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Daniel A. Durst, Counsel
Committee on Rules of Evidence
Supreme Court of Pennsylvania
Pennsylvania Judicial Center
P.O. Box 62635
Harrisburg, PA 17106-2635

Re: Pennsylvania Law Professors' Comment to Proposed Rule Pa.R.E. 413 – Evidence of Immigration Status

Dear Mr. Durst:

We respectfully submit comments to the proposed adoption to Rule 413 of the Pennsylvania Rules of Evidence. We write this letter as law professors from law schools in the Commonwealth of Pennsylvania who have testified, lectured, researched, or written about issues related to immigration law and evidence. Several of us direct clinics that represent immigrants who have cases that involve the intersection of immigration law and civil/criminal proceedings.

We applaud this proposed rule in that it creates a stand-alone rule on this significant topic. In our previous letter submitted to this Committee on June 3, 2019, we argued that the issue of immigration status is significant enough that it should be placed within an evidence rule itself, rather than relegated to the comments to Pa.R.E. 401. The proposed rule is a laudable step forward in limiting the admissibility of a party's or witness' immigration status.

The proposed rule, however, still fails to provide adequate protection, and should be strengthened in several ways. As previously noted, access to the courts is foundational under the First, Fifth and Fourteenth Amendments of the U.S. Constitution and the Remedies Clause of the Pennsylvania Constitution. Immigrants cannot be denied the equal opportunity to exercise their constitutional

rights. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Plyler v. Doe*, 457 U.S. 202 (1982). Yet plaintiffs, defendants, victims, or witnesses, may refrain from participating in a court case if they are forced to reveal their immigration status during the course of the proceeding. Without the necessary parties present, courts are less able to effectively adjudicate cases, interfering with the fundamental responsibilities and obligations of the courts to vindicate the legal rights of parties.

First, we recommend that the rule distinguish between civil and criminal cases. Rule 413, from the Washington Rules of Evidence, for example, creates such a distinction. *See also* Cal. Evid. Code §§ 351.2-351.3 (addressing civil actions); § 351.4 (addressing criminal actions). The constitutional right to confrontation creates different standards in criminal versus civil cases. U.S. Const. amend. VI; Pa. Const. art. I, § 9; *see also Commonwealth v. Philistin*, 53 A.3d 1, 16 (Pa. 2012).

In particular, the rule should be amended in terms of its application to civil proceedings. It should note that evidence of immigration status is "presumptively inadmissible." In a recent national survey, judges have noted the increased interruption in proceedings due to an immigrant victim's fear of coming to court.[1] This fear coincides, for example, with opposing parties raising immigration status offensively in civil protection from abuse cases. In employment law cases too, employers have been known to raise immigration status against employees as a deliberate intimidation tactic prior and during the course of a proceeding. *See, e.g., Arias v. Raimondo*, 860 F.3d 1185, 1187-88 (9th Cir. 2017).

The exception for allowing evidence of immigration status in civil proceedings, therefore, should solely be limited "to prove an essential fact of, an element of, or a defense to, an action." The additional language about "a party's or witness's motive" should be removed from the rule. "Motive" is a broad term that provides an exploitable loophole for litigants to offensively introduce evidence of immigration status to intimidate parties or witnesses.

Litigants, for example, may justify the introduction of evidence of immigration status by claiming that it impinges on the "motive" of parties or witnesses to fabricate testimony. Yet courts have found that the prejudicial value of such evidence is outweighed by any relevancy to an individual's credibility. *See, e.g., David v. Signal Int'l*, 735 F. Supp. 2d 440, 445 (E.D. La. 2010) (finding that defendants' "opportunity to test the credibility of plaintiffs does not outweigh the public interest in allowing employees to enforce their rights") (internal quotations omitted); *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499, 502 (W.D. Mich. 2005) (noting that "[w]hile a witness' credibility is arguably always at issue, such does not mean that *unlimited* exploration on the subject is permitted . . . the damage and prejudice which would result to Plaintiffs if discovery into their immigration status is permitted *far* outweighs whatever minimal legitimate value such material holds for Defendants) (emphasis in the original); *Andrade v. Walgreens-Option Care, Inc.*, 784 F. Supp. 2d 533, 535 (E.D. Pa. 2011) (finding the risk of unfair prejudice about revealing immigration status outweighs any probative value related to credibility). In the civil context, the outcome of this balancing test need not address an accused's constitutional right to confront witnesses. Further, courts adjudicating civil cases have looked beyond the immediate parties before the court to emphasize the importance of preventing the chilling effect that disclosure of immigration status

[1] NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, PROMOTING ACCESS TO JUSTICE FOR IMMIGRANT AND LIMITED ENGLISH PROFICIENT CRIME VICTIMS IN AN AGE OF INCREASED IMMIGRATION ENFORCEMENT: INITIAL REPORT FROM A 2017 NATIONAL SURVEY 103 (2018).

has on future litigants and witnesses. *See, e.g., Rivera v. Nibco, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004) (noting the chilling effect on civil rights actions as an unacceptable burden to the public interest); *Cazorla v. Koch Foods of Miss.*, LLC, 838 F.3d 540, 564 (5th Cir. 2016) ("allowing discovery of [immigration] information may have a chilling effect extending well beyond this case, imperiling important public purposes").

Second, we wish to register concerns about the advance notice process in the rule. While we appreciate the purpose of advance notice, the current language sets up an indeterminate process with use of the language "reasonable notice." Pa.R.E. 413 should instead delineate a specific process for determining whether such evidence is admissible. The rule should require parties to file a written motion in advance with an offer of proof. The court then would provide an in camera review of such offer of proof to determine the relevancy and admissibility of such evidence. The evidentiary rules in both Washington and California (civil and criminal) set forth similar procedures for determining the admissibility of evidence of immigration status. Pennsylvania's Rape Shield Law also provides for a process of written motion, offer of proof, and in camera review, for determining whether or not evidence of a victim's past sexual conduct or reputation can be used in a criminal prosecution. 18 Pa. Cons. Stat. § 3104(b).

Further, the rule should have no exception to the requirement of advance notice upon "good cause shown." There is no definition of what constitutes "good cause," potentially creating a situation where some courts may allow litigants to offer such evidence on the spot, resulting in the irreversible exposure of a litigant's immigration status. There should be no exception given the high stakes and the comparatively minimal effort of providing advance written notice and in camera review (or at the very least a narrower exception for "exigent circumstances" that are defined within the rule).

Thank you to the committee for the hard work involved in created Pa.R.E. 413 in response to the prior comments. We look forward to your continued careful consideration of our comments to the proposed rule.

Sincerely, (Institutional affiliations for identification purposes only)

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