SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

JUN DU,

Defendant.

Hon. Donald Leo

Indictment No: 74275-22

MEMORANDUM OF LAW IN SUPPORT OF SANCTUARY FOR FAMILIES' MOTION TO QUASH THE SUBPOENA *DUCES TECUM* AND FOR A PROTECTIVE ORDER

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Non-party Sanctuary for Families ("Sanctuary"), by and thru its undersigned counsel, respectfully submits this memorandum of law in support of its Motion to Quash the subpoena *duces tecum*, directed to it and noticed for return on September 27, 2024, pursuant to New York Criminal Procedure Law ("CPL") § 610.20(4) and Civil Practice Law and Rules § 2304, and for a Protective Order pursuant to CPL § 240.50 ("Motion").

PRELIMINARY STATEMENT

This case involves the prosecution of defendant Jun Du (the "Defendant") for alleged rape, forcible touching, sexual abuse, and sexual misconduct against the complainant. Sanctuary attorneys represent the complainant before federal immigration authorities in her case for T Visa immigration relief. On June 18, 2024, Sanctuary was served with a judicial subpoena *duces tecum* ordering production of the Application for T Nonimmigrant Status, USCIS Form I-914 ("Subpoenaed Information") of Sanctuary's client for *in camera* review. Ex. 1.[1] Sanctuary moves to quash the subpoena on the grounds that the Subpoenaed Information is confidential and protected from disclosure under the Violence Against Women Act, 8 U.S.C. § 1367(a)(2) ("VAWA Confidentiality Provision), a law that protects the confidentiality of crime victims' immigration information with the express purpose of encouraging crime victims to seek help, report crimes, and cooperate with law enforcement in the investigation of violence. New York law prohibits the use of compulsory process for such a foray into such statutorily-protected confidential information. Indeed, compelled disclosure of VAWA-protected information circumvents the statute's protections, vitiates its assurances of confidentiality, imperils its important purpose of protecting victims, emboldens abusers, and chills victim disclosure. The subpoena must be quashed.

[1] Exhibits cited "Ex." are attached to the Affirmation of Caroline A. Pizano, dated August 16, 2024, and filed herewith ("Pizano Aff.").

The VAWA Confidentiality Provision prohibits the "use by or disclosure ***to anyone*** . . . of ***any information*** which relates to" a victim that seeks the immigration relief at issue here, 8 U.S.C. § 1367(a) (emphases added), and imposes disciplinary action and fines for any violation of its strictures, 8 U.S.C. § 1367(c). It protects information relating to a victim's immigration case, including any application for T Visa immigration relief. Specifically, the provision creates a confidentiality right that may be consensually waived by the victim alone and provides no exception for a court order. *See* 8 U.S.C. § 1367(b). Under federal regulation, non-governmental agencies like Sanctuary in possession of a VAWA-protected T Visa application are bound by the provision and all the restrictions therein. *See* 8 C.F.R. § 214.11(p)(3).

Congress accordingly enacted VAWA with strong assurances to individuals in victim-based immigration cases that information related to their cases will be kept confidential. In line with that assurance, Courts routinely quash subpoenas on the motion of the government and organizations like Sanctuary on the basis that the VAWA Confidentiality Provision bars the compelled disclosure of the kinds of immigration materials sought in this case. As the statute make no exception for court order, Courts likewise do not compel *in camera* review of VAWA-protected immigration information.

In addition to the VAWA Confidentiality Provision, further confidentiality considerations protect the Subpoenaed Information as well. For one, courts generally protect the records of non-profit agencies that serve victims of violence, as Sanctuary does, on the basis that confidentiality of such agency records are critical to assuring the safety and security of battered men and women and encouraging victims to seek help. That is particularly true where the records sought include the contents of attorney files. For another, courts generally protect the immigration records of vulnerable individuals on the basis that public examination of one's immigration history,

particularly in proceedings against accused abusers, has an intimidating effect that serves to chill immigrants' exercise of their rights under the law. These compelling protections, along with the non-disclosure requirements of the VAWA Confidentiality Provision, all serve to outweigh whatever the Defendant's general interest in the T Visa application may be. The Defendant has failed to make any showing to overcome the powerful legal bars to disclosure in this case.

