

No. 17-15589

IN THE
**United States Court of Appeals
for the Ninth Circuit**

STATE OF HAWAII, *et al.*,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Hawaii, No. 1:17-cv-00050-DKW-KSC
District Judge Derrick K. Watson

**BRIEF OF AMICI CURIAE
TAHIRIH JUSTICE CENTER, THE ASIAN PACIFIC INSTITUTE ON
GENDER-BASED VIOLENCE, CASA DE ESPERANZA, AND THE
NATIONAL DOMESTIC VIOLENCE HOTLINE IN SUPPORT OF
APPELLANTS AND AFFIRMANCE**

Scott L. Winkelman
swinkelman@crowell.com
Luke van Houwelingen
lvanhouwelingen@crowell.com
Avi Rutschman
arutschman@crowell.com
Justin Kingsolver
jkingsolver@crowell.com
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 624-2500
Fax: (202) 628-5116

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

The amici curiae herein, Tahirih Justice Center, The Asian Pacific Institute on Gender-Based Violence, Casa de Esperanza, and the National Domestic Violence Hotline, through their undersigned counsel, submit this Disclosure Statement pursuant to Federal Rule of Appellate Procedure 26.1.

All of these amici curiae are non-stock, nonprofit organizations, none of which has any parent company, and no person or entity owns them or any part of them. They are not aware of any publicly held corporations not a party to this proceeding with a financial interest in its outcome.

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INTEREST OF AMICI CURIAE¹

Amici are a coalition of organizations united in the goal of serving survivors of gender-based and domestic violence.

Tahirih Justice Center (“Tahirih”) is a national non-profit that has served courageous individuals fleeing violence since 1997. Through direct services, policy advocacy, and training and education, Tahirih protects immigrant women and girls and promotes a world where they can enjoy equality and live in safety and dignity. Tahirih serves immigrant women and girls who have rejected violence, but face incredible obstacles to justice, including language barriers, lack of resources, and a complex immigration system.

The Asian Pacific Institute on Gender-Based Violence is a national resource center on domestic violence, trafficking, and other forms of gender-based violence in Asian and Pacific Islander communities. The institute serves a national network of advocates and community-based service programs that work with Asian and Pacific Islander survivors, and is a leader on providing analysis on critical issues

¹ In accordance with Federal Rule of Appellate Procedure 29(a)(2), amici curiae state that all parties have consented to the filing of this amicus brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(c)(5).

facing victims in the Asian and Pacific Islander community. The institute aims to strengthen advocacy, change systems, and prevent gender violence through community transformation.

Casa de Esperanza seeks to mobilize Latinas and Latino communities to end domestic violence. Founded in 1982 to provide emergency shelter for women and children experiencing domestic violence in Minnesota, in 2009 Casa de Esperanza launched the National Latin@ Network for Healthy Families and Communities. The National Latin@ Network is a national institute focused on preventing and addressing domestic violence in Latino communities. It organizes national and regional events and provides training and consultations to practitioners and advocates throughout the United States, as well as in Latin America. The organization also engages in federal and state public policy advocacy and conducts research on issues that affect Latino communities.

The National Domestic Violence Hotline (“NDVH”) was established in 1996 as part of the Violence Against Women Act. It operates a free, anonymous and confidential, around-the-clock hotline available via phone, internet chat, and text services to offer victims of domestic violence compassionate support, crisis intervention, safety planning and referral services to enable them to find safety and live lives free of abuse. A substantial number of the victims NDVH serves are immigrants or request help related to immigration-related issues. From May 2015

through March 2017, for example, over 10,000 victims contacted NDVH identifying as immigrants and over 6,500 of them sought help related to immigration concerns.

SUMMARY OF THE ARGUMENT

Violence against women and children is a global crisis. Worldwide, one in three women will suffer domestic or sexual abuse in her lifetime.² In the United States, a woman is assaulted or beaten every nine seconds.³ This abuse is often intimate or familial, carried out by the victim's partner or parent.⁴ The abuser dominates the victim's life so fully that any hope for escape from the abuser is often out of reach—absent a robust system of social and legal support.

For decades the United States has provided such support for its own citizens through an array of support systems and legal protections, from states

² *Global and Regional Estimates of Violence Against Women: Prevalance and Health Effects of Intimate Partner Violence and Non-Partner Sexual Violence*, World Health Organization Dep't of Reproductive Health & Research, 2 (2013), <http://www.who.int/reproductivehealth/publications/violence/9789241564625/en/>.

³ *Domestic Violence National Statistics*, National Coalition Against Domestic Violence, 1 (2015), <http://ncadv.org/files/National%20Statistics%20Domestic%20Violence%20NCADV.pdf>.

⁴ Michele Black et al., *National Intimate Partner and Sexual Violence Survey: 2010 Summary Report*, Centers for Disease Control and Prevention, 2 (2011) (“More than 1 in 3 women (35.6%) . . . in the United States have experienced rape, physical violence, and/or stalking by an intimate partner”), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.

criminalizing marital rape to Congress authorizing, then reauthorizing, the Violence Against Women Act (“VAWA”), building a framework of federal protections for domestic violence victims and creating criminal justice system and community-based responses to gender-based crimes.

