

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 15-60562

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MARIA CAZORLA, ET AL.,

Plaintiffs

v.

KOCH FOODS OF MISSISSIPPI, L.L.C.; JESSIE ICKOM.

Defendants

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant Cross-Appellee

v.

KOCH FOODS OF MISSISSIPPI, L.L.C.,

Defendant-Appellee Cross-Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
Nos. 3:10-cv-00135 & 3:11-cv-00391, Hon. Daniel P. Jordan III, Presiding

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**AMICI CURIAE BRIEF OF LATINOJUSTICE PRLDEF, NATIONAL  
IMMIGRANT WOMEN'S ADVOCACY PROJECT (NIWAP) AND  
OTHERS IN SUPPORT OF APPELLEE EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION SEEKING REVERSAL OF DECISION  
ALLOWING DISCOVERY OF CONFIDENTIAL INFORMATION  
DISCLOSED IN U VISA APPLICATIONS**

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**SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Circuit Rule 28.2.1, in addition to those disclosed in the parties' certificates of interested persons, have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. LatinoJustice PRLDEF
2. National Immigrant Women's Advocacy Project, Inc. (NIWAP, Inc.)
3. Legal Momentum

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## **INTRODUCTION**<sup>1</sup>

This Brief is being filed by a group of XXX organizations who have expertise on the Violence Against Women Act's ("VAWA") immigration protections and VAWA's confidentiality provisions and includes the lead agencies involved in development of these protections and implementation of these protections. Amici strongly support the position taken by the Appellant U.S. Equal Employment Opportunity Commission ("EEOC") in this case and submits this Amicus Brief in support of the EEOC's request that discovery of any information protected by VAWA confidentiality laws be barred including, but not limited to, information about or contained in an employee's U visa case file.

In 1994, Congress enacted the Violence Against Women Act (42 U.S.C § 13925, *et seq.*) ("VAWA"), a comprehensive legislative effort to "deter and punish violent crimes against women". H.R. Rep. No. 103-395, at 26 (1994). From the outset, and in the significant broadening of VAWA protections since, VAWA includes sweeping provisions designed to protect immigrant women and to remove critical barriers that may otherwise cause a chilling effect for immigrant survivors seeking legal and social service protections. Leslye E. Orloff, *VAWA*

*Confidentiality: History, Purpose, DHS Implementation and Violations of VAWA*

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<sup>1</sup> This brief was not authored, in whole or in part, by counsel to any of the Parties, nor has counsel or any other person, other than the amicus curiae, its members, or its counsel, contributed any funding towards the preparation or submission of this brief.

*Confidentiality Protections*, National Immigrant Women’s Advocacy Project, Inc., [www.niwap.org/uploads/Ch3\\_Confidentiality.pdf](http://www.niwap.org/uploads/Ch3_Confidentiality.pdf). Amici join in submitting this Brief to address a series of District Court orders that fundamentally misinterpret and undermine core provisions of VAWA, specifically the confidentiality provisions pertaining to U visa applications set forth in 8 U.S.C. Section 1367 and 8 C.F.R. Section 214.14.

In the record before this Court, the District Court correctly denied Appellee Koch Foods’ attempts to seek the immigration status of the Individual Plaintiffs and Aggrieved Individuals and discovery directed to the Appellant EEOC seeking U visa information regarding the employees seeking relief. For reasons which are not clear, in ruling upon the Koch Foods’ motion seeking to compel U visa information from the EEOC, the District Court, through a footnote, essentially opened a path for Koch Foods to seek the same confidential U visa information directly from the Individual Plaintiffs and the Aggrieved Individuals. This appeal arises from multiple rulings by the District Court compelling the Individual Plaintiffs and Aggrieved Individuals to provide information contained in victim workers’ U visa applications filed with the U.S. Department of Homeland Security (“DHS”) to Koch Foods that despite the fact that the information being sought by the employer is covered by VAWA’s confidentiality provisions.

As will be discussed herein, the District Court orders allowing discovery of U visa information in a civil matter directly from the victims for whom the EEOC seeks relief are unsupported by any reading of the confidentiality provisions of VAWA, are in direct contravention of Congress' intent in enacting the VAWA confidentiality provisions, and set a dangerous precedent that would allow perpetrators, their employers, and others to obtain information Congress clearly intended to shield so as to protect victims and the public. Amici respectfully request that this Court reverse the District Court's orders.

