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FIVE STEPS TO A BETTER U: IMPROVING THE CRIME-FIGHTING VISA

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ABSTRACT

Congress created the U nonimmigrant status to assist noncitizen victims of serious crime and to encourage them to assist law enforcement in the investigation of that crime. Despite these laudable goals, the process has been flawed since the outset. U visas were capped at 10,000 per year, eventually precipitating a multi-year backlog that diminishes the incentive to report crime for persons who fear deportation. Of particular importance, the willingness of law enforcement officers to provide a certification of helpfulness—a mandatory component of an application for U status—varies tremendously across agencies. Eligibility for U status is thus a matter of “geographic roulette.” New policies implemented under the Trump Administration threaten this already fraught scheme. In particular, the Department of Homeland Security has reinvigorated cooperative enforcement agreements with state and local police and expanded removal priorities to include those merely charged or suspected of criminal activity. These developments mean that undocumented victims of serious crime expose themselves to significant risk of deportation when they involve the police. When crime is unreported, perpetrators may remain at large, free to offend again. Particularly in domestic violence situations, survivors and their families remain vulnerable to further harm. Ironically, these results conflict with another stated initiative of the Trump Administration: fighting crime. This symposium essay offers five concrete reforms that would ameliorate the problems hampering the effectiveness of the U visa.

INTRODUCTION

Yanet fled to the United States from an abusive husband in El Salvador. When she sought legal help, her lawyer tried to force her to perform oral sex. She reported him to the police but is now afraid to move ahead with the charges, or seek a visa for crime survivors who assist police, for fear of deportation. Cristina withstood physical violence from her husband for years;

¹ Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation.*, N.Y. TIMES (Apr. 30, 2017), <https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html>.

only when she began to fear for her children's safety did she file a police report.² She too has abandoned the matter despite a potential pathway to lawful status out of concern that federal immigration authorities will seek to deport instead of assist her. Wilson called 911 after seeing a trespasser on his property, following a series of attempted break-ins to his home and car. When police arrived, they apprehended not only the trespasser, but also Wilson, and drove him to a Seattle Immigration and Customs Enforcement (ICE) field office within an hour of the initial call.³

Many similar stories have made news headlines since the inauguration of President Donald Trump.⁴ Throughout the country there is evidence of "a sharp downturn in reports of sexual assault and domestic violence among Latinos," and law enforcement officials in cities such as Los Angeles, Houston, and Denver have argued that the national turn toward harsher immigration policy and rhetoric has made noncitizens less willing to work with police.⁵

Undocumented victims of crime are uniquely caught between two significant law enforcement priorities: the reduction of criminal activity and the enforcement of immigration laws. To address this tension, Congress created the U visa in 2000 to protect survivors of certain crimes who have the courage to come forward, report the incident, and assist in any criminal investigation or prosecution.⁶ The dual purposes of the legislation were to enhance

² *Id.*

³ Paul P. Murphy & Deanna Hackney, *Police answered immigrant's call for help, then gave him to ICE*, CNN (Feb. 13, 2018), <https://www.cnn.com/2018/02/13/us/tukwila-police-ice-detain-trnd/index.html> (discussing how although Wilson Rodriguez had no criminal record and was a Deferred Action for Childhood Arrivals-recipient, the officers acted on the basis of an immigration administrative warrant issued after he missed his immigration court date in 2004).

⁴ See, e.g., Lindsey Bever, *Hispanics 'Are Going Further into the Shadows' Amid Chilling Immigration Debate, Police Say*, WASH. POST (May 12, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/05/12/immigration-debate-might-be-having-a-chilling-effect-on-crime-reporting-in-hispanic-communities-police-say/?utm_term=.891778ad1523; Nora Caplan-Bricker, "I Wish I'd Never Called the Police," SLATE (Mar. 19, 2017), http://www.slate.com/articles/news_and_politics/cover_story/2017/03/u_visas_gave_a_safe_path_to_citizenship_to_victims_of_abuse_under_trump.html; Katie Mettler, "This is Really Unprecedented": ICE Detains Woman Seeking Domestic Abuse Protection at Texas Courthouse, WASH. POST (Feb. 16, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/02/16/this-is-really-unprecedented-ice-detains-woman-seeking-domestic-abuse-protection-at-texas-courthouse/?utm_term=.3b1f700944e6; James Queally, *Latinos Are Reporting Fewer Sexual Assaults Amid a Climate of Fear in Immigrant Communities, LAPD Says*, L.A. TIMES (Mar. 21, 2017), <http://www.latimes.com/local/lanow/la-me-ln-immigrant-crime-reporting-drops-20170321-story.html>; Maya Rhodan, *Deportation Fears Silence Some Domestic Violence Victims*, TIME (May 30, 2017), <http://time.com/4798422/domestic-violence-deportation-immigration/>; John Burnett, *New Immigration Crackdowns Creating 'Chilling Effect' On Crime Reporting*, NAT'L PUB. RADIO (May 25, 2017), <https://www.npr.org/2017/05/25/529513771/new-immigration-crackdowns-creating-chilling-effect-on-crime-reporting>.

⁵ Medina, *supra* note 1.

⁶ 8 U.S.C. § 1101(a)(15)(U) (2018); see also Victims of Trafficking and Violence Protection Act of 2000, div. B, Violence Against Women Act of 2000, tit. V, Battered Immigrant Women Protection Act

law enforcement's ability to investigate and prosecute crimes, thereby protecting safety of the community more generally; and to further humanitarian interests by providing assistance to crime victims.⁷ To qualify for U status, noncitizens are required to establish several elements, including a certification from a police officer, prosecutor, or judge that the noncitizen was the victim of qualifying criminal activity and has been or is willing to be helpful in the investigation, prosecution, or sentencing.⁸

Advocates and scholars have lauded the U visa's goals while criticizing components of the process, especially the mandatory law enforcement certification.⁹ Of particular importance, the willingness of law enforcement officers to sign U certifications varies tremendously from agency to agency, subjecting undocumented victims to "geographic roulette."¹⁰ To be sure, the U visa statute and implementing regulations could be clearer in some respects, but many law enforcement agencies have undertaken certification policies that are far more restrictive than required by federal law.¹¹ Additionally, an annual statutory cap of 10,000 visas has led to a lengthy backlog of pending U applications that will likely take nearly a decade to clear.

New policies being implemented under the Trump Administration further threaten this already fraught scheme. In particular, the Department of Homeland Security (DHS) is reinvigorating cooperative enforcement agreements with state and local police while simultaneously expanding enforcement priorities to include those merely charged or suspected of criminal activity.¹² It is clear that the current administration is willing to remove deportable noncitizens even if they have pending U visas, and even if they

of 2000, Pub. L. 106-386, § 1513, 114 Stat. 1464, 1533-37, amended by Violence Against Women and Department of Justice Reauthorization Act of 2005, tit. VIII, Pub. L. No. 109-162, 119 Stat. 2960 (2006), amended by Violence Against Women and Department of Justice Reauthorization Act - Technical Corrections, Pub. L. No. 109-271, 120 Stat. 750 (2006) [hereinafter Battered Immigrant Women Protection Act of 2000 when referencing § 1513].

⁷ *Id.*; see *infra* Part I.A.

⁸ See 8 U.S.C. § 1101(a)(15)(S); *id.* § 1101(a)(15)(U) (offering temporary immigration relief to immigrants who have "suffered substantial physical or mental abuse" as a result of having been victims of certain qualifying criminal activity who have been helpful, are being helpful, or are likely to be helpful to law enforcement investigating or prosecuting the criminal activity).

⁹ See, e.g., Natalie Nanasi, *The U Visa's Failed Promise for Survivors of Domestic Violence* 21-33 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2872866; Michael Kagan, *Immigrant Victims, Immigrant Accusers*, 48 U. MICH. J. L. REFORM 915, 939-51 (2015); Eunice Hyunhye Cho et al., *A New Understanding of Substantial Abuse: Evaluating Harm in U Visa Petitions for Immigrant Victims of Workplace Crime*, 29 GEO. IMMIGR. L.J. 1, 24-30 (2014); Tahja L. Jensen, *U Visa "Certification": Overcoming the Local Hurdle in Response to a Federal Statute*, 45 IDAHO L. REV. 691, 700-02 (2009).

¹⁰ JEAN ABREAU ET AL., IMMIGR./HUMAN RTS. POL'Y CLINIC, U. OF N.C. SCH. OF L., THE POLITICAL GEOGRAPHY OF THE U VISA: ELIGIBILITY AS A MATTER OF LOCALE 22 (2014), <http://www.law.unc.edu/documents/clinicalprograms/uvisa/fullreport.pdf>.

¹¹ See *infra* Part II.A.; see also ABREAU ET AL., *supra* note 10, at 54-55.

¹² Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 30, 2017) [hereinafter Interior EO]; see also *infra* Part II.B.

do not have a criminal record.¹³ One predictable consequence of these changes is that undocumented noncitizens who experience serious crime will be even more afraid to report to the police, allowing perpetrators to remain at large and leaving survivors and their families vulnerable to further harm, particularly in domestic violence situations.¹⁴ Ironically, this result conflicts with another stated initiative of the Trump Administration: fighting crime.¹⁵

This symposium essay explains these obstacles and then outlines five concrete reforms that would ameliorate the problems we identify, improving the effectiveness of the U visa. First, states and municipalities should provide more concrete guidance and incentives to law enforcement agencies to ensure that victims who report a crime and who are willing to provide assistance in the investigation or prosecution of that crime are not erroneously deprived of an opportunity to seek the U visa due to locally-imposed constraints that exceed federal requirements.¹⁶ In addition to legislating (or at least clarifying) federal standards and definitions for purposes of U visa certifications, state or local governments should ensure that officers are aware that mere unlawful presence in the United States is not a crime.¹⁷ This reform is particularly important in jurisdictions that regularly cooperate with federal immigration enforcement officials to counteract apprehension about the risk of any contact with law enforcement. Relatedly, local law enforcement agencies should make their policies and procedures regarding the U visa certification process better known to their communities. Second, the federal government should condition 287(g) joint-enforcement agreements or the grant of law-enforcement-related federal funds on local law enforcement's willingness to follow federal standards and definitions regarding the U visa criteria. Third, U.S. Citizenship and Immigration Services (USCIS) should process U visa applications on a more timely basis so that qualified applicants can receive deferred action while they await final adjudication during the multi-year waitlist caused by the 10,000 visa annual cap. Fourth,

¹³ Melissa Etehad, *Denver mother is granted temporary deportation relief after 3 months of sanctuary in a church*, L.A. TIMES (May 13, 2017), <http://www.latimes.com/local/lanow/la-na-denver-mother-relief-20170512-story.html> (relating saga of Jeanette Vizguerra who officials sought to remove despite pending U visa application and lack of significant criminal history).