While protecting its own, our nation has not closed its eyes, or its doors, to victims of abuse globally. Through VAWA and other legislation, Congress has extended protections to non-citizens, creating new pathways to safety, residency, and citizenship for immigrant, undocumented, and trafficked victims of violence. Congress created the U and T Visa programs, limiting criminals’ ability to transform our nation’s immigration laws into tools of abuse.⁵ Our immigration courts have granted asylum to refugees escaping gender-based violence, demonstrating our nation’s commitment to combat such violence by recognizing gender-based persecution as grounds for asylum and refugee status.⁶

With one pen stroke, the President’s Executive Order 13780 (“the Order”) now endangers these protections and upends decades of moral leadership.

⁵ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513, 114 Stat. 1464, 1533-1537 (2000).

⁶ *E.g.*, *Matter of R-A-*, in which three U.S. Attorneys General took personal jurisdiction from the Board of Immigration Appeals (proceedings discussed at <https://cgrs.uchastings.edu/our-work/matter-r> (accessed Apr. 21, 2017)); *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014).

Displaced women and girls seeking refuge from violence bear the Order's brunt. These refugees are victims of the very instability and violence that the Order decries. Among their ranks are those forced from their homes by the atrocities of the Syrian civil war, those seeking refuge from the failed Libyan and Somalian states, those escaping institutionalized misogyny in Iran, and those victimized by terrorist brutality in Sudan and Yemen. The Order's 120-day halt to the refugee program condemns these victims to continued victimization, stranding them in refugee camps in which gender-based violence of the most gruesome forms—rape of women and children perpetrated by government officials and aid workers—is the daily norm. This Order forces displaced persons in the refugee pipeline—those *already* engaged in an extreme vetting process consuming 18 to 24 months of painstaking diligence—to remain in camps where violence pervades. And the Order singles out six nations where survivors of gender-based violence are particularly imperiled, thereby targeting for exclusion women and children in desperate need of the protections Congress has historically afforded.

In the name of serving America's public good, the Order also creates a public travesty by weakening the tools Congress has provided law enforcement to prosecute predators of women and children. The U and T Visa programs are designed to incentivize victims of domestic violence, sexual abuse, and trafficking to aid law enforcement in prosecuting abusers. The Order strips the beneficiaries

of social support systems designed by Congress to help survivors of gender-based violence recover from their abuse and reintegrate into society. Survivors with U or T nonimmigrant status will no longer be able to seek derivative visas for family members, denying them an important means of combating the profound isolation that abusers impose through gender-based violence and domestic abuse.

Through its hostile, ungenerous spirit, the Order also creates a broader—and very real—danger to noncitizen women and children survivors of gender-based violence. It sends the message that the United States and its officials are no longer friends to be trusted and turned to for protection and support, but threats to be feared. It compounds aversion to law enforcement, providing abusers yet another tool of control and coercion. This in turn undermines an overriding priority of the T and U visa programs—to cultivate trust and cooperation between survivors and law enforcement to bring criminals to justice. The Order condemns survivors to remain in abusive situations rather than come forward—and exposes our communities to criminals who might otherwise have been brought to justice.

Ours has long been a nation personified by a “mighty woman with a torch, . . . her name Mother of Exiles” who would challenge despots and tyrants to “[s]end these, the homeless, tempest-tost,” with her “lamp [lifted]” to welcome

them in.⁷ Congress has honored this vision by crafting a framework of protections developed over decades across Administrations and party lines, one that enables survivors to escape extreme violence and rebuild a life of safety and basic humanity. The Order departs from this salutary vision, to no good end. The harm it will cause—and has already caused—victims of gender-based violence is all too real, as amici see in their work every day. It slams the nation’s door on displaced women and girls vulnerable and regularly subjected to gender-based violence. It impedes effective police work. It makes Americans and would-be Americans less safe.

Amici respectfully request that this Court affirm.

ARGUMENT

I. By Halting the Refugee Program, the Order Targets Countries Where Violence Against Women and Children Is Acute and Pervasive.

A. The Order disables the United States Refugee Assistance Program in contravention of congressional intent.

Since 1980, victims of persecution have relied on the United States refugee program to escape extreme discrimination and violence. That year, after fifteen years of congressional debate on refugee challenges posed by conflicts in

⁷ Emma Lazarus, *The New Colossus* (1883).

