08-6183-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Roy Den Hollander, Sean Moffett, Bruce Cardozo, and David Brannon,

Plaintiffs-Appellants,

--against--

United States of America, Director of the U.S. Citizenship and Immigration Services, Director of the Department of Homeland Security, Director of the Executive Office for Immigration,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY OF PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

Class Representatives Den Hollander, Moffett, Cardozo, and Brannon brought this action against the defendants-appellees ("Government") for making, currently making, or will be making fact-findings that they "battered," or subjected to "extreme cruelty," or an "overall pattern of violence" their alien wives. The Class Representatives are excluded from the Government's fact-finding procedure, but their alien wives are allowed to fully participate.[1]

This action was also brought to allow the Class Representatives to contest any fact-findings that they committed "battery," "extreme cruelty," or an "overall pattern of violence," and to institute procedures to prevent the disclosure of false and privacy information contained in such findings. Contrary to the Government's contention, the Class Representatives do not want disclosure of their alien wives entire immigration records. (Gov't Brf. p. 2). They only want access to Government records finding them responsible for felonies, misdemeanors, and civil wrongs in proceedings from which they and their evidence were, are, or will be excluded.

The one-sided proceeding and the Chinese wall that prevents the Class Representatives access to records, even through the Privacy Act, were created by a

[1] The lower court did not rule on class certification for the appellants-plaintiffs class, so this case remains a putative class action. *See e.g.* Kahan v. Rosentiel, 424 F.2d 161, 169 (3rd Cir. 1970); Gaddis v. Wyman, 304 F. Supp. 713, 715 (S.D.N.Y. 1969).

number of statutes and regulations referred to as the Violence Against Women Act ("VAWA"). The challenged provisions are in **bold.**

The Amended Complaint does not blame the one-sided, VAWA fact-finding process for their marriages, but that the Government in reaching its findings and preventing the Class Representatives access to those findings, violated, is violating, or will violate, their

1. rights to due process by preventing them from speaking on their own behalf, by deterring them from again marrying an alien, by exposing intimate information to third parties without consent or opportunity to oppose, by nullifying their right to seek defamation damages because false statements in administrative proceedings are privileged, by lacking an impartial adjudicator because the Government only relies on one side to find abuse, and by voiding their right to rebut evidentiary presumptions and be adjudged under a meaningful standard of proof because they are prevented from submitting any evidence;

2. rights to equal protection because as U.S. citizens, U.S. citizens who married aliens, and males, VAWA bars them from refuting fact-findings of "battery," "extreme cruelty," or an "overall pattern of violence" while allowing their alien wives to prosecute such findings as the accusers;

3. rights to exercise constitutionally protected speech because the terms "extreme cruelty" and an "overall pattern of violence" are so overbroad as to

include statements made in the usual squabbling of couples and during divorce proceedings;

4. rights to know what type of conduct is prohibited because findings of "battery" and "extreme cruelty" rely on *ad hoc* decisions by the Government due to the vagueness of the terms; and

5. rights not to have Congress punish them without trial because they belong to a group that Congress believes is responsible for domestic violence in marriages involving aliens.

The Government claims the violation of these rights is of no consequence because the Class Representatives are not subject to any Federal proceedings that penalize them. (Gov't Brf. pp. 3, 20). That, however, is a penalty, is an injury—the Government locks the doors to citizens about whom it then finds committed crimes and civil wrongs.[2]

The Government also wrongly asserts that the fact-findings against the Class Representatives cannot be disclosed to third parties because no provision requires such, and the alien wives have no incentive to disclose the findings. (Gov't Brf. pp. 3-4, 20). When an alien wife enlists a government or private organization to obtain VAWA benefits, including immigration and divorce lawyers, that

[2] The Government tries to obfuscate the allegations of constitutional rights violations by claiming the Class Representatives are alleging a legal interest in the outcome of their spouses' immigration proceedings. (Gov't Brf. pp. 3, 20). The Class Representatives are not alleging a stake in the outcome, but the means used to determine the facts of abuse because those means require findings made in secret, one-sided proceedings.

organization must first determine whether abuse by the husband occurred and whether the abuse is somehow connected to the benefits requested. (Class Rep. Brf. p. 38).

