



**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

FRANCISCO RAMIREZ, )  
JACQUELINE REYES-MENDOZA, )  
AND THEIR MINOR CHILD, B.R., )

Victim-Witnesses – Petitioners, )

v. )

No. S-1-SC-39966

HONORABLE DAYLENE A. MARSH, )

District Court Judge – Respondent )

and )

DAVID PAULINO PADILLA-SUAZO, )

Real Party in Interest – Defendant )

**ON PETITION FOR EMERGENCY WRIT  
OF SUPERINTENDING CONTROL AND REQUEST FOR STAY,  
From the June 8, 2023 Order Denying Petitioners’ Motion to Quash Subpoena  
Eleventh Judicial District Court, Division VI, Case No. D-116-CR-2020-00835  
The Honorable Daylene A. Marsh, District Court Judge**

**MOTION OF NATIONAL IMMIGRANT WOMEN’S ADVOCACY  
PROJECT, INC. (NIWAP, INC.) AND VICTIM RIGHTS LAW CENTER  
(VRLC) FOR LEAVE TO FILE BRIEF AS AMICI CURIAE**

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Pursuant to Rule 12-320(A) NMRA, the National Immigrant Women's Advocacy Project, Inc. (NIWAP, Inc.) and the Victim Rights Law Center respectfully move the Court for leave to file a brief as *amici curiae* in support of Petitioners Francisco Ramirez, Jacqueline Reyes-Mendoza, and their minor child B.R. This case concerns the implications of the Violence Against Women Act's ("VAWA") immigration confidentiality protections that limit discovery in state court proceedings of information about and information contained in federal immigration files that are statutorily entitled to VAWA confidentiality protections under 8 U.S.C. 1367, including in criminal proceedings, in state courts. The proposed amicus brief will provide the Court with the necessary information to ensure the New Mexico Supreme Court's decision in this case is consistent with and not contrary to VAWA confidentiality statutes, regulations, U.S. Department of Homeland Security policies and publications and case law from federal and state courts across the country who have addressed in criminal, civil, and family court proceedings the important protections VAWA confidentiality laws offer immigrant victims of crime and abuse. In support of this motion, the movants offer as follows:

1. NIWAP, Inc. is a non-profit training, technical assistance, and public policy advocacy organization that develops, reforms, and promotes the implementation and use of laws, policies and practices to improve legal rights, services and assistance to immigrant women, children and immigrant victims of

domestic violence, sexual assault, child abuse, stalking, human trafficking and other crimes. NIWAP, Inc. Director, Leslye E. Orloff, has been closely involved with the enactment of the Violence Against Women Act (“VAWA”) including the VAWA self-petition in 1994 and the T and U visas in 2000, as well as the 1996, 2000, 2005 and 2013 VAWA confidentiality protections. NIWAP, Inc. has documented immigrant women’s experiences illustrating the need for VAWA confidentiality protections, and trained and provided technical assistance to advocates, attorneys and justice system professionals across the country to ensure that immigrant victims are protected by applicable confidentiality provisions.

2. NIWAP, Inc. routinely offers training for professionals working with immigrant victims and has offered technical assistance to callers from all 50 states, the District of Columbia, American Samoa, the U.S. Virgin Islands, embassies and consulates in over 3,500 distinct matters. NIWAP, Inc. has collaborated with the Department of Homeland Security (“DHS”) and the Federal Law Enforcement Training Center (“FLTEC”) in the development of online mandatory VAWA confidentiality training for DHS officials. NIWAP, Inc. has worked with Congress and federal agencies to implement VAWA confidentiality protections for immigrant victims of domestic violence, sexual assault, human trafficking, and other crimes in a manner that will enhance victim, community, and law enforcement officer safety. An important goal of this work is stopping perpetrators, family, employers and others

from learning about the existence of, obtaining documents contained in, or learning the outcome of VAWA confidentiality protected cases.

3. As part of its mission, NIWAP appears from time to time as *amicus curiae* to offer its perspective and expertise on matters of public importance related to the rights of, and legal protections afforded to, immigrant women in the United States.

4. A national nonprofit organization with offices in Massachusetts and Oregon, the Victim Rights Law Center (VRLC) provides legal counsel to help rape, sexual assault and stalking survivors rebuild their lives. VRLC is dedicated to seeking justice for every rape and sexual assault survivor. To this end, VRLC has provided free legal services to nearly 20,000 adult and youth victims of rape and sexual assault in Massachusetts and Oregon, including for survivors with immigration legal needs and complex privacy concerns. VRLC also provides training, consulting, mentoring and legal resources to thousands of legal professionals across the United States and U.S. territories each year on the use of civil laws to protect and promote the rights of sexual assault survivors. VRLC was founded in 2003 as the first non-profit agency in the country dedicated to meeting the legal needs of sexual assault survivors.

5. While the breadth of VRLC's work reflects the deep and reverberating impact of sexual assault throughout all aspects of a victim's life, for many of

VRLC's clients and the sexual assault survivors served by organizations VRLC assists, issues of privacy, security, and autonomy are fundamental to victim recovery as well as to promoting victim healing, offender accountability, and community safety. Based on VRLC's extensive experience, VRLC offers a uniquely well-informed perspective on the both the immigration and privacy needs of rape and sexual assault survivors. In 2004, the U.S. Department of Justice (DOJ) recognized VRLC's special expertise on these issues, selecting VRLC to serve as a DOJ national trainer and organizational consultant on the privacy rights and interests of sexual assault survivors for the Office on Violence Against Women (OVW) grantees. VRLC has continued to receive DOJ technical assistance funding for the last nearly 20 years.

6. The movants wish to be heard in this matter because it implicates the enforcement (or non-enforcement) of crucial VAWA confidentiality provisions in courts in New Mexico. This issue is at the heart of the movants' mission and is of the utmost importance to movants and to the clients that they serve. Movants' brief will assist the court by providing additional information on the legislative history of these VAWA confidentiality provisions, their importance to victims of abuse, and their interpretation by state and federal courts within the 10<sup>th</sup> Circuit and across the country.

7. On August 11, 2023, movants notified all parties of their intent to seek

the Court's leave to file the attached brief as *amici curiae*. Counsel for Petitioners responded that they do not oppose this request. Counsel for Real Party in Interest - Defendant did not respond. At the time, counsel for Respondent responded that they would oppose this request as untimely. The Court denied movants motion to submit an amicus brief in the petition phase. *See* Order, entered 10/3/23. Since then, the Court ordered briefing to proceed on the verified petition for emergency writ of superintending control. *See* Order, entered 2/15/24. Because this matter is now in the briefing phase, Movants are renewing their request for leave to file the attached brief as *amici curiae* given the nature of the issues at stake.

8. Respondent has been on notice of movants' intent to participate in this case since August 2023. There is no prejudice to Respondent in allowing the proposed amicus brief.

9. WHEREFORE, movants request leave to file a Brief as *amici curiae*, attached as **Exhibit A**, in support of the Petitioners.

Respectfully submitted,

/s/ Denise M. Chanez – Electronically Signed

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DATED: March 5, 2024

### **CERTIFICATE OF SERVICE**

I hereby certify that I caused a true copy of the foregoing filing to be filed electronically and served to all counsel of record as set forth below on this 5<sup>th</sup> Day of March, 2024, via the Court's e-filing/service system.

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**EXHIBIT A**

## **STATEMENT OF COMPLIANCE**

Pursuant to New Mexico Rule of Appellate Procedure 12-504(H), I certify that this brief complies with the type-volume requirement of New Mexico Rule of Appellate Procedure 12-504(G). It contains 5,906 words in the body of the petition, according to a count by Microsoft Word.

