C. MICHAEL MOORE
MICALA BERNARDO
KELLY FREUND
DLA PIPER LLP (US)
1900 N. Pearl Street, Suite 2200
Dallas, TX 75201-2451
Telephone: (214) 743-4500
Facsimile: (214) 743-4545
mike.moore@dlapiper.com
micala.bernardo@dlapiper.com
kelly.freund@dlapiper.com

Attorneys for the National Immigrant Women's Advocacy Project

DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEAL

In the Matter of: **M.A.** In Removal Proceedings	File No. A207-852-342

AMICUS CURAE BRIEF FOR RESPONDENT
M.A.

TABLE OF CONTENTS

PAGE

I. INTRODUCTION

The *amici* submit this brief in support of Respondent ("**Mr. M.A**.") seeking reversal of the Executive Office for Immigration Review ("**EOIR**") immigration judge's October 17, 2019 decision denying Mr. M.A's petition for (a) Violence Against Women Act (**"VAWA"**) cancellation of removal pursuant to Section 240A(b)(2) of the Immigration and Nationality Act ("**INA**"); (b) asylum pursuant to Section 208 of the INA; (c) withholding of removal pursuant to Section 241(b)(3) of the INA; and (d) protection under the Convention Against Torture, pursuant to 8 C.F.R. § 1208.16. *Amici* specifically submit this brief requesting the Board of Immigration Appeal ("**Board**") to remedy the flagrant and egregious violations of VAWA's confidentiality provisions that occurred in Mr. M.A.'s detention and removal proceedings. The Board should remedy these violations by terminating the present removal proceedings—a measure envisioned by Congress when it renewed the VAWA legislation in 2005 (*see infra* Sections III, IV), or, in the alternative, by reversing and remanding this matter to a different immigration judge.

Congress enacted VAWA to protect immigrant victims of domestic abuse by allowing victims to leave abusive spouses and prevent abusive spouses from using the U.S. immigration system against their victims. To further VAWA's goal, Congress enacted strict, broad confidentiality provisions that prohibit certain government officials, including U.S. Immigration and Customs Enforcement ("**ICE**"), EOIR employees and immigration judges, from (a) using or disclosing *to anyone, any information* which relates to an alien who is the beneficiary of an application for relief pursuant to VAWA, or (b) making an adverse determination of admissibility or deportability of an alien pursuant to the INA using information furnished solely by a spouse who has battered the alien or subjected the alien to extreme cruelty. *See* 8 U.S.C. § 1367(a)(2) (2013) (emphasis added). This prohibition extends to information derived from abusive spouses. Dep't of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009, H.R. Rep. No. 109-233, at 120 (2005).

Mr. M.A.'s abusive spouse (hereafter, "**J.C.A**.") called ICE to turn in Mr. M.A., triggering this removal action, as the record makes apparent. The record also shows that ICE employees, the EOIR Immigration Court, and the EOIR immigration judge engaged in a pattern of numerous, egregious direct

violations of VAWA's confidentiality protections. For example, ICE employees took the following prohibited actions: (1) used information obtained from J.C.A. to detain Mr. M. A.; (2) likely communicated VAWA protected information,[1] including the existence of Mr. M.A.'s cancellation of removal petition, to his abusive spouse; (3) sought evidence from and utilized testimony from Mr. M.A.'s abusive spouse in the proceedings before the immigration judge; and (4) refused to remove information about Mr. M.A.'s case from ICE's public electronic detainee locator database. Further, the Immigration Court failed to remove Mr. M.A.'s case from the court's automated information system, and the immigration judge admitted and relied upon evidence provided by Mr. M.A.'s abuser in issuing his adverse determination regarding Mr. M.A.'s deportability. The statements relied upon from J.C.A. characterized the marriage as fraudulent—*which is exactly the type of testimony that VAWA's confidentiality provisions were enacted to prohibit*. When perpetrators know of and/or have the opportunity to become involved in court proceedings brought by victims seeking protection, this poses enhanced danger for victims. Anne L. Ganley, *Domestic Violence: The What, Why and Who, As Relevant to Criminal And Civil Domestic Violence Cases*, Washington State Administrative Office of the Courts, Domestic Violence Manual for Judges, 2-19, 2-43, 2-63-64 (2016), https://www.courts.wa.gov/content/manuals/domViol/chapter2.pdf (noting that domestic abuse tends to escalate when an abuser learns that his victim is attempting to leave and that domestic abusers will often attempt to manipulate court proceedings as a form of control over their victims). Allowing information and testimony provided by abusers to influence a domestic abuse victim's immigration case and access to VAWA immigration relief will make it more dangerous for immigrant domestic violence victims to seek VAWA immigration protections and will chill future VAWA eligible immigrant victims from coming forward and seeking relief. Therefore, the Board must remedy the serious VAWA confidentiality violations that occurred in Mr. M.A.'s detention and removal proceedings by terminating these removal proceedings, or, in the alternative, ordering recusal of the immigration judge pursuant to the EOIR's authority to govern

[1] In the EOIR's Written Decision and Order of the Immigration Judge, issued October 17, 2019, the judge noted that "there is some to circumstantial evidence to suggest that [DHS's unauthorized disclosure of VAWA protected information] might have occurred." Order, at 19.

proceedings in immigration courts. These steps are essential to further Congress's intent to protect immigrant victims of domestic violence and to prevent perpetrators of domestic violence from continuing the cycle of abuse—as occurred here.

II. LEGISLATIVE HISTORY OF VAWA AND ITS CONFIDENTIALITY PROVISIONS

A. VAWA Was Enacted To Allow Immigrant Victims Of Abuse To Leave Abusive Relationships And Prevent Abusers From Using The U.S. Immigration System Against Their Victims.

One of Congress's chief concerns in enacting VAWA was reducing domestic violence. *See Hernandez v. Ashcroft*, 345 F.3d 824, 827-842 (9th Cir. 2003) (explaining that Congress's goal in enacting VAWA was to remove barriers preventing abused non-citizen spouses from leaving abusive relationships, which included providing a means for abused spouses "to achieve lawful immigration status independent of an abusive spouse."). Specifically, Congress sought to eliminate existing laws and law enforcement practices that condoned abuse or protected abusers, and instead, committed the legal system to protecting victims of abuse while identifying and punishing the perpetrators of domestic violence. Violence Against Women Act of 1993, H.R. Rep. No. 103-395 (1993); Violence Against Women Act of 1993, S. Rep. No. 138, at 41 (1993). In support of that overarching goal, VAWA was specifically intended to permit immigrants to leave abusive relationships by resolving the dilemma faced by many immigrant spouses of U.S. citizens. H.R. Rep. No. 103-395, at 26 ("[A] battered spouse may be deterred from taking action to protect himself or herself, such as filing for a civil protection order, filing criminal charges, or calling the police, because of the threat or fear of deportation."); *Id*. at 26 ("They fear both continued abuse if they stay with their batterers and deportation if they attempt to leave.")

The House Judiciary Committee, in considering the legislation, referenced a study that showed immigrant spouses married to U.S. citizens and permanent residents experienced particularly high rates of domestic violence. H.R. Rep. No. 103-395, at 26-27. 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-citizens 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.*

Id. at 26-27 (emphasis added). Congress also considered evidence of law enforcement's indifference to domestic violence. H.R. Rep. No. 103-395, at 27 (referencing a study that found 19,000 calls from victims alleging domestic violence resulted in fewer than 40 arrests).