Southeast Asia, President Carter signed into law the Refugee Act of 1980.⁸ In recognition of the United States’ “historic policy” of “respond[ing] to the urgent needs of persons subject to persecution in their homelands,” Congress established “a permanent and systematic procedure” to admit refugees on a humanitarian basis.⁹ “The admission of refugees is a national policy,” noted the Act’s Senate sponsor, “decided in partnership between the Executive Branch and Congress.”¹⁰

In the decades since, displaced persons facing persecution in their home country, or who had a well-founded fear of persecution if they returned home, have been eligible to apply for refugee status.¹¹ Six successive presidents have employed this standard to admit over three million refugees.¹² Over this period, the United States has confronted grave threats at home and abroad, including terrorist attacks on our embassies, bombings targeting our soldiers, and the unprecedented massacre of civilians in September 2001. Despite those threats, no

⁸ Pub. L. No. 96-212, 94 Stat. 102, 102-118 (1980); Edward M. Kennedy, *Refugee Act of 1980*, 15 INT’L MIGRATION REV. 141, 143 (Spring 1981) (“The origins of [the Act] date from hearings conducted during 1965-68 by the Senate Judiciary Subcommittee on Refugees”).

⁹ Pub. L. No. 96-212, § 101(a-b), 94 Stat. at 102.

¹⁰ Kennedy, *supra* note 8, at 155-56.

¹¹ 8 U.S.C. § 1001(a)(42) (2013).

¹² *Refugee Admissions by Region*, Refugee Processing Ctr., U.S. Dep’t of State (Feb. 2017).

president has before asserted the need (or the authority) to upend Congress' framework and halt the refugee program in its tracks.

B. Survivors of gender-based violence rely on the United States refugee program to escape their abusers.

Survivors of extreme violence, especially gender-based and domestic violence, rely on the refugee program for their very survival. According to the United Nations High Commissioner for Refugees, there are over 21 million refugees and 65 million displaced persons worldwide.¹³ Women and children comprise the vast majority.¹⁴ Many flee their home countries to escape legal and social infrastructures that actively enable violence against women. For decades, these refugees have sought and found sanctuary in the United States.

The Order would end this. For at least the next 120 days, the Order shuts the door to refugees worldwide.¹⁵ And likely longer: the refugee program's protections will remain unavailable to refugees from any but those scarce foreign countries that, in the unanimous discretion of the Secretaries of State and Homeland Security and the Director of National Intelligence, have implemented

¹³ *Figures at a Glance*, U.N. High Comm'r for Refugees (Jun. 20, 2016) (33,972 people are forced to flee their homes each day due to persecution and violence), available at <http://www.unhcr.org/en-us/figures-at-a-glance.html>.

¹⁴ *UNHCR Statistical Yearbook 2014*, U.N. High Comm'r for Refugees, 14th ed., at 64-66 (Dec. 8, 2015).

¹⁵ Order, § 6(a).

“additional procedures” that are “adequate to ensure the security and welfare of the United States.”¹⁶ War-torn nations without stable governments—like five of the six the Order calls out—may never meet that nebulous standard, despite being the nations whose nationals most need refugee protection. The Order thus threatens these nations’ victims of gender-based and domestic violence with *indefinite* exclusion.

Take Syria. Its enduring civil war has incited an epidemic of gender-based violence. In 2016, more refugees—4.9 million—fled Syria than any other nation on earth.¹⁷ The United States State Department recently reported that, since the conflict there began, Syrian government forces have committed over 7,600 incidents of sexual abuse against Syrian women.¹⁸ These forces exploit civil war as a license to target women for sexual abuse and use violent rape as a tool of warfare. The State Department’s report notes “an increased use of sexual violence against women before granting permission to depart besieged areas or to return with medical supplies and food.”¹⁹ Yet under the Order, the very government

¹⁶ *Id.*

¹⁷ *Figures at a Glance, supra* note 13.

¹⁸ *Country Report on Human Rights Practices 2016, Syria*, U.S. Dep’t of State, § 1(g).

¹⁹ *Id.*

whose forces are engineering sexual violence would be required to implement “additional procedures” for protections to be reinstated.

Somalia is no different. Somali women and girls endure extreme violence from which this Order extinguishes relief. Decades of armed conflict have eroded Somalia’s central government. Violent militias have capitalized on the resulting law enforcement vacuum to commit gender-based violence with impunity.²⁰ These violent acts, among them rape and female genital mutilation/cutting, are often carried out by clan militias, al-Shabaab, members of the national military and police forces, and even soldiers enlisted in the African Union’s mission in Somalia.²¹ This dire crisis has led more than a million Somalis to flee the country as refugees.²² Historically, they could seek protection through our nation’s refugee assistance program. No longer. The Order strands Somali rape victims in a country where their supposed protectors are often themselves perpetrators of

²⁰ *Country Report on Human Rights Practices 2016, Somalia*, U.S. Dep’t of State, § 1(g) (“Government forces, allied militias, men wearing uniforms, and AMISOM troops used excessive force, including torture, and raped women and girls, including IDPs. . . . [I]mpunity was the norm.”).

²¹ *Id.*; *Somalia*, Special Rep. of the Sec’y-Gen. for Sexual Violence in Conflict, United Nations (Mar. 25, 2015), *available at* <http://www.un.org/sexualviolenceinconflict/countries/somalia/>.

²² *Figures at a Glance*, *supra* note 13.

violence. Yet it is they, those who speak for the Somali government, who must implement “additional procedures” for the Order’s ban to be lifted.

