Cazorla v. Koch Foods of Mississippi, LLC: Where Discovery Issues Meet Current Immigration Policy

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In 2016, the Fifth Circuit addressed whether a district court's finding that Rule 26 of the Federal Rules of Civil Procedure allowed discovery of U-visa information from individual plaintiffs. The court declined to impose an order of its own. Instead, it remanded the case to the district court to devise an approach to U-visa discovery that "adequately protects the diverse and competing interests at stake."[1]

The Fifth Circuit case arose when workers at a Koch Foods plant brought a Title VII suit against Koch. They alleged Koch supervisors made it common practice to grope female workers, assault them, and often offer female workers money or promotions for sex. Koch defended, arguing that workers fabricated their accusations in hopes of securing U-visas, an incentive that those who assist the government in investigating qualifying crimes may receive under the Violence Against Women Act. And, Koch argued that the Equal Employment Opportunity Commission solicited and certified these false claims to build a high-profile, class-based discrimination suit against the company. The case highlights by far the most contentious issue regarding U-visas under the current administration, and conservative administrations in recent years: that mass "fraud" has destroyed United States immigration procedures.

Rather than remanding the case, the Fifth Circuit should have imposed a total bar on the discoverability of this information because the idea that "mass" fraud in the U-visa system is exaggerated, and the importance of upholding the legislative intent behind the program outweighs the relevance of such information.

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1. Cazorla v. Koch Foods of Miss., L.L.C., 838 F.3d 540, 564 (5th Cir. 2016).

INTRODUCTION

Under 8 U.S.C. § 1101(a)(15)(U), an alien[2] who has suffered

2. The statue uses the word "alien," and, to mirror the statute, this Note uses the term "alien" to describe those who are applying for U-visas. Although the term alien has a negative connotation, that is not my intention. It should also be noted that U-visas under 8 U.S.C. § 1101(a)(15)(U) are used more to protect aliens, not nonimmigrants. Nonimmigrants have some sort of legal status

"substantial" physical or mental abuse as the result of being a victim of a crime may file an application granting the applicant a temporary visa, designated as a U-visa. If the alien meets the statute's requirements, the applicant will be eligible for employment authorization. Then, after three years of U-visa status and continuous physical presence in the United States, the applicant may apply for lawful permanent residency.[3] When Congress passed this statute, it did so knowing that aliens were understandably reluctant to come forward to law enforcement agencies when they are the victims of crimes for fear of deportation.[4] Congress explicitly stated that alien women and children were often targeted victims of sexual assault and domestic violence and needed further protections than what was originally given in the Violence Against Women Act of 1994 (VAWA).[5] From that understanding, Congress stated the purpose of the Act and the U-visa program was to "encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens."[6]

A concern that arises from all visa applicants, including the U-visa, is

through travel visas or work visas; therefore, they are more likely to come forward because they are less likely to be subject to deportation. However, as stated in an amicus curiae brief filed on behalf of the plaintiffs in *Cazorla*, VAWA's confidentiality protections help both documented and undocumented immigrant crime victims. Brief of Amici Curiae LatinoJustice PRLDEF et al. in Support of Appellant EEOC Seeking Reversal of Decision Allowing Discovery of Confidential Information Disclosed in U Visa Applications at 53, Cazorla v. Koch Foods of Miss., L.L.C., 838 F.3d 540 (5th Cir. 2016) (No. 15-60562), 2015 WL 6506235 [hereinafter Brief of LatinoJustice PRLDEF]. "If the victim leaves or loses their employment or does not continue with school or work as a result of the crime victimization, the victim can become undocumented. . . . Using discovery in civil cases as a means by which perpetrators and employers can directly force victims to reveal information that they were assured would remain confidential will only enhance their apprehension." *Id.*

3. 8 U.S.C. § 1255(l)(1)(A) (2012).

4. *See* Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, § 1502, 114 Stat 1464, 1518 (2000) (citing two major goals: "Congress finds that—(1) the goal of the immigration protections for battered immigrants included in the Violence Against Women Act of 1994 was to remove immigration laws as a barrier that kept battered immigrant women and children locked in abusive relationships; (2) providing battered immigrant women and children who were experiencing domestic violence at home with protection against deportation allows them to obtain protection orders against their abusers and frees them to cooperate with law enforcement and prosecutors in criminal cases brought against their abusers and the abusers of their children without fearing that the abuser will retaliate by withdrawing or threatening withdrawal of access to an immigration benefit under the abuser's control." (citation omitted)).

5. *See id.* (citing a third major goal of the U-visa program: "[T]here are several groups of battered immigrant women and children who do not have access to the immigration protections of the [VAWA] which means that their abusers are virtually immune from prosecution because their victims can be deported as a result of action by their abusers and the Immigration and Naturalization Service cannot offer them protection no matter how compelling their case under existing law.").

6. *Id.*

an issue of fraud.[7] U-visa opponents allege that aliens file fraudulent accusations against so-called aggressors to obtain U-visas, and therefore stay in the United States under false pretenses.[8] Many members of Congress have found fault with the prior administration's handling of the U-visa program and have called on the Department of Homeland Security (DHS) to revamp the program, stating, "fraud and abuse of the program can lead to unjustified approvals leaving legitimate victims in the shadows."[9] Just how fraudulent the program really is remains a source of debate.[10] The United States Citizenship and Immigration Services (USCIS) is only allowed to approve 10,000 U-visas every year, making

7. Those seeking visas for asylum purposes are just one example of how fraud plagues the immigration system. In a recent discussion held by the Center for Immigration Studies with then-acting Director of Immigration and Customs Enforcement (ICE) Thomas Homan, Homan stated the following regarding asylum fraud:

> [A] vast majority of these families [from Central America] don't show up in immigration court and they get an order in absentia, because they—not only did they enter the country illegally and go into hiding, they won't appear in front of an immigration judge. . . .
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> . . . [L]ook at the facts of what's going on, look at how many—how many families do not get a final fear finding from a judge—because most don't; like 80 percent of them do not. . . .
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> . . . .
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> So there's a lot of fraud going on. And they know it, and they're certainly not going to show up to a judge and, you know, present a fraudulent case. And 80 percent don't get a fear finding. . . . I think a majority of them are taking advantage of a low threshold, and there's a lot of asylum fraud going on, and they're hiding. . . .
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> . . . .
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> They figured out the loopholes. They figured that, as I just said, they can come and have due process at great taxpayer expense and just disappear into society.

Jessica M. Vaughan & Tom Homan, *Immigration Newsmaker: A Conversation with ICE Deputy Director Tom Homan*, CTR. FOR IMMIGR. STUD. (June 6, 2018), https://cis.org/Transcript/Immigration-Newsmaker-Conversation-ICE-Deputy-Director-Tom-Homan.

8. *See* Malia Zimmerman, *Immigrants Preying on Americans with False Tales of Abuse to Stay in US, Experts Say*, FOX NEWS (Sept. 8, 2016), https://www.foxnews.com/us/immigrants-preying-on-americans-with-false-tales-of-abuse-to-stay-in-us-experts-say (claiming the rise in U-visa applications is not because there has been a wave of domestic violence toward immigrants, but because there is fraud in the system); Alex Pappas, *Immigration Attorney Pleads Guilty to Filing More Than 250 False Visa Applications*, FOX NEWS (Nov. 30, 2017), https://www.foxnews.com/politics/immigration-attorney-pleads-guilty-to-filing-more-than-250-false-visa-applications (reporting on an Indiana attorney who filed numerous false visa applications).

9. Letter from Senator Charles E. Grassley, Chairman, Senate Committee on the Judiciary, and Representative Bob Goodlatte, Chairman, House Committee on the Judiciary, to Department of Homeland Security Secretary Jeh Johnson (Dec. 20, 2016) [hereinafter Grassley Letter], *available at* https://www.grassley.senate.gov/news/news-releases/grassley-goodlatte-probe-u-visa-immigration-parole-practices-following-fraud.

10. *See infra* Part IV (discussing whether the fraud allegations are truly as bad as is sometimes reported).

it one of the most limited visa programs administered by the DHS.[11] Opponents of the program now have the Trump administration's support, and it has come to light in recent months that many aliens are in threat of being deported despite having pending U-visa applications with USCIS.[12] Immigration policies have radically changed, and will continue to do so, as the administration attempts to follow through on its policies.[13] With it, this "fraud" argument has permeated through Capitol Hill and Twitter along with other charged rhetoric about immigration and aliens.[14]

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11. Congress has statutorily capped the number of U-visas available at 10,000 per fiscal year. 8 U.S.C. § 1184(p)(2)(A) (2012). USCIS issued all 10,000 U-visas in 2017. *USCIS Grants All Available U Visas for Fiscal Year 2017*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 30, 2017), https://www.uscis.gov/news/alerts/uscis-grants-all-available-u-visas-fiscal-year-2017. However, other visas, such as those for specialty occupations, DOD cooperative research and development project workers, and fashion models, are capped as high as 65,000 per fiscal year. *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 3, 2017), https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models.

12. *See* John Bowden, *ICE Stepping Up Deportation of Crime Victims Requesting Visas: Report*, THE HILL (July 19, 2018, 9:53 AM), https://thehill.com/latino/397841-ice-stepping-up-deportation-of-crime-victims-awaiting-visa-report (reporting that ICE has apparently changed its policy under the Trump administration to permit the deportation of aliens who have applied for a U-visa); Alexandra Villarreal, *US Deporting Crime Victims While They Wait for U Visa*, CHI. SUN TIMES (July 20, 2018, 7:23 AM), https://chicago.suntimes.com/immigration/us-deporting-crime-victims-u-visa-bernardo-reyes-rodriguez-donald-trump/ (noting immigration attorneys are baffled by ICE's abrupt change of policy as their clients are deported despite the ongoing U-visa application process).

13. President Trump has made many changes to US immigration policy during the first two years of his presidency. Changes included ending the protection for over 200,000 Salvadorans who have been in the United States since at least 2001. Rafael Bernal, *Trump Officials End Immigration Protection for 260k Salvadorans*, THE HILL (Jan. 1, 2018, 10:12 AM), http://thehill.com/latino/367892-report-trump-to-end-immigration-protection-for-200000-salvadorans. Temporary Protected Status (TPS) was awarded to Salvadoran civil war refugees who were in the United States legally or illegally. *Id.* For a more comprehensive report on potential immigration reforms under the current administration, see DAVID WEISSBRODT, LAURA DANIELSON & HOWARD S. MYERS III, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL III–VIII (7th ed. 2017) (discussing the potential impact of various immigration reforms under consideration by the Trump administration). President Trump's numerous attempts at banning immigrants from certain Middle Eastern countries had been blocked at the federal courts numerous times, but the Supreme Court approved a narrowed version of the ban. *See Timeline of the Muslim Ban*, ACLU https://www.aclu-wa.org/pages/timeline-muslim-ban; Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

14. Students at UCLA conducted a study that looked at more than 6000 tweets and 300 speeches by Trump during both his campaign and presidency. Ronn Blitzer, *University Study Analyzes 6,000 Trump Tweets Which 'Prove' Racial Bias in Immigration Stance*, LAW & CRIME (Dec. 29, 2017, 11:45 AM), https://lawandcrime.com/immigration/university-study-analyzes-6000-trump-tweets-which-prove-racial-bias-in-immigration-stance/. In summary, their report concludes that Trump's rhetoric is as follows: "America, the once great castle on the hill, is besieged. Its walls are broken, its border lays open, and it is overrun by ruthless invaders. . . ." UCLA César E. Chávez Dep't of Chicana & Chicano Studies, *Our Findings*, UCLA (Dec. 21, 2017),

The importance of the Fifth Circuit's decision in *Cazorla v. Koch Foods of Mississippi, L.L.C.* is nuanced.[15] *Cazorla* implicates the connection between discovery issues and U-visas in a way that could be easily overlooked. There is virtually no precedent concerning whether U-visas are discoverable, as discovery issues are often resolved in the lower courts.[16] And the issue involves both the Federal Rules of Civil Procedure and statutory provisions. Under Federal Rule of Civil Procedure 26, a judge can restrict discovery "for good cause . . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[17] Under 8 C.F.R. § 214.14, the regulation which implements the U-visa program, "[a]gencies receiving information under this section . . . are bound by the confidentiality provisions and other restrictions set out in 8 U.S.C. 1367."[18] The combination of 8 C.F.R. § 214.14 and 8 U.S.C. § 1367(a)(2), the statute which prohibits the "use by or disclosure to anyone . . . of any information which relates to an alien who is the beneficiary of an application for relief under paragraph . . . (15)(U),"[19] yields *Cazorla*. The Fifth Circuit in *Cazorla* attempted to clarify what is discoverable from individual plaintiffs and certifying agencies like the Equal Employment Opportunity Commission (EEOC) when it comes to U-visa discovery,[20] based on virtually no precedent.[21] Relying on the statutes, and trying to take into account the public policy reasons for U-visa confidentiality, the Fifth Circuit ultimately reversed

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https://www.thepresidentsintent.com/our-findings/.

15. Cazorla v. Koch Foods of Miss., L.L.C., 838 F.3d 540 (5th Cir. 2016).

16. There are, however, a number of circuit court cases arising from discovery disputes that afford district courts wide discretion in discovery matters. *See, e.g.*, Bradley v. King, 556 F.3d 1225, 1229 (11th Cir. 2009) (stating that "[a] district court has wide discretion in discovery matters and our review is 'accordingly deferential'" (quoting Harbert Int'l, Inc. v. James, 157 F.3d 1271, 1280 (11th Cir. 1998))); Gov't of Ghana v. ProEnergy Servs., LLC, 677 F.3d 340, 344 (8th Cir. 2012) (stating that "[a]ppellate review of a district court's discovery rulings is 'both narrow and deferential'" (alteration in original) (quoting Roberts v. Shawnee Mission Ford, Inc., 352 F.3d 358, 360 (8th Cir. 2003))).

17. FED. R. CIV. P. 26(c)(1).

18. 8 C.F.R. § 214.14(e)(2) (2018).

19. In full, 8 U.S.C. § 1367(a)(2) states that no government agency may

> 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) (2012).

20. *Cazorla*, 838 F.3d at 547.

21. *Id.* at 555 (noting that "this dispute presents an issue of first impression in our circuit").

and remanded the lower court order.[22]

This Note analyzes and critiques the decision reached by the Fifth Circuit in *Cazorla*, as well as its impact on the future of the U-visa program. The Fifth Circuit tried, but ultimately failed, to account for the important public policy implications of allowing the discovery of U-visa information from the individual plaintiffs. An absolute bar on discovery of this information should have been awarded, and it was well within the court's power to do so. It is the victims of such abuse, beyond just the workplace abuse found in *Cazorla*, who will ultimately suffer as well as the public at large.

Part I of this Note discusses the legislative history and intent of the U-visa program,[23] the intersection between the U-visa and discovery,[24] the sparse relevant case law leading up to the *Cazorla* decision,[25] and the district court's opinion.[26] Part II discusses *Cazorla*,[27] details the dispute over the interpretation of 8 U.S.C. § 1367,[28] and parses the Fifth Circuit's Rule 26 balancing test.[29] Part III analyzes some of the missed arguments the Fifth Circuit did not rely on, compares those arguments to the ones it did rely on, and discusses possible rationales behind those decisions.[30] Part IV details the implications that the Fifth Circuit's opinion will have on the future of the U-visa program and its beneficiaries.[31]

I. TRANSITION OF U-VISA INTENT FROM A LEGISLATIVE PERSPECTIVE TO THE COURTROOM AND THE BEGINNING OF *CAZORLA*

The intersection between Rule 26 of the Federal Rules of Civil Procedure and U-visas has come up in a small number of district courts, therefore it is unsurprising that the Supreme Court has never addressed the issue.[32] Discovery issues are case specific, and making bright-line rules for whether there should be complete bars is typically best left to

22. *Id.* at 564.
23. *See infra* Part I.A (introducing the legislative history and intent of the U-visa program).
24. *See infra* Part I.B (detailing the intersection between U-visa and discovery issues).
25. *See infra* Part I.C (discussing the relevant case law).
26. *See infra* Part I.D (discussing the district court's opinion).
27. *See infra* Part II.A (introducing *Cazorla*).
28. *See infra* Part II.B (detailing the dispute over the interpretation of 8 U.S.C. § 1367).
29. *See infra* Part II.C (discussing the Fifth Circuit's Rule 26 balancing test).
30. *See infra* Part III (analyzing the Fifth Circuit's opinion).
31. *See infra* Part IV (discussing the impact of the Fifth Circuit on the U-visa program).
32. Cazorla v. Koch Foods of Miss., L.L.C., 838 F.3d 540, 559 (5th Cir. 2016) (explaining "the considerable deference" the court gives to lower courts in discovery rulings, which would explain why these issues rarely make it to the Supreme Court); *see also* McLane Co. v. EEOC, 137 S. Ct. 1159 (2017) (reviewing the enforcement of subpoenas issued by the EEOC under an abuse of discretion standard, resolving a circuit split where the Ninth Circuit traditionally used *de novo* review).

district and circuit courts.[33] The circuits are split as to the degree to which U-visas obtained through VAWA and other types of documentation information should be discoverable, especially in cases involving sexual assault, harassment, and domestic violence.[34] Leading up to *Cazorla*, through a myriad of reported and unreported cases, other courts also struggled with how much information is too much, bearing in mind the important public policy and legislative intent issues. The following section will unpack the legislative intent of U-visas, the intersection between U-visas and the workplace, the relevant case law leading to the *Cazorla* litigation, and the district court's opinion.

A. Legislative History and Intent of U-visas

U-visas were first introduced in 2000 as part of the reauthorization of VAWA and a specific addition of the Victims of Trafficking and Violence Protection Act (VTVPA).[35] VAWA was introduced in 1994, and when it was up for reauthorization in 2000, Congress created new avenues of relief for immigrant victims of human trafficking and other crimes by creating T-visas[36] and U-visas.[37] As testified on the Senate floor in 1999:

> Of course, a comprehensive effort to reduce violence against women and lessen its damages must do more than just arrest, convict and imprison abusers—we must also help the victims of violence. This legislation proposes to assist these crime victims in three fundamental ways:
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> Immediate protections from their abuser—such as battered women's shelters; help so that they can have access to the courts and legal assistance necessary to keep their abuser away from them; and

33. *See supra* note 16 (citing cases expressing deferential review of district court decisions regarding discovery disputes).

34. *See infra* note 251 (discussing the circuit split in more detail).

35. The law was officially passed in 2000 with bipartisan support. VTVPA also introduced T-visas, which are used for victims of trafficking. *See supra* notes 4–5 and accompanying text (discussing Congress's stated goals and reasons for creating the U-visa program).

