No. 12-1371

IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner*,

—v.—

JAMES ALVIN CASTLEMAN,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## BRIEF FOR *AMICI CURIAE* ASISTA IMMIGRATION ASSISTANCE, THE IMMIGRANT DEFENSE PROJECT, THE IMMIGRANT LEGAL RESOURCE CENTER, THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, AND THE WASHINGTON DEFENDER ASSOCIATION IN SUPPORT OF RESPONDENT

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## INTERESTS OF *AMICI CURIAE*[1]

ASISTA Immigration Assistance (ASISTA) worked with Congress to create and expand routes to secure immigration status for survivors of domestic violence, sexual assault, and other crimes, which were incorporated in the 1994 Violence Against Women Act (VAWA) and its progeny. ASISTA serves as liaison for the field with Department of Homeland Security (DHS) personnel charged with implementing these laws, most notably Citizenship and Immigration Services (CIS), Immigration and Customs Enforcement (ICE), and DHS's Office for Civil Rights and Civil Liberties. ASISTA also trains and provides technical support to local law enforcement officials, civil and criminal court judges, domestic violence and sexual assault advocates, and legal services, non-profit, pro bono, and private attorneys working with immigrant crime survivors. ASISTA has previously filed amicus briefs in the Second, Seventh, Eighth, and Ninth Circuits. See *Rosario v. Holder*, 627 F.3d 58 (2d Cir. 2010); *Sanchez v. Keisler*, 505 F.3d 641 (7th Cir. 2007); *Torres-Tristan v. Holder*, 656 F.3d 653 (7th Cir. 2011); *L.D.G. v. Holder*, No. 13-1011 (7th Cir.) (pending case); *Leiva-Mendoza v. Holder*, No. 10-1058 (8th Cir.) (remanded to BIA); *Lopez-Birrueta v.*

[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than amici, their members, and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

*Holder*, 633 F.3d 1211 (9th Cir. 2011); *Rusello v. Holder*, No. 11-71013 (9th Cir.) (pending case).

The Immigrant Defense Project (IDP) is a not-for-profit legal resource and training center that provides defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP is dedicated to promoting fundamental fairness for immigrants accused of crimes, and therefore has a keen interest in ensuring the correct interpretation of laws that may impact the rights of immigrants at risk of detention and deportation based on past criminal charges. This Court has accepted and relied on *amicus curiae* briefs submitted by IDP in key cases involving the interplay between criminal and immigration law, including *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); and *INS v. St. Cyr*, 533 U.S. 289 (2001) (brief cited at 322-23).

The Immigrant Legal Resource Center (ILRC) is a national non-profit back-up center located in San Francisco, California. The ILRC is a national leader in the area of the immigration consequences of crimes, as well as in advocating for the rights of battered immigrant women. The ILRC has provided information and assistance to thousands of immigration advocates, criminal defenders, courts, advocates for battered women, and other groups on these issues, and advocated for positive policy changes. The ILRC publishes manuals on these subjects, including Evangeline Abriel and Sally

Kinoshita, *The VAWA Manual: Immigration Relief for Abused Immigrants* (5th ed. 2008), and Kathy Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws* (10th ed. and 2013 update). The ILRC has previously filed *amicus* briefs in this Court; examples include *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010), and *Lopez v. Gonzales*, 549 U.S. 47 (2006).

The National Immigration Project of the National Lawyers Guild (National Immigration Project) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure a fair administration of the immigration and nationality laws. The National Immigration Project provides legal training to the bar and the bench on immigration consequences of criminal conduct and implementation of the Violence Against Women Act. It is also the author of *Immigration Law and Crimes* (2013-2 ed.) and three other treatises published by Thomson-West. The National Immigration Project has participated as *amicus curiae* in several significant immigration-related cases before the Supreme Court, Circuit Courts of Appeals, and Board of Immigration Appeals.

The Washington Defender Association (WDA) is a statewide non-profit organization whose membership is comprised of public defender agencies, indigent defenders, and those who are working to improve the quality of indigent defense in

Washington State. The purpose of WDA, as stated in its bylaws, is to "to protect and insure by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, including the right to counsel, and to resist all efforts made to curtail such rights and to promote, assist, and encourage public defense systems to ensure that all accused persons receive effective assistance of counsel." In 1999, WDA created the Immigration Project to defend and advance the rights of noncitizens within the Washington State criminal justice system and noncitizens facing the immigration consequences of crimes. Since its inception, WDA's Immigration Project has consulted in over 20,000 individual criminal cases by assisting defenders, prosecutors, and courts to understand and, where appropriate, mitigate the immigration consequences of criminal convictions. These 20,000 cases include countless defendants who relied on the WDA Immigration Project's analysis that assault in the fourth degree under Wash. Rev. Code § 9A.36.041 does not constitute a "crime of violence" for immigration purposes. Additionally, WDA's Immigration Project has been party to numerous *amicus* briefs before this Court, the U.S. Court of Appeals for the Ninth Circuit, the Board of Immigration Appeals, as well as the appellate courts in Washington State.

