

## How to Argue or Rule on VAWA Confidentiality Protections in Discovery Involving Immigrant Survivors

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### 1. OVERVIEW OF VAWA CONFIDENTIALITY PROTECTIONS

Congress created VAWA Confidentiality protections to prevent abusers and crime perpetrators from using immigration enforcement officials and information provided by victims to the government in support of their VAWA-related immigration cases as a toll to abuse non-citizen victims. VAWA Confidentiality and Victim Safety Provisions offer three types of protection to immigrant victims of domestic violence, child abuse, sexual assault, stalking, human trafficking and many other mostly violent criminal activities:

- **Abuser-Provided Information:** The Department of Homeland Security (DHS), the Department of Justice (DOJ), and the State Department are barred from taking action against a noncitizen victim based *solely* upon information provided by abusers and crime perpetrators (and their family members or agents).<sup>1</sup> These protections take effect in spouse and child abuse cases the moment there is a marriage or a parent-child or step-parent-child relationship<sup>2</sup> and in all other cases when the victim is in the process of filing a VAWA, T, U-visa or other VAWA confidentiality-protected application.<sup>3</sup>
- **Enforcement Prohibitions:** prohibit enforcement actions against immigrant victims in specific locations such as domestic violence shelters, rape crisis centers, victim services programs, family justice centers or supervised visitation centers, and courthouses.<sup>4</sup>
- **Non-Disclosure Requirements:** protect the confidentiality of information an immigrant victim provides to DHS, DOJ, or the Department of State. Seeks to prevent abusers, traffickers, and crime perpetrators from obtaining any information about the existence of

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<sup>1</sup> Virtue, Paul W., Acting Executive Associate Commissioner, Office of Programs, to all INS Employees, *Memorandum: Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA Section 384* ( May 5, 1997) (on file with author), <https://niwaplibrary.wcl.american.edu/pubs/conf-vawa-gov-insconfvawamemo-05-05-1997> (hereinafter “Virtue memo”); 6 151 CONG. REC. E2606-7 (December 18, 2005) (speech of Hon. John Conyers Jr.), <https://niwaplibrary.wcl.american.edu/pubs/conyers-extension-of-remarks-immigration-dec-18-2005-crec-2005-12-18-pt1-pge2605-4>.

<sup>2</sup> IIRIRA § 384 (a)(1)(A)-(D); 8 U.S.C. § 1367(a)(1)(A)-(D).

<sup>3</sup> IIRIRA § 384 (a)(1)(E)-(F); 8 U.S.C. § 1367(a)(1)(E)-(F); Dep’t Of Homeland Security, *Instruction Number: 002-02-001, Implementation Of Section 1367 Information Provisions* (November 7, 2013), <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

<sup>4</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 384 (a)(2); 8 U.S.C. § 1367(a)(2).

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the case, outcomes of the case, or information contained in the case file and using the information to harm the victim, locate the victim, identify a victim, or interfere in the adjudication of the victim’s case.<sup>5</sup>

## RESOURCES VAWA CONFIDENTIALITY PROTECTIONS:

- [Family Court Bench Card on Violence Against Women Act \(VAWA\) Confidentiality \(December 3, 2021\)](#)
- [VAWA Confidentiality Statutes, Legislative History, and Implementing Policy](#)
- [Chapter 03: VAWA Confidentiality: History, Purpose, DHS Implementation, and Violations of VAWA Confidentiality Protections](#)
- [Sample Amicus Curiae Brief VAWA Confidentiality and Family Court Discovery \(2011\)](#)
- [Sample Criminal Court VAWA Confidentiality Protections - Amici Curiae Brief of Legal Momentum, Sanctuary for Families, and National Immigrant Women's Advocacy Project \(2012\)](#)

## 2. HOW COURTS, PROSECUTORS, AND ATTORNEYS SHOULD RESPOND WHEN OFFENDERS SEEK DISCOVERY OF VAWA CONFIDENTIALITY-PROTECTED INFORMATION IN CRIMINAL, FAMILY, AND CIVIL COURT CASES

### A. Do not Impermissibly Disclose Information Regarding Immigration Status or Application to Government (or Other) Officials Without Victim’s Consent