### **ARGUMENT**

The VAWA and the Trafficking Victims Protection Act (22 U.S.C. § 7101, *et seq.*). ("TVPA") created several forms of immigration relief that were designed by Congress to offer protection to vulnerable immigrant victims of domestic violence, sexual assault, human trafficking, and other violent crimes. VAWA self-petitions, VAWA cancellation of removal, battered spouse waivers, U visas, and T visas offer documented and undocumented immigrant victims targeted by perpetrators of crimes committed in victim's homes, workplaces, schools, and in communities across the United States access to legal immigration status that includes a potential path to lawful permanent residency. Each of these forms of immigration relief results in encouraging immigrant crime victims to come out of the shadows and avail themselves of crime victim protections in the U.S. justice

system's civil, criminal, and family courts. Krisztina E. Szabo, David Stauffer, Benish Anver, and Leslye E. Orloff, *Early Access to Work Authorization For VAWA Self-Petitioners and U Visa Applicants February 12, 2014*, National Immigrant Women's Advocacy Project, Inc., 28-32, [www.niwap.org/reports/Early-Access-to-Work-Authorization.pdf](http://www.niwap.org/reports/Early-Access-to-Work-Authorization.pdf). When immigrant victims, like other crime victims, seek help from the police, prosecutors, courts, and other state and federal government enforcement agencies, by reporting the criminal activities they have suffered, the risk of harm to the victims and their family members increases. The VAWA confidentiality statute, 8 U.S.C. Section 1367(d), concerned about this issue, required that "[T]he Attorney General, Secretary of State, and the Secretary of Homeland Security shall provide guidance to officers and employees ... who have access to information covered by this section regarding the provisions of this section, including the provisions to protect victims of domestic violence and severe forms of trafficking in persons or criminal activity listed in section 101(a)(15)(U) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(u)) from harm that could result from the inappropriate disclosure of covered information."

Perpetrators use violence, retaliation, and threats against victims and their family members to undermine criminal prosecutions and enforcement actions, to maintain family property in divorce actions, to avoid paying child support, and to win

custody of children contravening state laws that discourage or bar perpetrators being awarded custody of children.

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.*" 8 U.S.C. § 1367 (emphasis added). Section 1367 prevents abusers from discovering the substance, as well as the existence, of any VAWA<sup>2</sup> application or U visa for relief. As such, courts have held that an immigrant victim's VAWA application or U visa application for relief is "absolutely privileged information" that cannot be compelled for use in either criminal or civil proceedings. *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").

Section 1367 prevents abusers, perpetrators, traffickers, employers, spouses, family members and others from discovering the substance, as well as the existence, of any VAWA, U visa, or T visa application for relief. Section 1367's

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<sup>2</sup> In this brief the term "VAWA" includes all forms of VAWA self-petitions, battered spouse waivers, VAWA cancellation of removal, and VAWA suspension of deportation.

robust protections improved upon prior regulations that failed to protect the confidentiality of immigrant victim information. *See* 8 C.F.R. § 216.5(e)(3)(vii) (1992) “[a]ny information provided under this part *may* be used for the purposes or enforcement of the act in any criminal proceeding,” (emphasis added); *see also* 56 Fed. Reg. 22635 (May 16, 1991), allowing alleged abusers to locate immigrant victims. To protect victims from the resulting harms, and foster full participation of immigrant victims in the justice system, Congress created VAWA’s confidentiality protections. VAWA’s confidentiality protections permit victims of domestic and sexual violence, human trafficking, and other U visa criminal activities to safely and confidentially file their immigration case without the perpetrators’ knowledge, consent, or ability to obtain any information about the case filed by the immigrant crime victim. VAWA, U and T visas were designed to allow victims to file with no requirement that victims separate from contact with their abusers because victims have no access to legal work authorization until their case is adjudicated and victims are more able to leave abusive circumstances after their have received a favorable adjudication from DHS. These confidentiality protections are essential for the many immigrant victims who remain at risk of harm from their abusers for an eight to twenty-four month period to while awaiting an immigration adjudication that provides legal work authorization. VAWA confidentiality also provides crucial life, safety, and stalking protections for victims who have fled

their abusers and victims who are at enhanced risk because they are actively participating in litigation involving perpetrators and their employers.

Government officials are barred from releasing any information about a VAWA confidentiality protected case to the perpetrator or any other person. 8 U.S.C. § 1367(a)(2). Adjudicators of VAWA, and T and U visa cases are also prohibited from relying [solely] on perpetrator information, which is considered “inherently suspect”. Department of Homeland Security, DHS Directives System, *Implementation Of Section 1367 Information Provisions*, Directive No. 002-02, Revision No. 00 (November 1, 2013) [www.niwap.org/uploads/implementation-of-section-1367.pdf](http://www.niwap.org/uploads/implementation-of-section-1367.pdf), (“Adverse determinations of 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. . . . If a DHS employee receives adverse information about a victim of domestic violence, sexual assault, human trafficking or an enumerated crime 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. Further, DHS employees receiving information solely from a prohibited source do not take action on that information unless there is an independent source of

corroboration.”); *see also* Department of Homeland Security, DHS Instructions System, Instruction No. 002-02-001, Revision No. 00, (November 7, 2013) (defining “prohibited sources”); 8 U.S.C. § 1367(a)(1).

