UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

HANS ROMAIN, *an individual*,

Plaintiff,

v.

JANET NAPOLITANO, *Secretary of the United States Department of Homeland Security*, *et al.*,

Defendants.

Civil Action No: 1:12-cv-00881-JBW

AMICI CURIAE BRIEF OF LEGAL MOMENTUM, SANCTUARY FOR FAMILIES, AND NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT

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I. INTRODUCTION

Legal Momentum, Sanctuary for Families, and National Immigrant Women's Advocacy Project ("Amici") submit this brief as *Amici Curiae* in support of the Defendants' Motion to Dismiss. Amici are non-profit advocacy organizations that have been involved with the enactment of the Violence Against Women Act ("VAWA") legislation and VAWA confidentiality protections. Congress enacted these provisions to ensure that immigration protections for immigrant victims included assurances that information about the existence of a VAWA immigration case and confidential immigration application materials are not disclosed to the abusive spouses of applicants.

In this case, the Plaintiff has been indicted in Brooklyn, New York for a rape he allegedly committed against his spouse. Through this mandamus proceeding, the Plaintiff now seeks to compel the Department of Homeland Security to produce any VAWA self-petition his spouse may have filed, pursuant to a subpoena issued by the Kings County Criminal Court. VAWA's confidentiality protections, however, expressly prohibit the disclosure of *any information* related to a VAWA application for relief to *any third party* — especially to the alleged abuser. As the legislative history confirms, Congress's paramount concern in enacting VAWA confidentiality was to prevent disclosure of an immigrant victim's confidential information to the allegedly abusive spouse. Therefore, this Court should grant Defendants' Motion to Dismiss.

II. INTEREST OF THE AMICI CURIAE

A. Legal Momentum

Legal Momentum is the nation's oldest legal advocacy organization dedicated to advancing the rights of women. Victims of domestic violence, sexual assault, trafficking and other crimes are among the issues have been the focus of Legal Momentum's national efforts to improve access to legal immigration status for immigrant women and children. Through a number of mechanisms, including advocacy with Congress, the Department of Homeland Security ("DHS"), the Department of Justice, Health and Human Services, the Department of Housing and Urban Development, the Department of Education, and the White House, Legal

Momentum has advocated for regulatory, legislative, and administrative improvements that benefit immigrant women. In the context of immigrant victims of domestic violence, Legal Momentum has worked with members of Congress to identify areas of needed legal reform and craft legislative solutions, has documented immigrant women's experiences illustrating the need for change, and trained and provided technical assistance to advocates, attorneys and justice system professionals across the country to ensure that immigrant victims can access the relief Congress designed to protect them. Legal Momentum has worked with federal agencies to craft policies and procedures that implement federal law protections for immigrant victims of domestic violence, sexual assault, human trafficking and other crimes in a manner that will enhance safety and access to legal remedies under immigration, family and public benefits laws for immigrant women and their children.

Starting in 1994 with the enactment of the Violence Against Women Act ("VAWA"),[1] Legal Momentum has been at the forefront of legislative and administrative advocacy securing legal protections for victims of violence against women. To improve upon the original VAWA provisions and stop perpetrators of violence against women from using threats of deportation to harm victims, Legal Momentum advocated with Congress to create the VAWA confidentiality protections enacted in 1996.[2] Since the enactment of VAWA confidentiality, Legal Momentum has continued to advocate for subsequent improvements and expansions to VAWA confidentiality, which were enacted as part of the Violence Against Women Act reauthorizations in 2000[3] and 2005,[4] and has been repeatedly called upon by the U.S. Department of Homeland

[1] *See* Violent Crime Control and Law Enforcement Act ("VAWA 1994"), Pub. L. No. 103-322, 108 Stat. 1796 (1994).

[2] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 384, 110 Stat. 3009, 3009-652 to -653 (1996) (codified at 8 U.S.C. § 1367).

[3] Victims of Trafficking and Violence Protection Act of 2000 ("VAWA 2000"), Pub. L. No. 106-386, 114 Stat. 1464 (2000).

[4] Violence Against Women and Department of Justice Reauthorization Act of 2005 ("VAWA 2005"), Pub. L. No. 109-162, 119 Stat. 2960 (2005).

