (affidavit of Tovar) at 1. When she was twelve, a stranger broke into her home, held a knife to her neck, and raped her. *Id.* The assailant threatened to kill Tovar and her family. *Id.* Afterwards, the assailant appeared at Tovar's school and brandished a knife; subsequently, he appeared at her house and pushed a knife to her neck. *Id.* at 2.

After these attacks, Tovar did not "feel safe alone," she felt like she could "no longer trust anyone," and she feared that she couldn't even "have a boyfriend." *Id.* at 2–3. Despite her "severe psychological trauma," Tovar assisted law enforcement. *See* Case No. 17-cv-719 (D. Or.), Docket No. 1-1 (certification of police chief).

When Tovar was 21, she filed a petition for a U visa, but was placed on a waitlist. Opinion at 9. Two years later, while her petition was still being processed, Tovar married her husband, who is also a

noncitizen. *Id.* Afterwards, the government granted Tovar's petition for a U visa.

Tovar promptly filed a second petition so that her husband could obtain derivative status. *Id.* The government denied this second petition on the ground that Tovar was not married several years earlier, when her first petition was filed. *Id.* Tovar and her husband then sought review in the District Court, which granted summary judgment for the government. *Id.*

A divided panel rules for the government. To determine whether the DHS's regulation conflicted with the statute, the panel applied the two-step analysis set forth in *Chevron*. Opinion at 11. First, the panel observed that the statutory phrase "accompanying, or following to join" is not specifically defined by statute. *Id.* After that, the panel concluded that the statute's meaning was ambiguous because the **agency** had given differing definitions to the statutory words. *Id.* at 13–14. Finally, the panel concluded that the agency's interpretation was reasonable under *Chevron* step two. *Id.* at 16.

Judge Watford dissented. He concluded that when Congress enacted the statute in 2000, the relevant statutory phrase—accompanying, or following to join—"had been used in dozens of federal immigration provisions, the first dating back to the 1920s." *Id.* at 26. He pointed out that as applied to spouses, this statutory phrase "had consistently been construed to mean that the marital relationship must

exist at the time the principal petitioner's application for an immigration benefit is *granted*, not at the time her application was *filed*." *Id.* (emphasis in original).

Judge Watford also observed that "when Congress wanted to depart from the settled meaning of that phrase it did so explicitly." *Id.* at 28. As an example, he pointed to 8 U.S.C. § 1101(a)(15)(U)(ii)(I), the immediately preceding subsection, which keys derivative-status eligibility to "the date on which such alien *applied* for" relief. *Id.* (emphasis in original).

Subsequently, the Court ordered both parties to file briefs on whether this case should be reheard en banc.[3]

Argument

I. The panel misapplied *Chevron* by deferring to the agency before exhausting the traditional tools of statutory construction.

A. The panel failed to correctly apply the "settled meaning" canon.

"Where Congress uses terms that have accumulated settled meaning," courts must infer "that Congress means to incorporate the established meaning of these terms." *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 329 (1981).

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[3] This brief uses the format of a petition for rehearing en banc.

Here, the relevant statutory phrase is a term of art; when Congress enacted the relevant statute in 2000, the phrase "accompanying or following to join" had been used in "dozens of federal immigration provisions." Opinion at 26 (Watford, J., dissenting) (citation omitted). When applied to spouses, this phrase had "consistently been construed" in a way that favored Tovar and her husband. *Id*. The government even conceded as much during oral argument. *Id.* at 28.

The majority never found otherwise. Instead, it concluded that the "settled meaning" canon did not apply because, in unrelated contexts, the agency's regulations defined the statutory term in dissonant ways. But this reasoning was doubly misguided. First, *Chevron* only applies when the *Legislature* creates ambiguity—not when the *Executive* attempts to do so. *See* Part III.B, *infra*. Second, the panel ignored a key fact: any variations in the regulations are irrelevant to this case.

For *Chevron* to apply, "[i]t is not enough that the [statutory] language at issue could conceivably be ambiguous under some circumstances not actually presented." *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 316 F.3d 913, 938 (9th Cir. 2003) (B. Fletcher, J., dissenting); *reheard en banc under the name The Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051 (9th Cir. 2003). "Rather, the ambiguity must actually be tied to the case or controversy at issue." *Id.*

Here, as Judge Watford observed, the regulations reveal a startling consistency. One regulation applies to refugees, who apply from outside the country—in those cases the marital relationship "must have existed prior to the refugee's **admission**." 8 C.F.R. § 207.7(c) (emphasis added). The regulation does **not** require the relationship to exist earlier, when the principal alien files her initial petition for relief.

Now take the regulation for asylum seekers—there, the marital relationship "must have existed at the time the principal alien's asylum **application was approved**." 8 C.F.R. § 208.21(b). Again, the regulation does **not** require the relationship to exist earlier, when the principal alien files her initial petition for relief.

To the extent the regulations vary, they only do so because some beneficiaries (*e.g.,* refugees) apply for status from outside the country, whereas others (*e.g.*, asylees) apply from within. To be clear, any variation lies at the periphery of this case.

Critically, when it comes to the interpretive question presented here, both regulations are fundamentally consistent: "eligibility for derivative status is measured at the time the principal petitioner is **granted** an immigration benefit, not at the time the principal petitioner **applies** for that benefit." Opinion at 28 (Watford, J., dissenting) (emphasis added). And as the government admitted, this consistency exists throughout the entire U.S. Code. *Id.*

B. The panel failed to construe the statute's meaning by looking at the law as a whole.

"Where Congress includes particular language in one section of a statute but omits it from another," courts must "presume[] that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citations omitted); *accord Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 777 (2020) (citing same rule). Put otherwise, it is a "fundamental canon that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *The Wilderness Soc'y*, 353 F.3d at 1060 (citation omitted).

This traditional tool of statutory construction applies at *Chevron* step one. For example, in *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the Supreme Court assessed two different provisions of the Immigration and Nationality Act, each of which articulated different legal standards for different forms of immigration relief. "Employing traditional tools of statutory construction," the Court compared the two statutes and concluded that "Congress did not intend the two standards to be identical." *Id.* at 446 (citing footnote 9 of *Chevron*).

This Court has reaffirmed this approach. For example, in *Aragon-Salazar v. Holder*, 769 F.3d 699 (9th Cir. 2014), this Court was faced with a question involving the timing requirements for immigration relief. *Id.* at 705. Though the key term was undefined, the Court did not

simply throw up its hands and declare the statute ambiguous; instead, the Court compared the statute to an earlier statute concerning similar relief. *See id.* at 704–05. By comparing the two, the Court concluded that "Congress ... knew how" to restrict noncitizens' right to seek relief, but deliberately chose not to do so in the later enactment. *Id.* at 705. This "traditional tool[]" of construction led the Court to conclude that the statute was unambiguous at *Chevron* step one. *Id.* at 706 (citing footnote 9 of *Chevron*).

Similarly, in *Santiago v. I.N.S.*, the en banc Court applied the same tool to construe the exact same statutory language at issue here: "If Congress had wished" for the words "accompanying, or following to join" to have anything other than their ordinary meaning, the en banc Court reasoned, "the words 'accompanying, or following to join' would be absent from this statute." 526 F.2d at 491.

Here, the panel took a diametrically opposed approach. It recognized a disparity between § 1101(a)(15)(U) and various other statutes, such as 8 U.S.C. § 1184(p)(7)(A), which keys eligibility for U-visa relief to when "petition was filed." But the majority concluded that this disparity "does not provide any instruction." Opinion at 15.

The majority's conclusion conflicts with *Cardoza-Fonseca, Aragon-Salazar*, and *Santiago*. Those cases teach that Congress knew precisely how to key U-visa eligibility to the time of filing—but when Congress drafted § 1101(a)(15)(U), it deliberately chose not to do so. This

"drafting choice" confirms that "Congress intended the phrase 'accompanying or following to join' to carry its usual meaning—with the family relationship assessed at the time the principal petitioner's application is granted." Opinion at 29 (Watford, J., dissenting).[4]

C. The panel erred by concluding that the statutory phrase was ambiguous simply because it was undefined.

"A statute's terms are not ambiguous simply because the statute itself does not define them." *Averett v. United States Dep't of Health & Human Servs.*, 943 F.3d 313, 315 (6th Cir. 2019); *Gardner v. Brown*, 5 F.3d 1456, 1459 (Fed. Cir. 1993) ("Congress is not required to define each and every word in a piece of legislation in order to express clearly its will."), *aff'd*, 513 U.S. 115 (1994).

