

Before the

**INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,
ORGANIZATION OF AMERICAN STATES**

JESSICA RUTH GONZALES,
in her individual capacity and on behalf of her deceased daughters,
KATHERYN, REBECCA, AND LESLIE GONZALES,
vs.
THE UNITED STATES OF AMERICA

Case No. 12.626

**AMICI CURIAE BRIEF
IN SUPPORT OF PETITIONER**

Presented by

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University of Texas School of Law Domestic Violence Clinic,
California Partnership to End Domestic Violence,
Domestic Violence Report,
National Association of Women Lawyers,
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INTERESTS OF AMICI

Founded in 1990, amicus the New York Legal Assistance Group ("NYLAG") is a not-for-profit organization dedicated to providing free civil legal services to New York's low income families. In 1994, NYLAG established its Domestic Violence Initiative, which provides assistance to victims of domestic violence on a priority basis. In addition to obtaining orders of protection, the Initiative provides victims with legal representation in child protection, custody, visitation, child and spousal support and matrimonial matters. NYLAG has further demonstrated its commitment to promoting legal services for victims of domestic violence through its Domestic Violence Clinical Center ("DVCC"). The DVCC is an innovative program administered and supervised by NYLAG attorneys, which offers law students the opportunity to learn the substantive and litigation skills necessary to provide exceptional representation to battered women. As such, NYLAG has a special degree of knowledge and expertise in the field of domestic violence.

Amicus University of Texas School of Law Domestic Violence Clinic ("DVC") was formed in 1997 as part of the University of Texas School of Law's clinical programs. Its mission is to provide comprehensive legal services to indigent domestic violence victims and collaborate with community agencies to improve victim safety and offender accountability.

Amicus the California Partnership to End Domestic Violence (CPEDV) is the federally recognized state domestic violence coalition for California. Its members include over 200 California agencies, organizations and individuals working to address domestic violence at local, state and national levels. CPEDV is a member-driven organization that serves as a leader and catalyst for social change by implementing innovative solutions to ensuring safety and justice for victims of domestic violence and their children. This includes promoting legislative and public

policy reforms that improve institutional responses to domestic violence, providing training and technical assistance to domestic violence service providers, fostering collaboration and coalition building at the local, state and national levels, and providing information and referrals for domestic violence victims who are in need of assistance. As the statewide coalition, CPEDV is acutely aware of both the successes and limitations of the Violence Against Women Act in addressing the needs and safety of domestic violence victims and their children. Accordingly, CPEDV has a compelling interest in this case and joins the amicus curiae brief filed by the New York Legal Assistance Group and the University of Texas School of Law.

Amicus Domestic Violence Report (DVR) is a multi-disciplinary newsletter that is widely distributed throughout the nation to 2,000 domestic violence programs and advocates, judges, lawyers, therapists, doctors, clergy, academics, police, probation officers and others interested in ending domestic violence. Since October of 1995, it has published every two months and covers all of the many aspects of domestic violence, and is primarily concerned with promoting the safety of domestic violence victims and the children in homes where domestic violence occurs. The newsletter editors, contributors, and advisory board, who include lawyers, psychologists, nurses and other healthcare providers, criminologists, police, academics, researchers and battered women's advocates, work with and train policymakers throughout the nation and assist them in drafting protocols and appropriate responses for domestic violence.

Amicus the National Association of Women Lawyers ("NAWL") is the oldest women's bar association in the United States. It was founded in 1899, long before most bar associations admitted women. Today, NAWL is a national voluntary organization with members in all 50 states, devoted to the interests of all women including women lawyers. Through its members, committees, and the Women Lawyers Journal, it provides a collective voice in the bar, courts,

Congress, and workplace. NAWL stands committed to ensuring access to the courts for women and families in need of protection.

Amicus Sanctuary for Families' Center for Battered Women's Legal Services specializes in providing legal assistance and direct representation to indigent victims of domestic violence, primarily in family law and immigration matters. Over the last two decades, the Center has also assisted a growing number of victims of human trafficking, many of whom have also been subjected to domestic violence. These legal services are carried out by Center staff through advocacy and training in collaboration with volunteers from the private bar, law schools, and New York City's public interest community. The Center plays a leading role in advocating for legislative and public policy changes that further the rights and protections afforded battered women and their children. The Center's goal of helping its clients achieve safety and independence is strengthened by its location within a large, multifaceted agency that addresses battered women's needs for safe, confidential residences, permanent housing, counseling, support with parenting, and assistance with job readiness, education, and training. This goal is also furthered by its collaboration with a diverse range of local, national, international, private, and community organizations. For that reason, the Center joins this brief as amicus curiae.