Even in more stable nations, legal systems fail to protect—and sometimes actively punish—victims of gender-based violence. In Iran, women and girls endure misogynistic laws and practices that perpetuate widespread sexual violence.²³ Forced marriages are common, especially for young women.²⁴ Iranian law does not recognize rape inside marriage.²⁵ Once married, women are statutorily required to “submit” to their husbands; refusal to have sex is punishable by law.²⁶ Unmarried victims of sexual violence face implausible evidentiary burdens—a rape victim must proffer as witnesses four Muslim men or a combination of three men and two women or two men and four women²⁷—often disabling Iranian courts from providing recourse for victims of even the most brutal rapes. Cruelly, victims who cannot meet this burden after reporting sexual

²³ Ahmed Shaheed, *Report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran*, U.N. Human Rights Council, at ¶ 18 (Aug. 27, 2014) (66% of Iranian women have experienced domestic violence), <http://www.ohchr.org/EN/HRBodies/SP/CountriesMandates/IR/Pages/SRIran.aspx>.

²⁴ *Country Report on Human Rights Practices 2015, Iran*, U.S. Dep’t of State, § 6.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

violence are themselves subject to prosecution and barbaric punishment.²⁸ The Order bars these innocent victims from seeking refuge in the United States.

C. By delaying refugee admissions decisions for at least 120 days, the Order perpetuates violence.

Even if the Administration were promptly to restart the refugee program after 120 days, the damage will have been done. Delay will expose women and children, many of whom have already endured and satisfied extensive vetting by United States and international organizations, to more violence. Women and children face a great risk of becoming victims of gender-based, sexual, and domestic violence while in refugee camps awaiting U.S. refugee admission status.

U.N. officials have raised the alarm about this “deplorable and persistent trend”:

[F]emale refugees across the world are highly vulnerable to all forms of sexual and physical violence. In addition to the dangers women face from contesting armed groups, once on the move from the conflict zone, they are also at risk of being brutalized by human traffickers or even border security forces. Even after exiting the conflict zone, safety can be elusive: staying in a refugee camp within the country of origin or seeking protection elsewhere brings serious threats to women’s security, freedom and health.²⁹

²⁸ *Id.* (a woman found to have made a false accusation of rape faces 80 lashes).

²⁹ Marija Obradovic, *Protecting Female Refugees against Sexual and Gender-Based Violence in Camps*, U.N. University’s Inst. on Globalization, Culture, and Mobility (Oct. 23, 2015), available at <https://ourworld.unu.edu/en/protecting-female-refugees-against-sexual-and-gender-based-violence-in-camps>.

Rape, sexual assault, and subjugation plague refugee camps, perpetrated by male refugees and, alarmingly, by camp administrators.³⁰ Executive Branch agencies themselves acknowledge that many prospective refugees have already endured these deplorable conditions for months, if not years.³¹

The Order excepts from its ban those refugees for whom the State Department has already arranged travel.³² Yet many thoroughly vetted candidates who have completed most, if not all, of the State Department's pre-admission requirements will still be excluded. Before scheduling transit to the United States,

³⁰Audrey Sheehy, *Sexual Assault in the Refugee Camp*, HARVARD POLITICAL REVIEW (Oct. 17, 2016) (“No woman or girl is safe in a refugee camp, because rape is a weapon for war and power. . . . Many rapes in refugee camps occur while women are receiving rations, running daily errands, or sleeping in mixed gendered settlements. . . . [P]ublic officials working in the camps and humanitarian staff also sometimes assault women refugees.”); Mark Hanrahan, *Refugee Crisis: Women, Children Report Sexual Violence, Abuse on Migration Trail, Says UN*, NBC News (Feb. 28, 2017) (“[T]hree quarters of refugee and migrant children who took part in a survey said that they had experienced violence or harassment at the hands of adults during their journey, while nearly half of both women and children interviewed reported suffering and sexual abuse, often on multiple occasions.”), available at <http://www.nbcnews.com/news/world/refugee-crisis-women-children-report-sexual-violence-abuse-migration-trail-n726731>.

³¹ *U.S. Refugee Program FAQs*, U.S. Dep’t of State (Jan. 20, 2017) (“[T]he average processing time is about 18 to 24 months from UNHCR referring a refugee to the U.S. for consideration, through the U.S. Government’s screening and processing of the applicant, to [its] granting admission to the refugee.”), available at <https://www.state.gov/j/prm/releases/factsheets/2017/266447.htm> (accessed Apr. 21, 2017).

³² Order, § 6(a).

a prospective refugee must (1) undergo screenings and interviews by the U.N. High Commissioner for Refugees, (2) secure a U.N.H.C.R. referral to the U.S. refugee screening agencies (which only one percent of applicants receive), (3) pass rigorous biographic security checks, (4) clear interviews with the FBI, DHS, State Department, and National Counterterrorism Center (all which subject refugees, especially those from Syria, to heightened screening criteria), (5) pass a biometric identifier screen with the FBI, DHS, and Defense Department, (6) undergo and pass a comprehensive medical evaluation, (7) complete a course of cultural orientation classes to prepare for life in the United States, and (8) collaborate with refugee program authorities to determine a resettlement location.³³ The Order blocks applicants who have successfully completed all of these steps, stranding them in refugee camps and condemning them to further abuse.