The Amended Complaint at ¶¶ 93, 122, App. 17, 19, alleges the use of such organizations by Moffett and Brannon's wives who logically did so because it benefited them—an incentive. The extent to which information flowed back and forth between the Government, the alien wives, and third parties remains secret from Moffett and Brannon because of VAWA, but since their wives received benefits, information of abuse had to be transmitted. Whether the wives of Den Hollander and Cardozo also used such organizations remains a secret under VAWA.

The Government claims that the state proceedings brought against the Class Representatives by their alien wives are not traceable to VAWA. (Gov't Brf. pp. 4, 21). That is a claim it cannot possibly know because there has been no discovery in this case—it is still in the pleading stage. Perhaps the Government requests this Court to make a decision that as a matter of law aliens are never motivated to institute fraudulent *ex parte* state proceedings so they can use the documents generated as primary evidence in finding citizens committed abuse under VAWA. Basically, the Government asserts that the prize of permanent residency in America, where the average annual family income is $60,000, cannot

cause persons from the poorest nations to file false charges to assure winning that prize.

The Government wrongly asserts that state proceedings can correct the harm done by the alien wives' fraudulent state actions, which the Class Representative's Brief at pp. 26-30 makes clear they cannot.

The Government also mistakenly claims the relief sought by the Class Representatives would not impact their arrest records or redress the threat to their reputations because their alien wives would still have the same incentive to file false charges in state proceedings. (Gov't Brf. pp. 4, 21). Oh please! People will say anything when the person they accuse is permanently absent. The whole reason for the adversarial system is to provide a check on lies told. Besides, the relief sought need only reduce the probably of injury. Massachusetts v. EPA, 549 U.S. 497, 525 n. 23 (2007)(citation omitted).

Moreover, the relief sought would allow the Class Representatives to protect privacy information, rebut false information, and correct the findings of abuse to findings of no abuse. The Government's records would be changed, and any release would not invade privacy or harm reputation. Of course, the records might not be changed, but nobody knows that now.

As for the Government's argument under Rule 12(b)(6), there is no final decision by the district court for this Court to review. 28 U.S.C. § 1291.

THE GOVERNMENT'S OMITTED AND INACCURATE FACTS

The Government falsely presents VAWA as the only means "to relieve aliens whose U.S. citizen spouses were abusing them from the need to depend on that spouse to obtain" permanent residency. (Gov't Brf. p. 6). Before VAWA, alien wives had, and still have, two routes to permanent residency that do not depend on their abusive spouses. (Class Rep. Brf. p. 4). VAWA just makes it easier for them to fraudulently obtain residency.

In listing the self-petition requirements under VAWA, the Government wrongly states that one is "'extreme hardship' if deported." (Gov't Brf. p. 7). The VAWA "extreme hardship" requirement was eliminated in 2000. *See* 8 U.S.C. § 1154(a)(1)(A)(iii). "Extreme hardship," however, does remain for cancellation of removal proceedings if the alien wife is in such proceedings when she self-petitions. 8 U.S.C. § 1229b(b)(1)(D).

The "extreme hardship" requirement for cancellation of removal proceedings under VAWA should not be confused with the hardship requirement under a completely different route to permanent residency called the "hardship waiver," 8 C.F.R. § 216.5(e)(1). The "hardship waiver" is difficult to obtain, Gordon, Immigration Law & Proc., § 42.05(4)(b), p. 42-18, but VAWA's "extreme hardship" is easily satisfied. It can include: psychological effects of the alleged abuse, an alien wife's asserted need for social services available in America but not

reasonably accessible in her home country, or even her husband's ability to travel to his wife's home country. 8 C.F.R. § 1240.58(c).