Amicus Elizabeth Schneider has been involved in law reform in the domestic violence arena for more than 30 years. She is currently a Visiting Professor of Law at Columbia Law School, is the Rose L. Hoffer Professor of Law and Director of the Edward V. Sparer Public Interest Law Fellowship Program at Brooklyn Law School, and has taught Domestic Violence and the Law at Brooklyn, Harvard and Columbia Law Schools. She is the author of the prizewinning book *Battered Women and Feminist Lawmaking* (Yale University Press, 2000) and co-author of the law school casebook, *Domestic Violence and the Law: Theory and Practice*

(Foundation Press, 2d. ed. 2008) (with Cheryl Hanna, Judith G. Greenberg and Clare Dalton).

Professor Schneider was a consultant to the UN Secretary-General's Report on All Forms of Violence Against Women, which was submitted to the General Assembly in Fall 2006. She is a national expert in the fields of federal civil litigation, procedure, gender, law and domestic violence and is a frequent commentator for print and broadcast media.

Amicus the University of Baltimore Family Law Clinic provides representation for residents of the Baltimore community in a range of family law matters. The Clinic has focused particularly on the needs of battered women and their children, representing them in protective order, divorce, custody and child support proceedings and assisting them in understanding and using the criminal sanctions applicable when their partners' actions violate the criminal law. Protective orders assist the Clinic's clients in meeting their goals of safety and autonomy; when those orders are disregarded by those in authority, the lives of the Clinic's clients and their children can be endangered. For that reason, the Clinic joins this brief as amicus curiae.

Amicus the University of California at Berkeley Law School (Boalt Hall) Domestic Violence Practicum was established in 1990. Students work in the community on issues faced by survivors of domestic violence including employment, criminal, immigration, family law, welfare, and other issues. Practicum students have also worked on many policy issues, including California state legislation. Additionally the Practicum has authored or co-authored numerous amicus briefs, both in the California courts and in the U.S. Supreme Court.

Amicus the University of Cincinnati College of Law Domestic Violence and Civil Protection Order Clinic was established in 2005. The clinic serves victims of domestic violence, sexual assault and stalking. Clinic attorneys and students represent victims in every stage of the protective order process. The clinic's primary focus is on the safety of clients and their children.

Amicus the University of Toledo College of Law Domestic Violence Clinic was established in 1999 to provide free, comprehensive legal services to victims and survivors of domestic violence within a larger, coordinated community response to intimate partner violence.

Amicus the Victim Rights Law Center (“VRLC”) is a nonprofit organization based in Boston, Massachusetts, with a satellite office in Portland, Oregon. The mission of the VRLC is to provide legal representation to victims of rape and sexual assault, to help rebuild their lives, and to promote a national movement committed to seeking justice for every rape and sexual assault victim. The VRLC meets this mission through direct representation of victims in Massachusetts (in education, immigration, privacy, employment, housing, physical safety, and other civil and administrative matters) and national legal advocacy, training and education regarding civil remedies for victims of sexual assault. The VRLC has a particular focus on meeting the needs of victims of non-intimate partner sexual assault. The VRLC provides legal counsel to over five hundred clients each year in Massachusetts, and trains and provides technical assistance to hundreds of legal professionals across the United States and US Territories each year. The breadth of VRLC’s work reflects the deep and reverberating impact of sexual assault throughout all aspects of a victim’s life, as well as the importance of holding offenders accountable for the consequences of their actions. The VRLC submits that many of the issues cited in the immediate amicus brief apply to sexual assault survivors as well, another class of crime victims covered, though inadequately, by the Violence Against Women Act.

SUMMARY OF ARGUMENT

In the recent past, the United States as a nation has made considerable strides in addressing the social, economic, and legal aspects of domestic violence. The most important contribution of the federal government in this area is the Violence Against Women Act of 1994

("VAWA"), which, among other things, funds shelters for victims and their children, funds training for police and prosecutors who deal with batterers, and encourages (but does not require) states to adopt best practices in the investigation and adjudication of domestic violence, such as making petitions for protective court orders free for victims and requiring mandatory arrest of batterers when police receive reports that the batterer has violated a protective order. While these are fine policies, VAWA does not fulfill the United States' duty of due diligence to prevent, investigate, and punish domestic violence. Most importantly, VAWA provides no court remedy when police or batterers fail to take steps to enforce a court order of protection, as they did in the instant case.

Rather, VAWA is primarily a source of voluntary grants which are not monitored for compliance, and which are dependent on interested localities, organizations, and states applying for and implementing them. As a result, VAWA resources and grants go disproportionately to certain cities and states. VAWA vastly underfunds critical services like shelters and civil legal services, and does not secure the right of victims to housing, thereby limiting victims' options for escape from their abusers. Moreover, in the almost 15 years since VAWA was first passed, domestic violence rates in the United States have not been reduced proportionate to overall violent crime rates, civil and criminal law remedies still remain inadequate to protect battered women, and state laws on domestic violence remain inconsistent and do not fill VAWA's gaps. The United States does not fulfill its duty of due diligence to Ms. Gonzales or to domestic violence victims generally through VAWA.