³³ *U.S. Refugee Admissions Program: Applications and Case Processing*, U.S. Dep't of State, available at <https://www.state.gov/j/prm/ra/admissions/> (accessed Apr. 21, 2017).

II. By Jeopardizing the T and U Visa Programs, the Order Puts Victims at Risk and Undermines Law Enforcement.

A. Congress designed the T and U Visa programs to empower immigrant survivors of gender-based and domestic violence and to make our communities safer.

Congress created T and U nonimmigrant status when it passed the Victims of Trafficking and Violence Protection Act of 2000 (“VTVPA”).³⁴ The bill recognized that unauthorized immigrants—particularly women and children—were vulnerable to gender-based violence because their fear of deportation could outweigh their determination to seek justice for their abusers. To that end, the legislation created a sensible *quid pro quo*, whereby survivors were permitted legally to remain in the United States provided they assisted law enforcement in prosecuting their abusers and traffickers. Criminals could no longer wield immigration law against their victims with impunity.

Survivors of “severe forms of trafficking in persons,” such as sex and forced labor trafficking, are granted nonimmigrant status under the T program. In addition to being a trafficking survivor, those granted T program status must be present in the United States because of trafficking, agree to assist law enforcement in the prosecution or investigation of trafficking, and show that they will

³⁴ Pub. L. No. 106-386, *supra* note 5.

experience extreme hardship if removed.³⁵ Meanwhile, survivors of domestic abuse, as well as other enumerated crimes, can access nonimmigrant status through the U program. Eligible survivors must have suffered “substantial physical or mental abuse” as a result of the crime, possess information about it, be willing to assist law enforcement in the investigation and prosecution of the offender, and demonstrate that the crime occurred in the United States or violated a law over which our nation has extra-territorial jurisdiction.³⁶

The T and U status programs help empower survivors by encouraging them to seek assistance from law enforcement rather than avoid it for fear of deportation. Non-citizens in turn are more likely to serve as witnesses in investigations and prosecutions, making communities safer. This is an important animating purpose of the programs.³⁷ It is not the sole purpose, however. Congress also meant to provide survivors with the means to rebuild their lives and reintegrate into their communities. The programs enable survivors to seek employment.³⁸ They create pathways to lawful permanent resident status after continued residence in the

³⁵ 8 U.S.C. § 1101(a)(15)(T)(i)(I)–(IV) (2013).

³⁶ 8 U.S.C. § 1101(a)(15)(U)(i)(I)–(IV) (2013).

³⁷ *E.g.* H.R. Rep. No. 106-487, at 4 (1999) (“[T]o deter international trafficking and to bring its perpetrators to justice, nations . . . must . . . giv[e] the highest priority to investigation and prosecution of trafficking offenses, and . . . protect[] rather than punish[] the victims of such offenses.”).

³⁸ 8 C.F.R. § 214.11(d)(11); 8 C.F.R. § 214.14(c)(7).

United States.³⁹ And because return to something approaching normalcy requires a stable, nurturing domestic environment, Congress specifically authorized survivors to seek derivative status for family members overseas.

The Order wreaks havoc on this carefully constructed program.

B. The ninety-day travel ban for nationals of six countries impairs one of the most important forms of humanitarian relief offered by the T and U visa programs—family reunification through derivative visas.

The Order, on taking effect, imposes an immediate ninety-day travel and entry ban on nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen. Nationals of these countries who are outside the United States and did not have a valid visa on January 27, 2017 or on the Order’s effective date cannot enter the United States.⁴⁰ There are limited exceptions. The entry ban does not apply to lawful permanent residents, foreign nationals admitted or paroled into the United States after the Order’s effective date, or foreign nationals with advance parole or an equivalent document granting entry.⁴¹ The Order also purports to grant consular officers and Customs and Border Patrol (“CBP”) officials discretionary case-by-

³⁹ 8 U.S.C. § 1255(l-m) (2013).

⁴⁰ Order, § 3(a).

⁴¹ Order, § 3(b).

case waiver authority if a foreign national can make certain demonstrations.⁴²

Even were discretion exercised—and there is credible reason to doubt it will be—the Order’s scheme is woefully inadequate.

The travel ban would cripple the T and U status programs and harm the very victims of violence Congress intended them to help. A strong network of support helps survivors of gender-based violence recover and reintegrate into society.⁴³ For immigrant women and children who find themselves strangers in a strange land upon escaping their abusers, this social construct may be available only through reunification with family. Congress recognized this, and provided in the VTVPA that individuals with T or U status could obtain derivative visas for family members residing overseas.⁴⁴ Congress’ endorsement of the centrality of family

⁴² Order, § 3(c)(iv) (waiver permissible if (1) denial of entry during the suspension would cause undue hardship, (2) the foreign national’s entry would not pose a national security threat, and (3) such entry would be in the national interest). The Order describes scenarios in which a waiver could be appropriate, including when a foreign national seeks entry to be reunited with “a close family member . . . admitted on a valid nonimmigrant visa[.]”).