The Government states that self-petitioning alien wives under VAWA need to be of "good moral character," but fails to note that VAWA actually allows aliens to acquire permanent residency when they are not of good moral character. **8 U.S.C. §§ 1182(h)(1)(C)**; **1227(a)(1)(H)(ii)**; **1229b(b)(2)(C)**; Amended Complaint ¶¶ 138, 173, 225, App. 21, 25, 33. So the good moral character requirement is to a large extent meaningless.

The Government claims VAWA's secrecy is to protect "domestic violence victims." (Gov't Brf. p. 9). But the secrecy begins the moment an alien wife files a self-petition, Gov't Brf. p. 10, which is before any determination of domestic violence has been made. What the secrecy provision really does is keep secret from citizens proceedings that find they committed crimes and civil wrongs.

The Government ignores, as did the lower court, that the Amended Complaint requests nominal damages for past violations of the Class Representatives' due process rights. (Amended Complaint ¶¶ 1, 41, 219(d), App. 6, 11, 31). Nominal damages signify that a plaintiff's rights were technically invaded even though he could not prove any loss or damage, Griffith v. Colorado, Div. of Youth Servs., 17 F.3d 1323, 1327 (10th Cir. 1994), and nominal damages should be awarded for deprivation of procedural due process, *see* Stein v. Board of

N.Y. Bureau of Pupil Transp., 792 F.2d 13, 18 (2d Cir.), *cert. denied*, 479 U.S. 984 (1986).

As for other allegations and arguments of the Class Representatives, the Government juxtaposes some and overlooks others in an effort to falsely convey that the Class Representatives rely on some arguments but not others. (Gov't Brf. pp. 11-14). The allegations and arguments are not in the alternative, and neither one is less important than the other, except the allegation of violation of the Class Representatives' right of access to deportation hearings. (Amended Complaint ¶¶ 3, 210, App. 6, 30). A right that allows the press and, in turn, the public to act as a check on abusive Government practices. This allegation is based on Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002), which is in conflict with No. Jersey Media Group v. Ashcroft, 308 F.3d 198, 201 (3rd Cir. 2002), so the Class Representatives have not emphasized that argument, but neither have they abandoned it. The Government completely ignores it.

The Government Brief at pp. 11-12 asserts the Amended Complaint at ¶ 142, App. 21, alleges denial of an opportunity for the Class Representatives to "defend" themselves from being found "guilty" of abuse, and that at ¶¶ 162-63, App. 23-24, they complain about not being able to submit "exculpatory" evidence. The Government replaces the word "refute" with the word "defend," inserts the word "exculpatory," which does not appear in the Amended Complaint, and uses the

word “guilty” without noting that the Amended Complaint at p. 3 n. 1, App. 8, defines guilty according to Black’s Law Dictionary as meaning responsible for a crime or civil wrong. The Government’s linguistics are meant to support their misleading argument that procedural due process only applies to proceedings in which a person is a party, and that the Class Representatives rely on analogies with proceedings in which a person is a party. Procedural due process, however, is not limited to parties in proceedings, but is meant to protect persons from the mistaken or unjustified deprivation of a liberty interest by government, regardless of how that occurs—in the light of day or secretly behind closed doors where only the accusers may go.

The only substantive due process allegations in the Amended Complaint concern equal protection, overbroad and vague statutes, bills of attainder, and that VAWA interferes with the states jurisdiction over family matters.

The Government claims the Class Representatives concede that the VAWA provisions are facially sex-neutral. (Gov’t Brf. p. 14). That is false. (Class Rep. Brf. pp. 50-51).

The Government tries to paint Den Hollander as a bad character because he “attempted to intervene” into deportation proceedings begun against his alien wife, Gov’t Brf. p. 15, in part, because of a request from the U.S. Embassy in Russia, Amended Complaint ¶ 74, App. 14, and filed a Civil R.I.C.O. suit primarily

directed against Russian and Chechen organized crime associates of his wife who had been identified by Russian Military Intelligence.