¹⁴ See *infra* text accompanying notes 19–26.

¹⁵ See, e.g., Task Force on Crime Reduction & Public Safety, Exec. Order No. 13,776, 82 Fed. Reg. 10,699 (Feb. 14, 2017).

¹⁶ See generally CAL. PENAL CODE § 679.10 (2017) (requiring state and local law enforcement agencies, prosecutors, judges, and other specified officials to certify the helpfulness of immigrant crime victims as part of the federal U visa certification within 90 days when certain conditions are met).

¹⁷ Unauthorized presence in the U.S. is a crime only if it occurs after an individual was previously removed from the U.S. and then returned without permission. See 8 U.S.C. § 1326 (2018). Although entering the U.S. without authorization is a misdemeanor, a noncitizen's presence in the U.S. after expiration or violation of a visa is not itself a crime. See *id.* § 1325.

Congress should upwardly revise the annual cap to more accurately reflect the number of undocumented crime victims who report serious crime each year. Fifth and finally, Congress should provide an alternative U visa route that allows federal officials to certify qualifying criminal activity and helpfulness in situations where local officials are unreasonably withholding certification.

At the end of the day, no one benefits from a “class of silent victims.”¹⁸ The reforms to the U visa that we suggest are thus critical to achieve Congress’s dual aims of protecting vulnerable noncitizens and fighting crime, and acknowledge the rise of local participation in the immigration enforcement process and the expansion of federal enforcement priorities to include virtually all undocumented persons. Any of the measures considered here would improve upon the current implementation of the U visa. Together, they would fully realize the statutory provision’s goals.

The essay unfolds as follows. In Part I, we briefly explain the U visa requirements and Congress’s objectives in enacting this status. In Part II, we outline some of the most significant problems that have developed in the implementation of the U visa. In Part III, we turn to a range of federal and state solutions that would help address these problems and explain why even a restrictionist administration should want to pursue them.

I. THE U VISA: PURPOSE, BENEFITS, AND ELIGIBILITY REQUIREMENTS

A. Rationales for a Visa for Noncitizen Crime Victims

Humanitarian organizations and law enforcement officials have long noted a breakdown in communication between noncitizens and law enforcement because of fears of deportation.¹⁹ In 2000, Congress acknowledged the seriousness of this issue when it created the U visa during consideration of the Victims of Trafficking and Violence Prevention Act (VTVPA) and related statutes.²⁰ The U visa is a “nonimmigrant” lawful sta-

¹⁸ Stacey Ivie & Natalie Nanasi, Fed. Bureau of Invest., U.S. Dep’t of Justice, FBI Law Enforcement Bulletin, *The U Visa: An Effective Resource for Law Enforcement* 10 (2009) (quoting a Virginia police detective).

¹⁹ *Id.* (“The fear of deportation has created a class of silent victims.”); *see, e.g.*, HUMAN RIGHTS WATCH, US: IMMIGRANTS ‘AFRAID TO CALL 911’ (May 15, 2014); Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. OF POVERTY L. & POL’Y 43 (2000) (reporting on a study showing that fear of being deported is “either the first or second most intimidating factor[] that kept battered immigrants from seeking the services they needed to end the abusive relationship”).

²⁰ *See, e.g.*, Battered Immigrant Women Protection Act of 2000, *supra* note 6.

tus that Congress intended to be available to noncitizens harmed by serious crime in the United States who have the courage to report the crime to law enforcement authorities and assist with any investigation.²¹

During congressional debate prior to the passage of the VTVPA, many members focused on the U visa's purpose of encouraging a symbiotic working relationship between law enforcement and noncitizens.²² Proponents of the VTVPA acknowledged that immigrants who felt protected by law enforcement would be more willing to report crimes and cooperate with police. For instance, Rep. Sheila Jackson-Lee noted, "Battered immigrant women and children were not able to appeal to law enforcement agencies and courts for protection because they simply feared being reported to the [Immigration and Naturalization Service] and deported."²³ In addition to the law enforcement purpose of the U status, from the outset Congress was also concerned with providing humanitarian aid to noncitizen survivors of serious crime in this country. Rep. Janice Schakowsky, for example, explained that the VTVPA will "strengthen and expand access to a variety of legal protections for battered immigrants so they may flee violent homes, obtain court protection, cooperate in the criminal prosecution of their abusers and take control of their lives without fear of deportation."²⁴

By offering protection from removal to those who assist law enforcement in solving crimes, the U visa (like the T visa for trafficking survivors) was thus designed to promote cooperation between law enforcement and immigrant communities by assuaging deportation fears and providing humanitarian relief for crime victims.²⁵ The legislation has been amended multiple times since 2000, with wide bipartisan support, under both Republican and Democratic administrations.²⁶

²¹ IVIE & NANASI, *supra* note 18, at 10.

²² See, e.g., 146 CONG. REC. S10,164–71 (daily ed. Oct. 11, 2000) (statement of Sen. Kennedy, "These and other important measures will do a great deal to protect battered immigrants and their children from domestic violence and free them from the fear that often prevents them from prosecuting these crimes.").

²³ *Battered Immigrant Women Protection Act of 1999: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 106th Cong. 65 (2000) (statement of Rep. Jackson-Lee).

²⁴ *Id.* (statement of Rep. Schakowsky).

²⁵ Battered Immigrant Women Protection Act of 2000 § 1513(a)(2)(B); see also Kagan, *supra* note 9, at 919–29.

²⁶ See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013); see also Trafficking Victims Protection Reauthorization Act of 2011, H.R. 2830, 112th Cong. (2011); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006), amended by Violence Against Women and Department of Justice Reauthorization Act - Technical Corrections, Pub. L. No. 109-271, 120 Stat. 750 (2006).

B. Benefits of the U Visa

The U visa—more accurately called U status²⁷—provides “nonimmigrant” (i.e., temporary) status for a period of four years, but which can be extended in some circumstances.²⁸ As part of the U status, noncitizen beneficiaries are authorized to work.²⁹ Recipients of the U visa can also petition for certain immediate family members to obtain “derivative U status.”³⁰ Notably, noncitizens with U status can apply for lawful permanent resident status after three years of lawful continuous presence in the United States if they can meet various criteria.³¹

A statutory annual cap of 10,000 visas, however, has created a significant backlog. Currently, this backlog has created a wait-time for final adjudication of U status applications that likely verges on a decade.³² We will return to the significance of this backlog below in Part II.

C. Eligibility Requirements

The U visa statute defines a qualifying noncitizen as an “alien [who] has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity.”³³ The statute defines qualifying “criminal activity” as:

[Activity] involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest;

²⁷ In this essay, we use the terms “U status” and “U visa” more or less interchangeably, as do most immigration officials and advocates. To be more precise, U status is a nonimmigrant status that allows particular noncitizen victims of crime to temporarily stay in the United States and obtain employment authorization. U visas, on the other hand, permit persons outside the United States who qualify for U status, and who are not inadmissible, to process through a U.S. consulate and lawfully enter the country.

²⁸ Kagan, *supra* note 9, at 925.

²⁹ *Id.* at 917.

³⁰ See CITIZENSHIP & IMMIGR. SERV., U.S. DEP’T OF HOMELAND SEC., VICTIMS OF CRIMINAL ACTIVITY: U NONIMMIGRANT STATUS (2017), <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status>.

³¹ See CITIZENSHIP & IMMIGR. SERV., U.S. DEP’T OF HOMELAND SEC., GREEN CARD FOR A VICTIM OF A CRIME (U NONIMMIGRANT) (2011), <https://www.uscis.gov/green-card/other-ways-get-green-card/green-card-victim-crime-u-nonimmigrant>.

³² See CITIZENSHIP & IMMIGR. SERV., U.S. DEP’T OF HOMELAND SEC., DATA SET: FORM I-918 APPLICATION FOR U NONIMMIGRANT STATUS, FISCAL YEAR 2017, 4TH QUARTER (2017), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2017_qtr4.pdf (showing 110,511 primary U visa applications pending as of the end of FY 2017) [hereinafter USCIS, FORM I-918 DATA FY 2017]. Some of these pending applications will be denied or abandoned, and noncitizens sometimes are in a position to submit more than one U visa application. Thus, it is not possible to predict exactly how long it will take to clear the backlog, though it will likely verge on a decade.