Here, the majority erred by finding ambiguity in large part because the relevant words were "not defined by statute." Opinion at 11;

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[4] Moreover, the majority's comparison was incomplete: it ignored several other statutes that use time-of-filing language that is conspicuously missing here. *E.g.*, 8 U.S.C. § 1101(a)(15)(U)(ii)(I) (keying derivative-status eligibility to "the date on which such alien **applied** for" relief); *id.* § 1184(p)(7)(B) (keying eligibility for U-visa relief to for certain children when events occur after petition "application … is **filed** but while it is pending"); *id.* § 1101(15)(R)(i) (keying eligibility to "for the 2 years immediately preceding the **time of application** for admission").

id. at 12 (relying on the fact that "all parties agree that Congress has never defined this statutory phrase"). By engaging in this reasoning, the majority ignored this Court's ordinary rule for undefined statutory terms: "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Yith v. Nielsen*, 881 F.3d 1155, 1165 (9th Cir. 2018) (finding no ambiguity at *Chevron* step one) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

The panel's reasoning cannot be squared with *The Wilderness Society v. U.S. Fish & Wildlife Service*, 353 F.3d 1051 (9th Cir. 2003) (en banc. There, the Court was faced with the statutory terms "commercial enterprise" or "within." *Id.* at 1061. Both the three-judge panel and the district court had deemed these terms ambiguous, but this Court granted rehearing en banc and reversed. *See generally id.*

The en banc Court recognized that "no statutory or regulatory provision expressly defines the meaning" of the relevant terms, but it refused to apply *Chevron* deference. *Id.* Instead, the Court exhausted the traditional tools of construction and found no ambiguity because of three factors: the plain language of the act, the statute's remedial purpose, and the statute's structure. *See id.*

Here, all three factors weigh against a finding of ambiguity. First, § 1101(a)(15)(U) employs a term of art that has been incorporated into dozens of statutes, and Congress has never used that term in a way that can be squared with the government's proposed construction. *See* Part

I.A, *supra*. Second, the statute's purpose is clear—the "accompanying or following to join" language exists to "preserve family unity." *Santiago*, 526 F.2d at 490–91. Third, Congress knew how to key eligibility to the date of filing if it wanted to—did so in several **other** statutes, but it deliberately chose not to do so here. *See* Part I.B, *supra*.

Just like in *The Wilderness Society*, these tools of construction should have dispelled any ambiguity at *Chevron* step one. And just like in *The Wilderness Society*, the panel's failure to employ these traditional tools of construction requires rehearing en banc.

II. The panel's decision conflicts with this Court's en banc decision in *Santiago v. I.N.S.*, as well as this Court's decision in *Landin-Molina v. Holder*.

In *Santiago v. I.N.S.*, en banc review was necessary to resolve the timing requirements imposed by the statutory phrase "accompanying, or following to join." 526 F.2d at 490. There, the en banc Court determined the statute's meaning according to the "plain language of the statute." *Id.*

Similarly, in *Landin-Molina v. Holder*, this Court resolved a question regarding the same statutory phrase's timing requirements. 580 F.3d at 918. But in *Landin-Molina*, the Court resolved the question by applying the statute's "plain language"—not by resorting to *Chevron* deference. *Id.* There, the Court concluded that spouses can "accompany or follow to join" the principal "so long as the marital relationship exists

at the time the principal petitioner's application for adjustment of status is granted." *See* Opinion at 26 (Watford, J., dissenting) (citing *Landin-Molina*, 580 F.3d at 919).

It is difficult to see how the same statutory language can be "plain" for the petitioners in *Santiago* and *Landin-Molina*, but "ambiguous" for the petitioners here. And it is even harder to square *Landin-Molina*'s interpretation of the statute with the majority's contrary interpretation here. En banc review is necessary to iron out this intra-circuit conflict.

III. This case involves an exceptionally important question.

A. The panel's decision will affect dozens of statutes.

As Judge Watford observed, the panel discovered ambiguity in a statutory phrase that appears in "dozens" of statutes. Opinion at 26. Accordingly, the panel's decision would affect wide swaths of the U.S. Code.

B. This case squarely implicates one of the most uncertain and divisive aspects of the *Chevron* doctrine.

Circuits have sharply split as to which "traditional tools" apply at *Chevron* step one. *Compare Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 816 (9th Cir. 2016) ("[T]he canon of constitutional avoidance is highly relevant at Chevron step one.") (citation omitted), *with Olmos v. Holder*, 780 F.3d 1313, 1321 (10th Cir. 2015) (reaching the opposite conclusion); *compare Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir.

2015) ("[A]n agency's legal authority to interpret a statute appears to trump any practice of construing ambiguous statutory provisions in favor of Indians."), *with Cobell v. Norton*, 240 F.3d 1081, 1100–01 (D.C. Cir. 2001) (reaching the opposite conclusion).

Even within this Circuit, the "footnote 9 principle" has led to recurring division. *E.g.*, *Romo v. Barr*, 933 F.3d 1191, 1203 (9th Cir. 2019) (Owen, J., dissenting) ("[T]he majority opinion overlooks the requirement that we first must employ 'traditional tools of statutory construction' when ascertaining congressional intent.") (citations omitted); *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 504 (9th Cir. 2007) (en banc) (Thomas, Pregerson, Reinhardt, and W. Fletcher, JJ., dissenting) (insisting that the majority erred by failing to apply the constitutional-avoidance canon at *Chevron* step one); *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1160–61 (9th Cir. 2013), *as amended* (July 9, 2013) (N.R. Smith, J., dissenting) (insisting that the majority erred by failing to apply the federalism canon at *Chevron* step one).

C. The panel's decision generates grave separation-of-powers concerns.

The majority's reasoning allows Executive agencies to work a novel form of interpretive alchemy: they now have the tools to transform legislative clarity into an ambiguous delegation of power. The

result is a shift in the balance of power that the Founders never contemplated.

By way of analogy, just examine the criticisms leveled against the doctrine known as "*Auer* deference." That doctrine requires judges to defer to executive agencies' interpretations of their own regulations. *See generally Auer v. Robbins*, 519 U.S. 452 (1997). Justice Scalia—who authored *Auer*—later concluded that subsequent decisions "allow[ed] the agency to control the extent of" its power in ways that our legal system never "remotely contemplate[d]." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment). In his view, the resulting concentration of power threatened to "contravene[] one of the great rules of separation of powers." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 621 (2013) (Scalia, J., concurring in part and dissenting in part).

The same threat exists here. The majority reasoned that if an agency interprets a statute in dissonant ways,[5] that **regulatory** ambiguity can spread and infect the **statute** itself. In other words, the Executive can manipulate the meaning of a Congressional statute. This

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[5] If anything, an agency's decision to interpret the same statutory phrase in two different ways suggests that the agency's interpretations are arbitrary or capricious. *See Cardoza–Fonseca*, 480 U.S. at 446 n.30.

gives the Executive dangerous incentives—by issuing conflicting regulations, agencies can now generate ambiguity in a statute; by generating statutory ambiguity, agencies can insulate themselves from searching judicial review. Put simply, the panel distended *Chevron* in a way that placed agencies' "ability to construe authoritatively the limits on [their] power in [their] own self-interested hands." *See Szonyi*, 942 F.3d at 876 (Collins and Bea, JJ., dissenting from denial of rehearing en banc).

D. The panel's decision will punish deserving noncitizens for delays caused by the government.

U visas are only available to individuals who are victimized by extremely serious crimes, overcome their trauma, and assist law enforcement. Here, Tovar was just a child when she was raped at knifepoint and threatened with murder. Despite her uncertain immigration status, she helped law enforcement bring her assailant to justice.

Even though Tovar deserved protection, the government's vast administrative bureaucracy left her waiting for years. During this protracted period of bureaucratic foot-dragging, Mrs. Tovar overcame her trauma and entered into a relationship that "promised nobility and dignity to all persons, without regard to their station in life." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593–94 (2015). And though the *government*

was responsible for the delay, the government now claims *Tovar and her husband* should be penalized as a result.

The panel's ruling now threatens to tear Tovar's marriage apart. Nothing in the U-visa statute indicates that Congress intended such a cruel result.

Conclusion

The petition should be granted.

Date: March 30, 2020 Respectfully submitted,

s/ Philip Smith

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARIA DEL CARMEN MEDINA TOVAR; ADRIAN JOVAN ALONSO MARTINEZ, *Plaintiffs-Appellants*,	No. 18-35072
v.	D.C. No. 3:17-cv-00719-BR
LAURA B. ZUCHOWSKI, Director, Vermont Service Center, United States Citizenship and Immigration Services; CHAD F. WOLF, Acting Secretary, Department of Homeland Security; WILLIAM P. BARR, Attorney General, *Defendants-Appellees*.	AMENDED OPINION

Appeal from the United States District Court
for the District of Oregon
Anna J. A. Brown, District Judge, Presiding

Argued and Submitted May 15, 2019
Portland, Oregon

Filed February 12, 2020

Before: N. Randy Smith, Paul J. Watford, and Ryan D. Nelson, Circuit Judges.

Opinion by Judge N.R. Smith;
Dissent by Judge Watford

SUMMARY*

Immigration

The panel filed an amended opinion affirming the district court's grant of summary judgment in favor of government defendants in a case involving when a spousal relationship must exist for a spouse to be eligible for derivative U-visa status. In the amended opinion, the panel deferred to a regulation adopted by the United States Citizenship & Immigration Service ("USCIS") that construed the statutory phrase "accompanying, or following to join" to require that a spouse's qualifying relationship exist at the time of the filing of the initial U-visa petition.