Security, the Board of Immigration Appeals and the Executive Office of Immigration Appeals to train immigration judges, immigration officers adjudicating cases involving immigration relief for immigrant victims, and Department of Homeland Security Trial Attorneys on VAWA's confidentiality protections. The VAWA provisions and confidentiality protections discussed herein arise from this group of statutes.

B. Sanctuary for Families

Founded in 1984 as a small network of safe homes, Sanctuary for Families ("Sanctuary") is now a leading provider of integrated services to battered women and their children in New York City. Sanctuary serves adult victims and children from throughout New York City. Their services pay special attention to the most at-risk, underserved victims of domestic violence, and their staff is acutely attuned to a broad spectrum of inequality issues impacting these populations. Sanctuary provides clinical, legal, shelter, and economic justice and empowerment services to over 11,000 of New York City's most vulnerable abuse victims and children annually.

Founded in 1988, Sanctuary's Legal Center is the largest provider of legal services exclusively for domestic violence victims in the U.S. The Center's attorneys have broad expertise in immigration law, orders of protection, child and spousal support, custody, visitation, and other practice areas critical to the impoverished victims who comprise the vast majority of our clients. Recognizing the profound legal, cultural, and linguistic barriers confronting battered immigrant women and girls, the Center has historically prioritized their cases. In 1998, the Center launched the Immigration Intervention Project (IIP) to provide targeted immigration legal services with a focus on remedies for domestic violence victims and today represents victims in a variety of immigration legal matters, including VAWA self-petitions, VAWA cancellation applications, asylum cases, U and T nonimmigrant status petitions and visas, and work permits. The IIP also defends victims in removal proceedings utilizing these specialized remedies, as well as in administrative and federal court appeals. Last year, IIP provided representation to over 2,000 clients in immigration cases, and helped over 800 clients obtain visas, asylum, green cards,

and other forms of legal status. In light of its extensive work with immigrant victims of domestic violence, Sanctuary is committed to supporting the integrity of state and federal statutes enacted to protect victims of domestic violence.

C. National Immigrant Women's Advocacy Project

National Immigrant Women's Advocacy Project ("NIWAP") was formed to educate, train, offer technical assistance and public policy advocacy, and conduct research that will assist a wide range of professionals working at the federal, state, and local levels who work with and/or whose work affects immigrant women and children. NIWAP's work is designed to promote the development, implementation, and use of laws, policies, and practices that benefit immigrant women and children.

III. VAWA'S CONFIDENTIALITY PROTECTIONS EXPRESSLY PROHIBIT THE PLAINTIFF FROM ACQUIRING ANY VAWA, T NONIMMIGRANT STATUS AND U NONIMMIGRANT STATUS APPLICATIONS OR PETITIONS FOR RELIEF THE VICTIM MAY HAVE FILED.

Congress enacted VAWA to provide a "mechanism for women who have been battered or subjected to extreme cruelty to achieve lawful immigration status independent of an abusive spouse." *Hernandez v. Ashcroft*, 345 F.3d 824, 827 (9th Cir. 2003). Among its substantive protections, VAWA provides immigrant victims of rape, domestic violence, and other crimes with the right to "self-petition" to obtain lawful immigration status through one of the specific types of immigration status created to protect immigrant victims of violence against women. The primary forms of VAWA immigration relief include:[5]

- The VAWA self-petition that helps battered spouses and children of U.S. citizens and lawful permanent residents;
- T nonimmigrant status and visa and continued presence offering protections for human trafficking victims;

[5] This Brief uses the term "VAWA" to include all forms of immigration relief available for the protection of immigrant victims including the VAWA self-petition, VAWA cancellation of removal and suspension of deportation, the T nonimmigrant status and visa, continued presence, the U nonimmigrant status and visa and battered spouse and child waivers.

- The nonimmigrant status and visa designed to help immigrant victims of domestic violence, sexual assault, trafficking, and an array of other mostly violent crimes; and
- Cancellation of removal and suspension of deportation for immigrant victims in removal proceedings before immigration courts.