³³ 8 U.S.C. § 1101(a)(15)(U)(i)(I).

domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.³⁴

The breadth of this list shows that Congress intended that victims of a wide variety of criminal activity would meet this part of the criteria for U status. Three types of noncitizens are within the scope of the U visa. The most prototypical group consists of individuals who suffered direct harm as result of criminal activity.³⁵ But the agency has also clarified that the statute contemplates U status for bystander victims in certain cases—defined as persons who are not direct targets, but who experience proximate and “unusually direct injury” as a result of qualifying crime.³⁶ This would include, for example, a pregnant woman who suffers a miscarriage from the trauma of witnessing violent crime.³⁷ Indirect victims, consisting of certain family members of direct victims who are incompetent, incapacitated, or deceased, also may qualify for U status.³⁸ Federal regulations specify that the qualifying family members who can be indirect victims include: spouses; unmarried children under 21-years-old; parents, if the victim is under 21-years-old; or siblings under the age of 18, where the victim is under 21-years-old.³⁹

In addition to satisfying the crime victim requirement, a qualifying individual must also show that he or she has “suffered substantial physical or mental abuse” as a result of this crime.⁴⁰ Physical or mental abuse is defined as “injury or harm to the victim’s physical person, or harm to or impairment of the emotional or psychological soundness of the victim.”⁴¹ When determining the amount of hardship necessary to constitute “substantial” abuse, USCIS will consider any credible evidence regarding the nature of the injury; the perpetrator’s conduct; severity of harm; duration of harm; consequences for the victim’s appearance, health, physical or mental soundness; and aggravation of pre-existing conditions.⁴² An applicant may present evi-

³⁴ *Id.* § 1101(a)(15)(U)(iii). A certification may be issued even when a perpetrator is prosecuted for criminal activity that is not listed as a qualifying crime, as long as qualifying criminal activity occurred during the commission of non-qualifying activity.

³⁵ *See* 8 C.F.R. § 214.14(a)(14) (2013).

³⁶ *See id.*; *see also* New Classification for Victims of Criminal Activity: Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,016–17 (Sept. 17, 2007).

³⁷ 72 Fed. Reg. 53,016–17.

³⁸ *Id.*

³⁹ *See id.* For purposes of qualifying as an indirect victim, age is determined as of the date of the underlying criminal activity.

⁴⁰ 8 U.S.C. § 1101(a)(15)(U)(i)(I).

⁴¹ 8 C.F.R. § 214.14(a)(8).

⁴² *Id.* § 214.14(b)(1).

dence of the substantiality of abuse in the form of declarations of the applicant, therapists, or social workers, as well as through medical records, police reports, or photographs of the injury.⁴³

Although the “credible evidence” standard is somewhat relaxed, proving the requisite level of hardship is by no means guaranteed. As the regulations indicate, “the existence of one or more of the factors automatically does not create a presumption that the abuse suffered was substantial.”⁴⁴ The agency scrutinizes this factor and regularly denies U status in cases where there are no or few physical injuries.⁴⁵

Next, and most critically for purposes of this essay, a noncitizen cannot apply to federal authorities for a U visa without including a certification from law enforcement that the noncitizen was helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of qualifying criminal activity. These certifications must be completed by a “certifying official” within a federal, state, or local law enforcement agency, or by the prosecutor, judge, or other authority with responsibility for investigating or prosecuting the qualifying criminal activity.⁴⁶

Several aspects of the certification requirement are worth elaborating. First, Congress chose not to require that the criminal investigation actually result in formal charges or a prosecution against the perpetrator.⁴⁷ The agency has long confirmed this understanding, and it is reflected in the guidance material for law enforcement agencies published by DHS.⁴⁸ Indeed, no particular acts on the part of either law enforcement or the noncitizen are required.⁴⁹ It is enough that the victim reports the crime and that the law enforcement agency has investigated the matter enough to detect qualifying

⁴³ *Id.* § 214.14(c)(2); 8 U.S.C. § 1184(p)(4) (2018).

⁴⁴ 8 C.F.R. § 214.14(b)(1).

⁴⁵ *See, e.g., In re* Petitioner, 2013 WL 5176075 (Admin. App. Off., Citizenship & Immigr. Serv., U.S. Dep’t of Homeland Sec. April 18, 2013) (finding “red marks and a scratch . . . which caused her pain” and applicant’s credible account that “she can no longer trust men and used to get depressed” to be insufficient evidence of “any permanent or serious harm the incident caused to her appearance, health, or physical or mental soundness”); *Matter of F-V-V-*, 2016 WL 6610949 (Admin. App. Off., Citizenship & Immigr. Serv., U.S. Dep’t of Homeland Sec. Oct. 14, 2016) (finding insufficient evidence of “substantial mental abuse” where the perpetrators’ extortion crime caused victim to suffer anxiety, depression, and loss of employment).

⁴⁶ *See* 8 C.F.R. §§ 214.14(a)(2)–(3).

⁴⁷ *See* 8 U.S.C. §§ 1101(a)(15)(U)(i)(II)–(III).

⁴⁸ *See* WILLIAM R. YATES, CITIZENSHIP & IMMIGR. SERV., U.S. DEP’T OF HOMELAND SEC., CENTRALIZATION OF INTERIM RELIEF FOR U NONIMMIGRANT STATUS APPLICANTS 4 (2003); *see also* U.S. DEP’T HOMELAND SEC., U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL, AND TERRITORIAL LAW ENFORCEMENT, https://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf [hereinafter DHS, CERTIFICATION RESOURCE GUIDE].

⁴⁹ *See* 8 C.F.R. § 214.14(a)(5).

criminal activity.⁵⁰ On the other hand, by regulation, the noncitizen's responsibility to provide reasonably-requested assistance is ongoing through the duration of U status.⁵¹ Second, neither the statute nor the implementing regulations impose any time limit on the criminal activity or the certification.⁵² The qualifying crime can have occurred long ago, even preceding passage of the initial U visa legislation, or in situations where the statute of limitations for prosecution of the crime has now passed.⁵³

If law enforcement officials adhere to the federal statute and implementing regulations accurately, they should sign certifications whenever the noncitizen is a direct or indirect victim of qualifying criminal activity, so long as he or she has not declined any reasonable request for assistance. It bears emphasizing that this is no rubber stamp for obtaining the U visa; USCIS will determine whether the noncitizen has satisfied the requisite level of physical or emotional hardship and will independently review each aspect of the certification requirements, including whether the criminal activity is a qualifying crime and whether the applicant is a qualified victim.⁵⁴ Nevertheless, nothing constrains the discretion of law enforcement officials to impose more onerous conditions than required by federal law, or to simply refuse to certify at all. Thus, the U scheme transfers significant gatekeeping authority to local law enforcement.

Finally, a U status applicant must be "admissible" to the United States, which is a term of art that applies to both noncitizens outside of the country and those within the United States' borders.⁵⁵ Where inadmissibility factors are present, such as unlawful presence, unlawful employment, or criminal history, the noncitizen must convince USCIS that a waiver is appropriate in the exercise of discretion.⁵⁶ USCIS has indicated that where the applicant's criminal history includes serious crimes, waivers will only be granted in

⁵⁰ *Id.* Therefore, a victim need not testify against the perpetrator, nor must the victim affirmatively pursue law enforcement to assist in the investigation or prosecution of the criminal activity. "Prosecution" also extends beyond actively prosecuting a criminal charge to include sentencing, thus extending the time period wherein a victim may be helpful. See Joey Hipolito, *Illegal Aliens or Deserving Victims: The Ambivalent Implementation of the U Visa Program*, 17 ASIAN AM. L.J. 153, 171–72 (2010).

⁵¹ 8 C.F.R. § 214.14(b)(3). A certifying official can withdraw certification even after USCIS approval of U status if the victim declines a reasonable request in an ongoing investigation or prosecution. *Id.* § 214.14(h)(2)(A).

⁵² See *id.*

⁵³ *Id.*

⁵⁴ CITIZENSHIP & IMMIGR. SERV., U.S. DEP'T OF HOMELAND SEC., INSTRUCTIONS FOR SUPPLEMENT B, U NONIMMIGRANT STATUS CERTIFICATION at 1 (2017), <http://www.uscis.gov/files/form/I-918.pdf> [hereinafter USCIS, INSTRUCTIONS FOR SUPPLEMENT B].

⁵⁵ 8 U.S.C. § 1184(a)(1); see also 8 C.F.R. § 214.1(a)(3)(i).

⁵⁶ Under the applicable waiver, any ground of inadmissibility may be waived if doing so would be "in the public or national interest," except for those that apply to participants of Nazi executions, genocide, acts of torture. See 8 U.S.C. § 1184(d)(14).

“extraordinary circumstances.”⁵⁷ In short, while the law enforcement certification is a necessary and critical component of an applicant’s bid for U status, it is not determinative.

II. OBSTACLES TO EFFECTIVE IMPLEMENTATION OF THE U VISA

For a number of reasons, Congress’s goals in creating the U visa have not been adequately realized. Two concerns are of particular importance. First, the local implementation of the U visa certification process is inconsistent and unreliable. Second, new developments in immigration enforcement are rapidly compounding the problem. These factors combine with the now-paltry number of U visas annually available each year to create a situation that simply cannot accomplish the legislation’s crime-fighting and humanitarian objectives. This Part elaborates on these concerns.

A. Inconsistent and Unreliable U Visa Certifications

As an initial matter, the existence of the U status remains unknown to many noncitizens who would be within the scope of protection intended by Congress. Almost no law enforcement agencies engage in community outreach regarding the U visa or publish information about the process and criteria for obtaining a certification of helpfulness. A review of the web pages of all 159 counties in Georgia, for example, revealed that as of October 13, 2016, only one police department had publicly available guidelines on the certification process.⁵⁸ This lack of information leaves victims of even very serious crimes without critical information that would encourage them to come forward. As a result, the effects of crime on individuals, families, and communities remain unmitigated and perpetrators remain at large.

In part, this lack of transparency may turn on the fact that law enforcement agents themselves remain unclear about the U visa and the certification requirements. Although regulations require that each local agency designate particular officials with authority to sign certifications, at present there is no corresponding educational requirement or mechanism for federal oversight.⁵⁹ The only information that the federal government regularly pro-

⁵⁷ 8 C.F.R. § 212.17(b)(2).

⁵⁸ See GWINNETT CTY. GOV’T, U VISA APPLICATION CERTIFICATION REQUESTS (2018), <https://www.gwinnettcountry.com/portal/gwinnett/Departments/Solicitor/VictimWitness/UVisaInformation>.