## BACKGROUND

*Amici* have expertise at the intersection of criminal and immigration law as they affect

immigrant domestic violence survivors.[2] This brief respectfully emphasizes to the Court that a ruling reversing the Court of Appeals based on a broad reading of "misdemeanor crime of domestic violence" could have profound effects on immigration law. These include the unintended consequences of hurting immigrant domestic violence survivors who get swept into the criminal justice system, as well as their family members, and stifling the vital reporting of domestic abuse.

While Congress' goal of taking guns out of the hands of those who commit domestic violence is laudable, a broad reading of the statute could have unintended consequences for domestic violence survivors. The Court should not depart from its holdings addressing nearly identical statutory language to achieve a result that cannot be squared with precedent or 18 U.S.C. § 922(g)(9)'s plain meaning. This is especially true given the absence of any indication that Congress intended to impose harsh immigration consequences when it restricted gun possession by domestic violence misdemeanants.

## SUMMARY OF ARGUMENT

In *Johnson v. United States*, 559 U.S. 133 (2010), and *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the

[2] *Amici* use the terms "victim" and "survivor" interchangeably. While law enforcement generally frames those who suffer domestic violence as "victims," many of those who have undergone abuse consider themselves survivors of violence, and view "victim" as a pejorative term, indicating passivity. "Survivor" acknowledges the great strength it takes to successfully leave abuse and establish a new life despite the trauma endured.

Court construed statutory language almost identical to that presented here. As the Court of Appeals' decision faithfully followed these precedents, it should be affirmed.

The similarity between 18 U.S.C. § 922(g)(9), the statutory provision at issue in this case, and the previously construed provisions in *Johnson* and *Leocal* implicates the interpretation of immigration law deportation grounds based on "crimes of violence" and "crimes of domestic violence." Should the Court adopt the broad reading of "misdemeanor crime of domestic violence" urged by the government, the impact on immigration detention, deportation, and family unity could be staggering. If the Court departs from its traditional tools of statutory construction in this case, the same wide range of misdemeanor convictions to which the government seeks to attach section 922(g)(9)'s firearms prohibition could become the basis for deporting long-term residents of the United States for offenses deemed minor by the criminal justice system. This would have a calamitous impact on some of their families (which include U.S. citizen children).

Moreover, because immigrant domestic violence survivors themselves get swept into the criminal justice and deportation systems – sometimes when batterers use arrests as a tactic of control – an overbroad statutory reading in this case could hurt some of the same survivors Congress intended to protect. *See, e.g.,* Anthony Lewis, *The Mills of Cruelty*, NEW YORK TIMES, Dec. 14, 1999 ("[F]or biting an abusive husband during a domestic dispute, Ms. Flores is to be deported."). There is a complexity to domestic violence prosecutions and convictions that fails to be captured by a binary

opposition of victim and convict. *Cf. United States v. Booker*, 644 F.3d 12, 20–21 (1st Cir. 2011) ("§ 922(g)(9) addresses an acute risk to an identifiable class of victims—those in a relationship with a perpetrator of domestic violence").

Victim reporting of abuse would also suffer if the Court defines "misdemeanor crime of domestic violence" overbroadly and allows even state convictions covering nonviolent conduct to have detention, deportation, and other adverse immigration consequences. Immigrant survivors who depend on financial support from a perpetrator of domestic violence, for example, will face dire circumstances if their family's livelihood is put at risk by any misdemeanor conviction falling under the government's broad umbrella definition. Such considerations have been shown to influence greatly a survivor's crucial decision of whether to seek help at all.

Although *Amici* support restricting past abusers from firearms possession, this brief respectfully suggests that the Court decline to do so by stretching the definition of a "misdemeanor crime of domestic violence" beyond its plain meaning and thus potentially triggering unintended consequences relating to similarly phrased or defined provisions in other areas, such as immigration law. Affirmance would return the matter for Congress to consider anew, using the normal process of public input that accompanies statutory change, and would ensure that any consequences of amendment are intentional.

## ARGUMENT

For the reasons detailed below in Point II, the government's reading of section 922(g)(9) could lead to immigration effects with adverse consequences for many of the very domestic violence survivors the provision sought to protect. The Court should avoid such unintended consequences and interpret the "misdemeanor crime of domestic violence" term at issue here consistently with the Court's readings of other similarly defined violent crime provisions.

### I. The Court should follow *Johnson* and *Leocal* to affirm the Court of Appeals and thereby avoid the deleterious effects an overbroad reading of "misdemeanor crime of domestic violence" would have for immigration law.

Based on *Johnson* and *Leocal*, the Court should reject the government's invitation to ignore the language chosen by Congress in section 922(g)(9). *See* Opening Brief, 19 ("Congress could have just as easily chosen to prohibit the possession of firearms by those convicted of 'misdemeanor crime(s) of domestic abuse.'"). Congress' use of "violence" in section 922(g)(9) should not be shunted aside on policy grounds. Moreover, the Court should be aware that the government's attempt to downplay the burden on individuals of section 922(g)(9)'s firearms restriction sidesteps the potential serious immigration law consequences of broadly reading "misdemeanor crime of domestic violence."