Accordingly, this Court should not entertain attempts by the perpetrator, his employer, or any other person to seek an alternative means of obtaining confidential information that the government is forbidden from providing and that was intended to remain out of their hands. Allowing discovery in a civil case of VAWA confidentiality protected information would render VAWA confidentiality protections meaningless and will hand perpetrators and/or their employers a powerful tool that Congress clearly intended to bar.

**I. THE LEGISLATIVE HISTORY OF THE U VISA PROGRAM CLEARLY HIGHLIGHTS CONGRESS’ INTENT TO EXPAND THE CONFIDENTIALITY PROVIDED TO U VISA APPLICANTS AND THE ACCUSATIONS.**

By creating the VAWA self-petition and the U visa crime victim immigration relief in VAWA in 1994 and in reauthorizing VAWA in 2000, Congress hoped to free immigrant domestic abuse victims who were trapped in abusive marriages and offering temporary immigration relief for immigrant crime victims who mustered the courage to come forth and work with law enforcement, prosecutors, and other government officials investigating and prosecuting the criminal activities suffered. Before the passage of VAWA, Immigration and



Naturalization Service (“INS”) regulations contained an exception through which INS and state and local authorities could disclose information about the victim to the accuser. With the passage of VAWA, Congress closed that loophole by limiting the release of VAWA confidential information to law enforcement officials “to be used *solely for a legitimate law enforcement purpose in a manner that protects the confidentiality of such information.*” 8 U.S.C. § 1367(b)(2) (emphasis added). In a subsequent INS memorandum, 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 passing VAWA’s confidentiality protections for immigrant crime victims, Congress drew upon a long history of confidentiality protections for victims of domestic violence, sexual assault, and other crimes. Under the 1984 Family Violence Prevention and Services Act (“FVPSA”) (Pub. L. No. 98-457, § 101 et seq., 98 Stat. 1749, et seq. (1984), as amended) and VAWA 1994, as amended, any shelter, rape crisis center, domestic violence program, or other victim service program that receives either VAWA or FVPSA funding is barred from disclosing to anyone any information about a victim receiving services, including any locational information. *See* FVPSA, Pub. L. No. 98-457, § 303(a)(2)(E) (codified as amended at 42 U.S.C. § 10402(a)(2)(E) (1984)), mandating that the Federal

government may make grants to States only if the States “provide documentation that procedures have been developed, and implemented including copies of the policies and procedure, to assure the confidentiality of records pertaining to any individual provided family violence prevention or treatment services by any program assisted under this chapter and provide assurances that the address or location of any shelter-facility assisted under this chapter will, except with written authorization of the person or persons responsible for the operation of such shelter, not be made public”); *see also* ACF Grant Opportunities, Family Violence Prevention and Services/Grants to State Domestic Violence Coalitions, [http://www.acf.hhs.gov/grants/open/HHS-2007-ACF-ACYF-SDVC-0122.html#part\\_3\\_1](http://www.acf.hhs.gov/grants/open/HHS-2007-ACF-ACYF-SDVC-0122.html#part_3_1). Congress found that “[m]any immigrant women live trapped and isolated in violent homes, afraid to turn to anyone for help. They fear both continued abuse if they stay with their batterers and deportation if they attempt to leave.” H.R. Rep. No. 103-395, at 25 (1993). The legislative history of the creation of the VAWA confidentiality protections states that “we all know confidentiality is a matter of life and death whether or not they are citizens or whether they are immigrants... If you could imagine if you had an abuser being tried in court for abuse, he could get the victim deported so she could not testify if we didn’t do this.” Full Committee Mark Up: Hearing on H.R. 2202 Before the House Judiciary Committee, 104th Cong. (1995) (statement of Representative Patricia Schroeder).

Discussing the importance of VAWA confidentiality in family violence cases, Senator Wellstone stated, “It would be unconscionable for our immigration laws to facilitate an abuser’s control over his victim.” Hearing on H.R. 2202 Before the House Judiciary Committee, 104th Cong. (1995) (Statement of Sen. Wellstone).

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

Congress in 2000 created the U visa program to provide temporary immigration benefits to victims who had suffered abuse as a result of certain crimes, and assisted law enforcement or other federal investigative authorities in the detection, investigation, prosecution, conviction, or sentencing of those crimes. *Id.*, § 1513, 114 Stat. 1533-37; 8 C.F.R. §§ 214.14(a)(2) and (5). At the same time, Congress amended VAWA's confidentiality provisions to cover this new form of

immigration relief. *Id.* The recent 2010 *DHS Broadcast Message on New 384 Class of Admission Code* memo on VAWA confidentiality announced the creation of a red flag “384” notification system designed to alert immigration officials of VAWA confidentiality protected cases. That system guarantees that VAWA confidentiality protections attach upon the filing of a VAWA confidentiality protected immigration case and continue indefinitely. *DHS Broadcast Message on New 384 Class of Admission Code*, [www.niwap.org/uploads/message-to-DHS-384-COA.pdf](http://www.niwap.org/uploads/message-to-DHS-384-COA.pdf).