Thus, through VAWA, Congress gave battered immigrant spouses and other immigrant crime victims the right to "self-petition" for themselves and their children. *See, e.g.*, 8 U.S.C. § 1154(a)(1)(A)(iii)-(vii), (B)(ii)-(v), (C), (D), (K) & (L) (setting forth requirements for VAWA self-petitioners); 8 U.S.C. § 1101(a)(15)(T), 8 U.S.C. § 1184(o) (T nonimmigrant status applications), 8 U.S.C. § 1101(a)(15)(U), 8 U.S.C. § 1184(o). Immigrant victims of domestic violence can now secure employment authorization and other immigration benefits, including, but not limited to lawful permanent residence status without the approval, assistance, or cooperation from their abusers. *See id.*

Congress also provided these victims with the concomitant right to confidentiality protections that prohibit the disclosure of *any information* related to a VAWA confidentiality-protected application for relief. Congress enacted confidentiality measures that prohibit federal authorities from using or disclosing *any information* related to a VAWA application for relief to *any third party*:

> § 1367. Penalties for disclosure of information
>
> (a) In general
>
> Except as provided in subsection (b) of this section, *in no case may* the Attorney General, or any other official or employee of the Department of Justice, the Secretary of Homeland Security, the Secretary of State, or any other official or employee of the Department of Homeland Security or Department of State (including any bureau or agency of either of such Departments) –
>
> (2) *permit use by or disclosure to anyone* (other than a sworn officer or employee of the Department, or bureau or agency thereof, for legitimate Department, bureau, or agency purposes) *of any information which relates to an alien who is the beneficiary of an application for relief* under paragraph (15)(T), (15)(U), or (51) of section 101(a) of the Immigration and Nationality Act [8 U.S.C. § 1101(a)(15)(T), (U), (51)] or section 240A(b)(2) of such Act [8 U.S.C. § 1229b(b)(2)].

8 U.S.C. § 1367(a)(2) (emphasis added).

VAWA's confidentiality protections are "strict." *Hawke v. U.S. Dep't of Homeland Sec.*, No. C-07-03455, 2008 WL 4460241, at *7 (N.D. Cal. Sept. 29, 2008). They are also broad: by prohibiting the "use by or disclosure to *anyone* . . . of *any information*," § 1367 prevents abusers from discovering the substance, as well as existence, of any VAWA application for relief. As such, courts have held than an immigrant victim's VAWA application for relief is "absolutely privileged information" that cannot be compelled for use in either criminal or civil proceedings. *See Hawke* 2008 WL 4460241 at *7 (denying accused batterer's demand that the Department of Homeland Security produce his wife's immigration records for use in criminal battery proceedings); *Demaj v. Sakaj*, No. 3:09-CV-255, 2012 WL 476168 at *5 (D. Conn. Feb. 14, 2012) (denying motion to compel U-Visa application because "disclosure of these documents for this purpose runs contrary to the intent of the protections afforded by 8 U.S.C. § 1367").

Because the express language of § 1367(a)(2) prevents the Plaintiff from acquiring any VAWA application for relief, this Court should grant Defendants' Motion to Dismiss.

IV. NO EXCEPTION TO VAWA CONFIDENTIALITY APPLIES HERE.

"Congress's goal in enacting VAWA was to eliminate barriers to women leaving abusive relationships." *Hernandez*, 345 F.3d at 841. To that end, "one of the primary purposes of the VAWA confidentiality provision" is "to prohibit disclosure of confidential application materials to the accused batterer." *Hawke*, 2008 WL 4460241, at *7. These legislative protections would be pointless if the Plaintiff, the alleged abuser, could obtain whatever VAWA confidential information he wants simply by subpoenaing it from the Department of Homeland Security.

None of the limited exceptions to VAWA confidentiality apply to this case. This case does not involve the disclosure of VAWA confidential information based on the victim's consent, or for census information, Congressional oversight, communicating with victim service providers, or for assisting with an immigrant victim's eligibility for certain public benefits. *See* 8 U.S.C. § 1367(b)(1), (4)–(7). And contrary to the Plaintiff's assertions, this case does not

involve the disclosure of VAWA confidential information "to be used solely for a legitimate law enforcement purpose." *Id.* § 1367(b)(2). The Plaintiff is not a member of "law enforcement."

Instead, this case is about an allegedly abusive spouse wanting to obtain access to his victim's confidential VAWA application as part of a fishing expedition for alleged "impeachment" material that he merely hopes, but does not know to exist. But that is not one of the limited exceptions that Congress authorized in § 1367. Thus, as the court ruled in *Hawke*, the Plaintiff does not have the right "to receive absolutely privileged information like any records held by DHS here." *Hawke*, 2008 WL 4460241 at *7.