### A. The statutory provisions reviewed in *Johnson* and *Leocal* are virtually identical to section 922(g)(9), and the Court should affirm based on these precedents.

The Fourth Circuit correctly encapsulated the core of this case:

> We see little, if any, distinction between the "physical force" element in a "crime of violence" in § 16 under *Leocal*, a "violent felony" under § 924(e) in *Johnson* and a "misdemeanor crime of domestic violence" in § 922(g)(9) in the case at bar. All these statutes describe an act of "violence" and require the identical element of that violent act to include "physical force." A "crime of violence" is a "violent, active crime" and a "violent felony" requires "violent force." We see no principled basis upon which to say a "crime of domestic violence" would include nonviolent force such as offensive touching in a common law battery.

*United States v. White*, 606 F.3d 144, 153 (4th Cir. 2010).

Section 922(g)(9) prohibits firearms possession by persons convicted of a "misdemeanor crime of domestic violence." This term is defined in section 921(a)(33)(A)(ii), in pertinent part, as an offense that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly

weapon." In *Johnson*, the Court addressed the meaning of "physical force" in the definition of the term "violent felony" in § 924(e)(2)(B)(i), which defines such a felony as one that "has as an element the use, attempted use, or threatened use of physical force against the person of another." In *Leocal,* the Court, *inter alia*, interpreted 18 U.S.C. § 16(a), which defines a "crime of violence" as "any offense that has as an element the use or attempted use or threatened use of physical force against the person or property of another."

The Court in *Leocal* established the principle, followed in *Johnson*, that "[t]he ordinary meaning of this term ['crime of violence'], combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes." 543 U.S. at 11; *see also Johnson*, 559 U.S. 133, 140, 142 (2010) ("'physical force' as used in section 924(e)(2)(B)(i) means 'violent force' . . . force strong enough to constitute 'power'").

The government suggests that the Court place undue emphasis on the "misdemeanor" component of section 922(g)(9), and distinguish away the "crime of domestic violence" component as not reflecting Congress' true intent to sweep in all crimes of "abuse." Yet after enacting this provision on July 8, 1996, Congress two months later enacted the Illegal Immigration Reform and Immigrant Responsibility Act containing a new deportation ground for crimes of domestic violence, *see* 8 U.S.C. § 1227(a)(2)(E)(i), with a definitional cross-reference to 18 U.S.C. § 16. While the Court could explicitly limit its holding to section 922(g)(9), distinguishing *Leocal* and the term "crime of violence" in the immigration law context,

the more natural and consistent reading of section 922(g)(9) is that its parallel statutory language of "force" has the same "violent" meaning in both contexts.

### B. The Court should not adopt a reading of section 922(g)(9) that could carry with it severe immigration law consequences.

The government attempts to downplay the consequences of reading section 922(g)(9) broadly. For example, noting the ACCA's severe recidivist sentencing enhancement, the government sees "[s]ection 922(g)(9) [as] different in kind and in degree. It prohibits a class of persons thought to pose a heightened risk of danger (those with convictions for misdemeanor crimes of domestic violence) from possessing a firearm." Opening Brief, 20. Yet whereas the government urged the Court in its *Johnson* briefing not to adopt a reading of "misdemeanor crime of domestic violence" that would restrict "the domestic-violence provisions of immigration law," *Johnson*, Respondent's Brief, 41, the government makes no mention in this case of the breadth of deportation consequences that would result from the Court's adoption of its reading.

In fact, if the Court were to read section 922(g)(9) to encompass non-violent force without a clear limitation precluding application of that holding in the immigration law context, a sea change to the deportation law of "crimes of domestic violence" could ensue. Several of the Courts of Appeals that have interpreted section 922(g)(9) use their criminal-law precedents addressing that provision to inform their interpretation of the "crime

of domestic violence" deportation ground. *See Mondragon v. Holder*, 706 F.3d 535, 547 (4th Cir. 2013) ("Mondragón was convicted of Virginia assault and battery, the elements of which are broad and allow for the possibility that Mondragón was convicted of either a crime of violence or a crime of nonviolence. *See United States v. White*, 606 F.3d 144, 148–49 (4th Cir. 2010) [interpreting section 922(g)(9)]."); *Hernandez v. U.S. Att'y Gen.*, 513 F.3d 1336, 1340 (11th Cir. 2008) ("Although not an immigration case, [*United States v. Griffith*, 455 F.3d 1339 (11th Cir. 2006)] is relevant here because a 'crime of domestic violence' for purposes of § 922(g)(9) is defined to include an offense, inter alia, that '(ii) has, as an element, the use or attempted use of physical force.' 18 U.S.C. § 921(a)(33)(A). This is essentially the same definition of a 'crime of violence' as in 18 U.S.C. § 16(a), the immigration statute at issue here."); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1018 (9th Cir. 2006) ("The result we reach [interpreting 'crime of domestic violence' under 8 U.S.C. § 1227(a)(2)(E)(i)] is consonant with this and other courts' holdings regarding whether materially similar battery offenses under other statutes are 'crimes of violence' within the meaning of § 16(a) and other similar statutory provisions.").