36. Although both passed under the same law, a T-visa is slightly different from a U-visa. T-visas focus on applicants who are victims of trafficking, and do not require certification. 8 U.S.C. § 1101(a)(15)(U), (T) (2012). For a more in depth explanation of the differences between U- and T-visas, see Leslye E. Orloff, Kathryn C. Isom & Edmundo Saballos, *Mandatory U-visa Certification Unnecessarily Undermines the Purpose of the Violence Against Women Act's Immigration Protections and Its "Any Credible Evidence" Rules—A Call for Consistency*, 11 GEO. J. GENDER & L. 619, 643–44 (2010).

37. 8 U.S.C. § 1101(a)(15)(U), (T). Congress also created the VAWA Self-Petition for Permanent Residence, which allows for an abused spouse to no longer require the sponsorship of a US citizen or a lawful permanent resident spouse, but instead can "self-petition," enabling the victim to leave the abusive marriage and still become a permanent resident. 8 U.S.C. § 1154(a)(1)(A), (B).

> removing the "catch-22s" that may literally often force women to stay with their abuser—such as the discriminatory insurance policies which could force a mother to choose: turn-in the man who is beating me or keeping health insurance for her children.
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> . . . .
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> . . . In 1994, we worked out provisions so battered immigrant women—whose ability to stay in the country was dependent on their husbands—would not have to [choose]: stay in America and continue to get beaten or leave their husbands, end the abuse, but have to leave America (perhaps even without their children).
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> While we had fixed some aspects of this problem in 1994, there remain other aspects of immigration law which leave a woman with just such a horrible, unfair and immoral choice. . . . [W]e have worked to include in this legislation several of these corrections.[38]

The purposes of U-visas are laid out in the statute:

> (1) to remove barriers to criminal prosecutions of persons who commit acts of battery or extreme cruelty against immigrant women and children; and (2) to offer protection against domestic violence occurring in family and intimate relationships that are covered in State and tribal protection orders, domestic violence, and family law statutes.[39]

Alien victims of crimes are less likely to come forward due to fears of deportation, and Congress determined this remedy would alleviate such fears.[40] Four requirements must be met to be eligible for a U-visa: (1) the alien must have suffered substantial physical or mental abuse from having been a victim of a qualifying criminal activity;[41] (2) the alien must have

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38. 144 CONG. REC. 10,143 (1998) (statement of Senator Biden). For more pertinent quotes from the floor debate surrounding the passage of VAWA, see Katrina Castillo et al., *Legislative History of VAWA (94, 00, 05), T and U-Visas, Battered Spouse Waiver, and VAWA Confidentiality*, NAT'L IMMIGRANT WOMEN'S ADVOC. PROJECT (June 17, 2015), http://library.niwap.org/wp-content/uploads/2015/VAWA_Leg-History_Final-6-17-15-SJI.pdf.

39. Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, § 1502(b)(1)–(2), 114 Stat 1464, 1518 (2000). *See also* notes 4–5 and accompanying text.

40. A detective in Payson, Arizona testified regarding the necessity of U-visas:

> [F]or victims of sexual assault or child crimes. . . . [t]he initial call is a real problem for law enforcement. If people are not making the call to law enforcement, which happens when people don't know the U-visa is available, this is a problem. This is the hard part because people are reluctant to call since they are worried about deportation. I don't know if there are any plans to get the word out for people who need it.

Report: The Importance of the U-visa as A Crime-Fighting Tool for Law Enforcement Officials—Views from Around the Country, NAT'L IMMIGRANT WOMEN'S ADVOC. PROJECT 3 (Dec. 3, 2012) [hereinafter *NIWAP U-visa Report*], http://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Qref-UVisaCrimeFightingTool-12.03.12.pdf. This is just one of many testimonies that show how the U-visa program makes it more likely aliens will come forward.

41. DEP'T HOMELAND SEC., U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE 4 [hereinafter DHS GUIDE], https://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf. The following constitute qualifying crimes within the meaning of the VTVPA:

information concerning that criminal activity; (3) the alien must have been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the crime as certified by an appropriate agency;[42] and (4) the criminal activity violated US laws.[43]

There was a seven-year period between the creation of the U-visa program and when USCIS published the U-visa interim final rule.[44] When the interim final rule was published, it imposed many new procedures for those seeking U-visas.[45] While certifying agencies followed certain informal rules before the process was fully regulated, the standardization of the certification process brought significant changes for applicants. Now, the applicant must not only fill out a Form I-918, applicants must also provide a Form I-918, Supplement B, (Supplement Form B), filled out by a law enforcement officer, for the agency to certify their petition.[46] Supplement Form B requires law enforcement officials to describe the criminal activity involved, any injuries to the victim, the type of help that the victim is providing to law enforcement, and any involvement of the victim's family members.[47] Both Form I-918 and Supplement Form B also require that, for many questions to which an applicant answers "Yes," they must also provide

abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, fraud in foreign labor contracting, genital female mutilation, felonious assault, hostage, incest, involuntary servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual exploitation, slave trade, stalking, torture, trafficking, witness tampering, unlawful criminal restraint, and other related crimes. *Id.* at 3. The list is intentionally broad and nonexhaustive to give law enforcement flexibility. For more information on how law enforcement can "narrow" down to a qualifying crime, see GAIL PENDLETON, LEXISNEXIS, WINNING U VISAS: GETTING THE LAW ENFORCEMENT CERTIFICATION 5–6 (2008), http://www.asistahelp.org/documents/resources/ExpCommPendleton0208_B744054E28C97.pdf (noting that "the crimes listed are just general categories" and explaining strategies to ensure the crime listed in an application is a qualifying crime).

42. 8 C.F.R. § 214.14(a)(2), (b)(3) (2018). *See also* U.S. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGRATION SERVS., INSTRUCTIONS FOR FORM I-918 at 12 (2017), http://www.uscis.gov/files/form/i-918instr.pdf (detailing evidence that will be considered "helpful").

43. *See* 8 U.S.C. § 1101(a)(15)(U) (2012) (detailing the statutory requirements a victim must meet to obtain a U-visa).

44. *See infra* note 54 (discussing the issues caused by the seven-year delay in more detail); *see also* Micaela Schuneman, Note, *Seven Years of Bad Luck: How the Government's Delay in Issuing U-Visa Regulations Further Victimized Immigrant Crime Victims*, 12 J. GENDER, RACE & JUST. 465, 466 (2009) (describing the ramifications of the interim rule).

45. *See* New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014 (Sept. 17, 2007) (codified at 8 C.F.R. § 214.14 (2018)).

46. *Id.* at 53,023 (codified at 8 C.F.R. § 214.14(c)(2)(i)).

47. *See id.* (stating that the certifying agency must fill out Form I-918, Supplement B); U.S. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGRATION SERVS., FORM I-918, SUPPLEMENT B, U NONIMMIGRANT STATUS CERTIFICATION (2017) [hereinafter SUPPLEMENT FORM B], https://www.uscis.gov/sites/default/files/files/form/i-918supb.pdf.

additional information in that form.[48] If the victim meets the statutory requirements and the appropriate certifying agency approves the application, the applicant can remain in the United States for up to four years and will receive authorization to work.[49] As is common with many immigration policies, the program is plagued with certification issues, delays in issuance and certification, and complaints of fraud.[50]

U-visa certification is a major hurdle for many to overcome due to the vast discretion that certifying bodies and individuals possess, and typically no applications for a U-visa will be accepted without a certification.[51] With the multiple requirements and hurdles that an applicant must go through, the U-visa process is possibly one of the slowest pathways to citizenship, taking almost fifteen years to complete.[52] This is due not only to the delays in certification, but also the

48. SUPPLEMENT FORM B, *supra* note 47; U.S. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGRATION SERVS., FORM I-918, PETITION FOR U NONIMMIGRANT STATUS (2017) [hereinafter FORM I-918], https://www.uscis.gov/sites/default/files/files/form/i-918.pdf. For example, Form I-918 asks whether petitioner has ever "[s]erved in any prison, jail, prison camp, detention facility, labor camp, or any other situation that involved detaining persons." FORM I-918, *supra*. If that petitioner had checked yes, they are asked to describe the circumstances under "Part 8. Additional Information." *Id.*

49. U-visas are typically valid for four years. *See Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status (last updated June 12, 2018) (detailing the general application process). However, under limited circumstances, extensions past the four years are available. *See* Policy Memorandum on Extension of Status for T and U Nonimmigrants 8–9 (Apr. 19, 2011), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/April/exten.status-tandu-nonimmigrants.pdf (addressing the specific circumstances where extensions may be given).

50. By way of illustration, in 2015, Representative Diane Black introduced the U-visa Reform Act. In a press release by the congresswoman, she stated that "the program has become a backdoor for obtaining permanent legal status . . . . Rampant fraud and abuse of U Visas now undermines its effectiveness for law enforcement and circumvents the law abiding individuals who seek to immigrate to our country through the proper channels." Press Release, Representative Diane Black, Black Introduces U Visa Reform Act (Feb. 5, 2013) [hereinafter Black Press Release], https://votesmart.org/public-statement/764305/black-introduces-u-visa-reform-act#.XFXIrc9Ki8o. Fraud complaints will be discussed in depth in regard to discovery issues later in this Note.

51. *See generally* DHS GUIDE, *supra* note 41 (detailing the many factors and circumstances considered with regard to law enforcement certification of an alien's U-visa application). For more background, see UNC SCH. OF LAW IMMIGRATION/HUMAN RIGHTS POLICY CLINIC, THE POLITICAL GEOGRAPHY OF THE U VISA: ELIGIBILITY AS A MATTER OF LOCALE 9–10 (2014), http://www.law.unc.edu/documents/clinicalprograms/uvisa/fullreport.pdf (noting that "[s]ince the advent of the U visa, immigrant and civil rights advocates have observed that there is no uniformity in the [Supplement Form B] certification process" and detailing the harms this causes to U-visa applicants); *see also* Tahja L. Jensen, Comment, *U Visa "Certification": Overcoming the Local Hurdle in Response to A Federal Statute*, 45 IDAHO L. REV. 691, 704 (2009) (discussing the possibility that anti-immigration viewpoints are "fueling the lack of certifications").

52. Imogene Mankin, *Abuse-in(g) the System: How Accusations of U Visa Fraud and Brady*

high volume of U-visa applications.[53] Each problem comes with its own unique proposals, but the issue of discovery of U-visa applications has a direct impact on litigation.[54]

B. The Intersection Between U-visas and the Workplace

In 2007, DHS and USCIS named the EEOC a "certifying agency" permitted to provide certification for U-visa petitions.[55] As such, the EEOC is one of many government agencies with the power to certify that an alien victim's petition meets the statutory requirements of supporting the investigation or prosecution of one or many of the qualifying crimes.[56]

In a July 2008 memorandum, the EEOC wrote its own policies and procedures on how to best determine if a petition should be awarded certification.[57] First, the regional attorney (RA) and staff will assess the petition for certification and conduct an initial inquiry into whether the alien meets certain requirements, including an in-person interview of the

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Disclosures Perpetrate Further Violence Against Undocumented Victims of Domestic Abuse, 27 BERKELEY LA RAZA L.J. 40, 48 (2017).

53. *See id.* (explaining the multiple waiting periods an applicant faces when seeking a U-visa, often due to application backlog). *See also, e.g.*, Catholic Charities CYO v. Chertoff, No. C 07-1307 PJH, 2007 WL 2344995, at *2 (N.D. Cal. Aug. 16, 2007) (summarizing the class action complaint filed by Catholic Charites and other legal aid organizations alleging that USCIS delays in promulgating the necessary regulations to certify and issue U-visas greatly harmed one's chances of getting a U-visa). Even after USCIS issued rules governing certifications, general delays in receiving U-visas based on arbitrary reasons still plague the system.

54. As one commentator pointed out, "there is still much uncharted territory in the implementation of the statute and regulations, and the adjudication of the visa petitions . . . due in large part to the government's seven-year delay in issuing implementing regulations." Elizabeth M. McCormick, *Rethinking Indirect Victim Eligibility for U Non-Immigrant Visas to Better Protect Immigrant Families and Communities*, 22 STAN. L. & POL'Y REV. 587, 590 (2011). *See* SUPPLEMENT FORM B, *supra* note 47.

55. 8 C.F.R. § 214.14(a)(2) (2018).

56. *Id.*; DHS GUIDE, *supra* note 41, at 3. Other labor enforcement agencies with certifying power include the US Department of Labor, the National Labor Relations Board, the California Department of Fair Employment and Housing, the California Division of Labor Standards Enforcement, the Illinois Department of Labor, and the New York Department of Labor. *The UVisa: A Potential Immigration Remedy for Immigrant Workers Facing Labor Abuse*, NAT'L EMP'T L. PROJECT 3–4 (Mar. 2014) [hereinafter *NELP U-Visa Remedy*], http://nelp.org/content/uploads/2015/03/UVisa.pdf.

57. Memorandum from EEOC Chair Naomi C. Earp to District Directors and Regional Attorneys on EEOC Procedures for U Nonimmigrant Classification Certification (July 3, 2008) [hereinafter EEOC Procedures], http://www.asistahelp.org/documents/resources/EEOC_procedures_for_U_visa_certific_A9ABDA9CC5582.pdf. The above-referenced EEOC document contains a three-page memorandum from EEOC Chair Earp introducing the attached "EEOC Procedures" to the EEOC district directors, which contains the actual policies and procedures the EEOC adopted regarding U-visa certification. All subsequent references to this document will be to the EEOC Procedures and not the accompanying memorandum.

candidate.[58] The qualifying criminal activity the RA finds "must be related to the unlawful employment discrimination alleged in the charge or otherwise properly under investigation by the EEOC."[59] If the RA believes that the petition has merit, the RA will submit it to the general counsel who will conduct a similar analysis before submitting it to the office of the c

air (OCH).[60] The OCH will ultimately determine if the EEOC is the appropriate certifying agency for that petition.[61] The information the OCH requires to certify U-visa petitions is rife with details that employers attempting to defend against certain workplace violation charges may find helpful in mounting their defense.

To start, the OCH requires an explanation of how the case came to the attention of the EEOC officer, the credibility of the charging party based on an in-person interview, a draft Supplement Form B, and any additional supporting documentation that may be necessary, including relevant case law and legal authority.[62] There are multiple parts in Supplement Form B where the EEOC's implementation memorandum specifically asks for as much information as possible. By way of example: "Subpart 5 asks the certifying agency briefly to describe the criminal activity being investigated and/or prosecuted and the involvement of the victim seeking U nonimmigrant status in that activity. As much factual detail as possible should be provided."[63] Subpart 6 asks for a description of any known or documented injury to the victim. Again, as much information as possible is needed to determine if the victim suffered substantial physical or mental abuse as required by the statute.[64] Information requested by Subpart 6 requires explicit details regarding workplace sexual harassment, assault, or rape. Because the EEOC is asking for "as much information as possible,"[65] and victims are asked to supplement any parts with their own explanations,[66] it is unsurprising that many defendants

58. *Id.* at 1.

59. *Id.* Because the EEOC handles employment disputes, it will only certify petitions that arise from such disputes. As will be discussed later, there is a significant problem with workplace sexual harassment and assault toward alien workers. *See NELP U-Visa Remedy*, *supra* note 56, at 2–3 (detailing the types of worker abuse that qualify as "criminal activity" for purposes of U-visa certification, which include felonious assault, abusive sexual contact, rape, sexual assault, and sexual exploitation).

60. EEOC Procedures, *supra* note 57, at 1–2.

61. *Id.* at 2.

62. *Id.* at 2–3.

63. *Id.* at 3.

64. *Id.*

65. *Id.*

66. *Id.*; *see* SUPPLEMENT FORM B, *supra* note 47 (stating that applicants are allowed to supplement the Supplement Form B with any information).

seek this information during various types of litigation.[67]

C. Relevant Case Law Leading up to the Cazorla *Litigation*

Because disputes involving U-visas—as well as other types of visas provided by VAWA—are under-litigated,[68] there are few decisions on the issue of exactly how much U-visa information should be discoverable. The Fifth Circuit was the first circuit to directly address this issue, as many of these discovery requests are dealt with by the lower courts. In such cases, some courts resolve this issue by reading the plain language of Rule 26 in conjunction with the requested information, including the district court that first heard *Cazorla*.[69]

In *Camayo v. John Peroulis & Sons Sheep, Inc.*, the US District Court for the District of Colorado ruled on a motion to compel the production of documents and responses to interrogatories that would require plaintiffs to disclose certain aspects of their immigration status, such as whether they had applied for a U-visa or T-visa.[70] The defendant

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67. While this Note focuses on companies seeking U-visa information to defend against EEOC charges or other workplace-related litigation, discovery of U-visa information is also an issue in criminal matters. Criminal defendants also try to use this information to combat criminal charges. For example, in *Hawke v. United States Department of Homeland Security*, No. C-07-03456 RMW, 2008 WL 4460241 (N.D. Cal. Sept. 29, 2008), a battered wife applied for a U-visa months before her husband was arrested for misdemeanor battery against her. *Id.* at *1. The husband requested the wife's U-visa information because it would contain her sworn testimony regarding the extent of his abuse that he could possibly use to impeach her. *Id.* The court held that the restrictive language under VAWA and 8 U.S.C. § 1367(a)(2) (2012) barred the husband from access to that information. *Id.* at *7. In another case, a criminal defendant, facing charges of unlawful sexual contact and gross sexual assault, sought discovery of the alien victim's, as well as the victim's mother's, immigration status. State v. Marroquin-Aldana, 89 A.3d 519, 524 (Me. 2014). The Maine Supreme Court ruled that the trial court's decision to quash the subpoena was not an abuse of discretion because the subpoena did not state with specificity the information the defendant sought; rather, this was no more than a "fishing expedition," which ran contrary to the protections given to documents filed with immigration authorities pursuant to federal law. *Id.* at 530.

68. *See* McCormick, *supra* note 54, at 590 (noting "there is still much uncharted territory in the . . . adjudication of the visa petitions" largely due to the seven-year delay in implementing regulations).

69. *See generally* Cazorla v. Koch Foods of Miss., LLC, No. 3:10cv135-DPJ-FKB, 2014 WL 12639863 (S.D. Miss. Sept. 22, 2014).