Nor can such a right be inferred from the language of 8 U.S.C. § 1367(b)(3), which permits "disclosure of information in connection with judicial review of a determination in a manner that protects the confidentiality of such information." Prior alleged abusers have argued, unsuccessfully, that this exception authorizes civil and criminal discovery into a victim's confidential VAWA information. *Hawke*, 2008 WL 4460241 at *6. But this argument misunderstands how the word "*determination*" in § 1367(b)(3) is antecedent to the phrase "*determination* of admissibility or deportability of an alien under the Immigration and Nationality Act" in § 1367(a)(1). Because "a determination" under § 1367(b)(3) "refers to the government's determination of a VAWA self-petitioner's immigration status," this exception only applies to judicial review in immigration proceedings. *See Hawke*, 2008 WL 4460241, at *6–*7. In any event, Section 1367(b)(3) is also inapplicable because the compelled disclosure of a victim's VAWA information to her alleged abuser could never qualify as "a manner that protects the confidentiality of such information." *See* 8 U.S.C. § 1367(b)(3). The confidentiality of that information would be immediately lost upon the alleged abuser's receipt of it.

VAWA confidentiality is both a prohibition on governmental action and a right that belongs to the immigrant victim. *See Sakaj*, 2012 WL 476168 at *2–*6 (denying motion to compel U-Visa application based on applicant's assertion of Section 1367 confidentiality). Congress recognized as much in allowing immigrant victims to waive their rights to VAWA confidentiality. *See* 8 U.S.C. § 1367(b)(4). And absent voluntary disclosure by a victim,

information protected by VAWA should remain confidential, regardless of whether it resides with the government or the victim. To hold otherwise would defeat the paramount purpose of VAWA confidentiality — "to prohibit disclosure of confidential application materials to the accused batterer." *Hawke*, 2008 WL 4460241 at *7.

Because none of the exceptions to VAWA confidentiality applies in this case, the Court should grant Defendants' Motion for to Dismiss.

V. THE PLAINTIFF HAS NO CONSTITUTIONAL RIGHT TO OBTAIN INFORMATION PROTECTED BY VAWA CONFIDENTIALITY.

Under *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution has an obligation to disclose information favorable to the accused where the information is material to guilt or punishment, but only to the extent that the information is in the possession or control of the prosecution. Similarly, under *People v. Rosario*, 9 N.Y.2d 286, 289–90, *cert. denied*, 368 U.S. 866 (1961), the prosecution need only disclose to defendant witnesses' statements (relating to the subject matter of their testimony) that are in the possession or control of the prosecution. Neither *Brady* nor *Rosario* requires the disclosure of the existence of a VAWA-protected petition. If such a petition exists at all,[6] it resides exclusively in the possession and control of the Department of Homeland Security, a federal agency that answers to an independent sovereign, and has not been shared with the Kings County District Attorney's Office.

The Second Circuit has explained that "[t]he Brady obligation extends only to material evidence . . . that is known to the prosecutor." *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998). The Second Circuit has rejected as "completely untenable" the position that "knowledge on any part of the government is equivalent to knowledge on the part of this prosecutor." *United States v. Quinn*, 445 F.2d 940, 944 (2d Cir. 1971); *see also Avellino*, 136 F.3d at 249 ("the imposition of an unlimited duty on a prosecutor to inquire of other offices [of

[6] Plaintiff has failed to articulate any theory of relevancy or materiality that would entitle him to these confidential records. Plaintiff's is not entitled to a fishing expedition just because he "merely desire[s] the opportunity for an unrestrained foray into confidential records in the hope that the unearthing of some unspecified information would enable him to impeach the witness." *People v. Gissendanne*r, 48 N.Y.2d 543, 549 (N.Y. 1979).

the government] not working with the prosecutor's office 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.'") (quoting *United States v. Gambino*, 835 F.Supp. 74, 95 (E.D.N.Y. 1993), *aff'd*, 59 F.3d 353 (2d Cir. 1995)). Thus, while an individual prosecutor is presumed to have knowledge of information gathered in connection with her office's investigation of the case and "has a duty to learn of any favorable evidence known to others acting on the governments behalf," this presumption does not extend to information acquired by federal agencies, which were "uninvolved in the investigation or trial." *United States v. Locascio*, 6 F.3d 924, 949 (2d Cir. 1993) (refusing to impute to prosecutors knowledge of reports prepared by FBI agents who were not involved in the underlying investigation or trial).

