CERTIFIED DISASTER: A FAILURE AT THE INTERSECTION OF THE U VISA AND THE CHILD WELFARE SYSTEM

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INTRODUCTION

Immigration policy, and particularly the treatment of immigrant children, has long been an issue that captivates our national attention. Deferred Action for Childhood Arrivals ("DACA"), the "surge" of unaccompanied minors, family separation, and the detention of children have all featured prominently in the media, and rightly so. But often the obstacles immigrants face in seeking relief happen in a quieter, more mundane fashion that rarely gets attention. Procedural or regulatory matters that may seem insignificant at first blush can result in insurmountable barriers to long-term immigration status and stability. This article addresses one such aspect of immigration law—U Nonimmigrant Status (also called the "U visa")—and how it intersects with child welfare policy to harm the very immigrant youth it was meant to protect.

As a young child, Maria escaped violence in Mexico and fled to El Paso, Texas, with her mother.[1] Her mother was physically abusive, but Maria was afraid to tell anyone. Her mother told her if she called the police, they would both be deported because they were undocumented. Maria, fearful of being sent back to a violent country where she had not lived in years, stayed quiet. One day, Maria showed up to school with visible bruises. She disclosed the abuse to her school counselor, who made a report to child protective services. Maria recounted the traumatic details of her mother's abuse to a child welfare investigator and was placed in foster care, but all the while she worried talking to authorities would result in deportation for her or her mother. She was never asked to speak to the police but continued working with child protective services as they investigated her mother's abuse. She even testified in court.

Based on her victimization and cooperation with the child protective services investigation, Maria could be eligible for U Nonimmigrant Status, a form of immigration relief intended to protect vulnerable survivors of violent crime.[2] A U visa would provide Maria with long-term immigration status, protection from deportation, a path to citizenship in the United States, and safety from her mother's retaliation. To be eligible for a U visa, a victim must demonstrate, among other things, that they were helpful to the agency investigating the criminal activity of which they were a victim.[3] Maria satisfied this when she cooperated with the child welfare investigator and testified in court. But to actually apply for U visa relief, Maria would need to get a signed certification from child protective services identifying her as a crime victim who cooperated with their investigation. Any agency that has "criminal investigative jurisdiction in their respective areas of expertise" may certify a U visa application, "including, but not limited to, child protective services."[4] But child welfare agencies have taken vastly different approaches to issuing certifications.[5] In some states, it would be easy for Maria to get a certification from child protective services. In California, for example, she would have received the certification automatically within thirty days.[6] But because she lived in Texas, Maria was entirely barred from relief. The Texas child protective services agency categorically refuses to issue U visa certifications, and without it, Maria could not even apply for U Nonimmigrant

1. This case example is emblematic of several real clients I represented while working in Texas. No real client names have been used.

2. *See infra* Part I.

3. *See infra* Part I.

4. 8 C.F.R. § 214.14(a)(2) (2020).

5. *See infra* Part II. Some states' child welfare agencies review and issue U visa certifications regularly, following clear, thorough procedures. Other child welfare agencies arbitrarily limit their certifications or outright refuse to certify U visas. In such states, if a child is not eligible for other forms of immigration relief and cannot obtain a certification from a traditional law enforcement agency, they will have no options to remain in the United States. In other states, there is no clear certification policy or protocol.

6. *See infra* Section II.A.

Status.[7] Based on the coincidence of where the crime against Maria occurred, she has no hope of getting the immigration relief for which she would otherwise have been eligible, and she remains vulnerable to deportation.

The U visa was designed to protect immigrant victims like Maria, who otherwise might not report their victimization due to fear of deportation.[8] Likewise, the child welfare system was designed to protect kids like Maria from abuse and to help them plan for a safer, more secure future.[9] Yet, at the intersection of these systems is a failure to protect Maria from deportation—not for any reason having to do with the merits of her U visa eligibility but simply because of the geographic location where the criminal activity occurred.

Maria's case is not uncommon. In imposing the investigative agency certification requirement, the Department of Homeland Security ("DHS") intended to create a mechanism to facilitate a victim's cooperation with law enforcement.[10] But state and local agencies' resistance to collaborate around federal immigration policy has derailed the U visa's goals and rendered the certification requirement a barrier to the very protection it was meant to facilitate. Although child protection agencies are best positioned to assist and protect kids like Maria, they fail to do so when they do not certify U visas. Thus, the example of child welfare agencies is emblematic of how an agency's unwillingness to participate in the U visa process, even where certification is compatible with the larger agency goals, contravenes the U visa's purpose. It conditions U visa relief not on the merits of eligibility but rather factors like anti-immigrant bias, lack of training, or misunderstanding of the role of certifying agencies. It also demonstrates how those agencies are neglecting their duties to protect those in their care.

This ad hoc approach by state agencies has resulted in inconsistent and disparate access to humanitarian immigration relief for the very victims the U visa was meant to protect. The immigration system affords investigative agencies like child protective services vast discretion in issuing certifications.[11] The idea behind this discretion is that agencies should have the

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7. *See infra* Section II.A.

8. *See* 146 CONG. REC. S10191–93 (daily ed. Oct. 11, 2000) (statement of Sen. Hatch); *see generally* Jason A. Cade & Meghan L. Flanagan, *Five Steps to A Better U: Improving the Crime-Fighting Visa*, 21 RICH. PUB. INT. L. REV. 85, 90–91 (2018) (citing *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)); Katrina Castillo, ALEXANDRA SPRATT, CATHERINE LONGVILLE & LESLYE E. ORLOFF, Nat'l Immigrant Women's Advoc. Project, Legislative History of VAWA (94, 00, 05), T and U-Visas, Battered Spouse Waiver, and VAWA Confidentiality (2015), http://library.niwap.org/wp-content/uploads/2015/VAWA_Leg-History_Final-6-17-15-SJI.pdf.

9. *See* John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 453, 455–59 (2008).

10. *See infra* Section I.C.

11. *See* Alizabeth Newman, *Reflections on VAWA's Strange Bedfellows: The Partnership Between the Battered Immigrant Women's Movement and Law Enforcement*, 42 U. BALT. L. REV. 229, 270–71 (2013) ("[L]aw enforcement agencies have unchecked discretion if and when to sign the certificate, which directly determines whether or not an applicant can apply for relief.") (citing Ordonez Orosco v. Napolitano, 598 F.3d 222, 226 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 389 (2010)); Cade & Flanagan,

greatest knowledge of a person's victimization and cooperation.[12] However, the way agencies have chosen to exercise this discretion (or not) has resulted in a "geographic roulette" that means similarly situated youth with identical claims may have completely different access to immigration relief based on the state in which they were harmed.[13]

Much scholarship has been devoted to the U visa and its benefits and shortcomings, including the problematic effects of allowing local certifying agencies such vast discretion.[14] Scholarship has even examined certifications by other "non-traditional" law enforcement agencies, such as the Department of Labor and Equal Employment Opportunity Commission.[15] However, there is no scholarship exploring certification practices of child protection agencies and the abdication of duties toward immigrant youth that occurs at the intersection of the child welfare system and the U visa program. This article aims to fill that gap.

Using the example of child protection agencies as a framework, this article examines the inconsistent approaches of certifying agencies and the lack of standards around the U visa certification requirement to address broader questions about consistently effectuating the U visa's purpose to protect immigrant victims of crime.[16] Part I analyzes the history, purpose, and operation of U Nonimmigrant Status, including the development of—and debate surrounding—the certification requirement. Part I also discusses why, even though this problem of inconsistent exercise of discretion plagues all types of certifying agencies, child welfare agencies in particular deserve attention and

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supra note 8, at 97–98; Rachel Gonzalez Settlage, *Uniquely Unhelpful: The U Visa's Disparate Treatment of Immigrant Victims of Domestic Violence*, 68 RUTGERS U.L. REV. 1747, 1767 (2016) ("The decision whether or not to issue [a certification] is left entirely to the discretion of the certifying official and is not subject to review."); *Ordonez Orosco*, 598 F.3d at 226–27 ("[T]he decision to issue a law enforcement certification is a discretionary one.").

12. *See* 8 C.F.R. § 214.14(a)(2) (2020).

13. *See* JEAN ABREU, SIDNEY FOWLER NINA HOLTSBERRY ASHLEY KLEIN, KEVIN SCHROEDER, & MELANIE STRATTON LOPEZ, UNC SCHOOL OF LAW, IMMIGRATION/HUMAN RIGHTS POLICY CLINIC, THE POLITICAL GEOGRAPHY OF THE U VISA: ELIGIBILITY AS A MATTER OF LOCALE 31–32 (2014).

14. *See, e.g.*, Cade & Flanagan, *supra* note 8, at 96–98; Leslye E. Orloff, Kathryn C. Isom, & Edmundo Saballos, *Mandatory U-Visa Certification Unnecessarily Undermines the Purpose of the Violence Against Women Act's Immigration Protections and Its "Any Credible Evidence" Rules—A Call for Consistency*, 11 GEO. J. GENDER & L. 619, 637 (2010) [hereinafter Orloff et al., *Mandatory U Visa Certification*]; Tahja L. Jensen, *U Visa "Certification": Overcoming the Local Hurdle in Response to A Federal Statute*, 45 IDAHO L. REV. 691, 704 (2009); Settlage, *supra* note 11, at 1792–93; Jamie R. Abrams, *The Dual Purposes of the U Visa Thwarted in A Legislative Duel*, 29 ST. LOUIS U. PUB. L. REV. 373, 411 (2010); Newman, *supra* note 11, at 271; Michael Kagan, *Immigrant Victims, Immigrant Accusers*, 48 U. MICH. J.L. REFORM 915, 929 (2015).

15. *See generally* Eunice Hyunhye Cho, Giselle A. Hass, & Leticia M. Saucedo, *A New Understanding of Substantial Abuse: Evaluating Harm in U Visa Petitions for Immigrant Victims of Workplace Crime*, 29 GEO. IMMIGR. L.J. 1 (2014); Rachel Nadas, *Justice for Workplace Crimes: An Immigration law Remedy*, 19 HARV. LATINX L. REV. 137 (2016); Leticia M. Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891 (2008) [hereinafter Saucedo, *A New "U"*]; Leticia M. Saucedo, *Immigration Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace*, 38 FORDHAM URB. L.J. 303 (2010) [hereinafter Saucedo, *Immigration Enforcement*].

16. Certifying agencies of all types have inconsistent approaches to certification. This paper focuses on child welfare agency certifications for reasons detailed in Section II.E.

scrutiny. Part II examines the inconsistent approaches state child welfare agencies take to certifying U visas and the reasons underlying those disparities. Part III argues that the absence of clear and consistent certification standards for child welfare agencies perverts the purpose of the certification requirement and the U visa, results in a disparate impact for minor immigrant victims of crime in different states and amounts to an abdication of child welfare agencies' duties to the youth in their care. Part IV proposes a new standard for minor U visa applicants to promote a more consistent administration of immigration benefits and provides the framework for such a standard. It also advocates for uniform enforcement of U visa certification practices through federal funding of state child welfare systems. While the recommendations in this paper are specific to child welfare agencies, they speak to the need to create a safety valve for any case in which a law enforcement agency circumvents its duty to protect by refusing to issue U visa certifications.

I. U NONIMMIGRANT STATUS OFFERS PROTECTION TO IMMIGRANT VICTIMS OF CRIME

As a new lawyer representing current and former foster youth in south Texas, I worked with many minors like Maria who were undocumented or had insecure immigration status. Some had been in the United States only a few months; others had lived here most of their lives. Almost all of my clients were victims of physical or sexual abuse, and this abuse was investigated by the Texas Department of Family and Protective Services ("DFPS"), which oversaw the state's child protective services agency. My clients cooperated fully in child welfare investigations. They participated in forensic interviews, answered questions from investigators, provided information about the abuse, and sometimes testified in child welfare proceedings. Based on the information my clients provided, the agency would make a determination about the abuse and whether to take custody of the youth. Often, the cases were referred to the police department, but police did not pursue an investigation or press charges. Rather, the crimes were addressed and handled internally within the child protection agency.[17]

Some of my clients qualified for another form of immigration relief, but many others were not eligible for the forms of relief typically available to youth in foster care.[18] However, almost all of these clients did qualify for

17. Other times, law enforcement agencies did investigate, but they placed their own restrictions on issuing certifications that made getting one impossible, or the process for requesting a certification was backlogged a year or longer. This was not a feasible solution for a visa that is meant to provide protection in the face of reporting abuse.

18. For example, DACA is a common form of temporary relief for young adults. To qualify, an applicant must have continuously resided in the United States since June 15, 2007, and many of my clients had not lived in the country long enough. *See* Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship and Immigr. Servs., and John Morton, Dir., U.S. Immigr. and Customs Enf't, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-

U Nonimmigrant Status. U Nonimmigrant Status is a type of immigration relief that allows victims of certain qualifying criminal activity who are helpful in the investigation of that criminal activity to remain in the United States.[19] The U visa affords the applicant valid nonimmigrant[20]—or temporary—status to live and work in the United States for four years,[21] as well as a path to citizenship.[22] In creating the U visa, Congress had two goals: create an investigative tool to help law enforcement address crimes against immigrant victims who might not otherwise report their victimization due to fear of deportation[23] and offer humanitarian protection to immigrant victims, specifically "battered women and children."[24] Congress hoped that, by offering long-term immigration status and a path to citizenship, the U visa would

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individuals-who-came-to-us-as-children.pdf; *see also* Olga Y. Kuchins, *Out of the Shadows: Deferred Action for Childhood Arrivals, Deferred Action to Parents of Americans and Lawful Permanent Residents, and Executive Prosecutorial Discretion in Immigration Law*, 43 HASTINGS CONST. L.Q. 705, 711 (2016); Jessica Arco, *A Dream Turned Nightmare: The Unintended Consequences of the Obama Administration's Deferred Action for Childhood Arrivals Policy*, 82 GEO. WASH. L. REV. 493, 508 (2014). In addition, the future of DACA is perpetually uncertain. *See* Michael Jeb Richard, *Deferred Action for Childhood Arrivals: Place A Bet or Wait on A Dream*, 40 S.U. L. REV. 293, 312 (2013) ("DACA is a product of executive authority [and] can be modified, superseded, or rescinded at any time."). Many were not eligible for Special Immigrant Juvenile Status ("SIJS"), a typical form of relief for foster children, because their parents were not the perpetrators or because they were over eighteen years old. Technically, SIJS is available to youth under 21. However, Texas courts, like those in many states, lose jurisdiction over youth once they turn eighteen, so a child over eighteen would be unable to get a predicate order from a state court, which is required in order to apply for SIJS. Cristina Ritchie Cooper, *A Guide for State Court Judges and Lawyers on Special Immigrant Juvenile Status*, 36 CHILD. L. PRAC. 25, 31–32 (2017); Laila L. Hlass, *States and Status: A Study of Geographical Disparities for Immigrant Youth*, 46 COLUM. HUM. RTS. L. REV. 266, 290 (2014). In addition, SIJS presents similar access issues to U visas, as both agencies and courts vary in how they issue state court orders, which results in disparate access to relief. *See* 8 U.S.C. § 1101(a)(15)(J) (2018); 8 C.F.R. § 204.11 (2020). Many did not qualify for VAWA relief, relief available to battered children and spouses of U.S. citizens or legal permanent residents, because their abusers did not have the requisite immigration status. *See* 8 U.S.C. § 1154(a)(1) (2018); Laura Carothers Graham, *Relief for Battered Immigrants Under the Violence Against Women Act*, 10 DEL. L. REV. 263, 269–70 (2008).

19. *See* 8 U.S.C. § 1101(a)(15)(U) (2018); 8 C.F.R. § 214.14 (2020).

20. A nonimmigrant visa is issued to a person with permanent residence outside of the United States who is permitted to remain in the United States on a temporary basis for a particular purpose. An immigrant visa is issued to a person who plans to live permanently in the United States. *See Glossary*, U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC., https://www.uscis.gov/tools/glossary/nonimmigrant (last visited Jan. 31, 2021); *Requirements for Immigrant and Nonimmigrant Visas*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/travel/international-visitors/visa-waiver-program/requirements-immigrant-and-nonimmigrant-visas (last visited July 26, 2020). Some nonimmigrant categories, such as U Nonimmigrant Status, include a path to citizenship. In this paper, I am using the term "immigrant" colloquially to describe someone who has come to the United States from another country.

21. Cade & Flanagan, *supra* note 8, at 92; Kagan, *supra* note 14, at 925.

22. FOREIGN AFFAIRS MANUAL, *infra* note 23, at 402.6–6(J); Kagan, *supra* note 14, at 925; Cade & Flanagan, *supra* note 8, at 92.

23. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, § 1513(a)(2)(A), 114 Stat 1464, 1533 (2000); U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL: 9 FAM VISAS 402.6-6(B)(a) (2020), https://fam.state.gov/FAM/09FAM/09FAM040206.html [hereinafter Foreign Affairs Manual]; Cade & Flanagan, *supra* note 8, at 87–88; Settlage, *supra* note 11, at 1764–65; Abrams, *supra* note 14, at 379.

24. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, § 1513(a)(2)(A), 114 Stat 1464, 1533 (2000); FOREIGN AFFAIRS MANUAL, *supra* note 23, at 402.6–6(B)(a); Cade & Flanagan, *supra* note 8, at 87–88; Settlage, *supra* note 11, at 1764–65; Abrams, *supra* note 14, at 378–79.

enable immigrant victims of crime to participate fully in a criminal investigation without fear of being removed from the country.[25]

This was sometimes the only form of long-term immigration relief for which my foster youth clients qualified, and DFPS was the only agency that could certify based on its investigation. However, because my clients lived in Texas, they could not apply for U Nonimmigrant Status. In 2016, Texas DFPS enacted a policy stating it would no longer certify U Nonimmigrant Status applications, claiming federal regulations did not authorize it to do so because it did not have the authority to arrest and prosecute perpetrators as a result of its investigations.[26] Texas DFPS not only categorically declines to exercise certification authority but declines even to acknowledge that they have such authority. This interpretation of the law contradicts—or at least misinterprets—the statutory language, which not only explicitly counts child protective services among the list of certifying agencies but also broadly defines a certifying agency as an "authority that has responsibility for the investigation *or* prosecution of a qualifying crime or criminal activity."[27] As explained in Section I.D, "investigation" is interpreted broadly.

Even though my clients were eligible for immigration relief under federal law, their opportunity to seek such relief was hung up on the technicality of the agency's certification practices. My clients would have qualified for long-term immigration relief if they lived elsewhere, or possibly if a different agency had investigated the crime, but because they lived in a state whose child welfare agency refused to review certification requests, they had no options.