For these reasons and those that follow, Sanctuary respectfully requests that this Court safeguard the existence and substance of the Subpoenaed Information in this case, issue an order quashing the subpoena *duces tecum*, and issue a protective order barring any attempts by any party to discover or use any VAWA-protected information in these proceedings.

BACKGROUND

A. Sanctuary for Families Serves Domestic Violence and Trafficking Survivors.

Sanctuary is a non-profit based in New York City that serves victims of domestic violence, human trafficking, and other forms of gender violence. Ex. 2, ¶ 2. It offers comprehensive services to victims of violence with a mission to promote the safety, healing and self-determination of those it serves. *Id.* The services Sanctuary provides includes legal assistance helping clients to apply for immigration relief for which they are eligible, including T Visas. *Id.* ¶ 3. As part of its work on victim-based immigration cases, Sanctuary receives protected information from its clients and maintains privileged and confidential immigration materials in its records. *Id.*; Pizano Aff., ¶ 5.

As a recipient of protected immigration information from trafficking victims, Sanctuary is "bound by the confidentiality provisions and other restrictions set out in" the VAWA Confidentiality Provision. 8 C.F.R. § 214.11(p)(3). Specifically, federal regulation states that *any* "[a]gencies receiving information" related to a trafficking victim's application for T Visa immigration relief, "whether governmental or non-governmental, are bound by the confidentiality provisions and other restrictions set out in 8 U.S.C. 1367." 8 C.F.R. § 214.11(p)(3). Likewise, as a recipient of federal funding under VAWA and the Victims of Crime Act ("VOCA"), Sanctuary is mandated to protect the confidentiality and privacy of the information of the clients it serves. *See* 28 C.F.R. § 94.115(a)(1)–(2); 34 U.S.C. § 12291(b)(2); Pizano Aff. ¶ 10.

B. The Subpoena Seeks Protected Records from a Victim-Based Immigration Case.

In 2022, the Defendant was indicted for sexual abuse in the first degree (one count), sexual abuse in the third degree (two counts), rape in the third degree (one count), sexual misconduct (one count), and forcible touching (two counts) against the complaint. *See* Indictment No. IND-74275-

22/001. He was arrested on these charges on June 2, 2022, and his prosecution has been pending since. *See* Arrest No. K22623126.

The complainant in this case is a client of Sanctuary. Ex. 2, ¶ 4. Sanctuary staff attorneys represent the complainant before the federal immigration authorities in her case for T Visa immigration relief. *Id.* On June 18, 2024, Sanctuary was served with a judicial subpoena *duces tecum* ordering production of the Application for T Nonimmigrant Status, USCIS Form I-914 of the complainant for *in camera* review. *See* Ex. 1; Ex. 2, ¶ 5. The subpoena was directed to Sanctuary attorney Karen Wang, and does not specify the grounds for the subpoena or its relevance or materiality to the Defendant's prosecution. *See* Ex. 1; Ex. 2, ¶ 5.

Upon receipt of the subpoena, consistent with its obligations to protect the confidentiality and privacy of its clients and the information sought, Sanctuary attorneys advised its client of the subpoena. Ex. 2, ¶ 6. The client declined to waive the statutory protections of the VAWA Confidentiality Provision or any other privilege or confidentiality protections over Sanctuary's records in this case. *Id.*

STANDARD

"'The proper purpose of a subpoena *duces tecum* . . . is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding.'" *People v. Gonzalez*, 40 Misc.3d 1213(A), at *2 (Sup. Ct. Bronx Cnty. 2013) (quoting *People v. Kozlowski*, 11 N.Y.3d 223, 242 (2008)); CPL § 610.20(4) ("evidence sought" must be "relevant and material to the proceedings"). "A subpoena duces tecum ***may not*** generally be 'used for the purpose of discovery or to ascertain the existence of evidence.'" *People v. Trump*, 208 N.Y.S.3d 481, 2024 N.Y. Slip Op. 50465(U), at *1 (Sup. Ct. N.Y. Cnty. 2024) (quoting *People v. Gissendanner*, 48 N.Y.2d 543, 551 (1979)) (emphasis added).