In criminal, family, and civil court cases, if immigrant survivors are asked about the existence of or decisions made in a VAWA confidentiality-protected immigration case, counsel for the survivor or the prosecutor should not admit or deny the existence of such case, whether or not one has been filed and should object and cite VAWA confidentiality. 8 U.S.C. § 1367.<sup>6</sup> Information contained in or regarding the existence of a VAWA, T, or U visa application is “absolutely privileged information” that cannot be demanded use in a criminal or civil proceeding (*Hawke v. United States Department of Homeland Security*). In a criminal case when law enforcement, prosecutors or a judge has signed a U visa or T visa certification the certification itself and any cover letter seeking the certification may be discoverable, but no other information about the existence of, actions taken in or information contained in the VAWA confidentiality protected immigration case file.<sup>7</sup>

## RESOURCES

- [Court Rulings Confirm Federal VAWA Confidentiality Protections Bar Discovery of VAWA Confidentiality Protected Information in State Family Court Proceedings](#)
- [VAWA Confidentiality and Discovery Cases \(December 6, 2021\)](#)
- [Family Court Bench Card on Violence Against Women Act \(VAWA\) Confidentiality \(December 3, 2021\)](#)
- [Training Tools for Prosecutors on the U Visa, VAWA and Criminal Court Discovery \(February 2022\)](#)
- [October 14, 2022 Webinar: What Judges, Attorneys, and Prosecutors Need to Know About How VAWA Confidentiality Impacts Discovery In Cases Involving Immigrant Survivors](#)

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<sup>5</sup> IIRIRA § 384 (a)(2); 8 U.S.C. § 1367(a)(2)

<sup>6</sup> See step-by-step discussion below in Section 2.C.

<sup>7</sup> See discussion of prosecutor’s disclosure obligations below in Section 3.

## B. How to Respond to Discovery Requests and In Depositions<sup>8</sup>

Perpetrators may attempt to obtain information about a victim's VAWA confidentiality-protected case through state court discovery in a family, civil or criminal case. Case law nationally, DHS policies, and the federal the VAWA confidentiality statute all confirm that the information about the existence of, actions taken, and evidence contained in federal VAWA confidentiality-protected case files is not discoverable in state civil, family, and criminal court cases. In family and civil court actions counsel for the victim should object to discovery of VAWA confidentiality protected information and should object to questions about the existence of VAWA confidentiality protected cases during depositions.<sup>9</sup>

**The only document that may be discoverable is a U visa certification or a T visa declaration signed by a government official involved in the case before the court.**<sup>10</sup> Even in U or T visa cases where the certification or declaration may be discoverable, the whole immigration file and any documents contained in the victim's immigration case file are not discoverable.<sup>11</sup>

In a criminal, family law, or civil case where the victim is a witness who is available to testify and be cross-examined, allowing any discovery of the contents of the noncitizen's VAWA self-petition, T or U visa case file is a *fishing expedition*. This is particularly true in a VAWA self-petition or battered spouse waiver case where the VAWA self-petitioning statutes and regulations do not include submission of any certifications from government officials. Further, in every VAWA self-petition case the need for the VAWA confidentiality protections to keep the existence of any VAWA self-petition case and the contents of the VAWA self-petition case shielded from discovery is particularly acute because these involve cases of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent residence spouse or parent who could have filed immigration papers for the victim whose abuse of the victim spouse or child typically included exerting power and control over the victim's access to legal immigration status; which is why the victim is self-petitioning.

If the opposing party in a civil or family court case seeks through discovery or cross-examination to obtain information about or information contained in a VAWA confidentiality-protected case, attorneys should consider filing:

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<sup>8</sup> *VAWA Confidentiality Protections for Immigrant Crime Victims* (Update March 8, 2021), <https://niwaplibrary.wcl.american.edu/vawa-confidentiality-materials-tools>; *VAWA Confidentiality and Discovery Cases* (December 6, 2021), <https://niwaplibrary.wcl.american.edu/vawa-confidentiality-cases>.

<sup>9</sup> See step-by-step discussion below in Section 2.C.

<sup>10</sup> *Training Tools for Prosecutors on the U Visa, VAWA and Criminal Court Discovery* (Update February 2022), <https://niwaplibrary.wcl.american.edu/prosecutors-tools>. NIWAP collaborates with AEquitas to provide technical assistance to prosecutors on criminal case discovery questions and criminal case strategy in cases involving immigrant survivors. NIWAP provides technical assistance on VAWA confidentiality to lawyers representing survivors in state court cases. To obtain either of these forms of technical assistance contact NIWAP.