⁵⁹ See 8 C.F.R. § 214.14(a)(2)–(3) (indicating certifying official includes a federal, state or local judge, or any other person in a supervisory role at any federal, state, or local law enforcement agency, child protective services, the Department of Labor, Equal Employment Opportunity Commission, or other agency with authority to detect, investigate, or prosecute crime in their respective area of expertise, who

vides to local law enforcement regarding the U visa or certifications consists of the instructions to Form I-918, Supp. B, and a “Law Enforcement Certification Resource Guide” that DHS publishes online.⁶⁰

Due to the lack of training and oversight regarding law enforcement’s role in the U visa scheme, many law enforcement officials are either unfamiliar with or misinformed about federal standards for the U visa.⁶¹ Consequently, it typically falls to advocates at nonprofit organizations (and sometimes immigration law firms) not only to track down the proper official to sign an applicant’s certification, but also to educate that official about the criteria for issuing a certification.⁶² In effect, then, DHS has delegated the responsibility of educating and guiding law enforcement agencies to nonprofits and private stakeholders.

One consequential drawback of this obligation is that time and effort spent on law enforcement advocacy and education cuts into the resources these already-strapped legal-services providers can devote to representing their clients.⁶³ And, to be sure, there is no guarantee that such efforts will even be successful. Furthermore, individuals who are detained or who live in areas without nonprofits or attorneys with immigration knowledge will face the nearly impossible task of ascertaining and navigating the certification process pro se. The predictable result is that many are unable to access the protection intended by Congress.

Even more critically, law enforcement officials often fail to sign certifications even where a noncitizen’s eligibility for U status is clear. There is no mechanism to compel law enforcement officials to sign a certification, and there is no appellate review of a law enforcement official’s refusal to issue a certification.⁶⁴ The statute and federal regulations currently do not provide any alternative to the certification process or any measure of oversight for recalcitrant law-enforcement agents.⁶⁵ Indeed, USCIS-generated instructions for the certification form advise local officials that they are under “no legal obligation” to sign the certification.⁶⁶ The result is that local law enforcement officials have complete discretion to determine which noncitizen crime victims, if any, should be permitted to seek the relief that

has been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency).

⁶⁰ See USCIS, INSTRUCTIONS FOR SUPPLEMENT B, *supra* note 54, at 2; DHS, CERTIFICATION RESOURCE GUIDE, *supra* note 48.

⁶¹ See Jensen, *supra* note 9, at 703.

⁶² See Nora Phillips, *U Visas for Immigrant Victims of Crime*, CHI. BAR ASS’N REC. at 42, 44 (2008).

⁶³ See Jensen, *supra* note 9, at 703.

⁶⁴ See 8 C.F.R. § 214.14.

⁶⁵ See, e.g., *id.* § 214.14(c)(ii)(2)(i).

⁶⁶ See USCIS, Instructions for Supplement B, *supra* note 54; Abreau et al., *supra* note 10, at 9.

Congress intended them to have when it created the U visa.⁶⁷

Unsurprisingly, many jurisdictions and individual officials implement the certification process in ways that go beyond or conflict with federal eligibility requirements. Several national studies of law enforcement agencies have revealed that in hundreds of jurisdictions officials either refuse to sign certifications completely or impose restrictive limitations on the circumstances in which they will sign.⁶⁸ Common limitations include that the crime occurred too long ago, or too recently, or there was no prosecution or conviction, or because, in the law enforcement official's view, the noncitizen did not suffer substantial harm.⁶⁹ Yet other jurisdictions will not sign certifications unless the noncitizen demonstrates extraordinary "helpfulness" in the investigation or prosecution.⁷⁰

And because local law enforcement officials are under no obligation to sign the certifications even where the noncitizen is willing to cooperate in the investigation and clearly meets the eligibility criteria, many simply refuse to sign altogether. Some law enforcement officials are immigration-restrictionists who oppose the U visa or any federal assistance for undocumented persons who cooperate with law enforcement.⁷¹ Others simply do not see the U visa as within the scope of their duty, or they determine whether to sign in individual cases through seemingly arbitrary factors.⁷²

⁶⁷ See Jamie R. Abrams, *The Dual Purposes of the U Visa Thwarted in a Legislative Due*, 29 ST. LOUIS U. PUB. L. REV. 373, 392 (2010) (arguing that the federal decision to devolve immigration power to local authorities "fatally altered the symbiotic balance that Congress envisioned" with the U visa).

⁶⁸ See ABREAU ET AL., *supra* note 10, at 3; see also NATALIA LEE ET AL., NAT'L IMMIGR. WOMEN'S ADVOC. PROJECT, NATIONAL SURVEY OF SERVICE PROVIDERS ON POLICE RESPONSE TO IMMIGRANT CRIME VICTIMS: U VISA CERTIFICATION AND LANGUAGE ACCESS 13–14 (2013) (explaining the reasons given by agencies in defense of their decisions to decline to sign certifications).

⁶⁹ ABREAU ET AL., *supra* note 10, at 14; LEE ET AL., *supra* note 68, at 13–14; see also Nanasi, *supra* note 9, at 21–33; Derek Quizon & Katie Urbaszewski, *Visa Rules are Loose for Illegal Immigrants Who are Victims of Crimes*, ARIZONA REPUBLIC (Aug. 19, 2010), <http://archive.azcentral.com/arizonarepublic/news/articles/2010/08/19/20100819arizona-illegal-immigrants-visas.html> (reporting divergent and inconsistent approaches to U visa certifications across prosecutors' offices).

⁷⁰ Anna Gorman, *U-visa Program for Crime Victims Falters*, L.A. TIMES (Jan. 26, 2009), <http://articles.latimes.com/2009/jan/26/local/me-crimevisa26>.

⁷¹ *Id.*

⁷² See, e.g., ABREAU ET AL., *supra* note 10, at 27 (reporting that 165 law enforcement agencies across 35 states will never sign U status circumstances); *id.* at 20 (reporting that the police chief in Minnesota "would not feel 'comfortable' certifying U visa applications to anyone that he did not know personally"); LEE ET AL., *supra* note 68, at 14 (reporting that some law enforcement agencies won't sign certifications due to misconceptions regarding the legal parameters and requirements of the visa); Nanasi, *supra* note 9, at 25 n.121 (reporting immigration advocate's quip that "as I think many others have already said, NYPD won't grant certs . . . if they don't feel like it.").

B. Expansion of Federal Removal Priorities and Increased Immigration Enforcement by Local Authorities Further Threatens This Already-Fraught Scheme

A series of Executive Orders on immigration enforcement, signed within one week of President Trump's inauguration, quickly made the situation even more precarious for crime victims who lack immigration status. On January 25, 2017, President Trump signed Executive Order 13,768: Enhancing Public Safety in the Interior of the United States (hereinafter "Interior EO"), which details the Administration's new priorities for the enforcement of immigration law in the United States.⁷³ Among other important changes, the Interior EO broadens the concept of "criminal alien" to include noncitizens who have not yet been convicted of any crime. Specifically, section 5 of the Interior EO states the Secretary of Homeland Security shall "prioritize for removal" noncitizens who:

- (a) Have been convicted of any criminal offense;
- (b) Have been charged with any criminal offense, where such charge has not yet been resolved;
- (c) Have committed acts that constitute a chargeable offense;
- (d) Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;
- (e) Have abused any program related to the receipt of public benefits;
- (f) Are subject to a final order of removal, but who have not yet complied with their legal obligation to depart the United States; or
- (g) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.⁷⁴

On the same day, President Trump signed another Executive Order titled "Border Security and Immigration Enforcement Improvements" (hereinafter "Enforcement Improvements EO"), which further establishes the new Administration's intended approach regarding noncitizens suspected of committing crimes.⁷⁵ Relevantly, the Enforcement Improvements EO indicates

⁷³ Interior EO, *supra* note 12, at 8800.

⁷⁴ *Id.*

⁷⁵ Border Security and Immigration Enforcement Improvements, Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 30, 2017) [hereinafter Enforcement Improvements EO].

that immigration authorities will “detain individuals apprehended on suspicion of violating Federal or State law, including Federal immigration law.”⁷⁶

Together, the Enforcement Improvements EO and the Interior EO have serious implications for many individuals seeking U visa status. Because the Interior EO prioritizes the removal of noncitizens who have committed any act that could be charged as a crime, all noncitizens believed to have entered without inspection are now priorities, because illegal entry is defined as a misdemeanor under 8 U.S.C. § 1325(a).⁷⁷ Moreover, as advocacy organizations have noted, because the broad language of the EO captures any act that could “constitute a chargeable criminal offense,” the new enforcement priorities would seem to include persons suspected of even “very minor offenses such as jaywalking and driving without a license.”⁷⁸

Statements from top agency officials have repeatedly emphasized the breadth of these expanded priorities. Then-Secretary of Homeland Security John Kelly stated, “The laws on the books are pretty straightforward. If you’re here illegally, you should leave or you should be deported, put through the system.”⁷⁹ Secretary Kelly issued new memoranda at the outset of his appointment that abandoned the Obama-era prosecutorial discretion guidelines as agency-wide policy.⁸⁰ Likewise, in a February 2017 memo, ICE Associate Director Matthew Albence instructed deportation officers to “take enforcement action against *all* removable aliens encountered in the course of their duties.”⁸¹ Acting Director of ICE Thomas Homan reiterated

⁷⁶ *Id.*

⁷⁷ 8 U.S.C. § 1325(a).

⁷⁸ See Interior EO, *supra* note 12; AM. IMMIGR. LAW. ASS’N & AM. IMMIGR. COUNS., SUMMARY AND QUESTIONS/ANALYSIS OF EXECUTIVE ORDER “ENHANCING PUBLIC SAFETY IN THE INTERIOR OF THE UNITED STATES” at 3 (Feb. 14, 2017), <http://www.aiala.org/infonet/summary-brief-analysis-of-trump-executive-orders>.