The principal consideration for determining whether prosecutors have a fairness obligation under *Rosario* also depends on whether the items sought actually are in the possession or control of the prosecutor's office. Thus, *Rosario* does not compel the production of information in the possession or control of federal law enforcement authorities or administrative agencies. *People v. Napolitano*, 282 A.2d 49, 56 (N.Y. App. Div. 1st Dep't 2001) (finding notes of an interview with a defendant produced and held by an investigator at the Securities and Exchange Commission did not constitute *Rosario* material, where the investigator refused to provide the District Attorney's Office with them); *People v. Marvin*, 258 A.D.2d 964, 964 (N.Y. App. Div. 4th Dep't); *People v. Letizia*, 159 A.D.2d 1010, 1011 (crime victim's statement to the Crime Victim's Compensation Board does not constitute *Rosario* material if the transcript of the testimony is not in the possession or control of the prosecution). Furthermore, even if the VAWA material were in the possession and control of the prosecution, the duty to disclose under *Rosario* is not absolute. *Rosario* does not compel disclosure of material "that must be kept confidential." *People v. Rosario*, 9 N.Y.2d 286, 289 (N.Y. 1961); *see also People v. Tissois*, 72 N.Y.2d 75, 78 (N.Y. 1988) (disclosure of child witness's statements to a social worker properly denied by the court because the communications were shielded from disclosure by statute).

VI. LEGISLATIVE HISTORY CONFIRMS THAT VAWA CONFIDENTIALITY PREVENTS ACCUSED BATTERERS FROM USING THE IMMIGRATION SYSTEM AGAINST THEIR VICTIMS.

In reauthorizing VAWA in 2005, Congress emphasized how VAWA confidentiality prevents alleged abusers from using the immigration system against their victims:

> In 1996, Congress created special protections for victims of domestic violence against disclosure of information to their abusers and the use of information provided by abusers in removal proceedings. In 2000, and in this Act, Congress extended these protections to cover victims of trafficking, certain crimes and others who qualify for VAWA immigration relief. *These provisions are designed to ensure that abusers and criminals cannot use the immigration system against their victims. Examples include abusers using DHS to obtain information about their victims, including the existence of a VAWA immigration petition, interfering with or undermining their victim's immigration cases, and encouraging immigration enforcement officers to pursue removal actions against their victims*.

H.R. Rep. No. 109-233, at 120 (emphasis added); *see also* 151 Cong. Rec. E2605, E2607 (daily ed. Dec. 18, 2005) (statement of Rep. Conyers). The Plaintiff insists that "[i]t is clear" from this legislative history that "the thrust of the confidentiality provision at issue is to prevent the undermining of immigration proceedings and removal cases, not state court criminal matters." Reply at 4. The Plaintiff, however, is incorrect for at least two reasons.

First, giving the Plaintiff the victim's confidential information would interfere with any VAWA application for relief the victim may have filed. By his own acknowledgement, the Plaintiff wants this confidential information to "raise concerns about [the victim's] credibility" based on allegedly inconsistent statements. Compl. ¶ 21. But this is the same motivation that caused the court in *Hawke* and *Sakaj* to refuse access to VAWA confidential information. *See Hawke*, 2008 WL 4460241 at *1; *Sakaj*, 2012 WL 476168 at *5. That is because the purpose of § 1367 "is to protect the confidentiality of the applications by preventing disclosure of these documents to alleged criminals as disclosure would allow, in this case [the Plaintiff], to interfere with or undermine [the victim's] immigration case." *Sakaj*, 2012 WL 476168 at *5–*6.

Second, and more fundamentally, VAWA confidentiality does not just prevent interference with the process of an immigration proceeding; VAWA confidentiality prohibits "use by or disclosure to *anyone* . . . of *any information*" relating to a VAWA application for

relief. 8 U.S.C. § 1367(a)(2). Congress knew that the right to self-petition was not enough to encourage immigrant victims to escape conditions of domestic violence. As the legislative history confirms, robust confidentiality was also needed to prevent alleged abusers from using the immigration against their victims in any fashion — whether by undermining a victim's VAWA application, or by gathering information from the DHS to further perpetuate the cycle of abuse. To accept the Plaintiff's version of this legislative history would not only undo years of expansive confidentiality that Congress has enacted, but also chill immigrant victims of domestic violence from ever coming forward and self-petitioning for relief.

