

No. 23-334

IN THE
Supreme Court of the United States

DEPARTMENT OF STATE, ET AL.,

Petitioners,

v.

SANDRA MUÑOZ, ET AL.,

Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit**

**BRIEF OF PROFESSORS AND SCHOLARS AS
AMICI CURIAE IN SUPPORT OF
RESPONDENTS**

Nadia Anguiano
Counsel of Record
Seiko Shastri
FEDERAL IMMIGRATION
LITIGATION CLINIC
JAMES H. BINGER CENTER
FOR NEW AMERICANS
UNIVERSITY OF
MINNESOTA LAW SCHOOL
229 19th Ave. S.
Minneapolis, MN 55455
(612) 301-8653
angui010@umn.edu
Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*¹

Amici are eight professors and scholars who have expertise on gangs—including on law enforcement’s use of tattoos to designate gang membership—and the intersection of gang membership-designation and immigration law. They appear in their personal capacities and provide their affiliation for identification purposes only. *Amici* believe that their deep expertise on these issues may be helpful to the Court. Together, *amici* share a strong interest in ensuring that individuals, particularly Black and Latino men, are not erroneously identified as gang members, thereby preventing the potentially devastating consequences attached to gang mislabeling—including a noncitizen’s permanent exclusion from the United States—that harm entire families and communities of this country.

David C. Brotherton, PhD, is a Professor of Sociology at the John Jay College of Criminal Justice and the Graduate Center, City University of New York. His studies on gangs, deportation, and juvenile justice reform span more than three decades. He is the Director of the Social Change and Transgressive Studies Project at John Jay College, Principal Investigator of the New York City Deportation Pipeline Project (NSF), Co-Editor-in-Chief of the International Journal of Critical Criminology, and the founder of the book series “Studies in Transgression”

¹ Pursuant to this Court’s Rule 37.6, counsel for *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

(Temple). His 15 books and more than 50 articles and chapters have been translated into multiple languages while his research has received awards from the American Society of Criminology, the Guggenheim, Spencer, and Grant Foundations, the American Library Association, the Inter-American Development Bank, and the World Bank. In 2023 he was named the recipient of the Lifetime Achievement Award from the Division of Critical Criminology.

Beth Caldwell, JD/MSW, is a Professor of Law at Southwestern Law School. She has written extensively about the intersections between criminal and immigration law and is an expert in the field of crimmigration. She has published a book titled *Deported Americans* and scholarly articles on a range of criminal and immigration law topics, including an article about how culturally specific tattoos have been used to misidentify people as gang members.

Laila Hlass, LLM/JD, is a Clinical Professor of Law at Tulane Law School. She has written extensively about children and youth, gang assessments, and the immigration legal system and is a nationally known immigration law expert. She has published scholarly articles on the laws, policies, and practices related to children and youth within the immigration legal system.

Mary Holper, JD, is an Associate Clinical Professor and Associate Dean for Experiential Learning at Boston College Law School. She has published articles on immigration law and procedure, the intersection of immigration and criminal law, gang assessments in immigration law, and immigration detention. She is a nationally known immigration law expert.

Jody Miller, PhD, is a Distinguished Professor and Undergraduate Program Chair at the School of Criminal Justice at Rutgers University (Newark), in New Jersey. Her research focuses on gender, crime, and victimization in the contexts of urban communities, the commercial sex industry, sex tourism, and youth gangs. She is a Fellow of the American Society of Criminology (ASC) and former Co-Editor (2018-2023) of ASC's flagship journal, *Criminology*. She is a member and former Co-Director (2016-2023) of the National Science Foundation-sponsored Racial Democracy, Crime and Justice Network (RDCJN). She has won numerous awards for her work, including the American Society of Criminology Herbert Bloch Award (2022) and Mentor Award (2015), the Coramae Richey Mann Award from the ASC Division on People of Color and Crime (2009), the ASC Division on Women and Crime's Distinguished Scholar Award (2010) and New Scholar Award (2001), and the ASC's Ruth Shonle Cavan Young Scholar Award (2001).

Susan A. Phillips, PhD, is a full Professor of Environmental Analysis at Pitzer College in Claremont, California. She has written extensively about gangs, gang graffiti, and gang tattooing, and is an expert in gang identification in Los Angeles. She has published scholarly articles and books on gang graffiti, tattooing and symbolism. She has written over a dozen letters for immigrant visa cases to determine whether tattoos have gang-related content.

Sarah Sherman-Stokes, JD, is a Clinical Associate Professor and Associate Director of the Immigrants' Rights and Human Trafficking Program at Boston University School of Law. Her scholarship

takes a critical look at immigration law and policy, including at the intersections of immigration and criminal law, detention and deportation, and immigrant surveillance and enforcement. She regularly speaks to the media and engages in public facing advocacy on these issues.