/s/ Denise M. Chanez – Electronically Signed  
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## TABLE OF CONTENTS

STATEMENT OF COMPLIANCE.....	i
TABLE OF AUTHORITIES .....	iv
ARGUMENT .....	1
I. Legislative History Supports Petitioners. ....	1
A. Congress Enacts VAWA To Protect Abuse Victims. ....	2
B. Congress Amplifies Confidentiality Protections.....	3
1. <i>2000: Introduction of U/T Visas.</i> .....	4
2. <i>2005: Additional Protections, Stiffer Penalties.</i> .....	4
3. <i>2013: Closing Loopholes.</i> .....	5
C. Evidence Underscores The Importance Of Confidentiality.....	6
II. VAWA Confidentiality Contains No Discovery Exception. ....	7
A. Judicial Consensus Weighs Against Permitting Discovery. ....	8
1. <i>Some Courts View VAWA Confidentiality As Absolutely</i> <i>Barring Discovery.</i> .....	9
2. <i>The Canon Of Expressio Unius Supports This</i> <i>Conclusion.</i> .....	11
B. Supreme Court Precedent Implies A Bright-Line Bar On Discovery Of VAWA-Protected Information. ....	12
C. The Fifth Circuit’s Balancing Test Would Not Permit The Discovery Sought Here. ....	13

1.	<i>Public Interests In Confidentiality</i> .....	14
2.	<i>Victim Interests In Confidentiality</i> .....	16
3.	<i>Any Defense Interests In VAWA-Protected Information Are Outweighed</i> .....	18
D.	<i>Brady Does Not Compel Victims To Waive Confidentiality</i> .....	21
III.	Conclusion .....	24

**TABLE OF AUTHORITIES**

<b>CASES</b>	<b>PAGE</b>
<b>New Mexico Cases</b>	
<i>Case v. Hatch</i> , 2008-NMSC-024, 144 N.M. 20, 183 P.3d 905 .....	23
<i>State v. Huerta-Castro</i> , 2017-NMCA-026, 390 P.3d 185 .....	24
<i>State v. Stevenson</i> , 2020-NMCA-005, 455 P.3d 890 .....	23
<b>Other Jurisdictions</b>	
<i>Arizona v. Buccheri-Bianca</i> , 312 P.3d 123 (Ariz. Ct. App. 2013) .....	19
<i>Auguste v. Alderden</i> , No. 03-cv-02256-WYD-KLM, 2008 WL 3211283 (D. Colo. Aug. 6, 2008) .....	12
<i>Baldrige v. Shapiro</i> , 455 U.S. 345 (1982).....	12
<i>Barrett v. United States</i> , No. 09-CIV-105-JHP, 2012 WL 3542609 (E.D. Okla. Aug. 16, 2012), <i>aff'd in part, rev'd in part on other grounds</i> , 797 F.3d 1207 (10th Cir. 2015) .....	22
<i>Camayo v. John Peroulis &amp; Sons Sheep, Inc.</i> , No. 10-cv-00772-MSK-MJW, 2012 U.S. Dist. LEXIS 168078 (D. Colo. Nov. 27, 2012) .....	9
<i>Cazorla v. Koch Foods of Miss., L.L.C.</i> , 838 F.3d 540 (5th Cir. 2015) .....	8, 9, 11, 12, 13, 14, 15, 16, 17

<i>Commonwealth of Pennsylvania v. Riojas</i> , No. 2038 MDA 2015, 2016 WL 5940424 (Pa. Super. Ct. Sept. 7, 2016) .....	8, 10
<i>David v. Signal International, L.L.C.</i> , 735 F. Supp. 2d 440 (E.D. La. 2010) .....	17
<i>Demaj v. Sakaj</i> , No. 3:09 CV 255(JGM), 2012 WL 476168 (D. Conn. Feb. 14, 2012) ...	10, 20
<i>EEOC v. Global Horizons, Inc.</i> , No. CV-11-3045-EFS, 2013 WL 3940674 (E.D. Wash. July 31, 2013) .....	9
<i>EEOC v. Sol Mexican Grill LLC</i> , No. 18-2227 (CKK), 2019 WL 2896933 (D.D.C. June 11, 2019) .....	8, 11, 15, 17, 18
<i>In re England</i> , 375 F.3d 1169 (D.C. Cir. 2004).....	12
<i>Guardado v. Maryland</i> , No. 2397, 2015 WL 5968756 (Md. Ct. Spec. App. Oct. 14, 2015) .....	19
<i>Guillen v. B.J.C.R. LLC</i> , 341 F.R.D. 61 (D. Nev. 2022) .....	8, 10, 14, 15, 17, 20
<i>Hawke v. U.S. Department of Homeland Security</i> , No. C-07-03456 RMW, 2008 WL 4460241 (N.D. Cal. Sept. 29, 2008) ...	3, 8, 10
<i>Maine v. Marroquin-Aldana</i> , 89 A.3d 519 (Me. 2014) .....	18, 20, 21
<i>Molnar v. Margaret W. Wong &amp; Associates</i> , No. 109440, 2021 WL 1575218 (Ohio Ct. App. Apr. 22, 2021), <i>appeal not allowed</i> , 173 N.E.3d 504 (Ohio 2021) .....	9, 15
<i>People v. Alvarez</i> , No. G047701, 2014 WL 1813302 (Cal. Ct. App. May 7, 2014) (unpublished) .....	19

<i>People v. Lopez</i> , No. A163573, 2022 WL 17958442 (Cal. Ct. App. Dec. 27, 2022) (unpublished) .....	19, 24
<i>Rivera v. NIBCO, Inc.</i> , 364 F.3d 1057 (9th Cir. 2004) .....	14, 16, 17
<i>Smith v. Secretary of New Mexico Department of Corrections</i> , 50 F.3d 801 (10th Cir. 1995) .....	23, 24
<i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1984).....	17
<i>Tapia v. Tansy</i> , 926 F.2d 1554 (10th Cir. 1991) .....	20
<i>United States v. Avellino</i> , 136 F.3d 249 (2d Cir. 1998) .....	22
<i>United States v. Bouette</i> , No. 1:17-cr-3338-JMC, 2019 WL 2357008 (D.N.M. June 4, 2019)	22, 23, 24
<i>United States v. Brown</i> , 347 F.3d 1095 (9th Cir. 2003), <i>aff'd</i> , 223 F. App'x 647 (9th Cir. 2007)	20, 21
<i>United States v. Garcia-Martinez</i> , 730 F. App'x 665 (10th Cir. 2018).....	23
<i>United States v. Gutierrez de Lopez</i> , 761 F.3d 1123 (10th Cir. 2014) .....	20
<i>United States v. Locascio</i> , 6 F.3d 924 (2d Cir. 1993) .....	23
<i>United States v. Rosenschein</i> , C.R. No. 16-4571 JCH, 2019 WL 2298810 (D.N.M. May 30, 2019).....	22
<i>Washington v. Horning Bros., LLC</i> , No. 2:17-CV-0149-TOR, 2018 WL 2208215 (E.D. Wash. May 14, 2018) .....	10, 16, 17, 18

## STATUTES

8 U.S.C. § 1186a(c)(4).....	2
8 U.S.C. § 1367.....	15
8 U.S.C. § 1367(a).....	3
8 U.S.C. § 1367(b).....	3
8 U.S.C. § 1367(b)(2).....	6
8 U.S.C. § 1367(b)(6), (7), (8).....	6
8 U.S.C. § 1367(c).....	3, 5
34 U.S.C. § 12291(b)(2)(C).....	11
Pub. L. No. 98-457, tit. III, § 303(a)(2)(E), 98 Stat. 1749.....	9
Pub. L. No. 101-649, § 701(a)(5), 104 Stat. 4978.....	1
Pub. L. No. 103-322, tit. IV, 108 Stat. 1902.....	1
Pub. L. No. 104-208, div. C, § 384, 110 Stat. 3009.....	2
Pub. L. No. 106-386, 114 Stat. 1464.....	4, 20
Pub. L. No. 109-162, 119 Stat. 2960.....	4, 5
Pub. L. No. 113-4, 127 Stat. 54.....	6