A. In enacting the Violence Against Women Act of 1994, Congress understood that confidentiality protections were necessary in light of the dangers of domestic violence faced by immigrant victims.

Congress enacted the Violence Against Women Act of 1994 to reduce domestic violence. In doing so, Congress recognized that U.S. immigration law had "terribly exacerbated" the dangers of domestic violence for immigrant victims:

> Domestic battery problems can become terribly exacerbated in marriages where one spouse is not a citizen, and the non-citizen's legal status depends on his or her marriage to the abuser. Current law fosters domestic violence in such situations by placing full and complete control of the alien spouse's ability to gain permanent legal status in the hands of the citizen or lawful permanent resident spouse.

H.R. Rep. No. 103-395, at 26-27.[7]

In response to this systemic problem, Congress gave immigrant victims of domestic abuse the right to self-petition for a lawful permanent residence status and other immigration benefits without the approval, assistance, or cooperation from their abusers. *See* Pub. L. No.

[7] These dangers persisted for decades because U.S. immigration law was rooted in the common law doctrine of coverture — the antiquated notion that "the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband, under whose wing, protection, and cover, she performs everything." Leslye E. Orloff & Janice V. Kaguyutan, *Offering A Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 Am. U. J. Gender Soc. Pol'y & L. 95, 100 (2002) (quoting William Blackstone, *Commentaries on the Laws of England* 432 (1765)).

103-322, § 40701(a), 108 Stat. 1796, 1953-54. At the same time, Congress recognized the concomitant need for confidentiality protections to prohibit the disclosure of VAWA application materials to an alleged abuser. Congress commissioned the Attorney General to study "the means by which abusive spouses may obtain information concerning the addresses or locations of estranged or former spouses," *id.* § 40508(a), 108 Stat. at 1950, and analyze how to "creat[e] effective means of protecting the confidentiality of information concerning the addresses and locations of abused spouses to protect such persons from exposure to further abuse," *id.*[8]

B. Congress enacted the VAWA confidentiality provisions to protect immigrant victims from any retaliation their abusers might take in response to the exercise of self-petition rights.

VAWA 1994's confidentiality studies culminated in the VAWA confidentiality provisions enacted in 1996, which are now codified at 8 U.S.C. § 1367. In presenting the amendment that would ultimately become § 1367, Representative Pat Schroeder emphasized how § 1367 addressed "the very essential issue of confidentiality vis-á-vis battered women and children. *I think we all know confidentiality is a matter of life and death whether or not they are citizens or whether they are immigrants*." *See* Full Committee Mark Up: Hearing on H.R. 2202 Before the House Judiciary Committee, 104th Cong. (Sept. 19, 1995) (emphasis added). Confidentiality was essential because "giving the abuser the ability to influence the INS would give the abuser control over the victim's status." *Id.* (emphasis added). As the debate continued, Senator Paul Wellstone echoed that "[i]t would be unconscionable for our immigration laws to facilitate an abuser's control over his victim. It would be unconscionable for our immigration laws to abet criminal perpetrators of domestic violence. It would be unconscionable for our immigration laws to perpetuate violence against women and children." 142 Cong. Rec. S4306 (1996) (statement of Sen. Wellstone).

[8] Further VAWA legislation addressed the confidentiality of communications between victims and their counselors, *id.* § 40153, 108 Stat. at 1921, and protected the confidentiality of a victim's address, *id.* § 40281, 108 Stat. at 1938-39.

Section 1367 furthered this legislative intent in two ways. First, strict confidentiality protections prevent abusers from obtaining *any information* relating to a VAWA application for relief. 8 U.S.C. § 1367(a)(2). Second, additional confidentiality measures prohibit immigration authorities from making immigration determinations based solely upon information furnished by abusers and crime prepetrators. *Id.* § 1367(a)(1).

These robust protections improved upon prior regulations that failed to protect the confidentiality of immigrant victim information. Prior INS regulations contained an exception — "[a]ny information provided under this part *may* be used for the purposes or enforcement of the act in any criminal proceeding," 8 C.F.R. § 216.5(e)(3)(vii) (1992) (emphasis added); 56 Fed. Reg. 22635 (May 16, 1991) — that allowed alleged abusers to locate immigrant victims through public information provided by the INS and state and local authorities. Congress closed that loophole by limiting the release of VAWA confidential information to law enforcement "to be used *solely for a legitimate law enforcement purpose*." 8 U.S.C. § 1367(b)(2) (emphasis added). And in a subsequent INS memorandum describing these changes, the agency admitted that its "disclosure of information to the alleged abuser or any other family member was inappropriate even prior to the new law." 74 Interpreter Release 795 (May 12, 1997).

