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NO. 95905-6

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

LEONEL ROMERO OCHOA,

Respondent.

**BRIEF OF AMICI CURIAE
NORTHWEST JUSTICE PROJECT, LEGAL VOICE, THE ASIAN
PACIFIC INSTITUTE ON GENDER-BASED VIOLENCE, AND
THE WASHINGTON STATE COALITION AGAINST DOMESTIC
VIOLENCE**

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I. INTRODUCTION

For years, law enforcement and prosecutors around the country have experienced difficulty prosecuting many cases because undocumented immigrant victims and witnesses were afraid to cooperate. Those victims and witnesses are more afraid of the immigration consequences of revealing their unlawful presence here than of the criminals who assault them, rape them, or even try to kill them. Those who live with their assailant are reminded constantly of the threat of deportation if they contact police. When victims and witnesses are brave enough to come forward and cooperate with law enforcement, some are deported and no longer available as witnesses.

In response, Congress created the U visa in 2000. The U visa offers temporary legal status, helping prevent witnesses from being deported in retaliation for reporting or to make them unavailable for trial. Temporary legal status undermines criminals' threats and intimidation of witnesses.

The Court of Appeals' decision in this case frustrates the purpose of the U visa program. It reinforces abusers' ability to use their victims' immigration status to intimidate, isolate, and control them. It allows immigration status to become the focus of a trial without any evidence a victim is receiving immigration relief. It exposes victims to detrimental immigration consequences before any immigration relief is even available.

The trial court in this case properly weighed the immense prejudicial

effect of the victim's immigration status, its likely effect on the trial, and the probative value to the defendant. Amici urge this Court to reverse the Court of Appeals decision holding otherwise.

II. INTEREST OF AMICI

The interest of amici Northwest Justice Project, Legal Voice, the Asian Pacific Institute on Gender-Based Violence, and the Washington State Coalition Against Domestic Violence is fully set out in the Motion to Participate as Amici Curiae.

III. STATEMENT OF THE CASE

Amici adopt the State's statement of the case as set forth in Motion for Discretionary Review.

IV. ARGUMENT

A. The Court can consider an issue raised only by amici.

The State petitioned only for review by this Court of the lower court's harmless error analysis. Amici request that this Court review whether the trial court's ruling excluding U visa evidence was error at all.

This Court has previously held that it has "inherent authority to consider issues not raised by the parties if necessary to reach a proper decision."¹ In *Alverado v. WPPSS*, the additional issue had been raised and

¹ *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 468, 843 P.2d 1056 (1993); see also *Alverado v. WPPSS*, 111 Wn.2d 424, 429-30, 759 P.2d 427 (1988), *cert. denied*, 490 U.S. 1004 (1989).

argued by the parties in the trial court, although no one raised the issue before this Court.² This Court raised the issue of federal preemption *sua sponte* and found preemption applied.³ In *Harris v. Department of Labor & Industries*, neither party had raised or briefed the additional issue before this Court or the trial court.⁴ Amicus curiae raised the issue of federal preemption for the first time in this Court.⁵ Nonetheless, this Court addressed the issue, finding no federal preemption in that case.⁶

In the present case, the parties raised, briefed, and argued the issue in both the trial court and the Court of Appeals. Although the State has now apparently abandoned the issue, this Court has adequate briefing, and amici believe it is necessary to consider the issue for a proper ruling.

B. Immigration status is often used to harass, control, and abuse victims of domestic violence.

Immigrant women are particularly vulnerable to domestic violence. In 1994, after extensive hearings related to the need for the Violence Against Women Act⁷, Congress found that a “battered spouse may be deterred from taking action to protect himself or herself, such as filing a

² 111 Wn.2d at 429-30.

³ *Id.* at 425, 433.

⁴ 120 Wn.2d at 467-468. *Harris* was heard on direct review by this Court, so no argument was made at the Court of Appeals. *Id.* at 466.

⁵ *Id.* at 467.

⁶ *Id.* at 468-471.