Texas's decision to make and implement its own interpretation of the federal U visa regulations is not anomalous. Child protective service agencies across the country have varying policies with respect to certification.[28] Many individuals qualify for U Nonimmigrant Status as a result of involvement with the child welfare system but, because of their geographic location, cannot obtain certifications and are therefore denied the opportunity to even apply for immigration relief.

The sections below will examine (A) the purpose and history of the U visa, (B) how the U visa works in practice, and (C) the helpfulness requirement

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25. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, § 1502(a)(2), 114 Stat 1464, 1518 (2000) (stating the U visa would allow victims of domestic violence to seek protective orders and cooperate with law enforcement without fear of deportation); *see also* Cade & Flanagan, *supra* note 8, at 91 (citing *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)); Orloff et al., *Mandatory U Visa Certification*, *supra* note 14, at 635; Natalie Nanasi, *The U Visa's Failed Promise for Survivors of Domestic Violence*, 29 YALE J.L. & FEMINISM 273, 297–313 (2018).

26. *See U Visa Certification Requests*, TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., CHILD PROTECTIVE SERVS. HANDBOOK 6733 (Mar. 2019) https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_6700.asp [hereinafter Tex. DFPS, *U Visa Certification Requests*].

27. 8 C.F.R. § 214.14(a)(2) (2020). *See supra* discussion at Section I.D.

28. *See infra* Part II.

and law enforcement certification, before (D) defining "certifying agency" and (E) explaining special considerations for child welfare agencies.

A. *Purpose and History of U Nonimmigrant Status*

Congress created the U nonimmigrant classification with the passage of the Victims of Trafficking and Violence Protection Act in October 2000, which also reauthorized the Violence Against Women Act.[29] The reauthorization's primary objective was to remove immigration law as a barrier to immigrant women and children who feel trapped in abusive relationships because they fear reporting to law enforcement.[30]

Congress recognized that immigrant victims of crime face particular obstacles to reporting crimes committed against them and fully participating in the investigation and prosecution of those crimes.[31] In addition to limited language proficiency, social isolation, and disparities in social and economic resources, immigrants may fear that going to law enforcement, even as a victim, will result in their arrest and deportation for immigration violations.[32] As a result, immigrants report their victimization at lower rates.[33] Often, this fear of deportation is exploited by abusers to keep the victim from leaving the relationship or reporting the crime.[34] Unfortunately, it is also reinforced by some law enforcement officers who disregard immigrant victims, treat them as criminals, or engage in immigration enforcement against them.[35] Such

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29. *See* Castillo et al., *supra* note 8, at 52–55.

30. *See* 146 CONG. REC. S10,191–93 (daily ed. Oct. 11, 2000) (statement of Sen. Hatch); Cade & Flanagan, *supra* note 8, at 91; Orloff et al., *Mandatory U Visa Certification*, *supra* note 14, at 619–20; Settlage, *supra* note 11, at 1776.

31. *See* 146 CONG. REC. S10,191–93 (daily ed. Oct. 11, 2000) (statement of Sen. Hatch); *see generally* Leslye E. Orloff & Janice V. Kaguyutan. *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95 (2002) (describing the ways U.S. immigration policy has historically fostered domestic violence) [hereinafter Orloff & Kaguyutan, *Offering a Helping Hand*]; *see also* Cade & Flanagan, *supra* note 8, at 91; Orloff et al., *supra* note 14, at 619–20; Rachel Gonzalez Settlage, *supra* note 11, at 1776.

32. *See* April Paredes, Donalene Roberts, & Taylor Stuart, *Domestic Violence*, 19 GEO. J. GENDER & L. 265, 272 (2018); Nanasi, *supra* note 25, at 297–313.

33. *See* Paredes et al., *supra* note 32, at 303 (describing how reports of domestic violence decreased across the country as a result of the Trump administration's strict immigration enforcement); Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 68 (2003) (finding battered women with undocumented or insecure immigration status were less likely to call the police for help); Nawal H. Ammar, Leslye E. Orloff, Mary Ann Dutton, & Giselle Hass, *Calls to Police and Police Response: A Case Study of Latina Immigrant Women in the USA*, 7 INT'L J. OF POLICE SCI. & MGMT. 230, 236 (2005) (finding women with stable immigration status are twice as likely as undocumented women to report domestic violence); Nik Theodore, Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement, UNIV. OF ILL. AT CHICAGO 5 (2013), https://greatcities.uic.edu/wpcontent/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf (finding two-thirds of undocumented Latino immigrants were less likely to report a crime to law enforcement).

34. *See* Sudha Shetty & Janice Kaguyutan, *Immigrant Victims of Domestic Violence: Cultural Challenges and Available Legal Protections*, VAWNET APPLIED RESEARCH FORUM, Feb. 2002, at 1–2, https://vawnet.org/sites/default/files/materials/files/2016-09/AR_Immigrant.pdf; Orloff & Kaguyutan, *Offering a Helping Hand*, *supra* note 31, at 163; Orloff et al., *Mandatory U Visa Certification, supra* note 14, at 635.

35. *See* Cade & Flanagan, *supra* note 8, at 90; Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy*

obstacles to reporting abuse and seeking assistance allow abusers to exploit their victims' legal vulnerabilities and operate with impunity.[36] In fact, prior to the advent of the U visa, Congress found that "abusers are virtually immune from prosecution because their victims can be deported as a result of action by their abusers and the [federal immigration system] cannot offer them protection no matter how compelling their case under existing law."[37]

To address these concerns and encourage immigrant victims of crime to come forward, Congress created U Nonimmigrant Status. The purpose of this new nonimmigrant visa classification was twofold: (1) to "strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes . . . committed against aliens," and (2) to "offer[] protection to victims of such offenses in keeping with the humanitarian interests of the United States."[38] The U visa was meant to serve as an investigative tool to aid law enforcement. However, Congress also acknowledged that immigrant populations are more vulnerable to crime, so the U visa was intended to afford humanitarian relief to the abused. Congress hoped that, by offering long-term immigration status and a path to citizenship, the U visa would enable immigrant victims of crime to participate fully in a criminal investigation without fear of being removed from the country.[39]

Congress found immigrants, and particularly women and children, are frequently "targeted to be victims of crimes committed against them in the United States, including rape, torture, kidnapping, trafficking, incest, domestic violence, sexual assault, female genital mutilation, forced prostitution, involuntary servitude, being held hostage or being criminally restrained."[40] The U visa aimed to protect immigrant victims of these crimes from deportation, enabling them to participate fully in a criminal investigation or prosecution without fear of being removed from the country. Congress recognized that holding perpetrators of criminal activity accountable would not be

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Implications, 7 GEO. J. ON POVERTY L. & POL'Y 245, 293 (2000) (reporting fear of deportation is "either the first or second most intimidating factor that kept battered immigrants from seeking the services they needed to end the abusive relationship."); Settlage, *supra* note 11, at 1776.

36. Orloff et al., *Mandatory U Visa Certification*, *supra* note 14, at 619–20, 635.

37. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, § 1502(a)(3), 114 Stat 1464, 1518 (2000) (codified at 22 U.S.C. § 7101).

38. *Id.* at § 1513(a)(2)(A); *see also* Cade & Flanagan, *supra* note 8, at 87–88; Settlage, *supra* note 11, at 1764–65; Abrams, *supra* note 14, at 379.

39. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, § 1502(a)(2), 114 Stat. 1464, 1518 (2000) (stating the U visa would allow victims of domestic violence to seek protective orders and cooperate with law enforcement without fear of deportation); *see also* Cade & Flanagan, *supra* note 8, at 91 (citing *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)); Orloff et al., *Mandatory U Visa Certification*, *supra* note 14, at 635; Natalie Nanasi, *The U Visa's Failed Promise for Survivors of Domestic Violence*, 29 YALE J.L. & FEMINISM 273, 297–313 (2018).

40. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, § 1513(a)(1)(A), 114 Stat. 1464, 1533 (2000) (codified at 22 U.S.C. § 7101).

possible "if abusers . . . can avoid prosecution by having their victims deported."[41]

By affording U visa protection, the government sought to diminish the perpetrator's power to threaten the victim with deportation as a consequence of cooperating with law enforcement.[42] Congress hoped the creation of such a visa would facilitate reporting of crimes by victims who are not in lawful immigration status, encourage law enforcement agencies to investigate crimes committed against immigrants, regularize the immigration status of victims cooperating with law enforcement, and help law enforcement better serve immigrant victims of crime.[43]

B. *How U Nonimmigrant Status Works*

Despite the far-reaching objectives of the U visa, not every immigrant victim of crime is eligible. To qualify for U Nonimmigrant Status, an applicant must demonstrate the following: (1) they are a victim of qualifying criminal activity, (2) they have suffered substantial physical or mental abuse as a result of having been a victim of that criminal activity,[44] (3) they possess information about the criminal activity, (4) they were helpful or are likely to be helpful to law enforcement in the investigation or prosecution of the criminal activity,[45] and (5) the criminal activity occurred in the United States or violated U.S. laws.[46] Where the direct victim is deceased, incompetent, or incapacitated as a result of the crime, their spouse, children, or parents, or unmarried siblings may be considered indirect victims of the crime.[47]

The statute lists twenty-nine qualifying crimes, including domestic violence, sexual assault, rape, abusive sexual contact, and felonious assault.[48] It also states that qualifying criminal activity includes any similar activity where the elements of the crime are substantially similar, as well as attempt,

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41. *See* Cade & Flanagan, *supra* note 8, at 91; Orloff et al., *Mandatory U Visa Certification*, *supra* note 14, at 635.

42. *See* Cade & Flanagan, *supra* note 8, at 91; Orloff et al., *Mandatory U Visa Certification*, *supra* note 14, at 635; *see also* New Classification for Victims of Criminal Activity; Eligibility for "U" Visa Status, 72 Fed. Reg. 53013, 53015 (Sep. 17, 2007) (to be codified as 8 C.F.R. pts. 103, 212, 214, 248, 274a, 299) [hereinafter *U Visa Interim Rule*].

43. *See* Cade & Flanagan, *supra* note 8, at 91; Orloff et al., *Mandatory U Visa Certification*, *supra* note 14, at 635; Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, § 1502 (a)(2), 114 Stat. 1464, 1518 (2000) (codified at 22 U.S.C. § 7101); Nanasi, *supra* note 25, at 297–313.

44. The U visa regulations base the "substantial abuse" determination on a number of factors, including, but not limited to: the nature of the injury inflicted or suffered; the severity of the perpetrator's conduct; the severity of the harm suffered; the duration of the infliction of the harm; and the extent to which there is a permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions. No single factor is required or determinative. *See* 8 C.F.R. § 214.14(b)(1) (2020).

45. If the applicant is under the age of 16 or is unable to provide the information due to a disability, a parent, guardian, or next friend may possess information and assist law enforcement on their behalf. *See* 8 U.S.C. §§ 1101(a)(15)(U)(i)(II)–(III) (2018).

46. *See* 8 U.S.C. § 1101(a)(15)(U) (2018).

47. *See* FOREIGN AFFAIRS MANUAL, *supra* note 23, at 402.6-6(C)(c).

48. *See* 8 U.S.C. § 1101(a)(15)(U)(iii) (2018); Cade & Flanagan, *supra* note 8, at 93.

conspiracy, or solicitation to commit any of the qualifying crimes.[49] The list does not include neglect, so child neglect would not rise to the level of qualifying crime; however, physical abuse, and certainly sexual abuse, of a child could. In fact, the U visa was designed with battered women and children in mind.[50]

There is no time limit specifying when the victim may apply for U Nonimmigrant Status, though there are some practical timing considerations.[51] Most importantly for the purposes of this article, there are no exceptions to the requirement that the applicant be helpful to law enforcement, although parents may cooperate with the law enforcement agency where the victim is under sixteen years old.[52] An applicant need not be in the United States at the time of application in order to qualify.[53]

To actually apply for U Nonimmigrant Status, an applicant must file a signed Form I-918, Petition for U Nonimmigrant Status along with a Form I-918, Supplement B, U Nonimmigrant Status Certification ("certification").[54] This is the law enforcement certification at issue in this article. The certification does not guarantee eligibility for a U visa but is required in order to apply for this status.[55] It must be signed by a qualifying law enforcement agency and attest that the applicant was a victim of a qualifying crime, possessed helpful information about that crime, and was helpful or is likely to be helpful to law enforcement in the investigation or prosecution of the crime.[56] Although this certification does not afford any immigration benefit to the applicant on its own, the requirement nevertheless renders applicants dependent on law enforcement for their immigration future in the United States because they cannot apply for a U visa without this certification.[57]

In addition to the certification, an applicant must also provide a personal statement describing the criminal activity of which they were a victim as well as "any credible evidence" to establish each eligibility requirement, along with other required forms.[58] These documents are submitted to U.S.

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49. *See* 8 U.S.C. § 1101(a)(15)(U)(iii); *see also* Orloff et al., *Mandatory U Visa Certification*, *supra* note 14, at 639.

50. *See* Cade & Flanagan, *supra* note 8, at 91; Orloff et al., *Mandatory U Visa Certification*, *supra* note 14, at 639; Nanasi, *supra* note 14, at 280.

51. *See* Cade & Flanagan, *supra* note 8, at 95. For example, some jurisdictions will only certify when the crime is within the statute of limitations or place other time restrictions on certification requests. *See* Settlage, *supra* note 11, at 1774; Abreu et al., *supra* note 13. In addition, demonstrating ongoing harm or helpfulness becomes more difficult the longer a victim waits to file.

52. *See* 8 U.S.C. § 1101(a)(15)(U)(i)(II)–(III) (2018); Kagan, *supra* note 14, at 927.

53. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., VICTIMS OF CRIMINAL ACTIVITY U NONIMMIGRANT STATUS, https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status (last visited July 27, 2020) [hereinafter *Victims of Criminal Activity*]; *see also* FOREIGN AFFAIRS MANUAL, *supra* note 23, at 402.6–6(B)(c).

54. *See* Orloff et al., *Mandatory U Visa Certification*, *supra* note 14, at 632.

55. *See* Cade & Flanagan, *supra* note 8, at 97.

56. *See id*. at 88; Orloff et al., *Mandatory U Visa Certification*, *supra* note 14, at 635–36.

57. Orloff et al., *Mandatory U Visa Certification*, *supra* note 14, at 643; Kagan, *supra* note 14, at 928.

58. *See* 8 C.F.R. § 214.14(c)(4) (2020); *Victims of Criminal Activity*, *supra* note 53.

Citizenship and Immigration Services ("USCIS"), an agency within DHS, which adjudicates the application.[59] Customarily, the applications are all adjudicated by a special unit within USCIS, the Vermont Service Center, that handles exclusively humanitarian applications related to victims of crime.[60]

There is a numerical limit on the number of U visas that can be issued in any particular year. The visa issuances are capped by statute at 10,000 per year.[61] If the statutory cap is reached before all pending petitions have been adjudicated (which it historically has been),[62] USCIS creates a waiting list for any eligible applicants awaiting a final decision and a U visa.[63] Applicants on the waiting list are granted deferred action or parole and can apply for authorization to work in the United States while waiting for additional U visas to become available.[64] Once additional visas become available, they are issued to applicants on the waitlist in the order the applications were received.[65] As of July 2020, there were over 153,000 pending applications, which means it would take over a decade before someone applying for U Nonimmigrant Status could receive their visa.[66]

If the application for U Nonimmigrant Status is ultimately successful, the applicant receives valid nonimmigrant—or temporary—status in the United States for four years.[67] In addition, the applicant receives authorization to work in the United States during this time.[68] The applicant may also petition for derivative status for family members, as the ability to reunite or remain with family is a vital part of achieving the U visa's humanitarian purpose and also contributes to the likelihood that the applicant will fully cooperate with law enforcement, sometimes for prolonged periods of time.[69] Applicants under twenty-one years of age may petition for derivative immigration status for their spouse, children, parents, and unmarried siblings who were under eighteen years old on the date the principal applicant's petition was filed.[70]

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59. Orloff et al., *Mandatory U Visa Certification*, *supra* note 14, at 645.

60. *Id*. As of mid-2020, applicants from certain states will have their applications adjudicated by the Nebraska Service Center, which has no subject matter focus. *U Nonimmigrant Status Program Updates*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 25, 2017), https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-criminal-activity-u-nonimmigrant-status/u-nonimmigrant-status-program-updates.

61. *See* 8 U.S.C. § 1184(p)(2) (2018); 8 C.F.R. § 214.14(d) (2020); FOREIGN AFFAIRS MANUAL, *supra* note 23, at 402.6-6(B)(c); Amanda Frost, *Cooperative Enforcement in Immigration Law*, 103 Iowa L. Rev. 1, 33 (2017); Settlage, *supra* note 11, at 1787; Kagan, *supra* note 14, at 939.

62. *See* Frost, *supra* note 61, at 33; Saucedo, *Immigration Enforcement*, supra note 15, at 318–19; Cade & Flanagan, *supra* note 8, at 106–07; Saucedo, *A New "U," supra* note 15, at 912.

63. *See* Settlage, *supra* note 11, at 1787.

64. *See* Frost, *supra* note 61, at 33; Settlage, *supra* note 11, at 1787.

65. *See* Settlage, *supra* note 11, at 1787.

66. *See* U.S. CITIZENSHIP & IMMIGR. SERVS, NUMBER OF FORM I-918, PETITION FOR U NONIMMIGRANT STATUS BY FISCAL YEAR, QUARTER, AND CASE STATUS FISCAL YEARS 2009-2020 (2020), https://www.uscis.gov/sites/default/files/document/data/I918u_visastatistics_fy2020_qtr2.pdf.

67. *See* Cade & Flanagan, *supra* note 8, at 92; Kagan, *supra* note 14, at 925.

68. *See* Abrams, *supra* note 14, at 380.

69. *See* 8 U.S.C. § 1101(a)(15)(U)(ii) (2020); Cade & Flanagan, *supra* note 8, at 92; Kagan, *supra* note 14, at 925.

70. *See* 8 U.S.C. § 1101(a)(15)(U)(ii)(I) (2018).