## RULES

Fed. R. Civ. P. 26(c).....	13
Fed. R. Evid. 412(c)(2).....	11
Rule 12-320(C) NMRA.....	1

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8 C.F.R. § 216.5(e)(3)(viii) (1992).....	1
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New Classification for Victims of Criminal Activity; Eligibility for “U”  
 Nonimmigrant Status,  
 72 Fed. Reg. 53,014 (Sept. 17, 2007) .....5

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Tara N. Richards et al., *The Cycle of Violence Revisited: Distinguishing Intimate Partner Violence Offenders Only, Victims Only, and Victim-Offenders*, 31 Violence & Victims 573 (2016) .....7

Erica L. Smith, Bureau of Just. Statistics, NJC 305613, <i>Female Murder Victims and Victim-Offender Relationship, 2021</i> , at 1 (Dec. 2022), <a href="https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/fmvv or21.pdf">https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/fmvv or21.pdf</a> .....	7
Second Ord. Re: Discovery Disps., <i>Perez v. Seafood Peddler of San Rafael Inc.</i> , No. 3:12-cv-00116 WHO (NC), (N.D. Cal. Sept. 10, 2013), ECF No. 162.....	10, 19, 21
U.S. Dep’t of Homeland Sec., <i>Implementation of Section 1367 Information Provisions</i> , Instruction No. 002-02-001 (Nov. 7, 2013), <a href="https://niwaplibrary.wcl.american.edu/wp-content/uploads/implementation-of-section-1367-information-provisions-instruction-002-02-001_0_0.pdf">https://niwaplibrary.wcl.american.edu/wp-content/uploads/implementation-of-section-1367-information-provisions-instruction-002-02-001_0_0.pdf</a> .....	5, 8
U.S. Dep’t of Just., <i>The Attorney General Guidelines for Victim and Witness Assistance</i> (2022) (effective Mar. 31, 2023) .....	3, 6
USCIS, DHS, <i>Ann. Rep. on Immigr. Applications and Petitions Made by Victims of Abuse – Fiscal Year 2022: Rep. to Cong.</i> at 9 (Apr. 13, 2023) .....	15
USCIS, Form I-918 Instructions (Dec. 6, 2021), <a href="https://www.uscis.gov/sites/default/files/document/forms/I-918instr.pdf">https://www.uscis.gov/sites/default/files/document/forms/I-918instr.pdf</a> .....	15
USCIS, Form I-914 Instructions (Dec. 2, 2021), <a href="https://www.uscis.gov/sites/default/files/document/forms/i-914instr.pdf">https://www.uscis.gov/sites/default/files/document/forms/i-914instr.pdf</a> .....	15
USCIS, Form I-360 Instructions (Jul. 15, 2022), <a href="https://www.uscis.gov/sites/default/files/document/forms/i-360instr.pdf">https://www.uscis.gov/sites/default/files/document/forms/i-360instr.pdf</a> .....	15
USCIS, PA-2023-14: Safe Address and Special Procedures for Persons Protected by 8 U.S.C. 1367 (Apr. 11, 2023) .....	8
White House, <i>U.S. National Plan to End Gender-Based Violence: Strategies for Action</i> (May 2023) .....	6

## ARGUMENT<sup>1</sup>

### **I. Legislative History Supports Petitioners.**

Prior to the Violence Against Women Act of 1994<sup>2</sup> (“VAWA” or “VAWA 1994”), abused immigrant women and children had no independent pathway to legal status in the U.S., forcing them to rely on their U.S. citizen or lawful permanent resident spouse’s cooperation. In 1990, Congress sought to “establish measures to protect the confidentiality of information concerning any abused alien spouse or child.”<sup>3</sup> Resulting regulations permitted production of victim information pursuant to court orders, in criminal proceedings, or when requested by state or federal law enforcement agencies.<sup>4</sup> These exceptions often led to disclosure of victims’ information “to . . . alleged abuser[s].”<sup>5</sup> Congress realized this legal and regulatory framework “foster[ed] domestic violence . . . by placing full and complete control

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<sup>1</sup> Pursuant to Rule 12-320(C) NMRA, *amici* disclose that no counsel for any party authored this brief, in whole or in part, and that no person other than the *amici* and their counsel made any monetary contribution to fund the preparation or submission of this brief.

<sup>2</sup> Pub. L. No. 103-322, tit. IV, 108 Stat. 1902.

<sup>3</sup> Immigration Act of 1990, Pub. L. No. 101-649, § 701(a)(5), 104 Stat. 4978, 5085-86 (amending then-current 8 U.S.C. § 1186a(c)(4)); *accord* 8 U.S.C. § 1186a(c)(4).

<sup>4</sup> 8 C.F.R. § 216.5(e)(3)(viii) (1992).

<sup>5</sup> Memorandum to All INS Employees (May 5, 1997), *reprinted in* 74 Interpreter Releases 795, 796 (May 12, 1997).

of [an] alien spouse’s ability to gain permanent legal status in the hands of the citizen of lawful permanent resident spouse.”<sup>6</sup>

**A. Congress Enacts VAWA To Protect Abuse Victims.**

Seeking to “deter and punish violent crimes against women,” Congress enacted VAWA.<sup>7</sup> VAWA’s self-petition process was crafted to provide immigrant victims temporary status and allow applications (“Self-Petitions”) for permanent status *without the abuser’s knowledge*.<sup>8</sup> To ensure new regulations effectively protected this vulnerable population, Congress commissioned the Attorney General to analyze how confidentiality could prevent “exposure to further abuse.”<sup>9</sup>

In 1996, Congress first passed “VAWA Confidentiality,”<sup>10</sup> protecting information (i) about the existence of, (ii) contained in, or (iii) relating to Self-Petitions and U/T Visa case files (“VAWA-Protected Information”). The statute (1) prohibits basing admissibility or deportability determinations solely upon information furnished by abusers; and (2) mandates that “*in no case*” may the

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<sup>6</sup> H.R. Rep. No. 103-395, at 26 (1993).

<sup>7</sup> *Id.*

<sup>8</sup> *See* VAWA 1994 § 40701(a), 108 Stat. at 1953-54 (amending 8 U.S.C. § 1154(a)(1)).

<sup>9</sup> *Id.* § 40508(a)(2), 108 Stat. at 1950.

<sup>10</sup> *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 384, 110 Stat. 3009-546, 3009-652 (codified at 8 U.S.C. § 1367).

government “permit use by or disclosure *to anyone . . . of any* information which *relates to*” a victim.<sup>11</sup> Congress took these protections seriously: *each violation* of VAWA Confidentiality was punishable by disciplinary action and a civil fine of up to \$5,000.<sup>12</sup>

Congress included five exceptions: census information, law enforcement investigations, judicial review of immigration determinations,<sup>13</sup> public benefit determinations, and victims’ express waiver.<sup>14</sup> Congress conspicuously excluded a court order exception.<sup>15</sup>

#### **B. Congress Amplifies Confidentiality Protections.**

In 2000, 2005, and 2013, alongside other amendments, Congress expanded the classes of immigrants protected by VAWA Confidentiality and added

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<sup>11</sup> 8 U.S.C. § 1367(a) (emphases added).

<sup>12</sup> *Id.* § 1367(c).

<sup>13</sup> Department of Homeland Security (“DHS”) guidance clarifies: “[D]efense counsel in state cases may . . . attempt to make the entire A-file discoverable; however, the . . . file is not discoverable in its entirety under [the judicial review] exception.” U.S. Dep’t of Homeland Sec., *Implementation of § 1367 Info. Provision*, Instruction No. 002-02-001, at 7 (Nov. 7, 2013), [https://niwaplibrary.wcl.american.edu/wp-content/uploads/implementation-of-section-1367-information-provisions-instruction-002-02-001\\_0\\_0.pdf](https://niwaplibrary.wcl.american.edu/wp-content/uploads/implementation-of-section-1367-information-provisions-instruction-002-02-001_0_0.pdf) (emphasis in original) (“DHS Guidelines”).