⁴³ Alytia A. Levendosky, et al., *The Social Networks of Women Experiencing Domestic Violence*, 34 AM. J. OF CMTY. PSYCHOLOGY 95, 106 (2004); Lisa Goodman, et al., *Obstacles to Victims’ Cooperation with the Criminal Prosecution of Their Abusers: The Role of Social Support*, 14 VIOLENCE AND VICTIMS 427, 429 (1999) (survivors may hesitate to cooperate with law enforcement because they fear losing their abusers’ social and economic support).

⁴⁴ 22 U.S.C. § 7101(b)(5) (2013) (“Traffickers often transport victims from their home communities to unfamiliar destinations, including foreign countries away

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for survivors echoes the value placed on the family institution by our Constitution and in our laws.⁴⁵

Generally, an individual granted T or U nonimmigrant status can petition United States Citizenship and Immigration Services (“USCIS”) for certain family members to receive derivative status.⁴⁶ In the U Visa program, derivative visas are available for the survivor’s spouse, children, and unmarried siblings under age eighteen.⁴⁷ If the survivor is younger than age twenty-one, she can petition for derivative status for her parents.⁴⁸ In the T Visa program, a survivor over twenty-one can petition for derivative visas for her spouse and children, while a survivor under twenty-one can also petition for derivative visas for her parents.⁴⁹ The survivor must demonstrate that the individual for whom she seeks derivative status is an eligible family member and is admissible to the United States. If USCIS

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from family and friends . . . and other sources of protection and support, leaving the victims defenseless and vulnerable.”).

⁴⁵ *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (“[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”).

⁴⁶ 8 C.F.R. § 214.11(k)(2); 8 C.F.R. § 214.14(f)(2).

⁴⁷ 8 C.F.R. § 214.14(f)(1).

⁴⁸ *Id.*

⁴⁹ 8 C.F.R. § 214.11(k)(1).

denies an application, it must do so in writing, providing the survivor with an opportunity to file an administrative appeal.

The Order rescinds this framework. By its terms, if a survivor's family members are nationals of one of the six enumerated countries, they will be banned from entering the United States absent a waiver from a consular or CBP official. That waiver mechanism is not a viable alternative to the derivative visa program, as it imposes a heightened evidentiary burden on the individual seeking entry. Rather than observe the existing statutory requirement that the survivor demonstrate familial eligibility and admissibility, the family member must now satisfy the ill-defined requirement to prove her or his entry would not pose a national security threat to the United States *and* would be in the nation's interest. Worse, the consular or CBP official's decision not to issue a waiver is unappealable. There is thus appreciable risk that family members who wish to enter the United States under U or T visa derivative status will be turned away, without recourse.

The resulting risk to survivors is grave. The support provided by family members can help a survivor reconstruct her identity after leaving her abuser. Through assistance from family, she can shed the label "victim" and re-identify as "mother," "parent," or "sister." This ability both to nurture family members, and be nurtured by them, begins to free survivors from the isolation that accompanies

their abuse.⁵⁰ The presence of a family member also provides physical protection against retaliation by the abuser. And, in instances where a survivor can obtain a derivative visa for a parent, the parent's presence can prevent her from sliding into poverty.⁵¹ A parent can assist with chores and child care, providing the survivor a base of domestic support necessary for her to become economically self-reliant and preventing an economically-driven return to abusive relationships.

The presence of family can also allay a survivor's often justified concern that her family members are not safe overseas. An abuser or trafficker often will have connections in the survivor's native country. Threats to the family's well-being can be every bit as coercive as threatening a survivor with deportation. Likewise, an underage survivor's ability to obtain derivative status for her parents can rebuild the family structure, preventing a survivor from becoming a ward of the state and staving off continued abuse.

⁵⁰ Kathy Bosch & M. Betsy Bergen, *The Influence of Supportive and Nonsupportive Persons in Helping Rural Women in Abusive Partner Relationships Become Free From Abuse*, 21 J. OF FAMILY VIOLENCE 311, 311 (2006) (“Social support reduces the isolation that many abusers enforce, and is a major factor in helping women become safe and free from abuse.”).

⁵¹ Denise Brennan, *Key Issues in the Resettlement of Formerly Trafficked Persons in the United States*, 158 U. PA. L. REV. 1581, 1583 (2010) (T visa recipients are usually locked into “low-paying and insecure jobs” even after receiving nonimmigrant status due, in part, to a lack of social networks and support).

For survivors of violence, who so often are left in precarious circumstances after escaping their abusers, even the Order’s three months of “temporary” delay will cause extreme hardship. Three months for a victim can be a lifetime—or the end of one. The immediate presence of family can mean the difference between recovery and more suffering.

III. The “Case-By-Case” Waiver Provisions Are Underdeveloped and of Little Consolation to Victims of Abuse.

In the Order’s latest incarnation, the President identifies certain categories of foreign nationals and refugees who may qualify for “case-by-case” admission at the discretion of the Secretaries of State and Homeland Security.⁵² This discretionary and unreviewable waiver regime poses at least three problems for the populations amici serve.