Applicants over twenty-one years of age may petition for derivative immigration status for their spouse and children.[71] The perpetrator of the qualifying crime is not eligible for derivative U Nonimmigrant Status, so a child cannot petition for derivative status for a parent whose abuse gave rise to their U visa eligibility.[72]

After three years, the U visa holder may apply to adjust their status to permanent residence if they can establish the following: (1) they have been physically present in the United States for a continuous period of at least three years while in U Nonimmigrant Status, (2) they have not unreasonably refused to assist law enforcement since receiving their U visa, and (3) their continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.[73] To demonstrate their helpfulness to law enforcement in the adjustment context, the applicant need only provide "any credible evidence." They do not need to provide a certification from law enforcement.[74] Once the U visa holder adjusts status, they become a legal permanent resident ("green card holder").[75] Five years after that, they may apply to become a citizen.[76]

C. *The Helpfulness Requirement and Law Enforcement Certification*

As demonstrated by the legislative history and evidentiary requirements, cooperation with a law enforcement investigation or prosecution is an integral part of U Nonimmigrant Status.[77] The statute requires that a U visa applicant "has been helpful, is being helpful, or is likely to be helpful" to "authorities investigating or prosecuting criminal activity."[78] The regulations go on to specify that a victim must possess "credible and reliable information establishing that he or she has knowledge of the details upon which his or her petition is based" and must be helpful or likely to be helpful to a certifying agency, assisting them in the investigation or prosecution of the qualifying criminal activity.[79]

There is no exception available for this helpfulness requirement, and an applicant's obligation to cooperate with law enforcement is ongoing until the U visa holder adjusts to legal permanent residence.[80] "The statute imposes an ongoing responsibility on the alien victim to provide assistance, assuming

71. *See* 8 U.S.C. § 1101(a)(15)(U)(ii)(II) (2018).
72. *See* 8 C.F.R. § 214.14(f)(1) (2020); FOREIGN AFFAIRS MANUAL, *supra* note 23, at 402.6-6(E)(1)(c).
73. FOREIGN AFFAIRS MANUAL, *supra* note 23, at 402.6–6(J); Kagan, *supra* note 14, at 925; Cade & Flanagan, *supra* note 8, at 92.
74. *See* Abrams, *supra* note 14, at 410.
75. *See* Kagan, *supra* note 14, at 925; Cade & Flanagan, *supra* note 8, at 92.
76. *See* 8 U.S.C. § 1427(a) (2018).
77. *See* Orloff et al., *Mandatory U Visa Certification*, *supra* note 14, at 634-35; Kagan, *supra* note 14, at 927; Cade & Flanagan, *supra* note 8, at 94; Settlage, *supra* note 11, at 1765.
78. 8 U.S.C. 1101(a)(15)(U) (2018).
79. 8 C.F.R. §§ 214.14(b)(2)–(3) (2020).
80. *See* Abrams, *supra* note 14, at 375.

there is an ongoing need for the alien victim's assistance. This requirement applies to the alien victim while [their] petition is pending and, if approved, while [they are] in U nonimmigrant status."[81] This underscores the U visa's purpose as an investigative tool aimed at protecting immigrant victims who come forward to report crimes.[82] Refusal or failure to cooperate with or provide information to law enforcement is a bar to U visa eligibility.[83]

There was a great deal of debate at the inception of the U visa about whether law enforcement cooperation should be required of applicants and, if so, what that should entail.[84] Some argued that cooperation with law enforcement could be dangerous or even fatal to an immigrant victim of a violent crime, pointing to statistics indicating that the risk of violence increases upon involvement with the criminal justice system.[85] Congress responded to this concern by declining to require law enforcement cooperation for other forms of relief for battered victims; the U visa was the sole exception.[86]

Congress implemented this helpfulness requirement by mandating a signed certification from a certifying agency as part of the U visa application.[87] A certification is simply a means by which law enforcement attests to an applicant's helpfulness.[88] Not everyone who obtains a certification will qualify for U Nonimmigrant Status, but "the visa process cannot start at the federal level until the crime victim receives state/local certification,"[89] and certifying agencies have "unchecked discretion" over whether or not to issue it.[90]

The certification is not mentioned in the eligibility requirements of the U visa created in 2000, which only say the applicant must possess information about the criminal activity and must be helpful or likely to be helpful.[91] The certification requirement exists in a different section of the statute, entirely separate from the section outlining eligibility requirements, and says the following:

> The petition filed by an alien under section 1101(a)(15)(U)(i) of this title shall contain a certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local

81. FOREIGN AFFAIRS MANUAL, *supra* note 23, at 402.6-6(C)(f).

82. *See* Orloff et al., *Mandatory U Visa Certification*, *supra* note 14, at 634-35; Kagan, *supra* note 14, at 927; Cade & Flanagan, *supra* note 8, at 94.

83. *See* 8 C.F.R. § 214.14(b)(3) (2020); Cade & Flanagan, *supra* note 8, at 94.

84. *See* Settlage, *supra* note 11, at 1768–71.

85. *See, e.g.*, Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the H. Subcomm. on the Judiciary, 106th Cong. 66-253, 167–68 (2000) (statement of Leslye Orloff, Director, Immigrant Women Project, NOW Legal Defense and Education Fund).

86. *See* Settlage, *supra* note 11, at 1769.

87. *See* 8 U.S.C. § 1184(p)(1) (2018); Cade & Flanagan, *supra* note 8, at 88.

88. *See* 8 C.F.R. § 214.14(a)(12) (2020); 8 U.S.C. 1101(a)(15)(U)(i)(III) (2018); FOREIGN AFFAIRS MANUAL, *supra* note 23, at 402.6-6(D); Cade & Flanagan, *supra* note 8, at 94.

89. *See* 8 C.F.R. § 214.14(c)(2)(i) (2020); DEP'T OF HOMELAND SEC., INSTRUCTIONS FOR SUPPLEMENT B, U NONIMMIGRANT STATUS CERTIFICATION 1–5 (2019), https://www.uscis.gov/sites/default/files/document/forms/i-918supbinstr.pdf; Cade & Flanagan, *supra* note 8, at 95.

90. Newman, *supra* note 11, at 270–71; *see also Ordonez Orosco*, 598 F.3d at 226–27; Cade & Flanagan, *supra* note 8, at 97–98; Settlage, *supra* note 11, at 1767.

91. *See* 8 U.S.C. §§ 1101(a)(15)(U)(i)(II)–(III) (2018).

> authority investigating criminal activity described in section 1101(a)(15)(U)(iii) of this title. This certification may also be provided by an official of the Service whose ability to provide such certification is not limited to information concerning immigration violations. This certification shall state that the alien "has been helpful, is being helpful, or is likely to be helpful" in the investigation or prosecution of criminal activity described in section 1101(a)(15)(U)(iii) of this title.[92]

Note that the statute does not actually require the Form I-918, Supplement B that USCIS has decided to mandate. Rather, it only requires some certification from law enforcement. DHS chose to designate a specific form in its regulations,[93] but the language of the statute allows for any kind of statement from law enforcement that says the applicant has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of qualifying criminal activity.[94] Also, note that all eligibility requirements for the U visa aside from the helpfulness requirement are only subject to an "any credible evidence" standard.[95]

Like the helpfulness requirement, the certification requirement has been debated over the years. In 2013, during the VAWA reauthorization process, Senator Leahy introduced an amendment that would allow for secondary evidence of a victim's helpfulness in place of the certification, but this amendment was not included in the final version of the bill.[96] Despite the historical back-and-forth about the advisability of the requirement, a U visa applicant today must obtain a certification signed by a designated certifying agency.[97]

The helpfulness and certification requirements are inherently problematic because they are premised on the flawed assumptions that (1) law enforcement and quasi-law enforcement agencies will investigate every qualifying crime such that the victim's helpfulness is needed, (2) law enforcement and quasi-law enforcement agencies have positive relationships with immigrant communities that allow them to facilitate access to this form of immigration relief fairly, and (3) law enforcement and quasi-law enforcement agencies help all victims regardless of immigration status and do not make decisions based on bias or political expediency.[98] The reality of these agencies' interactions with the immigrant communities tells a different story.[99]

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92. 8 U.S.C. § 1184(p) (2018).
93. *See* 8 C.F.R. § 214.14(a)(12) (2020); 8 C.F.R. § 214.14(c)(2) (2020).
94. *See* 8 U.S.C. § 1184(p) (2018).
95. *See* 8 U.S.C. § 1184(p)(4) (2018); 8 C.F.R. § 214.14(c)(4) (2020); Orloff et al., *Mandatory U Visa Certification*, supra note 14, at 635–38; Settlage, *supra* note 11, at 1768.
96. *See* Settlage, *supra* note 11, at 1771.
97. *See* 8 U.S.C. § 1184(p)(1) (2018); Cade & Flanagan, *supra* note 8, at 94.
98. *See* Cade & Flanagan, *supra* note 8, at 90 ("Humanitarian organizations and law enforcement officials have long noted a breakdown in communication between noncitizens and law enforcement because of fears of deportation.").
99. *See* Dutton et al., *supra* note 35, at 255; Ankita Patel, *Back to the Drawing Board: Rethinking Protections Available to Victims of Trafficking*, 9 SEATTLE J. SOC. JUST. 813, 833 (2011); *see generally*

D. *Defining "Certifying Agency"*

The legislative history, purpose, and plain language of the U visa regulations demonstrate Congress's intent to rely on the expertise of child protective service agencies as certifying authorities. Federal law broadly defines which entities may issue a certification of helpfulness. A certifying agency is defined as follows:

> [A] Federal, State, or local law enforcement agency, prosecutor, judge, or other authority, that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity. This definition includes agencies that have criminal investigative jurisdiction in their respective areas of expertise, including, but not limited to, child protective services, the Equal Employment Opportunity Commission, and the Department of Labor.[100]

In its 2007 interim rules on U Nonimmigrant Status, which were later adopted permanently, DHS explained that the term "investigation *or* prosecution" in the statute and regulations should be interpreted broadly.[101] The regulations include non-traditional law enforcement agencies like child protective services in the definition of "certifying agencies" out of a recognition that those agencies "have criminal investigative jurisdiction in their respective areas of expertise."[102] Congress specifically "chose not to require that the investigation result in a criminal prosecution against the perpetrator."[103] Rather, "[i]t is enough that the victim reports the crime and that the law enforcement agency has investigated the matter enough to detect qualifying criminal activity."[104] The DHS interim rule, which was later permanently adopted, clarified that the investigating agency need not even have prosecutorial authority; rather, "the term 'investigation or prosecution,' used in the statute and throughout the rule, includes the detection or investigation of a qualifying crime or criminal activity, as well as the prosecution, conviction, or sentencing of the perpetrator of such crime or criminal activity."[105]

Policing Immigrant Communities, 128 HARV. L. REV. 1771 (2015) (exploring challenges in the policing of immigrants).

100. 8 C.F.R. § 214.14(a)(2) (2020).

101. *U Visa Interim Rule*, *supra* note 42, at 53019 (emphasis added).

102. *Id.* at 53036; *see also* Saucedo, *A New "U," supra* note 15, at 893 (discussing Department of Labor and Equal Employment Opportunity Commission as certifying agencies); Sylvia Lara Altreuter, *Family Courts As Certifying Agencies: When Family Courts Can Certify U Visa Applications for Survivors of Intimate Partner Violence*, 86 FORDHAM L. REV. 2925, 2940 (2018) (discussing family courts as certifying agencies).

103. Cade & Flanagan, *supra* note 8, at 94.

104. *Id.* at 94–95.

105. *U Visa Interim Rule*, *supra* note 42, at 53020; *see also* Newman, *supra* note 11, at 271 ("An applicant should be issued a certificate if she provided helpful information to investigate a crime of domestic violence, even if the prosecution decided to charge the perpetrator with a different crime, declined to prosecute at all, or went to trial and lost the case.").

The regulations include non-traditional law enforcement agencies like child protective services, the Equal Employment Opportunity Commission, and the Department of Labor in the definition of "certifying agencies" out of a recognition that those agencies "have criminal investigative jurisdiction in their respective areas of expertise."[106] Other non-traditional law enforcement agencies listed in the rule are the Equal Employment Opportunity Commission and the Department of Labor.[107] However, the list of agencies in the regulations is not meant to be exhaustive; several DHS resources list certifying agencies as any "investigative agencies" or agencies with "criminal investigative jurisdiction."[108]

Not much information is available about why the architects of the U visa regulations included child protective services in particular among the list of certifying agencies, aside from the fact that they "have criminal investigative jurisdiction in their . . . area[] of expertise," namely investigating abuse and neglect of minors.[109] But from the inception of the U visa in 2000, legislators spoke of the importance of protecting immigrant children and of the implications criminal activity has on local child welfare agencies, clearly anticipating the role of child protective services in some capacity. For example, in a statement to Congress, Representative Jackson-Lee said, "[W]hen [battered immigrant] women are facing desperate times and struggles, they have children who are directly impacted. Oftentimes, when the mothers are in shelters or deported, the children become the custody of the local child welfare agencies."[110]

Congress recognized that "there would be many instances in which state, local, and federal authorities would bring actions against perpetrators that may not be criminal prosecutions[, including] child abuse cases."[111] Although child protection agencies have been included in the definition of the term "certifying agency" since its inception with the interim rule in 2007,[112] practitioners were seeking and obtaining certifications from child protection agencies before this language was added. Thus, the certification power belongs to entities that are most likely to have knowledge of and investigate certain offenses. Child protective service agencies often play this role in child abuse cases, and the U visa regulations acknowledge this reality.

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106. *Id.* at 53036; *see also* Saucedo, *A New "U," supra* note 15, at 893 (discussing Department of Labor and Equal Employment Opportunity Commission as certifying agencies); Altreuter, *supra* note 102, at 2940 (discussing family courts as certifying agencies); 8 C.F.R. § 214.14(a)(2) (2020).

107. *See* 8 C.F.R. § 214.14(a)(2) (2020).

108. *See, e.g.*, DEP'T OF HOMELAND SEC., U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, 12–13 (2020) https://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf [hereinafter DHS Law Enforcement Guide].

109. *U Visa Interim Rule*, *supra* note 42, at 53019.

110. 146 CONG. REC. H9042 (daily ed. Oct. 6, 2000) (statement of Rep. Jackson-Lee).

111. Orloff et al., *Mandatory U Visa Certification supra* note 14, at 639.

112. *See U Visa Interim Rule*, *supra* note 42, at 53013.

E. *Special Considerations for Child Welfare Agencies*

Many of the issues discussed in this paper apply to any category of certifying agency—such as police departments, prosecutors, or judges—and not only child welfare agencies. This section outlines the reasons why this paper focuses on child welfare agencies in particular.

Youth who interact with the foster care system may experience crimes, such as physical abuse or sexual assault, either before they enter care or while they are in care. Although statistics vary, the Administration for Children and Families reported in 2018 that 10.7% of children interacting with state child welfare systems did so as a result of physical abuse, 7% resulted from sexual abuse, and 15.5% involved multiple types of abuse, which could include physical abuse, sexual abuse, or both.[113] Once youth are removed from their homes and placed in foster care, the likelihood of experiencing maltreatment is generally higher than for children who are not in the system.[114]

A youth who has experienced physical or sexual assault may qualify for U Nonimmigrant Status.[115] Often, traditional law enforcement agencies do not investigate these crimes in a meaningful way, making it difficult, if not impossible, for the victim to obtain the predicate law enforcement certification from those agencies.[116] After all, dependency cases are civil proceedings, not criminal.[117] However, child protective service agencies do investigate these crimes, and youth frequently participate in these investigations by taking part in interviews or testifying in court proceedings.[118] These agencies can play an important role in immigrant children's lives, and they have expertise when it comes to investigating child abuse affecting this population. Youth who have been victims of such criminal activity and have cooperated with a child protective service investigation qualify for U Nonimmigrant

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113. U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, CHILD MALTREATMENT 2018 21, 40 (2018), https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2018.pdf (Experts have long criticized available data on the child welfare system as incomplete or underreported, so these numbers likely do not capture the full scope of the problem) [hereinafter ACF, *Child Maltreatment 2018*]; *see*, *e.g.*, David Finkelhor, CURRENT CONTROVERSIES ON FAMILY VIOLENCE 299 (Donileen R. Loseke, et al. eds., 2d ed. 2005).

114. *See* David J. Herring, *Child Placement Decisions: The Relevance of Facial Resemblance and Biological Relationships*, 43 JURIMETRICS J. 387, 405 (2003); Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 542 (2019); Sara S. Greene, *A Theory of Poverty: Legal Immobility*, 96 WASH. U.L. REV. 753, 782 (2019); Jill M. Zuccardy, *Nicholson v. Williams: The Case*, 82 DENV. U. L. REV. 655, 667 (2005).

115. *See* 8 U.S.C. § 1101(a)(15)(U)(iii) (2018) (listing the crimes that qualify someone to apply for U Nonimmigrant Status, including rape, incest, domestic violence, sexual assault, abusive sexual contact, stalking, and felonious assault).

116. *See* Settlage, *supra* note 11, at 1772 ("[L]aw enforcement officers are not always willing to respond to reports of domestic abuse or document an investigation."); *see generally* CHILDREN'S WELFARE INFO. GATEWAY, CROSS-REPORTING AMONG RESPONDERS TO CHILD ABUSE AND NEGLECT (2016) (reviewing state policies on cross-reporting between child protective agencies and law enforcement).

117. *See generally* William Wesley Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 GA. L. REV. 473, 478 (1990).

118. *See* Robert H. Pantell, *The Child Witness in the Courtroom*, PEDIATRICS, Mar. 2017, at 1; Trivedi, *supra* note 114, at 525.

Status and should be able to get a certification from the child protection agency. Unfortunately, this does not always happen.[119]

As discussed in detail in Part II, all types of certifying agencies have certification policies and practices that lack standardization and consistency.[120] Many of the solutions proposed in this article may be extrapolated to non-child welfare certifying agencies, such as police departments, prosecutors, and courts. This lack of consistency undermines the U visa's goals because it means that immigrants who have experienced the same crimes and cooperated with law enforcement to the same extent have different access to immigration relief simply because of their geographic location. Many scholars have addressed the problem of inconsistent certification practices by law enforcement, including other non-traditional law enforcement agencies such as the Equal Employment Opportunity Commission and the Department of Labor.[121] However, there is a gap in the existing scholarship regarding child welfare agencies as certifiers, and U visa certifications by child welfare agencies raise some particularly compelling, unique, and challenging questions.

This section outlines five reasons why child welfare agencies are the focus of this article and the solution it presents: (1) the legal duties child protection agencies owe to the youths in their care, (2) the agencies' non-traditional law enforcement role, (3) the interplay of the federal and state interests in the welfare of children, (4) the impact of federal funding of state child welfare agencies, and (5) the fundamental failure existing at the intersection of the immigration and the child welfare systems.