In reauthorizing VAWA in 2005, Congress introduced additional protections to VAWA confidentiality. Among these increased protections, Congress expanded VAWA confidentiality under Section 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 Section 1367 for violating VAWA confidentiality provisions (*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). As in the past, Congress added these increased victim protections “*to ensure that abusers and criminals cannot use the immigration system against their victims.*” See H.R. Rep.

No. 109-233, at 120 (emphasis added) (2005); *see also* 151 Cong. Rec. E2605, E2607 (daily ed. Dec. 18, 2005).

**II. THE CONFIDENTIALITY PROVISION OF THE U VISA PROGRAM PROHIBITS DISCLOSURE OF AN APPLICANT'S INFORMATION TO ANY THIRD PARTY, AND PARTICULARLY THE AGGRESSOR, DURING DISCOVERY.**

The confidentiality provisions of U visa applications prohibit federal authorities from using or disclosing any information related to a VAWA application to *any third party*. While serving as a shield to prohibit governmental disclosure, VAWA confidentiality also provides a sword of protection for immigrant victims. By laying out the limited circumstances under which VAWA confidentiality can be waived, Congress made clear that VAWA confidentiality is a privilege that belongs to the victim. For example, with prior written consent of the victim, DHS can “communicate with nonprofit, nongovernmental victims’ service providers for the sole purpose of assisting victims in obtaining victim services from programs with expertise working with immigrant victims. Agencies receiving referrals are bound by the provisions of this section.” 8 U.S.C. § 1367(b)(7).

Congress also allowed limited circumstances in which immigrant victims could voluntarily waive their rights to VAWA confidentiality. 8 U.S.C. § 1367(b)(4). Absent voluntary disclosure by a victim, information protected by

VAWA is statutorily required to remain confidential, regardless of whether the information 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. Accordingly, courts should not compel victims to reveal confidential information they otherwise would not voluntarily reveal to anyone, much less to their aggressors, or to those who employed the aggressor and countenanced the aggressor’s behavior.

Additionally, VAWA confidentiality contained an exclusive list of exceptions to the information sharing bar. Each exception was expressly limited. The exceptions included the law enforcement exception discussed on page 13, the waiver with written consent discussed on page 18, and an exception applicable to judicial review in 8 U.S.C. Section 1367(b)(3) that does not apply to or in any manner reach court ordered discovery. The judicial review exception is exclusively linked to judicial review of DHS and immigration judge decisions on the VAWA confidentiality protected victim’s immigration case in an immigration proceeding and not to a civil or criminal case. And even that exception requires disclosure “in a manner that protects the confidentiality of such information.” 8 U.S.C. §1367(b)(3). Thus, to compel disclosure of a victims’ VAWA confidentiality protected information to her accused perpetrator or to someone who could release

that information to the perpetrator could never meet the statutory exception.

Additionally, each of the other exceptions limit disclosure to entities that could not be construed to include a perpetrator or an employer. They are – to the census 1367(b)(1); to public benefits agencies solely for benefits determinations 1367(b)(5); to the Chair and Ranking member of the House and Senate Judiciary committees for oversight purposes 1367(b)(6); and for national security purposes 1367(b)(8).

Disclosing confidential information provided by a crime victim in an immigration status application that receives VAWA confidentiality protection undermines the purpose of confidentiality and could result in disastrous consequences for the victim. The vast majority of immigrant victims receiving VAWA confidentiality protection are immigrant victims of: domestic violence, child abuse, elder abuse, sexual assault, and human trafficking, and are filing VAWA confidentiality protected cases: VAWA self-petitions, battered spouse waivers, U visas, and T visas. Courts considering requests to access information contained in a victim's VAWA self-petition and U visa case files have recognized the need to protect victims by denying discovery requests for disclosure of VAWA confidentiality protected information in civil or family court proceedings. For example, in both *Hawke v. United States Department of Homeland Security*, and *Demaj v. Sakaj*, the courts found VAWA confidentiality outweighed any interests

asserted by the perpetrators seeking disclosure of confidentially protected information.

In *Hawke*, the court held that the federal government could not release information protected by VAWA confidentiality provisions to civil or criminal attorneys who sought such information. *Hawke*, 2008 WL 4460241, at \*1. In *Demaj*, the court found the VAWA confidentiality protections to be absolute. “[W]hile it would appear that claims of abuse made in Respondent’s U-Visa application are relevant to Respondent’s credibility as a witness and may be used to impeach Respondent’s testimony at trial, disclosure of these documents for this purpose runs contrary to the intent of the protections afforded by 8 U.S.C. § 1367”. *Demaj*, 2012 WL 476168, at \*18.