In addition, the Board of Immigration Appeals has also applied the *Johnson* framework to misdemeanor "crimes of domestic violence," noting that "[h]ad the Supreme Court determined that its ruling in *Johnson* did not apply outside the context of the ACCA, it could have responded to the Government's specific arguments regarding immigration cases, and to those of the dissent, by so

limiting its ruling." *Matter of Velasquez*, 25 I. & N. Dec. 278, 282-83 (BIA 2010).

The prospective consequences for immigration law of a broad reading of "misdemeanor crime of domestic violence" would be compounded by retroactive effects upsetting plea agreements thought to avoid collateral deportation. *Cf. Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) ("[A]s a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." (footnote omitted)). The Court expressed concern about undoing such negotiated agreements in *Descamps v. United States*, 133 S. Ct. 2276, 2289 (2013), quoting *Taylor v. United States*, 495 U.S. 575, 601-02 (1990): "'[I]f a guilty plea to a lesser, nonburglary offense was the result of a plea bargain,' [*Taylor*] stated, 'it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty' to generic burglary. That way of proceeding, on top of everything else, would allow a later sentencing court to rewrite the parties' bargain." *Amici* estimate that a substantial number of criminal pleas have been taken in reliance on case-law and expert opinion that a conviction for an offense whose minimum conduct includes the common-law battery of an offensive or unconsented touch is not a crime of violence under 18 U.S.C. § 16. *See, e.g.*, Dan Kesselbrenner & Lory Rosenberg, *Immigration Law and Crimes* (2013-2 ed.), § 2.23 (describing BIA view that simple battery is "not categorically a crime of violence under 18 U.S.C.A. § 16(a) and therefore not categorically a crime of domestic violence under INA § 237(a)(2)(E)(i),"

relying on *Johnson*); Immigrant Defense Project, *Representing Immigrant Defendants in New York* (5th ed. 2011), A-4 (stating in Appendix A, "Quick Reference Chart for Determining Immigration Consequences of Common New York Offenses" that under *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003), "even intentional infliction of injury does not equal the intentional use of force required for crime of violence [aggravated felony] definition under 18 USC 16(a)").

The Court's interpretation of section 922(g)(9) would, therefore, cast a long and foreboding shadow onto immigration law if the government's position is accepted. As the Court is well aware, "deportation is a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Fong Haw Tan v. Phelan,* 333 U.S. 6, 10 (1948).

### C. The government's reliance on *Duenas-Alvarez* is misplaced, as in this case the plain language of Tennessee's indivisible misdemeanor domestic assault statute makes it broader than the generic offense.

In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), the Court addressed whether a California vehicle-theft statute was overbroad for aggravated

felony purposes under immigration law. The respondent in that case did not argue that the plain language of the statute took it out of the realm of generic theft offenses. Instead, Duenas-Alvarez contended that California case law had interpreted the statute in ways that might allow for convictions that do not match the generic requirements for a theft offense. In rejecting Duenas-Alvarez's position on judicial interpretations of the California statute, the Court held that:

> [T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic possibility, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.
>
> Because Duenas-Alvarez makes no such showing here, we cannot find that California's statute, *through the California courts' application of a "natural and probable consequences" doctrine*, creates a subspecies of the

> Vehicle Code section crime that falls outside the generic definition of "theft."

549 U.S. at 193 (emphasis added). This is a completely different scenario from Respondent's, as his Tennessee statute of conviction is overbroad on its face, without regard to judicial interpretation. The difference lies between whether particular factual conduct is covered by a statute of conviction as a result of statutory interpretation by the courts (as in *Duenas-Alvarez*), as opposed to whether the language of a statute, by itself, creates a non-generic offense. *See United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) ("Where, as here, a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination,' [under] *Duenas-Alvarez*[,] is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. The state statute's greater breadth is evident from its text." (citation omitted)).

When a statute's plain language is overbroad, a "realistic possibility" of application is automatic. *See Ramos v. U.S. Att'y Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013) ("*Duenas-Alvarez* does not require this showing when the statutory language itself, rather than 'the application of legal imagination' to that language, creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition."). Tenn. Code Ann. § 39-13-111(B) reaches nonviolent physical force, which takes it outside the generic offense defined in section 921(a)(33)(A)(ii). *Cf. Johnson*, 559 U.S. at 143 ("Specifying that 'physical force' must rise to the

level of bodily injury does not suggest that without the qualification 'physical force' would consist of the merest touch. It might consist, for example, of only that degree of force necessary to inflict pain—a slap in the face, for example."). The Court need not, therefore, engage in a *Duenas-Alvarez* analysis.