<sup>11</sup> DHS policy warns DHS officials that: "Please note, defense counsel in state cases may sometimes attempt to make the entire A-file discoverable; however, the entire file is not discoverable in its entirety under this exception" Dep't Of Homeland Security, *Instruction Number: 002-02-001, Implementation Of Section 1367 Information Provisions* (November 7, 2013), <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

- A motion in limine to strike the defendant’s pleadings and motions for violation of the Federal Rule 11 of Civil Procedure or the state equivalent;
- A motion for protective order to prevent disclosure of VAWA confidentiality protected information; and
- A motion to quash.

## RESOURCES:

- [Sample Motion for Protective Order Addressing VAWA Confidentiality Protections in Family Court Cases \(2009\)](#)
  - [Sample Victim's Motion in Limine to Strike the Defendants' Pleadings, Motions, and Advocacy for Pleadings and Motions for Violation of Federal Rule of Civil Procedure 11 \(2009\)](#)
  - [VAWA Confidentiality and Discovery Jurisprudence \(Case Law\) \(December 6, 2021\)](#)
  - [Family Court Bench Card on Violence Against Women Act \(VAWA\) Confidentiality \(December 3, 2021\)](#)
- C. **Step-by-Step on How Attorneys and Judges Can Keep VAWA Confidentiality Protected Information Out of State Court Proceedings<sup>12</sup>**

To prevent information about the victim’s immigration status or existence of a U visa, T-visa or VAWA self-petition out of the family court, when such information is sought through discovery or on cross-examination, judges should be prepared to rule and attorneys should:

1. First, object to the relevance of such information in the custody, protection order, or divorce action. The relevance of a victim’s immigration status must be weighed against the in terrorem effect that disclosure of this information would have in discouraging the victim from asserting their rights in the family court proceeding.
2. If that argument is unsuccessful, argue that the opposing party’s attempt to obtain this information is part of the opposing party’s pattern of control and is designed to further abuse and intimidate the victim.
3. Next, argue that the information is not discoverable under *Hawke and Demaj* and under VAWA Confidentiality laws.
  - a. At this stage, counsel should consider filing a Motion in Limine to keep all information about immigration status or any case the victim may have filed for VAWA, U visa, or T visa immigration relief out of the family court proceeding.
4. Lastly, if the court does not rule favorably on any or all of the above, argue that if discovery must happen, it should be limited to an in-camera review of only the most relevant information. Counsel should argue that the **in-camera review be limited to the U visa or T visa certification signed by a government official and not the full case file**. If the court requires additional documents for in-camera review, counsel must provide redacted copies that remove personally identifying information from the records.

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<sup>12</sup> Thronson Veronica T., Angel Carole, Fata Soraya, Molina Rocio, Anver Benish, Wells Kalli and Orloff Leslye E., Utilizing VAWA Confidentiality Protections, in *Winning Custody Cases for Immigrant Survivors: The Clash of Laws, Cultures, Custody and Parental Rights*. 9 Fam. & Intimate Partner Violence Q. 2-3, 82-83 (2017), <https://niwaplibrary.wcl.american.edu/winning-custody-article-2017>. Also available from NIWAP contact [info@niwap.org](mailto:info@niwap.org).

## RESOURCES:

- [Utilizing VAWA Confidentiality Protection in Family Court Proceedings](#)<sup>13</sup>
- [Quick Reference Guide for Judges: VAWA Confidentiality and Discovery Related Case Law \(June 12, 2021\)](#)
- [VAWA Confidentiality and Discovery Cases \(December 6, 2021\)](#)
- [Family Court Bench Card on Violence Against Women Act \(VAWA\) Confidentiality \(December 3, 2021\)](#)

### **D. Cases in Which the Victim Will Raise Her Own Immigration Status and/ or Immigration Related Power and Control Abuse**

Sometimes it can be helpful to the victim’s case to demonstrate that they obtained or are in the process of obtaining legal immigration status through a VAWA self-petition, battered spouse waiver, the U visa, or a T visa case. This can help demonstrate that they will not be removed from the U.S. and have or will receive legal work authorization or issue a driver’s license. Counsel for victims may also want to raise the fact in cases of child abuse, child neglect, or abandonment perpetrated by the child’s father against the child, that the child has filed or been granted Special Immigrant Juvenile Status. This demonstrates that the child is on a path to lawful permanent residency and to being granted in the interim protection from deportation, work authorization and access to a driver’s license or state government issued identification.