First, and most importantly, child protection agencies have long been considered to have *parens patriae* duties to the victims in their care, including a legal mandate to secure a child's safety and well-being, provide needed services, and evaluate options for permanency.[122] Permanency demands that a child be given "a stable, safe, custodial environment . . . [to] provide the child with such basic needs as safety and protection, stability and continuity of

119. *See generally* 8 U.S.C. § 1101(a)(15)(U) (2018); 8 C.F.R. § 214.14 (2020).

120. *See* ABREU ET AL., *supra* note 13, at 31–32; Cade & Flanagan, *supra* note 8, at 97–98; Abrams, *supra* note 14, at 392; Orloff et al., *supra* note 14, at 638.

121. *See* Cade & Flanagan, *supra* note 8, at 96–98; Orloff et al., *Mandatory U Visa Certification*, *supra* note 14, at 637; Jensen, *supra* note 14, at 704; Settlage, *supra* note 11, at 1792–93; Abrams, *supra* note 14, at 411; Newman, *supra* note 11, at 271; Kagan, *supra* note 14, at 929; *see generally* Cho et al., *supra* note 15; Nadas, *supra* note 15; Saucedo, *A New "U," supra* note 15; Saucedo, *Immigration Enforcement*, *supra* note 15.

122. *See* Daniel L. Hatcher, *Purpose vs. Power: Parens Patriae and Agency Self-Interest*, 42 N.M. L. REV. 159, 164–65 (2012) ("[T]he parens patriae doctrine [provides] the foundational authority and duty of states to serve and protect the best interests of children."); Rebecca Williams, *Faith Healing Exceptions Versus Parens Patriae: Something's Gotta Give*, 10 FIRST AMEND. L. REV. 692, 722 (2012) ("The doctrine of parens patriae is defined by many states as more than just a right, but also a duty to protect the interests of children."); *Parens Patriae*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining *parens patriae* as "the state in its capacity as provider of protection to those unable to care for themselves"); Elizabeth A. Varney, *Trading Custody for Care: Why Parents Are Forced to Choose Between the Two and Why the Government Must Support the Keeping Families Together Act*, 39 NEW ENG. L. REV. 755, 761 (2005) ("Under the doctrine of parens patriae, the state has a right, indeed, a duty, to protect children.").

caregivers, a sense of identity, and the opportunity to grow both physically and emotionally."[123] Federal law mandates any state child welfare agency receiving federal dollars work toward permanency.[124] It also requires state agencies to create a "plan for assuring that the child receives safe and proper care and that services are provided" to facilitate permanency and "address the needs of the child while in foster care," among other things.[125] Finally, it requires agencies to verify each child's immigration status.[126]

In addition to these federal mandates, many state statutes require their child welfare systems to make timely permanency decisions and provide "care, treatment, and guidance that will assist the child in developing into a self-sufficient adult."[127] State and federal case law support this. Multiple courts have found that child welfare agencies have a duty to protect and supervise children over whom they have assumed a custodial role, though there are some limitations.[128]

Inconsistent certification practices interfere with these duties.[129] The requirements to evaluate options for permanency and help children work toward safety and self-sufficiency should include options for long-term immigration relief where a child is undocumented or has insecure status. In fact, many states have policies that specifically require this type of immigration evaluation.[130] Where states have a custodial duty toward a child in their care

123. Varney, *supra* note 122, at 767–68.

124. *See* 42 U.S.C. §§ 671(a)(15)(C)–(E).

125. 42 U.S.C. § 675 (2018); *see also* 45 C.F.R. § 1356.21 (2020).

126. *See* 42 U.S.C. § 671(a)(27) (2018).

127. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., DETERMINING THE BEST INTERESTS OF THE CHILD, CHILD WELFARE INFO. GATEWAY 2 (2016), https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/best-interest (finding nineteen states listed permanency as a guiding principle in determining a child's best interests and twelve listed self-sufficiency).

128. *See, e.g.*, DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989) (finding the state has no duty to protect a child from third party violence but "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being"); Nicini v. Morra, 212 F.3d 798, 808 (3d Cir. 2000) ("[W]hen the state places a child in state-regulated foster care, the state has entered into a special relationship with that child which imposes upon it certain affirmative duties."); Connor B. *ex rel.* Vigurs v. Patrick, 985 F. Supp. 2d 129, 134–35 (D. Mass. 2013), *aff'd*, 774 F.3d 45 (1st Cir. 2014) (finding federal funding involves assessment of states in three areas: child safety, permanency, and child and family well-being); *In re* Andrew C., No. H12CP11013647A, 2011 WL 1886493, at *17 (Conn. Super. Ct. Apr. 19, 2011); H.B.H. v. State, 429 P.3d 484, 489 (Wash. 2018) ("[W]here the State [places children] in foster care, the State has a statutory and constitutional duty to ensure that those children are free from unreasonable risk of harm . . . flowing from the lack of basic services while under the State's care and supervision."); Braam *ex rel.* Braam v. State, 81 P.3d 851, 857 (Wash. 2003) ("[A]s custodian and caretaker of foster children," the State . . . must include adequate services to meet the basic needs of the child.").

129. *See* discussion *infra* Section III.A.

130. *See, e.g.*, N.C. DEP'T OF HEALTH & HUMAN SERVS., PERMANENCY PLANNING SERVICES POLICY, PROTOCOL, AND GUIDANCE 138 (2020), https://policies.ncdhhs.gov/divisional/social-services/child-welfare/policy-manuals/permanency-planning_manual.pdf; MO. DEP'T OF SOC. SERVS., CHILD WELFARE MANUAL: SECTION 4, CHAPTER 4 (WORKING WITH CHILDREN), SUBSECTION 4 – SPECIAL POPULATIONS (2019), https://dssmanuals.mo.gov/child-welfare-manual/section-4-chapter-4-working-with-children-subsection-4-special-populations/; CONN. DEP'T OF CHILDREN & FAMILIES, SPECIALIZED CHILD WELFARE SUBJECTS: IMMIGRATION 21–13 (2019), https://portal.ct.gov/DCF/Policy/Legal/V12 [hereinafter Conn. DCF, *Immigration*]; TEX. DEP'T

and fail to engage in immigration permanency planning, those states fail to meet their *parens patriae* duties and responsibilities.

Equivalent duties and mandates do not exist for other law enforcement or certifying agencies. Thus, child welfare agencies are emblematic of this larger structural problem with the U visa. Where other agencies might have broader jurisdiction, the reason child welfare agencies exist is to protect children. When an agency does not consistently issue U visa certifications, it fails to fulfill that purpose and abdicates its duties to youth in its care. The example of child welfare agencies highlights how the unwillingness of local entities to participate in the U visa process, even where certification is compatible with larger agency goals, perverts the purpose of the U visa.

Second, child welfare agencies play a "non-traditional" law enforcement role because they cannot arrest or prosecute those accused of committing the criminal activity they investigate. For this reason, the risk of confusion about their certifying role is greater. Child welfare agencies may not readily view themselves as possessing investigative authority over criminal activity in the same way a police department would because, though there may be criminal penalties for child abuse, child protection proceedings are civil proceedings.[131] In fact, this is among the justifications Texas DFPS provided in explaining their decision to categorically decline to certify U visas.[132] Although the regulatory language explicitly includes child protective services in the definition of certifying agencies, Texas is an example of how child welfare agencies' unique role may yield confusion about certifications by law enforcement versus quasi-law enforcement agencies. As a result of this confusion, the risk that child welfare agencies will wrongly or arbitrarily block access to U visas by failing to issue certifications is higher. Yet obtaining a certification is "a tremendous obstacle for survivors," as is the prospect of working with police.[133] This requires advocates to "approach certification creatively and seek certification from less obvious authorities."[134] For this reason, it is important that child protective services remain an option for certification.

Third, child welfare agencies certifying—or failing to certify—U visas blurs the lines between traditional state and federal roles. While the federal government has long been described as having complete plenary authority over immigration, states have traditionally taken primary responsibility for

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of Children & Family Servs., International and Immigration Issues 6700 (2017), https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_6700.asp ("Correctly identifying a child or youth's citizenship or immigration status and promptly pursuing available options promotes permanency.").

131. Rebecca E. Baneman, *Who Will Speak for the Children?: Finding A Constitutional Right to Counsel for Children in Foster Care*, 9 U. PA. J. CONST. L. 545, 547 n.9 (2007).

132. Letter from Susan E. Tennyson, Open Records Attorney for the Tex. Dep't of Family & Protective Servs., to Efren C. Olivares, Racial & Econ. Justice Program Dir., Tex. Civil Rights Project 1–2 (Feb. 13, 2017) (on file with author) [hereinafter Tennyson Letter]; Laura Marie Thompson, *Child Protective Services Refusing to Help Child Crime Victims with Immigration Visas*, THE TEX. OBSERVER (Dec. 2, 2016, 12:36 PM), https://www.texasobserver.org/child-protective-services-refusing-to-help-child-crime-victims; *See infra*, Section III.A for further discussion of this policy.

133. Altreuter, *supra* note 102, at 2925.

134. *Id*.

the safety and well-being of children in their jurisdictions.[135] This means both the child protection system and the immigration system have a legitimate interest in the welfare of immigrant children.[136] This article does not take the position that states are inherently better-positioned to exercise authority over child safety and welfare but rather acknowledges that this is a role states have traditionally assumed. While the federal government *could* make determinations about child abuse and helpfulness in the U visa context pursuant to the "any credible evidence" standard (as it does in other contexts), perhaps Congress decided that state child protection agencies have greater expertise and capacity to identify and address child abuse and are in a better position to evaluate helpfulness.[137]

Also, unlike traditional law enforcement agencies, which investigate and prosecute a wide array of crimes, child protective services has no federal equivalent.[138] In addition, while other law enforcement agencies across the country generally operate on a local level and may individually decide not to review certification requests as a local entity, many child protection agency policies are made at the state level.[139] This makes this issue unique since the actor is the state as a whole, rather than local law enforcement. This raises questions about the division of federal and state powers and whether child protection agencies are uniquely situated to make particular factual determinations.[140] Although it is important to note this tension, these questions of federal versus state powers as they relate to this issue are outside the scope of this article.

Fourth, every state's child welfare agency receives federal funding, giving both the state and federal government a vested interest in the quality of services provided by child welfare agencies and raising questions about if and how the federal government may direct the agencies it funds.[141] Though

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135. *See* Gregory Zhong Tian Chen, *Elian or Alien? The Contradictions of Protecting Undocumented Children Under the Special Immigrant Juvenile Statute*, 27 HASTINGS CONST. L.Q. 597, 602 (2000); Vivek S. Sankaran, *Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?*, 41 U. MICH. J.L. REFORM 281, 285 (2007).

136. *See* Chen, *supra* note 135, at 604–06.

137. Even this does not necessitate a certification requirement. The certification could still be optional evidence of helpfulness without being mandatory. *See* Cade & Flanagan, *supra* note 8, at 95 (discussing the gatekeeping effect of deferring to state agencies); Kagan, *supra* note 14, at 928; Stephen Lee, De Facto Immigration-Courts, 101 CAL. L. REV. 553, 553 (2013) ("[P]rosecutors can exercise their gatekeeping power to deviate from or completely unsettle federal immigration enforcement priorities. . . ."); Abrams, *supra* note 14, at 392 (shifting immigration decision-making power to local officials "fatally alter[s] the symbiotic balance that Congress envisioned. . . .").

138. *See* Emilie Stoltzfus, CONG. RESEARCH SERV., R43458, CHILD WELFARE: AN OVERVIEW OF FEDERAL PROGRAMS AND THEIR CURRENT FUNDING 4–5 (Jan, 10, 2017), https://fas.org/sgp/crs/misc/R43458.pdf. [hereinafter Stoltzfus, *Child Welfare: An Overview*].

139. *See id.*; Aimee Corbin, *Decreasing Disproportionality Through Kinship Care*, 18 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 73, 79 (2016).

140. *See* Chen, *supra* note 135, at 602.

141. *See* NAT. CONFERENCE OF STATE LEGISLATURES, CHILD WELFARE FINANCING (2019), http://www.ncsl.org/research/human-services/child-welfare-financing-101.aspx#/; Kristina Rosinsky & Dana Connelley, Child Welfare Financing SFY 2016: A Survey of Federal, State, and Local Expenditures, CHILD TRENDS 1 (2016), https://www.childtrends.org/publications/child-welfare-financing-sfy-2014-a-survey-of-federal-state-and-local-expenditures; Sankaran, *supra* note 135, at 290–91.

family law has traditionally been considered the sole purview of the states,[142] child welfare law has been increasingly federalized since the 1970s in an attempt to "reform state systems through incentive-based funding."[143] There are many legitimate critiques of this federalization trend. Some examples include that it incentivizes removing children from their families of origin, it compromises the independence of state court judges, it shifts state focus to compliance with funding requirements rather than seeking the best options for individual families, and it disincentivizes states from offering services that would divert families from the foster care system.[144] These critiques have been discussed at length, and the complex issue of federalization of state child welfare agencies is beyond the scope of this article. But regardless of its shortcomings, federal funding—and specifically the conditions placed on state agencies in order to receive it—significantly impacts state child welfare agencies across the country.[145] In exchange for federal dollars, states must comply with a host of requirements and mandates "designed to ensure the safety and well-being of all children and families served"[146] that "have become increasingly restrictive over the years."[147] Among these mandates is a requirement to ensure children have a safe and permanent home[148] and a requirement to create a plan for each child's proper care.[149] The federal funding of state child welfare agencies indicates that both the state and federal government share an interest and investment in the safety, stability, and well-being of children in foster care. It also indicates that the federal government can and does place all sorts of conditions on its funding. This means the child welfare system already has a mechanism in place to ensure compliance with federal funding and creates an opportunity for the federal government to create a legal hook for compliance with U visa standards. Such mechanisms do not exist with other types of certifying agencies.

Finally, certifications by child protection agencies expose a failure at the intersection of the child welfare and immigration systems and get to the very

142. *See, e.g.*, Sankaran, *supra* note 135, at 285; United States v. Lopez, 514 U.S. 549, 564–65 (1995).

143. Sankaran, *supra* note 135, at 288–89; *see also* Kay P. Kindred, *Of Child Welfare and Welfare Reform: The Implications for Children When Contradictory Policies Collide*, 9 WM. & MARY J. WOMEN & L. 413, 450 (2003).

144. *See generally* Zuzana Murarova & Elizabeth Thornton, *Federal Funding for Child Welfare: What You Should Know*, 29 CHILD. L. PRAC. 33 (2010); Sankaran, *supra* note 135; Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259 (2003).

145. *See generally* Sankaran, *supra* note 135; Muranova & Thronton, *supra* note 144; Crossley, *supra* note 144; Kindred, *supra* note 143.

146. Stoltzfus, *Child Welfare: An Overview*, *supra* note 138, at 1–2; Emilie Stoltzfus, *Child Welfare: Purposes, Federal Programs, and Funding*, CONG. RESEARCH SERV. 1 (2019), https://fas.org/sgp/crs/misc/IF10590.pdf [hereinafter Stoltzfus, *Child Welfare: Purposes, Federal Programs, and Funding*].

147. Sankaran, *supra* note 135, at 289–92; *see also* Crossley, *supra* note 144, at 270; Stoltzfus, *Child Welfare: An Overview*, *supra* note 146, at 6.

148. *See* Stoltzfus, *Child Welfare: An Overview*, *supra* note 138, at 1–2.

149. *See* 42 U.S.C. §§ 671(a)(15)(C), 675(1) (2018).

heart of why U visas were created in the first place.[150] Congress created the U visa to protect vulnerable populations—namely undocumented children and women who are victims of domestic violence.[151] Child welfare agencies were likewise created to protect a vulnerable population: children who experience abuse or neglect by caretakers.[152] When child welfare agencies refuse to certify, or when they certify in an arbitrary manner, they contravene not only the clear Congressional intent behind the U visa—to protect immigrant victims of crime and encourage them to report criminal activity to investigating agencies—but also the clear purpose of the child welfare system—to protect and work toward the best interests of children in their care.[153] Thus, the intersection of the U visa scheme and the child welfare system illustrates a failure to accomplish either goal.

For these reasons, this article focuses solely on child welfare agencies as a key example of reliance on certifying agencies and the problems that arise when certifications are inconsistent. But this is just one example of the larger systemic failure of certifying agencies across the country.[154]

II. INCONSISTENT APPROACHES TO U VISA CERTIFICATIONS BY CHILD WELFARE AGENCIES

Despite the clear intention to rely on child welfare agency expertise in certifying U visa applications, implementation of this certifying authority has been inconsistent, with agencies in different states—and even different localities—approaching certification in different ways. The certification process shifts "the criminal assessments that determine eligibility for the U visa" from the federal government to certifying agencies.[155] This system gives certifying agencies complete discretion about whether to issue a certification and under what circumstances,[156] and for this reason, it has been criticized as "allow[ing] for inconsistencies in the implementation of a national program."[157] Some state child welfare agencies have taken this to mean they have discretion about whether or not they even engage in good-faith review of certification requests, and "nothing constrains the discretion of law

150. *See* 146 CONG. REC. 10191–93 (daily ed. Oct. 11, 2000) (statement of Sen. Hatch); Castillo et al., *supra* note 8, at 1; Cade & Flanagan, *supra* note 8, at 90–91.

151. Cade & Flanagan, *supra* note 8, at 87–88; Settlage, *supra* note 11, at 1764–65; Abrams, *supra* note 14, at 379.

152. *See* John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 456–60 (2008); Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 HASTINGS L.J. 1, 41–61 (2001); Corbin, *supra* note 139, at 78–80.

153. *See* Cade & Flanagan, *supra* note 8, at 97–98; Abrams, *supra* note 14, at 392; Orloff et al., *Mandatory U Visa Certification*, *supra* note 14, at 638.

154. *See* Cade & Flanagan, *supra* note 8, at 97–98; Abrams, *supra* note 14, at 392; Orloff et al., *Mandatory U Visa Certification*, *supra* note 14, at 638.

155. Kagan, *supra* note 14, at 928.

156. *See* Settlage, *supra* note 11, at 1772–73; Newman, *supra* note, 11, at 271; *Ordonez Orosco*, 598 F.3d at 226–27.