No rationale exists to permit perpetrators accused of committing the crimes described in VAWA self-petitions, and U and T visa applications to use civil court discovery to obtain the same VAWA confidentiality protected information that the government itself is prohibited from revealing or requiring disclosure of that protected information to the perpetrator or the perpetrator’s employer, family member of someone associated with or who could deliver the information to the perpetrator *directly from the victim*. To do so could create a chilling effect for victims seeking judicial remedies for abuse or violence and defies the legislative history and purpose of the confidentiality provision.



### **III. IMPORTANCE OF VAWA CONFIDENTIALITY FOR CRIME VICTIM PROTECTION.**

The VAWA confidentiality provisions serve three essential goals. The first is to protect the victims themselves. The second is to assist law enforcement by freeing victims to provide the evidence necessary to seek out and prosecute perpetrators, employers, and others connected to violence against victims. The third is for public safety generally.

#### **A. Protection of Victims.**

Congress enacted VAWA and created the U visa to protect victims of violence, especially women and children. Full Committee Mark Up: Hearing on H.R. 2202 Before the House Judiciary Committee, 104th Cong. (1995) (statement of Statement of Sen. Wellstone, “It would be unconscionable for our immigration laws to perpetuate violence against women and children.”). The overwhelming majority of U visa applications, over seventy-five percent, are victims of domestic violence, rape, sexual assault, and/or human trafficking. Leslye E. Orloff and Paige E. Feldman, *National Survey on Types Of Criminal Activities Experienced By U-Visa Recipients*, IMMIGRANT WOMEN PROGRAM, LEGAL MOMENTUM (November 29, 2011), [www.niwap.org/uploads/National-Survey-Types-Criminal-Activities-2011.pdf](http://www.niwap.org/uploads/National-Survey-Types-Criminal-Activities-2011.pdf). The majority of VAWA confidentiality protected cases involve perpetrators who have intimate, close, and/or ongoing access to the crime victim as

a family member, employer, or human trafficker. Many of the crimes covered by U visa protections (*e.g.* sexual assault, stalking, human trafficking, child sexual exploitation, and felonious assault) involve criminal perpetrators whose activities are serial in nature affecting public safety and often multiple victims in the community. Crime victims who file police reports, cooperate in government investigations, and testify in criminal, civil, and family court proceedings do so at increased risk to themselves, their children, and their family members. Involvement in court actions increases danger to victims— both those who continue living or working in locations where the abuse occurred and those fled and gone into hiding.

VAWA's and TVPA's immigration protections for crime victims help both documented and undocumented immigrant crime victims. Immigrant women and girls who enter the United States legally with a range of temporary visas are still vulnerable to sexual assault, human trafficking, and domestic violence. Such individuals may be in the United States on a work visa tied to a particular employment, a student visa, or a diplomatic visa. If the victim leaves or loses their employment or does not continue with school or work as a result of the crime victimization, the victim can become undocumented. Other immigrants with tourist, work, or religious visas may become crime victims eligible to move from temporary legal immigration status to a U visa that provides a potential path to lawful permanent residency in the United States. Additionally, immigrant victims

who attained legal immigration status through a family member are often threatened that if they report abuse, or that the abuser will have their legal immigration status taken away. Thus, immigrant victims with a form of temporary lawful immigration status may legitimately fear immigration consequences should their perpetrators obtain information about or access to information contained in their VAWA confidentiality protected immigration case. Using discovery in civil cases as a means by which perpetrators and employers can directly force victims to reveal information that they were assured would remain confidential may only enhance their apprehension. Specifically, battered immigrant Latinas who had a stable immigration status were almost twice as likely to call police compared with those who either had a temporary legal immigration status or were undocumented. Nawal H. Ammar, Leslye E. Orloff, Mary Ann Dutton, and Giselle Aguilar-Hass, *Calls to police and police response: A case study of Latina immigrant women in the USA*, 7 INT'L J. POLICE SCIENCE & MGMT, 236-37 (2005). In fact, immigration status is one of the two most heavily weighed factors a battered woman considers in whether to report domestic violence to the.

Perpetrators have actively tried to have removal actions initiated by the DHS against victims who have filed U visa and VAWA applications in the course of litigation in order to deter them from proceeding with the charges and to withdraw the allegations, despite DHS's clear policy that deportation of VAWA and U visa

applicants is not a priority category for removal. Thirty percent of U visa applicants have become the subject of DHS enforcement actions after filing their application and while it was still pending, with over a quarter initiated by reporting by the perpetrator or the perpetrator's family. Szabo, *supra*, at 28-32.