In cases where the perpetrator has been threatening to have the victim or the children deported or where they abuser has the ability to file, but had refused to file an immigration case for the victim or the child(ren) proving these forms of immigration related abuse can be important evidence documenting the pattern of domestic violence and child abuse in the relationships before the family court.

Revealing that the victim and often the parties’ child has received or is in the process of obtaining legal status through one of the VAWA confidentiality protected forms of immigration relief does not mean that all or any part of the victim’s federal immigration case file is discoverable through family or criminal court discovery.<sup>14</sup> Counsel should still make the arguments in steps 2-4 discussed in Section 2.C above and courts should rule on these arguments to prevent further discovery in a state court proceeding of any information contained in a VAWA confidentiality protected immigration case file under 8 U.S.C. Section 1367(a)(2).

## RESOURCES:

- [Quick Reference Guide for Judges: VAWA Confidentiality and Discovery Related Case Law \(June 12, 2021\)](#)
- [VAWA Confidentiality and Discovery Cases \(December 6, 2021\)](#)
- [Court Rulings Confirm Federal VAWA Confidentiality Protections Bar Discovery of VAWA Confidentiality Protected Information in State Family Court Proceedings](#)

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<sup>13</sup> See pages 36-52 of this publication containing a detailed discussion of VAWA confidentiality laws and policies, and DHS crime victim protections. Also available from NIWAP contact [info@niwap.org](mailto:info@niwap.org).

<sup>14</sup> *State vs. Marroquin-Aldana*, 2014 ME 47, 89 A.3d 519, 531

- [Custody of Children in Mixed-Status Families: Preventing the Misunderstanding and Misuse of Immigration Status in State-Court Custody Proceedings](#)<sup>15</sup>
- [Chapter 06.1: Countering Abuser's Attempts to Raise Victim's Immigration Status in Custody Case](#)<sup>16</sup>
- [Utilizing VAWA Confidentiality Protection in Family Court Proceedings](#)<sup>17</sup>

Counsel considering raising immigration-related abuse as part of the victim’s family court case may be able to strengthen the evidence of abuse presented in the family court case using the following tools:

- [Trauma-Informed - Structured Interview Questionnaires for Immigration Cases \(SIQI\)](#)
- [How to Prepare Your Case Through a Trauma-Informed Approach: Tips on Using the Trauma-Informed Structured Interview Questionnaires for Family Court Cases \(SIQI\)](#)

## **E. Deterring Harassment and Exertion of Undue Influence in Civil Court Action - Rule 11 of the Federal Rules of Civil Procedure**

Rule 11 of the Federal Rules of Civil Procedure and equivalent state civil procedure rules were adopted to limit abusive and bad faith acts by attorneys and pro se litigants in court. These laws protect against and respond to threats and other tactics of immigration-related abuse that arise in the context of court litigation. Rule 11 applies only to assertions contained in papers filed with or submitted to the court.

Attorneys can argue and courts can rule based upon Rule 11(b) (1) that threats of deportation like criminal actions threatened during a civil trial constitute harassment, cause unnecessary delay, and/or increase the cost of litigation. Courts have held that an attorney who threatens criminal prosecution to a person involved in a civil case commits moral turpitude, and the attorney’s belief in the person’s guilt is no defense and is not even a mitigating factor.

### **RESOURCES:**

- VAWA Confidentiality Chapter with Sample Motions Based on VAWA Confidentiality and Rule 11:
  - [VAWA Confidentiality: History, Purpose, DHS Implementation and Violations of VAWA Confidentiality Protections](#)
- [Utilizing VAWA Confidentiality Protection in Family Court Proceedings](#)<sup>18</sup>

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<sup>15</sup> Discussing strategies particularly in cases involving immigration related abuse when victims family law attorneys may wish to raise as part of the evidence they present in the victim’s custody or divorce case the abuser’s attempts to use the victim’s immigration status as a coercive control tactic in the relationship.

<sup>16</sup> Discussing immigration related abuse and fear of losing children as key power and control tactics. pp. 5-9.

<sup>17</sup> See pages 36-52 of this publication containing a detailed discussion of VAWA confidentiality laws and policies, and DHS crime victim protections. Also available from NIWAP contact [info@niwap.org](mailto:info@niwap.org).