70. Camayo v. John Peroulis & Sons Sheep, Inc., Nos. 10-cv-00772-REB-MJW, 11-cv-01132-REB-MJW, 2012 WL 5931716, at *1 (D. Colo. Nov. 27, 2012). This case involved requesting direct information from the plaintiffs themselves—the plaintiffs did not file any actions with the EEOC or other federal employment bodies. *Id.* However, it is noted in Camayo's complaint that the US Department of Labor had previously filed a suit against John Peroulis & Sons in 2000, which resulted in the parties entering into an "H-2A Compliance Plan" where the defendants agreed, among other things, to:

> (1) prohibit acts of workplace violence; (2) provide workers with adequate breaks for eating meals; (3) require that workers have a two-week supply of food at all times; (4) provide workers access to a telephone to make phone calls; (5) provide workers copies of the work contract and employee handbook; and (6) ensure that workers are in

company, John Peroulis & Sons, had employed the plaintiffs, Roel Espejo Camayo and Juvencio Samaniego Damian, as H-2A[71] visa workers.[72] Upon arrival at the ranch where plaintiffs would be working, their passports and H-2A visas were immediately confiscated, they were forced to work long hours with little food, and they were verbally and physically abused, all in violation of the defendants' H-2A compliance plan.[73] Both plaintiffs were independently threatened with deportation to Peru on multiple occasions for "seemingly any reason."[74] Plaintiffs brought suit to recover damages for injuries inflicted by the defendants under the Trafficking Victims Protection Reauthorization Act (TVPRA),[75] the Colorado Wage Claim Act,[76] and a number of common law claims including assault, battery, and negligent infliction of emotional distress.[77]

In the resulting litigation, the defendants served interrogatories on both plaintiffs asking them to "[d]escribe in detail your efforts to obtain a T- or U-visa," including a detailed description of "when you first learned about the possibility of obtaining T- or U-visas and from whom," their "efforts to secure visas for any family members, and whether such visas have been issued and to whom," and "all statements, written or oral, made by you or others on your behalf as part of the application process."[78] The defendants also requested that plaintiffs produce "all documents related in any way to your efforts to obtain a T- or U-visa," including the actual application.[79]

The district court granted the motion to compel by turning to the plain language of Rule 26(b)(1) that states the scope of discovery includes information "relevant to any party's claim or defense" and information

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possession of their passports and visas at all times.

See Complaint ¶¶ 61–64, Camayo v. John Peroulis & Sons Sheep, Inc., Nos. 10-cv-00772-REB-MJW, 11-cv-01132-REB-MJW, 2012 WL 5931716 (S.D. Miss. Sept. 22, 2014), 2010 WL 2315400.

71. *See* 8 U.S.C. § 1188. Visas offered under this statute allow employers to hire foreign workers to come to the US to perform temporary agricultural work.

72. Complaint, *supra* note 70, ¶¶ 6–7.

73. *Id.* ¶¶ 45–64.

74. *Id.* ¶ 58. The threat of deportation or being forced out of the US is high even when the worker is in the US legally on a nonimmigrant visa. *See* Brief of LatinoJustice PRLDEF, *supra* note 2, at 54 (noting that "[e]ven immigrant women who become naturalized U.S. citizens or lawful permanent residents have residual fears of adverse immigration actions").

75. 18 U.S.C. § 1589 *et seq.* (2012).

76. COLO. REV. STAT. § 8-4-101 *et seq.* (2018).

77. Complaint, *supra* note 70, ¶¶ 113–84.

78. Camayo v. John Peroulis & Sons Sheep, Inc., Nos. 10-cv-00772-REB-MJW, 11-cv-01132-REB-MJW, 2012 WL 5931716, at *1–2 (D. Colo. Nov. 27, 2012).

79. *Id.* at *2.

that is "reasonably calculated to lead to the discovery of admissible evidence."[80] The court reasoned that because the defendants were purporting the plaintiffs fabricated the extent of their harm in order to obtain U- or T-visas and leave their employment, this information was paramount to the case, making disclosure necessary.[81] The court further found that the *in terrorem* effect[82] of disclosure would be adequately addressed by an order restricting the use of the information outside the current dispute.[83]

Another case that sheds some light on this issue is *David v. Signal International, LLC*, a 2010 district court case from Louisiana[84] that the Fifth Circuit relied on heavily in *Cazorla*.[85] In *David*, the defendants were facing a class action suit brought on behalf of over 500 Indian men who alleged Signal enticed them to travel to the United States under the H-2B guest worker program in the aftermath of Hurricane Katrina, which promised that "qualified candidates" could obtain legal permanent residence.[86] Upon arrival, the plaintiffs were subjected to extremely poor working conditions.[87] When workers complained, Signal threatened them with deportation and refused to supply them with the visas originally promised.[88] Signal sought discovery from the plaintiffs of any

80. *Id.* at *1. Note that due to a 2015 amendment, Rule 26 no longer employs the language that information be "reasonably calculated to lead to the discovery of admissible evidence." *See* FED. R. CIV. P. 26. However, both the district court and circuit court in *Cazorla* ruled before the 2015 amendments.

81. *Camayo*, 2012 WL 5931716, at *2.

82. The *in terrorem* effect test weighs whether disclosure would threaten or intimidate present or future parties from litigation on similar issues. For clarity, and unless otherwise necessary, I will describe the Rule 26 balancing test as the need for the information weighed against the public policy implications of disclosure, instead of the *in terrorem* effect. This is in an effort to discuss implications beyond what can be indicated by the Federal Rules. For an interesting discussion and background on Federal Rule of Civil Procedure 26 and disclosure, see generally Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—"Much Ado About Nothing?"*, 46 HASTINGS L.J. 679 (1995) (examining the disclosure rule in the context of the recent debate over discovery abuse and the general outcry for corrective response to what are seen by many as runaway litigation costs).

83. *Camayo*, 2012 WL 5931716, at *2. The plaintiffs opposed the defendant's motion to compel, citing the "chilling effect" that disclosure would entail. *Id.*

84. David v. Signal Int'l, L.L.C., 735 F. Supp. 2d 440 (E.D. La. 2010).

85. Cazorla v. Koch Foods of Miss., L.L.C., 838 F.3d 540, 556 (5th Cir. 2016) (citing *David* as the most analogous case). Although *David* deals with T-visas, the T-visa and U-visa programs are similar in the type of information disclosed. *See supra* notes 35–37 (discussing the passage of VTVPA in 2000, which included both the T- and U-visa programs).

86. *David*, 735 F. Supp. 2d at 441.

87. *Id.* at 443. David Kurian, the class representative whose factual assertions the court deemed representative of the other plaintiffs, claimed that the living conditions and food at Signal were horrible, that the guards searched the workers whenever they left, and that they were forced to do all of the unsanitary work while none of the American workers were required to do such work. *Id.*

88. *Id.*; *see also supra* note 74 (discussing the persistent threat of deportation migrant workers

applications for T- and/or U-visas and any supplemental visas they may have tried to procure for family members.[89] The plaintiffs objected, arguing such information was confidential, and Signal responded that the discovery was legitimate because the confidentiality bar under 8 U.S.C. § 1367 only applies to federal information, and no agency was currently involved in the dispute.[90] Signal also argued that any right to confidentiality found under the statute was waived because an "unrelated putative class member" had turned a T-visa application over to a local newspaper.[91] Thereby, the argument goes, they waived their individual confidentiality privilege—so all class members had effectively waived their privilege.[92]

After much back and forth, the court upheld its previous order that effectively barred the defendants from any inquiry into the plaintiffs' current immigration status, as it was deemed irrelevant to the claims asserted and "discovery of such information would have an intimidating effect on an employee's willingness to assert his workplace rights."[93] Additionally, the court flat-out rejected Signal's claim that the class members had waived any privilege to their T- and U-visa information based on the fact that one class member shared information with a newspaper.[94] The court rejected this premise not only because there is no case law to support it, but also because no class yet existed.[95] Ultimately, the parties agreed that the class representatives would produce the sworn statements attached to the T- or U-visa applications, which the court found as "the most productive way to resolve the instant dispute."[96] These two cases give a good overview of some of the issues that the Fifth

face, even when they are in the country legally).

89. *David*, 735 F. Supp. 2d at 443.

90. *See id.* at 444 (stating that "no agency has asserted the Section 1367 privilege").

91. *Id.* at 447 (stating that "Signal contends that it is engaged in a two-front war, one in this forum and one in the press"). In its Memorandum in Support of Motion to Compel, Signal cited an online media outlet that "published an account *explicitly based on T visa applications* about former Signal H2B workers who were arrested in North Dakota" as the reason the privilege was waived. Memorandum of Defendant, Signal International, LLC in Support of Motion to Compel at 6, David v. Signal Int'l, L.L.C., 735 F. Supp. 2d 440 (E.D. La. 2010) (No. 08-cv-01220), 2010 WL 3017670. It also demanded that because the article was so unfavorable toward Signal, Signal should have had access to the information out of fairness. *Id.* at 7. S*ee also* Editorial, *They Pushed Back*, N.Y. TIMES (June 28, 2010), http://www.nytimes.com/2010/06/29/opinion/29tue3.html (discussing the facts of the *David* case and cheering the USCIS's decision to grant special visas to about 150 of the approximately 500 plaintiffs in *David*, having concluded they were subject to involuntary servitude and were entitled to visas as victims of human trafficking).

92. *David*, 735 F. Supp. 2d at 444.

93. *Id.* at 447 (citing Rivera v. NIBCO, Inc., 364 F.3d 1057, 1065 (9th Cir. 2004)).

94. *Id.*

95. *Id.*

96. *Id.* at 448.

Circuit would later face in *Cazorla*.

D. District Court Battle

The US District Court for the Southern District of Mississippi, when it heard *Cazorla*, cited to little guiding authority because little precedent existed.[97] The district court had to rule on the relevant discovery issues involving not only the EEOC claim, but also the eleven individual plaintiffs who filed separately from the EEOC. The EEOC got involved in 2009, when ten workers filed Title VII discrimination claims with the EEOC alleging abuse by Jessie Ickom, Juan Garcia, and other employees at a Koch Foods processing plant.[98] In 2010, several of the same workers then filed suit in the district court against Koch and Ickom, a case that would remain pending while the EEOC investigation took place.[99] The EEOC investigated the charges against Koch, found reasonable cause to believe that Title VII violations had occurred, and attempted conciliation.[100] Attempts at conciliation failed, and in June of 2011 the EEOC filed its own suit against the company with an estimated class of fifty to seventy-five other Hispanic men and women.[101] The district court consolidated the EEOC's and the individual claimants' suits.[102]

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97. Cazorla v. Koch Foods of Miss., LLC, No. 3:10cv135-DPJ-FKB, 2014 WL 12639863, at *3 (S.D. Miss. Sept. 22, 2014) (noting "[a]s an initial point, there is little guidance" because "[s]ection 1367 has rarely been examined in this context, and § 214.14(e)(2) has never been cited in a reported opinion"). As a result, the district court cited less than half a dozen cases in its opinion that pertain to the relevance of the information versus the effect of its disclosure. *Id.* at *5–6. But this is not uncommon when comparing this district court case to the cases discussed in Part II.C. *See supra* notes 68–96 and accompanying text (detailing two factually relevant cases, *Camayo* and *David*, that deal with the same issue but reach different, unpersuasive conclusions).

98. The EEOC's second amended complaint claimed that between 2004 and 2008, Jessie Ickom and Juan Garcia supervised the deboning area where most of the alleged abuse took place. Second Amended Complaint ¶ 19, EEOC v. Koch Foods of Miss., LLC, No. 3:11-CV-00391-CWR-LRA, 2012 WL 12033809, (Sept. 17, 2012). Note that the EEOC's complaint was originally filed in *EEOC v. Koch Foods of Mississippi, LLC*, which was later consolidated with *Cazorla*. Agreed Order of Consolidation and Allowing Intervention, Cazorla v. Koch Foods of Miss., LLC, No. 3:10-CV-135-DPJ-FKB, 2014 WL 12639863 (S.D. Miss. Sept. 22, 2014), 2011 WL 13079215.

99. Second Amended Complaint, *supra* note 98, at 2.

100. There were three Title VII charges against Koch detailed in the Second Amended Complaint filed by the EEOC. Count I was that the company engaged in unlawful employment practices by creating a hostile work environment based on sex in violation of Title VII of the Civil Rights Act of 1964 (Title VII); Count II was that Koch created a hostile work environment based on national origin/race in violation of Title VII; and Count III was for retaliation in violation of Title VII. *Id.* ¶¶ 46, 57, 69.

101. Cazorla v. Koch Foods of Miss., L.L.C., 838 F.3d 540, 545–46 (5th Cir. 2016); *see also* Second Amended Complaint, *supra* note 98, ¶ 7 (stating "[t]he Commission made a good faith effort to eliminate the alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion, which efforts proved unsuccessful," and listing the Commission's various efforts such as inviting Koch Foods to meet with the EEOC, which did not work).

102. *Cazorla*, 838 F.3d at 546. *See also* Agreed Order of Consolidation and Allowing

The alleged events took place at Koch Foods's large poultry processing plant in Morton, Mississippi.[103] The plant employees were overwhelmingly Hispanic, illiterate, spoke little English, and many were undocumented.[104] The harassment and hostile conduct allegedly occurred on a weekly or daily basis from 2004 to 2008.[105] The EEOC complaint outlined the allegations of abuse toward employees working under Ickom and Garcia.[106] The EEOC recounted that on more than one occasion, Ickom removed female employees from the production line to an isolated area and attempted to sexually assault them.[107] Ickom, Garcia, and other supervisors also offered money to employees in exchange for sex and made unwanted physical advances toward female employees such as touching and openly groping them in plain view of the plant's security cameras.[108] Supervisors including Ickom and Garcia verbally and physically harassed the male employees, and made them pay money to use the bathroom, maintain their job positions, or use sick time.[109] When employees tried to complain about this conduct, they, their family members, or their spouses who also worked at the plant "were subjected

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Intervention, *supra* note 98.

103. According to Koch Foods's website, the corporation began in 1985 when it was "a one-room chicken deboning and cutting operation with only 13 employees." It is now one of the leading poultry processors in the country, and in 2015 it reinvested $100 million to expand its capacity in Ohio and Mississippi. *About Us: Our Story*, KOCH FOODS, http://www.kochfoodsinc.com/our-company/about-us (last visited Feb. 9, 2019). The Morton plant was one of the plants upgraded in 2015, representing $33 million of the corporate investment while creating 180 jobs. *Koch Foods Expanding in Forest and Morton, Mississippi, Creating 203 New Jobs*, MISS. DEV. AUTHORITY, https://www.mississippi.org/general/koch-foods-expanding-in-forest-and-morton-miss-creating-203-new-jobs/ (last visited Feb. 2, 2019).

104. *Cazorla*, 838 F.3d at 544. This is not uncommon in the United States. According to a report published by the NIWAP, of the 250,000 laborers employed in the 174 US chicken factories, at least half are Latino and more than half are women. Alina Husain & Leslye E. Orloff, *Immigrant Women, Work, and Violence Statistics*, NAT'L IMMIGRANT WOMEN'S ADVOC. PROJECT (June 19, 2015), http://library.niwap.org/wp-content/uploads/2015/CULT-RCH-ImmigrantWomenWorkViolence_FactSheet.pdf.

105. Second Amended Complaint, *supra* note 98, ¶ 22.

106. *Id.* ¶¶ 24–45.

107. *Id.* ¶ 24. The risk for abuse is incredibly high for alien workers, but women are among the most vulnerable. *See* Husain & Orloff, *supra* note 104 (discussing how immigrant workers are particularly susceptible to abuse).

108. Second Amended Complaint, *supra* note 98, ¶¶ 24, 27.

109. *Id.* ¶ 25. While immigrant women are considered the most vulnerable because of the particularly odious sexual violence they face, immigrant men are subjected to incredible, albeit different, abuse. *See generally* Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345 (2001), *reprinted in* 22 IMMIGR. & NAT'LITY L. REV. 303 (2001) (discussing the extreme working conditions undocumented workers face in the United States and how immigration law oftentimes undermines labor protections intended to protect undocumented workers, and advocating for reform).

to escalated and more frequent physical or sexual assaults."[110] By the time the EEOC filed the second amended complaint, two and a half years later, more than 117 employees were listed as aggrieved individuals.[111]

There were many issues to be litigated in this case, but the issue of U-visa discovery went first through a magistrate judge, then a district court judge, before reaching the Fifth Circuit.[112] Koch had already made a broad request for immigration status information from the EEOC and the individual claimants, but the court granted the EEOC and individual plaintiffs a Rule 26 protective order.[113] Koch then made a more limited request for information relating to the individual plaintiffs' attempts to obtain T- or U-visas.[114] In support, Koch argued that it was entitled to the information because the allegations, "particularly claims of sexual and physical assaults and extortion, are false and were made solely for the purpose of obtaining such benefits."[115] The plaintiffs opposed Koch's motion, arguing that Koch's theory, that the plaintiffs falsely claimed to be victims of abuse as a means to obtain temporary legal status, was "mere conjecture and speculation."[116] Ultimately, Magistrate Judge Ball ruled that because Koch had raised a "legitimate defense" it was entitled to pursue discovery to the ends of that defense.[117] The judge's reasoning was as follows:

> The relevance of this information clearly outweighs its *in terrorum* [sic] effect, as any individuals who have applied for immigration benefits have, necessarily, already disclosed their immigration status to federal

110. Second Amended Complaint, *supra* note 98, ¶ 35.

111. *Id.* ¶ 89. Koch argued on appeal that the jump in the number of "aggrieved individuals" named by the EEOC was proof of mass fraud in the system, but the Fifth Circuit rejected this argument. Cazorla v. Koch Foods of Miss., L.L.C., 838 F.3d 540, 558 (5th Cir. 2016).

112. In August 2012, Koch Foods served the EEOC and the individual plaintiffs with discovery requests for U-visa and other immigration status information. The plaintiffs moved for a Rule 26 protective order, and in response, Koch Foods did not allege that the plaintiffs were lying to get the visas. Therefore, Koch Foods's first attempt to obtain the plaintiffs' immigration status information was denied. Cazorla v. Koch Foods of Miss., LLC, No. 3:10cv135-DPJ-FKB, 2014 WL 281979, at *1 (S.D. Miss. Jan. 24, 2014), *modified on reconsideration*, 2014 WL 12639863 (Sept. 22, 2014); *see also Cazorla*, 838 F.3d at 546.

113. *Cazorla*, 2014 WL 281979, at *1.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at *2. Judge Ball cited two cases to support this decision. The first is *Camayo v. John Peroulis & Sons Sheep, Inc.*, No. 10-cv-00772-MSK-MJW, 2012 WL 5931716 (D. Colo. Nov. 27, 2012), which has been discussed at length above. *See supra* notes 70–83 and accompanying text. The second case is *EEOC v. Global Horizons, Inc.*, No. CV-11-3045-EFS, 2013 WL 3940674, at *7 (E.D. Wash. July 31, 2013), a similar case to *Camayo* and *Cazorla*, where the district court held that discovery into the plaintiffs' T-visas was allowed since it pertained to the defendants' defense, specifically that the plaintiffs' allegations of abuse were not credible and were only made to secure legal status.

> authorities. Koch Foods's motion is granted as to its discovery requests concerning these matters, subject to the entry of an appropriate protective order.[118]

Therefore, while Judge Ball did deny Koch's motion to reconsider the November 2012 discovery that broadly requested immigration status information, he nonetheless ordered the plaintiffs and the EEOC to "serve full and complete answers to interrogatories" to various questions about their attempts to obtain T- or U- visas, which the EEOC had potentially issued as a certifying body, and produce all documents pertaining to such answers.[119]

Plaintiffs immediately filed a motion for reconsideration,[120] which was denied, and then sought review of the magistrate judge's order by the district court judge, pursuant to Rule 72, providing that a district judge "must determine de novo any part of the magistrate judge's disposition that has been properly objected to."[121] In September of 2014, the magistrate judge's order was reviewed to determine if the order was "clearly erroneous" or "contrary to law."[122] The plaintiffs raised three issues that the district court would take under consideration: "(1) whether Koch Foods is estopped from pursuing this discovery; (2) whether the Magistrate Judge's order contravenes the U-Visa-authorizing statute and U-Visa regulations; and (3) whether the *in terrorem* effect of the discovery outweighs the information's relevance."[123] Under Rule 26(c)(1), the district court was tasked with balancing the defendants' interest in obtaining access to the U-visa information against the EEOC

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118. *Cazorla*, 2014 WL 281979, at *2.