STATEMENT OF FACTS

On June 27, 2005, the United States Supreme Court held that Jessica Gonzales had no remedy under the United States Constitution against police officers of the town of Castle Rock,

Colorado who ignored her many calls for help when, in violation of a valid court-issued domestic violence restraining order, her ex-husband kidnapped their three children, who were later found dead in his truck.¹ Ms. Gonzales had obtained the restraining order in early 1999 because of her husband's threats, unpredictable behavior, and suicide attempt in their home; a judge agreed that the respondent posed a risk of irreparable injury to Ms. Gonzales and the children.² Under the law of the state of Colorado at that time, the police were obligated to arrest or seek a warrant for the arrest of any person of anyone who violated any provision of a valid restraining order.³ Promotion of mandatory arrest laws is one of the goals of VAWA,⁴ but in Ms. Gonzales's case, neither the protective order, nor VAWA, nor the Constitution ended up offering protection to Ms. Gonzales and her children.

ARGUMENT

As the Inter-American Commission noted in its admissibility decision,⁵ the United States is obligated to implement the principles of the American Declaration on the Rights and Duties of Man[kind].⁶ These principles include the right to protection from acts of violence, even private violence; the rights of women and minority racial and ethnic groups to equal state protection as men and those of the dominant culture; and to petition government and receive a prompt response.⁷ Finally, every state must provide an effective remedy for acts violating fundamental rights. States have a duty to "*prevent, investigate and punish*" human rights violations and to

¹ *Town of Castle Rock v. Gonzalez*, 545 U.S. 748 (2005).

² See Gonzales Merits Brief, March 24, 2008, at 6-7.

³ Colo. Rev. Stat. § 18-6-803.5(3) (1999).

⁴ Pub. L. 103-322, § 40231, 108 Stat. 1796, 1932-34 (1994); Pub. L. 106-386, § 1104, 114 Stat 1464, 1497 (2000); Pub. L. 109-162, § 102, 119 Stat. 2960, 2975-78 (2005).

⁵ Admissibility Decision of July 24, 2007 ¶ 56.

⁶ AG/RES. 1591 (XXVIII-O/98) (June 2, 1998).

⁷ American Declaration arts. I, II, XXIV.

“provide compensation as warranted for damages resulting from the violation,” even where these result from the actions of a private party.⁸

The United States has argued in its brief on admissibility that the federal government has formulated a “nationwide response” to domestic violence through a “comprehensive legislative package” known as the Violence Against Women Act,⁹ first enacted in 1994¹⁰ and reauthorized with new provisions in 2000¹¹ and 2005.¹² However, as the Inter-American Court has recognized, “legislation alone is not enough to guarantee the full effectiveness of . . . rights.”¹³ The passage of the Violence Against Women Act was unquestionably a bellwether moment in the fight against domestic violence in the United States, but on its own VAWA does not and cannot fulfill the United States’ obligation to prevent, investigate, and punish violations of women’s rights to be physically safe, nor does it provide compensation for damages resulting from failures of the United States to do so.

I. VAWA is a Limited Remedy that Fails to Protect Women or to Discharge the United States’ Obligations Under International Law.

The Violence Against Women Act is, as the United States describes it, a comprehensive legislative package that seeks to provide funding for training of police, prosecutors, and advocates in dealing with domestic violence;¹⁴ funds shelters, civil legal services, and other services for domestic violence victims, especially in “demonstration” projects that can be

⁸ Velásquez Rodríguez Case, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988) ¶ 166 (emphasis added).

⁹ Response of the United States Regarding Jessica Gonzales at 15-20.

¹⁰ Pub. L. 103-322, Tit. IV, 108 Stat. 1796 (1994).

¹¹ Pub. L. 106-386, 114 Stat. 1464 (2000).

¹² Pub. L. 109-162, 119 Stat. 2960 (2005).

¹³ Case of the Sawhoyamaya Indigenous Community v. Paraguay, Judgment of March 29, 2006, Inter-Am. Ct. H.R. (Ser. C) No. 146 (2006) ¶ 167.

¹⁴ Pub. L. 103-322, § 40121, 108 Stat. 1796, 1910-17 (1994); Pub. L. 106-386, § 1103, 114 Stat. 1464, 1495-97 (2000); Pub. L. 109-162, § 101, 119 Stat. 2960, 2972-75 (2005).

replicated by other organizations;¹⁵ and encourages best practices by states by conditioning receipt of funding on, among other things, the states' using mandatory arrest policies and removing fees for applying for protective orders; and many other services.¹⁶

Yet VAWA fails to accomplish four crucial things: (1) it does not provide any direct remedy when abusers or police officers violate victims' rights, (2) it does not require participation by all states or monitor their progress, (3) it does not fully or adequately fund all the services that are needed, and (4) it does not require states to pass or strengthen legislation around civil protective orders or the housing rights of domestic violence victims