157. Kagan, *supra* note 14, at 928.

enforcement officials to impose more onerous conditions than required by federal law, or to simply refuse to certify at all."[158]

Each year, undocumented youth interact with state child welfare systems as a result of abuse by a parent or caretaker, and many of these youth would qualify for U Nonimmigrant Status.[159] But the boundless discretion regarding whether and how law enforcement agencies will certify U visas promotes the inconsistent implementation of immigration regulations across states[160] and creates a scenario in which a youth's access to immigration relief depends not on the merits of their eligibility but rather on the coincidence of their geographic location. In addition, it means state child protection agencies are effectively making determinations about who may or may not remain in the United States, precluding otherwise eligible immigrant youth from accessing relief. Before these topics are discussed further, it is important to understand the disparate state policies around the country and what incentives and duties exist that might compel child welfare agencies to process or refuse to process certifications.

A. *Disparate Child Welfare Agency Certification Policies*

A survey of state child protective service agency policies demonstrates how widely the practices vary across the country. Some certifying agencies "abuse their discretion by implementing very limited certification policies or by refusing to participate in the U visa process at all," implementing blanket refusal policies against certifying—or even reviewing—any U visa applications.[161] Others arbitrarily refuse to sign certifications under certain circumstances or for particular applications for reasons unrelated to the statutory, regulatory, or DHS guidance. These agencies tack on their own requirements or more stringent policies. For example, they may create arbitrary deadlines, limit the types of crimes for which they will issue certifications, only provide certifications in open cases, only provide certifications in closed cases, and so on.[162] This creates obstacles for immigrants seeking access to relief and

158. Newman, *supra* note 11, at 271; ABREU ET AL., *supra* note 13, at 67; Cade & Flanagan, *supra* note 8, at 95.

159. *See* Chen, *supra* note 135, at 598; ACF, *Child Maltreatment 2018*, *supra* note 113, at 41. Reliable data pertaining to immigrant youth in the child welfare system are limited. Information about immigrant families' interactions with state child welfare agencies is not collected at state or national levels CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., ISSUE BRIEF: IMMIGRATION AND CHILD WELFARE ISSUE BRIEF 2 (2015), https://www.childwelfare.gov/pubPDFs/immigration.pdf. One study estimates immigrants make up about 8.6% of children who interact with child welfare systems. YALI LINCROFT & ALAN J. DETTLAFF, FIRST FOCUS ON CHILDREN, CHILDREN OF IMMIGRANTS IN THE U.S. CHILD WELFARE SYSTEM, FIRST FOCUS 1 (2010), https://firstfocus.org/resources/fact-sheet/children-immigrants-u-s-child-welfare-system (There is reason to believe this is underreported, such as fear of disclosing immigration status and insufficient tracking systems.).

160. *See* Newman, *supra* note 11, at 271; ABREU ET AL., *supra* note 13, at 67; Cade & Flanagan, *supra* note 8, at 95.

161. ABREU ET AL., *supra* note 13, at 4.

162. *See* Yvette Lopez-Cooper, *¿En Qué Te Puedo Ayudar? When is a Crime Victim Helpful? Using California's Immigrant Victims of Crime Equity Act (Senate Bill 674) to Define the U Visa's Helpfulness*

results in policies that vary widely from one agency to another.[163] Still other certifying agencies have a statute or policy requiring consistent review and issuance of certifications where the applicants are victims of qualifying criminal activity and demonstrate helpfulness to law enforcement.[164] Even these states vary in their level of protection and discretion.[165] Finally, some have no clear policy and thus fail to review certification requests in a consistent or principled manner. For example, these states may leave the decision to the discretion of individual employees who lack guidance about when or how to issue certifications, or they may not inform employees that they can sign certifications at all.

This section will not discuss the policy of every single state child protection agency, in part because not every state has a discernible policy that is consistently implemented. This itself demonstrates the problem. Rather, this section will evaluate a few key examples that demonstrate the array of inconsistent approaches child protection agencies have taken to implementing certification authority.

1. *Texas*

The Texas DFPS provides an example of the most restrictive possible policy. Before 2016, DFPS issued certifications and had a policy requiring staff members to send certification requests up the chain of command for review.[166] In 2016, DFPS shifted its policy to a blanket refusal to certify any U visas.[167] As justification for this policy change, DFPS stated it could no longer issue certifications because it "do[es] not have criminal investigative authority" and "could no longer provide certifications that would be effective for the applicants."[168] As alluded to in Part I, this policy misinterprets the statutory language, which not only explicitly counts child protective services among the list of certifying agencies but also broadly defines a certifying agency as an "authority that has responsibility for the investigation *or* prosecution of a qualifying crime or criminal activity."[169] As explained in Section I.D, "investigation" is defined broadly.

Requirement, 53 CAL. W. L. REV. 149, 158–59 (2017); Newman, *supra* note 4, at 270–71; ABREU ET AL., *supra* note 4, at 36; Settlage, *supra* note 11, at 1774.

163. *See* Lopez-Cooper, *supra* note 162, at 159; Newman, *supra* note 11, at 270–71; ABREU ET AL., *supra* note 13, at 36; Settlage, *supra* note 11, at 1774.

164. *See* ABREU ET AL., *supra* note 13, at 45–46.

165. *See* SALLY KINOSHITA & ALISON KAMHI, IMMIGRANT LEGAL RES. CTR., A Guide to Obtaining U Visa Certifications 4 (2017), https://www.ilrc.org/sites/default/files/resources/u_visa_certification_advisory_ab.ak_.pdf.

166. *See* TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., CHILD PROTECTIVE SERVS. HANDBOOK 6724 (2013) (on file with the author); *see also* Memorandum from Audrey Deckinga, Assistant Comm'r for Tex. Child Protective Servs., to CPS Reg'l Dirs., Program Adm'rs, and Program Dirs. (Aug. 6, 2012) (on file with the author).

167. *See* Tex. DFPS, *U Visa Certification Requests*, *supra* note 26.

168. *See* Tennyson Letter, *supra* note 132.

169. 8 C.F.R. § 214.14(a)(2) (2020) (emphasis added); *see* discussion *supra* Section I.D.

2. *Massachusetts & Connecticut*

Toward the other end of the spectrum, the Massachusetts and Connecticut child welfare agencies both have robust policies related to the review of certification requests. In Massachusetts, the Department of Children and Families ("DCF") lays out steps for staff to take when they receive requests for U visa certifications.[170] DCF interprets their certifying authority broadly to include current or former clients as well as those who were only investigated by DCF (regardless of whether the allegations were ultimately supported or unsupported) but who never entered care.[171] DCF gives area directors the authority to issue certifications and directs them to verify that the client qualifies for U Nonimmigrant Status.[172] Area directors must forward the certification request to the Office of the General Counsel within fourteen days from the time the request was presented to the Department.[173]

Connecticut takes this policy further by broadening protections to parent victims and requiring caseworkers to take certain steps.[174] If a caseworker believes either an adult or child they are working with may qualify for a U visa, either as a victim of domestic violence or another qualifying crime, that caseworker is required to consult with the DCF area office attorney and forward a request for certification to the agency's designated certifier.[175] The caseworker does not have discretion whether to proceed with a U visa certification, as the policy says they "shall" take both of these steps.[176]

3. *California & New York*

Both California and New York have protocols in place governing all certifying agencies, not just child welfare agencies. The state of New York issued a protocol "to ensure that all state agencies with the authority to certify have adequate procedures for the receipt and timely processing of requests" for certification and addresses situations when the "certification form *must* be provided by a New York state agency to an eligible petitioner."[177] The protocol broadly defines who may be considered an eligible petitioner as well as

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170. *See* MASS. DEP'T OF CHILDREN & FAMILIES, U NONIMMIGRANT STATUS CERTIFICATION (U VISA) GUIDANCE & PROTOCOL 2–4 (2018) (on file with author) [hereinafter MASS. DCF, U NONIMMIGRANT STATUS].

171. *Id.* at 1.

172. *Id.* at 2.

173. *Id.* at 2–3.

174. *See* Conn. DCF, *Immigration*, *supra* note 130, at 2. In addition to a child welfare agency policy, Connecticut does have a statewide statute to address U visa certifications. *See* CONN. GEN. STAT. ANN. § 46b-38b (West 2021). This statute appears only to apply to traditional law enforcement agencies as it delineates the duties of a "peace officer" and discusses procedures for arresting and charging family violence. *See generally id.* (employing the term "peace officer" throughout).

175. Conn. DCF, *Immigration*, *supra* note 130, at 2.

176. *Id.*

177. *See* N.Y. OFFICE FOR NEW AM., UNIFIED STATEWIDE U VISA PROTOCOL: NEW YORK STATE'S PROTOCOL REGARDING CERTIFICATION OF USCIS FORM I-918, SUPPLEMENT B 1 (2018), https://newamericans.ny.gov/pdf/U%20Visa%20Certification%20Protocol_FINAL.pdf [hereinafter N.Y. U VISA PROTOCOL] (emphasis added).

which agencies qualify as certifying agencies.[178] If the agency has reason to believe a petitioner is a direct victim, indirect victim, or bystander of a qualifying crime (based on any credible evidence, including the petitioner's own testimony), the agency has jurisdiction to investigate that crime, and the petitioner has been, is being, or is likely to be helpful to the agency (considering the totality of all relevant facts and circumstances), then the agency *shall* issue a certification.[179] The agency is required to do so as soon as possible, but no later than sixty days from when the request was received.[180] If the petitioner or a qualifying family member is in removal proceedings, the agency must process the request within fourteen days.[181] The protocol also provides additional protections for immigrant crime victims.[182] For example, it prohibits agency staff from questioning any victims or witnesses about their immigration status except as necessary to discuss a certification, and it requires certifying agencies to explain to the petitioner that the agency does not make referrals to Immigration and Customs Enforcement.[183] There is a statewide certification coordinator whose job is to ensure compliance with this protocol.[184]

The New York statewide protocol calls on certifying agencies to develop additional policies specific to the operation of their organization.[185] In addition to the statewide protocol, the New York Office of Children and Family Services issued its own U visa certification request instructions and guidance for agency staff.[186] This document lays out precise steps agency staff must take when issuing U visa certifications to eligible children or family members.[187] New York's protocol offers robust protection for victims, but because it is based on state policy and not a statute, it is precarious and subject to change with a new administration.[188]

California went even further than New York by creating a statewide statutory mandate for investigating agencies to issue certifications. California's Immigrant Victims of Crime Equity Act, which took effect on January 1, 2016, created an affirmative responsibility for California certifying agencies to provide certifications to victims of qualifying crimes who have been helpful, are being helpful, or are likely to be helpful.[189] The purpose of this legislation was "to address the inconsistent certification approvals across the state of California" and remove the opportunity for individual law enforcement

178. *Id.* at 1–2.
179. *Id.* at 5.
180. *Id.* at 6.
181. *Id.*
182. *Id.*
183. *Id.* at 6–7.
184. *Id.* at 8.
185. *Id.*
186. *See* N.Y. OFFICE FOR NEW AM., *supra* note 177.
187. *See id.* at 4–10.
188. New York has a state statute mandating certification, but the mandate only applies to certifications for T visa applicants, not U visa applicants. N.Y. SOC. SERV. LAW §§ 483-cc (McKinney 2016).
189. CAL. PENAL CODE § 679.10(g) (West 2021).

entities to subjectively determine who can stay in the country regardless of their victimization and helpfulness.[190]

The law created a rebuttable presumption that the victim meets the helpfulness requirement "if the victim has not refused or failed to provide information and assistance reasonably requested by law enforcement."[191] This rebuttable presumption makes California's law the most expansive in its protection of immigrant crime victims.[192] Those who supported the bill found this rebuttable presumption "necessary to bring fairness and equity to victims of crime who should not be treated differently just because they were victimized in a county where officials are reluctant to help non-citizen victims."[193] If the victim qualifies, the certifying official "shall" complete the certification, even if no charges were filed, there was no conviction, or the investigation is over.[194] Initially, the certifying officials were required to do so within ninety days of the request, or fourteen days if the victim is in removal proceedings.[195] However, a new bill went into effect on January 1, 2020, which, among other things, shortened that timeframe.[196] Officials are now required to submit certifications within thirty days, or seven days if the victim is in removal proceedings.[197] California's law, like New York's, prohibits certifying agencies from disclosing the victim's immigration status and requires agencies to report to the legislature the number of certifications requested and issued.[198]

California's certification law, like its federal corollary, explicitly lists child protective services among the list of certifying agencies.[199] California Department of Children and Family Services does not have a publicly-available certification policy but appears to leave it to the discretion of local county divisions to develop specific protocols and procedures around U visa certification requests as needed.[200]

These are a few examples of policies that clearly dictate how child welfare agencies should approach certification requests. But many states have ad hoc,

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190. Lopez-Cooper, *supra* note 162, at 161; *see also* CAL. S. RULES COMM., SENATE FLOOR ANALYSIS, SB-674, at 4 (2015) (authored by Sen. Kevin De León), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB674#.

191. CAL. PENAL CODE § 679.10(g) (West 2021).

192. *See* Alison Kamhi & Sarah Lakhani, IMMIGRANT LEGAL RES. CTR., A Guide to State Laws on U Visa and T Visa Certifications 6–9 (2020). Nevada has a similarly expansive law featuring a rebuttable presumption of helpfulness but allows law enforcement ninety days to issue certifications. *See* NEV. REV. STAT. ANN. §§ 217.550–217.590 (West 2019).

193. S. COMM. ON PUBLIC SAFETY, Senate Floor Analysis, SB-674, at 5 (2015) (authored by Sen. Kevin De León), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB674# [hereinafter De León, Public Safety Analysis].

194. CAL. PENAL CODE § 679.10(h) (West 2021).

195. De León, *supra* note 193, at 5.

196. CAL. PENAL CODE § 679.10(j) (West 2021).

197. *Id.*

198. *Id.* at § 679.10(m).

199. *Id.* at § 679.10(a)(5).

200. *See*, *e.g.*, L.A. DEP'T OF CHILDREN & FAMILY SERVS., PROTOCOL FOR REQUESTING U VISA CERTIFICATIONS FROM THE LA CTY. DEP'T OF CHILDREN & FAMILY SERVS. (DCFS) 3 (2017), http://www.courts.ca.gov/documents/BTB24-3F-7.pdf.

unclear, or absent policies on U visa certifications.[201] Even those states that have clear policies vary greatly in the protection offered to immigrants as well as the amount of discretion given to the individual reviewing the request.[202]

4. *Minnesota*

Some states have no state-level policy but feature a patchwork of local policies. Minnesota provides one example. The City of Minneapolis passed an ordinance in 2017 mandating certifications for U visa applicants within thirty days (seven days if the victim or their qualifying family members are in removal proceedings).[203] But this ordinance is limited to agencies within the city's jurisdiction, such as the police department and city prosecutor.[204] This would not include child protective services, which is a state agency. On the other hand, the state of Minnesota has yet to adopt a standard certification statute or even a policy that would provide guidance to its child welfare agency.[205]

5. *Other States*

Some states have a policy or statute at the state level, but it is unclear whether child protection agencies are included. This implicates the problem discussed in Section I.E of child welfare agencies being a "non-traditional" law enforcement agency. For example, Arkansas has a state statute requiring law enforcement agencies to "adopt a policy for the completion and signing of T and U nonimmigrant visa certification forms."[206] But unlike other states, Arkansas does not define law enforcement agency in its statute, and it is unclear whether Arkansas considers child protective services to be covered by this mandate. Similarly, Montana and North Dakota's U visa statutes mandate that law enforcement officers provide a certification to qualifying crime victims "as soon as practicable" but do not define "law enforcement officer" or specify whether the statutes cover child welfare agencies.[207] Delaware has a statute mandating U visa certifications for helpful victims, but it applies only to a "police officer or prosecutor."[208] The state child protection agency does not appear to be included. Even if these states did intend that their

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201. *See* ABREU ET AL., *supra* note 13, at 2–4; Cade & Flanagan, *supra* note 8, at 98; Orloff et al., *Mandatory U-Visa Certification*, *supra* note 8, at 638; Settlage, *supra* note 11, at 1775–76; Newman, *supra* note 11, at 270.

202. *See* Kinoshita & Kamhi, *supra* note 165, at 4–6.

203. *See Code of Ordinances*, MINNEAPOLIS, MINN. § 19.60, https://library.municode.com/mn/minneapolis/codes/code_of_ordinances?nodeId=COOR_TIT2AD_CH19EMAUIMMA_19.60CEVICR (last accessed Feb. 14, 2021).

204. *See id.*

205. At the time of this writing, there are three pending bills in Minnesota that would require certifiers to process requests within ninety days, or fourteen days if the victim is in removal proceedings. *See* H.F. 2367, 91st Leg., 1st Engrossment (Minn. 2019); S.F. 2970, 91st Leg. (Minn. 2019); H.F. 2586, 91st Leg., 1st Engrossment (Minn. 2019).

206. ARK. CODE ANN. § 12-19-104(a) (West 2015)).

207. *See* MONT. CODE ANN. § 44-4-1503 (West 2015).

208. DEL. CODE ANN. tit. 11, § 787(n) (West 2019).

statutes cover child protection agencies, the lack of clarity leaves open the possibility of the same problem that exists in Texas: agencies deciding they do not have the requisite certifying authority and thus declining to exercise it. In contrast, Washington and Maryland's statutes refer not to law enforcement agencies but to "certifying agencies," echoing the federal language in 8 C.F.R. § 214.14(a)(2) that explicitly includes child protective services as in the definition of a certifying agency.[209]

Still other states limit their U visa mandates further than required by federal statutes and regulations. For example, Louisiana and Arkansas have state statutes providing for U visa certifications, but those statutes apply only to victims of human trafficking.[210] Victims of the nearly thirty other U visa qualifying crimes are out of luck. At the local level, these restrictions are even more apparent, as there are no limits on the restrictions certifying agencies may impose, and "many law enforcement agencies have undertaken certification policies that are far more restrictive than required by federal law."[211] Some agencies will only certify closed cases; others will only certify open cases.[212] Some agencies will not certify if the crime occurred too recently; others will not certify if the crime occurred too long ago.[213] Some define helpfulness narrowly, only issuing certifications for victims essential to a prosecution, and others define it broadly, issuing certifications for anyone who reported the criminal activity to an investigating agency.[214]

Many other states and their child welfare agencies have no certification policy or law, which leaves decisions to the discretion of the individual certifying agent or the head of the agency at any given time. The lack of clear guidance to caseworkers in the child welfare context will effectively limit—and in many cases preclude—access to certifications.

As a result of these inconsistent—and at times indiscernible—policies, similarly situated immigrants who are equally eligible for immigration relief under federal law are not given the same opportunity to pursue that relief.[215] The effect of this is what one study describes as a "geographic roulette" for U visa applicants whereby "agency and crime location . . . determine the remedy's availability rather than the actual merits of an applicant's petition."[216] This conflicts with a long-standing principle of federal immigration law: the need for national uniformity.[217]

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209. *See* WASH. REV. CODE ANN. §§ 7.98.020–7.98.030 (West 2018); MD. CODE ANN., CRIM. PROC. §§ 11-930–11-931 (West 2019).