Compulsory process is generally unavailable for a "foray into confidential records in the hope that the unearthing of some unspecified information [will] enable [a party] to impeach witness[es]," *Gissendanner*, 48 N.Y.2d at 549, or for "an *in camera* inspection of the subpoenaed information, presumably to have the Court determine whether any relevant or material information exists in the first instance." *Gonzalez*, 40 Misc.3d 1213(A), at *2; *see also People v. Cox*, 145 A.D.3d 1507, 1508 (4th Dep't 2016) (affirming trial court's decision not to direct production of confidential psychiatric record for *in camera* review). Notably, where it concerns confidential records, a defendant's general interest in discovery or impeachment material bows to statutory confidentiality protections and public policy interests. *See People v. Bartlett*, 40 Misc.3d 1202(A), at *2 (Sup. Ct. Kings Cnty. 2013) (denying motion to compel disclosure of VAWA-protected information); *People v. Martinez*, 40 Misc.3d 1204(A), at *1–2 (Sup. Ct. Kings Cnty. 2013) (granting motion to quash subpoena of domestic violence agency records); *see also People v. Colon*, 173 A.D.3d 1704, 1705 (4th Dep't 2019) ("[D]efendant failed to establish that the interests of justice significantly outweighed [the record's] confidentiality[.]").

ARGUMENT

I. The Subpoena Improperly Seeks Disclosure of Statutorily-Protected Information from a Victim-Based Immigration Case and Must Be Quashed.

The subpoena *duces tecum* in this case improperly seeks disclosure of statutorily-protected confidential records in violation of the VAWA Confidentiality Provision and the strong public interests at the heart of the statute. It must be quashed.

A. Disclosure of Information Regarding a T-Visa Imperils the Statutory Purpose, Intent, and Function of Federal Protections for Violence Survivors.

i. The Critical Purpose of the VAWA Confidentiality Provision is to Encourage Victims to Report Violence and Assist Law Enforcement in Investigation of Crime.

When Congress enacted VAWA, its sought to provide a "mechanism for women who have been battered or subjected to extreme cruelty to achieve lawful immigration status." *See Hernandez v. Ashcroft*, 345 F.3d 824, 827 (9th Cir. 2003). Among its substantive protections, VAWA provides battered immigrants and other immigrant crime victims with two significant rights: (1) the right to obtain lawful immigration status through specific types of immigration relief, including a U Visa for victims of certain enumerated forms of gender-based violence and a T Visa for victims of a severe form of human trafficking; and (2) the right to confidentiality by prohibiting the disclosure of "***any information***" related to any VAWA-protected immigration information, including applications for relief. *See* 8 U.S.C. § 1367(a)(2).[2] Federal regulations expressly state that agencies "whether governmental or non-governmental" in possession of VAWA-protected information "are bound by the confidentiality provisions and other restrictions set out in 8 U.S.C.

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[2] "***[I]n 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) . . . ***permit use by or disclosure to anyone*** of ***any information*** which relates to an alien who is the beneficiary of an application for relief" for a T Visa, U Visa, or other visas for battered individuals. 8 U.S.C. § 1367(a)(2) (emphasis added).

1367." 8 C.F.R. § 214.11(p)(3); *U.S. v. Murra*, 879 F.3d 669, 676, 681 n. 4 (5th Cir. 2018) ("In fact, [nonprofit organization providing services to victims] is bound by law not to reveal confidential information relating to the victims . . . to third parties") (citing 8 U.S.C. § 1367(a)(2) and 8 C.F.R. § 214.11(p)(3)). There is no exception for a court order. *See* 8 U.S.C. § 1367(b).

In enacting VAWA's protections, Congress made clear that the purpose, intent, and function of these federal protections is to support and encourage victims to come forward and to assist law enforcement in an investigation of the crimes against them. *See* VAWA, Pub. L. 106-386, 114 Stat. 1464, 1533–34 (Oct. 28, 2000). Specifically, Congress sought to "strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes" and "facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens." *Id.* In doing so, Congress implicitly recognized the very real issue that "[n]oncitizen victims of human trafficking and qualifying criminal activity may not have immigration status in the United States and may therefore be fearful of working with law enforcement."[3] Not only that "[t]raffickers and abusers often use a lack of immigration status to exploit and control victims." *Id.* As a result, immigration relief—along with the attendant confidentiality protections—is "a critical tool to encourage victims to become strong and active participants in the detection, investigation, or prosecution of a crime, and therefore increase community safety as a whole." *Id.*; *see Bartlett*, 40 Misc.3d 1202(A), at *2 ("Congress' clear intent is to keep these visa applications confidential . . . in order to encourage undocumented women to come forward and report abuse[.]").