A U visa grants temporary, lawful, nonimmigrant resident status to an alien who has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity in the U.S. and who helped law enforcement investigating or prosecuting that criminal activity. Under 8 U.S.C. § 1101(a)(15)(U)(ii), a U-visa recipient may petition for derivative status for a qualifying relative who is "accompanying, or following to join," the principal alien.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

That provision specifies which relationships may qualify for derivative U-visa status: "(I) in the case of [a principal alien] who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien; or (II) in the case of [a principal alien] who is 21 years of age or older, the spouse and children of such alien." The regulation at issue here, 8 C.F.R. § 214.14(f)(2), provides that the relationship between the principal alien and the qualifying family member must exist at the time the principal alien's petition was filed, must continue to exist at the time the derivative petition is adjudicated, and at the time of the qualifying family member's subsequent admission to the U.S.

The principal alien in this case, Maria Medina Tovar, a Mexican citizen, came to the U.S., was the victim of a serious crime, and was helpful to law enforcement. She submitted her petition for a U visa and later married a Mexican citizen. She was then granted U-visa status and filed for derivative U-visa status for her husband. The USCIS denied that petition on the ground that the couple was not married when Tovar filed her initial petition. Tovar and her husband ("Plaintiffs") sought review in the district court, which granted the government defendants' summary judgment motion.

The panel applied the two-step analysis from *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), to review the agency's construction of the phrase "accompanying, or following to join." First, the panel concluded that Congress has not directly spoken to the question of when a qualifying relationship must exist for an "accompanying, or following to join," family member to be eligible for derivative U-visa status. The panel rejected Plaintiffs' contention that "accompanying, or following to

join" has a well-established meaning, explaining that the agency has defined the phrase differently depending on the alien's status. For example, for a refugee, the qualifying relationship must exist prior to the refugee's admission to the U.S, must continue to exist at the time of filing for derivative benefits, and at the time of the derivative's admission to the U.S. Whereas, for asylum, the relationship must exist at the time the principal alien's asylum application was approved, must continue to exist at the time of filing for derivative benefits, and at the time of the derivative's admission to the U.S.

The panel also rejected Plaintiffs' assertion that the "age out" provision for unmarried siblings – which provides that an eligible unmarried sibling is one who is under 18 at the time when the principal applied for a U visa – makes it clear that Congress did not intend to limit other qualifying family members to the date of the application. The panel explained that the statutory provision does not provide any instruction regarding the timing of when a spouse's relationship would qualify for status.

At step two of *Chevron*, the panel concluded that the agency's regulation imposes reasonable requirements in light of the text, nature, and purpose of the U-visa statute. The panel explained that it is reasonable for the agency to require that qualifying relationships exist at the time of the initial U-visa application, where the purpose of the U-visa statute is to provide only limited, temporary, nonimmigrant status to alien victims of crime (already present in the U.S.) based on their aid to law enforcement.

The panel also concluded that the regulation does not violate Equal Protection. With respect to Plaintiffs' argument

that spouses and children of U-visa recipients are similarly situated and yet treated inconsistently without a rational basis, the panel concluded that spouses and children are not similarly situated because the dependency of spouses is not equivalent to that of the parent-child relationship. The panel further concluded that, even if the groups were similarly situated, treating spouses and children differently is rationally based on Congress's interest in preventing marriage fraud. With respect to Plaintiffs' argument that spouses of U-visa holders, refugees, asylees, and other nonimmigrant and immigrant visa holders are similarly situated and improperly treated differently, the panel concluded that immigration fraud concerns and the underlying purposes of the different visa categories provide a rational basis for the different treatment of U-visa spouses as compared to other spouses.

Dissenting, Judge Watford wrote that he would reverse on the ground that the regulation is not a valid interpretation of the governing statute. Judge Watford wrote that USCIS's interpretation cannot be squared with the well-settled meaning of "accompanying or following to join," which had consistently been construed to mean that the marital relationship must exist at the time the principal petitioner's application is granted, not when her application was filed. Looking at the rules for refugees and asylees, Judge Watford observed that in both contexts, principal petitioners may seek derivative status on behalf of their spouses if the marriage exists when the principal petitioner is granted status. Judge Watford also wrote that it is clear that Congress used the phrase "accompanying or following to join" in its traditional sense in the U-visa statute because when Congress wished to depart from that meaning it did so explicitly, by providing that a principal petitioner who is under the age of 21 may petition for derivative status on behalf of unmarried siblings

under 18 years of age on the date on which such alien applied for status.

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OPINION

N.R. SMITH, Circuit Judge:

The United States Citizenship & Immigration Service ("USCIS") permissibly construed the statutory phrase "accompanying, or following to join" in 8 U.S.C. § 1101(a)(15)(U)(ii) when it adopted its regulation, 8 C.F.R. § 214.14(f)(4), requiring that a spouse's qualifying relationship exists at the time of the initial U-visa petition and that the qualifying relationship continues throughout the adjudication of the derivative petition. Thus, we must accord *Chevron* deference to the USCIS's interpretation of the statute in enacting the regulation. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 292 (1988).

I. Administrative Framework

A U visa is a nonimmigrant visa category that grants temporary, lawful, nonimmigrant resident status to a noncitizen alien who "has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity" in the United States and who helped law enforcement "investigating or prosecuting [that] criminal activity." 8 U.S.C. § 1101(a)(15)(U)(i). A U visa provides lawful temporary nonimmigrant status "for a period of not more than 4 years,"[1] but a U-visa holder may apply for an adjustment of status to that of a lawful permanent resident ("LPR") after maintaining U-visa status for three years. *Id.* §§ 1184(p)(6), 1255(m)(1)(A).

A U-visa recipient—a principal alien—may also petition for derivative status for a qualifying relative who is "accompanying, or following to join," that principal alien. *Id.* § 1101(a)(15)(U)(ii). That statutory provision specifies which relationships may qualify for derivative U-visa status:

> (I) in the case of [a principal alien] who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien; or

[1] The four-year period may be extended upon certification that "the alien's presence in the United States is required to assist in the investigation or prosecution of such criminal activity" or "if the Secretary determines that an extension of such period is warranted due to exceptional circumstances." 8 U.S.C. § 1184(p)(6).

> (II) in the case of [a principal alien] who is 21 years of age or older, the spouse and children of such alien.

Id. When the principal alien adjusts status, the Secretary "may adjust the status of or issue an immigrant visa to a spouse [or] a child . . . to avoid extreme hardship" if he or she did not receive a nonimmigrant visa under § 1101(a)(15)(U)(ii). *Id.* § 1255(m)(3).

The agency promulgated regulations interpreting and implementing these U-visa statutes. 8 C.F.R. §§ 214.14, 245.24. Under the regulations, the principal alien must file a petition—Form I-918—to obtain U-visa status. *Id.* § 214.14(c)(1). The principal alien may also apply for derivative U-visa status on behalf of qualifying relatives by submitting a Form I-918, Supplement A. *Id.* § 214.14(f)(2). "[T]he relationship between the U-1 principal alien and the qualifying family member must exist at the time Form I-918 was filed, and the relationship must continue to exist at the time Form I-918, Supplement A is adjudicated, and at the time of the qualifying family member's subsequent admission to the United States." *Id.* § 214.14(f)(4). Additionally, the regulation includes a provision to prevent aliens from aging out. The age of a principal alien under 21 and that alien's unmarried siblings under the age of 18 are determined as of the initial petition date, so that such aliens may qualify for status even if they are no longer under that age when their petitions are adjudicated. *Id.* § 214.14(f)(4)(ii).

II. Procedural History & Facts

The principal alien in this case, Maria Medina Tovar, was born in Mexico in 1992; she came to the United States when

she was six years old. In 2004, Tovar was the victim of a serious crime while living in Oregon, and she was helpful to law enforcement in the investigation or prosecution of that crime. On June 14, 2013, Tovar filed her U-visa petition (Form I-918). Thereafter, on September 21, 2015, Tovar married Adrian Alonso Martinez, a citizen of Mexico. Tovar was granted U-visa status as of October 1, 2015. On March 26, 2016, Tovar filed a petition for derivative U-visa status (Form I-918, Supplement A) for Martinez as her "accompanying, or following to join," spouse. The USCIS denied that petition, because Tovar and Martinez were not married when Tovar filed her initial petition for principal U-visa status, as required by 8 C.F.R. § 214.14(f)(4).

On May 8, 2017, Plaintiffs filed a complaint in district court seeking declaratory and injunctive relief from USCIS's denial of derivative status for Martinez.[2] On cross-motions for summary judgment, Plaintiffs argued that the regulation requiring the marital relationship to exist at the time of the principal U-visa petition is contrary to the statute and that the regulation violates equal protection under the Fifth's Amendment's Due Process Clause. Defendants replied that the U-visa provision in 8 U.S.C. § 1101(a)(15)(U) is ambiguous, but the agency's regulation is a reasonable interpretation and should be afforded deference.

[2] Plaintiffs did not file an administrative appeal of USCIS's denial. However, Defendants conceded before the district court that exhaustion of administrative remedies was not a prerequisite to judicial review in this case. *See Darby v. Cisneros*, 509 U.S. 137, 154 (1993) ("[W]here the APA applies, an appeal to 'superior agency authority' is a prerequisite to judicial review *only* when expressly required by statute or . . . agency rule . . . .").