119. *Id.*

120. Cazorla v. Koch Foods of Miss., LLC, No. 3:10cv135-DPJ-KFB, 2014 WL 12639863, at *1 (S.D. Miss. Sept. 22, 2014). The interim procedural history was detailed in the district court opinion:

> The Magistrate Judge granted Koch Foods's motions in part, finding that the relevance of the alleged motivation clearly outweighs the alleged *in terrorem* effect of allowing production. This prompted Plaintiffs to file a Motion for Reconsideration, which was denied, and subsequent objections under Federal Rule of Civil Procedure 72. On May 23, 2014, the Court took Plaintiffs' objections under advisement and ordered them to produce certain information for *in camera* review. After an Emergency Motion to Clarify, Plaintiffs complied, and the matter is now ripe for decision.

Id. (citations omitted).

121. *See* FED. R. CIV. P. 72 (permitting a party to file objections to a magistrate judge's order and requiring the district court to "modify or set aside any part of the order that is clearly erroneous or is contrary to law").

122. *Id.*; *Cazorla*, 2014 WL 12639863, at *1. A district court may only modify orders if, after reviewing the entirety of the evidence, the court "is left with the definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

123. *Cazorla*, 2014 WL 12639863, at *2.

and individual plaintiffs' interests in keeping the information confidential, while recognizing the broad discretion given to the magistrate judge to award such protective orders.[124]

The district court immediately rejected the plaintiffs' quasi-estoppel argument.[125] In regard to the plaintiffs' argument that the magistrate judge's order contravened the underlying statute and regulations, the district court explicitly pointed out there was "little guidance on these provisions."[126] Applying the plain meaning of 8 U.S.C. § 1367 and 8 C.F.R. § 214.14(e)(2), the district court found the applicable law did *not* bar the production of U-visa information directly from the individual claimants who were parties to the civil suit.[127] The district court reasoned that if Congress had "wished to create an absolute privilege, it could have easily drafted that language. It did not, and the court affirm[ed] the Magistrate Judge on this issue with respect to the Individual Plaintiffs."[128] Regarding disclosure by the EEOC, the district court overruled the magistrate judge's ruling, instead holding that Koch could not circumvent the law by obtaining the same information it originally sought to discover from the individual claimants through the EEOC.[129]

In the individual plaintiffs' last argument to bar Koch from discovering U-visa information, they asked the district court to restrict discovery of this information because any relevance it had was "clearly outweigh[ed by] the *in terrorem* effect of its disclosure."[130] Again, the district court

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124. *Id.*; *see also* FED. R. CIV. P. 26(c). The balancing test under Rule 26(c)(1) applies to all discovery disputes, and it was used in both *Camayo* and *David*. *See supra* notes 70–83 and 84–96 and accompanying text (discussing the application of the balancing test in *Camayo* and *David*, respectively).

125. *Cazorla*, 2014 WL 12639863, at *2. Quasi-estoppel precludes a party from asserting a right that is ultimately inconsistent with a position that is it has already taken. Here, the district court found little support for this argument and found that Koch's request for U-visa information was in line with its defense that the plaintiffs falsified their claims. *Id.*

126. *Id.* at *3. Because district courts have so much discretion over the scope of discovery under the Federal Rules, there are few cases on point. *See infra* note 142 (discussing the Fifth Circuit's adherence to allowing broad district court discretion).

127. *Cazorla*, 2014 WL 12639863, at *3 (noting that the law "prevent[s] the EEOC from unilaterally disclosing the information, [but] it does not prohibit discovery directly from an applicant who is a party in the civil context").

128. *Id.* The court cited an unreported Connecticut district court case for support. *See* Demaj v. Sakaj, No. 3:09 CV 255(JGM), 2012 WL 476168, at *6 (D. Conn. Feb. 14, 2012) (holding that while "arguably running afoul of the letter of this section," production of U-visa information from the individual plaintiffs is not barred, but discovery from the DHS is barred (citation omitted)).

129. *Cazorla*, 2014 WL 12639863, at *3–4. The statute is quite unambiguous: Section 1367(a)(2) precludes covered entities, like the EEOC, from disclosing "any information which relates to an alien who is the beneficiary of an application for relief." *Id.*; 8 U.S.C. § 1367(a) (2012).

130. *Cazorla*, 2014 WL 12639863, at *4. The individual plaintiffs and the EEOC cited cases previously discussed in this Note, primarily *Global Horizons, Inc.*, *Camayo*, and *David*. *Id.* at *4–5. *See supra* note 117 (discussing *Global Horizons, Inc.*); *supra* notes 70–83 and accompanying text

noted the lack of binding and analogous precedent governing these issues.[131] The district court noted "most of the cases Plaintiffs cite fail to address discovery related to U visas whereby an alien and his or her family members can gain the privilege of remaining in the United States" temporarily and that "[t]he cases that do mention T and U visas are nonbinding and not persuasive."[132] The district court further concluded that, because the truthfulness of the claims was the salient issue, Koch raised a legitimate defense and would be allowed discovery as to the efforts the claimants took to procure immigration benefits that arose out of the allegations in the lawsuit.[133] The district court acknowledged the plaintiffs' alternative arguments—arguments that will be discussed more in the Fifth Circuit opinion—but stated the court could alleviate any fears of retribution and criminal prosecution, should the information be discovered, by redacting and limiting the dissemination of such information.[134] The district court recognized that Koch's discovery requests in their current form sought information beyond the scope of the magistrate judge's order, and instructed the plaintiffs to limit their answers to the relevant interrogatories "to immigration efforts related to the allegations in this case."[135] The district court applied the same limit to the document requests.[136] As such, the plaintiffs were ordered to produce relevant Supplement Form B's and any additional submissions or related communications, but any information outside the scope of the litigation was ordered to be redacted.[137]

II. *CAZORLA V. KOCH FOODS OF MISSISSIPPI, L.L.C.*

A. Introduction

After the district court entered the order, the plaintiffs—both the EEOC and the individual claimants—and Koch Foods appealed.[138] The EEOC sought an interlocutory appeal under 28 U.S.C. § 1292(b) and to stay proceedings, which both the district court and Fifth Circuit

(discussing *Camayo*); *supra* notes 84–96 and accompanying text (discussing *David*).

131. *Cazorla*, 2014 WL 12639863, at *4.

132. *Id. See also supra* note 97 (detailing the lack of precedent and courts' mixed holdings as a result thereof).

133. *Cazorla*, 2014 WL 12639863, at *5–6.

134. *Id.* at *6.

135. *Id.* at *7.

136. *Id.*

137. *Id.*

138. The district court certified the EEOC's order for interlocutory appeal and stayed the proceedings; the Fifth Circuit granted both the petition and cross-petition. Cazorla v. Koch Foods of Miss., L.L.C., 838 F.3d 540, 548 (5th Cir. 2016).

certified.[139] Broadly, the EEOC and individual plaintiffs argued that the district court erred in not giving enough weight to their *in terrorem* arguments for blocking Koch's discovery, and Koch argued that the district court erred in blocking any discovery from the EEOC.[140] The Fifth Circuit addressed many issues, but the two most legally significant were as follows: (1) whether Section 1367 completely bars U-visa discovery from both the individual claimants and the EEOC;[141] and (2) whether the district court abused its discretion when, in conducting its Rule 26 balancing analysis, it found the probative value of the visa information to Koch outweighed the hardship to the plaintiffs.[142]

Before addressing the two main issues, the Fifth Circuit discussed Koch's jurisdictional claims and the appropriate legal standard and procedure for a Rule 26 discovery dispute.[143] Koch asked the Fifth Circuit to exercise its discretion not to review the district court's Rule 26 balancing on interlocutory review and to dismiss the individual plaintiffs because they did not file a timely motion to intervene.[144] While it may seem arbitrary to bring up these arguments in one breath and swiftly dismiss them in the next, in addressing the jurisdictional issues the Fifth Circuit acknowledged, "[B]y fully addressing [these issues], we may be able to hasten the end of this already long-running litigation, e.g., by preventing post-trial appeals on the same topic and clarifying the permissible scope of U visa discovery, preventing further pretrial disputes."[145] For that reason, despite the fact that "Rule 26 balancing

139. *See id.* at 546–47 (summarizing the procedural history of the case). Koch opposed the EEOC's motion for an interlocutory appeal at the district court level. *See* Koch Foods of Mississippi, LLC's Response to Plaintiff EEOC's Motion for Certification for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(B), Cazorla v. Koch Foods of Miss., LLC, No. 3:10-CV-135-DPJ-FKB, 2015 WL 3970606 (S.D. Miss. June 30, 2015), ECF No. 504.

140. *Cazorla*, 838 F.3d at 548.

141. *Id.* at 551–54.

142. *Id.* at 555–64. The Fifth Circuit cited the following factors to consider when evaluating abuse of discretion:

> when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgement.

Id. at 547 (quoting Kern v. TXO Prod. Corp., 738 F.2d 968, 970 (8th Cir. 1984)). The abuse of discretion standard is on par with other discovery cases the Fifth Circuit has heard. *See* Kelly v. Syria Shell Petroleum Dev. B.V., 213 F.3d 841, 855 (5th Cir. 2000) (stating that "[a] district court has 'broad discretion in all discovery matters,' and 'such discretion will not be disturbed ordinarily unless there are unusual circumstances showing a clear abuse'" (quoting Wyatt v. Kaplan, 686 F.2d 276, 283 (5th Cir. 1982))).

143. *Cazorla*, 838 F.3d at 547–50.

144. *Id.* at 547–49.

145. *Id.* at 548. At the time the Fifth Circuit considered the case, the litigation was six years old and still in the discovery stage. The individual plaintiffs filed their complaint in March 2010 and

disputes do not normally merit interlocutory review," the Fifth Circuit saw an opportunity to put this litigation to rest by "review[ing] the district court's discovery order in its entirety,"[146] and denied Koch's request that the court stay its hand.[147]

The Fifth Circuit also dismissed Koch's argument that the individual plaintiffs did not file a timely petition for permission to intervene.[148] Because Rule 5[149] allows petitions for discretionary review, like Section 1293 interlocutory review, to be filed within the time specified by the statute, and Section 1293 does not specify such timing, the timing of petition for appeal is designated by Rule 4(a).[150] Under Rule 4(a)'s "timeline for intervention in an appeal as of right," the plaintiffs were within the appropriate deadline by filing twelve days after the EEOC did for interlocutory review.[151] Having dispensed with the procedural arguments, the Fifth Circuit moved to address the substantive issues.

The standard for discovery disputes is an important part of the Fifth Circuit's decision. The district court applied Rule 26(c)(1), allowing for restrictions on certain discoverable information "for good cause . . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[152] At the district court level, it was the plaintiffs who had the burden to show good cause for barring the information, "which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements."[153]

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their case was consolidated with the EEOC's case in December 2011. *See* Cazorla v. Koch Foods of Miss., LLC, No. 3:10-CV-135-DPJ-FKB, 2011 WL 13079215 (S.D. Miss. Dec. 5, 2011).

146. *Cazorla*, 838 F.3d at 548. The Ninth Circuit has also exercised its discretion under Section 1292 to review a district court's Rule 26 balancing analysis on interlocutory appeal. *See* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1063, 1075 (9th Cir. 2004) (exercising review under Section 1292 of the district court's discovery order, concluding that it was "neither erroneous nor contrary to law for the district court to protect the plaintiffs, and the public interest, from being unduly burdened by issuing the protective order").

147. *Cazorla*, 838 F.3d at 547–49. The district court ultimately "certified the order for interlocutory review because it found that its interpretation of 8 U.S.C. § 1367 was a 'controlling question of law.'" *Id.* at 548 n.16. But as the district court explained, an "appellate court may address any issue fairly included within [a] certified order because 'it is the *order* that is appealable, and not the controlling question identified by the district court.'" *Id.* (alteration in original) (quoting Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 205 (1996)).

148. *Cazorla*, 838 F.3d at 548–49. The district court only certified the EEOC's motion for interlocutory appeal; therefore, the individual plaintiffs had to seek permission from the Fifth Circuit to intervene in the appeal. *See supra* note 139 (discussing the procedural history following the district court's entry of the discovery order).

149. FED. R. CIV. P. 5.

150. *Cazorla*, 838 F.3d at 549.

151. *Id.*; *see also* FED. R. CIV. P. 4(a).

152. Cazorla v. Koch Foods of Miss., LLC, No. 3:10cv135-DPJ-KFB, 2014 WL 12639863, at *2 (S.D. Miss. Sept. 22, 2014) (quoting FED. R. CIV. P. 26(c)(1)).

153. *Cazorla*, 838 F.3d at 549 (quoting the district court's order and finding the plaintiffs failed

On appeal, the plaintiffs disputed the assignment of the burden, and instead urged that "U-visa information is . . . presumptively sensitive information," thus the burden should be on the party that requests the information to show a particularized need.[154] However compelling the argument, the Fifth Circuit refused to consider it because it was not presented to the district court first.[155] Thus, the plaintiffs "more elaborate theory" was waived and would not be considered on appeal.[156]

B. Dispute Over Interpretation of 8 U.S.C. § 1367

The Fifth Circuit then set its sights on the first main issue: whether the plaintiffs waived their Section 1367 claims, whether Section 1367 applies to the EEOC, and whether Section 1367 protects individual U-visa disclosure.[157]

The Fifth Circuit first rejected Koch's contention that the plaintiffs waived their Section 1367 claims by not *explicitly* stating the responses fell under Section 1367 protection.[158] In fact, the court reasoned that many of the plaintiffs' discovery responses did explicitly cite Section 1367 protections, and the plaintiffs expressly claimed that the information in dispute was exempt from discovery under the magistrate judge's

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to carry their burden by arguing Section 1367's confidentiality provisions protected the individual claimants and that the *in terrorem* effect of U-visa discovery would outweigh its relevance).

154. *Id.* (alteration in original). In their appellate brief, the individual plaintiffs (also referred to as the "intervenors") argued that U-visa discovery is similar to tax return discovery. Brief for Intervenors Agustin Barragan-Davalos et al. at 13–14, *Cazorla*, 838 F.3d 540 (No. 15-60562), 2015 WL 6663697. Tax returns often contain information that is within the ordinary scope of discovery, but courts routinely disallow it because "[n]ot only are the taxpayer's privacy concerns at stake, but unanticipated disclosure also threatens the effective administration of our federal tax laws." *Id.* at 13 (alteration in original) (quoting Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc., 2 F.3d 1397, 1411 (5th Cir. 1993)). The individual plaintiffs also analogized U-visa information to presentence investigation reports, or PSIRs, where courts generally look at three considerations before allowing this information to be disclosed during discovery: (1) "the privacy interest of the defendant;" (2) "the government's interest in access to information needed in criminal investigations; and" (3) "the sentencing court's interest in insuring that relevant information to the sentencing decision is available to the court." *Id.* at 14–15 (citing United States v. Huckaby, 43 F.3d 135, 137–38 (5th Cir. 1995)). The individual plaintiffs argued that under that framework the burden should be Koch's because U-visa information is explicitly recognized as a class of "presumptively sensitive information." *Id.* at 17.

155. *Cazorla*, 838 F.3d at 549–50.

156. *Id.* at 550. In what appears to be a bit of wrist slapping, the Fifth Circuit noted,

> In their appeal briefing, plaintiffs reference several points in the record where they purportedly pressed their argument, but each shows, at most, that plaintiffs occasionally used the term "need" and advocated a balancing approach in contesting whether Koch was entitled to the discovery it sought. This did not suffice to preserve the more elaborate theory they advance on appeal.

Id.

157. *Id.* at 550–55.

158. *Id.* at 550–51.

original 2012 protective order.[159] Therefore, the waiver claim was rejected.[160]

Next, the Fifth Circuit addressed Section 1367's application to the EEOC. As discussed above,[161] under the "straightforward" reading of 8 U.S.C § 1367 and C.F.R. § 214.14, "[a]gencies receiving information under this section . . . are bound by the confidentiality provisions and other restrictions set out in 8 U.S.C. 1367."[162] To that end, agencies, like the EEOC,[163] may not disclose that information to anyone as it relates to the U-visa applicant.[164] The Fifth Circuit was unpersuaded by Koch's argument that Section 1367 does not preclude discovery of U-visa information because the statute does not explicitly "prohibit discovery of U-visa information in litigation."[165] The court acknowledged Koch was correct that Congress typically explicitly states when it is creating an "evidentiary privilege,"[166] but found the DC Circuit's decision, *In re England*, more persuasive than Koch's argument.[167] The Fifth Circuit adopted the same reasoning the DC Circuit used for barring the disclosure of certain military promotion records by stating that Koch was barred from disclosure of U-visa information from the EEOC because that "discovery would inhibit Congress's purpose in enacting the

159. *Id.* at 550.

160. *Id.* at 551.

161. *See supra* note 129 and accompanying text (discussing Koch's argument that Section 1367 does not apply to the EEOC because it is not explicitly listed as a "covered agency," an argument the district court rejected because the implementing regulation expanded the scope of the statute).

162. *Cazorla*, 838 F.3d at 550–51 (alterations in original) (quoting 8 C.F.R. § 214.14(e)(ix)(2) (2016)).

163. *See supra* notes 56–60 and accompanying text (discussing DHS's approval of the EEOC as a certifying body, permitting it to certify U-visa applications).

164. 8 U.S.C. § 1367(a), (a)(2) (2012) ("[I]n no case may [any official] . . . permit use by or disclosure to anyone . . . of any information which relates to an alien who is the beneficiary of an application for relief . . . .").

165. Brief of Defendant-Appellee Cross-Appellant Koch Foods of Mississippi, LLC at 44, *Cazorla*, 838 F.3d 540 (No. 15-60562). They argued that

> Section 1367 merely provides that U-visa information should be kept confidential by certain governmental agencies and their employees. The plain text does not bar (or even mention) disclosure in litigation and does not apply to applicants. The failure to expressly prohibit disclosure in litigation forecloses any argument that the information is privileged.

Id. at 45 (citations omitted).

166. *Cazorla*, 838 F.3d at 551. The court noted that "as a purely textual matter, it is unclear why a provision broadly barring *any* 'disclosure' would have to specify 'including in discovery' in order to have effect." *Id.* The court cited *Baldrige v. Shapiro*, 455 U.S. 345, 354–61 (1982), where the Supreme Court held that a statute barring disclosure of certain census records also barred them from discovery despite the statute's silence on evidentiary privilege to these records in civil cases. *Cazorla*, 838 F.3d at 551 n.29.