[3] *Victims of Human Trafficking and Other Crimes*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes (last accessed July 24, 2024).

Indeed, in enacting the VAWA Confidentiality Provision, Congress emphasized the importance of keeping VAWA-protected immigration materials out of the hands of "alleged criminals" and assured victims that these materials would be kept confidential. *See Bartlett*, 40 Misc.3d 1202(A), at *2; *Commonwealth v. Riojas*, 2016 WL 5940424, at *30 (Sup. Ct. Pa. Sept. 7, 2016) (affirming trial court's decision to quash subpoena seeking VAWA-protected information); *Demaj v. Sakaj*, 2012 WL 476168, at *5 (D. Conn. Feb. 14, 2012) (denying motion to compel U Visa materials including those in possession of individual respondent); *Hawke v. U.S. Dep't of Homeland Sec.*, 2008 WL 4460241, at *7 (N.D. Cal. Sep. 29, 2008) ("one of the primary purposes of the VAWA confidentiality provision [is], namely, to prohibit disclosure of confidential application materials to the accused batterer."). In doing so, Congress recognized that the assurance of the confidentiality of immigration materials is critical to protect victims, who face great danger of violence and intimidation by their abusers, and who are already terrorized, fearful, and reluctant to participate in prosecution of the crimes against them. *See* U.S. DEP'T OF JUST., 2018 BIENNIAL REPORT TO CONGRESS ON THE EFFECTIVENESS OF GRANT PROGRAMS UNDER THE VIOLENCE AGAINST WOMEN ACT 26 (2018) (citing intimidation and witness tampering as significant reasons victims are hesitant to participate in prosecution of their abusers). As this Court has recognized, confidentiality is key, as "the promise of help without confidentiality is an empty one." *Martinez*, 40 Misc.3d 1204(A), at *2.

In this manner, by enacting the VAWA Confidentiality Provision, Congress created an express confidentiality right and imparted overriding public policy interests underlying the law.

ii. The VAWA Confidentiality Provision is a "Strict" Non-Disclosure Provision and Bars Disclosure of VAWA-Protected Information from Third-Party Entities.

The VAWA Confidentiality Provision is "strict" and bars the compelled disclosure of the immigration records of crime victims, including applications for immigration relief, as here. *See*

Hawke, 2008 WL 4460241, at *7; *Roy v. County of Los Angeles*, 2016 WL 11783814, at *2–3 (C.D. Cal. Nov. 18, 2016) (explaining that the VAWA Confidentiality Provision is a "strict non-disclosure provision intended to protect abuse and trafficking victims from harm or retribution – or the fear thereof – should they seek relief under the specified statutes"); *see also EEOC v. SOL Mexican Grill LLC, et al.*, 2019 WL 2896933, at *3 (D.D.C. June 11, 2019) (finding that U Visa information "is not discoverable" under 8 U.S.C. § 1367(a)(2)). It applies to bar compulsory disclosure even in cases where the protected information is sought from a non-governmental agency in possession of the same information. *See* 8 C.F.R. § 214.11(p)(3). Importantly, federal regulation states that non-governmental agencies like Sanctuary in possession of VAWA-protected immigration information specific to immigrant trafficking victims, as here, are bound by VAWA's confidentiality protections. *Id.*

Nor can the complainant, Sanctuary, or other entity be compelled to turn over the protected information. Courts recognize that to permit accused traffickers and batterers to obtain VAWA-protected material from a source other than the federal government (such as from a complainant) constitutes an impermissible end-run of the statute and undermines the purpose of the law. *See Bartlett*, 40 Misc.3d 1202(A), at *1–2; *Riojas*, 2016 WL 5940424, at *29. For example, in a domestic violence prosecution before this Court in *Bartlett*, the defendant moved to compel the People's disclosure of the complainant's VAWA-protected U Visa application as related to the alleged domestic violence suffered by the complainant in that case. 40 Misc.3d 1202(A), at *1–2. The Court rejected defendant's efforts to obtain the U Visa application entirely, stating, "Congress' clear intent is to keep these visa applications confidential in order to encourage undocumented women to come forward and report abuse." *Id.* (citing 8 U.S.C. § 1367).