In response to this systemic problem of abusers using the immigration system as leverage over their victims, Congress gave immigrant victims of domestic abuse the right to seek lawful permanent residence status and other immigration benefits without the approval, assistance, or cooperation of their abusers. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40701(a), 108 Stat. 1796, 1953-54 (1994). Thus, through VAWA, Congress gave battered immigrant spouses and other immigrant crime victims the right to "self-petition" for themselves and their children for forms of lawful immigration relief, including the ability to apply for lawful permanent residency. *See, e.g.*, 8 U.S.C. § 1154(a)(1)(A)(iii)-(vii), (B)(ii)-(v), (C), (K), (L) (setting forth requirements for VAWA self-petitioners); 8 U.S.C. § 1101(a)(15)(T), 8 U.S.C. § 1184(o) (creating T visas for victims of human trafficking); 8 U.S.C. § 1101(a)(15)(U), 8 U.S.C. § 1184(p) (creating U visas for victims of crime, including domestic violence, sexual assault, stalking and 25 other crimes).

B. The Purpose Of VAWA's Confidentiality Protections Is To Protect Victims And Prevent Abusers From Triggering Their Victims' Deportation And From Learning About Or Influencing Their Victims' Immigration Case.

Congress knew 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 process against their victims in any fashion—whether by undermining a victim's VAWA application, or by gathering information from government agencies to further perpetuate the cycle of abuse. Alina Husain & Leslye Orloff, *VAWA Confidentiality: Statutes, Legislative History, and Implementing Policy*, National Immigrant Women's Advocacy Project, American University, Washington College of Law, at 1-2 (2017), http://niwaplibrary.wcl.american.edu/wp-content/uploads/VAWA-Confidentiality-Statutes-Leg-History-Policies-2.23.17.pdf. Furthermore,

recognizing that information and testimony proffered by an abuser or suspected abuser is inherently unreliable (*id*. at 8, 22), Congress sought to prevent such evidence from being used to make an adverse determination against an immigrant victim. *Id*. at 3, 6-11, 22. Over the years and through multiple amendments, Congress has repeatedly strengthened VAWA's confidentiality protections in order to address these concerns. *See* Husain, *supra*. Allowing VAWA violations to go unchecked would not only undo the ever expanding confidentiality protections that Congress has enacted through the years, but would also deter immigrant victims of domestic violence—whose abusers are their U.S citizen and lawful permanent resident husbands—from coming forward and self-petitioning for relief. Research has found that in times of increased immigration enforcement, citizen and lawful permanent resident abusive spouses are particularly effective in using immigration related abuse as a tool to stop abused immigrant spouses from seeking the immigration relief Congress designed for their protection, resulting in a 391% decline in the willingness of abused immigrant spouses to file self-petitions. Rafaela Rodrigues et al., *National Immigrant Women's Advocacy Project, et al., Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims in an Age of Increased Immigration Enforcement*, National Immigrant Women's Advocacy Project, American University, Washington College of Law, 82 (2018), http://niwaplibrary.wcl.american.edu/wp-content/uploads/Immigrant-Access-to-Justice-National-Report.pdf.

In conjunction with implementation of the original VAWA in 1994, 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," Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40508(a), 108 Stat. 1796, 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*. That study 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-a-vis" victims of domestic violence. *See* Full

Committee Mark Up: Hearing on H.R. 2202 Before the House Judiciary Committee, 104 Cong. (Sept. 19, 1995). "I think we all know *confidentiality is a matter of life and death* whether or not they are citizens or whether they are immigrants." *Id*. (emphasis added). In addition to concerns regarding safety, confidentiality was essential because "giving the abuser the ability to influence the INS would give the abuser control over the victim's status." *Id*. Senator Paul Wellstone echoed those concerns, stating that it was "unconscionable for our immigration laws to *facilitate an abuser's control over his victim*" and "unconscionable for our immigration laws to abet criminal perpetrators of domestic violence." 142 Cong. Rec. S4306 (daily ed. Apr. 29, 1996) (statement of Sen. Wellstone) (emphasis added).

It is clear that because "Congress's goal in enacting VAWA was to eliminate barriers to women leaving abusive relationships" (*Hernandez*, 345 F.3d at 841), it was particularly concerned with preventing the *abuser* from obtaining confidential VAWA information, either directly or indirectly. Report of the Committee on the Judiciary House of Representatives To Accompany H.R. 109 at 122 (Sept. 22, 2005) ("This Committee wants to ensure that immigration enforcement agents and government officials covered by this section do not *initiate contact with abusers, call abusers as witnesses or rely[] on information furnished by or derived from abusers* to apprehend, detain and attempt to remove victims of domestic violence. . . ."), http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-lghist-dojexcerptshr-3402-09-22-2005 (emphasis added); *see also* 151 Cong. Rec. E2607 (daily ed. Dec. 18, 2005) (statement of Rep. Conyers, Jr.)[2]. Congress has emphasized how VAWA confidentiality prevents alleged abusers from using the immigration system against their victims:

> 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*

[2] "In determining whether a person furnishing information is a prohibited source, primary evidence should include, but not be limited to, court records, government databases, affidavits from law enforcement officials, and previous decisions by DHS or Department of Justice personnel. Other credible evidence must also be considered. Government officials are encouraged to consult with the specially trained VAWA unit in making determinations under the special 'any credible evidence' standard." *Id.* Here the record shows that the abused immigrant spouse had called the police for help due to domestic violence *before* both the USCIS marriage fraud finding based on the abuser's evidence and ICE responding to a tip from the abusive spouse that led to the victim's detention and initiation of removal proceedings against the victim. *See infra* Section III(A).

> *their victims, including the existence of a VAWA immigration petition, interfering with or undermining their victims' 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, Jr.). The courts have reiterated the importance of preventing abusers from accessing confidential VAWA information. "[O]ne of the primary purposes of the VAWA confidentiality provision" is "to prohibit disclosure of confidential application materials to the accused batterer." *Hawke v. U.S. Dep't of Homeland Sec., No. C-07-03456 RMW*, 2008 4460241, at *7 (N.D. Cal. Sept. 29, 2008).