First, victims of gender-based violence are excluded altogether from those the Order suggests may qualify for waivers.

Second, public evidence unfortunately reveals this waiver provision, like the rest of the revisions found in the Order’s new version, to be just dressing—an attorney sleight-of-hand to inoculate the Order from legal challenge.⁵³ The Order’s

⁵² Order, §§ 3(c) and 6(c).

⁵³ Donald J. Trump, White House Press Conference (Feb. 16, 2017) (“The new order is going to be very much tailored to what I consider to be a very bad decision.”); Donald J. Trump, Nashville, Tenn. (March 15, 2017) (“The order he

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internal inconsistency alone betrays the waiver provisions' emptiness. As one of only two specific examples of terrorism-related crimes used to justify the refugee ban, the Order cites the 2014 conviction of "a native of Somalia who had been brought to the United States as a child refugee."⁵⁴ This refers to Mohamed Osman Mohamud, born in 1991, who fled Somalia with his family in early 1992 to a Kenyan refugee camp.⁵⁵ In October 1993, the United States allowed his father, a university professor who speaks five languages, to resettle in this country.⁵⁶ When Mohamud was five, the United States permitted him and his mother to join his father in Portland.⁵⁷ Presented with the identical situation today, two of the Order's "case-by-case waiver" provisions would suggest that the State Department should admit Mohamud to the United States.⁵⁸ Yet by offering Mohamud as an

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blocked was a watered down version of the first order that was also blocked by another judge and should've never been blocked to start with.").

⁵⁴ Order, § 1(h).

⁵⁵ Lynne Terry, *Family of Portland's bomb suspect, Mohamed Mohamud, fled chaos in Somalia for new life in America*, *The Oregonian* (Dec. 4, 2010), available at http://www.oregonlive.com/portland/index.ssf/2010/12/suspect_in_portland_bomb_plot.html.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Order, § 3(c)(iv) (waiver appropriate when "the foreign national seeks to enter the United States to visit or reside with a close family member (e.g., a spouse, child, or parent)" with long-term permission to remain in the United States) *and*

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example of the problem the Order is supposedly addressing, it suggests that he would have been excluded as a young child had the Order then been in effect. This confusion should give this Court no comfort that the waiver provisions can cure what ails the Order. Nor can survivors of gender-based violence rest secure that waiver provisions so vague and indeterminate will preserve the protections Congress provided with the T and U programs.

Even if the waiver provisions are accepted at face value, the waiver process imposes heavy evidentiary burdens on applicants. As Appellees noted below, “[a]ll aliens covered by the Order—including refugees who are themselves seeking to escape violence—are presumptively excluded as potential terrorists . . . [and] must seek admission based on an intricate scheme of categorical exemptions and case-by-case waivers.”⁵⁹ This scheme presents additional hurdles that would delay family reunification. This is no small matter where reunification, by Congress’ design, could provide a gender-based violence survivor the social support and protection she needs.

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Order, § 3(c)(v) (waiver appropriate when “foreign national is an infant, a young child or adoptee”).

⁵⁹ Mem. Supp. Pl.’s Mot. TRO at 39, *State of Hawaii v. Trump*, No. 1:17-cv-00050-DKW-KJM (D. Haw. Mar. 8, 2017), ECF No. 65.

IV. The Order Deters Immigrant Survivors of Domestic Violence from Accessing the Justice System.

The Order also imperils the safety of immigrant survivors of gender-based and domestic violence currently in the United States by stoking a fear of law enforcement. While not affecting their legal status in name, the Order reinforces a growing anxiety among undocumented survivors that any interaction with government institutions may subject them to deportation. When viewed in conjunction with other fear-inducing government actions—the Administration’s promise to deport eleven million undocumented immigrants,⁶⁰ its executive order on removal priorities,⁶¹ and ICE’s invasions of the sanctity of the courtroom⁶²—the

⁶⁰ Andy J. Semotiuk, *What Trump’s Presidency Means For Illegal Immigrants And Immigration To The U.S.*, Forbes (Nov. 10, 2016) (noting President Trump’s intent to deport 11 million illegal immigrants), *available at* www.forbes.com/sites/andyjsemotiuk/2016/11/10/what-trumps-presidency-means-for-illegal-immigrants-and-immigration-to-the-u-s/#47ebb17347eb; Jeremy Diamond, *Trump orders construction of border wall, boosts deportation force*, CNN (Jan. 25, 2017), *available at* <http://www.cnn.com/2017/01/25/politics/donald-trump-build-wall-immigration-executive-orders/>.

⁶¹ Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 30, 2017).