<sup>18</sup> See pages 36-52 of this publication containing a detailed discussion of VAWA confidentiality laws and policies, and DHS crime victim protections. Also available from NIWAP contact [info@niwap.org](mailto:info@niwap.org).

### 3. PROSECUTOR’S DISCLOSURE OBLIGATIONS

Under rulings from the Supreme Court and **most state case law, prosecutors have discovery obligations to disclose certain information to the defense.** Generally, **U visa certifications and T visa declarations are subject to discovery in criminal cases** as they are considered under the prosecutor’s control and are deemed relevant and material to the case, as the defense can argue that the U visa and T visa provide a possible bias or motive to lie. Courts have ruled that the rest of the information in the victim’s U or T visa file is not discoverable by the defendant in the state’s criminal case. Obligations may differ for federal prosecutors depending on the facts of the case because the U visa and T visa are federal immigration remedies adjudicated by the Department of Homeland Security (DHS), a federal agency.

#### **A. Prosecutors have a constitutional mandate to disclose “material” and “exculpatory” evidence in their “possession” to defendants in criminal cases (*Brady v. Maryland*)**

Under the Supreme Court’s decision in *Brady v. Maryland*, prosecutors have a constitutional mandate to disclose “material” and “exculpatory” evidence in their “possession” to defendants in criminal cases, even absent a request from the defendant for such evidence. Under the Violence Against Women Act (VAWA), VAWA confidentiality protections prohibit the disclosure of information contained in and information about the existence of immigration cases filed by VAWA self-petitioners, T visa, and U visa applicants. State and local prosecutors are not constitutionally required under the Brady line of cases to seek out, obtain or disclose the existence of any information that is not in the prosecutor’s custody or control.

#### **B. U visa certification/T visa declaration form signed by law enforcement or a prosecutor is discoverable under Brady or its progeny.**

Under most state penal codes and constitutional obligations under *Brady v. Maryland*, a U visa certification/T visa declaration issued during the pendency of the case may be considered discoverable as “material” evidence.

In criminal cases when prosecutors or law enforcement officials have been asked to sign a U visa certification or a T visa declaration, any forms signed and any cover letter or other materials provided to the law enforcement agency or prosecutor as part of the certification request would be in the custody and control of the prosecutor and would be discoverable and fall within prosecutors’ disclosure obligations. However, any other information about whether or not a VAWA confidentiality protected immigration case was ever filed and if a case was filed the contents of the victim’s VAWA confidentiality protected federal immigration case file would not be discoverable.

#### **RESOURCES:**

- [Training Tools for Prosecutors on the U Visa, VAWA, and Criminal Court Discovery \(February 2022\)](#)
- [What’s Immigration Status Got to Do with It? Prosecution Strategies for Cases Involving Undocumented Victims \(July 24, 2017\)](#)
- [VAWA Confidentiality and Criminal Cases: How Prosecutors Should Respond to Discovery Attempts for Protected Information \(July 24, 2017\)](#)
- [Certifying Early: When Should You Sign a U or T Visa Certification for a Victim? \(July 24, 2017\)](#)

- [Quick Reference Guide for Prosecutors: U Visa and VAWA Confidentiality Related Case Law \(July 24, 2017\)](#)
- [Utilizing VAWA Confidentiality Protections in Family and Also Criminal Court Cases \(February 17, 2017\)](#)
- Q&A on Prosecutor’s Disclosure Obligations [U visa Certification and T Visa Declaration Toolkit for Law Enforcement Agencies and Prosecutors \(August 30, 2021\)](#)

#### 4. AMICUS BRIEF AND MOTIONS

##### [Amicus Curiae Brief EEOC v Koch Foods \(October 22, 2015\)](#)

**Overview:** This appeal to the 5<sup>th</sup> Circuit Court of Appeals addresses multiple rulings by the District Court compelling the individual victim worker plaintiffs in a case brought by the EEOC against their employer Koch Foods to respond to discovery by providing the employer with information contained in employee victims’ U Visa applications filed with the U.S. Department of Homeland Security. This was a case in which multiple employees suffered sexual assault, physical assault and other forms of harassment perpetrated at their place of employment Koch Foods. The District court ordered that victim employees turn over information despite the fact that VAWA’s confidentiality provisions offer protection to the information being sought by the employer. The District Court orders had allowed discovery of U Visa information in a civil matter directly from the victims for whom the EEOC seeks relief. Amicus argued that such discovery was unsupported by any reading of the confidentiality provisions of VAWA and is in direct contravention of Congress’ intent in enacting the VAWA confidentiality provisions, and sets a dangerous precedent allowing perpetrators, their employers, and others to obtain information Congress clearly intended to shield to protect victims and the public. Amici requested that this Court reverse the District Court’s orders. The 5<sup>th</sup> Circuit Court of Appeals agreed that the District Court was required to reconsider its discovery decisions after fully considering VAWA confidentiality and conducting the balancing of interests set out in the [5<sup>th</sup> Circuit’s Ruling](#).