⁷ Pub. L. No. 103-322, 108 Stat. 1902 et seq. (1994).

civil protection order, filing criminal charges or calling the police, because of the threat or fear of deportation.”⁸ In 2000, when creating the U and T visas, Congress again found, “Immigrant women and children are often targeted to be victims of crimes committed against them in the United States” (U.S.) and “must be able to report these crimes to law enforcement” without fear of deportation.⁹

The rate of abuse among immigrant women is higher than the rate in the general population.¹⁰ Among immigrant women who are or were married to a U.S. citizen, the rate of abuse by that citizen is almost three times the national average.¹¹ Studies of Latina immigrants in several large cities in the U.S. found that 34 percent to 50 percent of them reported being abused.¹²

One of a batterer’s most powerful tools to abuse an undocumented immigrant is the threat of deportation. In one study 65% of women interviewed reported that their abuser had used threats of deportation as a

⁸ H.R. REP. NO. 103-395, at 26 (1994).

⁹ Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. No. 106-386, § 1513(a)(1), 114 Stat. 1464, 1533 (2000).

¹⁰ GISELLE AGUILAR HASS, NAWAL AMMAR & LESLYE ORLOFF, BATTERED IMMIGRANTS AND U.S. CITIZEN SPOUSES 3-4 (2006) [hereinafter BATTERED IMMIGRANTS]

¹¹ *Id.*

¹² Giselle Aguilar Hass, Mary Ann Dutton & Leslye E. Orloff, *Lifetime Prevalence of Domestic Violence Against Latina Immigrants: Legal and Policy Implications*, 7 INT’L REVIEW OF VICTIMOLOGY 93 (2000); Julia L Perilla, Roger Bakerman & Fran H. Norris, *Culture and Domestic Violence: The Ecology of Abused Latinas*, 9 VIOLENCE & VICTIMS 325 (1994).

form of abuse.¹³ Batterers tell their partners that they will be deported if they call police, “warn” they will lose their children if they attempt to leave, or directly threaten to call immigration authorities if the partner does not comply with the batterer’s demands.¹⁴ Other ways batterers may exploit their partners’ lack of secure status include withholding important documents, such as passports, birth certificates, or immigration papers; and threatening to withdraw a petition for immigration status.¹⁵

The fear these threats create is one of the top reasons battered immigrants do not leave their abuser, contact authorities, or seek victims’ services.¹⁶ It also impedes criminal investigation and prosecution, when immigrant victims are too afraid to assist law enforcement.

C. The Court of Appeals’ decision would undermine the very purpose of the U nonimmigrant status.

In an effort to reduce violence against immigrant women and increase their cooperation with law enforcement and prosecutors, Congress created a new “Humanitarian/Material Witness Nonimmigrant Classification,”¹⁷ now known as U nonimmigrant status or a “U visa.”

¹³ EDNA EREZ & NAWAL AMMAR, VIOLENCE AGAINST IMMIGRANT WOMEN AND SYSTEMIC RESPONSES: AN EXPLORATORY STUDY (2003).

¹⁴ BATTERED IMMIGRANTS, *supra* note 11, at 3-4.

¹⁵ *Id.*

¹⁶ See, e.g., Mary Ann Dutton, Leslye E. Orloff & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL’Y 245, 293 (2000).

¹⁷ VTVPA §1513(b), 114 Stat. at 1534.

Victims of certain crimes who assist in the investigation and/or prosecution of the crime can apply for a U visa, which provides temporary immigration relief and the possibility of permanent status.¹⁸

1. Purpose of U visas

Congress created the U visa in 2000 to “strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes . . . committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States.”¹⁹ It was designed to “facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status” and “encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.”²⁰

2. Allowing defendants to cross-examine any immigrant victim aware of the program about their immigration status would eviscerate its protections.

If defense attorneys are permitted to cross-examine victims about their immigration status and related collateral matters, the victim

¹⁸ 8 U.S.C. § 1101(a)(15)(U); 8 C.F.R. § 214.14.

¹⁹ VTVPA, § 1513(a)(2), 114 Stat. at 1533.