Section 1367 furthered this 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 or derived from abusers and crime perpetrators. *Id.* § 1367(a)(1); H.R. Rep. No. 109-233, at 283 (2005). These robust provisions improved upon prior regulations that had failed to adequately protect the confidentiality of immigrant victim information. Previous INS regulations contained an exception: "[a]ny information provided under this part *may* be used for the purposes of enforcement of the Act or in any criminal proceeding," 8 C.F.R. § 216.5(e)(3)(vii) (1992) (emphasis added); *Conditional Basis of Lawful Permanent Residence for Certain Alien Spouses and Sons and Daughters; Battered and Abused Conditional Residents*, 56 Fed. Reg. 22,635, at 22,638 (May 16, 1991) (to be codified at 8 C.F.R. pt. 216) that allowed alleged abusers to locate immigrant victims through public information provided by the INS and state and local authorities. Congress closed that loophole in 1996 by limiting the release of VAWA confidential information to "law enforcement officials to be used solely for a legitimate law enforcement purpose." 8 U.S.C. § 1367(b)(2); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 384, 110 Stat. 3009-653 (1996). 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, 796 (May 12, 1997). Similarly, in 1997 immigration judges were instructed to "ensure that

all cases involving battered spouses and/or battered children are clearly identified as soon as possible and are subjected to heighted care by the Court." Dep't of Justice, The Office of the Chief Immigration Judge, Operating Policies and Procedures Memorandum No. 97-7: Procedures For Identifying Potential Battered Spouse/Battered Child Cases, at 2 (1997) ("Memo No. 97-7"), http://niwaplibrary.wcl.american.edu/pubs/operating-policies-procedures-memorandum-no-97-7-procedures-identifying-potential-battered-spouse-battered-child-cases. These protections apply from the moment an immigration judge learns that the case involved a battered spouse, even when the judge learns this during the actual hearing, as occurred in Mr. M.A.'s case. *See infra* Section II(C).

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 (daily ed. Oct. 11, 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 and VAWA confidentiality protections and were accordingly also extended to those newly-qualified individuals. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106, §§ 1501-1513, 114 Stat. 1464, 1518-37 (2000). Congress also created the U-visa program in 2000 to provide immigration benefits to victims who had suffered abuse as a result of certain crimes, and who had been helpful, were being helpful, or were likely to be helpful to law enforcement in the detection, investigation, prosecution, conviction or sentencing of those crimes. *Id.* § 1513, 114 Stat. 1533-37; 8 C.F.R. 214.14 (a)(5). At the same time, Congress again amended VAWA's confidentiality provisions to cover this new form of immigration relief. Pub. L. No. 106, § 1513, 114 Stat. 1473, 1533-37.

In reauthorizing VAWA in 2005, Congress added even more protections to VAWA confidentiality. Among these increased protections, Congress expanded VAWA confidentiality under § 1367 to include newly created forms of immigration relief, Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 817, 119 Stat. 2960, 3060-61; §§ 811, 817, 119 Stat.

3057, 3060 (2006); to preclude immigration enforcement against victims at protected locations *id*. §825(c) 119 Stat. 3065; 817, 119 Stat. 3060-61; required the Department of Homeland Security ("**DHS**") to develop policies, protocols, and training to implement VAWA confidentiality, *id*. § 817, 119 Stat. at 3060-61; and authorized that when § 1367 was violated, such "[r]emoval proceedings filed in violation of section 384 of IIRIRA shall be dismissed." H.R. Rep. No. 109-233, at 121. Again, Congress added these increased protections "to ensure that abusers and criminals cannot use the immigration system against their victims." *Id*. at 120; see also 151 Cong. Rec. E2605, E2607 (daily ed. Dec. 18, 2005). Congress further strengthened VAWA confidentiality protections in 2013 by requiring that when confidential VAWA information is shared with law enforcement under the 1367(b)(2) exception, it is done "in a manner that protects the confidentiality of that information." *See* 8 U.S.C. § 1367(b)(2) (2013).

The current confidentiality measures prohibit DHS and DOJ personnel, including ICE officials, immigration courts, and immigration judges, from disclosing any information related to a VAWA application for relief to any third party:

> (a) In general
>
> Except as provided in subsection (b), 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)—
>
> (1) *make an adverse determination of admissibility or deportability* of an alien under the Immigration and Nationality Act [8 U.S.C.A. § 1101 et seq.] using information furnished solely by— (A) *a spouse or parent who has battered the alien or subjected the alien to extreme cruelty. . . .*[3]
>
> (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.A. § 1101(a)(15)(T), (U), (51)] or section 240A(b)(2) of such Act [8 U.S.C.A. § 1229b(b)(2)].[4]

8 U.S.C. § 1367(a)(1)(A); 8 U.S.C. § 1367(a)(2) (emphasis added).

[3] The "**prohibited source**" rule.
[4] The "**prohibited disclosure**" rule

VAWA's confidentiality protections are "strict." *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). They are also broad. By prohibiting the "use by or disclosure to anyone . . . of any information," § 1367 prevents abusers from discovery of the substance, as well as the existence, of any VAWA application for relief. 8 U.S.C. § 1367(a)(2). As such, courts have held that 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 abuser'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(JGM), 2012 WL 476168, at *5 (D. Conn. Feb. 14, 2012) (denying motion to compel discovery of a 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"). VAWA Confidentiality is both a prohibition on governmental actions and a right that belongs to the immigrant victim. *See Sakaj*, 2012 WL 476168, at *2-6 (denying motion to compel discovery of a victim's 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). Absent voluntary disclosure by a victim, information protected by VAWA must remain confidential.

DHS agency-wide policies echo Congress's concern that information provided by an immigrant's spouse is often unreliable.[5] In particular, a spouse may offer adverse evidence relating to his immigrant spouse in retaliation for leaving the relationship.[6] The courts in *Hawke* and *Sakaj* rejected requests for the

[5] "If a DHS employee receives adverse information about a victim of domestic violence . . . from a prohibited source, DHS employees should treat the information as inherently suspect and exercise all appropriate prosecutorial discretion with respect to pursuing the adverse information." Dep't of Homeland Security, Directive No. 002-02, Implementation of Section 1367 Information Provisions, at 3-4 (Nov. 1, 2013) ("DHS Nov. 1, 2013 Memo"); *see also*, U.S. Dep't of Justice, 74 Interpreter Release 797 (May 12, 1997), https://asistahelp.org/wp-content/uploads/2018/10/First-INS-384-Memo-Non-Disclosure-and-other-Prohibitions-Relating-to-Battered-Aliens.pdf (describing receiving adverse information from an immigrant's U.S. citizen spouse as potentially "difficult fact situations.")

[6] "An assertion of fraud by the prohibited source, such as an accusation that the marriage is fraudulent, ordinarily will not serve as the sole basis for adverse action. Abusers often claim their marriage is fraudulent in order to exact revenge or exert further control over the victim." *See* Dep't of Homeland Security, Instruction No. 002-02-001, Implementation of Section 1367 Information Provisions, at 11 (Nov. 7, 2013) ("DHS Nov. 7, 2013 Memo").

disclosure of VAWA confidentiality protected information sought for the purpose of undermining the credibility of the abuse victim. *See*, *Hawke*, 2008 WL 4460241, at *1, 7; *Sakaj*, 2012 WL 476168, at *5-6 (stating that one of the purposes of VAWA "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."). Because VAWA cancellation of removal and VAWA self-petition actions were designed to address this problem of immigration related abuse, power, and control including retaliatory allegations of fraudulent marriage, immigration courts cannot deny a VAWA self-petition or cancellation of removal application based on information provided solely by the applicant's abuser. DHS Nov. 7, 2013 Memo at 11; *see generally* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("**IIRIRA**") § 384(a)(1), H.R. Rep. No. 104-828, at 108 (1996); 8 U.S.C. § 1367(a)(1). Adverse determinations from prior actions based solely on information provided by a prohibited source—such as the USCIS finding that Mr. M.A.'s marriage was not entered into in good faith— also cannot be the basis for a denial of a VAWA self-petition or cancellation of removal. Both the VAWA cancellation and the USCIS denials in this case relied solely on abuser-provided information, without consideration of the full record, including the battering and extreme cruelty that occurred in this case as required by VAWA's any credible evidence rules. Leslye E. Orloff et al., *Mandatory U-Visa Certification Unncessarily Undermined The Purpose Of The Violence Against Women Act's Immigration Protections And Its "Any Credible Evidence" Rules—A Call for Consistency*, Vol. XI The Georgetown J. Of Gender And The Law 619, http://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Gov-Jrnl-AnyCredibleEvidenceRules.pdf

Permitting an adverse determination against an abused immigrant spouse to stand based on a U.S citizen husband abuser's testimony, sought and used by ICE in violation of VAWA's statutory protections for domestic abuse victims, would harken back to the more lax and dangerous standards that Congress, and the agencies to which it delegated immigration authority, have wholeheartedly rejected.