⁷⁹ Kery Murakami, *Immigrant deportations up sharply under Trump*, MANKATO FREE PRESS (Aug. 19, 2017), http://www.mankatofreepress.com/news/local_news/immigrant-deportations-up-sharply-under-trump/article_a2b7b8d3-d00b-5839-9f1d-8de5d83b3696.html (reporting ICE’s statement that the agency is no longer exercising leniency with respect to undocumented residents who have not committed weighty crimes); Dan Merica, *Kelly sworn in as Trump’s second chief of staff*, CNN (July 31, 2017), <http://www.cnn.com/2017/07/31/politics/john-kelly-chief-of-staff/index.html> (describing John Kelly’s appointment as Chief of Staff, requiring him to vacate the position at the Department of Homeland Security); Chuck Todd, *Full Kelly Interview: Visa Overstays Are a “Big Problem.”* NBC (Apr. 15, 2017), <https://www.nbcnews.com/meet-the-press/video/full-kelly-interview-visa-overstays-are-a-big-problem-for-immigration-enforcement-922041923875>.

⁸⁰ See Memorandum from U.S. Dep’t of Homeland Security Sec. John Kelly to U.S. Customs & Border Protection Acting Comm’r Kevin McAleenan et al. on “Enforcement of Immigration Laws to Serve the National Interest” (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [hereinafter Memorandum from Sec. Kelly to Acting Comm’r McAleenan et al.].

⁸¹ Memorandum from U.S. Dep’t of Homeland Security, Immigration & Customs Enforcement Exec. Assoc. Dir. Matthew Albence to All Enforcement & Removal Operations Employees at 1 (Feb. 21,

the Administration's commitment to this approach in December 2017, stating, "There's no population off the table. If you're in this country illegally, we're looking for you and we're going to apprehend you."⁸² Regional ICE directors have sounded much the same theme.⁸³

A central strategy of the new Administration to effectuate these expanded enforcement priorities revolves around empowering, and, if necessary, coercing "state and local law enforcement agencies across the country to perform the functions of an immigration officer in the interior of the United States to the maximum extent permitted by law."⁸⁴ There are several components to this effort. First, the federal government has reinvigorated joint federal-state enforcement programs, and in particular, 287(g) agreements,⁸⁵ Secure Communities,⁸⁶ and the Criminal Alien Program.⁸⁷

Section 287(g) became law as a part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.⁸⁸ In essence, 287(g) enforcement programs deputize state and local police officers to enforce federal immigration laws. These programs allow local law enforcement officers to investigate immigration status, and, if the person appears to be deportable, to detain and turn them over to federal agents.⁸⁹ The number of 287(g) programs had declined significantly before Trump took office, after evidence emerged that their implementation precipitated discriminatory policing and increased mistrust of law enforcement while being costly and ineffective in apprehending serious offenders.⁹⁰ One study of the 287(g) program in Nashville, Tennessee, based on two years of data, revealed that its implementation led to significant racial profiling and public trust concerns.⁹¹ Other studies of

2017), <https://www.documentcloud.org/documents/3889695-doc00801320170630123624.html> (emphasis added).

⁸² Adam K. Raymond, *Deportations Are Down Under Trump, But Arrests of Non-Criminal Immigrants Surge*, N.Y. MAGAZINE (Dec. 20, 2017), <http://nymag.com/daily/intelligencer/2017/12/deportations-are-down-as-immigration-arrests-surge.html>.

⁸³ See, e.g., Vivian Yee, "Please, God, Don't Let Me Get Stopped": Around Atlanta, No Sanctuary for Immigrants, N.Y. TIMES (Nov. 25, 2017), <https://www.nytimes.com/2017/11/25/us/atlanta-immigration-arrests.html> (quoting Atlanta ICE field officer director Sean Gallagher as saying, "If you're in this country illegally, you should be scared. We're probably going to come knocking at some point.>").

⁸⁴ Interior EO, *supra* note 12, at 8880.

⁸⁵ See *id.* at 8800 (announcing in section 8(a) that federal agencies will seek to enact 278(g) cooperative enforcement agreements with local authorities).

⁸⁶ See *id.* at 8801 (announcing in section 10(a) that federal agencies will reinstate the Secure Communities program).

⁸⁷ See Memorandum from Sec. Kelly to Acting Comm'r McAleenan et al., *supra* note 80.

⁸⁸ Pub. L. No. 104-208, 110 Stat. 3009-547 (1996) (codified at 8 U.S.C. § 1357(g)).

⁸⁹ *Id.*

⁹⁰ AM. IMMIGR. COUNCIL, THE 287(G) PROGRAM: AN OVERVIEW 2, 4-6 (2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_287g_program_an_overview_0.pdf.

⁹¹ See Amanda Armenta, *Between Public Service and Social Control: Policing Dilemmas in the Era of*

cooperative enforcement programs around the country demonstrated similar problems with discriminatory policing.⁹²

Still other reports indicate that the 287(g) program “has been costly for localities, has not focused on serious criminals, and has harmed the relationship between police and local communities.”⁹³ For example, the Migration Policy Institute (MPI) conducted a comprehensive analysis of the 287(g) program and found that many programs did not target serious criminal offenders. Many jurisdictions implemented an enforcement model designed to identify as many unauthorized immigrants as possible, regardless of criminal history.⁹⁴ MPI’s study revealed that half of all detainees issued through the 287(g) program as of 2011 nabbed noncitizens who had committed only misdemeanors and traffic offenses, rather than serious or violent crime.⁹⁵

Many law enforcement agencies recognize the problems these enforcement practices can create with respect to public trust. The Police Executive Research Forum, for example, interviewed law enforcement executives who stated that by enforcing federal immigration law, the sheriff’s office “poisoned the relationship between law enforcement and Latinos, hindering general law enforcement efforts within the Latino community.”⁹⁶ Similarly, the International Association of Chiefs of Police, commented:

Local police agencies depend on the cooperation of immigrants, legal and [otherwise], in solving all sorts of crimes and in the maintenance of public order. Without assurances that they will not be subject to an immigration investigation and possible deportation, many immigrants with critical information would not come forward, even when heinous crimes are committed against them and their families.⁹⁷

Immigration Enforcement, 63 SOC. PROBS. 111, 121–22 (2016).

⁹² See, e.g., Edgar Aguila-socho et al., *Immigr. Rts. Clinic, U. of Cal. Irvine Sch. of L., Misplaced Priorities: The Failure of Secure Communities in Los Angeles County* 16–18 (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012283 (noting increased racial profiling in policing in LA County following the implementation of the Secure Communities program); Michael Coon, *Local Immigration Enforcement and Arrests of the Hispanic Population*, 5 J. Migration & Hum. Sec. 645, 646 (2017) (finding that 287(g) program in Frederick Co., Maryland led to “significantly higher number of arrests of Hispanics by the Sheriff’s Office than would have occurred in its absence”); Trevor Gardner II & Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, Chief Just. Earl Warren Inst. on Race, Ethnicity & Diversity (2009), https://www.law.berkeley.edu/files/policybrief_irving_0909_v9.pdf.

⁹³ Am. Immigr. Council, *supra* note 90, at 1.

⁹⁴ Randy Capps et al., *Migration Pol’y Inst., Delegation and Divergence: 287(g) State and Local Immigration Enforcement* at 20 (2011), <http://www.migrationpolicy.org/research/delegation-and-divergence-287g-state-and-local-immigration-enforcement>.

⁹⁵ *Id.* at 2.

⁹⁶ AM. IMMIGR. COUNCIL, *supra* note 90, at 6.

⁹⁷ *Id.*

Likewise, over a decade ago, a group of police chiefs from the 64 largest police departments found that “without assurances that contact with the police would not result in purely civil immigration enforcement action, the hard won trust, communication and cooperation from the immigrant community would disappear.”⁹⁸

Despite this history, many jurisdictions are again embracing an expanded role in federal immigration enforcement. ICE arrests of noncitizens in Georgia, for example, have increased 80 percent, in part because “sheriffs and the police have been working with federal agents to identify and detain immigrants, a model of cooperation that the Trump administration is rapidly trying to expand throughout the country.”⁹⁹ As of October 3, 2017, ICE has entered into 287(g) agreements with 60 law enforcement agencies in 18 states—double the number of agreements in effect on the day that Trump signed the Enforcement Improvements EO and the Interior EO (collectively, the “EOs”).¹⁰⁰ This number is likely to continue to rise as jurisdictions contemplate new (or rekindled) joint enforcement agreements.¹⁰¹

With increased assistance from local authorities, ICE arrested more than 41,200 undocumented immigrants in the 100 days after Trump signed the EOs. The number of arrests represents a 38 percent increase from the same time period in 2016. However, “non-criminal arrests” accounted for nearly one-fourth of that number.¹⁰² The 10,800 non-criminal immigration arrests made nationwide between January 25 and April 29, 2017, represent a 150 percent increase from the non-criminal arrests made during the same time period in 2016.¹⁰³

The expanded enforcement priorities and rising role of state and local law enforcement agencies in the deportation machinery have reignited fear

⁹⁸ MAJOR CITIES CHIEFS IMMIGR. COMM., ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICE AGENCIES at 6 (2005), https://www.majorcitieschiefs.com/pdf/MCC_Position_Statement.pdf.

⁹⁹ Yee, *supra* note 83.

¹⁰⁰ IMMIGR. & CUSTOMS ENFORCEMENT, U.S. DEP’T OF HOMELAND SEC., DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION AND NATIONALITY ACT (2018), <https://www.ice.gov/287g>.

¹⁰¹ See, e.g., Jeremy Redmon, *Georgia could see expansion in immigration enforcement program*, ATLANTA JOURNAL-CONSTITUTION (Oct. 31, 2017), <http://www.myajc.com/news/state--regional-govt--politics/georgia-could-see-expansion-immigration-enforcement-program/wmCAGpUmwXVRS7NpSKg46O/>.

¹⁰² See 8 U.S.C. § 1325(a); Aria Bendix, *Immigrant Arrests Are Up, But Deportation is Down*, ATLANTIC (May 17, 2017), <https://www.theatlantic.com/news/archive/2017/05/under-trump-immigrants-arrests-are-up-but-deportation-is-down/527103/>.

