

IN THE SUPERIOR COURT OF COBB COUNTY  
STATE OF GEORGIA

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██████████

Plaintiff,

Civil Action

v.

Case Number 11-1-784-05

██████████,

Defendant.

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**AMICUS CURIAE BRIEF OF LEGAL MOMENTUM**

**I. INTRODUCTION**

Legal Momentum submits this brief as *Amicus Curiae* in support of Defendant's Motion for a Protective Order. Legal Momentum is a non-profit advocacy organization that has been closely involved with the enactment of Violence Against Women Act ("VAWA") legislation and VAWA confidentiality protections. Congress enacted these protections to ensure that immigration protections for immigrant victims included assurances that information about the existence of a VAWA immigration case and confidential immigration application materials are not disclosed to the abusive spouses of applicants.

In this case, the Plaintiff has been charged with battery for violence he allegedly committed against his wife, the Defendant. Through divorce proceedings, he now seeks to compel the existence and substance of any VAWA application the Defendant may have filed with requests for production, interrogatories, and a deposition notice. But VAWA's confidentiality protections expressly prohibit the disclosure of *any information* related to a VAWA application for relief to *any third party* — especially the accused batterer. As the legislative history confirms, Congress's paramount concern in enacting VAWA confidentiality was to prevent disclosure of an immigrant victim's confidential information to the accused batterer. This Court should grant Defendant's Motion for a Protective Order.

## **II. INTEREST OF THE AMICUS CURIAE**

Legal Momentum is the nation's oldest legal advocacy organization dedicated to advancing the rights of women. By helping to create a legal framework that helps immigrant victims of violence against women end the destructive role of violence in their lives, Legal Momentum strives to protect and expand the rights of immigrant women and their children. To help immigrant women improve their lives and future prospects in their new country, Legal Momentum focuses on four core interconnected areas: violence against women, immigration, economic empowerment, and access to justice. Based in part on case studies and field work, Legal Momentum examines and analyzes the roles of immigration, public benefits, and family and criminal laws in the lives of immigrant women.

Victims of domestic violence, sexual assault, trafficking and other crimes are among the issues that are the focus of Legal Momentum's national efforts to improve access to legal immigration status for immigrant women and children. Through a number of mechanisms, including advocacy with Congress, the Department of Homeland Security ("DHS"), the Department of Justice, Health and Human Services, the Department of Housing and Urban Development, the Department of Education, and the White House, Legal Momentum advocates for regulatory, legislative, and administrative improvements that benefit immigrant women. In the context of immigrant victims of domestic violence, Legal Momentum identifies areas of needed legal reform, works with members of Congress to craft legislative solutions, collects stories documenting immigrant women's experiences illustrating the need for change, and trains and provides technical assistance to advocates, attorneys and justice system professionals across the country to ensure that immigrant victims can access the relief Congress designed to protect them. Legal Momentum then works with federal agencies to craft policies and procedures that implement federal law protections for immigrant victims of domestic violence, sexual assault, human trafficking and other crimes in a manner that will enhance safety and access to legal remedies under immigration, family and public benefits laws for immigrant women and their children.

Starting in 1994 with the enactment of the Violence Against Women Act (“VAWA”),<sup>1</sup> Legal Momentum has been at the forefront of legislative and administrative advocacy securing legal protections for victims of violence against women. To improve upon the original VAWA provisions and stop perpetrators of violence against women from using threats of deportation to harm victims, Legal Momentum advocated with Congress to create the VAWA confidentiality protections enacted in 1996.<sup>2</sup> Since the enactment of VAWA confidentiality, Legal Momentum has continued to advocate for subsequent improvements and expansions to VAWA confidentiality, which were enacted as part of the Violence Against Women Act reauthorizations in 2000<sup>3</sup> and 2005,<sup>4</sup> and has been repeatedly called upon by the U.S. Department of Homeland Security, the Board of Immigration Appeals and the Executive Office of Immigration Appeals to train immigration judges, immigration officers adjudicating cases involving immigration relief for immigrant victims, and Department of Homeland Security Trial Attorneys on VAWA’s confidentiality protections. The VAWA provisions and confidentiality protections discussed herein arise from this group of statutes.

**III. VAWA’S CONFIDENTIALITY PROTECTIONS EXPRESSLY PROHIBIT THE PLAINTIFF FROM INQUIRING INTO THE EXISTENCE OR SUBSTANCE OF ANY VAWA, T-VISA AND U-VISA APPLICATION FOR RELIEF.**

Congress enacted VAWA to provide a “mechanism for women who have been battered or subjected to extreme cruelty to achieve lawful immigration status independent of an abusive spouse.” *Hernandez v. Ashcroft*, 345 F.3d 824, 827 (9th Cir. 2003). Among its substantive protections, VAWA provides battered immigrants and other immigrant crime victims with two

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<sup>1</sup> See Violent Crime Control and Law Enforcement Act (“VAWA 1994”), Pub. L. No. 103-322, 108 Stat. 1796 (1994).