Persuasive cases from outside New York find similarly. In *Riojas*, in a prosecution for rape, the defendant subpoenaed the complainant victim seeking information related to her application for immigration relief under VAWA. 2016 WL 5940424, at *28. The trial court granted the motion to quash, and the defendant was later convicted of rape. *Id.* When the defendant appealed his conviction, he claimed, *inter alia*, that the lower court erred in granting the motion to quash "because it resulted in [defendant's] inability to obtain information about [the complainant] pertaining to her application for a U-Visa and using such information at trial." *Id.* The appellate court disagreed, pointing out that VAWA "specifically prohibits disclosure of information obtained from a beneficiary for an application for relief under the VAWA." *Id.* In so finding, the Court explained that even though "Appellant sought information from [the complainant] and not a [federal] government official," the information was still protected by law, and "this Court has no authority to order [complainant's] disclosure of any information pertaining to [complainant's] U-Visa application as disclosure is specifically prohibited by statute." *Id.* at *29. It further explained that "requiring disclosure from the [complainant] would be contrary to the purpose of the statute" and thus defendant was not permitted to circumvent the statute by subpoenaing the complainant for the application. *Id.* at *30.

Courts in the civil context have drawn similar conclusions. For example, in *Demaj v. Sakaj*, a petitioner under the Hague Convention sought to compel discovery from the respondent concerning her U Visa application, which the district court denied. 2012 WL 476168, at *5. In denying the petitioner's motion to compel, the Court reasoned:

> [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, the purpose of which is to protect the confidentiality of the applications by preventing disclosure of these documents to alleged criminals . . .

Id.; *see also Cash v. Wetzel*, 2017 WL 11602655, at *3 (E.D. Pa. May 24, 2017) ("[B]ecause a U-visa applicant must be a victim or witness cooperating with law enforcement, there will nearly always be a criminal defendant connected with the visa application who would argue that access to the file might be of some benefit to him. To recognize this as sufficient to warrant disclosure of the file would be to do away with §1367 completely."); *Att'y Grievance Comm'n of Md. v. Singh*, 464 Md. 645, 653 n. 4 (Md. 2019) (using pseudonym for immigrant in disciplinary proceeding because VAWA Confidentiality Provision "imposes certain confidentiality obligations" and anonymity is "[c]onsistent with the intent of that statute").

Here, as in *Bartlett* and *Riojas*, Defendant is likely to argue that the VAWA Confidentiality Provision does not apply because the subpoena is directed at Sanctuary and not at the federal immigration authorities. As the foregoing shows, that argument is unavailing. Under federal regulation, Sanctuary is expressly bound by the strictures of the VAWA Confidentiality Provision. *See* 8 C.F.R. § 214.11(p)(3). Moreover, as the case law recognizes, the protections of the VAWA Confidentiality Provision and the public interests it serves would be rendered meaningless if the Defendant is permitted to end-run the statute by subpoenaing Sanctuary or the complainant instead of the federal immigration authorities for the statutorily-protected T Visa application.

The T Visa application is protected by law and its disclosure is barred in this case.

iii. The VAWA Confidentiality Provision Provides No Exception for Court Order.

The VAWA Confidentiality Provision makes no exception for court order and its protections apply in this case without exception. *See* 8 U.S.C. § 1367(b). The statute's limited exceptions are where (1) an adult victim grants a consensual waiver of the statute's protections, (2) the disclosure involves completely anonymized statistical data, (3) the disclosure is for a specific "national security purpose," "legitimate law enforcement purpose," or judicial review of an immigration determination, and is done "in a manner that protects the confidentiality of such

information," or (4) it is for the purpose of a public benefit determination. *Id.* "None of the exceptions involve disclosure of information to a defendant in a criminal case, nor do any of them give the Court any discretion to permit disclosure of the application or any information pertaining to" VAWA-protected materials. *Riojas*, 2016 WL 5940424, at *29. While Congress could have provided such an exception if it wanted to and has done in other laws, *see, e.g.*, 5 U.S.C. § 552a(b)(11), it did not do so here. Accordingly, no exceptions to the VAWA Confidentiality Provision apply, and it bars disclosure by court order of the Subpoenaed Information in this case.