¹⁰³ Bendix, *supra* note 102; see also IMMIGR. & CUSTOMS ENFORCEMENT, U.S. DEP’T OF HOMELAND SEC., FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT at 2 (2017), <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf> (showing that immigration arrests of noncitizens without criminal histories more than doubled under the Trump Administration, while immigration arrests generally rose by 42 percent).

and distrust in immigrant communities. A survey of hundreds of advocates and legal service providers in 46 states found that noncitizens increasingly are afraid to call police, press charges, or testify at trial, in part because immigration officials are now making arrests at courthouses.¹⁰⁴ Panic within these communities was incited by incidents such as the courthouse arrest of an undocumented woman seeking a protective order against her abusive boyfriend in February 2017.¹⁰⁵ Although the woman had no outstanding warrants, ICE agents arrested the woman at an El Paso hearing as she petitioned for the protective order. ICE has said it will continue to make courthouse arrests, spreading fear among immigrant communities, silencing victims, and further diminishing trust between noncitizens and law enforcement.¹⁰⁶

Rising fear of interactions with law enforcement can be seen in a recent reduction in noncitizens' willingness to report crime in cities throughout the country. Most significantly, reports of domestic violence and sexual assault have plummeted. In Houston, Texas, for example, the number of Hispanic-reported aggravated assaults is down 12 percent.¹⁰⁷ Texas police department data show that sexual assault reports dropped 43 percent in the first three months of this year, as compared to last year.¹⁰⁸ Similarly, Los Angeles Police Chief Charlie Beck reported sexual assaults have dropped 25 percent, and domestic violence reports have dropped 10 percent among the city's Latino population.¹⁰⁹ The chilling effect on crime reporting is not isolated to border states. Police in New Jersey reported a six percent decrease in 2017 in service calls from communities that are made up predominantly of undocumented residents.¹¹⁰

To be sure, not all local law enforcement agencies have adopted stricter immigration enforcement under the Trump Administration. In February 2017, several counties announced plans to terminate their existing 287(g) agreements.¹¹¹ Although some counties, such as Harris County, Texas, stated

¹⁰⁴ TAHIRIH JUST. CTR., 2017 ADVOCATE AND LEGAL SERVICE SURVEY REGARDING IMMIGRANT SURVIVORS (2017), <http://www.tahirih.org/wp-content/uploads/2017/05/2017-Advocate-and-Legal-Service-Survey-Key-Findings.pdf>.

¹⁰⁵ Tom Dart, *Undocumented Texas woman arrested while seeking domestic violence help*, GUARDIAN (Feb. 16, 2017, 6:58 p.m.), <https://www.theguardian.com/us-news/2017/feb/16/texas-undocumented-woman-arrested-el-paso-domestic-violence>.

¹⁰⁶ Tom Dart, *Fearing Deportation, undocumented immigrants wary of reporting crimes*, GUARDIAN (Mar. 23, 2017, 6:30 a.m.), <https://www.theguardian.com/us-news/2017/mar/23/undocumented-immigrants-wary-report-crimes-deportation>.

¹⁰⁷ Burnett, *supra* note 4.

¹⁰⁸ *Id.*

¹⁰⁹ Queally, *supra* note 4.

¹¹⁰ Bever, *supra* note 4.

¹¹¹ AM. IMMIGR. COUNCIL, *supra* note 90, at 6.

the termination was based on resource allocation issues, sheriffs in other counties indicated that enforcement outcomes do not appear to justify the 287(g) agreements.¹¹² Sheriff Eric Severson of Waukesha County, Wisconsin, for example, testified in a Senate hearing that “instances of criminal activity of illegally present immigrants beyond their status is relatively uncommon in my County and generally in Wisconsin.”¹¹³ And, in an effort to counteract the tension between immigrant communities and law enforcement that is precipitated by 287(g) programs, some law enforcement agencies have released unofficial assurances to immigrants, promising that crime survivors could continue seek law enforcement assistance without fear of immigration enforcement consequences.¹¹⁴

Other jurisdictions have not only declined to enter into 287(g) or related official enforcement-cooperation agreements, but also limited the circumstances under which they will comply with immigration detainers, provide access to federal enforcers, or acquire information regarding the immigration status of noncitizens encountered in the course of their duties.¹¹⁵ The reasons that cities enact such policies vary from place to place, but a central motivating factor tends to be the desire to foster circumstances in which noncitizens will not fear police, increasing public safety for the entire community.¹¹⁶

The Trump Administration has endeavored to penalize some of these local jurisdictions through deprivation of various federal law enforcement funds. The Interior EO made clear that the Executive Branch would seek to “ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law,”¹¹⁷ and the Administration has made good on its threats to try to punish state and local law enforcement agencies that do not fully enforce federal immigration mandates, whatever their motivation for doing so. In March 2017, Attorney General Jeff Sessions announced he would cut federal funding to so-called sanctu-

¹¹² *Id.*

¹¹³ *The Effects of Border Insecurity and Lax Immigration Enforcement on American Communities: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 115th Cong. 1 (2017) (statement of Eric J. Severson, Sheriff, Waukesha Cty., Wisconsin).

¹¹⁴ See Megan Cassidy & Yihyun Jeong, *Many Arizona Police Agencies Show Little Appetite for New Executive Order on Immigration Enforcement*, AZCENTRAL (Feb. 2, 2017), <https://www.azcentral.com/story/news/politics/immigration/2017/02/02/arizona-police-agencies-trump-executive-order-immigration-enforcement/97269046/>.

¹¹⁵ See Don Babwin, *Chicago Asks for National Halt to Trump Immigration Rules*, U.S. NEWS (Sept. 11, 2017), <https://www.usnews.com/news/best-states/illinois/articles/2017-09-11/chicagos-lawsuit-over-sanctuary-city-threat-goes-to-court>.

¹¹⁶ See Dart, *supra* note 106.

¹¹⁷ Interior EO, *supra* note 12, at 8799.

ary jurisdictions.¹¹⁸ Significant litigation has ensued, in which the targeted cities have challenged the constitutionality of the Administration's power to coerce them into carrying out a federal immigration enforcement agenda through restrictions of federal funding.¹¹⁹ On November 21, 2017, District Judge William H. Orrick in San Francisco issued a permanent injunction blocking the funding penalty as beyond the scope of executive authority.¹²⁰

Despite these sites of resistance, however, the fact remains that many local jurisdictions are embracing or at least accepting their role in the Trump Administration's immigration enforcement crackdown. And even in those locales that have more protective policies in place, individual officers (or individual circumstances) could mean that a noncitizen's decision to report crime could as readily lead to his or her deportation as to a U visa. In sum, the administration's enforcement priorities and methods are likely to increase tension and distrust between immigrants and law enforcement. Without assurances or specific guidance regarding the role of state and local law enforcement in the U visa process, the Executive Orders will continue to discourage cooperation between noncitizens and law enforcement. As a result, victims will be even more apprehensive about approaching law enforcement to report crimes for fear that they themselves will be detained or placed in removal proceedings, even if they lack a criminal record or have not committed any unlawful acts besides illegal entry into the United States. below.

C. The Annual Cap of 10,000 U Visas Compounds These Problems

The implementation problems described in the preceding sections are exacerbated by the statutory 10,000 annual cap on U visas.¹²¹ It did not take long for backlogs to develop once the process for applying opened, in part because the agency failed to issue implementing regulations for more than

¹¹⁸ U.S. Att'y Gen. Jeff Sessions, Remarks on Sanctuary Jurisdictions (Mar. 27, 2017).

¹¹⁹ See Forrest G. Read IV, *Trump Administration Stops Law Enforcement Funds to Chicago, Sanctuary City, and Gets Sued*, NAT'L L. REV. (Aug. 22, 2017), <https://www.natlawreview.com/article/trump-administration-stops-law-enforcement-funds-to-chicago-sanctuary-city-and-gets> (reporting on Chicago's lawsuit seeking a preliminary injunction in a challenge to the Trump Administration's decision to condition Justice Assistance Grants to law enforcement on local cooperation with immigration officials); Joel Rubin, *L.A. looks to join fight against Trump administration over threats to withhold anti-crime funds for 'sanctuary' cities*, L.A. TIMES (Aug. 22, 2017), <http://www.latimes.com/local/lanow/la-me-ln-sanctuary-city-lawsuit-20170822-story.html>; Vivian Lee, *Judge Blocks Trump Effort to Withhold Money From Sanctuary Cities*, N.Y. TIMES (Apr. 25, 2017), <https://www.nytimes.com/2017/04/25/us/judge-blocks-trump-sanctuary-cities.html>.

¹²⁰ Eli Rosenberg, *Federal judge blocks Trump's executive order on denying funding to sanctuary cities*, WASH. POST (Nov. 21, 2017), https://www.washingtonpost.com/news/politics/wp/2017/11/21/federal-judge-blocks-trumps-executive-order-on-denying-funding-to-sanctuary-cities/?utm_term=.0cef3c280c3c.

¹²¹ 8 U.S.C. § 1184(p)(2)(A). The cap only applies to principal applicants.

seven years after Congress first created the U visa.¹²² Federal regulations now provide that U status applications can be filed after the 10,000 cap is reached, but the statutory limitation still results in an ever-lengthening wait period.¹²³ As of the end of fiscal year 2017, 110,511 U status primary applications remained pending—a number that will take a decade to clear unless the statutory cap is amended.¹²⁴ Although USCIS is authorized to grant conditional U status approvals along with deferred action in the interim between application and final adjudication, it has not prioritized resources to this end.¹²⁵ Consequently, current applicants likely must wait many years—possibly verging on a decade—even for that temporary measure.¹²⁶ Thus, even where local law enforcement is willing to sign certifications for crime victims who come forward, they remain in a precarious limbo. The statutory cap, along with the agency's current approach to the backlog, ultimately contribute to the on-the-ground dynamics that frustrate Congress's goals when it created the U visa.

D. Summary of Obstacles to an Effective U Visa Program

As federal enforcement priorities expand and local roles in immigration enforcement become increasingly ramped up through joint federal-state cooperative programs such as 287(g) agreements, so do noncitizens' concerns that they will be asked about immigration status or turned over to immigration authorities if they come forward to report crime. While some local law enforcement agencies are resisting the new immigration enforcement priorities and the efficacy of 287(g) agreements, many others are taking an active role in immigration enforcement.