## II. An overbroad definition of domestic violence would hurt immigrant survivors and their family members who get swept into the criminal justice system.

Current immigration law already metes out harsh consequences to those who commit serious crimes – including domestic violence-related offenses. For the reasons discussed below, expanding the scope of domestic violence crimes considered "crimes of violence" could unnecessarily and imprudently increase the likelihood of these harsh immigration consequences in domestic violence cases, including for the domestic violence survivor and her family members.

### A. Survivors face a significant risk of being convicted for domestic violence.

The majority of women who are arrested for domestic violence are survivors of ongoing abuse.[3] They may have used violence in retaliation or in self-

[3] Shoshana Pollack et al., *Women charged with domestic violence in Toronto: The unintended consequences of mandatory charge policies* 7-9 (2005).

defense.[4] In other cases, domestic violence survivors may be arrested without having used violence at all, because their abusers were successful in manipulating law enforcement by lying about the survivors' use of violence in order to get them arrested, a recognized part of the pattern of domestic violence.[5]

> Today, more male batterers are alleging claims of self-defense earlier: with the 911 call and at the scene. It seems we have trained our batterers well. . . . "The jail cell is a great class room." Batterers are savvier about the laws. They have learned that calling 911 first to "tell their story" may help them avoid being held accountable. They have found that it helps to retaliate against the victim for previous police calls because the victims naturally become reluctant to make further calls to the police.[6]

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[4] *Id.*; Gregory L. Stuart et al., *Reasons for Intimate Partner Violence Perpetration Among Arrested Women*, 12 Violence Against Women 609 (2006).

[5] *See* William DeLeon-Granados et al., *Arresting developments: Trends in female arrests for domestic violence and proposed explanations*, 12 Violence Against Women 355 (2006); *see also* Meg Crager et al., *Victim-Defendants: An Emerging Challenge in Responding to Domestic Violence in Seattle and the King County Region* (2003).

[6] Gael B. Strack, "*She hit me, too" Identifying the Primary Aggressor: A Prosecutor's Perspective* 3, 5, *available at* http://www.ncdsv.org/images/she_hit_me.pdf; Susan L. Miller, *The Paradox of Women Arrested for Domestic Violence:*

The consequences of arrest for domestic violence survivors can be dire.[7] Abusers' coercive behavior is reinforced; they feel rewarded and invincible; victims "think twice" before calling the police and continue to live in fear; children learn to distrust the police, especially when both parents are removed; law enforcement is frustrated and batterers are not held accountable.[8] If convicted (or if they plead), domestic violence survivors may be unable to gain or retain custody of their children, jobs, and housing.[9]

### B. Immigrant survivors are at least as likely as citizen survivors to be convicted, and they then become subject to removal.

Senator Edward M. Kennedy, who shepherded the original and subsequent Violence Against Women Acts (VAWA), opined on the immigration provisions of VAWA's 2005 reauthorization:

> Eliminating domestic violence is

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*Criminal Justice Professionals and Service Providers Respond*, 7 Violence Against Women 1339, 1351–63 (2001).

[7] Melissa E. Dichter, *"They Arrested Me—And I Was the Victim": Women's Experiences With Getting Arrested in the Context of Domestic Violence*, 23 Women & Criminal Justice 81 (2013).

[8] Strack, s*upra* note 6, at 5.

[9] National Clearinghouse for the Defense of Battered Women, *The Impact of Arrests and Convictions on Battered Women* 1-2 (2008), *available at* http://www.biscmi.org/wshh/NCDBW_%20Impact_of_Arrest.pdf ; David Hirschel & Eve Buzawa, *Understanding the Context of Dual Arrest with Directions for Future Research*, 8 Violence Against Women 1449, 1459 (2002).

> especially challenging in immigrant communities, since victims often face additional cultural, linguistic and immigration barriers to their safety. Abusers of immigrant spouses or children are liable to use threats of deportation to trap them in endless years of violence.

151 Cong. Rec. S13749, 13753 (daily ed. Dec. 16, 2005) (statement of Sen. Kennedy).

As noted above in Point II(A), all victims of domestic violence face some risk of being arrested and convicted if they report the abuse to law enforcement.[10] Immigrant victims are particularly vulnerable to being arrested and prosecuted for domestic violence, even when they are not the primary perpetrator of violence in the relationship, due to the cultural, linguistic and immigration barriers referenced by Senator Kennedy.