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

<sup>3</sup> Victims of Trafficking and Violence Protection Act of 2000 (“VAWA 2000”), Pub. L. No. 106-386, 114 Stat. 1464 (2000).

<sup>4</sup> Violence Against Women and Department of Justice Reauthorization Act of 2005 (“VAWA 2005”), Pub. L. No. 109-162, 119 Stat. 2960 (2005).

significant rights: (1) the right to “self-petition” to obtain lawful immigration status through one of the specific types of immigration status created to protect immigrant victims of violence against women; and (2) the right to strict confidentiality protections prohibiting the disclosure of *any information* related to any VAWA confidentiality protected application for relief. The primary forms of VAWA immigration relief include:<sup>5</sup>

- The VAWA self-petition that helps battered spouses and children of U.S. citizen and lawful permanent residents;
- The T-visa and continued presence offering protections for human trafficking victims;
- The U-visa designed to help immigrant victims of domestic violence, sexual assault, trafficking, and an array of other mostly violent crimes; and
- Cancellation of removal and suspension of deportation for immigrant victims in removal proceedings before immigration courts.

Through VAWA, Congress gave battered immigrant spouses and other immigrant crime victims the right to “self-petition” for themselves and their children. *See, e.g.*, 8 U.S.C. § 1154(a)(1)(A)(i)-(iii) (setting forth procedures for self-petitioners). Immigrant victims of domestic violence can now secure visas, lawful permanent residence status and other immigration benefits without the approval, assistance, or cooperation from their abusers. *See id.*

Congress also enacted measures to protect the confidentiality of any filed VAWA application for relief. These confidentiality measures prohibit federal authorities from using or disclosing *any information* related to a VAWA application to *any third party*.

#### § 1367. Penalties for disclosure of information

##### (a) In general

Except as provided in subsection (b) of this section, *in no case may* the Attorney General, or any other official or employee of the Department of Justice, the Secretary of Homeland Security, the Secretary of State, or any other official or

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<sup>5</sup> This Brief uses the term “VAWA” to include all forms of immigration relief available for the protection of immigrant victims including the VAWA self-petition, VAWA cancellation of removal and suspension of deportation, the T-visa, continued presence, the U-visa and battered spouse waivers.

employee of the Department of Homeland Security or Department of State (including any bureau or agency of either of such Departments) –

(2) *permit use by or disclosure to anyone* (other than a sworn officer or employee of the Department, or bureau or agency thereof, for legitimate Department, bureau, or agency purposes) *of any information which relates to an alien who is the beneficiary of an application for relief* under paragraph (15)(T), (15)(U), or (51) of section 101(a) of the Immigration and Nationality Act [8 U.S.C. § 1101(a)(15)(T), (U), (51)] or section 240A(b)(2) of such Act [8 U.S.C. § 1229b(b)(2)].

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

VAWA's confidentiality protections are "strict." *Hawke v. U.S. Dep't of Homeland Sec.*, No. C-07-03455 RWM, 2008 U.S. Dist. LEXIS 87603, at \*19 (N.D. Cal. Sept. 29, 2008). They are also broad: by prohibiting the "use by or disclosure to *anyone . . . of any information*," § 1367 prevents abusers from discovering the substance, as well as existence, of any VAWA application for relief.

Because the express language of § 1367(a)(2) prevents the Plaintiff from inquiring into the existence or substance of any VAWA application for relief, this Court should grant Defendant's Motion for a Protective Order.

#### **IV. NO EXCEPTION TO VAWA CONFIDENTIALITY APPLIES TO THIS CASE.**

"Congress's goal in enacting VAWA was to eliminate barriers to women leaving abusive relationships." *Hernandez*, 345 F.3d at 841. To that end, "one of the primary purposes of the VAWA confidentiality provision" is "to prohibit disclosure of confidential application materials to the accused batterer." *Hawke*, 2008 U.S. Dist LEXIS at \*19. These legislative protections would be pointless if the Plaintiff, the accused batterer in the case, could obtain whatever VAWA confidential information the victim may have simply by propounding interrogatories, requests for production, and a deposition notice.

None of the limited exceptions to VAWA confidentiality will compel Plaintiff's discovery. Though Congress enacted exceptions to VAWA confidentiality to permit the disclosure of confidential information for "legitimate law enforcement purpose[s]," census information, Congressional oversight, and to assist with an immigrant victim's eligibility for certain public benefits, 8 U.S.C. § 1367(b), Congress did not authorize an accused batterer to

take discovery on his victim's confidential information during ordinary civil or family court litigation.