Even immigrant women who become naturalized U.S. citizens or lawful permanent residents have residual fears of adverse immigration actions being taken against them as a barrier to accessing services for domestic violence victims, due largely to perpetrators ongoing threats. Almost one-third of immigrant Latina victims of domestic violence have a deep-seeded fear of immigration problems and deportation that do not end with the attainment of legal immigration status, such as through a U visa. Mary Ann Dutton, Leslye E. Orloff, and Giselle Aguilar, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications Has*, 7 *GEORGETOWN J. POVERTY LAW & POLICY* 292 – 95 (2000).

In sexual assault cases, ensuring the confidentiality of the victim's extremely sensitive and personal information in the victim's confidential immigration case is paramount. Disclosure of highly intimate information can have consequences for the victim's esteem, reputation, and safety and could provoke additional violence,

blackmail, intimidation, or harassment by the aggressor.<sup>3</sup> Sexual assault cases can often involve allegations that warrant protection of intimate information about the victim including anonymity of the plaintiff given privacy concerns related to the intimate nature of the accusations. *Doe v. El Paso Cnty. Hosp. Dist.*, 2015 WL 1507840, at \*4 (W.D. Tex. Apr. 1, 2015); *see also, e.g., Plaintiff v. Francis B*, 631 F.3d 1310, 1315-19 (11th Cir. 2011); *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 872 (7th Cir.1997) (“[F]ictitious names are allowed when necessary to protect the privacy of ... rape victims, and other particularly vulnerable parties or witnesses.”); *Doe v. Cabrera*, Civ. A. No. CV 14–1005(RBW), 2014 WL 4656610, at \*4 (D.D.C. Sept. 10, 2014); *EEOC v. Spoa, LLC*, No. CIV. CCB–13–1615, 2013 WL 5634337, at \*3 (D.Md. Oct.15, 2013); *Roe v. St. Louis Univ.*, No. 4:08CV1474 JCH, 2009 WL 910738, at \*3–5 (E.D.Mo. Apr.2, 2009); *Doe No. 2 v. Kolko*, 242 F.R.D. 193, 196 (E.D.N.Y.2006).

Courts have often considered the consequences of revealing highly personal and private information in the course of judicial proceedings. *Doe v. El Paso Cnty. Hosp. Dist.*, 2015 WL 1507840, \*4 (W.D. Tex. Apr. 1, 2015) (where the issues involved are matters of a sensitive and highly personal nature ... the normal practice of disclosing the parties' identities yields to a policy of protecting privacy

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<sup>3</sup> While the District Court permitted the use of a protective order to redact information related to the immigration status and history of Appellants, recognizing its irrelevance to the claims at hand, the information related to the very intimate nature of the crimes alleged, including those of a sexual nature, were permitted to be discoverable.

in a very private matter,” quoting *S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 712 - 13 (5th Cir. 1979)). The risk of revealing sexual assault victimization can be even more severe for victims who become ostracized from their cultural or religious communities or whose spouses initiate divorce proceedings when they learn about the victim’s sexual assault.

“Victim safety may be jeopardized if sensitive information is published or otherwise made available to the offender and the public.” Viktoria Kristiansson, *Walking a Tightrope: Balancing Victim Privacy and Offender Accountability in Domestic Violence and Sexual Assault Prosecutions Part I. An Overview of the Importance of Confidentiality and Privilege Laws*, 1, (May 2013), [http://www.aequitasresource.org/Issue\\_9\\_Walking\\_A\\_Tightrope\\_Balancing\\_Victim\\_Privacy\\_and\\_Offender\\_Accountability\\_in\\_Domestic\\_Violence\\_and\\_Sexual\\_Assault\\_Prosecutions\\_Part\\_I\\_May\\_2013.pdf](http://www.aequitasresource.org/Issue_9_Walking_A_Tightrope_Balancing_Victim_Privacy_and_Offender_Accountability_in_Domestic_Violence_and_Sexual_Assault_Prosecutions_Part_I_May_2013.pdf). The justice system holds perpetrators of criminal activities that include domestic violence, sexual assault, human trafficking, extortion, and felonious assault accountable for their actions. A perpetrator can be prosecuted for many years after a crime was committed. State family laws issue civil protection orders to domestic and sexual violence victims, grant custody to the non-abusive parent, limit visitation of parents who commit child abuse, and order a disproportionate share of marital property to victims of domestic violence. Civil courts award damages to victims of criminal activity in actions brought by the EEOC, crime

victims, and victims of human trafficking. As long as the perpetrator remains exposed to the potential of criminal prosecution, civil liability, or family law remedies for the criminal activities revealed in a victim's application for U visa status, the victim is at risk, and perpetrators can use ongoing violence, threats, stalking, immigration related abuse, and intimidation to silence victims. It is for this reason that VAWA confidentiality protections continue indefinitely and DHS immigration officials are encouraged to use prosecutorial discretion not to initiate enforcement actions against victims of domestic violence, sexual assault, human trafficking, and victims of criminal activity including immigrants involved as victims and witnesses in criminal cases and in civil rights enforcement actions. John Morton, *U.S. Customs and Immigration Enforcement, Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs*, (June 17, 2011), <http://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf>.