<sup>14</sup> 8 U.S.C. § 1367(b).

<sup>15</sup> *Hawke v. U.S. Dep’t of Homeland Sec.*, No. C-07-03456 RMW, 2008 WL 4460241, at \*6 (N.D. Cal. Sept. 29, 2008); DHS Guidelines at 7 (Nov. 7, 2013).

immigration enforcement certification requirements.

**1. 2000: Introduction of U/T Visas.**

In 2000, Congress created the “U” and “T” visa programs, providing temporary legal status (“U/T Visas”) to immigrant victims of enumerated crimes who, as certified by an authorized government officer (the “Certification”),<sup>16</sup> cooperate with and thereby “strengthen the ability of law enforcement agencies to detect, investigate, and prosecute [those] crimes . . . while offering protection to victims[.]”<sup>17</sup> As a result, VAWA 2000 offered protection to immigrants abused by *non-spousal, non-parent, and undocumented* perpetrators.

**2. 2005: Additional Protections, Stiffer Penalties.**

VAWA 2005 expanded VAWA Confidentiality and codified Congressional intent “to protect victims . . . from harm . . . result[ing] from . . . disclosure of covered information.”<sup>18</sup> Congressional remarks identified confidentiality as critical to preventing abusers from obtaining victims’ information, delegitimizing abusers’

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<sup>16</sup> A Certification is strictly required for U Visas but is optional for T Visas.

<sup>17</sup> VAWA 2000 § 1513(a)(2)(A), 114 Stat. at 1533; *see also id.* § 1513(a)(2)(B), 114 Stat. at 1534 (codified at 22 U.S.C. § 7101) (U/T Visas “will facilitate the reporting of crimes” and support applicants “during investigations or prosecutions”); *id.* § 1502(a)(3), (b)(1), 114 Stat. at 1518 (VAWA 2000 sought “to remove barriers to criminal prosecutions,” as many abusers were “virtually immune from prosecution”).

<sup>18</sup> VAWA 2005 § 817(4), 119 Stat. at 3061 (amending 8 U.S.C. § 1367(d)).

deportation threats, and facilitating successful prosecutions.<sup>19</sup> DHS posited that “delay [in implementing VAWA 2005] could result in serious harm” and “would be contrary to the public interest.”<sup>20</sup>

VAWA 2005 also required immigration officials to certify in removal proceedings that their enforcement actions were *not* based on information obtained in violation of VAWA Confidentiality. Penalty provisions were accordingly expanded to cover “[*a*]nyone who willfully . . . permits information to be disclosed in violation of this section *or* . . . *knowingly makes a false certification*” of compliance with § 1367 in connection with removal proceedings.<sup>21</sup> VAWA thus clearly prohibits both *violating* VAWA Confidentiality and *using information obtained in violation of* VAWA Confidentiality.

### **3. 2013: Closing Loopholes.**

VAWA 2013 narrowed VAWA Confidentiality’s law enforcement exception, prohibiting disclosure of VAWA-Protected Information unless “used solely for a

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<sup>19</sup> See H.R. Rep. No. 109-233, at 120 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 1636, 1671; 151 Cong. Rec. E2605-07 (daily ed. Dec. 18, 2005) (remarks of Rep. Conyers).

<sup>20</sup> New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,032 (Sept. 17, 2007).

<sup>21</sup> 8 U.S.C. § 1367(c) (emphases added) (second emphasized phrase added by VAWA 2005 § 817(c), 119 Stat. at 3061); *see id.* § 1229(e) (defining this certification).

legitimate law enforcement purpose” *and*, as with other exceptions (including for national security<sup>22</sup>), disclosed “in a manner that protects the confidentiality [thereof].”<sup>23</sup> DHS, implementing these amendments, explained that disclosure “may unwittingly aid perpetrators retaliate against, harm or manipulate victims and their famil[ies] . . . , and elude or undermine criminal prosecutions.”<sup>24</sup>

### **C. Evidence Underscores The Importance Of Confidentiality.**

Studies and reports validate Congressional findings that confidentiality is essential to protecting abuse victims, prosecuting abusers, and enhancing public safety:

- Victims face great danger of future violence after reporting a crime and during criminal investigations and prosecutions.<sup>25</sup>

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<sup>22</sup> VAWA 2005 and 2013 added three narrow exceptions permitting limited disclosure to (a) chairmen and ranking members of Congressional Judiciary Committees for oversight purposes, (b) certain “nonprofit, nongovernmental victims’ service providers” with victims’ express consent and (c) national security officials, solely for national security purposes. *See* 8 U.S.C. § 1367(b)(6), (7), (8).

<sup>23</sup> *Id.* § 1367(b)(2) (bold italicized phrase added by VAWA 2013 § 810(a)(2)(C), 127 Stat. at 117).

<sup>24</sup> DHS Guidelines at 15.

<sup>25</sup> *See* U.S. Dep’t of Just., *The Att’y Gen. Guidelines for Victim & Witness Assistance*, p. 33 (2022) (effective Mar. 31, 2023) (“2022 AG Guidelines”); *see also* White House, *U.S. National Plan to End Gender-Based Violence: Strategies for Action 59* (May 2023) (“[P]articipation in . . . court proceeding[s] could  
(cont’d)



- Victim intimidation and witness tampering are significant reasons victims are reluctant to participate in prosecution.<sup>26</sup>
- Over thirty percent of female homicide victims are killed by former or current partners.<sup>27</sup>
- “[Perpetrators of] domestic/sexual violence often have extensive criminal histories; they are charged with more assaults and violent offenses . . . and have high rates of recidivism . . . .”<sup>28</sup>

## II. VAWA Confidentiality Contains No Discovery Exception.

Courts unequivocally agree that government agencies may not produce

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escalate [an] abusive partner’s violence. . . .”) (citing Ctr. for the Study of Soc. Pol’y, *Race Equity Review: Findings from a Qualitative Analysis of Racial Disproportionality and Disparity for African American Children and Families in Michigan’s Child Welfare System* (2009)).

<sup>26</sup> Off. on Violence Against Women, U.S. Dep’t of Just., *2018 Biennial Report to Congress on the Effectiveness of Grant Programs Under the Violence Against Women Act 26* (2018) (“2018 VAWA Report”) (citing Sarah M. Buel, *De Facto Witness Tampering*, 29 Berkeley J. Gender, L. & Just. 72 (2014)).

<sup>27</sup> Erica L. Smith, Bureau of Just. Statistics, NJC 305613, *Female Murder Victims and Victim-Offender Relationship, 2021*, at 1 (Dec. 2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/fmvvor21.pdf>.

<sup>28</sup> 2018 VAWA Report at 21 (citing Drake, E., et al., *Recidivism Trends of Domestic Violence Offenders in Wash. State*, Wash. State Inst. for Pub. Pol’y, (2013)); see also Tara N. Richards et al., *The Cycle of Violence Revisited: Distinguishing Intimate Partner Violence Offenders Only, Victims Only, and Victim-Offenders*, 31 Violence & Victims 573 (2016).

VAWA-Protected Information.<sup>29</sup> The relevant question is what information, if any, courts may order victims to produce within the confines of VAWA Confidentiality. *Amici* contend that VAWA Confidentiality prohibits discovery of all VAWA-Protected Information and that any discovery must be limited to, at most, and solely in certain criminal cases, the Certification.