167. *Cazorla*, 838 F.3d at 552 (citing *In re* England, 375 F.3d 1169 (D.C. Cir. 2004)). *In re England* was authored by then-Judge John Roberts, prior to his elevation to the Supreme Court.

provision."[168] The Fifth Circuit thus did not budge from the straightforward reading of the statute and regulation and found that Koch was barred from discovery of U-visa information from the EEOC.

The Fifth Circuit's application of Section 1367 to the individual plaintiffs was ultimately as straightforward as the application to the EEOC. The Fifth Circuit addressed two important textual arguments that the plaintiffs presented. The first was that by adopting the district court's interpretation of Section 1367, the Fifth Circuit would render the statute meaningless by allowing Koch, and other similar litigants, to get the same information the court barred from disclosure by the EEOC (or another covered agency) from the individual plaintiffs themselves.[169] The Fifth Circuit agreed, stating, " indeed, Koch appears able to get most, if not all, of the information it wants from the individual claimants."[170] The plaintiffs argued that interpreting Section 1367 to bar discovery from the EEOC but not the individual plaintiffs would frustrate Congress's goal of fostering reporting of abuse.[171] However, the court found that "any exploration of [congressional] purpose is beside the point" because "§ 1367's text is unambiguous."[172] The Fifth Circuit reasoned "there is no need to depart from the straightforward text of the statute (i.e., by implying an additional privilege not explicitly set forth) in order to save it from superfluity."[173] The court also pointed to other provisions within Section 1367[174] and outside of Section 1367 that would protect individuals from disclosure, such as attorney-client privilege and protections under Rule 26(b)(1).[175]

The court also dismissed the plaintiffs' second textual argument, that under Section 1367(b)(4) individual plaintiffs, like certifying agencies, have the right to refuse subpoenas seeking information.[176] The court distinguished the two protections by explaining that "[t]he right to regulate a third party's disclosure of one's information is logically distinct from the right not to personally disclose that information; conceptually, it is possible, if perhaps unusual, that someone might have

168. *Id.* (citing *In re England*, 375 F.3d at 1177–78).
169. *Id.* at 553.
170. *Id.*
171. *Id.* at 552.
172. *Id.*
173. *Id.* at 554.
174. *Id.* The court noted that "as we read it" there are layers of confidentiality "that cannot be circumvented by subpoenaing individuals" such as the fact that Section 1367 requires a lawsuit. *Id.*
175. *Id.* For example, under Rule 26(b)(1), an individual claimant may be able to argue that it is too burdensome to disclose the records, where an agency may not be able to make the same argument. *Id.*
176. *Id.*

one but not the other."[177] Thus, the Fifth Circuit found that the district court correctly interpreted 8 U.S.C. § 1367 to bar discovery from the EEOC, but not from the individual claimants.[178]

C. Fifth Circuit's Correction of the District Court's Rule 26(c) Balancing Test

Because the Fifth Circuit agreed with the district court that Section 1367 did not protect against U-visa discovery from individual claimants, its next step was to discuss the district court's balancing test under Rule 26(c).[179] The Fifth Circuit agreed with the district court that there was a conspicuous lack of precedent: "[T]his dispute presents an issue of first impression in our circuit, much of the precedent the parties deem relevant is not, and what remains is equivocal."[180] In analyzing the nonbinding precedent, the court distinguished between two types of cases: those cases where immigration benefits were alleged to motivate claims, and those that did not.[181] In the latter, the Fifth Circuit explained that courts usually reject any discovery into immigration status, reasoning that it is hard to argue the status in itself is "important enough evidence of plaintiffs' broader credibility to be discoverable."[182] In the former, the Fifth Circuit noted that "where immigration status and benefits have related more directly to the parties' claims, defenses, and credibility" there have been divergent findings among the lower courts.[183] The court cited to both *David* and *Camayo* as two diverging opinions.[184] Because of the lack of guidance, the Fifth Circuit found that the district court was correct in at least recognizing that it would have to embark on its own Rule 26(c) balancing analysis.[185] The Fifth Circuit also found that the district court did not abuse its discretion in finding that the U-visa information had

177. *Id.*

178. *Id.*

179. *Id.* at 555. The Fifth Circuit broke down the district court's opinion's main points as follows: the lack of relevant and binding case law, the fact that the discovery Koch sought was probative of its defense, and that ultimately the relevance of that information outweighed any *in terrorem* effect. *See supra* Part I.D.

180. *Cazorla*, 838 F.3d at 555.

181. *Id.* at 555–56.

182. *Id.* at 556. In a footnote, the Fifth Circuit listed district court cases, both reported and unreported, including a case involving the EEOC that rejected "Defendants' argu[ment] that the charging parties' credibility is directly relevant and therefore, they should be able to inquire about falsification of identity and immigration status." *Id.* at 556 n.51 (alteration in original) (quoting EEOC v. Bice of Chi., 229 F.R.D. 581, 583 (N.D. Ill. 2005)).

183. *Id.* at 556.

184. *Id.* at 556–57, 557 n.55; *see generally* Part I.C (discussing *David* and *Camayo*).

185. *Cazorla*, 838 F.3d at 557.

probative value.[186] The court did not accept all of the district court's findings. For example, the court was unpersuaded by the district court's finding that the only reason there was a spike in claims was because employees were filing false claims.[187] However, the court still found it plausible that some of the claims could be false, or partly false, given the opportunity to obtain a visa.[188] Whether the district court's balancing test was undertaken correctly was still up for debate in the Fifth Circuit's opinion.[189]

The Fifth Circuit then discussed four factors in coming to its decision on whether the plaintiffs' and the public's interest in preventing U-visa discovery outweighed the probative value of the information: (1) the "Claimants' fears of being fired"; (2) the "Claimants' fears of being reported"; (3) "[t]he extent of additional discovery"; and (4) "the burden on non-claimants."[190] This section of the decision—and each of these factors—will likely create far-reaching effects for future litigants, who have statutory discovery protection of their U-visa information when requested by defendants from the EEOC, but somehow lack that protection when the same information is requested from the individual, leading to protracted litigation.

1. Claimants' Fears of Being Fired

The Fifth Circuit disagreed with the district court's conclusion that the claimants' fears of being fired were unfounded or illegitimate.[191] Because the protective order entered by the district court permitted the U-visa information to be used "for purposes unrelated to this litigation if

186. *Id.* at 558.

187. *Id.* The Fifth Circuit noted that there could be varying reasons for the spike in claims. For example, the EEOC could have found more claimants to come forward during the course of its investigation. *Id.* ("The EEOC's involvement could have caused the case's ranks to swell for any number of legitimate reasons; most obviously, the EEOC may have discovered additional harassment claimants during the pre-suit conciliation and investigation processes."). Additionally, the court acknowledged the multiple safeguards that are in place to protect against fraud. *Id.*

188. *Id.* at 559.

189. *Id.* The Fifth Circuit summarized the district court's Rule 26 analysis:

> After finding U visa discovery relevant, the court turned to the other side of the ledger, analyzing whether the discovery would create an undue burden. It reasoned that the claimants did not need to fear being fired once Koch discovered that they sought U visas, since most of them no longer worked for the company and others "may have other protection" or could be sheltered by a protective order. . . . For these reasons, the court concluded, the relevance of the discovery sought outweighed any burden it might impose.

Id.

190. *Id.* at 559–64. Some of these factors were discussed by the district court, but some of them were not.

191. *Id.* at 559–60.

'required by relevant law,'" the court found that employees would likely be fired as a result of disclosure because it is illegal to knowingly employ an undocumented worker, and the disclosure of U-visa information could lead to Koch discovering undocumented workers.[192] The court found that the claimants and their families legitimately feared discovery, particularly because Koch could engage in retributive firing while maintaining the firing was legal.[193] The Fifth Circuit did recognize the fear was "highly speculative" in this specific case given the fact that it was unclear how many claimants remained employed at Koch or how many of those claimants filed for U-visas.[194] Ultimately, that did not dissuade the court from recognizing there was a legitimate risk to the claimants and their families of losing their jobs, and this factor became an element considered in the balancing test.[195]

2. Claimants' Fears of Being Reported

Much like the district court's analysis regarding the claimants' fears of being fired, the Fifth Circuit also found the lower court "downplay[ed]" the claimants' fears of Koch reporting them to immigration authorities should their U-visa information be discoverable.[196] Even with a protective order in place barring Koch from taking such retributive action, the Fifth Circuit was not convinced, stating instead, "[a] protective order would not necessarily quell claimants' fear of suffering [retributive firing], regardless of Koch's intent to comply with the order."[197] Furthermore, the Fifth Circuit did not find compelling the district court's reasoning that, because those claimants who had submitted U-visa applications had already revealed their status to federal bodies such as the EEOC and USCIS, their fear of being reported was illegitimate.[198] Instead, the Fifth Circuit reasoned, "[a]n abuse victim might well be willing to disclose sensitive information to a few sympathetic officials, yet nonetheless fear that his or her abuser might obtain that information

192. *Id.* (noting that "Koch said earlier in the litigation that it will fire [plaintiffs] if it turns out they are undocumented" which "is unsurprising" because "it is illegal to knowingly employ an undocumented worker, and U visa discovery would necessarily show Koch which of its employees are undocumented"). The Fifth Circuit explained that it was "uncertain" whether the "required by relevant law" language could protect the employees because "doing so might force Koch to violate the law." *Id.* at 560.

193. *Id.* at 560.

194. *Id.*

195. *Id.* ("Nonetheless, if claimants have applied for U visas, their jobs may still be on the line, contrary to the district court's apparent belief.").

196. *Id.* at 561.

197. *Id.* The court also noted that "employers commonly and unlawfully retaliate against irksome workers by reporting or threatening to report them to immigration authorities." *Id.*

198. *Id.*

and spread it far and wide."[199] The court found that the mere fact a claimant disclosed his or her immigration status to particular authorities did not automatically indicate that a claimant could not legitimately fear disclosure to other bodies resulting in deportation.[200] Therefore, the court found it reasonable to add this effect of disclosure to the balancing test in the plaintiffs' favor.[201]

3. The Extent of Additional Discovery

Having already found that the U-visa information was relevant to the litigation, the Fifth Circuit further explained, if discovery of U-visa information was ultimately permitted, "it should not be barred simply because other impeachment evidence exists."[202] The plaintiffs disputed the quantity of discovery, not the quality, therefore the Fifth Circuit reminded the parties that the "quantity of additional discovery remains within the district court's discretion to control."[203] The court was satisfied with the district court's assurance that it would not allow a "fishing expedition" and reinforced the contention that the plaintiffs could seek relief from any "unduly burdensome demands" with the district court.[204]

4. The Burden on Non-Claimants

In deciding this last piece of the balancing test, the Fifth Circuit found the district court's lack of discussion concerning how "U visa litigation might intimidate individuals outside this litigation, compromising the U visa program and law enforcement efforts more broadly"[205] most pressing. The Fifth Circuit found that the district court "could and should" have considered the EEOC's interests and the interests of the broader public in its Rule 26 balancing test.[206] The court reasoned that there are thousands of people who apply for U-visas each year, and the district court did a disservice to the public by only looking at the chilling effect U-visa discovery would have on the specific claimants in this case.[207] The Fifth Circuit elaborated:

> Allowing U visa discovery from the claimants themselves in this high-profile case will undermine the spirit, if not the letter, of those

199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.* at 562.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*

> Congressionally sanctioned assurances and may sow confusion over when and how U visa information may be disclosed, deterring immigrant victims of abuse—many of whom already mistrust the government—from stepping forward and thereby frustrating Congress's intent in enacting the U visa program.[208]

The Fifth Circuit explained that this broader chilling effect was a "serious concern" for the EEOC, the National Labor Relations Board (NLRB),[209] and state and federal departments of labor that have the power to certify U-visa applications.[210] Relying on law review articles and other social science studies on the topic,[211] the court found credible evidence suggesting that immigrants are one of the most vulnerable groups when it comes to workplace abuse because their status makes them "highly reluctant" to report abuse for fear of retaliation, and they are particularly susceptible to threats of deportation.[212] If this information was readily discoverable, agencies like the EEOC and the NLRB would be unable to reassure those who do come forward that the statutory protections or protective orders are sufficient, cutting directly against Congress's intent in passing the U-visa program and keeping this information privileged under most circumstances.[213] Additionally, the Fifth Circuit feared these agencies would be unable to "reassure potential claimants that although U visa discovery was allowed in *this* case, it will not be allowed in *their* cases."[214] The Fifth Circuit looked beyond the effects its ruling would have on the parties before it and instead noted that virtually all immigrant abuse cases which the EEOC and other employment agencies handle have the same elements.[215] Therefore, ruling completely in favor of Koch would create Fifth Circuit precedent allowing such broad discovery that would be harmful to others outside of

208. *Id.* at 562–63 (footnotes omitted).

209. The NLRB filed an amicus brief in this case, which will be discussed at length in Part III. *See generally* Brief for the NLRB as Amicus Curiae Urging Partial Reversal in Support of Appellant Cross-Appellee EEOC, *Cazorla*, 838 F.3d 540 (15-60562), 2015 WL 6506234 [hereinafter Brief for the NLRB].

210. *Cazorla*, 838 F.3d at 563.

211. *Id.* at 563 n.77. For general background information and to review the articles the Fifth Circuit cited, see Kati L. Griffith, *Undocumented Workers: Crossing the Borders of Immigration and Workplace Law*, 21 CORNELL J.L. & PUB. POL'Y 611, 616–17 (2012) (discussing a 2008 survey of 4387 low-wage immigrant workers in three cities suggesting that immigrants are disproportionately likely to experience wage-and-hour violations); Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 676–79 (2003) (collecting evidence that undocumented workers underreport labor violations).

212. *Cazorla*, 838 F.3d at 563.

213. *Id.*

214. *Id.*

215. *Id.* at 563–64.

this litigation.[216]

Ultimately, the Fifth Circuit remanded the issue to the district court, having found the district court "confined its focus to the interests of the individuals before it."[217] The Fifth Circuit, "having weighed *all* of the problems U visa discovery may cause against Koch's admittedly significant interest in obtaining the discovery," concluded that the discovery the district court approved imposed an undue burden on the individual plaintiffs and needed to be redefined.[218]

III. IGNORED ARGUMENTS RESULT IN IMPORTANT CONSEQUENCES

The Fifth Circuit was succinct yet thorough in its opinion.[219] The Fifth Circuit was correct that there was a conspicuous lack of precedent—there were virtually no cases in other circuits on point, and when addressed in the lower courts, apart from being nonbinding, the opinions were often irrelevant given the particular facts. Overall, the opinion gives strong voice to the important policy implications the district court failed to address, namely the congressional intent behind the U-visa program.[220] But, the opinion leaves a loophole for future employers charged with the same workplace harassment to obtain information that would be barred had they asked for the same information from a government body.[221]

A. Missed Argument for A Total Bar of the Discoverability of This Information via Rule 26(c)

At the very beginning of Section IV of its opinion, the Fifth Circuit discussed its legal standard of review under Rule 26.[222] Importantly, it discussed the plaintiffs' argument that the district court erred in assigning them the burden of proof to show good cause under Rule 26(c)(1), rather than Koch.[223] In their brief, the plaintiffs advanced a legally sound

216. *Id.* at 564.

217. *Id.*

218. *Id.*

219. *See supra* note 145 (noting the Fifth Circuit recognized the case was years old and still only in the discovery stage).

220. *See supra* notes 203–214 and accompanying text (discussing the Fifth Circuit's finding that the district court failed to weigh the broader chilling effect its order might have on non-parties, which would undermine Congress's policy objectives in enacting the U-visa program).

221. *See* Brief of LatinoJustice PRLDEF, *supra* note 2, at 42 ("[T]his Court should not entertain attempts by the perpetrator, his employer, or any other person to seek an alternative means of obtaining confidential information that the government is forbidden from providing and that was intended to remain out of their hands."). The NIWAP is correct in noting this is simply a loophole to discover information Congress clearly did not want discovered.

222. *See supra* notes 154–156 (noting that the plaintiffs waived this argument because they failed to raise it in the district court).

223. *Cazorla*, 838 F.3d at 549 (urging the Fifth Circuit "to hold that U-visa information is . . .

argument: that other courts have held that certain types of information are so presumptively sensitive that the party seeking discovery initially bears the burden of proving a particular need for the information.[224] Therefore, if Koch wanted the sensitive U-visa information, it had the burden to show a particularized need.[225] For procedural reasons, the Fifth Circuit did not permit the plaintiffs to raise this argument because "[b]urden-shifting, presumptions of sensitivity, references to tax-return cases, and the like are wholly absent both from the district court's opinion and from plaintiffs' motions opposing U visa discovery."[226]

The Fifth Circuit could have accepted this "compelling" argument and remanded the case with instructions to shift the initial burden onto Koch to show a "particularized need" for the information.[227] However, because the plaintiffs did not introduce this argument in the district court, the only way they could have brought it before the Fifth Circuit would have been to argue in their brief there were "extraordinary circumstances" allowing this argument to be brought for the first time on appeal.[228] In order to show extraordinary circumstances did exist, plaintiffs would have had to plead that "the issue involved is a pure question of law and a miscarriage of justice would result from [the court's] failure to consider it."[229] In the

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presumptively sensitive information, and the party seeking this information always bears the burden of proving a particularized need for it" (alteration in original)).

224. *See* Brief for Intervenors, *supra* note 154, at 13–15 (arguing that, like tax returns and confidential settlement agreements, U-visa information is presumptively sensitive and shifts the burden of proof to the requesting party).

225. *Id.*; *see also Cazorla*, 838 F.3d at 549 (summarizing the plaintiffs' argument).

226. *Cazorla*, 838 F.3d at 549–50. The court continued:

> In their appeal briefing, plaintiffs reference several points in the record where they purportedly pressed their argument, but each shows, at most, that plaintiffs occasionally used the term "need" and advocated a balancing approach in contesting whether Koch was entitled to the discovery it sought. This did not suffice to preserve the more elaborate theory they advance on appeal.

Id. at 550. Indeed, there is no mention of this argument in the district court opinion. *See generally* Cazorla v. Koch Foods of Miss., LLC, No. 3:10cv135-DPJ-FKB, 2014 WL 281979 (S.D. Miss. Jan. 24, 2014).

227. *Cazorla*, 838 F.3d at 549 ("Plaintiffs' argument, however compelling, is waived.").

228. *See id.* at 549 n.23 (quoting AG Acceptance Corp. v. Veigel, 564 F.3d 695, 700 (5th Cir. 2009)) ("Under this Circuit's general rule, arguments not raised before the district court are waived and will not be considered on appeal unless the party can demonstrate 'extraordinary circumstances.'"). The *Cazorla* court also noted, "Plaintiffs do not argue that extraordinary circumstances are present here." *Id.* Given the high bar to raising unpreserved issues on appeal, it is unlikely the plaintiffs would have been successful even if they had tried.