B. The Defendant's Interests Must Bow to the Legal Protections Placed on the Immigration Records of Violence Survivors.

The VAWA Confidentiality Provision strictly prohibits disclosure of the T Visa application in this case. The defendant may have a general interest in discovering the complainant's T Visa application but no such interest can overcome the express bar set forth in the statute or the overwhelming confidentiality interests at stake here.

As explained above, in enacting VAWA, Congress assured the confidentiality of the immigration records of crime victims and set forth strong public policy interests for doing so: to encourage victims to report violent crimes and to assist law enforcement to combat those serious crimes. *Supra* § I(A). Courts across the country and this state have upheld those interests time and time again. *See Supra* § I(A); *Bartlett*, 40 Misc.3d 1202(A), at *2. In this manner, the VAWA Confidentiality Provision provides overwhelming confidentiality protections that alone are sufficient to outweigh any interest the defendant may have in the T Visa Application.

Not only that, more general confidentiality protections at issue in this case also serve to counter any general interest the defendant may have in discovering the complainant's T Visa application. Under New York law generally, records of non-profit agencies that involve victims of violence are also protected from disclosure. *See, e.g., Gonzalez*, 40 Misc.3d 1213(A), at *1, 3;

Martinez, 40 Misc.3d 1204(A), at *1. *Martinez* is illustrative of these protections. 40 Misc.3d 1204(A), at *1. In that case, the defendant sought the records of a local non-profit agency, the Brooklyn Family Justice Center, which had provided services to the complainant. *Id.* As the Defendant surely will do here, the defendant in *Martinez* argued that these records were "relevant and necessary to his effective cross-examination of the complainant in probing her motive and credibility." *Id.* This Court rejected those arguments, explaining that "Confidentiality as to assistance [of violence survivors] is essential, . . . to encourage victims to seek help to escape abuse without fear of retribution for informing to outside parties." *Id.* In granting the motion to quash, the Court found that that the defendant's interests "must . . . bow to public policy considerations, in this case the security and safety of troubled women and families looking for help." *Id.* These considerations are even more important here where multiple federal regulations expressly mandate and assure that Sanctuary will protect the information of clients that seek its services.

If these protections were not enough (they are), there is also a well-recognized public policy interest in protecting immigration information of vulnerable individuals in public legal proceedings. Specifically, Courts recognize that discovery into and compulsory disclosure of immigration records may render immigrants "intimidated by the prospect of having their immigration history examined in a public proceeding" and have a "chilling effect" on pursuing claims, which "unacceptably burdens the public interest." *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2004); *see also Washington v. Horning Brothers, LLC*, 2018 WL 2208215, at *5 (E.D. Wash. May 14, 2018) (citing "potential chilling effect of disclosing immigration" information and granting "request for a protective order prohibiting discovery of [plaintiff's] U visa immigration status"). Accordingly, courts routinely refuse to allow unjustified discovery into immigration records in public proceedings. *See Guillen v. B.J.C.R. LLC*, 341 F.R.D. 61, 71–72

(D. Nev. 2022) ("The court will not condone the use of discovery to engage in a 'fishing expedition' into Plaintiff's remote immigration records" as "requiring disclosure of these documents would surely have an intimidating or *in terrorem* effect"); *EEOC v. First Wireless Group, Inc.*, 225 F.R.D. 404, 406 (E.D.N.Y. 2004) (affirming suppression of discovery into immigration status on the basis that such discovery will embarrass, oppress, and intimidate individuals from exercising their legal rights); *EEOC v. Bice of Chicago*, 229 F.R.D. 581, 583 (N.D. Ill. July 18, 2005) (entering a protective order prohibiting discovery into immigration status because "questions about immigration status are oppressive, they constitute a substantial burden on the parties and on the public interest and they would have a chilling effect on victims of employment discrimination from coming forward to assert discrimination claims").