A. VAWA Does Not Provide a Federal Court Remedy for Victims of Gender-Based Violence.

As Ms. Gonzales points out,¹⁷ the 1994 version of VAWA authorized lawsuits in federal court against those who "commit a crime of violence motivated by gender."¹⁸ The Attorneys General of 38 of the 50 states supported this measure on the grounds that the state courts were incapable of addressing gender-based violence adequately.¹⁹ In other words, VAWA as originally passed attempted to provide battered women with a federal remedy against perpetrators of violence. Unfortunately, in 2000 the United States Supreme Court invalidated this portion of VAWA, holding that Congress did not have the authority to create such a cause of action as part of its power to regulate interstate commerce under the United States Constitution or its general police power.²⁰

¹⁵ Pub. L. 103-322, § 40221, 108 Stat. 1796, 1926-32 (1994); Pub. L. 106-386, §§ 1201-1202, 114 Stat 1464, 1504-06 (2000); Pub. L. 109-162, § 103, 119 Stat. 2960, 2978 (2005).

¹⁶ Pub. L. 103-322, § 40231, 108 Stat. 1796, 1932-34 (1994); Pub. L. 106-386, § 1104, 114 Stat 1464, 1497 (2000); Pub. L. 109-162, § 102, 119 Stat. 2960, 2975-78 (2005).

¹⁷ Jessica Gonzales Observations of December 11, 2006 at 44.

¹⁸ 42 U.S.C. 13981.

¹⁹ See *United States v. Morrison*, 529 U.S. 598, 653 (2000) (Souter, J. dissenting) (citing *See Crimes of Violence Motivated by Gender*, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess., 34-36 (1993)).

²⁰ *United States v. Morrison*, 529 U.S. 598 (2000).

Thus did the Supreme Court strike down the United States' first, and so far only, effort to provide a federal venue for punishing private violations of women's right to be free from gender-based violence. The Supreme Court decision in *Ms. Gonzales's* own case affirms that the United States Constitution also provides no remedy for the state's failure to protect victims of gender-based violence.²¹ No one expects that first responders can prevent every act of private violence. But the effect of the *Morrison* and *Gonzales* cases is that even where local and state police are negligent in their duties to protect women's right to physical security, and even where they fail to respond to an urgent call due to negative stereotypes they harbor about victims of domestic violence, or about women in general, there is no federal constitutional or statutory remedy.

B. VAWA is Non-binding on States and Primarily a Source of Grants.

In the absence of any substantive federal remedy for failure to protect women's rights, VAWA's role in preventing and punishing violence against women is limited primarily to making grants to state and local police and advocacy organizations who seek to implement training or programming;²² funding domestic violence service provision and training;²³ providing immigration relief to non-citizen victims of violence;²⁴ and coordinating interstate recognition of protective orders.²⁵ VAWA also issues grants to support domestic violence shelters,²⁶ rape

²¹ *Town of Castle Rock v. Gonzalez*, 545 U.S. 748 (2005).

²² Pub. L. 103-322, § 40121, 108 Stat. 1796, 1910-17 (1994); Pub. L. 106-386, § 1103, 114 Stat 1464, 1495-97 (2000); Pub. L. 109-162, § 101, 119 Stat. 2960, 2972-75 (2005).

²³ Pub. L. 103-322, § 40121, 108 Stat. 1796, 1910-17 (1994); Pub. L. 106-386, § 1103, 114 Stat 1464, 1495-97 (2000); Pub. L. 109-162, § 101, 119 Stat. 2960, 2972-75 (2005).

²⁴ Pub. L. 103-322, § 40701, 108 Stat. 1796, 1953-54 (1994); Pub. L. 106-386, § 1503, 114 Stat 1464, 1518-22 (2000); Pub. L. 109-162, Title VII, 119 Stat. 2960, 3053-78 (2005).

²⁵ Pub. L. 103-322, § 40221, 108 Stat. 1796, 1926-32 (1994); Pub. L. 106-386, § 1101, 114 Stat 1464, 1492-94 (2000); Pub. L. 109-162, § 106, 119 Stat. 2960, 2981-83 (2005).

²⁶ Pub. L. 103-322, § 40241, 108 Stat. 1796, 1932 (1994); Pub. L. 106-386, § 1202, 114 Stat 1464, 1505-06 (2000). By 2005, shelter grants were being administered through the Family Violence Prevention and Services Act rather than VAWA.

prevention courses,²⁷ domestic violence prevention and intervention programs,²⁸ and programs aimed at strengthening law enforcement, victim services, and prosecutorial and judicial responses to domestic violence.²⁹ The Federal Office on Violence Against Women (OVW) was established to administer grants for projects targeted at improving the issuance and enforcement of Protection Orders, including, as the United States points out, STOP (Services, Training, Officers, and Prosecutors) grants,³⁰ ARREST Grants to Encourage Arrest Policies and Enforcement of Protection Orders,³¹ and other programs aimed at training professionals to improve their responses to violence against women.³²

However, as Ms. Gonzales observes, these grants are entirely voluntary.³³ For instance, VAWA “conditions state receipt of sizable federal funding on the creation of systems that: (1) ensure that protection orders are given full faith and credit by all sister states; (2) provide government assistance with service of process in protection order cases; and (3) criminalize violations of protection orders,”³⁴ as well as those which adopt mandatory arrest requirements in domestic violence situations.³⁵ But if a state or locality chooses not to apply for the funding, VAWA has no impact at all.