229. N. Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910, 916 (5th Cir. 1996); *see also AG Acceptance Corp.*, 564 F.3d at 700–01 (holding that the plaintiffs' briefing was "devoid of any argument that a miscarriage of justice would result from [the court not] consider[ing] the . . . issue. . . . [B]ecause the [plaintiffs] have failed to identify any harm resulting from the district court's . . . ruling, we decline to consider their substantive argument for the first time on appeal." (footnotes omitted)).

plaintiffs' brief there is no pleading of extraordinary circumstances; instead, the brief focused on why U-visa information was presumptively sensitive, analogous to tax returns and presentence investigation reports, and not on the miscarriage of justice argument.[230] As "compelling" as the argument may have been, the plaintiffs failed to raise it, and so the Fifth Circuit was correct in finding it waived. Even if the argument had been properly raised, Koch would still have been unable to meet its burden of showing a "particularized need" for the U-visa information.[231]

The Fifth Circuit and the district court agreed that some of the U-visa information was relevant to Koch's defenses.[232] Ultimately, even if the burden had shifted as the plaintiffs wanted, it is possible that the Fifth Circuit would have still held Koch had a particularized need for the information.[233] Regardless, the plaintiffs put forward three cases in their brief to argue that "[e]ven relevant information may be withheld if, considering the parties' needs, the information is unnecessary to fair determination of the merits."[234] The three cases cited, however, are distinctly different from the present case. Given that the Fifth Circuit disregarded cases that were not factually analogous, it's unlikely the court would have found this argument persuasive.[235] While this may be

230. *See* Brief for Intervenors, *supra* note 154, at 14–15. The brief's Rule 26 burden-shifting analysis only analogizes the U-visa information with other presumptively sensitive information before going on to discuss how Koch must prove it had a particularized need for the information that outweighed its inherent sensitivity. Nowhere in the brief do the plaintiffs make an "extraordinary circumstances" argument. *See generally id.*

231. *Cazorla*, 838 F.3d. at 549. The Fifth Circuit did not go into this argument because it did not shift the burden to Koch under Rule 26(c). However, in the individual plaintiffs' brief, it is argued that the district court only took into consideration the relevance of the information and did not evaluate Koch's actual need for the information. Brief for Intervenors, *supra* note 154, at 19.

232. *Cazorla*, 838 F.3d. at 559 ("[A]lthough plaintiffs' claims are facially credible, and although the possibility that immigration benefits may have induced some claimants to step forward does not necessarily suggest that their claims are false, we find it plausible that some undocumented immigrants might be tempted to stretch the truth in order to obtain lawful status—and perhaps even lawful *permanent* status—for themselves and their families. . . . Given this . . . we cannot conclude that the district court abused its discretion in finding U visa discovery relevant and potentially probative of fraud.").

233. Based on Fifth Circuit precedent, Koch would have had to show a "compelling, particularized need for disclosure," assuming the U-visa information was presumptively sensitive. United States v. Huckaby, 43 F.3d 135, 138 (5th Cir. 1995) (quoting United States v. Corbitt, 879 F.2d 224, 239 (7th Cir. 1989)).

234. *See* Brief for Intervenors, *supra* note 154, at 19 (citing Bogan v. City of Boston, 489 F.3d 417, 423–24 (1st Cir. 2007); Moore v. Armour Pharm. Co., 927 F.2d 1194, 1198 (11th Cir. 1991); United States v. Bonanno Organized Crime Family of La Cosa Nostra, 119 F.R.D. 625, 627–28 (E.D.N.Y. 1988)).

235. For example, under the Rule 26 analysis, the Fifth Circuit noted the presented case law was not binding and distinguishable before engaging in its own balancing test. *Cazorla*, 838 F.3d at 555 (noting that "much of the precedent the parties deem relevant is not, and what remains is equivocal").

considered a missed opportunity for the plaintiffs in not pleading the correct standard, the Fifth Circuit established that legally there would be no burden shifting.[236] Had the brief been pled in this manner, with a focus on a "miscarriage of justice," this may have been a completely different case.

B. Missed Argument for A Total Bar of the Discoverability of This Information via Statute

Another potentially harmful move the Fifth Circuit made was shifting one of the plaintiffs' most important arguments from a statutory interpretation issue to a Rule 26 issue.[237] In their brief, the plaintiffs argued that there is, in fact, a total bar to the discoverability of U-visa information based on a side-by-side reading of Sections 1367(a)(2) and 1367(b)(4).[238] Section 1367(a)(2) bars government agencies from permitting "use by or disclosure to anyone . . . of any information which relates to an alien who is the beneficiary of an application" for a U-visa.[239] Section 1367(b)(4) allows individual U-visa applicants to waive the privilege stated in subsection (a)(2).[240] Plaintiffs argued that, when read together, the statutes indicate "U-visa information is privileged whether held by the government or by the U-visa applicant."[241] The

236. It may seem like a draconian result, particularly in this case where simply raising the burden-shifting argument could have created completely different outcome. However, this rule is necessary because, without it, the appellate court would be flooded with last-minute arguments and would be unable to review the district court's opinion. And this general rule is well applied throughout the Fifth Circuit. *See, e.g.*, Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 175–76 (5th Cir. 2014) (holding that the plaintiff did not present his argument that the defendant failed to prove certain elements of his claim at the district court or tribal courts, therefore waiving the issue on appeal); Green Tree Servicing, L.L.C. v. Clayton, 689 F. App'x 363, 370 (5th Cir. 2017) (holding that the plaintiffs' challenges to the arbitration agreement would not be accepted by the court because the challenges were not brought up in the district court).

237. *Cazorla*, 838 F.3d at 552–53. The plaintiffs argued that interpreting Section 1367 to permit discovery of U-visa information from the plaintiffs (as opposed to the EEOC) would frustrate the statute's goal of fostering reporting of abuse. *Id.* at 552. The Fifth Circuit rejected this argument out of hand because "§ 1367's text is unambiguous, any exploration of purpose is beside the point." *Id.* Nonetheless, the court found that the plaintiffs' "argument has weight" and "the harm Koch's desired discovery might cause to Congress's purposes is highly relevant to our Rule 26 analysis." *Id.* at 553.

238. Brief for Intervenors, *supra* note 154, at 10 (arguing that "[u]nless U-visa information held by individuals is as privileged as that same information held by the government, the words of §§ 1367(a)(2) and (b)(4) are meaningless. . . . Even if the statutory text could have been clearer, the text that appears in §§ 1367(a)(2) and (b)(4), read in conjunction with 8 C.F.R. § 214.14(e)(2), establishes that U-visa information held by the government and by U-visa applicants must be equally privileged.").

239. 8 U.S.C. § 1367(a)(2) (2012).

240. § 1367(b)(4) ("Subsection (a)(2) of this section shall not apply if all the battered individuals in the case are adults and they have all waived the restrictions of such subsection.").

241. Brief for Intervenors, *supra* note 154, at 9.

plaintiffs argued that "government privilege for U-visa information would be practically useless without an individual privilege."[242] As stated previously, the Fifth Circuit ultimately rejected this argument.[243]

The Fifth Circuit's rejection of the plaintiffs' argument, that Section 1367 provides a total bar to discovery from both government agencies and the individual claimants, can be seen as both a strength and a weakness of this opinion.[244] It is a strength insofar as the court performed a straightforward interpretation of the statue, which many legal scholars see as the only way to increase predictability—and decrease ambiguity—should the issue be litigated in the future.[245] It is a weakness in that the court had the opportunity to use its appropriate judicial discretion[246] to read an absolute bar to U-visa information and further public policy goals.[247] In using its appropriate judicial discretion, the Fifth Circuit *could* have taken into account the congressional intent behind the statute, instead of looking at it from a "purely interpretive standpoint."[248] But, likely believing that the issue could be resolved under a Rule 26 analysis, it chose the straightforward approach.[249] It is likely that the Fifth Circuit adopted this approach because it simply saw this U-visa information as relevant to the defense and thus, purely from a

242. *Id.*

243. *Supra* notes 167–176 and accompanying text.

244. Federal and appellate judges face a variety of issues on their daily dockets, but a good portion of those cases involve statutory interpretation issues. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 13–14 (Amy Gutmann ed., 1997) (noting that "[b]y far the greatest part of what I and all federal judges do is to interpret the meaning of federal statutes and federal agency regulations," and referring to statutory interpretation as "the principal business of judges and (hence) lawyers").

245. Statutory interpretation has been an issue debated among legal scholars and judges in the past fifty years. Some believe that there should be a statutory interpretation methodology, such as a Federal Rules of Statutory Interpretation, to bring lower courts more in line and mitigate future litigation. *See* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863 (2008) (arguing that courts should treat statutory interpretation questions with the highest regard to stare decisis). *See generally* Gary E. O'Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 333, 364 (2004) (concluding, "A Restatement of Statutory Interpretation has the potential to do for statutory interpretation what the Restatement of Contracts did for contracts and might move us a bit closer to having a shared, authoritative interpretive regime. It could be either an alternative to something like the Federal Rules of Statutory Interpretation or a precursor to such rules.").

246. It is not uncommon for a circuit court to adopt a straightforward reading of statutes, however, opposite those legal scholars who believe there needs to be Federal Rules of Statutory Interpretation, are those who understand that due to the "inherent imprecision of language and the severe limitations on legislative foresight," courts should and do have considerable interpretive leeway. Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 226 (2015).

247. The harmful effects will be discussed in Part IV, *infra*.

248. Cazorla v. Koch Foods of Miss., L.L.C., 838 F.3d 540, 553 (5th Cir. 2016).

249. *Id.* at 554.

relevance standpoint, determined it should be allowed for discovery under Rule 26.[250] The Fifth Circuit's commitment to a straightforward interpretation in this case mandated its inequitable ruling. The court deferred to a harmful procedural analysis based on the questionable existence of fraud, *knowing* the potential effects and protecting the information from discovery through the EEOC, and acting in direct opposition to plain-text interpretation of a federal statute passed with bipartisan support. A total bar without precedent to fall back on may have seemed risky in the eyes of the court, but necessary.[251]

C. Why the Fifth Circuit Found the Labor Agencies' Arguments Most Persuasive

The Fifth Circuit correctly recognized that the district court did not give enough credence to government labor agencies such as the EEOC and NLRB and other federal and state departments of labor, all of which certify U-visa applications.[252] In its opinion, the Fifth Circuit discussed directly the "serious concern" that would arise if this information was discoverable from the individual plaintiffs or EEOC and NLRB given the "[c]onsiderable evidence suggest[ing] that immigrants are disproportionately vulnerable to workplace abuse and, not coincidentally, highly reluctant to report it for fear of discovery and retaliation."[253]

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250. Under Rule 26 of the Federal Rules of Civil Procedure, parties are allowed to request discovery that supports a claim or defense. The district court, the Fifth Circuit, and a variety of other courts see this information as relevant and thus allow discovery under Rule 26 unless otherwise barred. *See supra* Part II.

251. The Fifth Circuit explicitly noted that there was a lack of precedent and that courts were split on a case-by-case basis, stating,

> Although courts have often barred discovery of immigration-related information, in many of these cases, immigration benefits were not alleged to have motivated or shaped the claims at issue and did not otherwise affect the plaintiffs' right to relief. In such cases, courts have frequently rejected the notion that immigration status is itself important enough evidence of plaintiffs' broader credibility to be discoverable.
>
> But where immigration status and benefits have related more directly to the parties' claims, defenses, and credibility, as here, district courts have reached divergent results.

Cazorla, 838 F.3d at 555–56.

252. *Id.* at 562 (stating, "These dynamics jeopardize the EEOC's interests and those of the broader public. The district court could and should have weighed them in its Rule 26 analysis. But its analysis considered only the immediate chilling effect of U visa discovery *on the individual claimants in this case*.").

253. *Id.* at 563. The Fifth Circuit cited to many secondary sources to bolster this statement, but the most persuasive is a study done at the University of Illinois at Chicago Center for Urban Economic Development. *Id.* at 563 n.77. As the court noted,

> The study found, in an analysis of 1,186 Chicago immigrant workers, "undocumented workers more often experience unsafe working conditions than do immigrants with legal status," that they file claims less frequently than would be expected given their rates of reported serious injury and unsafe working conditions, and that there is a strong and

The EEOC and amicus NLRB briefs are rife with real-life examples and common-sense workplace knowledge that likely persuaded the Fifth Circuit in its decision.[254] The NLRB's main argument for disallowing the discoverability of U-visa information was that it would incentivize employers to hire undocumented workers, unfairly penalize businesses that were not engaging in hiring undocumented workers, and "exert[] downward pressure on the working conditions of citizens and other authorized workers."[255] Because of that incentive, immigration status has been used in the past to strong-arm employees to remain silent when employers commit potentially criminal acts.[256] The Fifth Circuit also accepted the NLRB's argument that "inquiries" without limits would chill cooperation of not only those employees whose status is being questioned, but also those employees who may want to come forward but do not after seeing the ramifications.[257]

This argument is fully supported by case law, and is not a new issue

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statistically significant correlation between undocumented status and wage and hour complaints.

Id.

254. *See, e.g.*, Brief for the NLRB, *supra* note 209, at 7 ("On the basis of its long experience in protecting the statutory rights of workers, the NLRB has concluded that 'undocumented aliens are extremely reluctant to complain to the employer or to any of the agencies charged with enforcing workplace standards for fear that they will lose their jobs or risk detection and ultimately deportation.'" (quoting A.P.R.A. Fuel Oil Buyers Grp., 320 N.L.R.B. 408, 414 (1995))). "More recently, two Board members observed that undocumented workers 'face a double risk in taking concerted action—not just as employees asserting their Section 7 right . . . but as undocumented immigrants at risk of deportation.'" *Id.* (alteration in original) (quoting Mezonos Maven Bakery, Inc., 357 N.L.R.B. 376, 379 (2011) (concurring opinion), *aff'd in part and remanded in part on other grounds sub nom.* Palma v. NLRB, 723 F.3d 176 (2d Cir. 2013)).

255. Brief for the NLRB, *supra* note 209, at 5.

256. The NLRB noted other examples, including *Prof'l Research, Inc.*, 218 N.L.R.B. 96, 96–97 (1975), which found "that a union's threat of deportation if employee refused to sign authorization card interfered with free choice and warranted setting aside election." Brief for the NLRB, *supra* note 209, at 6. It also cited *John Dory Boat Works, Inc.*, 229 N.L.R.B. 844, 852 (1977), which held "that subpoenas probing into immigration status interfered with witnesses' ability to testify." Brief for the NLRB, *supra* note 209, at 6. The brief further cited *Viracon, Inc.*, 256 N.L.R.B. 245, 247 (1981), which found "that employer's threats of deportation if employees elected union representation were unlawful coercion." Brief for the NLRB, *supra* note 209, at 6.

257. *See* Brief for the NLRB, *supra* note 209, at 11 (citing Flaum Appetizing Corp., 357 N.L.R.B. 2006, 2011–12 (2011)). There is already a stigma surrounding those who come forward in sexual assault cases regardless of immigration status. Combining that fact with the employee-employer relationship and the possibility of being deported, the Fifth Circuit was correct in remanding the case to fully address the chilling effect of such discovery. *See* Michelle J. Anderson, Note, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401, 1402–03 (1993) (describing how not only are women in the United States highly statistically likely to be abused regardless of status, but those with conditional status, such as relying on a husband or corporation to supply a work visa, are even more likely to be abused); Husain & Orloff, *supra* note 104 (providing statistics on immigrant women demographics relating to work and violence).

for labor agencies. For example, the Ninth Circuit in *Fuentas v. INS* noted than an employer only reported undocumented workers that he had underpaid for three years when they filed suit to recover wages they were owed.[258] The Ninth Circuit later held, in 2000, that plaintiffs would be allowed to plead their claims in the case anonymously, due to their fear of retaliatory deportation.[259] In *Singh v. Jutla & C.D. & R's Oil, Inc.*, a district court addressed a situation where an employer had systematically recruited undocumented workers and then reported them to the authorities when any of the employees would file suit for unpaid wages.[260] These cases are just a few of many examples the NLRB cited. As a result, the Fifth Circuit correctly recognized the discoverability of U-visas would cause a chilling effect.[261]

Even though the Fifth Circuit correctly found that bodies like the EEOC and NLRB would have a legitimate interest in keeping this sensitive information private, it did not completely defer to their policies when coming to its ultimate decision. For example, the NLRB has a specific procedure in place for deciding if immigration status is even necessary to bring up at all in similar proceedings.[262] Internal policy dictates the NLRB conduct a well-thought-out and articulated balancing between the employer's interests "in supporting the defense against the chilling effect an employer's inquiries will have on current and potential Board witnesses."[263] And, the NLRB should consider "whether the

258. Fuentes v. I.N.S., 765 F.2d 886, 887 (9th Cir. 1985), *vacated on other grounds*, 844 F.2d 699 (9th Cir. 1988).

259. Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1062–63 (9th Cir. 2000).

260. Singh v. Jutla & C.D. & R's Oil, Inc., 214 F. Supp. 2d 1056, 1062 (N.D. Cal. 2002).

261. The EEOC also supported the NLRB's contentions in its own brief, citing to multiple cases where the chilling effect of allowing such information to be discoverable would be inappropriate. Response and Reply Brief for Plaintiff-Appellant Cross-Appellee EEOC at 58, Cazorla v. Koch Foods Miss. L.L.C., 838 F.3d 540 (5th Cir. 2016) (No. 15-60562) [hereinafter EEOC Reply Brief]. *See, e.g.*, Rivera v. NIBCO, Inc., 364 F.3d 1057, 1065 (9th Cir. 2004) ("The chilling effect [immigration status] discovery could have on the bringing of civil rights actions unacceptably burdens the public interest."); EEOC v. Bice of Chi., 229 F.R.D. 581, 583 (N.D. Ill. 2005) (finding immigration status discovery "would have a chilling effect on victims of employment discrimination from coming forward to assert discrimination claims").

262. "Because undocumented workers are employees protected by the NLRA, the Board has long held that an employee's immigration status is not relevant to the determination of whether a respondent—employer or union—has violated the Act." Brief for the NLRB, *supra* note 209, at 14 (citation omitted).