Liliana Zaragoza, JD, is an Associate Professor of Clinical Law and the Director of the Racial Justice Law Clinic at the University of Minnesota Law School. She has engaged in extensive advocacy regarding the New York Police Department's gang database and its impact on communities of color in New York City, including via legislative testimony; community education efforts about the collateral consequences of gang databases; and media commentary on other gang databases across the country.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent Sandra Muñoz, an award-winning civil rights lawyer and U.S.-born citizen, has been physically separated from her husband Luis Asencio-Cordero for the past eight years due to the Department of State’s denial of his immigrant visa. Only after Ms. Muñoz and Mr. Asencio-Cordero initiated this litigation in federal court—and nearly three years after the visa denial—did the State Department declare that it deemed Mr. Asencio-Cordero permanently inadmissible to the United States based on its determination that he “was a member of a known criminal organization ... specifically MS-13.” Pet. App. 124a. According to the State Department, its conclusion was “based on the in-person interview, a criminal review of Mr. Asencio-Cordero, and a review of the [sic] Mr. Asencio-Cordero’s tattoos.” *Id.*

But Mr. Asencio-Cordero has no criminal history—in the United States or abroad—and has repeatedly disclaimed gang involvement, including at his consular interview. J.A. 4. His tattoos therefore may have played an important—if not outcome-determinative—role in the State Department’s conclusion that he is a member of the “Mara Salvatrucha” gang, or MS-13. Resp’t Br. 7-8. Mr. Asencio-Cordero has four tattoos: depictions of La Virgen de Guadalupe (Our Lady of Guadalupe), Sigmund Freud, a “tribal” pattern with a paw print, and theatrical masks with dice and cards. *Id.* n.2. Mr. Asencio-Cordero, now 47 years old, got his tattoos in his teenage years in El Salvador. J.A. 22.

Law enforcement entities maintain that certain tattoos can be evidence that someone is a gang member. However, as courts, law enforcement officials, and scholars have all recognized, common methodology for identifying gang membership is imprecise (at best) and tattoos, standing alone, can be woefully unreliable for identifying whether someone is or has ever been an active gang member.

In particular, certain categories of tattoos that law enforcement uses to designate gang membership (such as some of Mr. Asencio-Cordero's) carry deep significance to Latinx culture and identity wholly unrelated to any gang membership or criminal activity.² These tattoos are of imagery imbued with religious meaning, related to cultural and ancestral identity, or widely popular in mainstream culture. See Section I.A.-C.

For several reasons, these tattoos, standing alone, do not constitute reliable indicators of gang membership. To begin, there is generally “considerable risk of error” associated with determining whether an individual is a gang member. *Vasquez v. Rackauckas*, 734 F.3d 1025, 1046 (9th Cir. 2013). That risk arises, in part, because of the “lack of objective criteria in making such assessments,” *id.*, which includes speculations about the meanings of certain tattoos. Problematically, law enforcement identifies as “gang symbols” certain tattoos that depict imagery that has deep cultural significance for many Latinx people, and which is unrelated to any

² The gender-neutral term “Latinx” is used in this brief to refer collectively to Latinos, Latinas, non-binary persons, and/or any persons of Latin American background.

purported gang membership. To be sure, some people do get certain tattoos because of their gang membership. But even those tattoos may not alone reliably confirm gang membership due to the highly subjective nature of a tattoo's meaning. Nor may those tattoos, standing alone, necessarily indicate *active* gang membership due to the common occurrence of individuals leaving gangs as people age. See Section II.

Finally, the erroneous designations of gang membership disproportionately impact Latino immigrant men like Mr. Asencio-Cordero. These mistaken designations, in turn, subject them to potentially life-altering consequences such as permanent exclusion from the United States. These harms then directly impact entire families and communities, such as Ms. Muñoz's, in the United States. See Section III.

ARGUMENT

I. SOME TATTOOS USED BY LAW ENFORCEMENT AS EVIDENCE OF GANG MEMBERSHIP DEPICT IMAGERY THAT IS INDEPENDENTLY SIGNIFICANT TO LATINX CULTURE AND IDENTITY.