As currently implemented, the U visa is an ineffective counterweight against noncitizens' fear of deportation, especially in jurisdictions that embrace cooperation with federal enforcers. In many communities, there is little publicly available information about the criteria or procedures for obtaining a U visa certification. And even when victims or their advocates are

¹²² Leticia M. Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 912 (2008) (describing the seven-year agency delay in promulgating regulations following statutory enactment of the U visa).

¹²³ See 8 C.F.R. § 214.14(d)(2).

¹²⁴ See USCIS, FORM I-918 DATA FY 2017, *supra* note 32. For reasons discussed above, *supra* note 32, it is difficult to predict exactly how long it will take to clear the current backlog.

¹²⁵ 8 C.F.R. § 214.14(d)(2).

¹²⁶ Historically, immigration officials began processing U applications and adjudicating those eligible for conditional approval at least one year before a visa would be available to the applicant. See SARAH BRONSTEIN, CATHOLIC LEGAL IMMIGR. NETWORK, CHANGES TO U VISA PROCESSING IN FISCAL YEAR 2017 (2016), <https://cliniclegal.org/resources/immigration-and-nationality-act-limited-number-u-visas-fiscal-year-2017>.

aware of the visa, many law enforcement agencies refuse to sign certifications, or employ constraints that exceed federal standards. Moreover, a signed U certification is only the first step in a lengthy process. The tremendous backlog in adjudications at the federal level means that noncitizens will remain in a precarious limbo while their applications languish for the better part of a decade. Consequently, Congress's goals for the U visa are inadequately realized, making communities less safe and failing to offer the intended protection for victims of serious crime.

III. FIVE REFORMS TO IMPROVE THE U VISA

In Part II, we explained how new federal policies, including the reinvigoration of local roles in immigration enforcement, exacerbate problems that have long-hampered the effectiveness of the U visa. In this Part, we lay out five reforms that would help ensure the U visa furthers the humanitarian and crime-fighting goals that Congress intended. Some of these reforms could be implemented at the state or local level, some are in the hands of the Executive Branch of the federal government, and some lie with Congress.

A. State and Local Measures to Encourage Noncitizen Victims to Report Crime and Certifying Officials to Adhere to Federal Law

Many states and municipalities may wish to increase the likelihood that noncitizens will report crime and help bring perpetrators to justice. Measures furthering those goals may be more viable in jurisdictions that already resist being co-opted into the Trump Administration's immigration crackdown. But because public safety has universal salience, even jurisdictions in which local law enforcement officers readily cooperate with immigration enforcement would likely at least want to consider actions to increase the trust of noncitizens who are victims of crime. A number of recommendations could be readily implemented without the need for legislation and regardless of whether any changes are forthcoming at the federal level.

One small but important measure in this regard would be to simply increase community awareness of the local agency's requirements and process for seeking a U visa certification, whatever they may be. This transparency could be achieved through a variety of means. First, law enforcement and government community outreach programs could promote awareness of the existence of the U visa and procedures necessary to obtain police certification. In general, community outreach has been shown to be an increas-

ingly effective policing method to promote cooperation with law enforcement and thereby decrease crime rates.¹²⁷ Presentations in public schools, particularly those located in districts with large immigrant populations, would educate the children of noncitizens who experience crime, as well as young victims, about their options, and, in particular, the potential resources available through the U visa. These events should describe the U visa, the application process, and local police certification procedures. Similar presentations could be given at town halls and community centers. In addition to communicating valuable information, these events might work to humanize local law enforcement officials and noncitizen residents to each other. Ideally, these kinds of efforts would not only increase immigrants' trust in their local officials, but also law enforcement's trust of immigrants.¹²⁸

Relatedly, law enforcement agencies should also publicize information about the U visa and local certification procedures in written materials. This could be done on agency websites, pamphlets, newspapers, or other publications distributed to residents. Ideally, the materials would also be available in Spanish and any other languages common to the community. Such web pages and publications could briefly outline the U visa, explain who may qualify for U visa relief, and provide contact information for the local law enforcement officials designated to review and sign certifications. It bears emphasizing that knowledge of the U visa and local procedures for seeking a law enforcement certification would help protect all community members from criminal acts, because survivors would be more likely to come forward with information that could solve or deter crimes.

Another set of state and local approaches would work to decrease noncitizens' apprehensiveness about reporting crime by making the certification process more consistent and by limiting or discouraging enforcement actions against cooperating crime victims. As discussed in Part II, many law enforcement agencies or officials do not consistently sign U visa certifications, or otherwise impose constraints that go beyond federal requirements for U visa certifications. Additionally, some jurisdictions detain potentially-deportable noncitizens and hand them over to ICE for deportation proceedings even where they would clearly meet the criteria for a U visa.¹²⁹ Both of these measures are counterproductive in the fight against crime and the protection of victims. State and municipal governments who want noncitizens

¹²⁷ NAT'L INST. OF JUST., OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., PROGRAM PROFILE: OPERATION PEACEKEEPER (2011), <https://www.crimesolutions.gov/ProgramDetails.aspx?ID=51>.

¹²⁸ CHRIS COGNAC, CMTY. ORIENTED POLICING SERV., U.S. DEP'T OF JUST., READY, SET, ENGAGE! IDEAS AND OPTIONS FOR COMMUNITY ENGAGEMENT AND PARTNERSHIP BUILDING (2015), https://cops.usdoj.gov/html/dispatch/06-2015/community_engagement_and_partnership_building.asp.

¹²⁹ See Caplan-Bricker, *supra* note 4.

to feel able to come forward to report crime and help bring perpetrators to justice should take measures that would bring local U visa policy better into line with federal law. Such measures should include, at a minimum, efforts to encourage signing certifications in appropriate cases under federal law.

The most effective approach along these lines would be for states to enact legislation that implements federal requirements for U visa certifications. A number of states have passed statutes that define various standards for handling U visa matters.¹³⁰ Most notably, California recently passed a law that adopted federal definitions for U visa certifications and enacted a rebuttable presumption that noncitizens who report crime meet the helpfulness requirement.¹³¹ Replicating federal definitions for the U visa criteria in state law and instituting a rebuttable presumption of helpfulness for noncitizens who report qualifying criminal activity would go a long way toward ensuring that law enforcement officials handle certification requests in a fair and consistent way. In turn, this approach would significantly reduce noncitizen crime victims' fear and uncertainty about coming forward.

If legislation is not in the cards within a particular state, due to political opposition or other obstacles, state or municipal governments should at least provide regular training and guidance to law enforcement agencies regarding the federal requirements for U visa certifications. In many cases, these trainings could be funded through continuing professional education funds or law enforcement grants. In an era of intense local involvement in immigration enforcement matters, training of law enforcement is more essential than ever to ensure officers are aware of the existence of U visas and the actual federal requirements for U visa certifications. State or local governments could provide local agencies with a set of criteria to guide certifying officials. This guidance could clarify that state officials should employ federal U visa standards and indicate specific criteria that would indicate circumstances under which law enforcement officials should typically provide noncitizens with police certifications.¹³² Additionally, and particularly

¹³⁰ See SALLY KINOSHITA & ALISON KAMHI, IMMIGR. LEGAL RESOURCE CTR., A GUIDE TO OBTAINING U CERTIFICATIONS at 4 (2017), https://www.ilrc.org/sites/default/files/resources/u_visa_certification_advisory_ab.ak_.pdf (discussing legislation relevant to U visa certifications in Arkansas, California, Delaware, Louisiana, Montana, and North Dakota).

¹³¹ See CAL. PENAL CODE § 679.10(f) (creating a "rebuttable presumption" that an immigrant victim is helpful, has been helpful, or is likely to be helpful, if the victim has not refused or failed to provide information and assistance reasonably requested by law enforcement and requiring certifying entities to complete the certification within 90 days of the request in typical cases).

¹³² For example, state or local policy or laws could include a checklist for certification with criteria such as the following: (1) the alleged crime occurred at any time in the United States and is a qualifying crime as defined the U visa statute; (2) the victim reported the crime to a law enforcement agency; and (3) the victim has complied with any reasonable requests for assistance with the investigation or prosecution of the crime including, but not limited to: indicating willingness to be helpful even if law en-

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in jurisdictions that engage in cooperative enforcement with ICE, state or local policy should encourage law enforcement officers to refrain from reporting cooperating crime victims to ICE, at least absent significant negative factors.

B. Conditioning 287(g) Agreements and Law Enforcement Grants on Compliance with Federal Law for U Certifications

If the Executive Branch is serious about fighting crime, it should take measures that counteract the fear and uncertainty that noncitizens face when deciding whether to report crime to law enforcement officials. One effective measure would be to condition federal-state cooperative enforcement agreements on local officials' willingness to follow federal statutory and regulatory law with respect to U certifications. The 287(g) program already requires federal authorities to train local partners on immigration law.¹³³ In the past, the Executive Branch has terminated 287(g) contracts with localities that violated federal law.¹³⁴ Since U visa rules are a part of immigration law, the Executive could require compliance with federal standards for U certifications before recognizing or renewing a 287(g) jurisdiction.

Another similar approach would be for the Executive Branch to condition federal law-enforcement grants on compliance with federal U visa rules. The constitutionality of such an approach, however, is less clear. In general, the Executive Branch lacks authority to impose new conditions on federal grants that were not contemplated by Congress and clearly agreed to by recipient states.¹³⁵ Thus, unless the particular federal grant at issue specifically authorizes the Executive to implement immigration-related requirements, the Administration would likely lack authority to condition receipt of federal funds on compliance with federal U visa rules.

On the other hand, Congress may well have the power to condition federal law enforcement grants on the willingness of state and local recipients to appropriately follow federal statutory and regulatory law concerning the

forcement determines not to further investigate or prosecute at this time; participating in any requested interview(s) with law enforcement officers regarding the crime or the perpetrator; communicating relevant information about the crime or the perpetrator to law enforcement; or providing law enforcement with any requested evidence related to the crime.