##### **Analysis:**

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. Accordingly, the court should not entertain attempts by the perpetrator, their employer, or any other person to seek an alternative means of obtaining confidential information that the government is forbidden from providing and intended to remain out of their hands. The Amicus Brief addresses the following issues:

- 1) The Legislative History of the U Visa program clearly highlights Congress’ intent to expand the confidentiality provided to U Visa applicants and the contents of their U visa immigration case files;
- 2) The confidentiality provisions of the U Visa program prohibit disclosure of an applicant’s information to any third party, particularly the aggressor, during discovery. The Brief discusses the limited circumstances under which VAWA confidentiality can be waived, Congress made clear that VAWA confidentiality is a privilege that belongs to the victim;

- 3) Importance of VAWA confidentiality for crime victim protections. The VAWA confidentiality provisions serve three essential goals (1) to protect the victims themselves; (2) 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; and (3) to protect public health and well-being.

The Amicus Brief expresses concern that should the court not bar the discovery of U Visa information, courts will without full understanding of the federal VAWA confidentiality protections attempt to weight the perpetrator’s or employer’s stated need for confidential, immigration-status-related discovery against the likelihood of harm from discovery to the victim. The Brief discusses the substantial harm and negative implications for victims that would follow a decision by the 5<sup>th</sup> Circuit to allow a perpetrator to force an immigrant victim worker in a case brought by the EEOC to produce the information contained in the victims’ U Visa applications and supporting documents to the employer and the perpetrator employed by the employer in an employment discrimination case.

[Amicus Curiae Brief of Legal Momentum in \*Hawke v. Department of Homeland Security\* \(2008\)](#)

**Overview:** In this case, an abuser is accused of criminal battery and seeks disclosure of alleged confidential immigration files, which, if they exist, would be protected from disclosure under VAWA confidentiality. The abuser sought to obtain VAWA confidentiality protected case information from the U.S. Department of Homeland Security (DHS) which denied the abuser’s request for the production of documents related to the confidential immigration files of the abuser’s wife. The abuser was seeking these confidential immigration files because he believes that the files may contain information which might assist him in his criminal defense. The abuser argues that the alleged VAWA-related application was denied and therefore falls into an exception to the confidentiality requirements. The court in [Hawke](#) denied the abuser’s request for disclosure of any information about or contained in any VAWA confidentiality protected case the victim wife may have filed without regard to whether the victim obtained lawful permanent residency based on that case.

**Analysis:**

- (1) The Abuser has not established the existence of a VAWA application. The abuser’s demand that the Government confirms the existence of such an application would itself undermine the confidentiality protections of VAWA. Even assuming that the victim’s alleged Adjustment of Status application was based upon VAWA, it was mooted, not denied on its merits. When DHS granted lawful permanent residency to the abuser’s wife, the grounds upon which she was granted that relief did not control whether any VAWA confidentiality protection she as a victim is entitled to receive continues. Her being granted status means DHS does not have to finally adjudicate any VAWA case that may have been filed. However, her alleged VAWA-related adjustment of status application would still be afforded VAWA confidentiality-based protection if the victim was entitled to VAWA confidentiality protection. In short, given that the abused wife’s alleged VAWA-related Adjustment of Status petition was not denied on its merits but mooted by granting a separate permanent residency

application, such an alleged application does not fall under the VAWA confidentiality exception.

- (2) Any VAWA application that the abused wife may have filed would also prevent disclosure. Documents submitted by the abuser were consistent with the possibility that the abuser's wife may have already been granted status as a VAWA self-petitioner and lawful permanent residency based on her approved VAWA application. Under this category, her entire immigration file would already be protected under VAWA confidentiality provisions. The abuser has not identified any exception that could even arguably apply to a granted VAWA self-petitioner application. Thus, the court must deny the abuser's motion.