²⁷ Pub. L. 103-322, § 40151, 108 Stat. 1796, 1920-21 (1994); Pub. L. 106-386, § 1401, 114 Stat. 1464, 1512-13 (2000); Pub. L. 109-162, § 302, 119 Stat. 2960, 3004 (2005).

²⁸ Pub. L. 103-322, § 40271, 108 Stat. 1796, 1937-38 (1994); Pub. L. 106-386, § 1106, 114 Stat. 1464, 1497 (2000); Pub. L. 109-162, § 401, 119 Stat. 2960, 3017-23 (2005).

²⁹ Pub. L. 103-322, § 40121, 108 Stat. 1796, 1910-17 (1994); Pub. L. 106-386, § 1103, 114 Stat. 1464, 1495-97 (2000); Pub. L. 109-162, § 101, 119 Stat. 2960, 2972-75 (2005).

³⁰ Pub. L. 103-322, § 40121, 108 Stat. 1796, 1910-17 (1994); Pub. L. 106-386, § 1103, 114 Stat. 1464, 1495-97 (2000); Pub. L. 109-162, § 101, 119 Stat. 2960, 2972-75 (2005).

³¹ Pub. L. 103-322, § 40231, 108 Stat. 1796, 1932-34 (1994); Pub. L. 106-386, § 1104, 114 Stat. 1464, 1497 (2000); Pub. L. 109-162, § 102, 119 Stat. 2960, 2975-78 (2005).

³² See Pub. L. 103-322, §§ 40152, 40412, 40421, 40607, 108 Stat. 1796 (1994); Pub. L. 106-386, §§ 1401, 1402, 1405, 1406, 114 Stat. 1464 (2000); Pub. L. 109-162, § 111, 204, 205, 503, 119 Stat. 2960 (2005).

³³ See Gonzales Merits Brief, March 24, 2008, at 53.

³⁴ Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J. L. & FEMINISM 3, 12 (1999).

³⁵ Ryan C. Hasanbasic, *Town of Castle Rock v. Gonzales: The Supreme Court Goes to Great Lengths to Ensure Police Discretion, But at What Cost?* 36 STETSON L. REV. 881, 913 (2007).

And indeed, many states do not receive VAWA funding. In 2007, no ARREST grants were made in 19 of the 56 participating states and U.S. territories.³⁶ Further, in 2007, the median total of grants made by the Office on Violence Against Women to programs within a single state or territory was approximately \$4.5 million U.S.D.³⁷ Alaska, a state with a population of 683,478, received \$15.9 million in funding from the Office on Violence against Women; New York, population 19,297,729, received \$18.8 million; and Wyoming, population 522,830, received \$2.3 million.³⁸ It should be noted that because many VAWA grants are made to localities and local nonprofit organizations rather than to states, VAWA coverage within each state varies. For example, West Virginia was given \$3,617,063 in various VAWA grants in 2007, but \$2.6 million of this funding was granted not to divisions of the state government, but to local foundations. The YMCA of Wheeling in and of itself received \$255,000. Similarly, in 2007 only \$2.9 million of the \$5,880,026 total grant money that Georgia received was granted to state-run DV programs.³⁹

Without a national scheme mandating legislation and training programs, the level of protection afforded to domestic violence victims varies across jurisdictions, with women in many parts of the country suffering from inadequate levels of protection and services. Yet another problem with the VAWA grant programs is that grants are not adequately monitored. “The National Center for State Courts (NCSC), reviewed surveys provided by state court administrators and found a ‘significant number of administrative offices noted that the courts were not receiving all of [a] 5 percent set-aside.’ Delays in spending also continue to plague

³⁶ See FY 2007 Office on Violence Against Women Grant Activity by State, available at <http://www.ovw.usdoj.gov/grant-activities2007.htm>.

³⁷ See *id.*

³⁸ See *id.*; census figures taken from <http://www.census.gov>.

³⁹ See FY 2007 Office on Violence Against Women Grant Activity by State, available at <http://www.ovw.usdoj.gov/grant-activities2007.htm>.

the efficacy of the funds.”⁴⁰ Failure to monitor implementation of the grants greatly diminishes VAWA’s effectiveness.

VAWA represents a significant funding source for services for victims of domestic violence and their advocates. However, providing funding to encourage states, localities, and agencies to act on a voluntary basis does not by itself fulfill the United States’ duty to provide comprehensive human rights protections for domestic violence victims.⁴¹ The voluntary nature of VAWA grants means that money often fails to reach persons most in need, who live in jurisdictions that lack the political will or the resources to navigate the complex terrain funding process.