The district court determined that (1) Congress did not directly address the question of when a marital relationship must exist for a spouse to be eligible for U-visa derivative status and (2) the regulation is reasonable and entitled to deference. Additionally, the district court concluded the regulation does not violate equal protection, because its treatment of nonimmigrant spouses is rationally related to immigration concerns (such as marriage fraud) recognized by Congress. Thus, the district court granted Defendants' motion for summary judgment and denied Plaintiffs' motion for summary judgment. Plaintiffs appealed.

III. Standard of Review

"We review de novo the district court's grant of summary judgment." *Herrera v. USCIS*, 571 F.3d 881, 885 (9th Cir. 2009).

IV. Discussion

A. *The Statute is Ambiguous as to "Accompanying, or Following to Join."*

As outlined above, Congress authorized the issuance of derivative U-visa status to qualifying relatives who are "accompanying, or following to join," the principal alien. *See* 8 U.S.C. § 1101(a)(15)(U)(ii). The parties agree that this case turns on the meaning of that phrase "accompanying, or following to join."

In reviewing "an agency's construction of the statute which it administers," we must employ the two-step *Chevron* analysis. *See Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–843 (1984). At step one of *Chevron*,

we must determine whether Congress has provided an answer to the precise question at issue. "If the intent of Congress is *clear* . . . the court, as well as the agency, must give effect to the *unambiguously expressed intent* of Congress." *Id.* at 842–43 (emphasis added). "If, however, the court determines Congress has not *directly addressed the precise question at issue*, the court does not simply impose its own construction on the statute." *Id.* at 843 (emphasis added). "Rather, if the statute is silent or ambiguous with respect to the *specific* issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* (emphasis added).

Here, Congress has not directly spoken to the question at issue: when must a qualifying relationship exist for an "accompanying, or following to join," family member to be eligible for derivative U-visa status? "[A]ccompanying, or following to join" is not defined by statute, even though Congress has used the phrase in numerous sections of the Immigration and Nationality Act. *See, e.g.*, 8 U.S.C. §§ 1153, 1158.

Congress has never directly addressed when a qualifying relationship must exist. Neither the plain language nor the surrounding language of the U-visa statute answer the question. In the surrounding language, Congress only designated qualifying "accompanying, or following to join," family members in the U-visa context with this language:

> (I) in the case of [a principal alien] who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status

> under such clause, and parents of such alien; or
>
> (II) in the case of [a principal alien] who is 21 years of age or older, the spouse and children of such alien.

8 U.S.C. § 1101(a)(15)(U)(ii); *see also* 8 U.S.C. § 1184(p). Otherwise, the statutory language is silent with regard to whether Congress intended that the qualifying relationship exist (1) when the principal filed his or her application, (2) when the application is adjudicated, (3) throughout the entire process, or (4) at some time after the principal alien has been granted status. In the absence of such an indication, we cannot impose our own construction of the statute.

Plaintiffs argue to the contrary. First arguing that the intent of Congress is clear from the language of the statute, Plaintiffs assert that "accompanying, or following to join" has a well-established meaning, and that Congress (in other contexts) has never limited the spouses' eligibility to the date of an application.

However, all parties agree that Congress has never defined this statutory phrase. Thus, we must look to case law or regulations to determine whether the phrase had a well-settled meaning at the time Congress enacted the statute. *Cf. Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1074 (9th Cir. 2008) (explaining that "[w]here a statute does not expressly define a term of settled meaning, courts interpreting the statute must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of that term" (internal quotation marks and alterations omitted)). The Supreme Court has held that "Congress'

repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998). However, contrary to Plaintiffs' (and the dissent's) argument, "accompanying, or following to join" did not have a settled meaning when Congress enacted the Victims of Trafficking and Violence Protection Act in October 2000. *Cf. Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–40 (1989) (noting that "[w]here Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms" (alteration omitted)). Instead, the agency has defined "accompanying, or following to join" differently depending on the alien's status. *See, e.g.*, Procedures for Filing a Derivative Petition (Form I-730) for a Spouse and Unmarried Children of a Refugee/Asylee, 63 Fed. Reg. 3792-01 (Jan. 27, 1998) (codified at 8 C.F.R. pts. 207, 208, and 299).

Giving consideration to the only two examples from the nonimmigrant context, the qualifying relationship for a refugee "must have existed prior to the refugee's admission to the United States and must continue to exist at the time of filing for accompanying or following-to-join benefits and at the time of the spouse or child's subsequent admission to the United States." 8 C.F.R. § 207.7(c). Whereas, in considering the qualifying relationship for asylum, it "must have existed at the time the principal alien's asylum application was approved and must continue to exist at the time of filing for accompanying or following-to-join benefits and at the time of the spouse or child's subsequent admission to the United States." 8 C.F.R. § 208.21(b). Thus, as is evident, both of these regulations have different timing requirements for when

the spouse's qualifying relationship must exist. Although asylee applicants may be more like U-visa applicants (because they are both present in the United States), there is no basis to conclude that (when it adopted the statute) Congress intended the phrase have the same meaning for U-visa applicants as it does for asylees.[3]

When enacting a statute, we presume Congress was aware of the different regulations interpreting this phrase in the immigrant, asylum, refugee, and U-visa contexts. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85 (1988); *cf. Rodriguez v. Sony Comput. Entm't Am., LLC*, 801 F.3d 1045, 1052 (9th Cir. 2015). Yet, Congress never added a definition of "accompanying, or following to join" (in *any* context), nor has it added any clarifying language or otherwise provided guidance to the agency on how that language should be interpreted regarding the timing of qualifying relationships.

Second, Plaintiffs assert that the "age out" provision for unmarried siblings makes it clear that Congress did not intend to limit other qualifying family members to the date of the application. Although the "age out" provisions shed light on Congress's intent to preclude the alien him or herself, the

[3] Additionally, Congress amended 8 U.S.C. § 1101 to add the U visa in 2000, Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, and the agency promulgated the U-visa regulations in 2007, 72 Fed. Reg. 53014-01 (Sept. 17, 2007). Since then, Congress has amended § 1101 numerous times, including an amendment to the U-visa section itself. *See, e.g.*, Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013 amendment adding qualifying crimes of which a noncitizen victim may be eligible for U-visa status). However, it has not defined or modified the term "accompanying, or following to join."

alien's children, and unmarried siblings from aging out,[4] 8 U.S.C. §§ 1101(a)(15)(U)(ii), 1184(p)(7), it does not provide any instruction regarding the timing of when the spouse's relationship would qualify for status. Importantly, spouses and parents are the only qualifying relatives that have no risk of "aging out" while the U-visa petition is pending. Further, between spouses and parents, only spouses have the potential of having different dates of assessments. Thus, Congress left a gap to fill with regard to when spouses are eligible. *See* 8 U.S.C. § 1101(a)(15)(U)(ii). The fact that Congress addressed when the alien and other qualifying relatives should be assessed to preclude them from aging out, does not unambiguously mean that Congress intended that *spouses* be assessed at a different time than the date of application.[5]

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[4] "Where Congress wanted to exempt certain aliens from aging out, it has done so explicitly." *Contreras Aybar v. Johnson*, 295 F. Supp. 3d 442, 455 (D.N.J. 2018), *aff'd sub nom. Contreras Aybar v. Sec'y U.S. Dep't of Homeland Sec.*, 916 F.3d 270 (3d Cir. 2019) (recognizing that in 2013, Congress enacted legislation to protect children from aging out in the U-visa context).

[5] However, Congress has made it clear that once a U-visa holder adjusts his or her status to legal permanent resident, "the Secretary of Homeland Security may adjust the status of or issue an immigrant visa to a spouse, a child, or in the case of an alien child, a parent who did not receive a nonimmigrant visa under section 1101(a)(15)(U)(ii) of this title if the Secretary considers the grant of such status or visa necessary to avoid extreme hardship." *See* 8 U.S.C. § 1255(m)(3); *see also* 8 C.F.R. § 245.24(h)(1)(iv) (defining extreme hardship). This provision, read in context, makes it clear the assessment date for determining eligibility for a qualifying family member must exist at some time prior to the U-visa petitioner adjusting his or her status.

Because "Congress has not directly addressed the precise question at issue" and "the statute is silent or ambiguous with respect to [this] specific issue," *Chevron*, 467 U.S. at 843, we must "not simply impose [our] own construction on the statute," *id.*, but instead must ask whether the agency's regulation reasonably fills the gap in the statute.