The case of Isaura Garcia, an immigrant living in Los Angeles, illustrates this problem. Ms. Garcia, who was undocumented, "called 911 in February [of 2011] to report an alleged beating by her partner." The police arrested both parties and fingerprinted Isaura. Because of the Secure Communities program, immigration officials obtained her

[10] *See* John Johnson, *A New Side to Domestic Violence; Arrests of Women Have Risen Sharply Since Passage of Tougher Laws*, L.A. TIMES, April 27, 1996, *available at* http://articles.latimes.com/1996-04-27/news/mn-63362_1_domestic-violence.

fingerprints and flagged her for removal, even though she had no criminal record.[11]

Responding to and communicating with police on the scene may be difficult for a variety of reasons.[12] For example,

> Frequently, officers dispatched to domestic violence calls within Latin American neighborhoods speak only English. If the batterer/husband speaks more English than the wife, his version of the incident is more likely to be accepted on his wife's behalf. Indeed, often the Spanish-speaking Latina is literally speechless because she cannot communicate with the police officer. [13]
>
> For immigrant survivors, in addition to language barriers, cultural barriers, fear of the abuser and the authorities, confusion, intimidation, lack of

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[11] Editorial, *Secure Communities Program: A Flawed Deportation Tool*, L.A. TIMES, May 23, 2011, *available at* http://articles.latimes.com/2011/may/23/opinion/la-ed-secure-20110523.

[12] Mary Haviland et al., *The Family Protection and Domestic Violence Intervention Act of 1995: Examining the effects of mandatory arrest in New York City* (2001), *available at* http://www.urbanjustice.org/pdf/publications/FamilyViolence/fvpreport.pdf.

[13] Guadalupe T. Vidales, *Arrested Justice: The Multifaceted Plight of Immigrant Latinas who Faced Domestic Violence*, 25 Journal of Family Violence 533, 539 (2010); Zelda B. Harris, *The Predicament of the Immigrant Victim/Defendant: "VAWA Diversion" and Other Considerations in Support of Battered Women*, 14 Hastings Women's L.J. 1, 13-14 (2003).

> awareness of rights, and a lack of access to advocates and other resources pose additional barriers to communicating effectively with law enforcement.[14]

Once in custody and/or facing trial, survivors are often desperate to be released and reunited with their children, who may have been placed with their abusers in their absence.[15] They may accept pleas because they are urged to do so by counsel unaware of the consequences, because the abuser's violence escalates during protracted trials, or because they face prolonged separation from children and work during custody and trial.[16]

Like other domestic violence survivors, immigrants who accept pleas or are convicted may lose their jobs or be unable to obtain jobs, especially in fields such as childcare and healthcare. Like other survivors, they will undoubtedly face challenges gaining or retaining custody of their children.[17] Unlike other survivors, they may also be subject to civil detention and removal.[18]

Convictions will also significantly complicate immigration status applications that survivors may have filed based on having been a victim of domestic

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[14] *See* Deanna Kwong, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections Under VAWA I & II*, 17 Berkeley Women's L.J. 137, 139-43 (2002).

[15] National Clearinghouse, *The Impact of Arrests and Convictions on Battered Women*, *supra* note 9 at 1-2.

[16] *Id.* at 2.

[17] *Id.* at 2-3.; *See also* Hirschel & Buzawa, *supra* note 9.

[18] *See, e.g.*, 8 U.S.C. §§ 1227(a)(2) (criminal deportation grounds), 1182(a)(2) (criminal inadmissibility grounds).

violence, sexual assault or other crime.[19] If they already have such status, it may impede gaining lawful permanent residence or citizenship.[20]

The availability of the U visa, a form of relief for immigrant survivors of domestic violence and other crimes, does not necessarily prevent removal. Congress created the U visa in 2000[21] to (1)

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[19] *See, e.g.,* 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(bb) (good moral character for VAWA self-petitioners); *see also* 8 U.S.C. § 1182(a)(2) (admissibility for the U visa). Although Congress created a waiver of the domestic violence ground of removal for those who are not the primary perpetrator, *see* 8 U.S.C. § 1227(a)(7), it is unwieldy and complicated. It only applies to non-citizens against whom adversarial immigration court removal proceedings have already been instituted. The waiver therefore does nothing to prevent a domestic violence victim from being detained and placed in removal proceedings. Moreover, once the noncitizen is placed in removal proceedings, this waiver has difficult evidentiary requirements, such as establishing who was the primary perpetrator of violence in a relationship and the connection between the crime and the non-citizen's having been battered or subjected to extreme cruelty. 8 U.S.C. §§ 1227(a)(7)(A), (A)(i)(III)(bb). Yet most immigrants go unrepresented in removal proceedings. American Bar Association Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* 5-8 (2010). Finally, DHS need not rely primarily on this ground to remove those with convictions, including survivors with convictions. It may deport survivors simply because they are present without admission or parole, refusing to exercise discretion in their favor because of their convictions.

[20] 8 U.S.C. § 1182(a)(2) (admissibility for lawful permanent residence); 8 U.S.C. § 1427(a) (good moral character for naturalization).