In this light, accepting Plaintiff's version of the legislative history harkens back to the days of these lax and dangerous standards — a position that both Congress, that the agencies to which it has delegated immigration authority, have wholeheartedly rejected.

C. In reauthorizing VAWA in 2000 and 2005, Congress strengthened VAWA confidentiality and expanded its coverage.

Congress reauthorized VAWA in 2000 "to improve on efforts made in VAWA 1994 to prevent immigration law from being used by an abusive citizen or lawful permanent resident spouse as a tool to prevent an abused immigrant spouse from reporting abuse or leaving the abusive relationship." 146 Cong. Rec. S10195 (2000) ("Title V, the Battered Immigrant Women Protection Act of 2000 – Section-By-Section Summary"). As part of these improvements, Congress expanded the right of self-petition to include immigrant victims that previously did not

qualify under VAWA 1994. Pub. L. No. 106-386, §§ 1501-1513, 114 Stat. 1464, 1518-37. VAWA confidentiality was also extended to these newly-qualified victims. *Id.*

Congress in 2000 also created the U-visa program to provide temporary immigration benefits to victims who had suffered abuse as a result of certain crimes, and were assisting law enforcement in the investigation or prosecution of those crimes. *Id.* § 1513, 114 Stat. 1533-37. At the same time, Congress amended VAWA's confidentiality provisions to cover this new form of immigration relief. *Id.* The most recent memo issued by the Department of Homeland Security on VAWA confidentiality announced the creation of a red flag "384" notification system that designed to alert immigration officials of VAWA confidentiality protected cases. That system guarantees that VAWA confidentiality protections attach upon filing of a VAWA confidentiality protected immigration case and continue indefinitely. VAWA confidentiality only ends if the case is dismissed on the merits. *See Hawke*, 2008 WL 4460241 at *6–*7 ("[W]hen Congress wrote the word 'denied,' [in § 1367(a),] the word meant 'denied *on the merits*.'") (emphasis in original); DHS Broadcast Message on New 384 Class of Admission Code (emphasizing that VAWA's "confidentiality provisions will continue to apply to the individual until all final appeal rights are exhausted").[9]

In reauthorizing VAWA in 2005, Congress introduced many additional protections to VAWA confidentiality. Among these increased protections, Congress expanded VAWA confidentiality under § 1367 to include newly-created forms of immigration relief, Pub. L. No. 109-162, § 817, 119 Stat. 2960, 3060; further expanded the definition of VAWA self-petitioners (thus extending VAWA confidentiality), *id.* §§ 811, 817, 119 Stat. at 3057, 3060; added penalties to § 1367, *id.* § 817, 119 Stat. at 3060; and required DHS to develop policies, protocols, and training to implement VAWA confidentiality, *id.* § 817, 119 Stat. at 3060. Again, Congress

[9] The DHS Broadcast Message on New 384 Class of Admission Code is *available at* http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/message%20to%20DHS%20384%20COA%20Final%2012.21.10.pdf/view?searchterm=384, and is also *available at* http://tinyurl.com/6oglwuh (last visited March 16, 2012).

added these increased protections "*to ensure that abusers and criminals cannot use the immigration system against their victims*." H.R. Rep. No. 109-233, at 120 (emphasis added); *see also* 151 Cong. Rec. E2605, E2607 (daily ed. Dec. 18, 2005).

This legislative history confirms that VAWA confidentiality is a vital component in enabling immigrant victims to escape conditions of domestic violence, overcoming the systemic dangers in U.S. immigration law, and ensuring that abusers and criminals cannot use the immigration system against their victims. In light of this Congressional intent, there is no justification, legal or otherwise, for permitting the alleged abuser in this case to breach VAWA confidentiality and acquire any VAWA, T nonimmigrant status or-visa, U nonimmigrant satus or visa or any other immigration application or petition for relief the victim may have filed. The Court should grant the Defendants' Motion to Dismiss.

VII. CONCLUSION

For the reasons stated, Amici respectfully request that this Court grant the Defendants' Motion to Dismiss.

Dated: March 16, 2012

Respectfully submitted,

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