C. VAWA Confidentiality Provisions Are Triggered When A Citizen Abuses Their Non-Citizen Spouse.

DHS's own operating procedures indicate that victims are entitled to VAWA confidentiality protections even before they applied for VAWA benefits. Accordingly, personnel of the relevant agencies have an affirmative obligation to take steps to identify such victims, to avoid relying on perpetrator provided information, 8 U.S.C. 1367(a)(1)(A), and to protect victims and their information immediately once they suspect an individual qualifies for protections under VAWA.[7] The statute, 8 U.S.C. 1367(a)(1)(A), guarantees that the prohibition on using information furnished by an abusive spouse attaches immediately from the moment there is a marriage and there is battery or extreme cruelty during the marriage, including before an individual has petitioned for VAWA status.[8] This is consistent with the treatment of VAWA's bars against immigration enforcement at protected locations, which also apply before the individual has indicated that he or she intends to seek VAWA status.[9]

Several memoranda specifically caution employees to be sensitive to the potential that abuser/abused dynamics are at play when a U.S. citizen offers evidence adverse to his or her immigrant spouse:[10]

---

[7] "The nondisclosure provision provides protection *as soon as a DHS employee has reason to believe* that the alien *may be the beneficiary of a pending or approved victim-based application or petition*. . . ." DHS Nov. 7, 2013 Memo, at 6 (emphasis added); "Immigration enforcement officers should refer aliens they encounter who *may qualify for relief* under this Act to immigration benefits adjudicators handling VAWA cases at CIS." 151 Cong. Rec. E2607 (daily ed. Dec. 18, 2005) (statement of Rep. Conyers, Jr.) (emphasis added); "INS officer or employee should take "*particular care* whenever an INS officer or employee *suspects that an alien . . . might have been subject to domestic violence*." 74 Interpreter Release 797 (May 12, 1997) (emphasis added); "Components establish, to the fullest extent reasonably practicable, means of identifying individuals protected by section 1367 confidentiality and will take steps to develop safeguards to protect this information in the relevant systems. One such way to help identify most, though not all, of those protected is through a Central Index System (CIS) database check. . . . For any cases *where it is suspected* that an alien is an applicant for a benefit protected by Section 1367, a DHS employee consults the Central Index System (CIS) database to verify whether an alien has a pending or approved application or petition covered by section 1367." DHS Nov. 7, 2013 Memo, at 14 (emphasis added).

[8] DHS Nov. 1, 2013 Memo at 3 ("Adverse determinations or admissibility or deportability against an alien are not made using information furnished solely by prohibited sources associated with the battery or extreme cruelty, sexual assault, human trafficking or substantial physical or mental abuse, *regardless of whether the alien has applied for VAWA benefits, or a T or U visa*.") (emphasis added).

[9] "ICE is currently taking the position that it generally will not place in removal proceedings aliens encountered at these sensitive locations unless fraud, criminal activity, or national security concerns are clearly present. ICE Employees must comply with the § 239(e) certification requirement even if the subject alien has not applied for or does not intend to apply for VAWA benefits." U.S. Dep't of Justice, U.S. Immigration and Customs Enforcement, Memorandum from William J. Howard, VAWA 2005 Amendments to the Immigration and Nationality Act and 8 U.S.C. § 1367, at 8 (Feb. 1, 2007) ("ICE 2007 Memo") "[I]t is clear that Congress intended that cases of aliens arrested at [sensitive locations] be handled properly given they may ultimately benefit from VAWA's provisions." *Id*. at 5.

[10] *See also* DHS Nov. 7, 2013 Memo at 10 ("In the interest of full compliance in what could be *difficult fact situation*, the following guideline is to be followed: If an INS employee receives information *adverse to an alien from the alien's*

> The *lack of a pending or approved VAWA self-petition does not necessarily mean that the prohibited source provisions do not apply* and that the alien is not a victim of battery or extreme cruelty. . . . Accordingly, *whenever a DHS officer or employee receives adverse information from a spouse*, family member of a spouse, or unknown private individual, the employee will check the Central Index System (CIS) for the COA "384" flag. Employees will be sensitive to the fact that the alien at issue may be a victim and that a victim-abuser dynamic may be at play.

DHS Nov. 7, 2013 Memo, at 10 (emphasis added).

In light of the fact that confidentiality attaches before a victim formally petitions for VAWA status, the immigration courts have recognized the importance for DHS personnel to promptly and effectively identify domestic abuse victims and designate VAWA information as confidential.[11] DHS and the immigration courts have implemented procedures to signal that documents contain VAWA information, including the creation of a red flag "384" notification system that would alert immigration officials of VAWA confidentiality protected cases. DHS Nov. 7, 2013 Memo, at 10; Memo No. 97-7, at 2-3.

III. VAWA CONFIDENTIALITY VIOLATIONS IN MR. M.A.'S IMMIGRATION PROCEEDINGS

DHS and the immigration judge committed numerous violations of VAWA's confidentiality provisions with respect to Mr. M.A.'s immigration proceedings, as did the Immigration Court. Both the Department of Justice, including the immigration judge and the immigration court, and the Department of Homeland Security, including ICE, are subject to VAWA's confidentiality provisions. ICE and the immigration judge in this proceeding, and in Mr. M.A.'s previous dealings with each of these agencies, and

U.S. Citizen or lawful permanent resident spouse . . . or from relatives of that spouse . . . *the INS employee must obtain independent corroborative information from an unrelated person* before taking any action based on that information."); 74 Interpreter Release 797 (May 12, 1997) ("In determining whether a person furnishing information is a prohibited source, primary evidence should include, but not be limited to, court records, government databases, affidavits from law enforcement personnel. Other credible evidence must also be considered. *Government officials are encouraged to consult with the specially trained VAWA unit* in making determinations under the special 'any credible evidence' standard.")

[11] "The key to preventing disclosure of these types of cases is to ensure that all cases involving battered spouses . . . are clearly identified as soon as possible and are subjected to heightened care by the Court." Memo No. 97-7, at 2. "There may be circumstances where it will not be apparent until the actual hearing that the case involves a battered spouse . . . . In all cases involving a battered spouse . . . the Judge must immediately close the hearing and clear the courtroom of the public." Memo No. 97-7, at 2-3. "If, at any time prior to the hearing, the Judge, the Court Administrator or Court staff becomes aware that a case involves battered spouse . . . the ROP must be immediately retrieved and stamped at least twice with the warning stamp on the front of the ROP cover." *Id.* at 2.