263. Brief for the NLRB, *supra* note 209, at 16. The NLRB has limited probes into immigration status in this way after being confronted with the issue in countless cases. *See generally* Flaum Appetizing Corp., 357 N.L.R.B. 2006 (2011) (holding that employers have to "articulate a basis for pleading an affirmative defense" because of which it may need to subpoena certain immigration documents); Farm Fresh Co., 361 N.L.R.B. 848 (2014) (holding that the Board will also consider whether the defense may support its case through other evidence).

defense can be supported through other means."[264] This may sound similar to the Rule 26 balancing test that the Fifth Circuit used; however, both the EEOC and NLRB urged the court to look at whether alternative means could be used to assess the issue of the claimants' credibility.[265] The EEOC and the NLRB partially concluded in their briefs that the district court failed to address the fact that Koch could have tested a claimant's credibility in alternative ways, such as witness testimony and the weight of respective evidence or admitted facts.[266] The Fifth Circuit did not address whether the information could be procured by alternative means, only that the information was presumptively relevant.[267] Ultimately, it is within the Fifth Circuit's purview to include or exclude whatever factors it wishes from a Rule 26 balancing test, within certain limits.[268] But, because the NLRB and EEOC are the agencies that certify U-visa applications, and they deal heavily in undocumented worker complaints every day and have firsthand knowledge of what works and what does not, the Fifth Circuit was counterproductive in failing to defer to them in its decision.[269]

D. Missing Intersection Between Immigration and Sexual Assault or Harassment in the Workplace

The Fifth Circuit ultimately held that the district court did not correctly

264. Brief for the NLRB, *supra* note 209, at 17 (citing *Farm Fresh Co.*, 361 N.L.R.B. 848).

265. Brief for the NLRB, *supra* note 209, at 22–23; EEOC Reply Brief, *supra* note 261, at 55–58.

266. Brief for the NLRB, *supra* note 209, at 22–23 (citing *In re* Double D. Constr. Grp., Inc., 339 N.L.R.B. 303, 305 (2003)).

267. The Fifth Circuit opinion does not mention that alternative means of gaining the information was taken into account.

268. *See* Cazorla v. Koch Foods of Miss., L.L.C., 838 F.3d 540, 555 (5th Cir. 2016). The court described the review as follows:

> "[T]he federal courts have superimposed a somewhat demanding balancing of interests approach to the Rule. Under the balancing standard, the district judge must compare the hardship to the party against whom discovery is sought against the probative value of the information to the other party." Courts also weigh relevant public interests in this analysis.

Id. (alteration in original) (footnote omitted) (quoting 6 JAMES WM. MOORE ET AL, MOORE'S FEDERAL PRACTICE ¶ 26.101(1)(c) (3d ed. 2011)).

269. The Fifth Circuit is not bound by NLRB or EEOC policies, but, arguably, they should be given deference. If the NLRB and EEOC both believe, based on their experiences with allowing discovery from individual plaintiffs, that it would harm their overall goals, the Fifth Circuit should have given greater deference to them. But, courts often disregard the EEOC's interpretations. *See* Theodore W. Wern, Note, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC A Second Class Agency?*, 60 OHIO ST. L.J. 1533 (1999) (discussing why the EEOC rarely gets judicial deference in regard to its interpretations of certain statues such as the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act).

address how disclosing U-visa information would affect those outside its decision in *Cazorla*.[270] The Fifth Circuit deferred slightly to the EEOC and NLRB's findings, but failed to fully flesh out the ramifications this decision would have on future immigration policies of other agencies,[271] such as the National Immigrant Women's Advocacy Project (NIWAP),[272] LatinoJustice PRLDEF,[273] and Legal Momentum.[274] Ninety-four other organizations also filed as amici, ranging from law professors to various women's groups advocating on behalf of sexual assault survivors.[275] The Fifth Circuit did not accept a majority of the arguments that the NIWAP amicus brief put forward, such as the argument that Congress drew on a long history of confidentiality protections when coming to its decision to protect U-visa disclosure

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270. *Cazorla*, 838 F.3d at 562.

> The district court's analysis of the harm that U visa discovery might cause the claimants was imperfect, but not critically so. More pressing is that the district court did not address how U visa litigation might intimidate individuals outside this litigation, compromising the U visa program and law enforcement efforts more broadly.

Id.; *see also supra* note 40 (discussing U-visas as a crime-fighting tool).

271. *Cazorla*, 838 F.3d at 563.

272. NIWAP is

> a non-profit public policy advocacy organization that develops, reforms, and promotes the implementation and use of laws, policies and practices to improve legal rights, services and assistance to immigrant women, children and immigrant victims of domestic violence, sexual assault, stalking, human trafficking and other crimes. . . . Since 2012, NIWAP Inc. has provided 148 trainings attended by 11,000 professionals working with immigrant victims and offered technical assistance to callers from all 50 states, the District of Columbia, American Samoa, the U.S. Virgin Islands, embassies and consulates on over 3,500 different matters. NIWAP, Inc. has collaborated with the Department of Homeland Security ("DHS") and the Federal Law Enforcement Training Center ("FLTEC") in the development of on line mandatory VAWA confidentiality training for DHS officials.

Brief of LatinoJustice PRLDEF, *supra* note 2, at 6–7.

273. *Id.* at 8. LatinoJustice PRLDEF, formerly known as the Puerto Rican Legal Defense and Education Fund, was established in 1972 and advocates for the equal protection of Latinos in the workplace. LatinoJustice PRLDEF litigates cases involving "wage theft, discriminatory practices and unfair workplace conditions, including gender-based discrimination, sexual harassment, and English-only language polices that limit the rights of Latina/o immigrants to secure equal employment opportunities in the workplace." *Id.*

274. Brief of LatinoJustice PRLDEF, *supra* note 2, at 8. Legal Momentum was founded in 1970 and

> was instrumental in the drafting and passing of the Violence Against Women Act in 1994 and its subsequent reauthorizations in 2000, 2005, and 2013. The organization has served as counsel and joined amicus curiae in numerous cases to support the rights of victims of intimate partner violence, sexual assault and other forms of gender-motivated violence.

Id.

275. For a full list of various groups who consented to the filing of the amicus brief, see Brief of LatinoJustice PRLDEF, *supra* note 2, at 1–5.

under Section 1367.[276] Neither did it accept the argument that "courts should not compel victims to reveal confidential information they otherwise would not voluntarily reveal to anyone, much less to their aggressors . . . ."[277] The brief argues for a total bar on alleged aggressors being able to access this information, whereas the Fifth Circuit did not agree that a total bar is appropriate given the relevance of the information.[278] The amicus brief states that "this Court should not entertain attempts by the perpetrator, his employer, or any other person to seek an *alternative means* of obtaining confidential information that the government is forbidden from providing and that was intended to remain out of their hands."[279] NIWAP is correct in noting this is simply a loophole to discover information Congress clearly sought to protect from discovery. However, as noted previously, the Fifth Circuit acknowledged, but did not close, this loophole.[280]

E. Missing Today's Political Climate

There would not be ninety-four amici if this issue was not salient in today's politics, and potentially crucial in determining thousands of people's daily working conditions. Fraud is a contentious issue with U-visas generally, and it was the crux of Koch's argument in *Cazorla*.[281] By allowing any, if only some, discovery into U-visa information, the Fifth Circuit may have unintentionally given legal support to the argument that the U-visa program is flooded with fraud. U-visas have been, and are, an important tool for the amici groups to help aliens gain lawful citizenship, but not everyone is as keen on them as the amici filers.[282] Some argue that the U-visa system in general is flawed, such as Professor Michael Kagan, director of the Immigration Clinic at the University of Nevada, Las Vegas School of Law. Professor Kagan argues

276. *Id.* at 45 ("The legislative history of the creation of the VAWA confidentiality protections states that 'we all know confidentiality is a matter of life and death whether or not they are citizens or whether they are immigrants. . . If you could imagine if you had an abuser being tried in court for abuse, he could get the victim deported so she could not testify if we didn't do this.'" (alteration in original) (citation omitted) (quoting *Full Committee Mark Up: Hearing on H.R. 2202 Before the House Judiciary Comm.*, 104th Cong. (1995) (statement of Representative Patricia Schroeder))).

277. *Id.* at 48.

278. Cazorla v. Koch Foods of Miss., L.L.C., 838 F.3d 540, 564 (5th Cir. 2016).

279. Brief of LatinoJustice PRLDEF, *supra* note 2, at 42 (emphasis added).

280. *Cazorla*, 838 F.3d at 553.

281. *Id.* at 558. Other than the fraud allegations, Koch did not provide a relevant reason for asking for this discovery.

282. *See* Zimmerman, *supra* note 8 (arguing that the rise in U-visa applications is not due to increased domestic violence toward immigrants, but rather that it is because there is fraud in the system); *see also* Pappas, *supra* note 8 (reporting on an Indiana attorney who had filed false visa applications for aliens).

that the U-visa certification creates a "'*quid pro quo* system' that pressures undocumented immigrants into trading testimony in order to remain in the United States."[283] Kagan also proposes that U-visa applicants are particularly "vulnerable to accusations of fraud in the criminal system because of its adversarial nature."[284]

This issue of fraud is not new to the U-visa debate, and many members of Congress fault the Obama administration for allowing fraudulent U-visas to be processed.[285] But it goes further back than just the previous administration. When the original U-visa bill was passed, even though it had broad bipartisan support, some opponents had concerns.[286] Republican Representative Lamar Smith of Texas warned that the U-visa program could "open up our immigration system to widespread fraud as criminal and illegal aliens learn that the way to defeat our immigration laws is simply to claim to be battered."[287] The *Cazorla* decision, reached just before entering into a term of anti-immigration policies, could send an implied message to the legal system that fraud is a legitimate issue with U-visas and an appropriate defense for companies to put forward.

IV. IMPLICATIONS OF *CAZORLA* ON CURRENT IMMIGRATION POLICY

The Fifth Circuit recognized the public policy implications of allowing broad discovery into individuals' U-visa applications and in doing so remanded the case to the district court "to devise an approach to U visa discovery that adequately protects the diverse and competing interests at stake."[288] Due to the current state of immigration policies, however, anything short of an absolute bar on this information will lead to harmful effects to those who are legitimate victims and in need of U-visas. In discussing the impact of *Cazorla*, it is important to remember that this case involved a civil action against a company, but as will be discussed in this section, U-visas impact civil and criminal cases against a variety of defendants.[289] Allowing the discussion of fraudulent U-visa

283. Mankin, *supra* note 52, at 44.

284. *Id.*

285. *See* Grassley Letter, *supra* note 9; *see also* Black Press Release, *supra* note 50.

286. *See Roll Call Vote on Violence Against Women Reauthorization Act of 2013*, U.S. SENATE (2013), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00019 (providing a summary of the roll call Senate vote for the 113th Congress, demonstrating that the bill had broad bipartisan support when VAWA was first passed and reauthorized).

287. *Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the H. Subcomm. on Immigration & Claims of the Comm. on the Judiciary*, 106th Cong. 24 (1999) (statement of Rep. Lamar S. Smith, Chairman, Subcomm. on Immigration & Claims).

288. Cazorla v. Koch Foods of Miss., L.L.C., 838 F.3d 540, 564 (5th Cir. 2016).

289. *See supra* notes 4–5 and accompanying text (discussing Congress's three major goals in

applications to continue, especially given the current administration's stance on immigration, will be detrimental to abuse survivors.[290] Additionally, the fraud aspect of the U-visa applications is unfounded given the strict requirements that DHS has in place.[291] The following section will discuss the implications of the current administration on the U-visa program, how *Cazorla* will continue to negatively impact the U-visa program, and why U-visa fraud is not as rampant as members of Congress and the current administration may believe.

A. Impact of Trump Administration on U-visa Program

The current administration zealously advocates for tough laws regarding immigration, leading to greater fears of deportation, even for those who are in the United States legally.[292] In the 2016 fiscal year, USCIS received a total of 35,044 U-visa petitions from victims of criminal activities,[293] and approved 10,046.[294] During the first fiscal

passing the U-visa program). U-visas may be certified if the applicant is helpful in either a civil or criminal case. The applicant must also meet the statutory requirements and be the victim of a qualifying crime.

290. The true ramifications may seem futuristic, but some police departments are citing deportation fears as having a direct correlation to a decrease in immigrants calling the police generally. *See* Cora Engelbrecht, *Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of Deportation.*, N.Y. TIMES (June 3, 2018), https://www.nytimes.com/2018/06/03/us/immigrants-houston-domestic-violence.html (noting that Houston saw a sixteen percent drop in domestic violence reports from the Hispanic community despite having one of the fastest-growing immigration communities in the country, which police attribute to tough enforcement of immigration laws and the political climate).

291. *See* DHS GUIDE, supra note 41 (noting that the list of qualifying crimes is intentionally broad to give law enforcement flexibility).

292. The National Immigration Center recommended that aliens who were brought to the United States as children who were going to apply for legal status under the Deferred Action for Childhood Arrivals (DACA) program not do so given the election of President Trump. Ignacia Rodriguez, *Our Recommendations for People Considering Applying for DACA Following the Election*, NAT'L IMMIGR. L. CTR. (Nov. 14, 2016), https://www.nilc.org/news/the-torch/11-14-16/. The DACA program is just one of many immigration programs that may be ended under the Trump administration. *See* Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html (discussing the general confusion surrounding Trump's plans for DACA).

293. U.S. CITIZENSHIP & IMMIGRATION SERVS., NUMBER OF I-918 PETITIONS FOR U NONIMMIGRANT STATUS (VICTIMS OF CERTAIN CRIMINAL ACTIVITIES AND FAMILY MEMBERS) BY FISCAL YEAR, QUARTER, AND CASE STATUS 2009–2017 [hereinafter USCIS 2017 REPORT], https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2017_qtr1.pdf. In total, there were 60,710 petitions received, which included petitions by family members of the victims. *Id.*

294. *Id.* Congress capped the amount of approved U-visas at 10,000 per fiscal year. DHS GUIDE, *supra* note 41, at 2. However, many argue that there should be an increase in the U-visa cap in order to continue the positive effects that have been seen since its implementation. *See* Lianna E. Donovan, Note, *The Violence Against Women Act's Protection of Immigrant Victims: Past,*

quarter of 2017,[295] the number of U-visa applications received decreased by 269 from the same time period in 2016—that is, essentially one month under the current administration.[296] While the total number of petitions received and approved stayed relatively the same between fiscal years 2016 and 2017, there is a noticeable trend of fewer approvals and more denials.[297] Additionally, the current administration's rhetoric surrounding immigration may not encourage those who are victims of crimes to come forward and apply for U-visas, but the true extent to which that is true will be unknown until more information is gathered. Police departments in large Hispanic areas, including San Diego, Los Angeles, and Denver are seeing a downward trend of reporting, while crime rises.[298] And a recent report released by the American Civil Liberties Union (ACLU) found similar trends on a national basis, citing the following statistics between 2016 and 2017:

> Approximately 22 percent of police officers surveyed reported that immigrants were less likely in 2017 than in 2016 to be willing to make police reports; 21 percent said immigrant crime survivors were less likely to help in investigations when police arrived at the scene of a crime; 20 percent reported that they were less likely to help in post-crime scene investigations; and 18 percent said immigrant crime survivors were less willing to work with prosecutors. As a result, law enforcement officials reported that many crimes have become more difficult to investigate: 69 percent said domestic violence was harder to investigate, 64 percent said this applied to human trafficking, and 59 percent said this was true about sexual assault.[299]

Practically, immigration attorneys are left with uncertainty regarding

Present, and Proposals for the Future, 66 RUTGERS L. REV. 745, 767–70 (2014) (arguing that failing to increase the cap would frustrate law enforcement efforts and create dangerous situations for victims of violence).

295. The first fiscal quarter ran from October to December of 2017. USCIS 2017 REPORT, *supra* note 293.

296. *Compare id.*, *with* U.S. CITIZENSHIP & IMMIGRATION SERVS., NUMBER OF I-918 PETITIONS FOR U NONIMMIGRANT STATUS (VICTIMS OF CERTAIN CRIMINAL ACTIVITIES AND FAMILY MEMBERS) BY FISCAL YEAR, QUARTER, AND CASE STATUS 2009–2016, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2016_qtr1.pdf.

297. *Compare* USCIS 2017 REPORT, *supra* note 293, *with* U.S. CITIZENSHIP & IMMIGRATION SERVICES, NUMBER OF I-918 PETITIONS FOR U NONIMMIGRANT STATUS (VICTIMS OF CERTAIN CRIMINAL ACTIVITIES AND FAMILY MEMBERS) BY FISCAL YEAR, QUARTER, AND CASE STATUS 2009–2018, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2018_qtr1.pdf.

298. Engelbrecht, *supra* note 290.

299. ACLU, FREEZING OUT JUSTICE: HOW IMMIGRATION ARRESTS AT COURTHOUSES ARE UNDERMINING THE JUSTICE SYSTEM 1 (2018), https://www.aclu.org/sites/default/files/field_document/rep18-icecourthouse-combined-rel01.pdf.

how to best advise their client as to the ramifications of calling police or taking their abusers to court.[300] According to one study, forty-three percent of advocates working with aliens who were victims of sexual assault or other violent crimes had clients drop their civil or criminal cases because they were afraid of being deported.[301] However, much of the empirical data surrounding U-visa applications is unknown; given the current information and the testimony of immigration attorneys dealing with aliens who would normally apply for U-visas, a drop in applications is occurring.[302] The U-visa program mitigated the perilous crossroads faced by victims to either call the police and save themselves from abuse or be deported.[303] But under the Trump administration, aliens are faced with the same crossroads as before, and while some are willing to take the risk, many are not.[304] This directly contradicts the congressional intent of passing the U-visa program in the first place—to give alien victims the protection and courage they need to engage with law enforcement for the betterment of the community.[305]

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300. *2017 Advocate and Legal Services Survey Regarding Immigrant Survivors*, TAHIRIH JUST. CTR. [hereinafter *2017 Advocate and Legal Services Survey*], http://www.tahirih.org/wp-content/uploads/2017/05/2017-Advocate-and-Legal-Service-Survey-Key-Findings.pdf. A DHS memo released in February 2017 gives broader authority to DHS to crack down on aliens, even those who are in the process of applying for visas, including U-visas. Memorandum from the Department of Homeland Security (Feb. 21, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf. According to one immigration attorney, in the past, showing an ICE or CBP agent the slip of paper stating the victim's U-visa application had been received indicated that the victim a low priority for deportation. Under the current administration, that same attorney spoke with ICE and CBP agents who informed him the same slip of paper would no longer protect the victim from deportation. Nora Caplan-Bricker, *"I Wish I'd Never Called the Police"*, SLATE (Mar. 19, 2017, 8:12 PM), http://www.slate.com/articles/news_and_politics/cover_story/2017/03/u_visas_gave_a_safe_path_to_citizenship_to_victims_of_abuse_under_trump.html.

301. *2017 Advocate and Legal Services Survey*, *supra* note 300. This is supported by reports of immigration lawyers' caution to file U-visa applications on behalf of their clients. *See* Beth Fertig, *Here's Why Immigrant Victims May (Still) Be Afraid to Report Crime*, WNYC NEWS (Feb. 21, 2017), https://www.wnyc.org/story/why-immigrant-victims-may-be-afraid-report-crime-despite-federal-program-help/ (describing some of the problems faced in the lower courts with filing U-visas).

302. *Supra* notes 292–301 and accompanying text.

303. *See generally NIWAP U-visa Report*, *supra* note 40 (providing testimonials of law enforcement officials who describe the predicament immigrant women faced when deciding whether to come forward to report a crime).