Nor can such an exception be inferred from the language of 8 U.S.C. § 1367. Prior accused batterers have argued, unsuccessfully, that § 1367(b)(3) — which permits “disclosure of information in connection with judicial review of a determination in a manner that protects the confidentiality of such information” — authorizes civil and criminal discovery into a victim's confidential VAWA information. *Hawke*, 2008 U.S. Dist. LEXIS at \*16. But this argument misunderstands how the word “*determination*” in § 1367(b)(3) is antecedent to the phrase “*determination* of admissibility or deportability of an alien under the Immigration and Nationality Act” in § 1367(a)(1). Because “a determination” under § 1367(b)(3) “refers to the government's determination of a VAWA self-petitioner's immigration status,” this exception only applies to judicial review in immigration proceedings. *See Hawke*, 2008 U.S. Dist. LEXIS at \*16-\*20 (denying accused batterer's request to produce wife's immigration records for use in criminal battery proceedings). Section 1367(b)(3)'s exception is for the same reasons inapplicable to divorce proceedings in family court.

Section 1367(b)(3)'s exception is further inapplicable because the compelled disclosure of a victim's VAWA information to her accused batterer could never qualify as “a manner that protects the confidentiality of such information.” *See* 8 U.S.C. § 1367(b)(3). The confidentiality of that information would be immediately lost upon the accused batterer's receipt of it.

VAWA confidentiality is a protection to be asserted by an immigrant victim, not just a prohibition on governmental action. Congress recognized as much in allowing immigrant victims to waive their rights to VAWA confidentiality. *See* 8 U.S.C. § 1367(b)(4). And absent voluntary disclosure by a victim, information protected by VAWA should remain confidential, regardless of whether it resides with the government or the victim. To hold otherwise would defeat the paramount purpose of VAWA confidentiality — “to prohibit disclosure of confidential application materials to the accused batterer.” *Hawke*, 2008 U.S. Dist LEXIS at \*19.

Because none of the exceptions to VAWA confidentiality applies in this case, the Court should grant Defendant's Motion for a Protective Order.

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

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

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

H.R. Rep. No. 109-233, at 120 (emphasis added); *see also* 151 Cong. Rec. E2605, E2607 (daily ed. Dec. 18, 2005) (statement of Rep. Conyers). As this legislative history confirms, allowing accused batterers, like the Plaintiff, to obtain VAWA confidential information from a victim would undermine years of expansive confidentiality protection that Congress has created.

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

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

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

H.R. Rep. No. 103-395, at 26-27.<sup>6</sup>

In response to this systemic problem, Congress gave immigrant victims of domestic abuse the right to self-petition for a lawful permanent residence status and other immigration benefits without the approval, assistance, or cooperation from their abusers. *See* Pub. L. No. 103-322, § 40701(a), 108 Stat. 1796, 1953-54. At the same time, Congress recognized the concomitant need for confidentiality protections to prohibit the disclosure of VAWA application materials to an accused batterer. Congress commissioned the Attorney General to study “the means by which abusive spouses may obtain information concerning the addresses or locations of estranged or former spouses,” *id.* § 40508(a), 108 Stat. at 1950, and analyze how to “creat[e] effective means of protecting the confidentiality of information concerning the addresses and locations of abused spouses to protect such persons from exposure to further abuse,” *id.*<sup>7</sup>

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

VAWA 1994’s confidentiality studies culminated in the VAWA confidentiality provisions enacted in 1996, which are now codified at 8 U.S.C. § 1367. In presenting the amendment that would ultimately become § 1367, Representative Pat Schroeder emphasized how § 1367 addressed “the very essential issue of confidentiality vis-à-vis battered women and children. *I think we all know confidentiality is a matter of life and death whether or not they are citizens or whether they are immigrants.*” *See* Full Committee Mark Up: Hearing on H.R. 2202

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<sup>6</sup> These dangers persisted for decades because U.S. immigration law was rooted in the common law doctrine of coverture — the antiquated notion that “the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband, under whose wing, protection, and cover, she performs everything.” Leslye E. Orloff & Janice V. Kaguyutan, *Offering A Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 Am. U. J. Gender Soc. Pol’y & L. 95, 100 (2002) (quoting William Blackstone, *Commentaries on the Laws of England* 432 (1765)).

<sup>7</sup> Further VAWA legislation addressed the confidentiality of communications between victims and their counselors, *id.* § 40153, 108 Stat. at 1921, and protected the confidentiality of a victim’s address, *id.* § 40281, 108 Stat. at 1938-39.