USCIS throughout the course of his immigration cases, repeatedly violated the VAWA confidentiality statute's "prohibited source" and "prohibited disclosure" confidentiality provisions, as outlined herein.

A. The History Of This Case is Important To Illustrate The Importance Of VAWA's Confidentiality Provisions.

This is a case in which Mr. M.A.'s abusive citizen spouse J.C.A. perpetrated physical violence against Mr. M.A., used a multitude of immigration related abuse tactics to exert power and control over Mr. M.A., and retaliated against Mr. M.A. for reporting the abuse and leaving the abusive relationship. It is well documented that the forms of immigration related abuse J.C.A. used in this case are exactly the types of abuse Congress created VAWA immigration protections and VAWA confidentiality to address. A review of the history of Mr. M.A.'s immigration proceedings is important to illustrate the full scope and impact of the VAWA confidentiality violations that occurred in this case. The record demonstrates that Mr. M.A. applied for adjustment of his immigration status pursuant to USCIS Form I-485 based on his marriage to J.C.A. USCIS denied his adjustment application in April 2017, finding that Mr. M.A.'s marriage to J.C.A. was fraudulent. It is clear from the record in this case that USCIS made its marriage fraud determination based on information provided to USCIS in a *separate, private interview with J.C.A.* Contrary to USCIS policy, Mr. M.A. was *never given an opportunity to respond* to the allegations of marriage fraud prior to his application being denied. U.S. Dep't of Homeland Security, U.S. Citizenship and Immigration Services ("**USCIS**"), Policy Memorandum PM-602-0085, Requests for Evidence and Notices of Intent to Deny, at 3-4 (June 3, 2013) ("Under 8 CFR 103.2(b)(16)(i), if a decision adverse to the individual is based on derogatory information, and the individual is unaware that the information is being considered, the officer must advise the individual of this information and offer him or her an opportunity to rebut it before the decision is rendered."), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/June%202013/Requests%20for%20Evidence%20%28Final%29.pdf, *superseded by* U.S. Dep't of Homeland Security, Citizenship and Immigration Services, Policy Memorandum PM-602-0163, Issuance of Certain RFEs and NOIDs Revisions to Adjudicator's Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b), (July 13, 2018),

https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf. The record also shows that Mr. M.A. had called the police for help after being subjected to domestic violence by J.C.A. before J.C.A.'s private interview with USCIS. Thus, evidence of the domestic violence existed in the state law enforcement records that USCIS could access, which should have alerted USCIS that Mr. M.A. was owed protection pursuant to VAWA's confidentiality provisions.

In addition, the record shows that ICE arrested Mr. M.A. in July 2017 and initiated removal proceedings against Mr. M.A. as a result of a tip provided by J.C.A. to ICE via an e-mail sent on June 12, 2017. Even though at the time of his arrest, Mr. M.A. had already made domestic violence related calls to the police and filed police reports against J.C.A. related to J.C.A.'s threatening and abusive behavior, neither ICE nor USCIS searched for those reports. Furthermore, ICE and USCIS both failed to connect the dots to ascertain that ICE and USCIS had received their information from the same source—Mr. M.A.'s abusive spouse. As outlined herein, ICE and the EOIR have allowed J.C.A.—the abusive spouse—to infiltrate and influence Mr. M.A.'s immigration status at every stage of the immigration process, despite ICE and EOIR's awareness of Mr. M.A.'s right to protection pursuant to VAWA. The Board cannot allow ICE, EOIR, the immigration judge, and USCIS to help an abusive citizen spouse control an immigrant victim's immigration status in violation of VAWA's confidentiality provisions, the history and purposes of VAWA's immigration protections, and without regard to congressional intent to prohibit this exact pattern of facts from occurring. These violations must be adequately addressed to remedy the harm caused to Mr. M.A. by the incidents of battering and extreme cruelty by J.C.A., to remedy the harm caused by the immigration enforcement actions and more than two and a half years of immigration detention that J.C.A. was able to get ICE to effectuate against Mr. M.A., and to ensure that future immigrant victims of domestic abuse can apply for relief pursuant to VAWA without fear of retaliation by their abusive U.S. citizen spouses.

B. The Immigration Judge's Reliance On And ICE's Proffer Of Testimony From Mr. M.A.'s Abusive Spouse To Make Negative Credibility And Other Factual Findings In A VAWA Cancellation Of Removal Case Violates VAWA Confidentiality's Prohibited Source Protections.

The immigration judge's decision denying Mr. M.A.'s application for asylum, withholding of removal, seeking protection under the Convention Against Torture, and cancellation of removal, and ordering deportation violates the prohibited source confidentiality provision because the immigration judge explicitly relied on information provided solely by Mr. M.A.'s abusive citizen spouse in rendering its decision. In the Written Decision and Order of the immigration judge, issued October 17, 2019 ("**Order**"), the immigration judge relied on testimony provided in an affidavit of J.C.A, Mr. M.A.'s abusive spouse, in making its determination that Mr. M.A.'s testimony was not credible. Specifically, the Order devotes substantial time to analyzing J.C.A.'s affidavit and relies on the affidavit extensively in finding that Mr. M.A. did not enter into a good faith marriage. The immigration judge further relied on the USCIS's finding that Mr. M.A.'s marriage was not entered into in good faith—a finding that the record makes clear—was also based on information provided to USCIS by Mr. M.A.'s abuser, J.C.A. Specifically, J.C.A provided the information when USCIS deviated from typical practice and privately interviewed J.C.A. *See Exh. 13.* The record also that Mr. M.A. had called the police on May 25, 2016, for help due to domestic violence committed by J.C.A., before USCIS issued its marriage fraud finding on April 3, 2017. A finding based solely on evidence provided by Mr. M.A.'s citizen spouse abuser J.C.A. *See Exh. 4*; *Exh. 18* at Tab I.

VAWA's confidentiality rules expressly prohibit the immigration judge, USCIS, and ICE from making "an adverse determination of admissibility or deportability . . . using information furnished solely by … a spouse … who has battered the alien or subjected the alien to extreme cruelty." 8 U.S.C. 1367(a)(1)(A). Here, the lion's share of evidence submitted by ICE and relied upon by the immigration judge, including critical evidence supporting the immigration judge's immigration fraud determination, was supplied exclusively by Mr. M.A.'s abusive spouse. DHS internal guidance strongly cautions against relying on evidence supplied by an abusive spouse. "If a DHS employee receives adverse information about a victim of domestic violence … from a prohibited source, DHS employees should treat the information as inherently suspect and exercise all appropriate prosecutorial discretion with respect to pursuing the adverse information." DHS Nov. 1, 2013 Memo, at 3-4. Further, "[a]n assertion of fraud by the prohibited source, such as an accusation that the marriage is fraudulent, ordinarily will not serve as the

sole basis for adverse action. Abusers often claim their marriage is fraudulent in order to exact revenge or exert further control over the victim." DHS Nov. 7, 2013 Memo, at 11.