C. VAWA Grants, while Laudable, do not Fulfill the Critical Needs of Domestic Violence Victims.

The diverse grants made under VAWA are a tremendous help to domestic violence victims around the country, but the grant amounts do not even come close to meeting the total need. This is demonstrated by three basic types of funding: shelter for battered women and their families, supervisors that monitor batters who have visitation rights with their children, and legal counsel to assist with the various civil legal matters that arise from violence within the family.

Before the 1970s, there were few, if any, domestic violence shelters for abused women in the United States.⁴² Presently there are shelters in every state, but there are still not remotely enough emergency shelters for women and children fleeing abusive relationships. Since its inception VAWA has helped to fund shelter services for battered women and their children.⁴³

⁴⁰ Leila Abolfazli, *Criminal Law: Violence Against Women Act (VAWA)*, 7 GEO. J. GENDER & L. 863, 865-66 (2006).

⁴¹ Velásquez Rodriguez Case, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988) ¶¶166, 174, 176.

⁴² Women/Children Fleeing Abuse, <http://www.npr.org/news/specials/housingfirst/whoneeds/abuse.html>

⁴³ See P.L. 103-322 § 40241; P.L. 106-386 § 1202. By 2005, shelter grants were being administered through the Family Violence Prevention and Services Act rather than VAWA.

Yet these are still utterly outstripped by the need for more shelter for domestic violence victims and their families.⁴⁴ In 2006, 1,898 families were turned away from domestic violence shelters in Virginia,⁴⁵ and in the Greater Richmond area, population 775,000, there were only 4 domestic violence shelters with a total of 56 beds.⁴⁶

Another important problem is the lack of availability of supervisors for batterers' visitation with their children. When a victim of domestic violence flees an abusive home, her abuser is usually eligible for visitation rights with children they have in common. One form of visitation designed to protect women and children from violence or stalking is visitation supervised by social work or mental health professionals at a specially designated center. "Supervised visitation, previously mandated most often in cases of child abuse and neglect, has become much more common in domestic violence cases. Judges may see it as the only responsible arrangement in cases with a history of domestic violence."⁴⁷ However, paying supervisors and their facilities is expensive and many poor families cannot afford it. "The most pressing issue with supervised visitation centers is simply an undersupply to meet the demand for centers that can handle domestic violence cases, with the appropriate safety protocols. The undersupply is directly linked to a lack of funding and intermittent funding."⁴⁸ Although VAWA began funding supervised visitation centers in 2000 and continued in 2005,⁴⁹ these monies have

⁴⁴ In fact, the Humane Society of America estimates there are three times the number of shelters for homeless animals as for abuse victims. See Haya El Nasser, American Journal: "No Kill' Pet Shelters Grow in Popularity, Detroit News, Sept. 15, 1997, at A2 (stating that there are approximately 5,000 animal shelters in the United States).

⁴⁵ *Id.*

⁴⁶ Bill Wasson, Abused who leave find few safe places, Times-Dispatch, October 27, 2007, <http://www.timesdispatch.com/cva/ric/news>.

⁴⁷ O'Sullivan et al., *Supervised and Unsupervised Parental Access in Domestic Violence Cases: Court Orders and Consequences*, Final technical report submitted to the National Institute of Justice (March 2006) at 33, available at <http://www.ncjrs.gov/pdffiles1/nij/grants/213712.pdf>.

⁴⁸ *Id.*

⁴⁹ P.L. 106-386 § 1301; P.L. 109-162 § 306.

decreased each year since 2003, as Congress fails time and again to approve the funding amount it previously authorized.⁵⁰

A victim's ability to obtain a civil order of protection may be further hampered by her lack of access to counsel. The United States Supreme Court, in *Gideon v. Wainwright*,⁵¹ established the right of an indigent defendant to state provided counsel in criminal cases, but the right to counsel has not been extended to civil cases.⁵² Some states have expanded a civil right to counsel, but nowhere in the United States is the right to counsel in civil cases comprehensive. Funding has been allocated under VAWA since 1998 for civil legal assistance for domestic violence victims,⁵³ but once again the need vastly outstrips the funding available.

The civil legal matters which entangle the lives of domestic violence victims, often involve a person's interests in "shelter, sustenance, safety, health and child custody," interests which are deemed "fundamental economic and social rights . . . in many of the world's constitutions and in international human rights treaties, but not explicitly protected by the federal United States Constitution."⁵⁴ The Charter for the Organization of American States, binding on

⁵⁰ "Assistance for 16.527: Supervised Visitation, Safe Havens for Children (FY 2000-2006)", FedSpending.org, available at http://www.fedspending.org/faads/faads.php?&sortby=r&record_num=all&detail=-1&datatype=T&reptype=a&database=faads&cfda_program_num=16.527.