⁶² Marty Schladen, *ICE detains alleged domestic violence victim*, El Paso Times (Feb. 15, 2017) (ICE arrested undocumented victim of domestic abuse as she left the courtroom where she had just obtained a protective order from her abuser, apparently based on that abuser’s tip), *available at* <http://www.elpasotimes.com/story/news/2017/02/15/ice-detains-domestic-violence-victim-court/97965624/>; Jonathan Blitzer, *The woman arrested by ICE in a courthouse speaks out*, The New Yorker (Feb. 23, 2017),

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effects on undocumented survivors of domestic violence may be profound.⁶³

Victims may well choose to remain in the shadows rather than seek justice or cooperate with local law enforcement.⁶⁴ The Order discourages the very cooperation the T and U visa programs are intended to foster.

This growing fear and distrust imperils the lives of immigrant survivors. Often, the fear of being deported and separated from family is all that prevents an

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<http://www.newyorker.com/news/news-desk/the-woman-arrested-by-ice-in-a-courthouse-speaks-out>.

⁶³ P.R. Lockhart, *Immigrants Fear a Choice Between Domestic Violence and Deportation*, Mother Jones (Mar. 20, 2017), available at <http://www.motherjones.com/politics/2017/03/ice-dhs-immigration-domestic-violence-protections>.

⁶⁴ Heidi Glenn, *Fear of Deportation Spurs 4 Women to Drop Domestic Abuse Cases In Denver*, NPR (Mar. 21, 2017), available at <http://www.npr.org/2017/03/21/520841332/fear-of-deportation-spurs-4-women-to-drop-domestic-abuse-cases-in-denver>; National Latin@ Network for Healthy Families and National Domestic Violence Hotline, *Realidades Latinas: A National Survey on the Impact of Immigration and Language Access on Latina Survivors* (April 2013), available at http://www.nationallatinonetwork.org/images/files/NLNRealidades_Latinas_The_Impact_of_Immigration_and_Language_Access_FINAL.pdf; James Queally, *ICE agents make arrests at courthouses, sparking backlash from attorneys and state supreme court*, Los Angeles Times (Mar. 16, 2016), available at <http://www.latimes.com/local/lanow/la-me-ln-ice-courthouse-arrests-20170315-story.html> (describing apprehension of undocumented immigrant by ICE on the Pasadena courthouse steps).

undocumented survivor from leaving her abuser.⁶⁵ That fear can be wielded as yet another tool of coercion and control in an abuser's hands. And domestic abuse is a crime that tends to escalate over time. The longer a survivor remains with her abuser, the more likely it is she will be seriously injured or killed. By intensifying a distrustful atmosphere, the Order deters undocumented survivors from seeking help from law enforcement, placing them in increased danger.

This dynamic does not only endanger the immigrant survivors themselves. When victims of gender-based and domestic violence avoid cooperating with law enforcement to bring their abusers to justice, communities are less safe. As former New York City Mayor Rudy Guiliani remarked, “If you are an illegal immigrant . . . and a crime is committed against you, I want you to report that, because lo and behold, the next time a crime is committed, it could be against a citizen or a legal immigrant.”⁶⁶ The public has a strong interest—reflected in the T

⁶⁵ Beth Lubetkin, *Violence Against Women and the U.S. Immigration Laws*, 90 AM. SOC'Y INT'L L. PROC. 616, 620 (1996) (“Fear of deportation deters abused immigrant woman from coming forward to report abuse. Just as with abuse victims who are not immigrants, batterers threaten that they will take custody of minor children. For immigrant women, that threat is all the more frightening when they are unfamiliar with the U.S. justice system, may not speak English and fear they will never see their children again if separated from them through deportation.”).

⁶⁶ Elizabeth M. McCormick, *Rethinking Indirect Victim Eligibility for U Non-Immigrant Visas to Better Protect Immigrant Families and Communities*, 22 STAN. L. & POL'Y REV. 587, 600 (2011).

and U visa framework established by Congress—in ensuring that undocumented immigrant survivors trust and not fear law enforcement.

CONCLUSION

Some of the darkest blots on our nation’s history have occurred when, in times of national fear, the Executive Branch has targeted the innocent to promote what it declares to be the public’s safety. *See, e.g., Korematsu v. United States*, 323 U.S. 214, 218 (1944). By contrast, what has made our constitutional order the world’s envy are those other moments when, even in times of fear—*especially* then—we side with our founding principles and protect the innocent. This Order is an unfortunate example of the former. It would subvert Congress’s intent to extend protection and support to foreign national victims of gender-based and domestic violence, in places it is needed most. It would subvert the public interest in helping those survivors and enlisting their help in turn to bring criminals to justice. It would turn a blind eye to the world’s innocent women and girl victims. It would depart profoundly from our nation’s historical humanitarian bent. It would not, and should not, make us proud.

Amici respectfully support Appellee’s position and request that this Court affirm the District Court’s preliminary injunction.

April 21, 2017

Respectfully submitted,

s/ Scott L. Winkelman
Scott L. Winkelman
swinkelman@crowell.com
Luke van Houwelingen
lvanhouwelingen@crowell.com
Avi Rutschman
arutschman@crowell.com
Justin Kingsolver
jkingsolver@crowell.com
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 624-2500
Fax: (202) 628-5116

Counsel for Amici Curiae

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Signature of Attorney or Unrepresented Litigant

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Date

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CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2017, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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Scott L. Winkelman