B. *The Agency Reasonably Interpreted the Ambiguous Phrase.*

The agency has filled that gap by enacting regulations that outline the parameters of the phrase in the various statutory provisions it has been charged to interpret. "[W]here a statute leaves a 'gap' . . . we typically interpret it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute." *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016). Notably, "[f]illing these gaps . . . involves difficult policy choices that agencies are better equipped to make than courts." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). At step two, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Deference "is especially appropriate in the immigration context," *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999), and "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency," *Chevron*, 467 U.S. at 844. An agency's interpretation is permissible "unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Id.*

Here, the agency's regulation imposes reasonable requirements regarding at what times a qualifying

relationship must exist for derivative U-visa status, "in light of the text, nature, and purpose" of the U-visa statute. *Cuozzo*, 136 S. Ct. at 2142. The U visa serves a narrow purpose. It was not created to allow aliens to come to the United States to work or attend school; it is not an immigrant visa designed to extend status to aliens who intend to permanently reside in the United States; nor does it offer protection to aliens seeking refuge from harm in their home country. Instead, the U visa operates to grant limited, temporary, nonimmigrant status to aliens already present in the United States who were victims of a serious crime. The U visa requires that aliens be or have been helpful in the investigation or prosecution of those crimes. Notably, the U visa does not require aliens to demonstrate that they will benefit the United States by providing a skill, performing work, or bringing jobs; and it does not require aliens to explain why they left their home country or whether they could safely return. The narrow nature and purpose of the U visa supports the agency's regulation. It is reasonable for the agency to require that qualifying relationships exist at the time of the initial U-visa application, where U-visa status provides only limited, temporary, nonimmigrant status to alien victims of crime (already present in the United States) based on their aid to law enforcement.

Thus, the agency's regulation is not "arbitrary, capricious, or manifestly contrary to the statute." *See Chevron*, 467 U.S. at 844; *see also Ruiz-Diaz v. United States*, 618 F.3d 1055, 1061 (9th Cir. 2010) (finding agency's regulation regarding timing of when alien beneficiaries of special immigrant visas may apply for adjustment of status to be reasonable, after determining Congress had been silent on the issue of timing); *Garcia-Mendez v. Lynch*, 788 F.3d 1058, 1064–65 (9th Cir.

2015) (upholding agency's resolution as "a permissible interpretation of an ambiguous statutory scheme").

Plaintiffs argue that the regulation is unreasonable, because it is inconsistent with other regulations interpreting "accompanying, or following to join" in other contexts. That the same statutory phrase—"accompanying, or following to join"—is used in other contexts is not determinative. "[W]ords have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section." *Envtl. Def. v. Duke Energy* Corp., 549 U.S. 561, 574 (2007) (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)). Put simply, "[c]ontext counts," *id.* at 576, and the circumstances of asylee and refugee status differs significantly from nonimmigrant U-visa status, thus supporting the agency's differing regulations.

As stated above, nonimmigrant U-visa status is limited. U-visa recipients are already present in the United States and have become victims of a serious crime herein; they need not demonstrate why they left their home country or whether they can safely return.[6] *See* 8 U.S.C. § 1101(a)(15)(U)(i). Nonimmigrant U-visa status generally lasts only for a period of four years and must be maintained for three years before a U-visa holder can apply to adjust status. *Id.* §§ 1184(p)(6), 1255(m)(1)(A).

[6] Additionally, U-visa applicants need not demonstrate the same general eligibility requirements as asylees and refugees. *See* 8 U.S.C. 1158(b)(2) (noting that alien will be ineligible for asylum if that alien, *inter alia*, participated in persecution of any person on account of a protected ground or was convicted of a particularly serious crime).

By contrast, the status of asylees or refugees is broader for a rational purpose. That status is granted to noncitizens fleeing to the United States to escape harm or persecution in their home country. 8 U.S.C. § 1101(a)(42). Applicants must demonstrate that they have suffered (or likely will suffer) persecution in that country on the account of a protected ground, and are therefore unable to return. *Id.* Although asylum "does not convey a right to remain permanently in the United States," it continues indefinitely and may be terminated only if certain conditions are met. *Id.* § 1158(c)(2). After one year of physical presence in the United States, the asylee may apply for adjustment of status to that of an LPR. *Id.* § 1159(b)(2); 8 C.F.R. §§ 209.1(a)(1), 209.2(a)(1)(ii).

In short, these immigrant and nonimmigrant statutes are aimed at addressing different concerns, have different requirements, and extend different benefits to the status holder. Thus, although the same textual phrase—"accompanying, or following to join"—is used in these contexts, the nature and purpose underlying the grants of status differ significantly. The agency has reasonably addressed these differences in its regulations by requiring that qualifying relationships exist at the time of the initial petition and through the grant of derivative status in the U-visa context, where nonimmigrant status is only temporarily granted for a fixed period of time to individuals based on victimization in the United States.[7]

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[7] Notably, the agency regulations governing T visas (which operate similarly to U visas, but are made available to victims of trafficking) has the same requirement that a qualifying relationship exist at the time of the initial application and throughout adjudication. 8 C.F.R. § 214.11(k)(4). The same reasonable basis supporting the regulation in the U-visa context

Given the deference to the agency to impose regulations interpreting (and gap filling) the immigration statutes, the requirement that a spouse's qualifying relationship exist at the time of the initial U-visa petition and continue to exist throughout the adjudication of the derivative petition in order to obtain derivative status is a reasonable interpretation.

C. *Equal Protection under the Fifth Amendment has not been Violated*

"[T]he Due Process Clause of the Fifth Amendment subjects the federal government to constitutional limitations that are the equivalent of those imposed on the states by the Equal Protection Clause of the Fourteenth Amendment." *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1170 n.4 (9th Cir. 2007). "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Classifications of groups of noncitizens are subject to rational basis review. *See Aleman v. Glickman*, 217 F.3d 1191, 1197 (9th Cir. 2000). Applying rational basis review, a classification "is accorded a strong presumption of validity and must be upheld if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id.* at 1200 (internal

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provides support for the regulation in the T-visa context. The fact that the agency has created the same requirements for U- and T-visa derivative relationships further demonstrates that the requirements are based on the nature and purpose of the U- and T-visa statutes.

quotation marks and citation omitted). "[T]he Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992). Rather, those challenging a regulation "have the burden to negate every conceivable basis which might support it." *Fournier v. Sebelius*, 718 F.3d 1110, 1123 (9th Cir. 2013) (internal quotation marks, citation, and alterations omitted).

Plaintiffs argue that spouses and children of U-visa recipients are similarly situated and yet treated inconsistently without a rational basis. Plaintiffs also argue that spouses of U-visa holders, refugees, asylees, and other nonimmigrant and immigrant visa holders are also similarly situated and thus improperly treated differently.

1. *Children and Spouses are not Similarly Situated*

The regulations require that all qualifying relationships exist at the time the U-visa application is filed. 8 C.F.R. § 214.14(f). However, Plaintiffs point out that if the U-visa applicant "proves that he or she has become the parent of a child after [the U-visa application] was filed, the child shall be eligible to accompany or follow to join." *Id.* § 214.14(f)(4)(i). Thus, the child and spouse are not treated similarly. However, we need not reach the issue of whether these regulations violate equal protection, because children (especially in these circumstances) are not similarly situated with adult spouses. *See, e.g.*, *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 61 (2001) (rejecting an equal protection claim between mothers and fathers); *Miller v. Albright*, 523 U.S. 420, 433–45 (1998) (rejecting an equal protection claim

because the challenged classes (unwed mothers and fathers) were not "similarly situated"). Children (in particular, infants) are dependent upon their mother, father, or both for their very survival. Whereas spouses may be dependent upon each other in some respects, that dependency is not equivalent to that of a parent-child relationship.

Even if children and spouses were similarly situated, the distinction between spouses and children does not violate equal protection based on a rational-basis review. Treating spouses and children differently is rationally based on Congress's interest in preventing marriage fraud. The concerns of marriage fraud with derivative spouses are not similarly present with derivative children. Congress has taken steps to ensure that marriage-based immigration be regulated and marriage fraud be punished. *See* Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537. Thus, the prevention of marriage fraud is a legitimate government purpose, and that purpose provides a rational basis for the U-visa regulation's different treatment of spouses as compared to children.

2. *Distinction Between Nonimmigrant Derivative Spouses is Rationally Based*.

The timing of when a spouse qualifies for derivative status by "accompanying, or following to join," the principal alien depends upon the underlying relief requested by the principal alien. Plaintiffs generally assert that there is no rational basis for treating U-visa spouses differently than asylum or refugee spouses. To prevail on an equal protection-rational basis challenge, Plaintiffs must "negate every conceivable basis" that could support a rational basis for a distinction between spouses. *Fournier*, 718 F.3d at 1123

(alteration and citation omitted). However, in their opening brief, Plaintiffs do not negate *any* conceivable basis for the distinction. Rather, Plaintiffs only summarily assert that any distinction is irrational and their reply brief fails to address it at all.[8] Thus, we need not address this question. *See Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim . . . .").

Nevertheless, Defendants respond that the risk of marriage and immigration fraud provide a rational basis for the different treatment of spouses under the regulations. Immigration fraud concerns and the underlying purpose of the different visa categories provide a rational basis for the different treatment of U-visa spouses as compared to other spouses. As discussed above, asylee and refugee status is extended to noncitizens who come to the United States fleeing their home country and cannot return at that time and applicants must demonstrate what harm they are fleeing and that they may likely be harmed if they return. 8 U.S.C. § 1101(a)(42). Once granted asylum, they may remain in the country indefinitely (unless status is terminated for a specified reason) and adjust to permanent resident status after only a year. *Id.* §§ 1158, 1159.