Here, instead of viewing the information supplied by J.C.A as "suspect" and excluding it from the record, the immigration judge explicitly relied on it in making adverse findings regarding Mr. M.A. without considering or requiring any corroboration of such evidence and without considering the full record, including the evidence of battering and extreme cruelty perpetrated by J.C.A. Further, the immigration judge ignored the ample evidence of bias in the record from J.C.A.'s text messages and social media posts, in which J.C.A. vows, among other things, to "make [M.A.] pay" and "make [M.A.] suffer." *See Exh. 18.* This is the exact result that Congress sought to prohibit in enacting VAWA. *See, e.g.,* 151 Cong. Rec. E2607 (daily ed. Dec. 18, 2005) (statement of Rep. Conyers, Jr.) ("Immigration enforcement agents and government officials covered by this section must not initiate contact with abusers, call abusers as witnesses or rely on information furnished by or derived from abusers to apprehend, detain, and attempt to remove victims of domestic violence."); H.R. Rep. No. 109-233, at 120 (2005) ("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….These provisions are designed to ensure that abusers and criminals cannot use the immigration system against their victims. Examples include … interfering with or undermining their victims' immigration cases, and encouraging immigration enforcement officers to pursue removal actions against their victims.") The ICE trial attorney's communications with J.C.A. and the immigration judge's reliance on evidence supplied by Mr. M.A.'s abuser, constitute gross violations of VAWA's confidentiality prohibited source protections.

C. Elicitation And Admission Of Testimony From Mr. M.A.'s Abusive Spouse Also Violates The VAWA Confidentiality Statute Because It Constitutes A Prohibited Disclosure.

In addition, ICE's elicitation of and use of, and the immigration judge's admission of, J.C.A.'s affidavit violates VAWA's prohibited disclosure provisions. In the Order, the immigration judge incorrectly held that admission of J.C.A.'s affidavit did not constitute a prohibited disclosure because 8 U.S.C. § 1367 (a)(2) permits DHS "by means of an explicit exception to use or disclose information

regarding [Mr. M.A.] to the Court for legitimate Department, bureau, or agency purposes, such as litigating the instant removal proceedings before this Court." This holding misconstrues the VAWA confidentiality statute in a number of ways. 8 U.S.C. § 1367 (a)(2) is the law enforcement exception to VAWA confidentiality.[12] The law enforcement exception applies only to state, local, and federal law enforcement officials, *not* DHS or the immigration judge. Even accepting, *arguendo*, the Court's incorrect reading of this exception as applying to DHS and immigration judges, the Court incorrectly ignored the manner in which this exception is applied to continue to protect confidentiality. The Court relied only on a part of the § 1367(a)(2) exception, conveniently leaving out the statutory language mandating that information released to law enforcement be handled "in a manner that protects the confidentiality of such information." § 1367(a)(2). Protecting the confidentiality of the information means not releasing the information to anyone, *particularly the abuser*, but the immigration judge and ICE counsel took *no* steps to keep the abuser J.C.A. from learning about or participating in Mr. M.A.'s VAWA confidentiality protected removal proceeding. The immigration judge failed to recognize that both VAWA's prohibited source and non-disclosure protections apply to removal proceedings. The immigration judge's doubly wrong application of the § 1367(a)(2) exception would gut those protections. The immigration Judge's holding flies in the face of legal precedent, ignores VAWA's legislative history, violates the clear language of 8 U.S.C. 1367, and directly contradicts the EOIR's own internal policies.

Indeed, courts interpreting the non-disclosure provisions have consistently held that the prohibition on disclosure is virtually absolute. *See, e.g., Cazorla v. Koch Foods of Miss., LLC*, 838 F.3d 540, 551-52 (5th Cir. 2016) (finding that confidentiality provisions applied to disclosure of U-Visa information during civil discovery); *Demaj v. Sakaj*, No. 3:09 CV 255(JGM), 2012 WL 476168, at *6 (D. Conn. Feb. 14, 2012) (denying motion to compel discovery of protected U Visa file in child custody case and holding disclosure would undermine purpose of statute meant to protect confidentiality of applications); *Hawke v. U.S. Dep't*

[12] The judicial exception (§ 1367(b)(3)) would also not apply because is intended to permit judicial review of denial of cancellation of removal and other proceedings relating to VAWA benefits and it also requires that information be only used "in a manner that protects the confidentiality of such information."

of Homeland Sec., No. C-07-03456 RMW, 2008 WL 4460421, at *7 (N.D. Cal. Sept. 29, 2008) (holding information contained in VAWA self-petition and related records "absolutely privileged"); *United States v. Brown*, 347 F.3d 1095, 1098-99 (9th Cir. 2003) (holding defendant's right to confront witnesses was not violated when denied access to witness's immigration file). In addition, the long-standing EOIR guidance implementing the VAWA confidentiality statute clearly states that the EOIR cannot disclose any information protected by VAWA confidentiality and imposes certain affirmative obligations on immigration judges to prevent such disclosures. *See* Memo No. 97-7, at 1-3.

Further, the Board must recognize and remedy the VAWA confidentiality violations in this case by the immigration judge and ICE counsel. To fail to do so would undermine the entire purpose of VAWA, which is to protect immigrant victims of domestic abuse. *See supra* Section II. Indeed the first group of immigrant victims Congress offered protections to were those abused by their U.S. citizen husbands. 8 U.S.C. 1186a(c)(4)(C). As set forth herein, Congress enacted VAWA in response to the systemic problem of abusers using the immigration system as leverage over their alien victims. The immigration judge's order flies in the face of VAWA's intended purpose, and in fact, punishes Mr. M.A. by allowing ICE and the immigration judge to obtain, receive, use, and disclose evidence obtained from a prohibited source. The legislative history of VAWA's confidentiality provisions makes clear that DHS (including ICE) cannot use evidence from abusers to deny an immigration benefit:

> This Committee wants to ensure that immigration enforcement agents and government officials covered by this section do not initiate contact with abusers, call abusers as witnesses or relying on information furnished by or derived from abusers to apprehend, detain and attempt to remove victims of domestic violence, sexual assault and trafficking . . . .

Department of Justice Appropriations Authorization Act, Fiscal Years 2006 to 2009, H.R. No. 109-223, at 120 (2005). ICE and the immigration judge acted in direct contravention of the plain meaning of the law, established congressional intent, and established operating court and department procedures by eliciting and using J.C.A.'s declaration as evidence in these proceedings. It is important to note that ICE, immigration judges, the immigration courts, and USCIS are all statutorily precluded from informing alleged perpetrators about a VAWA confidentiality protected case, from confirming the existence of such case,

from eliciting evidence from a spouse who is alleged to be an abuser, and from using evidence from an abusive spouse. ICE is also precluded from receiving evidence offered by an abusive spouse and using it in any immigration enforcement action or immigration court case against or involving a victim.

D. Admission Of Other Evidence Provided By Abuser Violates Prohibited Disclosure Provision.

The immigration judge and ICE committed additional prohibited disclosures by admitting and relying on other evidence obtained from the abusive spouse, including their reliance on USCIS's denial of Mr. M.A.'s immigration adjustment application to support its marriage fraud finding, despite the fact that the abusive spouse J.C.A. was the source of the information USCIS relied upon in issuing its findings. This was after USCIS used highly unusual procedures in its adjudication of this case, including a private meeting with J.C.A. The immigration judge then erred when he relied heavily on USCIS's denial of Mr. M.A.'s I-485 petition in its Order to support his finding that Mr. M.A. did not enter into his marriage with J.C.A. in good faith. The court in the VAWA cancellation case should have examined the USCIS's finding to determine the extent to which it may have been based on prohibited abuser provided information and then made a *de novo* good faith marriage determination based on the totality of the evidence, including the substantial evidence of abuse in the record, which USCIS did not have when it adjudicated the I-485 case.