One of the most common reasons people are identified by law enforcement as gang members is for the purported display of a “gang symbol.” *National Youth Gang Survey Analysis: Defining Gangs and Designating Gang Membership*, National Gang Center, <https://perma.cc/CW4B-Y4R5> (last visited Mar. 27, 2024). In fact, 94.9% of surveyed law enforcement “very often” or “sometimes” identify

individuals as gang members based on visual displays of “gang symbols,” including certain tattoos. *Id.*

Problematically, however, law enforcement regularly alleges gang membership based on three categories of tattoos imbued with deep significance to Latinx culture and identity. Beth Caldwell, *Reifying Injustice: Using Culturally Specific Tattoos as a Marker of Gang Membership*, 98 Wash. L.R. 787, 815 (2023). These include tattoos—such as some of Mr. Asencio-Cordero’s—depicting (1) religious symbols; (2) ancestral ties to Indigenous cultures, represented by Mayan and Aztec symbols; and (3) culturally popular images. *Id.* at 815-16.

For instance, law enforcement agencies and officials often use tattoos of common Catholic imagery—such as hands in prayer and La Virgen de Guadalupe—as indicia of gang membership. See, e.g., Mont. Dep’t of Corr. Sec. Threat Grp. Task Force, *STG Identification Summary Guide* 49-50 (Nov. 2007), <https://perma.cc/KK3N-T58Q> (identifying La Virgen de Guadalupe and praying hands as gang tattoos); Lou Savelli, *Understanding East Coast Mexican Gangs, Part 2*, POLICE1 (Dec. 2, 2005, 5:00 AM), <https://perma.cc/87DQ-XVN7>, (identifying tattoos of “a picture of a pair of praying hands” and “[t]he Our Lady of Guadalupe icon” among “favorite tattoo[s] worn by gang members”). Law enforcement also frequently uses well-known Aztec or Mayan symbols as evidence that someone is in a gang. See, e.g., *People v. Hernandez*, No. F077379, 2021 WL 5769068, at *5 (Cal. Ct. App. Dec. 6, 2021) (citing police officer’s assessment that “an Aztec tattoo” is “common” among gang members); William Riley, *Interpreting Gang Tattoos*, Corr. Today, Apr. 2006, at 51 (citing Aztec

eagle known as the “huelga bird,” or “labor strike bird,” as evidence of gang association).

Similarly, law enforcement relies on a generally popular tattoo—known as “Smile Now, Cry Later” or “Laugh Now, Cry Later”—that is now embraced even by professional actors, musicians, and athletes. See, e.g., Can. Border Servs. Agency: Org. Crime Section, *Tattoos and Their Meanings* 81 (May 2008), <https://perma.cc/J8KV-VY6X> (identifying “Smile Now, Cry Later” as “common” gang tattoo); Nat’l Gang Intel. Ctr., *Gang Tattoos*, Nat’l Gang Ctr. Newsletter, Summer 2016, at 5 (reporting that “[t]he theater-masks tattoo with ‘Smile Now, Cry Later’ or ‘Laugh Now, Cry Later’ is associated with both gang and nongang members”).

But whether or not these tattoos may indicate gang membership in any given case, they are also undeniably representations of imagery “inextricably tied to the Latino racial and cultural identity” and wholly divorced from any criminal association. Caldwell, *supra*, at 815.

A. La Virgen de Guadalupe and Other Religious Imagery.

La Virgen de Guadalupe, or “Our Lady of Guadalupe,” is an especially cherished religious symbol throughout Latin America—a deeply Catholic region. Scholars have observed that “no other religious body has had such a pervasive influence upon those societies [in Latin America] as has the Catholic Church.” Thomas F. Quigley, *The Catholic Church and El Salvador*, 32 *CrossCurrents* 129, 179-80 (1982); see Gina A. Zurlo, *A Demographic Profile of Christianity in Latin America and the Caribbean*, in

Christianity in Latin America and the Caribbean 3, 3-16 (Kenneth R. Ross et al. eds., 2022). According to historical data, at least 90% of Latin America's population was Catholic for most of the 20th century. Pew Rsch. Ctr., *Religion in Latin America: Widespread Change in a Historically Catholic Region* 4 (2014), <https://perma.cc/M8YZ-T8T2>. Many Latin Americans view La Virgen de Guadalupe as a special protector, and as a symbol of pan-Latinx identity that transcends attachment to any one geography. Macarena Gómez-Barris & Clara Irazábal, *Transnational Meanings of La Virgen de Guadalupe: Religiosity, Space, and Culture at Plaza Mexico*, 10 *Culture & Relig.* 339, 347 (2009).

La Virgen de Guadalupe refers to the Virgin Mary, who, according to tradition, appeared to Juan Diego—a man of Aztec descent who had converted to Christianity in Mexico in the year 1531. Nat'l Museum of Mex. Art, *The Virgin of Guadalupe/La Virgen de Guadalupe*, <https://perma.cc/YQD2-VVW4> (last visited Mar. 27, 2024). La Virgen de Guadalupe is therefore “more than a Catholic saint; she is, in addition, a political/cultural symbol representing struggles between the indigenous people and dominant population.” Dorie S. Goldman, “Down for La Raza”: *Barrio Art T-Shirts, Chicano Pride, and Cultural Resistance*, 34 *J. Folklore Rsch.* 123, 130 (1997).