¹³³ 8 U.S.C. § 1357(g)(2) (2018).

¹³⁴ Jeremy Duda, *Homeland Security Revokes 287(g) Agreements in Arizona*, ARIZ. CAPITAL TIMES (June 25, 2012), <http://azcapitoltimes.com/news/2012/06/25/homeland-security-revokes-287g-immigration-check-agreements-in-arizona/>.

¹³⁵ See, e.g., *Pennhurst State Sch. & Hosp. v. Halederman*, 451 U.S. 1, 17 (1981) (“[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.”); *County of Santa Clara v. Trump*, 250 F.Supp.3d 497, 531 (2017) (holding that the executive branch does not have the constitutional authority to withhold funds that Congress designated for a particular purpose).

U visa. To be sure, the authority of Congress to use federal funding as a lever to compel states and cities to implement federal policies is constrained by the Constitution.¹³⁶ Congress may authorize spending conditions only if they are “germane” to the grant’s underlying purposes.¹³⁷ Measures designed to increase public safety through effective law enforcement, such as providing protection to noncitizen crime victims, would likely be germane to several federal law enforcement grants.¹³⁸ The Edward Byrne Justice Assistance Grant, for example, administered by the Office of Justice Programs, specifically provides that its purpose is flexible assistance for programs like “law enforcement, prosecution, . . . crime prevention . . . , and crime victim and witness initiatives.”¹³⁹ These multiple goals would be directly furthered by better alignment of local law enforcement practices with federal U visa requirements. Thus, it is likely that Congress could constitutionally impose, as a condition on these grants, the requirement that states adhere to federal standards when certifying that a noncitizen was the victim of qualifying criminal activity and is willing to assist any investigation or prosecution.

A somewhat less impactful but still highly useful Executive Branch approach would be to provide federally-funded trainings regarding federal standards for the U visa, especially in jurisdictions where local authorities regularly engage in immigration enforcement. Either way, the federal government should help ensure that state and local officers do not impose constraints on U visa certifications that go beyond federal requirements. In particular, the federal government should direct or encourage agencies not to decline to certify simply because the criminal activity occurred long ago, or because the agency decides not to investigate or prosecute further.

C. More Timely Deferred Action for U Visa Applicants

At the agency level, USCIS could improve on the current scheme by providing deferred action to U applicants on a timelier basis. Currently, the agency does not make a conditional adjudication until the application has already been waiting for many years.¹⁴⁰ As a result, the applicant remains

¹³⁶ See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576 (2012).

¹³⁷ See *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987).

¹³⁸ See, e.g., OFF. OF JUST. PROGRAMS, U.S. DEP’T OF JUST., EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT PROGRAM, <https://www.bja.gov/jag/> (“The JAG Program provides states, tribes, and local governments with critical funding necessary to support a range of program areas including law enforcement, prosecution, indigent defense, courts, crime prevention and education, corrections and community corrections, drug treatment and enforcement, planning, evaluation, technology improvement, and crime victim and witness initiatives and mental health programs and related law enforcement and corrections programs, including behavioral programs and crisis intervention teams.”).

¹³⁹ *Id.*

¹⁴⁰ MARIA ODOM, CITIZENSHIP & IMMIGR. SERV. OMBUDSMAN, U.S. DEP’T OF HOMELAND SEC.,

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subject to detention or deportation for a period that extends long after the decision to report crime and assist police has to be made. USCIS should make a prima facie determination of eligibility within 6 to 12 months of the application's submission, providing deferred action to those who appear to qualify. Deferred action provides no real immigration benefit except the opportunity to apply for employment authorization and a temporary, revocable assurance that the person will not be deported for a temporary basis.

For its part, ICE should revise prosecutorial discretion policies such that U applicants who have yet to receive deferred action are generally not a removal priority, even if they are deportable on the basis of unlawful entry or presence. While some noncitizens who experience crime and cooperate with police might nevertheless remain enforcement priorities for the current Administration due to their own criminal history, this policy change would encourage noncitizen victims who are otherwise law-abiding to come forward and assist law enforcement.

D. Increasing the Annual Cap on U Visas

Congress could ameliorate some of the problems with the current implementation of the U visa by increasing the annual statutory cap on U visas. As discussed in Part II, the number of available visas is far outstripped by the number of noncitizens who are victimized. Additionally, because the agency did not issue regulations for over seven years, many noncitizens who could have applied earlier were unable to do so. The resulting backlog has created a waiting list that currently will take a decade to clear. This situation leaves vulnerable noncitizens in a liminal status even after coming forward to the police, which works against the goals of the U visa legislation. Accordingly, Congress should substantially increase the number of annual U visas. A reasonable number for this revised cap would be 34,000 per year, which is approximately the number of primary victim U applications that were filed annually in 2016 and 2017, subtracted by the number denied those years.¹⁴¹ A related statutory reform would be to provide for automatic deferred action for those whose applications are pending in the U visa waitlist.

PAROLE FOR ELIGIBLE U VISA PRINCIPAL AND DERIVATIVE PETITIONERS RESIDING ABROAD (2016), <https://www.dhs.gov/sites/default/files/publications/cisomb-u-parole-recommendation-061616.pdf>.

¹⁴¹ USCIS, FORM I-918 DATA FY 2017, *supra* note 32 (showing 35,044 applications filed by immigrant crime victims in FY 2016 with 1,843 denied, and 36,531 applications filed in FY 2017 with 2,128 denied). Note that the denials issued in each of those years would have been related to applications filed in earlier years, due to the backlog. Nevertheless, these figures still provide a rough-shod method of estimating the approximate number of appropriate visas that should be available in this category on an annual basis. To the extent there are fewer than 34,000 approvable applications filed in a given year, the excess visas will help clear the substantial backlog.

E. Alternative Route to Certification

Finally, Congress could create an alternative federal route for certification where an individual clearly qualifies for U visa but local law enforcement officials are unwilling to sign. As other commentators point out, the T visa provides a useful model for such an approach.¹⁴² The T visa (enacted at the same time as the U visa), was designed to provide assistance to trafficked immigrants and requires that the applicant “complies with any reasonable request for assistance” from law enforcement, providing an exception when the survivor is a minor or is “unable to cooperate . . . due to physical or psychological trauma.”¹⁴³ Although certifications from law enforcement officials are preferred, they are not required where the noncitizen can provide “[c]redible secondary evidence and affidavits . . . to otherwise establish the requirement that the applicant be a victim of a severe form of trafficking in persons.”¹⁴⁴

As with the T visa, Congress could legislate an alternate route for persons to establish eligibility for the U visa. Specifically, Congress could amend the statute so that noncitizens who experience serious crime, report that crime to police, and are willing to provide necessary further assistance could use affidavits and credible secondary evidence to establish their eligibility in circumstances where local authorities are unwilling to certify (for whatever reason). This reform would allow Congress’s U visa goals to be achieved, as applicants would still need to demonstrate that they reported serious crime to the police and did not refuse any reasonable requests for assistance, along with the requisite showing of hardship and other criteria. Consequently, noncitizens living in jurisdictions where police unreasonably refuse to sign certifications would still have an incentive to report crime.

F. Even an Enforcement-Oriented Administration Should Want to Pursue These Reforms

At first blush, it might seem that the Trump Administration would be unlikely to take measures that improve pathways to lawful presence for more undocumented noncitizens. Without a doubt, this Administration is committed to vigorous enforcement of immigration laws. But the U visa is a special case. First, as already noted, the Administration has articulated a commitment to fighting crime, and when undocumented individuals assist law enforcement they undoubtedly help in that effort. Second, as Amanda Frost

¹⁴² Kagan, *supra* note 9, at 962.

¹⁴³ 8 U.S.C. § 1101(15)(T)(i).

¹⁴⁴ 8 C.F.R. § 214.11(f).

recently pointed out, the U visa is a statutorily-authorized way to reduce the number of unauthorized persons inside the United States by bringing them into compliance with federal immigration law.¹⁴⁵ Professor Frost observed that a variety of federal agencies already employ cooperative enforcement measures designed to give regulatory violators the opportunity to pursue legitimate paths to compliance.¹⁴⁶ A similar approach in the immigration context for victims of crime who are willing to assist law enforcement would make communities safer, reduce the number of persons in the country who are undocumented, and allow federal enforcers to concentrate scarce resources on those it deems higher priority targets. For these reasons, even a restrictionist-oriented administration may well wish to pursue the reforms we suggest.

CONCLUSION

Despite its laudable goals of improving public safety and protecting noncitizens victimized by crime, the ground-level implementation of the U visa program has been fraught from the start. The paltry number of visas available each year has led to a tremendous backlog and multi-year waitlist. The Trump Administration's new immigration priorities further undermine this scheme and are likely to have a chilling effect on noncitizens' willingness to report crimes.¹⁴⁷ Like the U visa police certification requirement, President Trump's Executive Orders have delegated tremendous discretionary enforcement power to state and local law enforcement officials. The reinvigoration of 287(g) programs and similar cooperative enforcement has rekindled fears of racial profiling and discrimination in local policing practices, which in turn increases the reluctance of noncitizens to report crime or cooperate with law enforcement.

This essay outlined five reforms at local, state, and federal levels that would ameliorate these obstacles and help realize the goals behind the U visa legislation. Any of these measures would improve upon the current scheme. Together, they would give life to a critical program intended to make communities safer and provide humanitarian aid to victims.

¹⁴⁵ See Amanda Frost, *Cooperative Enforcement in Immigration Law*, 103 IOWA L. REV. 1, 32–33 (2017).

¹⁴⁶ *Id.* at 21–26 (discussing cooperative enforcement measures undertaken by the Environmental Protection Agency, the Securities and Exchange Commission, the Occupational Safety and Health Administration, and the Food and Drug Administration).

¹⁴⁷ See, e.g., Interior EO, *supra* note 12; Enforcement Improvements EO, *supra* note 75.

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