210. *See* ARK. CODE ANN. § 12-19-104 (West 2015); LA. STAT. ANN. § 46:2162(B) (2013).

211. Cade & Flanagan, *supra* note 8, at 88; *see also* Settlage, *supra* note 11, at 1774.

212. *See* Settlage, *supra* note 11, at 1774.

213. *See id*.

214. *See id*. at 1774; Newman, *supra* note 11, at 271.

215. *See* ABREU ET AL., *supra* note 13, at 3; Cade & Flanagan, *supra* note 8, at 98; Orloff et al., *Mandatory U-Visa Certification*, *supra* note 14, at 638; Settlage, *supra* note 11, at 1775–76; Newman, *supra* note 11, at 270.

216. ABREU ET AL., *supra* note 13, at 3–4.

217. *See id*. at 4; Kagan, *supra* note 14, at 928 ("This shift of responsibility . . . runs counter to the usual rule that immigration policy should be uniform across the country and is thus a federal responsibility.") (citing Arizona v. United States, 567 U.S. 387, 394 (2012)); Chen, *supra* note 135, at 602.

B. *Child Protective Services Duties and Incentives to Evaluate U Visa Certification Requests*

The reasons for these disparate policies vary. Of course, some of it may be attributed to a misunderstanding of the agency's role or lack of knowledge about immigration law and the U visa process in particular.[218] For example, Texas abdicates the authority given to it by DHS, saying it does not have the authority to certify U visas when the regulations clearly state otherwise.[219] But states with robust certification policies provide some insight too. Connecticut DCF frames its policy of broadly certifying as part and parcel of its duty to protect and conduct permanency planning for youth who come into contact with the child welfare system.[220] Massachusetts DCF frames its policy as necessary to incentivize safe cooperation with law enforcement.[221] New York state frames its policy as a recognition "that a U visa is a particularly powerful tool for agencies tasked with enforcing laws that protect vulnerable non-citizen New Yorkers."[222] California's legislation was meant "to address the inconsistent certification approvals across the state of California."[223]

The wide array of policies and rationales reflect that child protection agencies are often balancing competing considerations, incentives, and duties that necessarily impact how they engage, or refuse to engage, with the U visa process. These considerations with respect to certification of U visas can be broken down into three categories: politics, resource allocation, and the need to incentivize cooperation.

1. *Political Considerations*

Child welfare agencies may feel politically constrained when issuing certifications. A survey of all law enforcement agencies—not only child protective services—reveals blanket policies refusing to issue certifications are more common in communities where anti-immigrant sentiment is prevalent and agencies express resistance to training and education on this topic.[224] Some certifying agencies and law enforcement officials have openly expressed opposition to signing certifications because they are under the impression they would be granting status to undocumented immigrants or do not want to appear "soft" on immigration.[225] This is, of course, a

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218. *See* ABREU ET AL, *supra* note 13, at 67; Cade & Flanagan, *supra* note 8, at 97; Jensen, *supra* note 14, at 704 ("[T]here seems to be some misinformation disseminated at the local law enforcement level that certifying Form B is somehow approving nonimmigrants for legal status."); Settlage, *supra* note 11, at 1775–76.

219. *See* Tennyson Letter, *supra* note 132; 8 C.F.R. § 214.14(a)(2) (2020).

220. *See* Conn. DCF, *Immigration*, *supra* note 130, at 8.

221. *See* MASS. DCF, U NONIMMIGRANT STATUS, *supra* note 170, at 1.

222. *See* N.Y. OFFICE FOR NEW AM., *supra* note 177, at 1.

223. Lopez-Cooper, *supra* note 162, at 161.

224. *See* ABREU ET AL., *supra* note 13, at 59.

225. *See* Settlage, *supra* note 11, at 1768 ("Law enforcement certifiers . . . have admitted to refusing to issue an [certification] because they did not want to help an undocumented immigrant [and] expressed

misunderstanding of immigration law, as signing a U visa certification "is no rubber stamp for obtaining the U visa" and does not afford any immigration status itself.[226] It is also contrary to the U visa's express purpose, which is to provide protection for immigrant victims of criminal activity and incentivize reporting the criminal activity to law enforcement.[227] However, it suggests that agencies—particularly those located in states where anti-immigration sentiment prevails—must consider the political implications of how they implement this certification authority. This is no less true for child protective services.

2. *Resource Allocation*

Another reason child protection agencies may not want to engage in review of certifications is that it consumes valuable time, money, and resources. For child welfare agencies that are often significantly lacking in resources already, the prospect of overworked staff accommodating additional duties may seem daunting or impracticable.[228] If they are not compelled to process certification requests by some outside entity, it may be difficult to motivate child protection agencies to devote their minimal resources to doing so. Implementing a standardized review of certification requests may require training to educate child welfare workers, time to review requests, or resources to expand staff, among other expenses.

3. *The Need to Incentivize Cooperation*

Another practical concern is whether child welfare agencies need to motivate the victims they interact with to cooperate with an investigation in the same way a traditional law enforcement agency might. As explained in Part I, the U visa was created out of a recognition that immigrant victims are often afraid to report their perpetrators and cooperate with law enforcement out of fear that they will be deported.[229] The goal was to incentivize helpfulness by offering the victim the opportunity to apply for long-term immigration status so the perpetrator could not exploit their fear of deportation to escape accountability.[230]

The argument could be made that this is less salient in the context of child welfare investigations, both because reports of child abuse often come from someone other than the victim and because child welfare agencies have other

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concerns about being perceived as proimmigrant or "soft" on illegal immigration. . . ."); *see also* Jensen, *supra* note 14, at 704.

226. Cade & Flanagan, *supra* note 8, at 95.

227. *See* FOREIGN AFFAIRS MANUAL, *supra* note 23, at 402.6-6(B)(a); Cade & Flanagan, *supra* note 8, at 87–88; Settlage, *supra* note 11, at 1764–65; Abrams, *supra note* 14, at 379.

228. *See* Crossley, *supra* note 144, at 277.

229. *See* Orloff & Kaguyutan, *Offering a Helping Hand*, *supra* note 31, at 163; Cade & Flanagan, *supra* note 8, at 91.

230. *Id.*

tools at their disposal for compelling cooperation.[231] In addition, child victims have less freedom regarding whether to be involved in an investigation by a child welfare agency; the criminal activity against them will be investigated whether or not they consent to it. Also, child protective services have certain duties and requirements regarding interviewing that child, calling them to testify in court, and so on, that do not typically exist in the context of a domestic violence case involving an adult victim, for example.[232]

Because child protection agencies do not need to incentivize reporting and cooperation in the same way, it could be said that the need to use the U visa certification as a tool of investigations becomes less powerful, and these agencies therefore have less motivation to take on the task of processing certification requests. The inverse of this concern is the fear that if the prospect of a U visa certification incentivizes the victim to cooperate with the investigation, they may stop assisting with the investigation once the agency issues their certification. But USCIS has a safeguard in place to prevent this. If an applicant ceases to be helpful after the application has been filed, the agency may notify USCIS or rescind the certification.[233] In addition, the victim's obligation to cooperate with the investigating agency persists until they obtain their green card.[234]

These disincentives for child protective services will continue to exist until there is a change in resources, a shift in political will, or an outside entity (for example, state or federal statute, state or federal policy, or litigation) compelling agencies to issue certifications. In the meantime, though, vulnerable victims of crime in state care are foreclosed from accessing the immigration relief for which they are otherwise eligible solely because of their geographic location. The fix cannot depend on state child welfare agencies, or the status quo will remain.

That being said, there are many factors that should incentivize child welfare agencies to broadly issue certifications, not the least of which is that both the U visa and child welfare agencies share a common goal of helping and protecting victims of criminal activity, and the U visa is designed to help agencies like child protective services accomplish this.[235] While the need to incentivize cooperation in child welfare investigations is not the same as with

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231. *See* ACF, *Child Maltreatment 2018*, *supra* note 113, at 8 (finding that the vast majority of reports are made by professionals (67.3%), educators (20.5%), legal and law enforcement personnel (18.7%), and social services personnel (10.7%)).

232. *See* Sankaran, *supra note* 135, at 297; *see also* DIANE DEPANFILIS, U.S. DEP'T OF HEALTH & HUMAN SERVICES, ADMIN FOR CHLDREN & FAMILIES, CHILD PROTECTING SERVICES: A GUIDE FOR CASEWORKERS 37 (2018).

233. *See* Sabrina Balgamwalla, *Jobs Looking for People, People Looking for Their Rights: Seeking Relief for Exploited Immigrant Workers in North Dakota*, 91 N.D. L. REV. 483, 503 (2015) (discussing the safeguards USCIS has implemented to prevent this, such as contacting USCIS to rescind the certification); DHS LAW ENFORCEMENT GUIDE, *supra* note 108, at 12.

234. *See* 8 U.S.C § 1101(a)(15)(U) (2018); *see also* Abrams, *supra* note 14, at 410.

235. *See* Orloff & Kaguyutan, *Offering a Helping Hand*, *supra* note 31, at 163; Cade & Flanagan, *supra* note 8, at 91.

traditional law enforcement agencies, there is still a benefit to child welfare agencies employing the U visa certification as an investigative tool.

Many undocumented youth interact with the child welfare system each year.[236] Some are brought to the United States by parents or caretakers who continue to abuse them when they arrive.[237] Some come to the United States alone—perhaps to escape abuse—and are placed in foster care, where they may face abuse.[238] These parents and caretakers sometimes have control over the child's immigration status or can prevent the minor from reporting the abuse by threatening deportation.[239] Assistance accessing immigration relief would incentivize youth to come forward, resulting in safer outcomes for them and for any other child in that abuser's care.

Furthermore, although minor victims do not have a choice about whether the criminal activity against them is investigated, they can display varying degrees of helpfulness with the investigation and any testimony that follows. It is therefore useful for the child welfare agency to have a tool to incentivize the child's cooperation by alleviating any concerns about retaliation or deportation and providing them humanitarian relief and long-term immigration options. In addition, where one parent is a perpetrator and the other a victim, it is in the child welfare agency's interest to incentivize the cooperation of the victim parent with the investigation. This can be accomplished in part by offering the opportunity to apply for long-term immigration status in exchange for cooperation.

The fears of arrest, criminalization, or deportation do not diminish simply because the investigating agency is child protective services instead of the police. In fact, those anxieties are compounded in child welfare proceedings by a fear of being separated from one's family, a fear that was exacerbated in immigrant communities by the Trump administration's practice of separating immigrant children from their parents.[240] Accordingly, there is even more opportunity for an abuser to exploit potential negative implications of disclosure and cooperation with an investigation. For those reasons, there is still a need to incentivize cooperation with child protective investigations by providing the protection a U visa certification affords. To the extent the mission of child protection agencies is to protect children from abuse, they should be compelled to use every tool available to them.

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236. *See* Chen, *supra* note 135, at 604; *see also* CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., ISSUE BRIEF: IMMIGRATION AND CHILD WELFARE 2 (2015), https://www.childwelfare.gov/pubPDFs/immigration.pdf; Lincroft & Dettlaff, *supra* note 159, at 1.

237. *See* Chen, *supra* note 135, at 604.

238. *See id.*

239. *See id.*; Orloff et al., *Mandatory U-Visa Certification*, *supra* note 14, at 619–20; Soraya Fata, Eslye E. Orloff, Andrea Carcamo-Cavazos, Alison Silber, & Benish Anver, *Custody of Children in Mixed-Status Families: Preventing the Misunderstanding and Misuse of Immigration Status in State-Court Custody Proceedings*, 47 FAM. L.Q. 191, 194–95 (2013).

240. *See* Mariela Olivares, *The Rise of Zero Tolerance and the Demise of Family*, 36 GA. ST. U. L. REV. 287, 294 (2020); Nanasi, *supra* note 25, at 309.

State child welfare agencies have a vested interest in taking steps to keep victims in the country. Broadening access to immigration relief associated with criminal activity offers greater protection to victims and witnesses, enhances the relationship between investigating agencies and immigrant communities, and theoretically promotes safer communities.[241] In fact, despite existing hostility from some agencies, "[a] major constituency supporting the creation of U nonimmigrant status was and is law enforcement[.]"[242] Child protection agencies interact with and investigate allegations of abuse against millions of children each year and rely on child victims to substantiate those allegations.[243] In order to create safe communities for their children, states need to be able to promote the identification of victims and keep victims in the country during the course of an investigation. In addition, state child protection agencies are responsible for protecting children in their care, which includes taking steps to prevent them from being returned to potentially dangerous conditions in their home countries.[244]

Broadening protections for immigrant children not only protects those children but also furthers the greater mission of child welfare agencies to protect and provide services for children. This requires families—immigrant or not—to cooperate with the system. Certification incentivizes cooperation and thus makes communities safer for all, not just for immigrant families.

III. IMPACTS OF INCONSISTENT CERTIFICATION POLICIES AND PRACTICES

In imparting certification authority to agencies like child protective services, Congress intended to rely on those with knowledge and expertise of the investigations. But implicit in that authority is the belief that agencies will use it and "conduct a fair review of the certification request."[245] When agencies decline to do so, they abuse this authority, fail to adequately protect immigrant youth, and pervert the purpose of the U visa and its helpfulness standard.[246] In addition, it means similarly situated victims have disparate access to immigration relief simply because of their geographic location or because of the whims of the individual officer reviewing their case rather than their helpfulness and eligibility for long-term protection. Access to immigration relief depends not on a child's helpfulness but on anti-immigrant bias, political expediency, or misunderstanding of the law as manifested in child protective system policies and procedures. This Part will explore how the U visa's existing evidentiary standard for helpfulness and corresponding certification requirement allow agencies too much discretion, which results

241. *See* Orloff & Kaguyutan, *Offering a Helping Hand*, *supra* note 31, at 163.
242. Saucedo, *Immigration Enforcement*, *supra* note 15, at 313.
243. *See* ACF, *Child Maltreatment 2018*, *supra* note 113, at 18.
244. *See* discussion *supra* Section I.E.
245. Balgamwalla, *supra* note 233, at 505.
246. *See* Abrams, *supra* note 14, at 379; Cade & Flanagan, *supra* note 8, at 87–88, 115; Frost, *supra* note 61, at 32–33; Orloff et al., *Mandatory U Visa Certification*, *supra* note 14, at 635; Settlage, *supra* note 11, at 1764–65.

in inconsistent and harmful practices that run contrary to the express intent of the U visa.

A. *The Absence of Standards Perverts the U Visa's Purpose*

The dual purpose of the U visa was to protect immigrant victims of crime while incentivizing their cooperation with law enforcement investigations into criminal activity.[247] The certification requirement was designed to facilitate this cooperation by relying in part on the investigative expertise of state and local agencies and limiting the extreme power imbalance between law enforcement and immigrant victims.[248] However, the certifications do not accomplish this goal in a consistent way. Instead, they act as a procedural barrier to relief for qualified crime victims and have transformed, rather than minimized, the law enforcement-immigrant victim power disparity.[249]

Certifying agencies now have complete control over a U visa applicant's immigration future in the United States. The absence of standards around the certification requirement has perverted the purpose of the U visa. Rather than a reliable form of humanitarian relief, the U visa has become an erratic process due to arbitrary reasoning, political posturing, and agencies abusing their discretion to the detriment of immigrant victims.

Some might argue that Congress knew what it was doing when it gave certifying agencies such vast discretion—that it did not want a robust U visa program. But there are several aspects of the U visa's history and construction that indicate it was meant to be interpreted broadly. For example, the long list of qualifying crimes, along with its use of the term "criminal activity" rather than "crime," demonstrates "Congress intended that victims of a wide variety of criminal activity" would qualify.[250] In addition, the U visa permits any agency investigating criminal activity to act as a certifying agency, regardless of prosecutorial authority, "because its goal was to enhance tools that would make perpetrators accountable for their criminal activity."[251] In fact, Congress chose not to require criminal prosecution at all. Rather, it used the language "investigation or prosecution," recognizing that the determination about whether a victim was helpful should be detached from a prosecutor's

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247. *See* FOREIGN AFFAIRS MANUAL, *supra* note 23, at 402.6-6(B)(a); Abrams, *supra* note 14, at 379; Cade & Flanagan, *supra* note 8, at 87–88; Settlage, *supra* note 11, at 1764–65.

248. *See* 8 C.F.R. § 214.14(a)(2) (2020); ABREU ET AL., *supra* note 13, at 7; U.S. DEP'T OF HOMELAND SEC., U VISA IMMIGRATION RELIEF FOR VICTIMS OF CERTAIN CRIMES: AN OVERVIEW FOR LAW ENFORCEMENT (2017) [hereinafter DEP'T OF HOMELAND SEC., U VISA IMMIGRATION RELIEF], https://www.dhs.gov/sites/default/files/publications/U-Visa-Immigration-Relief-for-Victims-of-Certain-Crimes.pdf; *see also U Visa Interim Rule*, *supra* note 42, at 53036; Altreuter, *supra* note 102, at 2940 (discussing family courts); Saucedo, *A New "U," supra* note 15, at 893 (discussing Department of Labor and Equal Employment Opportunity Commission).

249. *See* Cade & Flanagan, *supra* note 8, at 97–98; Orloff et al. *Mandatory U-Visa Certification*, *supra* note 14, at 643.

250. Cade & Flanagan, *supra* note 8, at 93; *see also* Orloff et al., *Mandatory U-Visa Certification*, *supra* note 14, at 639.

251. Orloff et al., *Mandatory U-Visa Certification*, *supra* note 14, at 639.

decision whether to move a case forward.[252] The helpfulness requirement also permits the applicant the forward-looking option of saying they are "likely to be helpful" rather than mandating past helpfulness.[253] Finally, Congress "waived all grounds of inadmissibility for U visa recipients, including all criminal grounds, except for Nazi affiliations, genocide, or terrorist activities," which "indicates the extent to which Congress sought to protect U visa crime victim recipients."[254]

These decisions by Congress, taken together, demonstrate its intention to create robust protections for immigrant crime victims through the U visa. Although a handful of state child welfare agencies are accomplishing this goal, they are few and far between. Their successes are not sufficient to justify the inconsistent exercise of discretion that has resulted in disparate impact and is undermining the U visa's goals. The existing system gives too much power to agencies like child protective services to adopt policies that are inconsistent with the regulations. Although there are limitations on the federal government's ability to compel state action, the certification requirement operates on the assumption that law enforcement agencies actively investigate these crimes and review certification requests in good faith.[255] Congress and DHS gave agencies like child protective services certification authority because they have the knowledge and expertise to identify a victim and make a call about whether they have been helpful.[256] But in imparting this authority, the federal government likely contemplated that agencies would actually be reviewing certification requests. That is not happening, which renders reliance on their expertise moot. As a result, victims are not protected from immigration enforcement when they come forward to report crimes and cooperate with investigating agencies.[257]

The certification requirement was intended to help accomplish the U visa's goals but is achieving the opposite. The benefits of relying on agency expertise do not outweigh the risks associated with a system that permits those agencies to arbitrarily deny someone access to immigration relief.