As a powerful symbol of communal solidarity, representations of La Virgen have been incorporated into the daily lives of people throughout the Americas since the 1600s. Serge Gruzinski, *Images at War: Mexico from Columbus to Blade Runner (1492-2019)* 161 (2001) (recounting historical record of an image of

La Virgen de Guadalupe painted on a saddle blanket in 1602). Now, La Virgen de Guadalupe is an omnipresent religious and cultural symbol found in murals and other artwork, as well as more quotidian items like clothing, cars, jewelry, and—importantly—tattoos. Tattoos of La Virgen de Guadalupe are often “the embodiment of Latin American popular religiosity that has a long tradition of veneration of icons.” Gustavo Morello SJ, *I’ve Got You Under My Skin: Tattoos and Religion in Three Latin American Cities*, 68 *Soc. Compass* 61, 69 (2021). Thus, rather than designating gang membership, tattoos of La Virgen de Guadalupe can be nothing more than an important outward representation of both cultural and religious identity for anyone of Latin American descent.

B. Aztec and Mayan Symbols.

Tattoos of Aztec or Mayan symbols are another way many Latinx people represent their cultural roots or ancestry. During the U.S. civil rights era, a uniquely Mexican-American identity emerged as a deliberate effort to push back against the racism and marginalization directed towards people of Mexican ancestry in the United States. Mario T. García, *The Chicano Generation: Testimonies of the Movement* 176 (2015). A defining dimension of this identity—known as Chicano identity—was that it distinguished itself from both Mexican identity and mainstream American identity. See Randy J. Ontiveros, *In the Spirit of a New People: The Cultural Politics of the Chicano Movement* 14, 24-25 (2014).

Leaders of the Chicano movement incorporated various Indigenous Mexican and Mexican cultural symbols as a way to create a distinctly Mexican-

American form of cultural expression. García, *supra*, at 176; Laura E. Gómez, *Manifest Destinies: The Making of the Mexican American Race* 166 (2d ed. 2018) (“Part of the Chicano movement’s rhetoric was to embrace—rather than denigrate—Mexicans’ indigenous ancestry as part of the embrace of an oppositional, non-white identity.”). This distinct cultural expression—“well received in many corners of the U.S. culture industry, including museums and galleries, corporate and independent publishing houses, colleges and universities, and theater venues”—was one of the most significant contributions of the Chicano movement. Ontiveros, *supra*, at 2.

The Chicano movement’s efforts to champion pride in and connection to Aztec and Mayan civilizations included the incorporation of symbols from those cultures. For example, the symbol of the Aztec eagle became especially significant as the “huelga bird”—or the “labor strike bird”—an icon adopted by César Chávez and the civil rights efforts of the United Farm Workers Union. Edward J. McCaughan, *Art and Social Movements: Cultural Politics in Mexico and Aztlán* 33 (2012).

As Aztec and Mayan symbols gained new and revived meanings because of the Chicano movement, they became more popular as tattoos across cultures and nationalities. For many individuals of Latin American descent, tattoos of Aztec, Mayan, or other indigenous symbols are a reclamation of identity and reflection of pride in their heritage. Pancho McFarland, *The Chican@ Hip Hop Nation: Politics of a New Millennial Mestizaje* 208 (2013) (explaining that a common “symbolic marker” of Latinx identity

includes tattoos of Aztec icons and other images reflecting indigenous heritage). According to internationally recognized Chicano tattoo artist Freddy Negrete, “along with Catholic icons like the Virgin of Guadalupe, [artists] started to introduce Aztec imagery into our murals and tattoo art with Aztec girls, warriors, and gods [I]t was also spiritual, a way for us to connect to an ancient culture that was in our blood and our history.” Freddy Negrete & Steve Jones, *Smile Now, Cry Later: Guns, Gangs, and Tattoos, My Life in Black and Gray* 43 (2016). Therefore, “[w]hile it is true that some gangs use specific symbols derived from Aztec or Mayan imagery as markers of their specific gang, it is virtually impossible to distinguish a tattoo of cultural significance from a tattoo indicating gang association.” Caldwell, *supra*, at 823.