In this case, all of these confidentiality protections serve to override the defendant's unspecified and general interest in discovery of the complainant's T Visa application. Not only does the non-disclosure provision ***strictly*** bar disclosure, the Defendant has proffered nothing to justify his or the Court's review of the VAWA-protected T Visa application in this case. First, there is nothing to suggest that the complainant's immigration status is at issue in the Defendant's prosecution, so the T Visa application's relevance is tangential at best. *See, e.g., People v. AlvarezAlvarez*, 2014 WL 1813302, at *5 (Cal. Ct. App. May 7, 2014), *rev. denied* (July 16, 2014) (affirming trial court's decision in rape case to exclude reference to complainant's U Visa application, finding that the "visa was a tangential, collateral issue, and allowing evidence about it invited speculation about the legal status . . . which was completely irrelevant to this case."). Second, the Defendant does not show that the information sought is exculpatory or that it will reveal that the complainant lied. The opposite, there is nothing to suggest that the complainant had any reason to misrepresent any facts to the federal government in her immigration application.

To the contrary, complainant's incentive and the incentive of Sanctuary as a large and reputable social services agency in New York City is to be truthful to officials, just as the complainant will be truthful before this Court.

Defendant may argue that under New York law there is an express right to examine the entire T Visa application as a prior statement of the witness. *See People v. Rosario*, 9 N.Y.2d 286, 289 (1961). However, even that right requires that the evidence sought "relates to the subject matter of the witness' testimony and ***contains nothing that must be kept confidential***." *Id.* (emphasis added). Further, as the Court of Appeals has explained, there is no right "to go on a tour of investigation seeking generally useful information." *Id.* at 290. Instead, any right created allowing examination of a witness's prior statement "presupposes . . . that the necessities of effective law enforcement do not require that the statement be kept secret or confidential." *Id.* Here, the record contains material deemed by statute to be confidential, and that such confidentiality is required as a "necessit[y] of effective law enforcement." *See id.* Congress expressly enacted VAWA to "strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes" and "facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens." VAWA, Pub. L. 106-386, 114 Stat. 1464, 1533–34 (Oct. 28, 2000). To allow a "tour of investigation seeking generally useful information" runs contrary to the law, undermines the statute's purpose of assisting law enforcement, and cannot be permitted.

Indeed, simply "searching for some means of attacking the victim's credibility" is not a justification for gaining access to a confidential record; rather, it constitutes an impermissible "fishing expedition" and must be rejected. *See People v. Brown*, 24 A.D.3d 884, 887 (3d Dep't

2005) (affirming trial court's denial of defendant's request to review confidential records as "a fishing expedition searching for some means of attacking the victim's credibility"); *see also Gissendanner*, 48 N.Y.2d at 549 (finding trial court did not err in refusing to issue a subpoena where defendant failed to establish materiality of confidential information sought). Any speculative interest in the record that the Defendant may proffer do not overcome the federal protections of the information sought and the confidentiality interests at stake.

The subpoena must be quashed.

C. The VAWA Confidentiality Provision Precludes *In Camera* Review.

The fact that the subpoena seeks *in camera* review is of no moment. The VAWA Confidentiality Provision precludes review of the protected T Visa application.

Defendant may point to *Pennsylvania v. Ritchie*, in which the Supreme Court found that confidential child abuse records could be submitted "to the trial court for in camera review" to determine whether the records were material or relevant to the case. 480 U.S. 39, 59–61 (1987) ("An in camera review by the trial court will serve [the defendant's] interest without destroying the Commonwealth's need to protect the confidentiality of those involved in child-abuse investigations."). However, *Ritchie* did not involve the VAWA Confidentiality Provision, or even a statute like it, and its holding does not apply here.