By contrast, U visas are extended only to noncitizens already present in the United States who have been personally

[8] Plaintiffs argue that the government cannot rely on marriage fraud as a rational basis, because the government did not rely on this reason when it enacted the regulations. However, under a rational basis review, the government did not need to articulate its reasoning when it enacted the regulations. *See Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001).

victimized. *Id.* § 1101(a)(15)(U). U-visa petitioners need not demonstrate why or how they entered the United States or why they do not return to their country of origin. Because it is a nonimmigrant category, U-visa status generally lasts only for a period of four years (and does not confer the same benefits as asylum or refugee status) and must be maintained for three years before a U-visa holder can apply for adjustment of status. *Id.* §§ 1184(p), 1255(m)(1)(A).

Because significant differences exist between the categories of spouses and the requirements for obtaining status, "there is a rational relationship between the disparity of treatment" among spouses and it furthers a "legitimate governmental purpose." *See Aleman*, 217 F.3d at 1200 (citation omitted).

AFFIRMED.

WATFORD, Circuit Judge, dissenting:

I would reverse, as I do not think the regulation at issue here is a valid interpretation of the governing statute.

The regulatory provision challenged by the plaintiffs provides in relevant part as follows:

> [T]he relationship between the U-1 principal alien and the qualifying family member must exist at the time Form I-918 was filed, and the relationship must continue to exist at the time Form I-918, Supplement A is adjudicated, and

> at the time of the qualifying family member's subsequent admission to the United States.

8 C.F.R. § 214.14(f)(4). The plaintiffs do not challenge the regulation's requirement that the marital relationship exist at the time the petition for derivative status is adjudicated and at the time (if pertinent) of the spouse's subsequent admission to the United States. So our focus is solely on the regulation's requirement that "the relationship between the U-1 principal alien and the qualifying family member must exist at the time Form I-918 was filed."

Section 214.14(f)(4) plainly establishes an eligibility requirement: It purports to define which spouses are eligible to be treated as derivative beneficiaries in the U-visa context. Our cases make clear that an agency may impose eligibility requirements with respect to immigration benefits only if the requirements are grounded in the statutory text. *See Bona v. Gonzales*, 425 F.3d 663, 670 (9th Cir. 2005). Put differently, when Congress has specified the class of non-citizens eligible for a particular immigration benefit, an agency may not "impose[ ] a new requirement that is not contemplated by Congress." *Schneider v. Chertoff*, 450 F.3d 944, 956 (9th Cir. 2006).

The government contends that the eligibility requirement imposed by § 214.14(f)(4) is authorized by the U-visa statute's use of the phrase "accompanying or following to join" to describe those family members eligible to receive derivative status. 8 U.S.C. § 1101(a)(15)(U)(ii). In the government's view, this statutory term is ambiguous, as Congress did not attempt to define it elsewhere in the statute. The government further contends that USCIS reasonably filled this statutory gap by interpreting the phrase to mean

that a spouse may "accompany or follow to join" the principal petitioner only if the marital relationship existed on the date that the principal petitioner filed her application for a U visa.

I do not think USCIS's interpretation can be squared with the well-settled meaning of "accompanying or following to join." By the time Congress enacted the TVPA in 2000, that statutory phrase had been used in dozens of federal immigration provisions, the first dating back to the 1920s. *See* Immigration Act of 1924, ch. 190, § 13(c), 43 Stat. 153, 162. And as applied to spouses, the phrase had consistently been construed to mean that the marital relationship must exist at the time the principal petitioner's application for an immigration benefit is *granted*, not at the time her application was *filed*.

For example, Congress used the phrase "accompanying or following to join" in defining the spouses and children who may be treated as derivative beneficiaries when a non-citizen adjusts her status to that of a lawful permanent resident under 8 U.S.C. § 1255(i). *See* § 1255(i)(1)(B) (incorporating § 1153(d)). As we noted in *Landin-Molina v. Holder*, 580 F.3d 913 (9th Cir. 2009), spouses can "accompany or follow to join" under this 1994 enactment so long as the marital relationship exists at the time the principal petitioner's application for adjustment of status is granted. *Id.* at 919 (citing *Matter of Naulu*, 19 I. & N. Dec. 351, 352 n.1 (BIA 1986)). We relied in part on a 1999 policy memorandum in which the former Immigration and Naturalization Service explained that when a non-citizen seeking to adjust status under § 1255(i) marries or has children "after the qualifying petition or application was filed but before adjustment of status," these "'after-acquired' children and spouses are allowed to adjust under [§ 1255(i)]

as long as they acquire the status of a spouse or child before the principal alien ultimately adjusts status." *Id.* (quoting Accepting Applications for Adjustment of Status Under Section 245(i), HQ 70/23.1-P, HQ 70/8-P, at 5 (June 10, 1999), *reproduced at* 76 Interpreter Releases 1017 (July 2, 1999)). This interpretation of the statutory phrase also accords with the views of the State Department, both before and after enactment of the TVPA. *See* 9 Foreign Affairs Manual 502.1-1(C)(2)(b)(2)(b) (2018); 9 Foreign Affairs Manual 42.42 n.9 (1997).

The phrase "accompanying or following to join" has been given the same meaning in the context of non-citizens applying for asylum or refugee status. In those contexts, too, Congress has extended derivative status to family members "accompanying, or following to join," the principal petitioner. 8 U.S.C. §§ 1157(c)(2)(A) (refugees), 1158(b)(3)(A) (asylees). In neither of those contexts does the spouse's eligibility for derivative status depend on the date on which the principal petitioner filed her application for humanitarian status.

Take first the rule for refugees. So long as the principal petitioner (the refugee) was married to her spouse on the date the principal petitioner is admitted into the United States, the spouse is eligible for derivative status. 8 C.F.R. § 207.7(c); Procedures for Filing a Derivative Petition (Form I-730) for a Spouse and Unmarried Children of a Refugee/Asylee, 63 Fed. Reg. 3792, 3796 (Jan. 27, 1998). The couple need not have been married on the date that the refugee applied for refugee status. Likewise for asylees. Since asylees apply for asylum from within the United States, *see* 8 U.S.C. § 1158(a)(1), the eligibility rule for derivative beneficiaries does not turn on the date the asylee is admitted into the

United States. Instead, if the principal petitioner (the asylee) is married on the date her asylum application is granted, she may petition for her spouse to receive derivative status as well. 8 C.F.R. § 208.21(b); 63 Fed. Reg. at 3796. Again, that remains true even if the asylee married her spouse after applying for asylum. In both contexts, then, principal petitioners may seek derivative status on behalf of their spouses if the marriage exists when the principal petitioner is granted humanitarian status.

As these examples reflect, when Congress enacted the U-visa statute, the phrase "accompanying or following to join" had uniformly been interpreted to mean that eligibility for derivative status is measured at the time the principal petitioner is granted an immigration benefit, not at the time the principal petitioner applies for that benefit. Indeed, despite being pressed to do so, the government could not identify a single instance in which, before 2000, the phrase had been given a contrary construction. That fact triggers "a longstanding interpretive principle: When a statutory term is obviously transplanted from another legal source, it brings the old soil with it." *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (internal quotation marks omitted). Congress' deliberate choice to use the phrase "accompanying or following to join" in the U-visa statute brought with it the old soil concerning the point in time at which the required family relationship for derivative status is measured.

One additional interpretive clue bears mentioning. We know that Congress used the phrase "accompanying or following to join" in its traditional sense in the U-visa statute because when Congress wanted to depart from the settled meaning of that phrase it did so explicitly. Congress provided that a principal petitioner who is under the age of

21 may petition for derivative status on behalf of "unmarried siblings under 18 years of age on the date on which such alien *applied* for status under such clause." 8 U.S.C. § 1101(a)(15)(U)(ii)(I) (emphasis added); *see also* § 1158(b)(3)(B) (establishing similar rule for children of asylees). This provision permits unmarried siblings who would have "aged out" if the family relationship were assessed at the time the principal petitioner's U-visa application is granted to remain eligible for derivative status. By contrast, in the very next subsection, Congress extended eligibility to the spouse and children of a principal petitioner who is 21 years of age or older without any reference to the date of filing. § 1101(a)(15)(U)(ii)(II). That drafting choice provides further confirmation that Congress intended the phrase "accompanying or following to join" to carry its usual meaning—with the family relationship assessed at the time the principal petitioner's application is granted—except with respect to the one category of family members for which it provided otherwise.

"Congress has supplied a clear and unambiguous answer to the interpretive question at hand," so we need not venture beyond step one of the analysis under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018). Congress' use of the phrase "accompanying or following to join" requires USCIS to assess the existence of the marital relationship at the time the principal petitioner's application for a U visa is granted, not when the principal petitioner files her application for a U visa. In my view, § 214.14(f)(4) is invalid insofar as it renders a spouse ineligible for derivative status simply because she married the principal petitioner after the principal petitioner filed her application for a U visa. I would hold that a spouse is eligible

for derivative status so long as the marital relationship exists on the date USCIS grants the principal petitioner a U visa, and on the date USCIS adjudicates the petition for derivative status filed by the principal petitioner on her spouse's behalf.