C. Theater Masks Known as “Smile Now, Cry Later.”

The iconic and now mainstream “Smile Now, Cry Later” tattoo inked on Division I college football players, professional basketball players, and globally renowned entertainers, traces its history to Chicano cultural identity as well.³ It was first penned by

³ Pennsylvania State University football star receiver Harrison Wallace III, WNBA player Brittney Griner, actor/director Tom Hardy, and actor/musician Harry Styles all have “Smile Now, Cry Later” tattoos. Kelly Doll, *Lions, Clocks and Area Codes: Take a Tattoo Tour with Penn State Football Players*, Centre Daily Times (Aug. 16, 2023), <https://perma.cc/XT34-WPQJ>; Scott Gleeson, *Adult Life: Brittney Griner on Dating, Tattoos, Freedom*, USA Today Sports (June 17, 2013), <https://perma.cc/U5RD-Q82N>; Laura Sanders, *Tom Hardy’s 30 Tattoos and What They Mean*, LADBible (July 7, 2021), <https://perma.cc/8MZH-KHFF>;

famous Chicano tattoo artist Freddy Negrete. In his autobiography, Negrete explains that his inspiration came from seeing a magazine advertisement for an acting workshop with “two faces on it, one smiling, for comedy, and the other crying, for tragedy.” Negrete & Jones, *supra*, at 113. This image immediately reminded him of a 1966 song, “Smile Now, Cry Later,” by the Texan-Chicano group Sunny and the Sunliners. *Id.*

Over the years, interpretations of the tattoo have evolved to take on “different meanings for different people.” *Id.* As the National Gang Intelligence Center concedes, the tattoo is associated both with gang and non-gang members. Nat’l Gang Intel. Ctr., *supra*, at 5. For some, the tattoo “represents jail time—keep your head up ... until you’re on the outside”—or “living in the fast lane” until getting “blindsided by Cry Later.” Negrete & Jones, *supra*, at 113. For others, the symbol reflects “life as a Chicano” and living with racism and hardship. Goldman, *supra*, at 127. The tattoo design has become synonymous with Chicano art and has been incorporated into museum exhibitions. Shereen Marisol Meraji, *Black and Gray ... and Brown: A Tattoo Style’s Chicano Roots*, Nat’l Pub. Radio (Apr. 15, 2018), <https://perma.cc/8U76-B7ED> (discussing display of Freddy Negrete’s artwork in an exhibition at the Natural History Museum of Los Angeles).

The mainstream adoption of the Smile Now, Cry Later tattoo coincides with the seemingly exponential proliferation and widening societal acceptance of tattoos generally in recent decades. For instance, in

Erika Owen, *Harry Styles Tattoos, Explained*, Teen Vogue (Apr. 28, 2023), <https://perma.cc/X7RT-FEZ4>.

the United States, a 2023 study found that “32% of Americans have a tattoo, including 22% who have more than one,” with “no major differences by political party or whether Americans live in an urban, suburban or rural community.” Pew Rsch. Ctr., *32% of Americans Have a Tattoo, Including 22% Who Have More Than One* (Aug. 15, 2023), <https://perma.cc/KK4K-YCGR>. Reasons for getting tattoos range from “honor[ing] or remember[ing] someone or something,” to “mak[ing] a statement about what [the person] believe[s],” to simply wanting to “improve ... personal appearance.” *Id.* The plethora of motivations encompassed by these reasons highlights the vastly different possible interpretations of tattoos and the potential for error when drawing conclusions about a tattoo’s meaning. Perhaps unsurprisingly, then, “the largest share of untattooed adults (66%) say seeing a tattoo on someone else leaves them with neither a positive nor negative impression of that person.” *Id.*

II. CULTURALLY SIGNIFICANT TATTOOS ARE AN UNRELIABLE INDICATOR OF GANG MEMBERSHIP.

Identifying whether a particular person is a gang member is a complex and imperfect process that suffers from “[g]ang experts’ tendency to deemphasize the role of documented criminal activity and emphasize the role of ascribed characteristics and symbolic markers—such as the adoption of certain styles of dress or participation in an Immigrant community.” Maya P. Barak et al., *Conceptual and Empirical Obstacles in Defining MS-13: Law-Enforcement Perspectives*, 19 *Criminology & Pub. Pol’y* 563, 577 (2020). When those symbolic markers

are tattoos, especially those that, as described above, carry broader cultural significance, they are, standing alone, dangerously unreliable for designating gang membership. In addition, they may be especially unreliable in designating *active* gang membership, because such membership is often fleeting.

Law enforcement agencies identify individuals as gang members using various criteria, but usually based on two to three of the following factors:

- Self-admission, where the individual has told a police officer that they are a gang member or associate;
- Identification by a reliable informant, where someone police deem reliable informs law enforcement that an individual is a gang member;
- Appearance—wearing clothing or tattoos associated with a gang, or having a hair style associated with a gang;
- Displaying gang signs or symbols, which might include jewelry, belt buckles, logos, or hand signs;
- Being present in a geographic area that is a gang territory, even if that is the place where the individual lives;
- Being seen in the presence of gang members or associates, including childhood friends, classmates, family members, or coworkers; and
- Being arrested with gang members or associates, arguably the criteria most

closely tied to criminality, although this too may measure racial profiling more than actual criminal behavior.