²⁰ *Id.* at 1533-1534.

essentially becomes the defendant—the party on trial.²¹ A defense attorney can destroy the victim’s credibility simply by appealing to bias against undocumented immigrants. This leaves victims the untenable choice of allowing their testimony to be discredited and themselves publicly interrogated or foregoing the very immigration relief designed to protect them and remaining at risk of deportation in order to remain “credible” and see the perpetrator held responsible.

It also renders the confidentiality provisions of the VTVPA nearly meaningless. The federal government intended the U visa application to be a confidential process that avoided putting victims at greater risk of abuse or shame. Thus, Congress prohibited the “use or disclosure of any information relating to the beneficiary of a pending or approved petition for U nonimmigrant status,” with limited exceptions.²² There is an exception allowing disclosure to *federal* prosecutors for specified use in federal criminal proceedings,²³ but no such exception exists for disclosure to *state* prosecutors or defense attorneys. Even agencies that do receive the protected information under one of the exceptions may not re-disclose it

²¹ See Suzan M. Pritchett, *Shielding the Deportable Outsider: Exploring the Rape Shield Law as Model Evidentiary Rule for Protecting U Visa Applicants as Witnesses in Criminal Proceedings*, 40 HARV. J.L. & GENDER 365, 366-368 (2017).

²² 8 U.S.C. §1367(a)(2); 8 C.F.R. § 214.14(e)(1).

²³ *Id.* § 214.14(e)(1)(ix).

except as allowed by one of the exceptions in § 214.14(e)(1).²⁴

D. The Court of Appeals' decision would undermine ER 413.

In 2017, this Court adopted Evidence Rule 413 (ER 413), which deems evidence of any party or witness' immigration status generally inadmissible in both criminal and civil cases. In criminal cases, such evidence is only admissible if "immigration status is an essential fact to prove an element of, or a defense to, the criminal offense with which the defendant is charged, or to show bias or prejudice of a witness pursuant to ER 607."²⁵ If the evidence falls into one of those categories, ER 413 sets forth a test that is essentially the reverse of ER 403: "The court may admit evidence of immigration status to show bias or prejudice if it finds that the evidence is reliable and relevant, and that its probative value outweighs the prejudicial nature of evidence of immigration status."²⁶

ER 413 went into effect September 1, 2018, well after the defendant's criminal trial.

1. Purpose of ER 413

ER 413 was proposed to this Court in order to ensure equal access

²⁴ *Id.* § 214.14(e)(2).

²⁵ ER 413.

²⁶ ER 413(4). Because Court Rules cannot trump the guarantees of the State or Federal Constitution, though, the rule cautions, "Nothing in this section shall be construed to exclude evidence that would result in the violation of a defendant's constitutional rights." ER 413(5).

to the courts regardless of immigration status and provide a uniform way to deal with sensitive, highly prejudicial evidence of immigration status.²⁷ The drafters cited some of the same evidence considered by Congress when the U visa was created, explaining the particular vulnerability of undocumented immigrant women and the fear of deportation that interferes with their participation in the justice system.²⁸ They analogized immigration status to insurance and past sexual behavior, two other topics on which Washington has limited the admissibility of evidence due to the sensitive nature of the topics and their ability to confuse or inflame the jury.²⁹ Unlike insurance availability or past sexual behavior, though, evidence of immigration status “is not just an issue of money, embarrassment, or shame, but is so sensitive that it poses potentially life altering consequences that serve to bar marginalized people from coming to court at all.”³⁰

Washington Attorney General Bob Ferguson confirmed, “Unfortunately, in our experience,” some defendants and defense counsel use a “scare-tactic litigation strategy”—obtaining “information about the immigration status of the State's witnesses” and “unfairly seek[ing] to

²⁷ Drafters' Comment Accompanying Proposed ER 413, Columbia Legal Services, Northwest Immigrant Rights Project, Legal Voice, and the Washington Association of Prosecuting Attorneys, in 5A Wash. Prac., Evidence Law and Practice § 413.1 (6th ed.) (Karl B. Tegland).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

discredit people because of their immigration status.”³¹ The King County Prosecutor’s Office has also “seen firsthand how immigration status evidence can negatively impact criminal cases and civil protection orders. . . . Introducing immigration status evidence . . . chills participation in the legal system and plays on prejudice where factfinders may unwittingly make decisions based on immigrant stereotyping.”³²

To ensure equal access to justice regardless of immigration status, this Court adopted ER 413.