**A. Judicial Consensus Weighs Against Permitting Discovery.**

A broad consensus of courts—appellate, trial, state, and federal—favor either a complete or *de facto* prohibition on discovery of VAWA-Protected Information.<sup>30</sup> Some courts find VAWA-Protected Information absolutely non-discoverable. Other courts, following the Fifth Circuit, apply a balancing test; these courts generally find

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<sup>29</sup> See, e.g., *Cazorla v. Koch Foods of Miss., L.L.C.*, 838 F.3d 540, 552 (5th Cir. 2015); *EEOC v. Sol Mexican Grill LLC*, No. 18-2227 (CKK), 2019 WL 2896933, at \*3 & n.2 (D.D.C. June 11, 2019) (the “Fifth Circuit [has] refused to allow inquiry into the U Visa application process through the EEOC”); *Hawke v. U.S. Dep’t of Homeland Sec.*, No. C-07-03456 RMW, 2008 WL 4460241, at \*6-7 (N.D. Cal. Sept. 29, 2008) (applying strict confidentiality to information held by DHS); *Commonwealth of Pa. v. Riojas*, No. 2038 MDA 2015, 2016 WL 5940424, at \*30 (Pa. Super. Ct. Sept. 7, 2016); *Guillen v. B.J.C.R. LLC*, 341 F.R.D. 61, 68-69 (D. Nev. 2022).

<sup>30</sup> This prohibition recently become United States Citizenship and Immigration Services (“USCIS”) policy: “[§] 1367(a)(2) prevents DHS from disclosing ‘any information which relates’ to a protected person subject to limited exceptions[,] . . . includ[ing] information USCIS has in its records or other information about the protected person, even if those records do not specifically identify the person as one who has sought VAWA, T, or U benefits.” USCIS, PA-2023-14: Safe Address and Special Procedures for Persons Protected by 8 U.S.C. 1367, at 2-3 (Apr. 11, 2023).

that any defense interest in discovery is outweighed by the interests of the public, the individual victim(s), or both.

A few courts have permitted broad discovery of VAWA-Protected Information. These rulings typically suffer from glaring defects (*e.g.*, unawareness of VAWA Confidentiality),<sup>31</sup> involve rare fact patterns,<sup>32</sup> or fail to appreciate that, as recognized by the Fifth and Ninth Circuits, both undocumented and documented immigrants have credible fears of disclosure.<sup>33</sup>

**1. *Some Courts View VAWA Confidentiality As Absolutely Barring Discovery.***

Protecting abuse victims' confidential information is, as a legal concept, by no means revolutionary.<sup>34</sup> Courts are also generally skeptical of the relevance—and some prevent discovery—of immigration status in non-immigration proceedings.<sup>35</sup>

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<sup>31</sup> *Camayo v. John Peroulis & Sons Sheep, Inc.*, No. 10-cv-00772-MSK-MJW, 2012 U.S. Dist. LEXIS 168078, at \*5-6 (D. Colo. Nov. 27, 2012).

<sup>32</sup> *See, e.g., Molnar v. Margaret W. Wong & Assocs.*, No. 109440, 2021 WL 1575218, at \*1 (Ohio Ct. App. Apr. 22, 2021) (malpractice of immigration attorney), *appeal not allowed*, 173 N.E.3d 504 (Ohio 2021) (Table).

<sup>33</sup> *See EEOC v. Glob. Horizons, Inc.*, No. CV-11-3045-EFS, 2013 WL 3940674, at \*5-6 (E.D. Wash. July 31, 2013) (T-Visa).

<sup>34</sup> *See, e.g.,* Child Abuse Amendments of 1984 Family Violence Prevention and Services Act, Pub. L. No. 98-457, tit. III, § 303(a)(2)(E), 98 Stat. 1749, 1758 (codified as amended at 42 U.S.C. § 10402(a)(2)(E)).

<sup>35</sup> *See, e.g., Cazorla v. Koch Foods of Miss., L.L.C.*, 838 F.3d 540, 564 (5th Cir. (cont'd)

Building on these concepts, together with VAWA’s legislative history, many courts interpret VAWA as implying an absolute bar on discovery:

- *Northern District of California*: VAWA-Protected Information is “strict[ly] confidential” and “absolutely privileged[.]” Permitting disclosure to accused batterers “would defeat one of the primary purposes of” VAWA Confidentiality.<sup>36</sup>
- *District of Connecticut*: Discovery of VAWA-Protected Information for impeachment purposes “runs contrary to [statutory] intent[.]”<sup>37</sup>
- *Pennsylvania Superior Court*: Whether VAWA-Protected Information is sought from government officials *or victims*, permitting disclosure thereof “would be contrary to the purpose of [VAWA Confidentiality].”<sup>38</sup>

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2015); *Guillen v. B.J.C.R. LLC*, 341 F.R.D. 61, 71 (D. Nev. 2022); *see also* *Washington v. Horning Bros., LLC*, No. 2:17-CV-0149-TOR, 2018 WL 2208215, at \*4 (E.D. Wash. May 14, 2018) (“[I]mmigration status . . . is generally protected and not discoverable[.]”).

<sup>36</sup> *Hawke v. U.S. Dep’t of Homeland Sec.*, No. C-07-03456 RMW, 2008 WL 4460241, at \*7 (N.D. Cal. Sept. 29, 2008); *see also* Second Ord. Re: Discovery Disps., *Perez v. Seafood Peddler of San Rafael Inc.*, No. 3:12-cv-00116 WHO (NC), (N.D. Cal. Sept. 10, 2013) ECF No. 162.

<sup>37</sup> *Demaj v. Sakaj*, No. 3:09-CV-255(JGM), 2012 WL 476168, at \*5 (D. Conn. Feb. 14, 2012).

<sup>38</sup> *Commonwealth of Pa. v. Riojas*, No. 2038 MDA 2015, 2016 WL 5940424, at (cont’d)

## 2. *The Canon Of Expressio Unius Supports This Conclusion.*

“[T]he fact that Congress explicitly permitted disclosure pursuant to court order in other confidentiality provisions . . . suggests an intent *not* to allow such disclosure in Section 1367, which has no such text.”<sup>39</sup> Congress knows how to except discovery from confidentiality protections and has declined, over years of amending and reauthorizing VAWA, to do so.<sup>40</sup> Courts acknowledge this decision: the District Court for the District of Columbia found “no cause to believe that discovery [is] an unwritten exception to the statute.”<sup>41</sup> Even the Fifth Circuit conceded that, “as a purely textual matter, it is unclear why a provision [like Section 1367] broadly barring *any* ‘disclosure’ would have to specify ‘including in discovery’ in order to have effect.”<sup>42</sup>

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\*28, \*30 (Sup. Ct. Pa. Sept. 7, 2016) (“[VAWA] . . . specifically prohibits disclosure of information obtained from” Self-Petitioners and U/T Visa applicants).

<sup>39</sup> *Cazorla*, 838 F.3d at 551 n.27 (emphasis in original); *see also, e.g.*, 34 U.S.C. § 12291(b)(2)(C) (requiring Office on Violence Against Women grantees to maintain confidentiality absent a “court mandate”); Fed. R. Evid. 412(c)(2) (evidence of victims’ past sexual behavior must remain under seal “unless the court orders otherwise”).

<sup>40</sup> *See, e.g.*, 151 Cong. Rec. E2607 (daily ed. Dec. 18, 2005) (statement of Rep. Conyers, Jr., co-author of VAWA 2005).

<sup>41</sup> *EEOC v. Sol Mexican Grill LLC*, No. 18-2227 (CKK), 2019 WL 2896933, at \*3 (D.D.C. June 11, 2019).

<sup>42</sup> *Cazorla*, 838 F.3d at 551 (emphasis in original).