304. For detailed stories of victims of abuse facing this crossroads, see Shannon Dooling, *'I Was Afraid of Him and of Immigration': Domestic Violence Survivors Take Chance Applying for Special Visa*, WBUR NEWS (Sept. 12, 2017), http://www.wbur.org/news/2017/09/12/increase-u-visa-applications; Kari Lindberg, *Human Trafficking Victims Are Scared to Apply for Visas Under Trump*, VICE NEWS (June 12, 2017), https://news.vice.com/en_ca/article/434pkj/human-trafficking-victims-are-scared-to-apply-for-visas-under-trump.

305. *See supra* Part I.A (detailing the legislative history of the U-visa program).

B. Cazorla *Opinion Continues to Negatively Affect U-Visa Program*

Fear of reporting crimes for aliens may not be new under the current administration, though the fear has increased. What the Fifth Circuit failed to note, but what was not lost on immigration advocacy groups, is the far-reaching effect this litigation will have on the U-visa program. In their amicus brief, those groups advocated for the Fifth Circuit to take into account the negative implications that would affect not only those that have U-visas,

> but *all* immigrant victims of domestic violence, sexual assault, human trafficking, child abuse, felonious assault, stalking, extortion, and other crimes in *all* VAWA confidentiality protected cases, and in all kinds of contexts, employment, family, and in the community as a whole.[306]

This could not be achieved with anything short of a complete bar on the information that Koch sought to discover.[307] By way of example, the following real-world situation posed by the plaintiffs in their brief to the Fifth Circuit fleshes out many of the implications anything less than a total bar would have on the U-visa program even if an application has already been filed:

> [I]mmigrants' fears of disclosure are justified even if they have applied for a U-visa. Individuals with pending U-visa applications do not have legal status and are not work authorized; they are therefore still subject to detention, deportation, arrest, or loss of livelihood if their application information is ordered disclosed. The same is true for any applicant whose application is denied. U-visa applicants reveal information about family members who may not be applying for U- status and are not parties to the litigation, and thus may fear the deportation, arrest, or firing of their relatives if applications are disclosed. This risk remains even if the applicant's' [sic] own U-visa is granted. Also, U-visa status is not permanent and may be revoked. Fear of revocation is more acute and reasonable in a case where Defendant threatened to call immigration authorities as part of the alleged abuse and has repeatedly accused workers of fabricating their claims. Even the most carefully crafted protective order cannot allay these very real fears, and the nuances of any such order cannot easily be parsed by a large class of workers, many of whom speak only Spanish and have limited formal education. Moreover, if disclosure of this sensitive information becomes routine, workers contemplating future claims will likely come to believe that participation in a lawsuit comes at too high of a price, and thus may forgo efforts to hold abusive employers accountable.[308]

306. Brief of LatinoJustice PRLDEF, *supra* note 2, at 64.
307. Brief for Intervenors, *supra* note 154, at 27 n.8.
308. *Id.*

The Fifth Circuit chose to ignore many of the legitimate arguments posed by the plaintiffs in the above real-world situation.[309] While it may be important for this "relevant" information to come in for the defendant, it would have been more legitimate on the grounds of legislative intent behind VAWA and the U-visa program for the Fifth Circuit to completely bar this information under a strict reading of Rule 26 and the relevant statutes.[310] The amicus brief filed directly points this out by arguing "[t]he harm is not limited to and is much greater than concern that discovery of VAWA confidentiality protected information will lead to the 'annoyance, embarrassment, oppression or undue burden or expense' that Federal Rule of Civil Procedure 26 seeks to prevent."[311] Additionally, VAWA was passed with bipartisan support intentionally to protect these vulnerable parties and to convince them to come forward when they are victims of crime.[312] This is especially true when the defense that defendants like Koch are forwarding is more speculation than truth. The fundamental safety concerns of the victimized immigrants must outweigh considerations about litigation and discovery costs for wealthy employer-defendants like Koch Foods.

C. U-visa "Fraud" Is Not A Legitimate Defense

Under the current administration, and according to Republican pundits, discussions on visa applications for protective visas, like U-visas, rarely occur without a cry of "fraud."[313] But how well-founded are these accusations? If these accusations of "rampant" fraud are mostly

309. It is true that the Fifth Circuit detailed some of the important public policy issues at stake, but the court ultimately found the relevance of the information just as important. *See* Cazorla v. Koch Foods of Miss., L.L.C., 838 F.3d 540, 555–62 (5th Cir. 2016) (performing analysis under Rule 26(c), which "allows the court, 'for good cause, [to] issue an order' restricting discovery 'to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense'" and giving short shrift to the plaintiffs' concerns of being fired, reported to INS, and deported (alteration in original)).

310. Rule 26(c)(1) states a court can restrict access to certain discoverable information "for good cause . . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c)(1). There is certainly an argument that allowing discovery into individual plaintiffs' U-visas will cause all of those things. *See* Brief of LatinoJustice PRLDEF, *supra* note 2, at 60 (arguing that if the confidential information a victim has provided in a U-visa application becomes known by the victim's aggressor, "the perpetrator can use statements to both intimidate the victim to change or withdraw allegations or use threats and coercion to manipulate and [] scare the victim so that testimony presented in the civil, family, or criminal case brought against the abuser will be less credible").

311. Brief of LatinoJustice PRLDEF, *supra* note 2, at 61 (quoting FED. R. CIV. P. 26(c)(1)).

312. *See supra* notes 37–38.

313. *See, e.g.*, Neil Munro, *Obama Backdoor Amnesty Provided 'U visas' for 140,000 Illegal Aliens*, BREITBART (June 27, 2017), http://www.breitbart.com/big-government/2017/06/27/u-vsa-becomes-backdoor-amnesty-for-200000-plus/.

unfounded, by accepting the defense of fraud in order to allow U-visa discovery, courts essentially allow discovery based on a defense that is rarely true.[314] And while that may be within the court's discretion, when combined with the negative public policy effects previously discussed, particularly where aliens are filing fewer applications for fear of being deported, the Fifth Circuit has directly permeated this "fraud" discussion to the detriment of the U-visa program—a program that is already under fire.

While many Republicans and the current administration may believe that the U-visa program has created a system of unchecked fraud,[315] that may not be the case.[316] Perhaps before asking how fraudulent the U-visa program really is, the question should be: Why is it so easy to put forward this accusation against aliens? Many who believe there is fraud in the program say that the program is an "easy" way to gain lawful citizenship.[317] But again, that is likely not true. The U-visa program is in fact one of the longest, most evasive and time-consuming ways to try to gain lawful citizenship, taking almost fifteen years from first filing.[318] The process's lengthiness is often ignored by the current administration and the conservative media when discussing U-visa fraud. Also ignored are the ramifications of filing a fraudulent U-visa application, namely, deportation.[319] The U-visa statute specifically states that "[n]othing in this section prohibits USCIS from instituting removal proceedings . . . for misrepresentations of material facts . . . ."[320] Every alien who files a U-visa application risks deportation if any one of the certifying bodies finds their story is not credible.[321] In addition, "fraudulent" U-visas are

314. *See* Black Press Release, *supra* note 50 (explaining that "[r]ampant fraud and abuse of U Visas now undermines its effectiveness for law enforcement and circumvents the law abiding individuals who seek to immigrate to our country through the proper channels"). The primary reason the Fifth Circuit allowed the discovery was due to the defendants' defense. *Cazorla*, 838 F.3d at 559. If that defense is rarely true, then it should not be allowed at all, especially when the harms that may come from providing such discovery are so severe.

315. *Supra* text accompanying note 9.

316. Mark Becker, *Are Illegal Immigrants Faking Crimes to Stay in the Country*, ATLANTA J.-CONST. (Nov. 11, 2014), http://www.ajc.com/news/news/national/9-investigates-illegal-immigrants-faking-crimes-st/nh5Gx/; Liz Klimas, *Could This Become a Popular Way Illegal Immigrants Try to Cheat the System to Stay in the United States?*, BLAZE (Nov. 12, 2014), http://www.theblaze.com/news/2014/11/12/fake-victims-how-illegal-immigrants-could-stage-crimes-to-obtain-a-special-visa-in-the-u-s.

317. *See, e.g.*, Becker, *supra* note 316; Klimas, *supra* note 316. There are many news articles detailing U-visa fraud, but almost all of them are speculative.

318. *Supra* note 52 and accompanying text.

319. 8 C.F.R. § 214.14(h)(2), (4)(i) (2018).

320. 8 C.F.R. § 214.14(h)(4)(i).

321. *See* DHS GUIDE, *supra* note 41, at 14 (explaining that "the victim of the crime must possess credible and reliable information"). Certifying bodies include federal, state, and local law

inherently difficult to certify given the strict statutory requirements for U-visas, another element that opponents to the U-visa program seem to forget.[322] Not only must the alien be the victim of a qualifying crime, they must also be helpful to the investigation or the prosecution of the case and be certified by the appropriate body.[323] Coupled with the fear of deportation if the U-visa does not end up being issued, the long wait, and the statutory requirements, "fraud" defenses and allegations are not enough to overcome the public policy of keeping U-visa information privileged.

But how fraudulent is the program? This may be a hard question to answer[324]; however, in doing so we can look at just how restrictive the U-visa requirements are and the strict procedures it uses in certifying U-visas, to conclude generally that U-visas are more legitimate than fraudulent. The statutory requirements must all be proven to a certifying body before the application can be filed.[325] There are four statutory eligibility requirements a U-visa applicant must satisfy: (1) "the alien must have suffered substantial physical or mental abuse as result of having been a victim of a qualifying criminal activity"; (2) the alien must have information concerning that criminal activity; (3) the alien must have "been helpful, is being helpful, or is likely to be helpful" in the investigation or prosecution of the crime as certified by an appropriate agency; and (4) the criminal activity violated US laws.[326] While the "qualifying crimes" may be intentionally broad, there is no guarantee that the alien will be able to meet the requirement for "substantial" abuse.[327] This is especially true when coupled with the fact that many aliens are

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enforcement agencies, prosecutors' offices, local judges, family protective services, and department of labors. *Id.* at 2–3.

322. *See* Benish Anver et al., *U-visa: "Helpfulness"*, NIWAP (July 23, 2015), http://library.niwap.org/wp-content/uploads/2015/IMM-Checklist-UVisaHelpfulness-09.25.13.pdf (detailing what each certificating body may deem as "helpful"); *see also* Kristina Gasson, *What's Needed for A U Visa Certification of Helpfulness*, NOLO, https://www.nolo.com/legal-encyclopedia/whats-needed-u-visa-certification-helpfulness.html (discussing what would be considered helpful, including identification of the perpetrators and "descriptive details that help the prosecution convince a jury that the accused is guilty of a crime").

323. DHS GUIDE, *supra* note 41, at 2.

324. Conservative pundits and the current administration are likely to say that DHS and other certifying bodies have underperformed under the past administration on immigration, and that is why there is fraud. *Supra* note 313. However, in 2014, USCIS spent over $52 million on fraud prevention, and during the fiscal year, conducted roughly 30,000 fraud investigations. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF FISCAL YEAR 2016 at 85, 98 (2016), https://www.dhs.gov/sites/default/files/publications/FY_2016_DHS_Budget_in_Brief.pdf.

325. *See generally* DHS GUIDE, *supra* note 41, at 2–4.

326. 8 U.S.C. § 1101(a)(15)(U) (2012).

327. 8 U.S.C. § 1101(a)(15)(U)(i)(I). Because USCIS determines which applications to accept, it determines whether the abuse was "substantial."

non-English speakers and may have difficulty explaining their situation in a satisfactory manner.[328] Additionally, the helpfulness requirement does not require that the perpetrator be prosecuted, and this helps ensure that the victim is coming forward for the proper, nonfraudulent reasons.[329] If the statute required that the perpetrator be prosecuted in order for the victim to obtain a U-visa, that certainly would lead to fraudulent claims; the victim would then have an overwhelming incentive to exaggerate the abuse in order to secure a prosecution.[330] Logically, victims would be more likely to embellish in order to make sure that the perpetrator was prosecuted, rather than tell the truth and endure the possibility that the perpetrator not be prosecuted.

On top of the statutory requirements for U-visas, the certification process is also a fraud prevention measure.[331] After going to the police or other law enforcement agency and reporting the crime, the victim then has to seek certification from a certifying agent.[332] It is important to remember that this is entirely discretionary, and a law enforcement agency is under no statutory legal obligation to complete a Supplement Form B.[333] Agencies like the EEOC that require that certifying law enforcement officers meet directly with victims before certifying the petition impose another level of fraud prevention.[334]

Beyond the statutory requirements and the certification process, USCIS, the enforcement arm of the DHS for visas like the U-visa, has

328. *See* DHS GUIDE, *supra* note 41.

329. Sejal Zota, *Law Enforcement's Role in U Visa Certification*, UNC SCH. OF GOV'T IMMIGR. L. BULL., June 2009, at 4 ("Prosecution of the criminal activity is not required, since the statute requires a noncitizen victim to be helpful in *either* the investigation *or* the prosecution of the criminal activity." (emphasis added)).

330. *Id.*

331. Some scholars see the certification process as a fraud prevention method, while others see it as a roadblock. *See* Mankin, *supra* note 52, at 50. (arguing that "although it was not explicitly created as a fraud prevention safeguard, the certification serves to discourage fraudulent claims by imposing an additional burden of production on the applicant"). In comparison, see Amanda M. Kjar, Comment, *U-Visa Certification Requirement Is Blocking Congressional Intent Creating the Need for A Writ of Mandate and Training—Undocumented Immigrant Female Farmworkers Remain Hiding in the Fields of Sexual Violence*, 22 SAN JOAQUIN AGRIC. L. REV. 141, 153 (2012) (stating, "the certifying agencies are acting like a roadblock, which is resulting in injustice and the total undermining of the congressional intent behind the U-visa").

332. DHS GUIDE, *supra* note 41.

333. *Id.* at 5.

334. EEOC Procedures, *supra* note 57; *see also* EUNICE HYUNHYE CHO, NAT'L EMPLOYMENT LAW PROJECT, U VISAS FOR VICTIMS OF CRIME IN THE WORKPLACE: A PRACTICE MANUAL (2014), http://www.nelp.org/content/uploads/2015/03/U-Visas-for-Victims-of-Workplace-Crime-Practice-Manual-NELP.pdf (detailing more specifics about what different certifying bodies will require). This sort of fraud prevention is not required for other visas, such as the T-visa. *See supra* note 36.

sole responsibility for making approval decisions for U-visa applications.[335] So even after the victim has gone through the certification process, where their story is checked thoroughly, that story is checked and investigated again. The certification process by a certifying body has been discussed above, but the USCIS process takes the entire process one step further. According to the DHS's own U-visa certification procedure, USCIS conducts a full review of the petition and a background check of the victim including an FBI fingerprint check, a background search through name and birthday, and a review of criminal history.[336] This examination of procedural hurdles U-visa applicants must overcome is not to say that fraud in the U-visa program is nonexistent,[337] but USCIS may also request additional information from both the victim requesting the U-visa and the certifying agency if necessary to determine the merits of the application.[338] These cases of fraud are the outliers and should not be the controlling rhetoric surrounding the U-visa program.

Additionally, the administration may want to control its negative commentary of U-visas for fear of contradiction. President Trump has made it a well-known priority to deport criminal aliens.[339] Broadly, this is an area where advocates of U-visas and the administration may find a resolution. As one political commentator posed: "Trump has said that he wants to deport immigrant criminals. What better way is there to catch immigrant criminals than to encourage immigrants in the community to come forward and report when a crime is committed to law enforcement?"[340]

The *Cazorla* decision will ultimately harm the U-visa program as it accepts the idea that fraud is a legitimate and legally cognizable defense

335. DHS GUIDE, *supra* note 41, at 8.

336. *Id.* at 5.

337. *See, e.g.*, *Indianapolis Immigration Attorney Pleads Guilty to Fraud Scheme and Identity Theft in Relation to U-visa Applications*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Nov. 30, 2017), https://www.ice.gov/news/releases/indianapolis-immigration-attorney-pleads-guilty-fraud-scheme-and-identity-theft (detailing an incident where an immigration attorney fraudulently filed more than 250 false U-visa applications).

338. DHS GUIDE, *supra* note 41, at 9.

339. Erik Ortiz, *'Sanctuary' Cities Targeted by ICE in Immigration Raids as Nearly 500 Arrested*, NBC NEWS (Sept. 29, 2017, 6:58 AM), https://www.nbcnews.com/storyline/immigration-border-crisis/sanctuary-cities-targeted-ice-immigration-raids-nearly-500-arrested-n805796; Dara Lind, *Trump on Deported Immigrants: "They're Not People. They're Animals."*, VOX (May 17, 2018, 1:59 PM), https://www.vox.com/2018/5/16/17362870/trump-immigrants-animals-ms-13-illegal.

340. Sara Ramey, Opinion, *Eliminating the U Visa Cap Will Help Catch Criminals*, THE HILL (Feb. 2, 2018, 11:45 AM), http://thehill.com/opinion/immigration/373808-eliminating-the-u-visa-cap-will-help-catch-criminals.

to a U-visa application. This is particularly dangerous in situations that were presented in *Cazorla*, where a certifying body like the EEOC has already deemed that the abuse was legitimate enough to certify the U-visa petitions for the individual plaintiffs.[341] The Fifth Circuit tried to couch the ultimate decision, that Koch would be able to get some information from the individual plaintiffs in regard to their U-visas, by chastising the district court for not looking at the implications outside of the case.[342] But short of a total bar from discovery of this information, Koch and other defendants may be able to access this information regardless of effectively cutting right through the legislative intent of the U-visa program in a time when immigrant crime reporting is down and thus harmful to society as a whole.

CONCLUSION

By failing to designate an absolute bar on the discoverability of U-visa information, the Fifth Circuit created a statutory loophole—one that tells defendants both similar and dissimilar to Koch "if you cannot get the information from the government agency, just ask the individual plaintiffs." Of course, there would still be a Rule 26 balancing test, but just as easily, the court could have, and should have, deemed that under Rule 26(c)(1) the undue burden was too great given the important public policy reasons behind the confidentiality of the U-visa program. The *Cazorla* opinion tries, yet fails, to fully understand and appreciate the policy implications. There is much more data supporting the contention that aliens who are the victims of crimes are afraid to come forward to law enforcement than there is confirming that the U-visa program is extremely fraudulent.

If the Fifth Circuit can recognize the importance of the protection of information from the EEOC, failing to apply the same protection for the same information for individual plaintiffs smacks of judicial absurdity. Therefore, the Fifth Circuit should have ruled there is an absolute bar to this information because the future of the U-visa program is at stake: A program that makes everyone in the country safer, not just victims seeking protection.

341. *Supra* notes 118–119. It is unclear just how many petitions the EEOC certified, as Koch was barred from discovering that information from the EEOC. Cazorla v. Koch Foods of Miss., L.L.C., 838 F.3d 540, 552 (5th Cir. 2016). However, the Fifth Circuit clearly held that Koch could demand discovery of this nature from the individual plaintiffs. *Id.*

342. *Cazorla*, 838 F.3d at 564.