2. Exclusion of immigration status would become the exception rather than the rule, particularly in cases involving domestic violence and sexual assault.

As the trial court pointed out³³, any undocumented immigrant victim of a crime is potentially eligible for a U visa. Every undocumented immigrant victim then has a motive to lie on the stand in criminal trials. Under the analysis Ochoa and Amicus WACDL urge this Court to adopt, this evidence would always be so crucial that no prejudice could outweigh its probative value, so it would always be admissible. Since there is little purpose to introducing evidence of a witness’ *legal* immigration status, this

³¹ Letter from Bob Ferguson to Susan L. Carlson, Clerk, Washington Supreme Court (Sept. 15, 2017), http://www.courts.wa.gov/court_Rules/proposed/2017May/ER413/Bob%20Ferguson.pdf.

³² Letter from Daniel Satterberg, King County Prosecuting Attorney, to Susan L. Carlson, Clerk, Washington Supreme Court (Sept. 15, 2017), http://www.courts.wa.gov/court_Rules/proposed/2017May/ER413/Daniel%20Satterberg.pdf.

³³ 4RP 77-78.

would make ER 413 virtually meaningless in criminal cases.

This is particularly true in cases involving domestic violence or sexual assault. These types of assaults often occur behind closed doors. For this reason, they are notoriously hard to prosecute without a complaining witness, and the victim's testimony is central to the case. Thus, even a limitation that evidence of the victim's immigration status is admissible only where the victim's credibility is a key issue would leave the evidence admissible in nearly every domestic violence or sexual assault case. As this case demonstrates, even medical evidence, eyewitnesses to parts of the assault, and a great deal of circumstantial evidence do not insulate the victim's credibility from attack.

E. The trial court did not err in excluding evidence related to the victim's immigration status.

A defendant's right under the confrontation clause to admit prejudicial evidence is analyzed under a three-part test similar to ER 403,³⁴ set out in the Court of Appeals decision.³⁵ The trial court conducted the proper balancing test. The Court of Appeals downplays the prejudice inherent in disclosing a witness' immigration status and overemphasizes its probative value.

³⁴ *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

³⁵ *State v. Romero-Ochoa*, 1 Wn. App. 2d 1059, 2017 WL 6616736 (2017) (Slip Op., pp. 8-10).

1. Immigration status is highly prejudicial in today's climate.

The current Administration has emboldened “loud” racists to make themselves heard and re-normalized blatant racism.³⁶ Increasing diversity in our country and focus on minority rights have made many whites fearful that they are becoming the underclass.³⁷ This fear, the normalization of racism, and the anonymity of the internet have led to an environment in which people feel comfortable lashing out at others who look different or think differently.³⁸

The current political environment, combined with increased arrests and media coverage, has created a “climate of fear” among immigrants.³⁹ This fear has caused some undocumented immigrants to stay home and rarely drive.⁴⁰ School attendance and performance of children of undocumented immigrants have deteriorated, and undocumented parents in most areas surveyed are declining to sign up their citizen children for public benefits, such as free lunches and Medicaid.⁴¹

³⁶ Eddie S. Glaude, Jr., *Don't Let the Loud Bigots Distract You; America's Real Problem With Race Cuts Far Deeper*, TIME (Sep. 6, 2018); Opinion, Roy Johnson, *With Trump Normalizing Racism, Candidates Gain Comfort Using Not-so-coded Language*, AL.com (Aug. 30, 2018), https://www.al.com/news/index.ssf/2018/08/with_trump_normalizing_racism.html.

³⁷ *Id.*

³⁸ *Id.*

³⁹ RANDY CAPPS ET AL., *REVVING UP THE DEPORTATION MACHINERY: ENFORCEMENT AND PUSHBACK UNDER TRUMP* 66 (2018)

⁴⁰ *Id.* at 67.