**B. Supreme Court Precedent Implies A Bright-Line Bar On Discovery Of VAWA-Protected Information.**

In *Baldrige*, the Supreme Court concluded that discovery was not an unwritten exception to a federal statute prohibiting disclosure of individualized census records.<sup>43</sup> Specifically, where a confidentiality statute contains express exceptions, if permitting discovery would “undermine” Congress’s stated purpose(s), Supreme Court precedent prohibits such discovery.<sup>44</sup> The Supreme Court considered this especially relevant where a non-disclosure statute is re-adopted or expanded by Congress over time and involves an area of law Congress has historically regulated.<sup>45</sup>

Congress enacted and repeatedly expanded VAWA Confidentiality to protect cooperating immigrant victims from retaliation by their abusers.<sup>46</sup> In light thereof,

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<sup>43</sup> See *Baldrige*, 455 U.S. at 355-59, 361-62. See also *In re England*, 375 F.3d 1169, 1177-78 (D.C. Cir. 2004) (no unwritten discovery exception to federal statute—re-adopted by Congress—prohibiting disclosure of information related to military promotion boards); *Auguste v. Alderden*, No. 03-cv-02256-WYD-KLM, 2008 WL 3211283, at \*7 (D. Colo. Aug. 6, 2008) (no implied discovery exception to non-disclosure of consumer and credit reports where “Congress clearly intended to protect consumer credit and for consumer reports to remain confidential”).

<sup>44</sup> See *Baldrige v. Shapiro*, 455 U.S. at 361; *In re England*, 375 F.3d at 1177-81.

<sup>45</sup> See *Baldrige*, 455 U.S. at 355-59 (national census data); *England*, 375 F.3d at 1177-78 (reports of military promotion boards).

<sup>46</sup> See, e.g., *Cazorla*, 838 F.3d at 562-63 (finding, in VAWA context, that “detering immigrant victims of abuse . . . from stepping forward” would “frustrat[e] Congress’s intent”).

and of the specific exceptions Congress did include, reading an unwritten discovery exception into VAWA Confidentiality would undoubtedly defeat Congress's purposes.

**C. The Fifth Circuit's Balancing Test Would Not Permit The Discovery Sought Here.**

*Cazorla* interpreted Section 1367 as applicable only “to . . . enumerated government officials” and found no strict bar on seeking discovery from victims themselves.<sup>47</sup> *Cazorla* also acknowledged that federal courts may limit discovery under Federal Rule of Civil Procedure 26(c) “to protect a . . . person from annoyance, embarrassment, oppression, or undue burden or expense.”<sup>48</sup> To reconcile these considerations, the Fifth Circuit weighed the victims' and public interests in confidentiality against those of defendants seeking discovery.

VAWA Confidentiality disputes implicate victims' interests in safety, public interests in combatting violence, and defendants' interests in a victim's credibility, including any motive to fabricate.<sup>49</sup> Disclosure is “a substantial burden” on victims and the public; therefore, the balancing test asks “whether that burden is undue” in

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<sup>47</sup> *Id.* at 552.

<sup>48</sup> *Id.* at 555.

<sup>49</sup> *See id.* at 563-64 (noting considerations that “are likely present in virtually every immigrant-abuse case”).

light of “the interests [d]efendants put forward to justify . . . discovery.”<sup>50</sup>

### 1. *Public Interests In Confidentiality.*

Allowing discovery of VAWA-Protected Information “may have a chilling effect extending well beyond” a given case that could “imperil[] important public purposes” like combating abuse.<sup>51</sup> Because victim assistance is crucial to this national effort, the Ninth Circuit has described the public interest as “substantial[.]”<sup>52</sup> Violating VAWA Confidentiality through discovery thus risks not only the interests of government agencies involved in sensitive prosecutions but also, importantly, broader public interests.<sup>53</sup>

The Fifth Circuit viewed the following public interests—relevant in any case—as outweighing defendants’ interests, if any, in alleged impeachment evidence:<sup>54</sup>

- “Tens of thousands” of Self-Petitions and U/T Visa applications are

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<sup>50</sup> *Guillen v. B.J.C.R. LLC*, 341 F.R.D. 61, 70 (D. Nev. 2022).

<sup>51</sup> *Cazorla*, 838 F.3d at 564.

<sup>52</sup> *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1066 (9th Cir. 2004) (Because workplace anti-discrimination laws depend on private enforcement, immigration-related discovery “constitutes a substantial burden, both on the plaintiffs . . . and on the public interest,” and would hamper “the national effort to eradicate discrimination in the workplace[.]”).

<sup>53</sup> *See Cazorla*, 838 F.3d at 562-63.

<sup>54</sup> *See id.* at 562-64.



submitted each year,<sup>55</sup> all referencing VAWA Confidentiality.<sup>56</sup>

- Discovery of VAWA-Protected Information despite confidentiality assurances would “sow confusion over” the scope of VAWA Confidentiality.<sup>57</sup>
- “[I]mmigrants are disproportionately vulnerable to . . . abuse and . . . reluctant to report it for fear of . . . retaliation.”<sup>58</sup>

The *Fifth Circuit* ultimately concluded—and other courts agree<sup>59</sup>—that

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<sup>55</sup> *Id.* at 561 n.71. See also USCIS, DHS, *Ann. Rep. on Immigr. Applications and Petitions Made by Victims of Abuse – Fiscal Year 2022: Rep. to Cong.* at 9 (Apr. 13, 2023) (32,413 Self-Petitions filed by spouses, children and parents in 2022).

<sup>56</sup> See, e.g., USCIS, Form I-918 Instructions, at 17 (Dec. 6, 2021), <https://www.uscis.gov/sites/default/files/document/forms/I-918instr.pdf>; USCIS, Form I-914 Instructions, at 13-14 (Dec. 2, 2021), <https://www.uscis.gov/sites/default/files/document/forms/i-914instr.pdf>; USCIS, Form I-360 Instructions, at 16 (Jul. 15, 2022), <https://www.uscis.gov/sites/default/files/document/forms/i-360instr.pdf>.

<sup>57</sup> *Cazorla*, 838 F.3d at 562.

<sup>58</sup> *Id.* at 563.

<sup>59</sup> See, e.g., *Guillen v. B.J.C.R. LLC*, 341 F.R.D. 61, 71 (D. Nev. 2022) (disclosure “would surely have an intimidating or *in terrorem* effect . . . , and . . . discourage [victims] from raising [abuse] claims in the future”); *EEOC v. Sol Mexican Grill LLC*, No. 18-2227 (CKK), 2019 WL 2896933, at \*2, \*5 (D.D.C. June 11, 2019) (finding “high” risk that permitting discovery of VAWA-Protected Information would have a “chilling effect disadvantage[ing] all . . . mak[ing] it less likely that [abuses] will . . . be appropriately dealt with”); *Molnar v. Margaret W. Wong & Assocs.*, No. 109440, 2021 WL 1575218, at \*8 (Ohio Ct. App. Apr. 22, 2021) (“[D]isclosure of sensitive U visa information would violate Congress’s goal of

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undermining the credibility of “Congressionally-sanctioned” confidentiality assurances would discourage individuals “most in need” from coming forward, thus “frustrating Congress’s intent.”<sup>60</sup>

## 2. *Victim Interests In Confidentiality.*

Victims’ interests in keeping Self-Petition and U/T Visa case files confidential are substantial. Immigrant victims reasonably fear what abusers or government officials may do with their information. Specifically, immigrants often fear that disclosure of VAWA-Protected Information could jeopardize the victim’s (or their friends’ or family’s) immigration status.<sup>61</sup> For example, immigration status is one of the weightiest factors battered immigrant women consider in deciding to report

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encouraging aliens to report and assist law enforcement in the prosecution of criminal activity.”); *Washington v. Horning Bros., LLC*, No. 2:17-CV-0149-TOR, 2018 WL 2208215, at \*6 (E.D. Wash. May 14, 2018) (in U Visa sexual harassment case, chilling effect “would harm” victims *and* future plaintiffs).

<sup>60</sup> *Cazorla*, 838 F.3d at 562-63.