Caldwell, *supra*, at 799 (citing Julie Barrows & C. Ronald Huff, *Gangs and Public Policy: Constructing and Deconstructing Gang Databases*, 8 *Criminology & Pub. Pol'y* 675, 686 (2009)).

The Department of State uses parallel guidelines for determining inadmissibility under 8 U.S.C. § 1182(a)(3)(A)(ii), the statute cited as the reason for denying Mr. Asencio-Cordero's immigrant visa. J.A. 14. To assess whether an applicant is a member of an organized crime group, consular officials are instructed to consider the totality of relevant factors such as:

- (1) (U) Acknowledgement of membership by the individual, the organization, or another party member;
- (2) (U) Actively working to further the organization's aims in a way that suggests close affiliation;
- (3) (U) Receiving financial support or recognition from the organization;
- (4) (U) Determination of membership by a competent court;
- (5) (U) Credible information provided by local or U.S. law enforcement authorities, or other government agencies, indicating that the individual is a member;
- (6) (U) Frequent association with other members;
- (7) (U) Voluntarily displaying symbols of the organization;

(8) (U) Participating in the organization's activities, even if lawful;

(9) (U) Information regarding the applicant's criminal record, especially when that information indicates participation in crimes commonly committed by the organization's members, or arrests occurring with other members of the organization; and

(10) (U) The applicant's demeanor and credibility in answering questions on matters relevant to possible associations with identified criminal organizations, including any efforts by the applicant to evade questioning on such matters, to conceal evidence of their criminal associations or activities, or to misrepresent relevant facts.

9 Foreign Affairs Manual ("FAM") 302.5-4(B)(2)(i).

As these guidelines show, law enforcement uses tattoos and other symbols as indicia of gang membership. As a former corrections officer and member of the executive board of the National Major Gang Task Force wrote, "[t]attoos are part of a process of nonverbal communication used by gang members. Without the need to verbally communicate, a gang member, as well as observant nongang members, can identify a fellow gang member or rival." Riley, *supra*, at 46. The gang expert who submitted an affidavit in this case after reviewing Mr. Asencio-Cordero's tattoos similarly explained that "[s]ome gang members place tattoos on their body in order to show allegiance and membership in a gang," which may be "evidence that helps to determine gang membership

of the individual at some time in the individual's life.” J.A. 44.

Nevertheless, for the reasons explained above, tattoos that depict imagery that carries broader significance to Latinx culture and identity—such as some of Mr. Asencio-Cordero's—are unreliable to identify gang membership, let alone *active* membership. Indeed, law enforcement guides frequently caution that “[t]hough tattoos can be a sign of gang membership, they must be evaluated along with other indicators in order to make a definite designation, since some tattoos are used by both gang members and the general population.” Nat'l Gang Intel. Ctr., *supra*, at 5. These guides recognize that “an image may have several different, occasionally innocuous, meanings, depending on the interpretation of the individual or gangs using it.” Can. Border Servs. Agency, *supra*, at 2. Not surprisingly then, some jurisdictions, including California, do not permit tattoos to be the only indicator of gang membership; they require multiple criteria to be satisfied before an individual is entered into a gang database. Cal. State Auditor, *The CalGang Criminal Intelligence System*, Rep. No. 2015-130, at 15 (2016), <https://perma.cc/N8BY-4ERD>.

Similarly, courts have recognized the dangers of flawed gang databases and the overreliance on tattoos to designate gang membership. In the immigration context, at least one circuit court has reversed the Board of Immigration Appeals (“BIA”) for failing to consider whether conclusions in a gang database were reliable indicators that a noncitizen was affiliated with a gang. *Diaz Ortiz v. Garland*, 23 F.4th 1, 25 (1st Cir. 2022) (en banc). The Department of Homeland

Security alleged that Mr. Diaz Ortiz was a “verified” MS-13 gang member based on law enforcement field reports from a gang database. *Id.* at 7. Reviewing the agency’s factual conclusions, the First Circuit concluded that had the immigration judge and BIA “performed even a cursory assessment of reliability, they would have discovered a lack of evidence to substantiate the gang package’s classification of Diaz Ortiz as a member of MS-13.” *Id.* at 17. “Most significantly,” the record was silent as to the basis for the gang database’s point system, which assigned values to certain conduct—such as having a gang-related tattoo—and then labeled individuals as a gang member after they reached a certain points threshold. *Id.* at 17, 9. The court also observed the “patent disconnect between Diaz Ortiz’s conduct as described in the database and any threatening ‘gang-like’ activities” considering “[n]one of the reports support[ed] an inference that he had participated in criminal activity at all, let alone the kinds of violent crimes for which MS-13 is infamous.” *Id.* at 19.