⁴¹ *Id.* at 69-70.

Amidst this climate of fear, undocumented immigrants in a number of regions are reporting fewer crimes and accessing services for crime victims less often.⁴² For example, in the first four months of 2017, Houston saw 40 percent fewer rape reports and 10 percent fewer domestic violence reports from Latinos, compared to the same period in 2016.⁴³ At the same time, non-Hispanic reports of rape and domestic violence *increased*.⁴⁴ During the same period, victim services agencies across the country reported dramatic drops in undocumented immigrants seeking services.⁴⁵ “[P]olicies that make immigrants more scared about calling the police are really good for criminals,”⁴⁶ and prejudicial to the State.

Immigrants’ fears are not unwarranted. The Department of Homeland Security (DHS) confirmed in early 2017 that ICE agents may arrest undocumented immigrant victims and witnesses in courthouses.⁴⁷ In one prominent example, a woman was seized by ICE inside a courthouse

⁴² *Id.* at 68-69.

⁴³ See, e.g., Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, N.Y. TIMES (April 30, 2017).

⁴⁴ CAPPS ET AL., *supra* note 42, at 68.

⁴⁵ Medina, *supra* note 46; Key Findings, Tahirih Justice Center et al., 2017 Advocate and Legal Service Survey Regarding Immigrant Survivors, <https://s3.amazonaws.com/gbv-wp-uploads/wp-content/uploads/2017/07/27202842/Immigration-2017-Advocate-Legal-Service-Survey-Key-Findings.pdf>.

⁴⁶ Camalot Todd, *Forced Into Shadows: Deportation Fears Silence Undocumented Crime Witnesses, Victims*, LAS VEGAS SUN (July 12, 2018).

⁴⁷ Devlin Barrett, DHS: *Immigration Agents May Arrest Crime Victims, Witnesses at Courthouses*, THE WASHINGTON POST (Apr. 4, 2017).

immediately after obtaining a protection order.⁴⁸ Closer to home, a witness to a police shooting in Federal Way was arrested by ICE shortly thereafter and eventually deported.⁴⁹ An undocumented immigrant in Tukwila who called police to report someone was breaking into his car was himself detained and turned over to ICE, while the car prowler was released.⁵⁰

In *Salas v. Hi-Tech Erectors*, this Court observed that “the risk of prejudice inherent in admitting immigration status [evidence is] great.”⁵¹ “Issues involving immigration can inspire passionate responses that carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation,” because “questions regarding a defendant's immigration status...appeal to the trier of fact's passion and prejudice.”⁵²

In this particular case, the jurors were questioned during *voir dire* about their opinions regarding immigration status.⁵³ Several believed undocumented immigrants should be treated differently.⁵⁴ One juror expressed the opinion that immigrants who “are illegal” don’t have the same

⁴⁸ Marty Schladen, *ICE Detains Alleged Domestic Violence Victim*, EL PASO TIMES (Feb. 15, 2017).

⁴⁹ David Kroman, *In Federal Way, A Key Witness To A Police Shooting Was Deported By ICE*, CROSSCUT (Oct. 17, 2018), <https://crosscut.com/2018/10/federal-way-key-witness-police-shooting-was-deported-ice>.

⁵⁰ Nina Shapiro, *Tukwila Officers Turn Immigrant Over to ICE After He Called Them for Help. Was That Legal?*, THE SEATTLE TIMES (Feb. 9, 2018).

⁵¹ 168 Wn.2d 664, 673, 230 P.3d 583 (2010).

⁵² *Id.* at 672.

⁵³ 4RP 54-61.