<sup>61</sup> *See, e.g., Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 n.5 (9th Cir. 2004) (defendant “pledg[ing] not to use the plaintiffs’ immigration status . . . against them does not eliminate the substantial risk [to] the rights of these and future plaintiffs”); *Horning Bros.*, 2018 WL 2208215, at \*6 (notwithstanding a possible protective order for VAWA-Protected Information, undocumented victims “plausibl[y]” feared detention and removal); *see also* Orloff, L. E., Magwood, H. I., Campos-Mendez, Y. & Hass, G. A., NIWAP, *Transforming Lives: How the VAWA Self-Petition and U Visa Change the Lives of Survivors and their Children After Employment Authorization and Legal Immigration Status* 55 (June 8, 2021), <https://niwaplibrary.wcl.american.edu/pubs/transforming-lives-final-report> (25-38% of immigration enforcement actions taken against victims with pending U-Visa or Self-Petitions are initiated by perpetrators).

domestic violence to police.<sup>62</sup> Although “threats of deportation are among the most familiar and dreaded means by which [abusers] retaliate,”<sup>63</sup> many domestic violence victims deeply fear continuing immigration problems even after obtaining legal status<sup>64</sup> to such a degree that they forego participating in a litigation or prosecution.<sup>65</sup>

Victims also have interests in personal safety—many fear retaliation and continued abuse upon perpetrators receiving VAWA-Protected Information.<sup>66</sup>

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<sup>62</sup> See Nawal H. Ammar et al., *Calls to Police and Police Response: A Case Study of Latina Immigrant Women in the USA*, 7 Int’l J. Police Sci. & Mgmt. 230, 236-37 (2005).

<sup>63</sup> *Cazorla*, 838 F.3d at 563. See also, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 886-87 (1984) (employer reported five undocumented workers supporting union representation); *Guillen*, 341 F.R.D. at 63 (U Visa victim’s employer threatened deportation if she reported abuse); *Rivera*, 364 F.3d at 1064-65 (“the caselaw substantiates . . . fears” of facing deportation in response to asserting one’s rights); *Sol Mexican Grill*, 2019 WL 2896933, at \*2, \*4.

<sup>64</sup> See, e.g., *Guillen*, 341 F.R.D. at 70 (“U Visa discovery presents a substantial burden on Plaintiff” even with approved U-Visa); Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 Georgetown J. on Poverty L. & Pol’y 245, 292-95 (2000).

<sup>65</sup> See, e.g., *Rivera*, 364 F.3d at 1065; *Cazorla*, 838 F.3d at 561 n.72; *David v. Signal Int’l, L.L.C.*, 735 F. Supp. 2d 440, 447 (E.D. La. 2010) (VAWA-related discovery “will most assuredly strike paralyzing fear in the plaintiffs sufficient to chill any inclination they may have . . . to prosecute . . . claims” (citation omitted)).

<sup>66</sup> See, e.g., *Horning Bros.*, 2018 WL 2208215, at \*6 (finding undocumented victims feared “retaliation to themselves and their families” if defendant obtained their information); *Sol Mexican Grill*, 2019 WL 2896933, at \*4 (finding “risks of abuse in forcing [victims] to disclose their U Visa status”).

Victim interests are particularly strong in matters involving physical or sexual abuse in the home, regardless of their legal status. Not coincidentally, confidentiality measures taken to justify discovery are particularly ineffectual in these matters. Measures like redaction afford no protection where a perpetrator will be able to connect a victim to their Self-Petition or U/T Visa application. Therefore, courts tend—and *amici* urge this Court—to prohibit discovery of VAWA-Protected Information in such cases.<sup>67</sup>

**3. Any Defense Interests In VAWA-Protected Information Are Outweighed.**

A defendant’s constitutional and statutory interests can be satisfied by cross-examination, *Brady* disclosure (as discussed below) and, in certain cases, the production of the Certification.<sup>68</sup> As a general rule, however, constitutional

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<sup>67</sup> See, e.g., *id.*, at \*4 (reasoning that “providing anonymity to five [individuals] well-known to Defendants is likely impossible”); *Sol Mexican Grill*, 2019 WL 2896933, at \*3 n.2 (observing that, while anonymization and redaction of responses to written deposition questions may have struck an acceptable balance in a case involving 108 victims, it would not protect confidentiality “where the number of charging parties and claimants is smaller”).

<sup>68</sup> See, e.g., *Maine v. Marroquin-Aldana*, 89 A.3d 519, 530 (Me. 2014) (knowledge of victim’s U Visa application and the Certification permitted defendant to “vigorously cross-examine[] [the victim] regarding . . . her motive to fabricate in order to resolve [immigration] issues”).

protections do not warrant access to VAWA-Protected Information.<sup>69</sup> This is particularly true where the victim was unaware of possible immigration benefits when they reported the abuse and therefore had no motive to lie, effectively eliminating the defendant's alleged interest in such information for impeachment purposes.<sup>70</sup>

A Certification may sometimes be discoverable. The Certification includes any information provided by the victim to the certifying official and any supplemental materials related thereto. Other U/T Visa application and case files contain the victim's unrelated, personal information.<sup>71</sup> As only the Certification

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<sup>69</sup> See, e.g., Second Ord. Re: Discovery Disps., *Perez v. Seafood Peddler of San Rafael Inc.*, No. 3:12-cv-00116 WHO (NC), at 6 (N.D. Cal. Sept. 10, 2013) ECF No. 162 (defendants' arguments that they "need [U Visa information beyond the Certification] because it is highly relevant to impeachment and credibility[] . . . which [argument] could be made in every case where a witness is a U Visa beneficiary, appears to be foreclosed by § 1367(a)").

<sup>70</sup> See, e.g., *Arizona v. Buccheri-Bianca*, 312 P.3d 123 (Ariz. Ct. App. 2013); *People v. Lopez*, No. A163573, 2022 WL 17958442 (Cal. Ct. App. Dec. 27, 2022) (unpublished); *Guardado v. Maryland*, No. 2397, 2015 WL 5968756, at \*5 (Md. Ct. Spec. App. Oct. 14, 2015); *People v. Alvarez*, No. G047701, 2014 WL 1813302, at \*5 (Cal. Ct. App. May 7, 2014) (unpublished).

<sup>71</sup> See, e.g., Second Ord. Re: Discovery Disps., *Perez v. Seafood Peddler of San Rafael Inc.*, No. 3:12-cv-00116 WHO (NC), at 12 (N.D. Cal. Sept. 10, 2013) ECF No. 162 (ordering that defendants may not ask immigration-related questions in deposition where "defendants ha[d] not provided adequate justification to compel answers . . . as they ha[d] not explained why those questions are relevant to an issue in this case").

contains information relevant to law enforcement’s detection, investigation or prosecution of a crime, production thereof provides a sufficient basis to cross-examine a victim’s credibility, bias, and motive and adequately protects defendants’ rights.<sup>72</sup> Where such information is available to the defendant, “seeking a broad range of documents comprising [the] ‘entire immigration file(s),’ bears the hallmarks of an impermissible fishing expedition” in light of the Supreme Court’s ruling in *Nixon*, which interpreted Federal Rule of Criminal Procedure 17(c) as “requir[ing] a showing of relevancy, admissibility, and specificity.”<sup>73</sup> Numerous courts therefore limit discovery in U Visa cases to the Certification or, occasionally, the existence of the U Visa itself.<sup>74</sup>

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<sup>72</sup> See, e.g., *United States v. Brown*, 347 F.3d 1095, 1099, (9th Cir. 2003), *aff’d*, 223 F. App’x 647 (9th Cir. 2007); *United States v. Gutierrez de Lopez*, 761 F.3d 1123, 1146 (10th Cir. 2014) (no constitutional violation when prosecution declined to provide defense more than confidential informants’ immigration status, compensation for cooperating, and prior convictions); *Tapia v. Tansy*, 926 F.2d 1554, 1557, 1559 (10th Cir. 1991) (Confrontation Clause ensures opportunity for “effective cross-examination” but does not include “the power to require . . . disclosure of any and all information that might be useful in contradicting unfavorable testimony” (alteration in original) (citation omitted)).