"Funding for the provisions of VAWA is subject to congressional review every fiscal year, a power which Congress has, sadly, sought to wield freely. For example, in 2004, funding for VAWA's supervised visitation centers, educational and training programs, rural and campus violence prevention initiatives, and grants to encourage arrests was less than the authorized amounts, and successive decreases are projected for fiscal years 2005 and 2006." *Defense of Others and Defenseless "Others"*, 17 YALE JOURNAL OF LAW AND FEMINISM 327, 330 n.107 (2005).

⁵¹ 372 U.S. 335 (1963).

⁵² See *Lassiter v. Dep't of Soc. Servs of Durham County, N. C.*, 452 U.S. 18 (1981) (no automatic right to civil counsel in termination of parental rights case). In comparison, "[i]n approximately two-thirds of the [Council of Europe] countries, the right to counsel covers a wide spectrum of civil matters [including] family law, housing, consumer and debt cases, personal injury claims, public benefits, [and] employment and labor law" as a result of the European Court of Human Rights' ruling in *Airey v. Ireland*, 32 Eur. Ct. HR Serv A (1979): [1979]2 E.H.R.R. 305. Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World?*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 779 (2006).

⁵³ See, e.g., P.L. 106-36 § 1201; P.L. 109-162 § 103.

⁵⁴ Northeastern University School of Law, Program on Human Rights and the Global Economy, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases* (December 2006) [hereinafter *In the Interests of Justice*], available at <http://www.slaw.neu.edu/clinics/RightToCounsel.pdf>.

all member states, declares that each state shall “agree to dedicate every effort to the application of . . . [a]dequate provision for all persons to have due legal aid in order to secure their rights.”⁵⁵

D. VAWA Does not Secure the Right to Housing of Domestic Violence Victims, Thereby Limiting Victims’ Safety.

There is strong correlation between domestic violence and homelessness because “[t]hose women most vulnerable to the loss of housing and least likely to afford replacement housing are at the greatest risk of domestic violence.”⁵⁶ Statistical evidence clearly shows that, although women from all income brackets experience domestic violence in the United States, domestic violence *disproportionately* affects poor women. For instance, women “with household incomes of less than \$7,500 [U.S.D.] are seven times as likely as women with household incomes over \$75,000 [U.S.D.] to experience domestic violence;”⁵⁷ women who are renters are three times as likely to be victims as women who own their own homes;⁵⁸ and women who live in poor communities are generally more likely to be victims than those who live in wealthy communities.⁵⁹ Between 22% and 57% of homeless women identify domestic violence as the immediate cause of their homelessness.⁶⁰

The sheer number of homeless women and children who have experienced domestic violence makes it impossible to ignore three facts: first, that domestic violence is a primary cause of homelessness in the United States; second, that battered women and children are not afforded

⁵⁵ Charter of the Organization of American States art. 45(i), Apr. 30, 1948, 2 U.S.T. 2394, 1609 U.N.T.S. 119.

⁵⁶ Emily Martin, *Preventing Homelessness through Civil Rights Law*, Cornerstone (2006), available at <http://www.aclu.org/pdfs/fairhousingforbatteredwomen072806.pdf>.

⁵⁷ ACLU, Women’s Rights Project, *Domestic Violence and Homelessness* (March 21, 2006) [hereinafter *Domestic Violence and Homelessness*]; (citing Patricia Tjaden & Nancy Thoennes, U.S. Dep’t of Justice, NCJ 181867, *Extent, Nature and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey* (2000)), available at <http://www.aclu.org/pdfs/dvhomelessness032106.pdf>.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

adequate safeguards against eviction and housing discrimination; and third, that area shelters available cannot meet, and have not met, the needs of this huge homeless population. In order to combat domestic violence effectively, battered women's housing issues *need* to be addressed both with respect to temporary and permanent housing. When women who choose to leave are faced with homelessness without promise of refuge in a domestic violence shelter⁶¹ or alternate housing, they may conclude that returning to their abusers is the only way to put a roof over their head and the heads of their children.

1. Domestic violence victims are commonly evicted under laws prohibiting criminal activity in the home.

A major cause of homelessness for victims of domestic violence is the ability of landlords in both public and private housing to evict DV victims using tenancy laws proscribing criminal activity. In 1988, Congress amended the National Housing Act governing public housing to allow “public housing authorities [“PHA’s”] and landlords in federally assisted housing projects to evict tenants for the criminal activity of others on their lease, guests, and persons under their control.”⁶² In 2002, The Supreme Court, in *Department of Housing & Urban Development v. Rucker*, upheld this policy even as to “innocent” tenants, i.e. tenants who were unaware of the criminal activity on the part of their guests or family members, “affirming the broad discretion to institute eviction actions under this law conferred upon PHA’s and, by extension, other public

⁶¹ Often, there is no shelter space, particularly for victims with children, or the shelter policy dictates that victims must quit their jobs to be admitted. Such misguided policies are based on the premise that abusers will follow victims from their place of employment to the shelter, thus endangering not only the victim, but other residents and staff as well. See Jody Raphael, *Domestic Violence and Welfare Receipt: Toward a New Feminist Theory of Welfare Dependency*, 19 HARVARD W.L.J. 201, 223 (1996) (stating that “some shelters require women to quit their jobs once they enter a shelter so that the abuser cannot follow them from work to the shelter”).