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252. Newman, *supra* note 11, at 271.

253. *Id*. at 270–71.

254. Saucedo, *Immigration Enforcement*, *supra* note 15, at 314.

255. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 576 (2012); South Dakota v. Dole, 483 U.S. 203, 207–08 (1987) (discussing the use of federal funding as a lever to compel state action); Kagan, *supra* note 14, at 929 (citing Printz v. United States, 521 U.S. 898 (1997)).

256. *See* 8 C.F.R. § 214.14(a)(2) (2020); ABREU ET AL., *supra* note 13, at 7; DEP'T OF HOMELAND SEC., U VISA IMMIGRATION RELIEF, *supra* note 248; *see also U Visa Interim Rule*, *supra* note 42, at 53036; Altreuter, *supra* note 102, at 2940 (discussing family courts; Saucedo, *A New "U*," *supra* note 15, at 893 (discussing Department of Labor & Equal Employment Opportunity Commission).

257. *See* Abrams, *supra* note 14, at 397–98; Newman, *supra* note 11, at 270–71; Orloff et al., *Mandatory U-Visa Certification*, *supra* note 14, at 643; Settlage, *supra* note 11, at 1775–76.

B. *The Absence of Standards Has Altered the Function of the Helpfulness Requirement*

An immigrant's U visa eligibility is no longer centered on their helpfulness to the investigating agency, as was originally intended. Rather, eligibility is centered on factors like the geographic accident of where the criminal activity occurred, a state's sentiment toward immigrants as codified in the policies and practices of its certifying agencies, and understanding (or misunderstanding) of the law.[258] These are factors Congress did not intend to consider when evaluating an immigrant crime victim's eligibility for protection, and these factors have rendered the helpfulness requirement useless, or at the very least have fundamentally altered its function.[259]

The existing certification scheme—relying on the expertise of investigative agencies—only works if agencies engage with the process in a clear way, which many do not. This is true of all certifying agencies but even more problematic for non-traditional law enforcement agencies that may be confused about their role. Where policies and procedures are unclear, victims are deterred from coming forward and cooperating with investigations, which renders the U visa ineffective both as a law enforcement tool and as a mechanism for protecting victims.[260]

If certifying agencies were complying with federal statutes and regulations, "they [would] sign certifications whenever the noncitizen is a direct or indirect victim of qualifying criminal activity, as long as he or she has not declined any reasonable request for assistance."[261] Yet immigrant victims of crime are being helpful to law enforcement and still are not able to access immigration relief. The federal decision to devolve immigration power to local authorities "fatally altered the symbiotic balance that Congress envisioned" when it created the U visa.[262] It is time for a new evidentiary standard and heightened accountability for states in order to preserve the dual purpose of the U visa and consistently effectuate its goals.

C. *Inconsistent Policies Disparately Impact Similarly Situated Youth*

When child welfare agencies in different states have inconsistent or unclear policies, it creates a disparate impact for minor victims of crime who should be eligible for immigration relief.[263] Because the U visa provisions "leave 'helpfulness' to be arbitrarily interpreted in different districts,"[264]

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258. *See* Cade & Flanagan, *supra* note 8, at 98; Settlage, *supra* note 11, at 1792–93.

259. *See* Abrams, *supra* note 14, at 383–84; Settlage, *supra* note 11, at 1774; Newman *supra* note 11, at 271 ("[T]he provisions leave 'helpfulness' to be arbitrarily interpreted in different districts.").

260. *See* Orloff et al., *Mandatory U-Visa Certification*, *supra* note 14, at 638; *see also* Newman, *supra* note 11, at 270–71; Settlage, *supra* note 11, at 1792–93 ("In many cases, the [certification] requirement actually discourages cooperation from victims of domestic violence.").

261. Cade & Flanagan, *supra* note 8, at 95.

262. Abrams, *supra* note 14, at 392.

263. *See* ABREU ET AL., *supra* note 13, at 106–07.

264. Newman, *supra* note 11, at 271.

access to U Nonimmigrant Status depends not on the merits of someone's helpfulness as a crime victim but rather on the coincidence of where the crime happened to occur.[265] This means a child who experiences physical abuse in California and cooperates with a child protective services investigation would have a certification in thirty days or less and can begin pursuing a path to citizenship, but a child who experiences the same exact crime and cooperates to the same extent in Texas would never be eligible to apply for a U visa and could be deported.[266] The result is that states are effectively deciding that an immigrant otherwise eligible for relief under federal law will not be permitted to remain in the United States.[267] An agency's certifying authority should not allow them to foreclose an eligible crime victim from seeking U Nonimmigrant Status. All immigrant victims of crime are deserving of protection under federal law regardless of whether an investigating agency chooses to validate that by providing a certification.

D. *Agencies are Abdicating their Duties to Minors in their Care*

The failure of child welfare agencies to consistently certify U visa applications is particularly egregious because they are undermining the safety of the very individuals they are charged with protecting. This problem exposes the structural issues with the U visa's design. Child welfare agencies have a *parens patriae* duty to protect and evaluate permanency options for youth in their care.[268] *Parens patriae* is defined as "[the principle of] the state in its capacity as provider of protection to those unable to care for themselves."[269] This doctrine imposes on states a "duty . . . to protect children"[270] and requires states to "serve and protect the best interests of children," including planning for a child's future and helping them obtain stability.[271] Where youth in care have insecure immigration status, an agency must assess and pursue long-term immigration options available to them.[272] A child who is undocumented or has insecure status will struggle to achieve permanency if their ability to stay in the country remains uncertain. Additionally, lack of

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265. *See* ABREU ET AL., *supra* note 13, at 22; Settlage, *supra* note 11, at 1792–93; Newman, *supra* note 11, at 270–71.

266. *See* CAL. PENAL CODE § 679.10 (West 2021); *see also* Tex. DFPS, *U Visa Certification Requests*, *supra* note 26.

267. *See* ABREU ET AL., *supra* note 13; Cade & Flanagan, *supra* note 8, at 97–98.

268. *See* discussion *supra* Section I.E.

269. *Parens Patriae*, BLACK'S LAW DICTIONARY (11th ed. 2019)

270. Varney, *supra* note 122, at 761.

271. Hatcher, *supra* note 122, at 164–65; *see also* Williams, *supra* note 122, at 722.

272. In fact, some state child welfare program policies require permanency planning for immigrant youth. *See, e.g.*, N.C. DEP'T OF HEALTH & HUMAN SERVS., PERMANENCY PLANNING SERVICES POLICY, PROTOCOL, & GUIDANCE, NC CHILD WELFARE MANUAL 138 (2020), https://policies.ncdhhs.gov/divisional/social-services/child-welfare/policy-manuals/permanency-planning_manual.pdf; MO. DEP'T OF SOC. SERVS., CHILD WELFARE MANUAL: SECTION 4, CHAPTER 4 (WORKING WITH CHILDREN), Subsection 4 – Special Populations (2019), https://dssmanuals.mo.gov/child-welfare-manual/section-4-chapter-4-working-with-children-subsection-4-special-populations/; Conn. DCF, *Immigration*, *supra* note 130; TEX. DEP'T OF CHILDREN & FAMILY SERVS., CHILD PROTECTIVE SERVS. HANDBOOK 6700 (2017), https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_6700.asp.

immigration status presents significant obstacles to stability and self-sufficiency, including difficulty obtaining identification, getting a job, finding housing, accessing public benefits, and so on.[273]

Lack of secure status also implicates the child's safety. By failing to secure long-term immigration status for youth in their care, child welfare agencies make those youth more vulnerable to continued victimization. For example, if the child's abusive parent is in their home country, failing to identify long-term immigration options could result in the youth being deported and returned to an abusive parent. This contravenes the purpose of the U visa to protect vulnerable immigrant crime victims as well as the purpose of child protective services to protect and seek stability for youth in their care. This is, after all, the whole point of the U visa. The state is responsible for a child's safety, and by not certifying U visas for eligible youth, the state is undermining the safety of those it is charged with protecting. In doing so, the state neglects its *parens patriae* interest and responsibility to protect children in its care.

A lack of secure immigration status thus represents a threat to a child's safety, stability, permanency, and self-sufficiency. If a minor's cooperation with a child protection agency investigation gives rise to eligibility for long-term immigration relief, child protection agencies should have a duty to evaluate and facilitate that option in the same way they are required to evaluate and facilitate other permanency options. Blanket refusal to provide U visa certifications, or even an inconsistent approach to certification requests, is a dereliction of that duty and constitutes neglect in its own right.

The U visa and child welfare systems were both designed to protect vulnerable victims, yet at the intersection of these systems is a complete failure of many agencies to do so.

IV. THE NEED FOR A NEW STANDARD AND FEDERAL ACCOUNTABILITY

There is a wealth of scholarship proposing various reforms to the U visa.[274] This article will not revisit all of these reforms, but before outlining new proposals, this Part will briefly discuss some of these potential solutions and the associated challenges that demand removing discretion from certifying agencies like child protective services.

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273. *See, e.g.*, Laura Corrunker, *"Coming Out of the Shadows": Dream Act Activism in the Context of Global Anti-Deportation Activism*, 19 IND. J. GLOBAL LEGAL STUD. 143, 152 (2012) (education); Ian Long, *"Have You Been an Un-American?": Personal Identification and Americanizing the Noncitizen Self-Concept*, 81 TEMP. L. REV. 571, 575–86 (2008) (identification); Steven Sacco, *In Defense of the Eligible Undocumented New Yorker's State Constitutional Right to Public Benefits*, 40 N.Y.U. REV. L. & SOC. CHANGE 181, 186–96 (2016) (public benefits); Jose Vargas, *My Life as an Undocumented Immigrant*, N.Y. TIMES (June 22, 2011), https://www.nytimes.com/2011/06/26/magazine/my-life-as-an-undocumented-immigrant.html.

274. *See generally, e.g.*, Abrams, *supra* note 14; Cade & Flanagan, *supra* note 8; Jensen, *supra* note 14; Kagan, *supra* note 14; Newman, *supra* note 11; Orloff et al., *Mandatory U-Visa Certification*, supra note 14; Settlage, *supra* note 11.

One such proposed reform is to eliminate the Form I-918, Supplement B and allow other types of certification by law enforcement.[275] As discussed in Part I, the statute requiring certification does not actually mandate the specific Form I-918, Supplement B that USCIS chose to mandate. The statute only requires a "certification" from a certifying agency stating the applicant was a victim of a qualifying crime and was helpful, is being helpful, or is likely to be helpful.[276] Theoretically, the language of the statute would allow for any kind of statement from law enforcement so long as it meets the criteria.

By changing nothing more than its own practice, USCIS could expand acceptable types of certifications to alleviate the issue of agencies refusing to sign the Form I-918, Supplement B. But this change would only be minimally effective, as it raises the same concerns that exist with the certification requirement as currently administered. The problem is not the form itself. In fact, a form may be helpful to standardize certifications and guide the individuals writing them, many of whom do not have any expertise in immigration law and may not know what information is important to include in a certification without specific prompts on a form. Rather, the problem is the willingness of agencies to cooperate with the process. That problem will persist regardless of the form the certification takes.

Under the existing scheme, certifying agencies "wield a tremendous amount of power in the U visa petition process . . . that can be abused, misused, or not used at all."[277] Agencies are not exercising their authority, and even when they are, they are not always doing so in a manner consistent with federal immigration law. Until they do, a safety valve is needed to safeguard against abuse by certifying agencies and preserve the goals of the U visa program. Any effective solution must, at a minimum, remove vast discretion from certifying agencies.

A. *Solutions that Depend on Discretion of State Agencies are Insufficient*

As discussed above, state child welfare agencies are different from other certifying agencies because they have specific duties to protect youth in their care.[278] Protecting youth necessarily involves helping them feel safe reporting crimes by taking steps to protect them from deportation if they much such a report. It should also require agencies to pursue permanency, stability, and normalcy for the minor by evaluating and acting on all available options for regularizing their immigration status, including U visas.

States and their child welfare agencies can take affirmative steps to accomplish this. For example, states could pass legislation like that in California, which requires agencies to issue certifications expeditiously to any eligible

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275. *See, e.g.*, Jensen, *supra* note 14, at 707–08.
276. *See* 8 U.S.C. § 1184(p) (2018).
277. Abrams, *supra* note 14, at 411.
278. *See* discussion *supra*, Section I.E, Section III.A.

immigrant.[279] (This seems improbable.) States could provide clear guidance to their child welfare agencies explaining that they are permitted and expected to issue certifications. Child welfare agencies could train all staff on issues that impact foreign nationals in their care. They could require their caseworkers to engage in permanency planning for foreign national youth that includes exploring all available immigration options and broadly issuing certifications.

While these would be great solutions, they give rise to the same political problems that exist with certifications already: states that are hostile or indifferent to immigrants will not make reforms to align their practices with federal immigration policy of their own volition. The ultimate solution cannot rely on them doing so. Any state-level solution—statutes, litigation, statewide policies for child welfare agencies, and so on—would maintain the possibility of inconsistent approaches that create disparate impacts for similarly situated youth in different states. Moreover, it leaves the door open for anti-immigrant bias, confusion, and state or local resistance to implementing federal immigration protections to act as an obstacle to relief. If state agencies are unwilling to exercise their discretion consistently, the only option that remains is to eliminate that discretion.

Instead, this article proposes a new evidentiary standard for U visas that eliminates the abuse of discretion pervasive among child welfare agencies through two key changes to the helpfulness requirement. The first change speaks to the certification issue broadly and would address the inconsistency that plagues all types of certifying agencies. The second focuses on the certification issue specifically as it relates to child welfare agencies. Finally, this article proposes requiring state child welfare agencies to develop and adhere to U visa certification policies by making it a condition of their continued receipt of federal funding.

B. *A New Standard for Proving Helpfulness*

Section 101(a)(15)(U) of the Immigration and Nationality Act ("INA"), the statute outlining U visa eligibility, does not actually require law enforcement certifications. Certifying agencies do not *need* to make determinations about helpfulness; the federal government has its own mechanisms for fact-finding and credibility determinations in adjudicating other types of immigration relief.[280] For example, the U visa certification requirement stands in contrast to the requirements for T Nonimmigrant Status, a similar type of relief for victims of human trafficking that was created concurrently with U Nonimmigrant Status through the same legislation.[281]

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279. *See* CAL. PENAL CODE § 679.10 (West 2021).

280. *See*, *e.g.*, Cade & Flanagan, *supra* note 8, at 114; Kagan, *supra* note 14, at 962; Abrams, *supra* note 14, at 410; Orloff et al., *supra* note 14, at 645–47.

281. *See* 8 U.S.C. § 1101(a)(15)(T) (2018); 8 C.F.R. § 214.11 (2020).

Like the U visa, the T visa was created for the dual purposes of protecting victims and aiding law enforcement investigations.[282] It provides temporary nonimmigrant status and a path to citizenship for victims of a severe form of human trafficking who can demonstrate they cooperated with reasonable requests for assistance from law enforcement, are physically present in the United States on account of their trafficking, and would face extreme hardship involving severe and unusual harm if returned to their home country.[283] The T visa similarly requires law enforcement cooperation in the statute but does not specifically require a certification.[284] The T and U visas have developed side by side since their simultaneous creation in 2000, yet the T visa does not have a certification requirement, and the U visa does.[285] Applicants for T Nonimmigrant Status may provide a certification, but it is not a prerequisite for eligibility. Rather, they may provide any credible secondary evidence of helpfulness to law enforcement, such as a victim statement or police report.[286]

Although they were created simultaneously and serve much the same purpose, these two types of relief must be pursued in vastly different ways because of the added certification requirement that acts as an obstacle to qualified U visa applicants.[287] The legislative histories of the 2000 Violence Against Women Act and the Trafficking Victims Protection Act are "silent on the reason for this difference in the procedures required of victims filing for relief under the T-visa and the U-visa."[288] Regardless of the reason for this discrepancy, the T visa demonstrates that a certification is not required to effectuate the dual goals of protecting immigrant crime victims and aiding investigations of criminal activity.

Many scholars have discussed adopting the same "any credible evidence" standard for the U visa helpfulness requirement that applies to T visas.[289] (This "any credible evidence" standard is also the standard that applies to all other eligibility requirements for the U visa.)[290] This would mean USCIS could accept *any* evidence to support the applicant's claim that they were helpful, are being helpful, or are likely to be helpful. This standard would permit USCIS to determine "what evidence is credible and the weight to be

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282. *See* Castillo et al., *supra* note 8, at 7, 37; Rep. John Conyers Jr., *The 2005 Reauthorization of the Violence Against Women Act: Why Congress Acted to Expand Protections to Immigrant Victims*, 13 VIOLENCE AGAINST WOMEN 457, 459–61 (2007).

283. *See* 8 U.S.C. § 1101(a)(15)(T) (2018); 8 C.F.R. § 214.11 (2020).

284. *See* 8 U.S.C. § 1101(a)(15)(T) (2018); 8 C.F.R. § 214.11 (2020).

285. *See* Abrams, *supra* note 14, at 410; Cade & Flanagan, *supra* note 8, at 114; Kagan, *supra* note 14, at 962; Orloff et al., *supra* note 14, at 645–47.

286. *See* 8 C.F.R. § 214.11(h)(3)(iii) (2020).

287. *See* Abrams, *supra* note 14, at 410; Cade & Flanagan, *supra* note 8, at 114; Kagan, *supra* note 14, at 962; Orloff et al., *supra* note 14, at 645–47.

288. Orloff et al., *Mandatory U-Visa Certification*, *supra* note 14, at 644.

289. *See* Abrams, *supra* note 14, at 410; Cade & Flanagan, *supra* note 8, at 114; Kagan, *supra* note 14, at 962; Orloff et al., *Mandatory U-Visa Certification*, *supra* note 14, at 645–47.