VAWA's confidentiality provisions provide that the EOIR and ICE cannot use or disclose any information offered by a person they knew or had reason to know was an abuser. *See supra* Section II(B). These agencies were unquestionably on notice in 2019, and should have been on notice as early as 2017,[13] that Mr. M.A. alleged that J.C.A. had abused him; however, they continued to rely on testimony and information supplied by J.C.A. to USCIS with respect to Mr. M.A.'s I-485 petition, with total disregard to VAWA's confidentiality protections. Even if USCIS or ICE were unaware that Mr. M.A. qualified for VAWA confidentiality protections as an abused spouse of a U.S. citizen at the time of its decision relating to Mr. M.A.'s I-485 application, ICE unquestionably became aware of Mr. M.A.'s abuse allegations in February 2019 when he filed his VAWA cancellation of removal application. ICE should then have ceased

[13] *See infra* Section IV(F).

reliance on any information that was provided solely by J.C.A. The immigration judge became aware that Mr. M.A. was a victim of spousal abuse perpetrated by his U.S. citizen husband J.C.A. as early as 2017 during Mr. M.A.'s asylum case. At that time, Mr. M.A., acting *pro se,* provided the court with extensive documentation of the battering and extreme cruelty he had suffered from J.C.A. *See Exh. 4.*

E. EOIR And ICE Violated VAWA's Prohibited Disclosure Provision By Failing To Remove The Victim's Name From Automated Systems.

EOIR and ICE committed additional prohibited disclosures by failing to remove Mr. M.A.'s name from the court's automated system and ICE's online detainee locator system. EOIR's confidentiality guidelines clearly state that the immigration judge, EOIR, and ICE are required to remove information about an accuser's immigration case from the court's online automated systems, which are publicly accessible. *See* Memo No. 97-7, at 2-3. ICE and the EOIR should have been on notice of Mr. M.A.'s right to VAWA confidentiality protection when Mr. M.A. provided evidence that he was abused by his citizen spouse during his asylum case in 2017. Furthermore, on January 30, 2019, Mr. M.A.'s counsel informed the Court at a Master Calendar hearing that Mr. M.A. would be filing a VAWA cancellation of removal action. Despite the fact that EOIR and ICE were on notice of Mr. M.A.'s entitlement to VAWA confidentiality protections, Mr. M.A.'s information remained publicly available on both EOIR's court system and the ICE detainee locator system until counsel intervened to have the listings removed in May and June of 2019 respectively. EOIR's failure to remove Mr. M.A.'s case from the court's public system and ICE's failure to remove Mr. M.A. from the online detainee locator system allowed anyone—including J.C.A., Mr. M.A.'s abusive spouse—to access and view confidential information regarding his immigration case.[14] EOIR and ICE thereby thwarted the purpose of VAWA, which is to protect individuals such as Mr. M.A. by failing to prevent his abusive spouse from learning of the immigration court case in which Mr. M.A. filed his VAWA cancellation of removal petition and interjecting himself into the proceedings, perpetuating the cycle of abuse—which is exactly what happened.

[14] This included Mr. M.A.'s location in ICE detention, the date, time and location of all hearings, whether his case was pending or had been decided, and the status of any appeal filed.

F. ICE Violated "Disclosure" Provision By Communicating With Abusive Spouse About VAWA Cancellation Of Removal Case.

Consistent with the pattern of VAWA confidentiality violations discussed above, ICE additionally violated VAWA's disclosure provision by communicating with Mr. M.A.'s abusive spouse, J.C.A., about Mr. M.A.'s VAWA cancellation of removal case. In the record, ICE denies that it communicated with J.C.A. about Mr. M.A.'s VAWA cancellation of removal petition; however, it admitted that J.C.A. was "aware" of Mr. M.A.'s immigration case due to publicly available information that violates VAWA confidentiality. Counsel also admitted on the record that it had requested an affidavit from J.C.A. to be used against Mr. M.A.[15] Furthermore, regardless of ICE's denial, its actions throughout these proceedings demonstrate its communication with J.C.A., in violation of VAWA. ICE violates VAWA's confidentiality provisions when it: (a) initiates contact with or takes calls with an accused abuser; (b) provides information to an abuser about the victim's immigration case; or (c) elicits or relies on evidence provided by the abuser in a victim's immigration proceeding. *See, e.g.*, 8 U.S.C. § 1367(a)(2); DHS Nov. 1 2013 Memo; DHS Nov. 7, 2013 Memo; and Memo No. 97-7.

Here, the record shows that beyond failing to remove Mr. M.A.'s name from ICE's online detainee locator system, *ICE initiated contact with J.C.A. to obtain and then submit a declaration from* him, which appears to respond point-by-point to filings made by Mr. M.A. in these proceedings. ICE also filed a witness list in May 2019, indicating that it intended to call J.C.A. as a witness at Mr. M.A.'s hearing before the immigration judge on Mr. M.A.'s immigration case claims, *including his application for VAWA cancellation of removal*. *See Exh. 25.* These actions indicate that ICE was communicating with J.C.A., at the very least, to assist in preparing his declaration and that either directly or indirectly, J.C.A. obtained knowledge of the existence of, date, place, and substance of Mr. M.A.'s immigration hearing. Such

[15] *See Tr.* at 57 wherein ICE counsel Mr. Graham states: "I'm sorry, the respondent's husband is extremely aware of how the immigration system works. He knows the respondent's A number. He is following this case on his own, he doesn't need us to tell him when things were being set. There's numerous ways to find that out that don't have anything to do with contacting us: All we did when this was remanded is we asked the respondent's husband to please just put in a coherent document everything that happened."

communications—as well as any other communications that occurred between ICE and J.C.A.—each constitute separate VAWA confidentiality violations.

IV. THE BOARD MUST SANCTION THE EGREGIOUS VAWA CONFIDENTIALITY VIOLATIONS THAT OCCURRED IN THIS CASE

Department of Justice ("**DOJ**") and DHS employees who violate VAWA's confidentiality provisions are subject to "appropriate disciplinary action" and fines of $5000 *per violation* and sanctions by the express language of the statute. 8 U.S.C. § 1367 (c). However, the Board is not limited to the specifically enumerated remedies in order to cure violations such as those that occurred in this case. *Serotte, Reich & Wilson, LLP v. Montante*, No. 05-CV-0284E(Sc), 2006 WL 3827421, at *2 (W.D. N.Y. Dec. 27, 2006) (explaining that generally "the EOIR is charged with [the immigration judge's] supervision as having supervisory power over the Immigration Courts."); 8 C.F.R.U.S.C. § 1003.1(d)(1)(ii) (". . . [A] panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case."). When discussing the reauthorization of VAWA in 2005, Congress believed that immigration proceedings brought in violation of VAWA confidentiality should be dismissed, as indicated in the legislative history. *See* Department of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009, H.R. Rep. 109-233, at 121 (2005) ("Removal proceedings filed in violation of section 384 of IIRIRA shall be dismissed."); *see also* 151 Cong. Rec. E2607-08 (2005) (statement of Rep. Conyers, Jr.). Accordingly, remedial measures are appropriate here to remedy the egregious VAWA confidentiality violations that occurred throughout Mr. M.A.'s immigration proceedings.