<sup>73</sup> See *Marroquin-Aldana*, 89 A.3d at 529-30; see also, e.g., *Guillen v. B.J.C.R. LLC*, 341 F.R.D. 61, 71-72 (D. Nev. 2022) (where defendant did not provide a “reason to believe [the victim] provided inconsistent information [in U Visa application],” the court would “not condone the use of discovery to engage in a ‘fishing expedition’ into [victim’s] . . . immigration records”).

<sup>74</sup> See, e.g., *Demaj v. Sakaj*, No. 3:09 CV 255(JGM), 2012 WL 476168, at \*6 (D. Conn. Feb. 14, 2012) (ordering production of U-Visa itself but nothing more) *and*  
(cont’d)

In non-criminal cases like *Cazorla*, it may be the case that redacted discovery or other protective measures prevent defendants from associating information in U/T Visa applications with individual victims and thereby sufficiently protect those victims' and the public interests. *Amici* believe, however, that even if redacted discovery was appropriate in *Cazorla*, in light of the aforementioned factors, such workarounds must be limited to cases like *Cazorla* involving numerous, non-family-member victims. In other cases—particularly cases involving domestic abuse—redactions are useless and provide only the appearance of protection. Should this Court adopt a balancing test, *amici* urge the Court to fashion a rule that takes into account situations where, because VAWA-Protected Information cannot be meaningfully anonymized, *any* disclosure would effectively destroy confidentiality.

**D. *Brady* Does Not Compel Victims To Waive Confidentiality.**

Under *Brady*,<sup>75</sup> the prosecution in a criminal case has an affirmative duty to

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Second Ord. Re: Discovery Disps., *Perez v. Seafood Peddler of San Rafael Inc.*, No. 3:12-cv-00116 WHO (NC), at 6-8 (N.D. Cal. Sept. 10, 2013), ECF No. 162 (ordering production of number of U-Visa applications but nothing more); *Marroquin-Aldana*, 89 A.3d at 531, n.69 (defendant could sufficiently cross-examine based on awareness of victim's attempt to obtain a U-Visa and a copy of U-Visa certification); *see also Brown*, 347 F.3d at 1099 (denying defendant's request for immigration records not already in prosecutor's possession, as defendant could cross-examine witness regarding government cooperation without entire immigration file).

<sup>75</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

disclose to the defense any information in the prosecutor’s possession that is both material and potentially exculpatory. *Brady* does not create a general right to discovery.<sup>76</sup> *Brady* applies to the prosecution, is limited to material in the prosecution’s possession, and does not require the prosecution to seek out materials held by others.<sup>77</sup>

The prosecution is not synonymous with—and does not include—the entire government, let alone the victim.<sup>78</sup> The prosecution consists of the prosecutor, their

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<sup>76</sup> See *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (“There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one; as the Court wrote recently, ‘the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded. . . .’”) (citation omitted).

<sup>77</sup> See *United States v. Bouette*, No. 1:17-cr-3338-JMC, 2019 WL 2357008, at \*2 (D.N.M. June 4, 2019) (order) (“[A]lthough a prosecutor may be required to search files maintained by . . . the prosecution team, a prosecutor does not have a duty to obtain evidence from agencies that are not . . . .”); *United States v. Rosenschein*, C.R. No. 16-4571 JCH, 2019 WL 2298810, at \*3 (D.N.M. May 30, 2019) (same); cf. *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (“[T]he imposition of an unlimited duty on a prosecutor to inquire of other offices not working . . . on the case in question would inappropriately require us to adopt ‘a monolithic view of government’ that would ‘condemn the prosecution of criminal cases to a state of paralysis.’” (citation omitted)).

<sup>78</sup> See *Barrett v. United States*, No. 09-CIV-105-JHP, 2012 WL 3542609, at \*17 (E.D. Okla. Aug. 16, 2012), *aff’d in part, rev’d in part on other grounds*, 797 F.3d 1207 (10th Cir. 2015) (“[K]nowledge . . . of persons employed by a different office of the government does not in all instances warrant the imputation of knowledge to the prosecutor[.]”) (quoting *United States v. Gambino*, 835 F. Supp. 74, 95 (E.D.N.Y. 1993)).



office, and “other arms of the state involved in investigative aspects [of the case].”<sup>79</sup> Because victims are not “arms of the state,” *Brady* has no bearing on the scope of discovery from victims. A holding that *Brady* requires victims to produce VAWA-Protected Information in response to a subpoena would be a categorical error.

Immigration agencies—which are also often in possession of VAWA-Protected Information—may be included in the “prosecution” only to the extent that they are “closely aligned” with the prosecutor in a particular case.<sup>80</sup> Where immigration officials are not “part of the prosecution team,”<sup>81</sup> the prosecutor is not considered to be in possession of information in the possession of immigration agency, and consequently is not under a *Brady* obligation to produce the immigration agency’s records.<sup>82</sup>

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<sup>79</sup> *Case v. Hatch*, 2008-NMSC-024, ¶ 46, 144 N.M. 20, 183 P.3d 905 (alteration in original) (quoting *Smith*, 50 F.3d at 824); see also *Bouette*, 2019 WL 2357008, at \*2 (dubbing this the “prosecution team”); *State v. Stevenson*, 2020-NMCA-005, ¶ 17, 455 P.3d 890, 897 (same); *United States v. Locascio*, 6 F.3d 924, 949-50 (2d Cir. 1993) (prosecution not in possession of information acquired by federal agencies uninvolved in the investigation or trial).

<sup>80</sup> *United States v. Garcia-Martinez*, 730 F. App’x 665, 675 (10th Cir. 2018) (criminal defendant failed “to demonstrate that any federal immigration agency was . . . part of ‘the prosecution team’” (citation omitted)).

<sup>81</sup> *Id.*

<sup>82</sup> *Amici* are aware of a single instance in which a New Mexico court considered a victim’s U Visa application *Brady* material. There, discovery was permitted specifically because it included “many items . . . in support” from the presiding

(cont’d)

In the context of U/T Visas, to the extent a Certification—required in U visa applications but optional in T visa applications—was provided, this Certification may be *Brady* material.<sup>83</sup> Letters from U/T Visa applicants to certifying agencies requesting a Certification, including any attached supplemental material, may form the basis for the investigation and/or prosecution of the perpetrator. In such cases, the Certification is necessarily in the prosecutor’s possession<sup>84</sup> and falls squarely within *Brady*’s purview.

### **III. Conclusion**

Congress has enacted, amended and re-authorized VAWA Confidentiality protections specifically to protect victims and their families and prevent perpetrators of abuse, sexual assault, and human trafficking from co-opting the immigration system to silence their victims. While *Brady* may sometimes require *prosecutors* to produce Certifications, *Brady* does not compel *victims* to produce any VAWA-

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district attorney’s office and local law enforcement (*i.e.*, the prosecution team) directly relevant to the proceedings. *State v. Huerta-Castro*, 2017-NMCA-026, 390 P.3d 185, 199.

<sup>83</sup> See, e.g., *Smith v. Sec’y of N.M. Dep’t of Corr.*, 50 F.3d 801, 824 (10th Cir. 1995); *Bouette*, 2019 WL 2357008, at \*2.

<sup>84</sup> See, e.g., *People v. Lopez*, No. A163573, 2022 WL 17958442, at \*5 (Cal. Ct. App. Dec. 27, 2022) (unpublished) (clarifying that “the district attorney’s office had [U Visa application] information because . . . the [victims’] declarations that they cooperated with the investigation were submitted to the district attorney for certification”).

Protected Information, let alone create a general discovery exception to VAWA Confidentiality. Whether this Court chooses to categorically bar discovery of VAWA-Protected Information or adopt some version of the Fifth Circuit's balancing test, *amici* urge the Court to act to prevent discovery from becoming the exception that swallows victims' VAWA Confidentiality rights.

Respectfully submitted,

/s/ Denise M. Chanez – Electronically  
Signed

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