### [Sample Amicus Curiae Brief VAWA Confidentiality and Family Court Discovery \(2011\)](#)

**Overview:** This sample brief was adapted from an Amicus Curiae Brief Developed by Legal Momentum in support of a victim's motion for a Protective Order in a family court case. This was a case in which in divorce proceedings, the abuser sought to compel discovery of the existence and substance of any VAWA application that the victim may have filed. The abuser's counsel in the family court case filed requests for production, interrogatories, and a deposition notice to depose the victim. This brief was filed in before the trial court judge in the family court case and has been used as a basis for trial court brief resulting in denial of discovery of VAWA confidentiality protected information in family court cases by trial courts.

#### **Analysis:**

- (1) VAWA's confidentiality protections expressly prohibit the abuser from inquiring into the existence or substance of any VAWA, T Visa, or U Visa application the victim filed for immigration relief. VAWA's confidentiality protections are strict and broad by prohibiting the "use by or disclosure to anyone of any information," §1367 prevents abusers from discovering the substance, as well as existence, of any VAWA confidentiality protected application for immigration relief.
- (2) No exception to VAWA confidentiality applies to this family court case [i.e. legitimate law enforcement purposes, census information, Congressional oversight, etc.]. Congress did not authorize an accused batterer to obtain discovery on their victim's confidential information during civil or family court litigation.
- (3) Legislative history confirms that VAWA confidentiality prevents accused batterers from using the immigration system against their victims. There is no congressional intent or justification to allow the accused batterer, in this case, to breach VAWA confidentiality and inquire into the existence/substance of any immigration application the victim may have filed that receives as a matter of federal law VAWA confidentiality protections.

### [Sample Amicus Curiae Criminal Case Brief of Legal Momentum, Sanctuary for Families, and NIWAP \(2012\)](#)

**Overview:** Brief submitted on behalf of the abused immigrant spouse in support the Department of Homeland Security's Motion to Dismiss. In this case, an abusive spouse was indicted in Brooklyn, NY, for a rape he allegedly committed against his spouse. Through this mandamus

proceeding, the abuser sought to compel the Department of Homeland Security to produce any VAWA self-petition his spouse may have filed, pursuant to a subpoena issued by the Kings County Criminal Court. The Federal Court ultimately granted the DHS motion to dismiss and denied the discovery sought by the abuser in a sealed decision.

## Analysis:

- (1) VAWA's confidentiality protections expressly prohibit an abuser from acquiring any VAWA, T Visa, or U Visa status applications or petitions for relief the victim may have filed. Amongst the benefits provided, Congress provided these victims with the right to confidentiality protections prohibiting the disclosure of any information related to a VAWA confidentiality-protected application for relief, including to any third party. VAWA's confidentiality protections are strict and broad and cannot be compelled for use in either criminal/civil proceedings. Because the express language of §1367(a)(2) prevents the abuser from acquiring any VAWA application for relief, this Court should grant DHS's Motion to Dismiss.
- (2) None of the exceptions to VAWA confidentiality apply here.
- (3) The abuser has no constitutional right to obtain information protected by VAWA confidentiality. While an individual prosecutor is presumed to have knowledge of information gathered in connection with their office's investigation of the case and has a duty to learn of evidence known to the others acting on the government's behalf, this presumption does not extend to information acquired by federal agencies which were not involved in the investigation or trial.
- (4) Legislative history confirms that VAWA confidentiality prevents accused batterers from using the immigration system against their victims. The abuser argues that it is clear from the legislative history that the thrust of the confidentiality provision at issue is to prevent the undermining of immigration proceedings and removal cases, not state court criminal matters; the abuser is incorrect for at least two reasons. First, giving the abuser the victim's confidential information would interfere with any VAWA application for relief the victim may have filed. Second, VAWA confidentiality prohibits the use by or disclosure to anyone of any information relating to a VAWA application for relief. Further, in terms of the legislative history in enacting VAWA 1994, Congress understood that confidentiality protections were needed in light of the dangers of domestic violence faced by immigrant victims. In addition, Congress enacted the VAWA confidentiality provisions to protect immigrant victims from any retaliation their abusers might take in response to the exercise of self-petition rights. Next, in reauthorizing VAWA in 2000 and 2005, Congress strengthened VAWA confidentiality and expanded its coverage.