The potential for recidivism of violence against the victim remains great, particularly once the aggressor receives details of the victims' allegations or the fact that the victim has filed for immigration relief. When perpetrators learn that their victims have filed for immigration relief perpetrators and their family members actively retaliate by calling immigration authorities to have the victim's deported. Szabo, *supra*, at 26. Often perpetrators attempt to have the victim

arrested by local law enforcement officials, further silencing the victim.<sup>4</sup> *Id.* . *Id.* Seventy-eight percent of victims fear for their own safety and the safety of their children. *Id.*

**B. Impact on Law Enforcement and the Justice System.**

The confidentiality provision undeniably strengthens the ability of law enforcement, prosecutors, and government investigative agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes described in Section 101(a)(15)(U)(iii) of the Immigration and Nationality Act committed against immigrants, while also offering protection to victims of such offenses consistent with the humanitarian interests of the United States. Pub. L. No. 106-386, §§ 1513, 114 Stat. 1533-37. All women and children must be able to report these crimes to law enforcement without the fear that the highly sensitive information they report will be shared with their perpetrator. Protecting the confidentiality of victims who report having been a victim of the crime also encourages their full participation in the detection, investigation, prosecution, conviction, and sentencing of those crimes. This is the public safety policy at the heart of the Congressional intent in creating VAWA confidentiality protections. Ensuring that victims can confidentially file for and receive immigration protection removes deportation as a tool of coercion and frees victims

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<sup>4</sup> In domestic violence cases this occurs in 15.4% of the VAWA self-petitioning and 7.5% of U visa cases.



to come forward and government officials to better serve immigrant crime victims and their communities by investigating and prosecuting crimes committed against all members of the community, including immigrants. It also gives government officials a means to regularize the status of cooperating individuals during investigations or prosecutions.

The confidentiality provision serves an important role in furthering access to justice by strengthening collaboration and participation by vulnerable immigrant crime victims in the justice system. As with all laws and policies requiring confidentiality, the provision encourages open, honest, and safe communication between victims of criminal activity, police, prosecutors, the EEOC and other government agencies whose work involves the detection, investigation, prosecution, and enforcement of laws against persons who perpetrate violence. The law fosters the pursuit of justice and encourages victims' use of the justice system to seek accountability. Confidentiality is the foundation upon which victims rebuild their trust, self-esteem, and autonomy after they have been greatly harmed and had their lives destroyed by acts of violence. Confidentiality laws encourage victims to disclose their victimization in the context of therapeutic and other professional relationships, as well as seek redress through the civil and criminal justice systems. This is particularly true in the context of immigrant crime victims, who are at risk of further exploitation and abuse because of their vulnerable

immigration status. Removing the confidentiality protection may dissuade victims from reporting the criminal activities they suffered to the EEOC, to law enforcement, and persecutors, and will discourage testimony of victims of violence in civil, family, and criminal cases circumventing the justice system's ability to hold perpetrators accountable for their actions. Victims will be reticent to aid in a perpetrator's prosecution if they feel violated by the disclosure of information, particularly if there concerns about her or his safety. Kristiansson, *supra*.

By encouraging victims to come forward providing information about criminal activity, they assist government enforcement agencies like the EEOC and law enforcement officials in identifying potential witnesses to assist in cases brought against perpetrators, discouraging employers from hiring and retaining perpetrators, thus ultimately enhancing overall offender accountability. On the contrary, if an aggressor is provided with the confidential information a victim has provided in her U visa application, the perpetrator can use statements to both intimidate the victim to change or withdraw allegations or use threats and coercion to manipulate and the scare the victim so that testimony presented in the civil, family, or criminal case brought against the abuser will be less credible.

It is important that as the Court considers its ruling in this case that the Court be cognizant of the victim protection and offender accountability intent of Congress in creating VAWA, T and U visa crime victim protections, and VAWA

confidentiality. Amici strongly support a ruling that finds that under Federal Rule 26 VAWA confidentiality protections operate as an outright privilege to discovery in civil cases or alternatively that VAWA's confidentiality mandate warrants that the good cause exception be invoked to bar discovery. The VAWA confidentiality protection's statutory requirements that have continually strengthened by Congress, combined with clear legislative history and federal implementing agency (INS and DHS) policies to make it clear that what is at stake here in future acts of violence, criminal, and immigration related threats, witness tampering obstruction of justice and harm to specific individuals and society as a whole. The harm is not limited to and is much greater than concern that discovery of VAWA confidentiality protected information will lead to the "annoyance, embarrassment, oppression or undue burden or expense" that Rule 26 seeks to prevent. Fed. R. Civ. P. 26(c)(1).