All the courts that have addressed whether *Ritchie* requires *in camera* review of material protected by the VAWA Confidentiality Provision have held that it does not. *See Riojas*, 2016 WL 5940424, at *28–29; *Hawke*, 2008 WL 4460241, at *5–7; *Wetzel*, 2017 WL 11602655, at *5. These Courts explain that *Ritchie* is distinguishable from cases involving the VAWA Confidentiality Provision because, while the statute at issue in *Ritchie* allowed for disclosure upon a court order, the VAWA Confidentiality Provision makes no such exception. *Riojas*, 2016 WL

5940424, at *28–29 ("Therefore, this Court has no authority to order disclosure of any information pertaining to [victim's] U-Visa application as disclosure is specifically prohibited by statute, unlike in *Ritchie*."); *Hawke*, 2008 WL 4460241, at *5–7 (denying accused batterer's petition to require production of victim's VAWA immigration application for *in camera* review on the basis that "the strict confidentiality of the Violence Against Women Act still applies"); *Wetzel*, 2017 WL 11602655, at *5 ("Cash has not shown that he is entitled to in camera review of the victim's alien file. In fact, he has not shown that this Court would have the power to compel it."). Without an exception for disclosure by court order, the VAWA Confidentiality Provision gives "the courts no power to order disclosure," and accordingly, "the courts had no corresponding duty to conduct an *in camera* review of the protected material." *Wetzel*, 2017 WL 11602655, at *5. So too here, the VAWA Confidentiality Provision expressly bars a foray into the confidential materials at issue and makes no exception permitting the Court to order such review. The subpoena should be quashed on that basis alone.

The VAWA Confidentiality Provision provides sufficient basis on its own to justify the Court's quashing the subpoena for *in camera* review, but the Court has further reason to do so on the basis that Defendant has not established any actual factual predicate for gaining access to the statutorily-protected T Visa Application in the first instance. *See supra* § I(B). Under New York law, a subpoena *duces tecum* can never be used to compel an "*in camera* inspection of the subpoenaed information" without the defendant's first establishing the record's exculpatory nature or its specific materiality and relevance. *See Gonzalez*, 40 Misc.3d 1213(A), at *2; *Cox*, 145 A.D.3d at 1508. *Gonzalez* provides an on-point example of this principle in action. There, the defendant, accused of domestic violence, served a subpoena *duces tecum* on a not-for-profit organization that provided "free legal services" to the complainant, in which he sought the

agency's records concerning the complainant. 40 Misc.3d 1213(A), at *1. The non-profit agency moved to quash the subpoena and the defendant's counsel requested *in camera* review of the records as an alternative. *Id.* The Court denied defendant's request for *in camera* review and granted the motion to quash on the basis that defendant failed to make the requisite showing of "entitlement to the production of the specified documents or information that are relevant and material." *Id.* The Court added that even if the defendant had made the requisite showing, the agency's records were protected by attorney-client privilege. *Id.* The same result is appropriate here and is even more so, as the VAWA Confidentiality Provision expressly bars disclosure of the information sought by the subpoena.

The subpoena should be quashed.

II. A Protective Order Must Issue Preventing VAWA-Protected Information from Disclosure and Use in this Action.

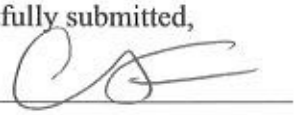
Pursuant to CPL § 240.50, the Court may issue a protective order preventing further discovery into VAWA-protected information in this case. Good cause exists for a protective order. CPL § 240.50. As set forth above, information and records from a victim-based immigration case are expressly protected under federal law and regulation, and their disclosure risks undermining a federal statutory scheme meant to protect victims, assist law enforcement, and promote the investigation and prosecution of violent crimes. *See supra* § I. The existence of an express statutory provision and these important public policy concerns underlying that statutory provision far "outweigh defendant's interest in nondisclosure," *Hill v. City of New York*, 170 A.D.3d 511, 512 (1st Dep't 2019), and warrant a protective order safeguarding the information and records protected under the Violence Against Women Act, 8 U.S.C. § 1367, in these proceedings.

CONCLUSION

For the foregoing reasons, the Court should grant Sanctuary's Motion and issue an order quashing the subpoena *duces tecum* and a protective order barring any attempts by any party to discover or use the Subpoenaed Information in these proceedings, and taking any additional action as the Court deems appropriate in the circumstances.

Dated: August 16, 2024

Respectfully submitted,

/s/ 

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