No. 18-35072

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIA MEDINA TOVAR, *et al.*,

Plaintiffs/Appellants

v.

LAURA ZUCHOWSKI, *et al.*

Defendants/Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT FOR THE DISTRICT OF OREGON

Case No. 3:17-cv-00719-BR

GOVERNMENT'S BRIEF OPPOSING REHEARING EN BANC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

FEDERAL STATUTES

FEDERAL REGULATIONS

FEDERAL RULES FOR APPELLATE PROCEDURE

FEDERAL REGISTER

INTRODUCTION

In response to this Court's order dated March 10, 2020, the Government contends that the present case does not warrant rehearing en banc under the strict standard set forth in Rule 35(a) of the Federal Rules of Appellate Procedure. In relevant part, the panel correctly found that:

> United States Citizenship & Immigration Service ("USCIS") permissibly construed the statutory phrase 'accompanying, or following to join' in 8 U.S.C. § 1101(a)(15)(U)(ii) when it adopted its regulation, 8 C.F.R. § 214.14(f)(4), requiring that a spouse's qualifying relationship exists at the time of the initial U-visa petition and that the qualifying relationship continues throughout the adjudication of the derivative petition.

Medina Tovar v. Zuchowski, 950 F.3d 581, 585 (9th Cir. 2020). In reaching this holding, the panel rejected the argument that the phrase "accompanying, or following to join" has a settled meaning that would preclude USCIS from interpreting it by regulation. *See id*.

There is no inter-circuit or intra-circuit split of authority regarding the meaning of this phrase. *See* Fed. R. App. P. 35(a). Nor is this question of statutory interpretation one of exceptional importance. *See id*. Significantly, Plaintiff-Appellant Alonso Martinez, had, and continues to have, an alternative potential avenue for relief that he has not availed himself. As the beneficiary of an approved Form I-929, he can immediately file an I-485 application for adjustment of status. *See* 8 U.S.C. § 1255(m)(3).

In addition, even if this Court were to rule in Plaintiffs' favor, USCIS would still be unable to grant Plaintiff Alonso Martinez the relief that he seeks. Simply put, under existing law, he cannot be accorded derivative U nonimmigrant status because, his wife, Plaintiff-Appellant Maria Medina Tovar, no longer possesses principal U-1 nonimmigrant status. Thus, the present appeal is not an appropriate vehicle for addressing the question of whether "accompanying, or following to join" has a settled meaning.

STATEMENT OF THE CASE

The U nonimmigrant classification (colloquially a "U visa") grants temporary, lawful, nonimmigrant resident status to a noncitizen alien who "has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity" in the United States and who helped law enforcement "investigating or prosecuting [that] criminal activity." 8 U.S.C. § 1101(a)(15)(U)(i). For petitioners within the United States, approval of a U nonimmigrant status petition provides lawful temporary nonimmigrant status "for a period of not more than 4 years," but a U-visa holder may apply for an adjustment of status to that of a lawful permanent resident ("LPR") after being continuously physically present in the United States for a period of three years following admission into U nonimmigrant status. *See id.* §§ 1184(p)(6), 1255(m)(1)(A). A U-visa recipient—a principal alien—may also petition for derivative status for a

qualifying relative who is "accompanying, or following to join," that principal alien. *Id.* § 1101(a)(15)(U)(ii). Although the statute does not address when the qualifying relationship must exist, USCIS, by regulation, requires that:

> [T]he relationship between the U-1 principal alien and the qualifying family member must exist at the time Form I-918 was filed, and the relationship must continue to exist at the time Form I-918, Supplement A is adjudicated, and at the time of the qualifying family member's subsequent admission to the United States.

8 C.F.R. § 214.14(f)(4).

Here, the principal alien in this case, Maria Medina Tovar, was born in Mexico in 1992; she came to the United States when she was six years old. *Tovar*, 950 F.3d at 586. In 2004, Tovar was the victim of a serious crime and she was helpful to law enforcement in the investigation or prosecution of that crime. *Id*. On June 14, 2013, Tovar filed her U-visa petition (Form I-918). *Id*. Thereafter, on September 21, 2015, Tovar married Adrian Alonso Martinez, a citizen of Mexico. *Id*.

Tovar was granted U nonimmigrant status as of October 1, 2015. On March 26, 2016, Tovar filed a petition for derivative U nonimmigrant status (Form I-918, Supplement A) for Martinez as her "accompanying, or following to join," spouse. *Id*. USCIS denied that petition because Tovar and Martinez were not married when Tovar filed her initial petition for principal U-visa status, as required by 8 C.F.R.

§ 214.14(f)(4). *Id*. Thus, he could not be an "accompanying, or following to join" spouse.

On May 8, 2017, Plaintiffs commenced litigation challenging USCIS's denial of this petition. *Id*. The district court entered summary judgment in favor of USCIS and Plaintiffs appealed.

While this matter was on appeal, on March 26, 2019, Plaintiff Medina Tovar filed an I-485 application for adjustment of status and an I-929 petition for her spouse. Form I-929 is a special form of immigrant visa petition, created especially for circumstances like those in this case: U-1 nonimmigrants who have adjusted, or are adjusting, status to lawful permanent residency can file Form I-929 on behalf of certain relatives who have never held U nonimmigrant status. 8 C.F.R. § 245.24(g), (h). On July 3, 2019, U.S. Citizenship and Immigration Services ("USCIS") approved this application and petition. As a result, Plaintiff Medina Tovar is now a lawful permanent resident and no longer has U nonimmigrant status. Plaintiff Alonso Martinez, as the beneficiary of an approved Form I-929, is now permitted to immediately file an I-485 application for adjustment of status. *See* 8 U.S.C. § 1255(m)(3). However, to date, Plaintiff Martinez has not done so.

On appeal, the panel found that Congress had not directly addressed the question at issue: when must a qualifying relationship exist for an "accompanying, or following to join," family member to be eligible for derivative U nonimmigrant

status? *Id*. at 587. It noted that neither the plain language nor the surrounding language of the U-visa statute answered the question. *Id*. The panel, therefore, looked to case law and regulations to determine whether this phrase had a settled meaning when Congress enacted the Victims of Trafficking and Violence Protection Act in October 2000, creating the U visa program. *See id*. After doing so, the panel correctly concluded that the phrase "accompanying, or following to join" is defined differently depending on the alien's status. *See id*. at 588 citing Procedures for Filing a Derivative Petition (Form I-730) for a Spouse and Unmarried Children of a Refugee/Asylee, 63 Fed. Reg. 3792-01 (Jan. 27, 1998) (codified at 8 C.F.R. pts. 207, 208, and 299).

The dissent disagreed concluding that the phrase "accompanying, or following to join" had a settled meaning at the time Congress created the U-visa program. *See Tovar*, 950 F.3d at 594 (Watford, J., dissenting) (finding that as applied to spouses, the phrase means that the marital relationship must exist at the time the principal petitioner's application for an immigration benefit is granted, not at the time her application was filed). Because the dissent found that this purported settled meaning was at odds with the regulatory language, the dissent would have found USCIS's reading impermissible and would have reversed the district court's decision. *See id*.

STARDARD FOR REHEARING EN BANC

"An en banc hearing or rehearing is not favored . . ." *See* Fed. R. App. P. 35(a); *see generally*, *United States v. American–Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960) (explaining that en banc courts are the exception, not the rule). Rehearing en banc hearing ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

Fed. R. App. P. 35(a); *see also*, *United States v. Cooley*, 947 F.3d 1215, 1216 (9th Cir. 2020) (Berzon, J., concurring) ("This case involves an unusual factual scenario and a technical issue of Indian tribal authority . . . There is no conflict among the circuits regarding the question presented here, the opinion is not in conflict with a Supreme Court decision, and the practical implications are limited"); *Nelson v. Nat'l Aeronautics & Space Admin.*, 568 F.3d 1028, 1029 (9th Cir. 2009) (Wardlaw, J., concurring) (explaining that en banc review was not appropriate because, *inter alia*, the panel opinion "creates no intra- or inter-circuit split, and because the narrow holding does not present an issue of exceptional importance").

ARGUMENTS

1. The present case does not merit rehearing en banc review under Rule 35(a).

Here, there is no inter-circuit or intra-circuit split as to whether the phrase "accompanying, or following to join" was a term of art when Congress created the U visa program. Nor is this a question of exceptional importance. Thus, rehearing en banc is not appropriate. *See* Fed. R. App. P. 35(a); *Cooley*, 947 F.3d at 1216 (Berzon, J., concurring).