⁶² Elizabeth M. Whitehorn, *Comment: Unlawful Eviction of Female Victims of Domestic Violence: Extending Title VII’s Sex Stereotyping Theories to the Fair Housing Act*, 101 NW. U.L. REV. 1419, 1420-21 (2007).

landlords.”⁶³ This holding has had severe consequences for victims of domestic violence living in public housing throughout the United States.

One strike policies and zero tolerance lease provisions permit PHA’s and other landlords to evict female domestic violence victims solely based on the criminal activity of their abusers. This problem has become so severe that Congress has acknowledged the prevalence with which women and children are evicted from public and subsidized housing based on violence perpetrated against them.⁶⁴ Statistical research has confirmed these findings as well. A recent study in Michigan found that women currently or formerly receiving welfare who had experienced recent or ongoing domestic violence were far more likely to face eviction than other women.⁶⁵

Congress responded to some of these concerns in by reauthorizing VAWA in 2005.⁶⁶ Under VAWA, public housing authorities and Section 8 landlords can only evict a tenant based on domestic violence perpetrated against her if they can prove there is an ‘actual and imminent threat’ to other tenants or staff if she is not evicted.⁶⁷ VAWA permits public housing authorities and Section 8 landlords to “bifurcate” a lease, i.e. evicting the batterer while permitting the rest of the household to stay.⁶⁸

⁶³ *Id.* at 1421.

⁶⁴ *Id.* at 1421.

⁶⁵ Domestic Violence and Homelessness, *supra* note 57, at 2.

⁶⁶ 42 U.S.C. §§ 1437d, 1437f.

⁶⁷ ACLU, Women’s Rights Project, *The Rights of Domestic Violence Survivors in Public and Subsidized Housing* [hereinafter *Rights of Domestic Violence Survivors*], available at http://www.aclu.org/pdfs/womensrights/subsidized_housing_2008.pdf; see Legal Momentum, *Housing Protections for Victims of Domestic and Sexual Violence* (2008) [hereinafter *Housing Protections*], http://www.legalmomentum.org/site/DocServer/Housing_02_27_07.pdf?docID=1041 (last visited September 2008).

⁶⁸ *Rights of Domestic Violence Survivors*, *supra* note 67, at 2. *But see* California Apartment Association, Policy Statement 13: Domestic Violence (stating while domestic violence often occurs between signors on a lease and action may be appropriately taken against the abusive tenant, California law does not permit landlords to exercise “partial eviction”).

However, the protections provided by VAWA do not apply to women in *private* housing. Some states provide a defense against eviction to victims of domestic violence, thereby protecting women in private housing as well. But only fourteen out of the fifty states⁶⁹ and Washington D.C.⁷⁰ provide domestic violence victims protection from, or an affirmative defense against, eviction based on her status as a victim of domestic violence. Still other states give victims the ability to break their lease agreements prematurely as a result of domestic violence.⁷¹ Such laws are important, but they do not offer refuge to victims who have nowhere to escape, nor do they make up for the lack of federal leadership on this issue.

2. VAWA does not prevent discrimination on the basis of victim status in private housing.

In addition to revoking existing leases because of domestic violence, landlords frequently refuse to offer new leases to women who have protective orders or are otherwise identifiable as a survivor of domestic violence.⁷² VAWA 2005 prohibits *public* housing authorities and Section 8 housing authorities⁷³ from denying admission to a person because she has been a victim of domestic violence.⁷⁴ But, again, VAWA does nothing regarding private landlords, and states vary on the rights afforded to survivors of domestic violence against housing discrimination.⁷⁵ A few states outright *prohibit* housing discrimination against victims of domestic violence,⁷⁶ although the majority do not.

⁶⁹ See, e.g., Housing Protections, *supra* note 67.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² National Coalition Against Domestic Violence, *Domestic Violence and Housing*, available at <http://www.ncadv.org/files/housing.pdf> (last visited Sept. 12, 2008) (citing *Interviews with State Coalitions and Local Shelter Programs*, National Coalition Against Domestic Violence (2003)).

⁷³ Rights of Domestic Violence Survivors, *supra* note 67.

⁷⁴ *Id.*

⁷⁵ Kristen M. Ross, Note: *Eviction, Discrimination, and Domestic Violence: Unfair Housing Practices Against Domestic Violence Survivors*, 18 HASTINGS WOMEN'S L.J. 249 (Summer 2007).

⁷⁶ See, e.g., Housing Protections, *supra* note 67.