[21] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(2), 114 Stat. 1464, 1533-34 (creating 8 U.S.C. §§ 1101(a)(15)(U)(i)(III), 1184(p)(1), & 1255(m)).

strengthen the ability of law enforcement agencies to detect, investigate, and prosecute crimes against noncitizens, encouraging them to "better serve immigrant crime victims;" and (2) create a new nonimmigrant visa category that will facilitate crime reporting by those not in lawful immigration status, comporting with the "humanitarian interests of the United States."[22] To qualify, law enforcement must certify that an applicant has been or is being "helpful."[23]

Unfortunately, local law enforcement delays,[24] refusal to participate in the U visa program, [25] and inconsistent policies,[26] diminish the effectiveness of the U visa as a deterrent to removal.[27] Nine years

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[22] *Id.* at § 1513(a)(2).

[23] *See* 8 U.S.C. §§ 1101(a)(15)(U)(i)(III), 1184(p)(1); *see also* 8 C.F.R. § 214.14(c)(2)(i) (certification requirement).

[24] *See* Anna Gorman, *A Race Between Protection and Deportation*, L.A. TIMES, July 13, 2009, *available at* http://articles.latimes.com/2009/jul/13/local/me-u-visa13 ("Attorneys contacted by The Times cited other such crime victims with pending applications who were deported, including a Virginia woman sent back to Uruguay and a Denver man removed to Mexico.").

[25] *Immigrants in Arizona face resistance to getting visas after being victims of crimes*, Public Radio International (Oct. 27, 2012, 6:30 AM), http://pri.org/stories/2012-10-27/immigrants-arizona-face-resistance-getting-visas-after-being-victims-crimes ("'I don't want my office to be in a position to help someone gain legal status for the purpose of prosecuting a criminal case,'" [Maricopa County Attorney Bill] Montgomery explained in an interview.").

[26] Lindsey J. Gill, *Secure Communities: Burdening Local Law Enforcement and Undermining the U Visa*, 54 Wm. & Mary L. Rev. 2055, 2068-70 (2013).

[27] *See* Leslye E. Orloff et al., *Mandatory U-Visa Certification Unnecessarily Undermines the Purpose of the Violence Against Women Act's Immigration Protections and Its "Any Credible*

after the creation of the U visa, a study sponsored by the University of Washington found that DHS and local law enforcement collaboration was undermining efforts to protect victims of domestic violence, creating "intense fear among victims."[28] Indeed, ICE continues routinely to lodge detainers against non-citizens in county jails who have no or minor criminal convictions.[29]

Despite these obstacles, the U visa program has proven its worth.[30] But the program is limited to 10,000 principal visas per year, which were used in the first two months of this fiscal year. *See* United States Citizenship and Immigration Services, *USCIS Approves 10,000 U Visas for 5th Straight Fiscal Year"*, Dec. 11, 2013, *available at* http://www.uscis.gov/news/alerts/uscis-approves-10000-u-visas-5th-straight-fiscal-year. Moreover,

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*Evidence" Rules – A Call for Consistency*, 11 Geo. J. Gender & L. 619, 637 (2010) (noting that many enforcement agencies and prosecutors' offices have failed to designate an official from the agency to sign U Visa certifications).

[28] Sarah Curry et al., *The Growing Human Rights Crisis Along Washington's Northern Border*, (Pramila Jayapal & Sarah Curry eds., 2009).

[29] Transactional Records Access Clearinghouse (TRAC), *New ICE Detainer Guidelines Have Little Impact* (Oct. 1, 2013), http://trac.syr.edu/immigration/reports/333/ ("[O]nly slightly more than a third (38 percent) of the individuals against whom detainers were issued had any record of a criminal conviction, including minor traffic violations. If traffic violations (including DWI) and marijuana possession violations are excluded, then only one-quarter (26 percent) of the individuals against whom detainers were issued had any conviction.").

[30] *See, e.g.*, Department of Homeland Security, *U Visa Law Enforcement Certification Resource Guide* (2011), *available at* http://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf.

victims who might qualify for a U visa if they help the criminal system "never will if they are too afraid to report crimes."[31]

### C. Reporting of abuse would suffer if the Court defines "misdemeanor crime of domestic violence" overbroadly.

#### i. Although immigrant survivors seek relief from abuse, they may not view deporting the abuser as the best solution.

For some survivors, deporting the abuser may harm the survivor and her family.[32] For instance, family members of immigrants charged with domestic violence may nonetheless rely on that individual as the sole support for the family. Deporting the "breadwinner" may punish the survivor for reporting, subjecting her and her children (who are often U.S. citizens) to devastating loss of economic support.

To avoid this injustice, many domestic violence courts seek to provide victim-centered solutions. When this involves immigrant survivors and abusers, avoiding removal while holding the abuser accountable may be the court's primary goal. The New York State Judicial Committee on Women in the Courts advises that deportation of abusers

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[31] Gill, *supra* note 26, at 2085.

[32] "A victim's refusal to cooperate with prosecution and fear of what may happen if she cooperates may be justified . . . ." *See* Erin S. Gaddy, National Center for the Prosecution of Violence Against Women, *Why the Abused Should Not Become the Accused* (2006), *available at* http://www.ndaa.org/pdf/the_voice_vol_1_no_8_2006.pdf.