⁵⁴ *Id.*

rights others do.⁵⁵ After listening to what the jurors said and observing their body language and tone, the trial court refused to allow questioning of any party or witness regarding their immigration status.⁵⁶ In so doing, the trial court explained that it was “concerned about the inflammatory effect of that kind of evidence,” that “once you start interjecting evidence of status, you are interjecting the potential for a juror to make a decision based on status, which is wholly irrelevant.”⁵⁷ The trial court went on to say, that its concerns were not just based on the overall heated “immigration debate in this country,” but also

even in this venire on questioning . . . there were emotional reactions of sufficient severity and intensity that I believe that bringing up immigration and going into status of any of the people that are going to be testifying in this case is going to inflame one way or another the jury so that their view of the case is going to be driven not by the evidence, but by their personal views about immigration and . . . what should or shouldn't happen to those who are in this country without proper documentation.⁵⁸

2. The probative value of the evidence sought is lower than Ochoa maintains.

Ochoa, the WACDL, and the Court of Appeals portray the U visa as a simple, direct, and rapid path to citizenship, or at least to legal permanent residency. The WACDL compares it to immediate forms of relief the

⁵⁵ 4RP 59.

⁵⁶ 5RP 28.

⁵⁷ 4RP 79.

⁵⁸ 5RP 30.

prosecutor may provide in exchange for testimony, such as a plea deal. In fact, applying for a U visa is a labor-intensive, lengthy, and uncertain process. A certification provided by the prosecutor does not determine whether a victim qualifies for a U visa and cannot speed up the process, and thus, in and of itself, provides no actual relief.

There are many hurdles to overcome in applying for a U visa, including significant delays and the bar related to having arrived illegally in the U.S. As of November 2018, U.S. Citizenship and Immigration Services (USCIS) was processing petitions filed in November 2014 for initial review, and projecting a wait of 49 months until a filing is adjudicated.⁵⁹ Only after the petition is adjudicated does the victim receive the preliminary relief (deferred action and ability to apply for employment authorization) described by the Court of Appeals and Amicus WACDL.

If the petition is approved, the victim must then wait on a waiting list for a U visa to become available. At the end of fiscal year 2015, there remained almost 64,000 applications pending, which translated to a wait of six to seven years for an available U visa, due to the annual 10,000-visa cap.⁶⁰ Within less than three months, USCIS issued all 10,000 U visas

⁵⁹ Check Case Processing Times, USCIS, <https://egov.uscis.gov/processing-times/> (select Form I-918 & either processing center).

⁶⁰ Liz Robbins, *Immigrant Crime Victims Seeking Special Visas Find a Tough Path*, THE NEW YORK TIMES (Mar. 8, 2016).

available for fiscal year 2016.⁶¹ As of the end of June 2018, the number of pending applications had doubled to 128,000,⁶² representing a possible wait time of 10-13 years for a U visa to become available.

After receiving an available U visa, the victim can finally begin the three-year wait to become eligible to adjust status to legal permanent residence.⁶³ Five years later the victim may become eligible to become a U.S. citizen,⁶⁴ 20 years or more after becoming the victim of a crime.

Not all applicants get that far in the process, though. If the petition for a U visa is denied, the victim can then be referred for removal proceedings.⁶⁵ Even before the petition is adjudicated, ICE has deported some victims who came forward and assisted law enforcement.⁶⁶

In this climate where undocumented immigrants try to stay off the radar, filing a U visa places them squarely on the radar of DHS. Petitioning

⁶¹ Alert, USCIS, USCIS Approves 10,000 U Visas for 7th Straight Fiscal Year (Dec. 29, 2015), <https://www.uscis.gov/news/uscis-approves-10000-U-visas-7th-straight-fiscal-year>.

⁶² *Id.*

⁶³ 8 U.S.C. § 1255(m). Note that amicus curiae WACDL incorrectly cites to § 1255(j), which applies to material witnesses against criminal enterprises or terrorist organizations, who are granted nonimmigrant status under 8 U.S.C. § 1101(a)(15)(S), rather than § 1101(a)(15)(U). 8 U.S.C. § 1255(m), which applies to U-nonimmigrants, does *not* require that a prosecution or investigation have been successful for a U visa holder to adjust status.

⁶⁴ 8 U.S.C. § 1427.

⁶⁵ Alert, USCIS, USCIS to Continue Implementing New Policy Memorandum on Notices to Appear (Nov. 8, 2018), <https://www.uscis.gov/news/alerts/uscis-continue-implementing-new-policy-memorandum-notices-appear>.