The panel correctly noted that the meaning of the phrase "accompanying, or following to join" is defined differently in different situations. *See Tovar*, 950 F.3d at 588. For example, the qualifying relationship for a refugee "must have existed prior to the refugee's admission to the United States and must continue to exist at the time of filing for accompanying or following-to-join benefits and at the time of the spouse or child's subsequent admission to the United States." *Id*. citing 8 C.F.R. § 207.7(c). Whereas, in considering the qualifying relationship for asylum, it "must have existed at the time the principal alien's asylum application was approved and must continue to exist at the time of filing for accompanying or following-to-join benefits and at the time of the spouse or child's subsequent admission to the United States." *Id*. citing 8 C.F.R. § 208.21(b). Thus, it is not correct to say, as Plaintiffs contend, that this phrase requires that a marital

relationship must exist only at the time the principal petitioner's application for an immigration benefit is granted (as opposed to also existing at time of filing).[1]

As the panel explained, when Congress created the U visa program, Congress was presumably aware of different regulations interpreting this phrase differently depending on the context. *See id*. at 589 citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85 (1988). Tellingly, Congress "never added a definition of 'accompanying, or following to join' (in *any* context), nor has it added any clarifying language or otherwise provided guidance to the agency on how that language should be interpreted regarding the timing of qualifying relationships." *Id*. (emphasis original).

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[1] Plaintiffs have relied heavily on *Landin-Molina*, 580 F.3d 913, 918 (9th Cir. 2009). But this reliance is misplaced for two primary reasons. First, *Landin-Molina*, arose in the immigrant, as opposed to nonimmigrant context. *See id.* at 918 n.7 citing 8 U.S.C. § 1153(d). Second, in *Landin-Molina*, this Court suggested that the words "accompany" and "following to join" do not have one settled meaning, but rather are subject to interpretation by the agency. *See id.* (citing an agency precedent decision which interpreted the phrase in the immigrant context), 918 n.7 (stating that these words "are terms of art defined *in the regulations*." *Id*. (emphasis added)). If these words are subject to agency interpretation and "defined in the regulations," then, necessarily, they are not statutorily defined.

Plaintiffs also suggest that their position is supported by *Santiago v. Immigration & Naturalization Service*, 526 F.2d 488, 490 (9th Cir. 1975) (en banc). But this decision does not address the question of when the qualifying relationship must exist. *See id*. (finding that the phrase "accompanying, or following to join" plainly does not mean "preceding with the hope . . . of being joined later"). Thus, it does address the question at issue in this appeal.

The panel further recognized that the agency's regulation imposes reasonable requirements regarding at what point in time the qualifying relationship must exist given the purpose of the U visa. *Id*. at 590. The panel explained:

> The U visa serves a narrow purpose. It was not created to allow aliens to come to the United States to work or attend school; it is not an immigrant visa designed to extend status to aliens who intend to permanently reside in the United States; nor does it offer protection to aliens seeking refuge from harm in their home country. Instead, the U visa operates to grant limited, temporary, nonimmigrant status to aliens already present in the United States who were victims of a serious crime. The U visa requires that aliens be or have been helpful in the investigation or prosecution of those crimes . . . It is reasonable for the agency to require that qualifying relationships exist at the time of the initial U-visa application, where U-visa status provides only limited, temporary, nonimmigrant status to alien victims of crime (already present in the United States) based on their aid to law enforcement.

Id. Moreover, USCIS's interpretation serves an important policy goal in preventing an alien from marrying someone with a pending U petition in the sole hope of obtaining an immigration benefit through that marriage. *See id*. at 593 ("Congress has taken steps to ensure that marriage-based immigration be regulated and marriage fraud be punished. *See* Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537. Thus, the prevention of marriage fraud is a legitimate government purpose…"). As the panel recognized, because USCIS's regulatory interpretation of this phrase is reasonable, the interpretation was entitled to deference.

In sum, this Court should not lightly find that a statutory phrase has a settled meaning because doing so impermissibly infringes on the ability of an agency to

promulgate regulations interpreting ambiguities and filling in gaps left in statutory language. Had Congress intended for the phrase "accompanying, or following to join" to have been given a particular meaning, Congress could have specified this meaning in the statute itself.

2. Administrative developments that occurred while this matter was on appeal, render this case is a poor vehicle for addressing the question of whether the phrase "accompanying, of following to join" has a settled meaning.

On March 26, 2019, Plaintiff Medina Tovar filed an I-485 application for adjustment of status and an I-929 petition for her spouse. On July 3, 2019, USCIS approved this application and petition. This means, since July 3, 2019, Plaintiff Alonso Martinez, as the beneficiary of an approved Form I-929, has been permitted to file an I-485 application for adjustment of status. *See* 8 U.S.C. § 1255(m)(3). Rather than receive temporary nonimmigrant status from USCIS, he can apply for lawful permanent resident (immigrant) status. Thus, he may be able to obtain, under existing provisions, a benefit more significant than the one sought in this litigation, but has nonetheless decided not to avail himself of this form of relief.

USCIS's July 3, 2019 decision to approve the I-485 application has another important consequence: Plaintiff-Appellant Alonso Martinez cannot be accorded derivative U nonimmigrant status because, his wife, Appellant Maria Medina Tovar, no longer possesses principal U-1 nonimmigrant status. Thus, necessarily,

he cannot derive U nonimmigrant status from her. This administrative change cuts heavily against rehearing en banc because it means that Plaintiff-Appellant Alonso Martinez will not benefit from a decision by this Court in his favor; rather this appeal will only affect others seeking derivative U nonimmigrant status.

By way of background, the INA draws a distinction between immigrants, who are granted the privilege of residing permanently in the U.S., and nonimmigrants, who are admitted to the United States for a temporary period of time and a particular, limited purpose. 8 U.S.C. §§ 1101(a)(15), 1101(a)(20), 1184(a)(1); *see also Elkins v. Moreno*, 435 U.S. 647, 663-66 (1978). Prior to her adjustment of status, Ms. Medina Tovar was a U-1 nonimmigrant. When Ms. Medina Tovar adjusted status to that of a lawful permanent resident, she was accorded "the privilege of residing permanently in the United States as an immigrant." 8 U.S.C. § 1101(a)(20). Importantly, the INA specifically excludes nonimmigrants from the definition of the term "immigrant." 8 U.S.C. § 1101(a)(15) ("The term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens…."). This exclusionary definition means that once Ms. Medina Tovar became a lawful permanent resident, she ceased to be a U-1 nonimmigrant under 8 U.S.C. § 1101(a)(15)(U). Significantly, under 8 U.S.C. § 1101(a)(15)(U)(ii), a spouse is only eligible for derivative U nonimmigrant status "if accompanying, or following to join, the alien

described in [8 U.S.C. § 1101(a)(15)(U)(i)]." Because he is no longer the spouse of a U-1 nonimmigrant, he is no longer eligible for classification as a derivative U nonimmigrant under the INA.

Regulatory text in this case further confirms Mr. Alonso Martinez's ineligibility for derivative U nonimmigrant status. Specifically, under 8 C.F.R. § 214.14(a)(10), a "qualifying family member" is defined, "in the case of an alien victim 21 years of age or older who is eligible for U nonimmigrant status as described in section 101(a)(15)(U) of the Act, 8 U.S.C. § 1101(a)(15)(U), the spouse or child(ren) of such alien." Subsection 214.14(f)(4) further requires that "the relationship between the U-1 principal alien and the qualifying family member must exist at the time Form I-918 was filed, and the relationship must continue to exist at the time Form I-918, Supplement A is adjudicated, and at the time of the qualifying family member's subsequent admission to the United States." *Cf. Kalezic v. INS*, 647 F.2d 920, 922 (9th Cir. 1981) ("Kalezic's application for permanent resident status was submitted on August 5, 1977, following the approval of his wife's visa petition on his behalf on July 21. This petition was revoked … on July 8, 1978, *retroactively effective as of the date of the original approval*, July 21, 1977. Therefore, Kalezic was *statutorily ineligible for a change of status* and his application was properly denied") (emphases added, citations omitted).

Here, Mr. Alonso Martinez is challenging the decision of USCIS to deny a Form I-918, Supplement A, that his wife, Ms. Tovar, filed on his behalf. But Mr. Alonso Martinez is no longer a "qualifying family member" under 8 C.F.R. § 214.14(a)(10) because his spouse no longer has U-1 nonimmigrant status – she has already adjusted her status to that of a lawful permanent resident. Because 8 C.F.R. § 214.14(f)(4) requires that a relationship with the U-1 principal alien "must continue to exist at the time [the] Form I-918, Supplement A is adjudicated," USCIS cannot properly approve Ms. Tovar's Form I-918, Supplement A. Significantly, Plaintiffs-Appellants do not challenge the portion of 8 C.F.R. § 214.14(f)(4) requiring the qualifying family relationship to exist at the time of adjudication. As there is no longer a "relationship" with a "qualifying family member," if the matter were remanded to USCIS, USCIS would be required to deny Ms. Tovar's Form I-918, Supplement A under the plain terms of its own regulations.

CONCLUSION

For these reasons, the present appeal should not be reheard en banc under Rule 35 of the Federal Rules of Appellate Procedure.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The Government is not aware of any pending case that raises the same or similar issues to the ones presented here.

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U.S. Department of Justice

CERTIFICATE OF COMPLIANCE

The undersigned certifies that, in accordance with this Court's Local Rules, this Brief is proportionately spaced, has typeface of 14 points and contains 3,105 words.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this date, a copy of the foregoing was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. All Participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

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