> is not necessarily a desirable outcome for abused immigrant women. If a victim depends on her abuser for support, the last thing she may want is to see him transported thousands of miles away, where he may be unable to earn a living and where support enforcement mechanisms may be meaningless.[33]

One way courts implement a victim-centered approach is to impose a penalty that does not necessarily subject those with criminal convictions to deportation, often by avoiding convictions that include the "crime of violence" elements. The Washington State Supreme Court stresses that fear of being removed after contacting police "is of particular concern in cases of domestic violence, when the victim wants to stop the abuse but does not want to lose a family member to ICE detention and/or possible deportation."[34] If there is no leeway for fashioning pleas that reflect the victims' wishes, immigrant victims are much less likely to access help. When victims of crimes fear reporting, they and their children are more isolated and their communities are less safe.

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[33] New York State Judicial Committee on Women in the Courts, *Immigration and Domestic Violence: A Short Guide for New York State Judges* 4 (2009), *available at* http://www.nycourts.gov/ip/womeninthecourts/ImmigrationandDomesticViolence.pdf.

[34] Washington State Supreme Court Gender and Justice Commission & Minority and Justice Commission, *Immigration Resource Guide for Judges* 3-5 (2013).

**ii. A broad interpretation of what is meant by "misdemeanor crime of domestic violence" in this case, if applied in the immigration context, could discourage immigrant domestic violence survivors from contacting the police.**

Enlarging the "misdemeanor crime of domestic violence" definition to encompass simple assault convictions that cover nonviolent conduct could transform them into deportable crimes and, in many cases into drastic, unwaivable "aggravated felony" offenses.[35] Aggravated felonies are among the most serious criminal convictions in immigration law.[36] This development would discourage immigrant communities, already fearful of the growing enmeshment of criminal and immigration law enforcement, from reporting domestic violence.

According to Eileen Hirst, chief of staff to former San Francisco Sheriff Michael Hennessey, "in a domestic violence case, it is not that unusual for police to arrive and arrest both parties and let the evidence get sorted out later" at the police station. Officers might fingerprint both parties to see

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[35] A misdemeanor simple assault with a suspended sentence of 365 days could become an aggravated felony if deemed to be a crime of violence under 18 U.S.C. § 16(a), *see, e.g.*, *United States v. Gonzalez–Tamariz,* 310 F.3d 1168, 1170-1171 (9th Cir. 2002) (misdemeanor can be "aggravated felony").

[36] Any non-permanent resident with such a conviction is subject to administrative removal without a hearing before an immigration judge, under 8 U.S.C. § 1228(b) (expedited removal of non-LPRs with aggravated felony convictions); *see also* Dan Kesselbrenner & Lory Rosenberg, *Immigration Law & Crimes* (2013-2 ed.), § 8:26.

whether they have criminal records. "By the time the details get sorted out, he or she can be on an ICE detainer and on the way to a detention facility. . . . This can make people reluctant to call police when they should."[37]

A study conducted in late 2012 found that "the increased involvement of police in immigration enforcement has significantly heightened the fears many Latinos have of the police, contributing to their social isolation and exacerbating their mistrust of law enforcement authorities." 70% of undocumented immigrants surveyed reported they are less likely to contact law enforcement authorities if they were victims of a crime. 28 percent of U.S.-born Latinos said they are less likely to contact police officers if they have been the victim of a crime because they fear that police officers will use this interaction as an opportunity to inquire into their immigration status or that of people they know: [38]

> The large share of "mixed status" families that include undocumented immigrants, authorized immigrants, and U.S. citizens is likely a factor here as well; deportation policies frequently result in family separation, and many Latinos perceive police contact as placing themselves or their family members and friends at risk. As a

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[37] Shankar Vedantam, *No Opt-out for Immigration Enforcement*, WASH. POST, Oct. 1, 2010, *available at* http://goo.gl/dcdJFN.

[38] Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* i (May 2013), *available at* http://goo.gl/rXFqLO.

> result, they are less like to voluntarily contact police to report crimes. [39]

As Hubert Williams, then-President of the Police Foundation, and Newark, New Jersey Police Chief for eleven years, testified to the House Judiciary Committee in 2009:

> In communities where people fear the police, very little information is shared with officers, undermining the police capacity for crime control and quality services delivery. . . . As a police chief in one of our focus groups asked, 'How do you police a community that will not talk to you?'"[40]

For these reasons, *amici* respectfully request that this Court consider carefully the implications of *Castleman* for immigrant domestic violence victims and for fighting crime in immigrant communities.

## CONCLUSION

*Amici* respectfully urge the Court to affirm the judgment of the Court of Appeals.

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[39] *Id.* at 16.

[40] *Hearing on Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws*, 111th Cong. 111-19, 81-82 (Apr. 2, 2009 statement of Hubert Williams), *available at* http://judiciary.house.gov/hearings/hear_090402.html.

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