290. 8 C.F.R. § 214.14(c)(4) (2020); Orloff et al., *Mandatory U-Visa Certification*, *supra* note 14, at 632.

given that evidence"—a determination USCIS already makes in the T visa context.[291]

Congress chose to use this "any credible evidence" standard for the other U visa eligibility requirements "in acknowledgement that it may be difficult, dangerous, or impossible for battered [immigrants] to obtain certain evidence."[292] This is equally true for the helpfulness requirement, yet Congress imposed a different standard. Given the failure of local certifying agencies to act consistently with federal immigration regulations, the U visa structure would be more consistent and more likely to broadly protect vulnerable immigrants if these helpfulness determinations were left up to the federal government instead of delegated to certifying agencies.

While adopting this broad standard would be preferable, unfortunately, efforts to change the law in 2013 failed, demonstrating that this is unlikely to be a viable option.[293] There are a couple of reasons this change may have failed. First, Congress created the certification requirement in part to prevent fraud, and one could think U visas would be more susceptible to fraud than T visas because of the wider group of qualifying criminal activity.[294] There is little evidence of fraud by U visa applicants, and Congress likely overcorrected by creating the certification requirement, as it bars eligible victims from relief more than it deters fraudulent applicants.[295] Nevertheless, the concern remains salient for lawmakers.

Second, Congress lacks the incentive to eliminate the certification requirement altogether because the requirement acts as a gatekeeper to the sheer number of potential U visa applicants. As discussed in Part I, the U visa has an annual cap of 10,000 per year, but there are far more than 10,000 eligible immigrants who apply each year, which has contributed to a substantial backlog for applicants of more than a decade.[296] This same concern does not exist for T visas, which have an annual cap of 5,000 that has never been reached.[297] A simple solution to this problem would be for Congress to increase the cap on annual U visa issuances, but that is a topic for another article.[298] In the

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291. 8 U.S.C. § 1154(a)(1)(J) (2018).

292. Settlage, *supra* note 11, at 1768–69.

293. *See* Violence Against Women Reauthorization Act of 2012, S. 1925, 112th Cong. § 3 (as passed by Senate, Apr. 26, 2012); Settlage, *supra* note 11, at 1771.

294. *See* Settlage, *supra* note 11, at 1789.

295. *See* Orloff et al., *Mandatory U-Visa Certification*, *supra* note 14, at 646–47; Settlage, *supra* note 11, at 1790–91 ("U visa eligibility requirements outside of the [certification] already protect against fraud.").

296. *See* Settlage, *supra* note 11, at 1787; Frost, *supra* note 61, at 32–33; Cade & Flanagan, *supra* note 8, at 106–107.

297. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., Number of Form I-914, APPLICATION FOR T NONIMMIGRANT STATUS BY FISCAL YEAR, QUARTER, AND CASE STATUS FISCAL YEARS 2008-2020 (2020), https://www.uscis.gov/sites/default/files/document/data/I914t_visastatistics_fy2020_qtr2.pdf.

298. *See* Cade & Flanagan, *supra* note 8, at 113 ("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."); Saucedo, *Immigration Enforcement*, *supra* note 15, at 318–19.

meantime, a shift to the T visa's "any credible evidence" standard may raise concerns about flooding an already saturated system.

To address these fraud and flooding concerns while eliminating the discretion of law enforcement agencies like child protective services, this article proposes a middle ground for expanding the evidentiary options available to applicants to prove helpfulness while still prescribing particular forms of accepted evidence.

This change would require both a statutory and a regulatory amendment. First, Congress should eliminate the statutory certification requirement found in 8 U.S.C. § 1184(p). Second, DHS should amend the regulations at 8 C.F.R. § 214.14 to remove all references to certification and specify in 8 C.F.R. § 214.14(c)(2) that in order to demonstrate helpfulness, the applicant must submit one or more of the following forms of evidence: a victim impact statement provided to law enforcement; proof of testimony provided in a criminal proceeding, protective order proceeding, child welfare proceeding, administrative proceeding, or similar proceeding; a statement from any employee of a law enforcement agency indicating helpfulness; a police report; a criminal complaint; or a Form I-918 Supplement B.[299] Each of these forms of evidence would carry the same weight in meeting the applicant's burden.

This dual statutory and regulatory fix would provide a uniform solution to the problem of inconsistent certification practices for multiple reasons. By not relying on states' discretion, it allows for more equitable access to immigration relief that does not depend on the accident of where the crime occurred or where the victim is located. It would mean agencies that arbitrarily refuse to certify, fail to establish consistent certification practices, or act beyond their power by tacking on additional obstacles to certification would no longer have the discretion to deny otherwise eligible applicants access to immigration relief. It would reduce the vast power differential between immigrant victims of crime and the certifying agencies who hold the keys to their immigration future. And it would give applicants more accessible options for proving helpfulness while still providing some guidance to allow adjudicators to limit the flood of applications and prevent fraud.

This solution is responsive not just to the example of child welfare agencies but to the problem of all certifying agencies that exercise their discretion in a way that bars eligible crime victims from accessing immigration relief.

299. The regulatory language at 8 C.F.R. § 214.14(c)(2) would read as follows: To establish that the applicant has been helpful, is being helpful, or is likely to be helpful to law enforcement, the applicant must submit at least one of the following forms of evidence: (1) a victim impact statement provided to law enforcement; (2) proof of testimony provided in a criminal proceeding, protective order proceeding, child welfare proceeding, administrative proceeding, or similar proceeding; (3) a statement from any employee of a law enforcement agency indicating helpfulness; (4) a police report; (5) a criminal complaint; or (6) a Form I-918, Supplement B.

C. *Eliminating the Helpfulness Requirement for Minors*

Separate from (or in addition to) the modification to forms of evidence accepted, there should be a different helpfulness standard for minors. Refusal by law enforcement agencies of any kind to certify is problematic, but youth in foster care likely have even less agency than adult victims, and child protective services have a duty to provide care and protection.[300] This necessarily includes exploring long-term immigration options. To resolve these issues, Congress should amend the language of INA § 101(a)(15)(U)(i)(III) to say the following:

> [T]he alien has been helpful, is being helpful, or is likely to be helpful to a Federal State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii), *unless the alien was 18 years of age or younger at the time the crime occurred.*

This statutory change is warranted for two reasons. First, minors should have a different standard because they face extra obstacles both in cooperating with investigating agencies and in obtaining evidence of such cooperation. A child is unlikely to be able to get the proposed evidence listed in Section IV.B on their own. Also, requiring children to cooperate with law enforcement often forces them to make the difficult choice to put their parent at risk of criminal or immigration enforcement in order to access immigration relief for themselves. They may experience an emotional attachment to, or financial dependence on, a parent that prevents them from making a free and informed decision to cooperate with law enforcement. In many cases, a child's compliance with the helpfulness requirement will depend on an adult permitting their cooperation; they may not be able to fulfill this requirement on their own or against the will of their parent or guardian. Even if they want to report against a parent's will, they may not know how to do so. The U visa helpfulness requirement acknowledges that a child may not be able to cooperate; it allows for a parent to cooperate in the child victim's stead if the child is under sixteen years old.[301] But this option assumes that the parent is not the perpetrator and that the parent is willing to permit and facilitate cooperation, which is not always the case. In addition, children are less likely to understand and be able to act on the options available to them. Where child protection agencies are failing to engage in a fair review of certification requests, they are abdicating their duties. Providing uniform access to immigration relief requires eliminating the discretion of these agencies.

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300. *See* discussion *supra* Sections I.E, III.A.
301. *See* 8 U.S.C. §§ 1101(a)(15)(U)(i)(II)–(III) (2018); Kagan, *supra* note 14, at 927.

Second, in many areas of immigration law, there is a recognition that children are more vulnerable and therefore need special protections. For example, the T visa was created with the same dual intent as the U visa: to offer protection to victims and facilitate cooperation with law enforcement. It was designed as an investigative tool like the U visa, yet the drafters determined that children should be exempted from the requirement to cooperate with law enforcement.[302] The agency can (and should) still certify, and the child has the option of cooperating, but the T visa's design acknowledges that protection outweighs the need for helpfulness when it comes to child victims. Congress determined that requiring minors to cooperate with a prosecution was "too much of a wall for them to climb," and a minor's ability to cooperate and obtain a certification should not foreclose their access to the T visa's protection.[303] The U visa should adopt this exemption in recognition of the additional obstacles to helpfulness that youth experience.

Ideally, the U visa system would work as it was designed to. Child welfare agencies would identify a victim and step in to protect them. That victim would cooperate with an investigation. The agency would provide the victim with a certification in a timely manner that allows them to access the U visa protection. But that is not happening, and until it does, there needs to be a safety valve that allows eligible victims of crime to access the relief designed to protect them. This exemption for minor victims to the helpfulness requirement, as well as the proposed new evidentiary standard in Section IV.B, would operate as those safety valves.

D. *Federal Funding of State Child Welfare Agencies to Compel U Visa Certification Policies*

The problem of state child welfare agencies failing to establish consistent U visa certification policies requires a uniform solution. That will not be achieved by leaving it up to the states. The federal government has traditionally held plenary power over immigration matters for this very reason: courts have long recognized a need for uniformity in the administration of immigration law and benefits, particularly with respect to who is admitted to the country.[304] However, the anti-commandeering doctrine presents an obstacle to the federal government requiring state child welfare agencies to certify U visas. It is well-established that "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the

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302. *See Approval of Compact of Free Associations Between the Governments of the U.S. and the Federated States of Micronesia and the U.S. and The Republic of the Marshall Islands; Trafficking Victims Protection Reauthorization Act of 2003; and Torture Victims Relief Reauthorization Act of 2003; Markup Before the Committee on International Relations House of Representatives: Markup Before the Comm. on Int'l Relations of the H.R.*, 108th Cong. 92 (2003) (statement of Rep. Smith of N.J.), http://commdocs.house.gov/committees/intlrel/hfa88500.000/hfa88500_0f.htm.

303. *Id.*

304. *See Approval of Compact of Free Associations Between the Governments of the U.S. and the Federated States of Micronesia and the U.S. and The Republic of the Marshall Islands*, *supra* note 302.

States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. . . . [S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty."[305] In the U visa context, this is reflected in written DHS policies related to U visas, in which the Department says law enforcement officers at any agency "cannot be compelled to complete a certification."[306]

But there is a notable exception to this anti-commandeering rule. Incident to its spending power found in Art. I, § 8, cl. 1 of the U.S. Constitution, Congress may "attach conditions to the receipt of federal funds."[307] Those conditions must be enacted "in pursuit of general welfare," be stated unambiguously such that states may exercise their choice knowingly, and be germane to a national concern.[308] The federalization of the child welfare system provides one example of the federal government conditioning funding on state agencies' compliance with certain mandates.

As discussed in Section II.E, the child welfare system on the national level has experienced a trend in federalization since the early 1970s, even though family law has traditionally been within the sole purview of states.[309] As a result of this federalization, almost half of the funds spent on state child welfare systems are supplied by dollars from various federal programs.[310] The federal government generally provides the money directly to state agencies, and "federal involvement in child welfare is primarily tied to this financial assistance."[311] Funding comes from a variety of sources, including Titles IV-B and IV-E of the Social Security Act, which constitute the largest funding streams dedicated to child protection agencies, as well as programs not designed for child welfare but which can be used for it nonetheless, such as

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305. Printz v. United States, 521 U.S. 898, 935 (1997); *see also* New York v. United States, 505 U.S. 144, 161 (1992) ("Congress may not simply "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.") (quoting Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288 (1981)); Kagan, *supra* note 14, at 929; Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police,* 91 IOWA L. REV. 1449, 1488 (2006).

306. NATALIA LEE, DANIEL J. QUINONES, NAWAL AMMAR, ADITI KUMAR, & LESLYE E. ORLOFF, NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT, AM. UNIV., DEP'T OF HOMELAND SEC. POLICY ANSWERS TO LAW ENFORCEMENT REASONS FOR NOT CERTIFYING 5 (2013) http://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Qref-DHSAnswersforLawEnforcementNotCertifying-09.27.13.pdf.

307. South Dakota v. Dole, 483 U.S. 203, 206 (1987); *see also* BRIAN T. YEH, CONG. RESEARCH SERV., THE FEDERAL GOVERNMENT'S AUTHORITY TO IMPOSE CONDITIONS ON GRANT FUNDS 1 (2017), https://fas.org/sgp/crs/misc/R44797.pdf ("[T]he Spending Clause, Article I, Section 8, Clause 1 of the U.S. Constitution has been widely recognized as providing the federal government with the legal authority to offer federal grant funds to states and localities that are contingent on the recipients engaging in, or refraining from, certain activities.").

308. *Dole*, 483 U.S. at 207–08; *see also* Cade & Flanagan, *supra* note 8, at 112.

309. *See* Sankaran, *supra* note 135, at 288–89; Crossley, *supra* note 144, at 270. As explained in Section II.E, there are many legitimate critiques of this trend. They are outside the scope of this paper. The goal of this discussion is to propose using the existing federal funding scheme to solve the U visa certifications problem.

310. *See* Murarova & Thornton, *supra* note 144, at 37; Stoltzfus, *Child Welfare: Purposes, Federal Programs, and Funding*, *supra* note 146, at 1.

311. Stoltzfus, *Child Welfare: An Overview*, *supra* note 138, at 1–2.

Temporary Assistance for Needy Families, Medicaid, and Social Security Income.[312] This federal funding was intended to "reform state systems through incentive-based funding"[313] and "has been central in shaping child protection policy and practice."[314] Although there are many valid critiques,[315] federal funding has brought with it some benefits, including, for example, "forcing state courts and agencies to consider a child's permanency needs."[316]

The federal government exerts control over state child welfare agencies by requiring them to comply with a series of federal mandates in order to receive funding.[317] These requirements were "designed to ensure the safety and well-being of all children and families served"[318] and "ensure all children in foster care ... receive certain protections."[319] These conditions have become increasingly restrictive as the federalization of child welfare has progressed.[320] If a state fails to comply with these mandates, it risks losing federal funding.[321] The federal government uses these requirements to hold states accountable to what it views as the appropriate standards for securing children's safety and well-being.[322]

The federalization of child welfare through funding and accompanying mandates informs a potential U visa solution in three ways. First, it reveals that both the state and the federal governments share an interest and investment in the well-being of children in state care. Second, it demonstrates that the federal government can—and does—place various conditions on funding to compel state child protection agencies to take particular actions. Third, it indicates that the federal government already has a comprehensive mechanism in place to enforce compliance with its mandates.

One could argue that several existing mandates should already require states to certify U visas for children in their care without alteration. For example, federal law mandates that any state child protection agency receiving federal dollars work toward permanency, defined as providing a child with "such basic needs as safety and protection, stability and continuity of caregivers, a sense of identity, and the opportunity to grow both physically and

312. For a complete discussion of how child welfare agencies are funded, *see generally* Crossley, *supra* note 144; Murarova & Thornton, *supra* note 144; Sankaran, *supra* note 135.

313. Sankaran, *supra* note 135, at 288–89.

314. Kindred, *supra* note 143, at 450.

315. *See generally* Crossley, *supra* note 144; Murarova & Thornton, *supra* note 144; Sankaran, *supra* note 135.

316. Sankaran, *supra* note 135, at 282.

317. *See id*. at 291–92 (listing some items from the "exhaustive list of requirements").

318. Stoltzfus, *Child Welfare: An Overview*, *supra* note 138, at 1–2.

319. *Id*. at 5.

320. *See* Crossley, *supra* note 144, at 270; Sankaran, *supra* note 135, at 289–92 (listing some of the statutory requirements imposed on states receiving federal funding); Stoltzfus, *Child Welfare: An Overview*, *supra* note 138, at 6.

321. Sankaran, *supra* note 135, at 292; Murarova & Thornton, *supra* note 144, at 38.

322. *See* Stoltzfus, *Child Welfare: An Overview*, *supra* note 138, at 1–2; Stoltzfus, *Child Welfare: Purposes, Federal Programs, and Funding*, *supra* note 138, at 1.

emotionally."[323] It also requires state agencies to create a "plan for assuring that the child receives safe and proper care and that services are provided" to facilitate permanency and "address the needs of the child while in foster care," among other things.[324]

For an undocumented child or a child with insecure immigration status, these mandates could and should require state child protection agencies to take all possible steps to regularize the immigration status of children in their care, including certifying U visas for helpful victims. A child cannot achieve stability and permanency if their ability to remain in the United States is uncertain. A child vulnerable to deportation and continued abuse as a result of their immigration status is not safe. A child who leaves foster care without immigration status will face significant obstacles to achieving independence, including difficulty obtaining housing, work, and identification. States should therefore be required to include steps for regularizing a child's immigration status in their case plan.

But the federal government should go a step further. It should specifically require state child welfare agencies to create and implement U visa policies as a condition of receiving federal funding. A measure designed to increase the safety, well-being, and stability of youth in foster care by providing protection to undocumented or insecurely documented victims would be germane to the goals of federal child welfare funding—namely, ensuring safety, establishing permanency, and promoting well-being. In addition, it would better align child protection agency practices with federal statutes and regulations concerning the U visa.[325] The federal government already places many conditions on state child welfare agencies to ensure the safety and stability of children in their care, and it has mechanisms in place to enforce compliance. It only makes sense that it would do so here.

CONCLUSION

The U visa was designed to help law enforcement better protect immigrant victims of crime, but its certification requirement, in combination with the vast discretion afforded to certifying agencies, is acting as a bar to immigration relief for eligible immigrant victims. As a result, the safety of immigrant victims, and in turn the safety of our communities, is compromised. Child welfare agencies offer an emblematic example of how an agency's unwillingness to participate in the U visa process, even where the certification is compatible with that agency's goals, contravenes the purpose of the U visa. When child welfare agencies decline to exercise the authority given to them by the federal government, they fail in their duty to protect children in their care. In

323. 42 U.S.C. §§ 671(a)(15)(C)–(E) (2018); Varney, *supra* note 122, at 767–68.

324. 42 U.S.C. § 675 (2018); *see also* 45 C.F.R. § 1356.21 (2020).

325. *See, e.g.*, Cade & Flanagan, *supra* note 8, at 112 (proposing a similar cooperative federal-state scheme in the context of police departments).

addition, they create a system in which access to relief and protection depends on local agency practices and biases, which may be out of step with federal immigration law. Immigrant crime victims in foster care should be afforded protection from abuse and deportation, but at the intersection of the child welfare and immigration systems is a failure to do so. As long as this persists, it is necessary to safeguard against misuse of the certifying authority by changing the certification and helpfulness requirements and using federal funding of child welfare systems to require states to create a robust regimen for certification.