In the criminal context, courts have overturned a gang enhancement based only on evidence that the defendant and other individuals present were Mexican and had tattoos. *People v. Perez*, 226 Cal. Rptr. 3d 820, 832 (Cal. Ct. App. 2017). In so doing, courts have rejected the prosecution’s “ascrib[ing] a gang connotation to any tattoo, an inference based solely on impermissible speculation.” *Id.*

To be sure, some people do get tattoos to indicate gang membership. But it is difficult, without more, to confirm the rationale behind any specific tattoo because the meaning of tattoos is highly subjective. For instance, the State of New Jersey has treated

tattoos containing “MS-13’ or ‘X3’; the number ‘503,’ El Salvador’s telephone country code; or a representation of devil horns” as indicia of membership in the MS-13 or “Mara Salvatrucha” gang. N.J. Comm’n of Investigation, *Organized Crime Spotlight: MS-13* 10 (Dec. 2018), <https://perma.cc/LY4L-8BTQ>; see also J.A. 44 (noting that the gang expert who reviewed Mr. Asencio-Cordero’s tattoos concluded that Mr. Asencio-Cordero did not have any tattoos representative of the MS-13 gang). But even the meaning of these numbers and symbols is elastic and can shift from person to person. Indeed, relying solely on the number “503” as evidence of gang membership could result in labeling any Salvadoran national seeking to display their cultural or national pride as a gang member subject to inadmissibility.

Moreover, gang tattoos do not per se demonstrate *active* gang membership. Longitudinal studies have found that gang membership is often a temporary aspect of life. Marvin D. Krohn & Terence P. Thornberry, *Longitudinal Perspectives on Adolescent Street Gangs*, in *The Long View of Crime: A Synthesis of Longitudinal Research* 148 (Akiva M. Liberman ed., 2008). Scholars have explained that, “[c]onsistent with the age-crime curve in criminological research and theory,” gang members generally “come and go,” or “age out of the group, move away, get jobs, and so on.” Barak et al., *supra*, at 566. Additionally, tattoo removal is costly, typically running in the hundreds or thousands of dollars depending on the size of a piece, and therefore not always accessible for individuals who no longer identify with their gang tattoos. Victoria D. Ojeda et al., *Motivations for Seeking Laser*

Tattoo Removal and Perceived Outcomes as Reported by Justice Involved Adults, 67 Int'l J. Offender Therapy & Compar. Criminology 126, 140 (2022). Old tattoos, in sum, cannot reliably indicate *active* gang membership.⁴

III. ERRONEOUS DESIGNATIONS OF GANG MEMBERSHIP DISPROPORTIONATELY IMPACT LATINO AND BLACK MEN AND CAN HAVE DEVASTATING CONSEQUENCES FOR NONCITIZENS AND THEIR FAMILIES.

One of the most pernicious effects of misusing tattoos for gang designation is the overapplication of the “gang member” label to Black and Latino men. This overapplication can lead to negative collateral consequences in many aspects of life, including immigration, the criminal legal system, housing, and employment.

Scholars from a broad range of disciplines have concluded that the overinclusive and subjective criteria used to identify gang members, particularly

⁴ Visa denials under 8 U.S.C. § 1182(a)(3)(A)(ii) do not appear to account for this nuance: an adjudicator’s “reason to believe” an applicant is an active member of a criminal organization can be premised off of overinclusive criteria under 9 FAM 302.5-4(B)(2)(i), including a review of an individual’s old tattoos. If the consular official determines that such evidence provides a “reason to believe” active membership in a gang, such membership is presumed to “indicate[] [the applicant’s] continuous involvement in criminal activities” and can therefore “reasonably support a conclusion that any travel by such an applicant to the United States likely will involve criminal activity[.]” 9 FAM 302.5-4(B)(2)(d). But past gang association alone does not necessarily indicate that a particular person has engaged in criminal activity or will engage in any in the future.

those related to appearance, feed a vicious cycle of misidentification of people of color as gang members. On the front end, misclassification and racial profiling are compounded by over-policing of certain communities. Laila Hlass, *The School to Deportation Pipeline*, 34 Ga. St. U.L. Rev. 697, 733 (2018); Barrows & Huff, *supra*, at 677. The identification of “individuals who meet only one criterion of gang membership ... without the requirement of a criminal conviction or even an arrest” are then added to gang databases, which in turn lack oversight. Barrows & Huff, *supra*, at 677; see also Hlass, *supra*, at 733. This overidentification then leads to additional police misidentification of gang members, perpetuating the racial disparities in the designation of gang membership. Barrows & Huff, *supra*, at 677; Plácido Gómez, *It Is Not Simply Because an Expert Says It Is So: The Reliability of Gang Expert Testimony Regarding Membership in Criminal Street Gangs: Pushing the Limits of Texas Rule of Evidence 702*, 34 St. Mary’s L.J. 581, 620 (2003).