The record in these proceedings is replete with findings and conclusions based on statements provided by Mr. M.A.'s abuser, who is unquestionably a prohibited source. The immigration judge's failure to exclude such evidence, and reliance on such evidence, frustrates the purpose of VAWA and congressional efforts to protect noncitizen victims of domestic violence. Indeed, the immigration judge's statements and conclusions taken together demonstrate the type of hostility and callous disregard towards victims of domestic violence that Congress has sought to eradicate through VAWA since 1994.

Furthermore, as discussed above, the Office of the Chief Immigration Judge has established clear procedures to ensure compliance with VAWA and protect victims of domestic violence. *See, e.g.*, Memo No. 97-7. Yet ICE officials and the immigration judge blatantly disregarded those procedures and the VAWA confidentiality statute's requirements, including explicit requirements in 8 U.S.C. 1367.

It is impossible for a victim of domestic violence to obtain a fair hearing under these conditions. The Board should not countenance such flagrant disregard for the law and the Court's own procedures on the part of an immigration judge—an individual charged with ensuring victims of domestic violence receive the protection contemplated by VAWA. Thus, the Board should dismiss the removal proceedings against Mr. M.A. on the basis that they were initiated based on information from a prohibited source and as a remedy for the VAWA confidentiality violations committed by ICE, the immigration judge and the immigration courts in this case. In the alternative, the Board should overturn the immigration judge's ruling in this case, remand the case for a new hearing on Mr. M.A.'s VAWA cancellation application,[16] order the recusal of the immigration judge currently assigned to this matter, assign the case to an immigration judge who is not located in the same immigration court as the judge currently assigned to this case, and order the exclusion of all evidence obtained in violation of VAWA confidentiality protections. Likewise, any ICE attorney who sought, received, or utilized information furnished by Mr. M.A.'s abuser should be immediately recused from this case due to their violations of VAWA confidentiality.

V. CONCLUSION

The lives and well-being of immigrant victims of domestic violence depend on the EOIR employing a thoughtful analysis of the meaning and purpose of VAWA including VAWA's confidentiality protections and crafting an approach to its implementation that furthers congressional intent. This is especially important given the particular vulnerability of non-citizen spouses of citizens. With respect to Mr. M.A., ICE violated VAWA's confidentiality provisions numerous times by disclosing sensitive information to and coordinating with his abuser throughout his immigration proceedings—violations that

[16] It is important to note that Mr. M.A. has filed and has received a *prima facie* determination in a VAWA self-petition case.

were compounded by the Immigration Judge's admission of and reliance on information provided by Mr. M.A's abuser in making his determinations.

Further, given the source of the allegations—the spouse and alleged abuser of an immigrant victim of domestic violence and the tenor of the information—that Mr. M.A. fraudulently entered into the marriage—this is the very sort of reliance upon abuser-provided information that the VAWA confidentiality provisions were meant to address. Accordingly, the Board should issue harsh penalties and take remedial measures to address and ameliorate the gross confidentiality violations that occurred in this case. In addition, the Board's decision in this case should be published and should clearly enumerate each of the VAWA confidentiality violations that occurred in this case to spell out explicitly to immigration judges, immigration court staff, and ICE that the actions taken in this case are *not* sanctioned by statute or by the Board. This will promote future VAWA confidentiality compliance by immigration judges, courts, and ICE. Otherwise, these violations of law will empower both ICE and the EOIR to perpetrate such violations in future cases and will have a chilling effect on future immigrant abuse victims' willingness to seek VAWA protection. Undermining access to VAWA protections for immigrant domestic violence victims is contrary to congressional intent, and poses grave harm to immigrant victims and their children. Further, as the International Association of Chiefs of Police recently found based on its expertise and research, "encouraging immigrant crime victims to report criminal activity translates into early detection of crimes and overall better reporting of crimes, which consequently enhances not only public safety but officer safety as well."[17] International Association of Chiefs of Police, *Support for Education and Awareness on U Visa Certifications and T Visa Declarations*, 2018 Resolutions, at 1 (Nov. 2018), http://niwaplibrary.wcl.american.edu/pubs/iacp-support-for-education-and-awareness-on-u-visa-certifications-and-t-visa-declarations.pdf.

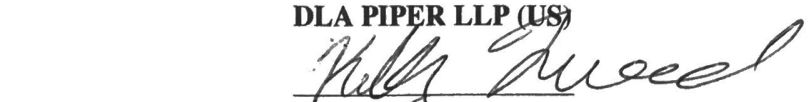
[17] *See also*, Krisztina E. Szabo & Leslye E. Orloff, *The Central Role of Victim Advocacy for Victim Safety While Victims' Immigration Cases Are Pending*, National Immigrant Women's Advocacy Project, American University, Washington College of Law (June 18, 2014), http://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Qref-SafetyPlanning-06.18.14.pdf (After filing their immigration cases a significant proportion of both VAWA self-petitioners (36.2%) and U visa victims (50.3%) continue to make calls to police to report crimes), http://niwaplibrary.wcl.american.edu/pubs/imm-qref-safetyplanning.

Dated: March 23, 2020

Of Counsel:

LESLYE E. ORLOFF
Adjunct Professor
Director, National Immigrant Women's Advocacy Project
American University
Washington College of Law
4300 Nebraska Avenue, N.W. Suite N1008
Washington, DC 20016
Telephone: (202) 274-4371
Facsimile: (202) 274-4226
orloff@wcl.american.edu

DLA PIPER LLP (US)



C. MICHAEL MOORE (TX Bar ID #14323600)
MICALA BERNARDO (TX Bar ID #21461108)
1900 N. Pearl Street, Suite 2200
Dallas, TX 75201-2451
Telephone: (214) 743-4500
Facsimile: (214) 743-4545
mike.moore@dlapiper.com
micala.bernardo@dlapiper.com

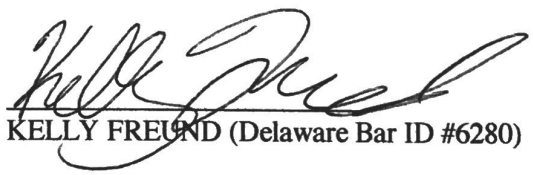
KELLY FREUND (Delaware Bar ID #6280)
1201 North Market Street, Suite 2100
Wilmington, DE 19801
Telephone: (302) 468-5700
Facsimile: (302) 394-2341 (fax)
kelly.freund@dlapiper.com

Attorneys for the National Immigrant Women's Advocacy Project

Mr. M.A.
A207-852-342

PROOF OF SERVICE

I hereby certify that on March 23, 2020 a true and correct copy of this **AMICUS CURAE BRIEF FOR RESPONDENT Mr. M.A.** was mailed to DHS-Office of Chief Counsel at 566 Veterans Drive, Pearsall, Texas 78061.



KELLY FREUND (Delaware Bar ID #6280)