⁶⁶ Tresa Baldas, “*We Have to Take Your Dad*”: *Man Deported By ICE After Helping Detroit Cops*, DETROIT FREE PRESS (Oct. 30, 2017).

for a U visa is a gamble. For many victims, it would be easier not to petition, not to call police, not to press charges. It would be safer to stay in the background. The U visa is a tool to lessen the fear that makes too many immigrant victims take that safer route.

In this case, there was only unauthenticated hearsay evidence that the victim might have been applying for a U visa. The trial court gave the defense opportunity to secure and produce additional proof, but they did not. The defense offered no proof that the victim was in danger of being deported, such that she would need to fabricate the attack to gain legal status. Similarly, the defense offered no proof she actually did apply for a U visa. If the victim chose not to pursue immigration relief, questions about her immigration status would have little probative value, but the foundational questions asked about her undocumented status before asking if she sought relief would have already stained her testimony.

In addition, this case was not strictly a he-said-she-said dispute, as Ochoa characterizes it. As the State pointed out in its brief before the Court of Appeals, there was medical evidence and eyewitnesses to some portions of the attack. This corroborating evidence places the victim's credibility less in dispute, decreasing the probative value of immigration status evidence.

3. Proper analysis under the Confrontation Clause requires consideration of whether the desired cross-examination will be used to intimidate the victim into not participating.

A defendant's right to cross-examine the witnesses against him is not absolute.⁶⁷ "The trial court retains the authority to set boundaries regarding the extent to which defense counsel may delve into the witness' alleged bias 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'"⁶⁸ Moreover, the confrontation clause does not entitle a defendant "to put specific facts before the jury."⁶⁹

Immigration status is a key tool used by perpetrators to intimidate victims, and the xenophobia-charged atmosphere currently pervading our country already causes many victims to fear involvement with authorities. Courts must be aware of reinforcing these dynamics when setting the boundaries of cross-examination of an immigrant victim. Disclosure of the victim's immigration status in an open courtroom may be sufficient to dissuade the victim from testifying, let alone the prospect of a grueling interrogation by defense counsel on the topic. Under *Fisher*, the trial court has discretion to—and should—carefully limit the scope of cross-examination of an immigrant victim to prevent the defense from intimidating the victim into not participating.

⁶⁷ *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002).

⁶⁸ *State v. Fisher*, 165 Wn.2d 727, 752, 202 P.3d 937 (2009) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

⁶⁹ *Fisher*, 165 Wn.2d at 752–53.

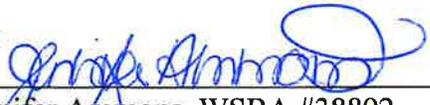
Because of this discretion, the decision to preclude cross-examination on certain topics should be reviewed as an evidentiary ruling, rather than as a question of constitutional error.⁷⁰ Rulings on the admissibility of evidence are reviewed for abuse of discretion.⁷¹ This Court must uphold the trial court's ruling on the scope of cross-examination absent a finding of manifest abuse of discretion.⁷²

V. CONCLUSION

Immigration status has been used as a weapon to intimidate victims from cooperating with law enforcement and to maintain a perpetrator's power and control. The U visa program provides protections to these victims and protects their access to justice regardless of their immigration status. Evidence of immigration status is extremely inflammatory in our current culture, and a victim should not be forced to testify about a U visa on the stand, absent direct relevance to the case. The trial court's ruling regarding this evidence was correct.

RESPECTFULLY SUBMITTED on this 30th day of November, 2018.

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⁷⁰ *Darden*, 145 Wn.2d at 619.

⁷¹ *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

⁷² *Fisher*, 165 Wn.2d at 752.

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I certify that on this date I caused to be served by filing with the Court's electronic filing portal the foregoing Brief of Amici Curiae Northwest Justice Project, Legal Voice, the Asian Pacific Institute on Gender-Based Violence, and the Washington State Coalition Against Domestic Violence to:

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