The degree to which Black and Latinx individuals are disproportionately identified as gang members is staggering. In 2007, Black and Latinx people nationally were “15 times more likely than non-Hispanic whites to be identified by the police as gang members.” Judith Greene & Kevin Pranis, *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies*, Just. Pol’y Inst., July 2007, at 36-37. One outcome of erroneous gang identifications is the overrepresentation of people of color in gang databases. Gang databases across the country have been criticized for disproportionately identifying Black and Latinx

individuals as gang members—at rates typically above 95%—despite evidence that approximately 40% of gang members in the United States are white. Caldwell, *supra*, at 791-92 (discussing case examples from New York, Chicago, Los Angeles, and Mississippi).

The consequences of such overinclusion are just as distressing, particularly to Latinx immigrants. In one prominent case, Immigration and Customs Enforcement (“ICE”) sought to terminate a teenager’s protected status as a Deferred Action for Childhood Arrivals (“DACA”) recipient based on the unfounded conclusion that his tattoo of the text “La Paz BCS” was evidence of gang membership. KIRO 7 News Staff, *Daniel Ramirez Tattoo: Attorneys Release Picture, Dispute Immigration Case*, KIRO 7 (Feb. 22, 2017, 8:35 PM), <https://perma.cc/VK5E-P7SN>. Daniel Ramirez Medina was arrested and detained by ICE despite his assertions that his tattoo simply represented his birthplace: La Paz, the capital city of the Mexican state Baja California Sur (“BCS”). *Id.* Five years after his initial arrest, the Department of Justice reached a settlement with Mr. Ramirez Medina, retracting the allegations immigration officials had relied on and conceding that he was not a gang member or a threat to his community. Mike Carter, *DOJ Settles Claim by Des Moines ‘Dreamer’ Detained by Immigration Despite Protected Status*, *Seattle Times* (Jan. 4, 2023), <https://perma.cc/77VZ-4ALP>. While Mr. Ramirez Medina was spared the harsh immigration consequences of gang misidentification, many others are not so lucky.

The negative repercussions of gang member labeling extend beyond the particular individuals who

are mislabeled to their families and communities, such as Ms. Muñoz’s and Mr. Asencio-Cordero’s. Gang membership misidentification that leads to the deportation or denial of admission of a noncitizen systematically causes “particularly severe and long-lasting effects on the socioeconomic status and emotional well-being of [their] family”—including, in many cases, on U.S. citizens. Yolanda Vazquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 How. L.J. 639, 668 (2011); Tanya Golash-Boza, *Punishment Beyond the Deportee: The Collateral Consequences of Deportation*, 63 Am. Behav. Scientist 1331, 1345-46 (2019). Indeed, the Department of Homeland Security itself recognized in this case that Ms. Muñoz, a U.S. citizen, would suffer extreme hardship if she were separated from Mr. Asencio-Cordero (exceeding the hardship caused by the mere fact of separation). Resp’t Br. 6, 27; see also J.A. 24 (detailing Mr. Asencio-Cordero’s relationship with his U.S. citizen daughter, from whom he has also been separated). Erroneously designating noncitizens as gang members on the basis of widely used tattoos of cultural significance runs the risk of imposing this extreme hardship on countless families and already marginalized communities.

* * *

Amici do not presume to speculate as to Mr. Asencio-Cordero’s motivations for getting his tattoos in his teenage years. Nor do they hold a view as to what the tattoos may mean to him. But tattoos that carry independent cultural significance to Latinx people are, standing alone, woefully unreliable

evidence of gang membership. As such, to the extent Mr. Asencio-Cordero's tattoos played a role in the State Department's denial of his visa, *amici* agree with the Respondents that the Department of State should have provided Ms. Muñoz, prior to this litigation, with a summary of the factual grounds for her husband's visa denial and a meaningful opportunity to timely respond with rebuttal evidence.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Ninth Circuit.

Respectfully submitted,

Nadia Anguiano

Counsel of Record

Seiko Shastri

FEDERAL IMMIGRATION

LITIGATION CLINIC

JAMES H. BINGER CENTER

FOR NEW AMERICANS

UNIVERSITY OF

MINNESOTA LAW SCHOOL

229 19th Ave. S.

Minneapolis, MN 55455

(612) 301-8653

angui010@umn.edu

Counsel for Amici Curiae

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