**C. Public Health And Well-Being.**

The impact of crime victimization on the health and wellbeing of victims is substantial. *See generally*, U.S. Department of Justice, Office of Justice Programs, Office for Victims of Crime, *Vision 21 Transforming Victim Services Final Report*, (May 2013), [http://ovc.ncjrs.gov/vision21/pdfs/Vision21\\_Report.pdf](http://ovc.ncjrs.gov/vision21/pdfs/Vision21_Report.pdf). Providing victim services, legal protection, safety planning, physical and mental health services to crime victims is essential to their ability to rebuild their lives and the

lives of their families and children following victimization and “plays an integral role in promoting safe and healthy communities.” *Id.* at vii. Understanding the role that VAWA, T and U visa immigration relief play in promoting public health and well-being, when the INS issued T visa regulations and the DHS issued the U visa regulations both agencies recognized that victims suffered legitimate public health and safety concerns. Victim safety and public health concerns merited issuance of interim final regulations that took effect immediately. In 2002, INS specifically found that:

In passing the TVPA, Congress intended to create a broad range of tools to be used by the Federal government to combat the serious and immediate problem of trafficking in persons. The provisions of the TVPA address the effect of severe forms of trafficking in persons on victims, including many who may not have legal status and are reluctant to cooperate. In trafficking in persons cases, perpetrators often target individuals who are likely to be particularly vulnerable and unfamiliar with their surroundings. The TVPA strengthens the ability of government officials to investigate and prosecute trafficking in persons crimes by providing for temporary immigration benefits to victims of severe forms of trafficking in persons. . . . Without the prompt promulgation of this rule, victims of severe forms of trafficking in persons might continue to be victimized for fear of coming

forward, thus hindering the ability of law enforcement to investigate and prosecute cases and preventing victims from obtaining critical assistance and benefits.

Similarly, in 2007 when DHS issued the U visa regulations DHS stated that:

USCIS has determined that delaying this rule to allow public comment would be impracticable and contrary to the public interest ...USCIS finds a compelling public need for rapid implementation of this rule...delay could result in serious harm...Congress created the new U classification to curtail criminal activity, protect victims of crimes committed against them in the United States, and encourage victims to fully participate in the investigation of the crimes and the prosecution of the perpetrators... Many immigrant crime victims fear coming forward to assist law enforcement until this rule is effective. Thus, continued delay of this rule further exposes victims of these crimes to danger, and leaves their legal status in an indeterminate state. Moreover, the delay prevents law enforcement agencies from receiving the benefits of the BIWPA and continues to expose the U.S. to security risks and other effects of human trafficking. Therefore, delay in the implementation of these regulations would be contrary to the public interest.

#### **IV. CONCLUSION.**

Amici are concerned that should the Court not bar discovery of U visa information, courts will be required to engage in a case by case analysis balancing test, weighing the perpetrator's or employer's stated need for confidential, immigration-status related discovery against the likelihood of harm from discovery to the victim. As illustrated by the District and Magistrate Courts' failures to fully understand VAWA confidentiality and immigration law U visa protections, the

likelihood of courts misunderstanding immigration law protections for crime victims is high. Further, specialized training is needed by courts, police, and prosecutors in domestic violence and sexual assault cases in order to fairly adjudicate these matters. It is imperative that for the justice system to function properly, law enforcement, prosecutors, and judges need proper training to adjudicate cases involving victims of sexual assault and domestic violence. Lack of proper training can lead to the revictimization of victims and can undermine critical policy considerations like public safety, retribution, and security. National Domestic Violence Hotline, *Who Will Help Me? Domestic Violence Survivors Speak Out About Law Enforcement Responses*. Washington, DC (2015). <http://www.thehotline.org/resources/law-enforcement-responses>. Judicial education and training is essential in order to fairly, justly and effectively undertake adjudications, including balancing tests. *See* National Council of Juvenile and Family Court Judges, 2015 NCJFCJ Topical-One Pagers, <https://cld.bz/xmnR21r#1>. This is particularly true for judges outside of the family court system who may not fully grasp the dynamics and physical and psychological consequences of domestic violence and sexual assault. The harm and negative implications that would follow a decision by this Court to allow a perpetrator to force an immigrant victim to produce her U visa application and supporting documents, would impact not only those immigrant victims in the

instant action, but all immigrant victims of domestic violence, sexual assault, human trafficking, child abuse, felonious assault, stalking, extortion, and other crimes in *all* VAWA confidentiality protected cases, and in all kinds of contexts, employment, family, and in the community as a whole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit via the CMF/ECF system, thereby serving the attorneys of record listed below:

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume requirements of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,846 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii) and Fifth Cir. R. 32.2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fifth Cir. R. 32.1 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font in the body and 12-point Times New Roman font in the footnotes.

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