Before the House Judiciary Committee, 104th Cong. (Sept. 19, 1995) (emphasis added). Confidentiality was essential because “giving the abuser the ability to influence the INS would give the abuser control over the victim’s status.” *Id.* (emphasis added). As the debate continued, Senator Paul Wellstone echoed that “[i]t would be unconscionable for our immigration laws to facilitate an abuser’s control over his victim. It would be unconscionable for our immigration laws to abet criminal perpetrators of domestic violence. It would be unconscionable for our immigration laws to perpetuate violence against women and children.” 142 Cong. Rec. S4306 (1996) (statement of Sen. Wellstone).

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

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

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

Congress reauthorized VAWA in 2000 “to improve on efforts made in VAWA 1994 to prevent immigration law from being used by an abusive citizen or lawful permanent resident spouse as a tool to prevent an abused immigrant spouse from reporting abuse or leaving the abusive relationship.” 146 Cong. Rec. S10195 (2000) (“Title V, the Battered Immigrant Women Protection Act of 2000 – Section-By-Section Summary”). As part of these improvements, Congress expanded the right of self-petition to include immigrant victims that previously did not qualify under VAWA 1994. Pub. L. No. 106-386, §§ 1501-1513, 114 Stat. 1464, 1518-37. VAWA confidentiality was also extended to these newly-qualified victims. *Id.*

Congress in 2000 also created the U-visa program to provide temporary immigration benefits to victims who had suffered abuse as a result of certain crimes, and were assisting law enforcement in the investigation or prosecution of those crimes. *Id.* § 1513, 114 Stat. 1533-37. At the same time, Congress amended VAWA’s confidentiality provisions to cover this new form of immigration relief. *Id.* The most recent memo issued by the Department of Homeland Security on VAWA confidentiality announced the creation of a red flag “384” notification system that designed to alert immigration officials of VAWA confidentiality protected cases. That system guarantees that VAWA confidentiality protections attach upon filing of a VAWA confidentiality protected immigration case and continue indefinitely. VAWA confidentiality only ends if the case is dismissed on the merits. *See Hawke*, 2008 U.S. Dist. LEXIS at \*19-\*20 (“[W]hen Congress wrote the word ‘denied,’ [in § 1367(a),] the word meant ‘denied *on the merits.*’”) (emphasis in original); DHS Broadcast Message on New 384 Class of Admission Code, available at <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/message%20to%20DHS%20384%20COA%20Final%2012.21.10.pdf/view?searchterm=384> (last visited June 15, 2011) (emphasizing that VAWA’s “confidentiality provisions will continue to apply to the individual until all final appeal rights are exhausted”).

In reauthorizing VAWA in 2005, Congress introduced many additional protections to VAWA confidentiality. Among these increased protections, Congress expanded VAWA confidentiality under § 1367 to include newly-created forms of immigration relief, Pub. L. No. 109-162, § 817, 119 Stat. 2960, 3060; further expanded the definition of VAWA self-petitioners (thus extending VAWA confidentiality), *id.* §§ 811, 817, 119 Stat. at 3057, 3060; added penalties to § 1367, *id.* § 817, 119 Stat. at 3060; and required DHS to develop policies, protocols, and training to implement VAWA confidentiality, *id.* § 817, 119 Stat. at 3060. Again, Congress added these increased protections “*to ensure that abusers and criminals cannot use the immigration system against their victims.*” H.R. Rep. No. 109-233, at 120 (emphasis added); *see also* 151 Cong. Rec. E2605, E2607 (daily ed. Dec. 18, 2005).

This legislative history confirms that VAWA confidentiality is a vital component in enabling immigrant victims to escape conditions of domestic violence, overcoming the systemic dangers in U.S. immigration law, and ensuring that abusers and criminals cannot use the immigration system against their victims. In light of this Congressional intent, there is no justification, legal or otherwise, for permitting the accused batterer in this case to breach VAWA confidentiality and inquire into the existence and substance of any VAWA, T-visa, U-visa or any other immigration application for relief the Defendant may have filed. The Court should grant the Defendant’s Motion for a Protective Order.

## **VI. CONCLUSION**

For the reasons stated, Legal Momentum respectfully requests that this Court grant the Defendant’s Motion for a Protective Order, and enter the Defendant’s Proposed Protective Order as written.

Respectfully submitted this the 16th day of June, 2011

**Kilpatrick Townsend & Stockton LLP**

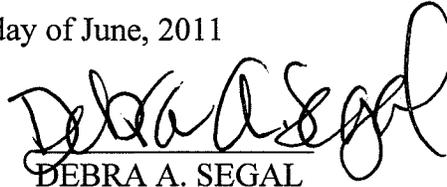
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**CERTIFICATE OF SERVICE**

This certifies that a copy of the foregoing *Amicus Curiae Brief of Legal Momentum* was served on counsel of record for the Plaintiff today by first class mail with sufficient postage, addressed as follows:

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