The Government also tries to create a false picture of the other Class Representatives by omitting pertinent matters from their allegations. (Gov't Brf. pp. 16-17). This Court is referred to the allegations in the Amended Complaint at ¶¶ 53-125, App. 12-19, rather than the Government's skewed recounting of them.

In recounting the relief requested by the Class Representatives, the Government leaves out: they be allowed to contest the fact-findings against them using the same procedures and evidentiary requirements as those that apply to their alien wives; they be guaranteed a neutral decision-maker at the district offices of the USCIS—not a decision-maker from the VAWA Unit in Vermont; and they have a right to appeal in a fashion similar to that of their alien wives. (Amended Complaint ¶ 212(f), App. 31). Originally, the self-petitioning procedure resided in USCIS district offices until the feminist lobby had it move to the Vermont Service Center so the lobby could more effectively exert influence over the staff. (Amended Complaint ¶¶ 127-29, 136-39, 219(j), App. 19-21, 32).

The poorly worded relief sought in ¶ 219(e), App. 31, is limited to access to only those records finding the Class Representatives committed "battery," "extreme cruelty," or an "overall pattern of violence" against their alien wives.

The last clause of the relief in the Amended Complaint ¶ 219(c), App. 31 about any Class Representative again marrying a foreigner is withdrawn, since their past experiences caused by VAWA have deterred them from ever again marrying a foreigner.

ARGUMENT

It is important to emphasize that throughout the Government's Brief it tries to convey the impression that the Class Representatives are interlopers into an immigration process that is merely deciding on the permanent residency status of their alien wives. The process is much more than that because it requires the Government to find facts on whether the Class Representatives committed "battery," "extreme cruelty," or an "overall pattern of violence" against their alien wives, and puts the Government's imprimatur of truth on such findings even though the Class Representatives are barred from the hearings, have no means to correct inaccurate conclusions, cannot limit dissemination to third parties, and have no recourse for damages that result from any dissemination.

Imagine Senator Joseph McCarthy had a list of names that was available to certain government agencies and certain private organizations because the law required those agencies and organizations to determine whether certain individuals were on the list. The names were secretly whispered to Senator McCarthy, and there was no way for a person to keep his name off the list without curtailing his

own rights. Once on the list, there was nothing he could do to get off other than adopting a new identity. Without a new identity, all he could do was watch as one job after another with government or private concerns was denied him. That's part of the VAWA legacy for the Class Representatives and many more American men.

1. Standard governing motions to dismiss under Fed. R. Civ. P. 12(b)(1)

The Government tries to heighten the standard for determining motions to dismiss based on standing by confusing decisions concerning *in personam* jurisdiction with subject matter jurisdiction and then equating standing to subject matter jurisdiction. The Government cites to Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 507 (2d Cir. 1994), which relies on CutCo Indus. v. Naughton, 806 F.2d 361, 364 (2d Cir. 1986), for the rule that *in personam* jurisdiction requires the plaintiff to make a *prima facie* showing of personal jurisdiction. *In personam* jurisdiction is not subject matter jurisdiction, but even were the requirements the same, Article III standing and subject matter jurisdiction are distinct concepts. Alliance for Envtl. Renewal, Inc. v. Pyramid Crossgates Co., 436 F.3d 82, 89 n. 6 (2d Cir. 2006).

Relying on its faulty analogies, the Government claims that a *prima facie* showing applies to determining whether standing exists. *Prima facie* means at first sight, on first appearance, Black's Law Dictionary, 9th ed., but the standard for

determining standing is less onerous in that a "court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff[s]." Raila v. U.S., 355 F.3d 118, 119 (2d Cir. 2004).

The Government also tries to move the standard higher by claiming the factual allegations must be "uncontroverted" and that a court should not draw "argumentative inferences" in favor of the plaintiff. (Gov't Brf. p. 23). The Government ignores that this case is still on the pleadings. The only factual allegations are in the Amended Complaint. They do not have to be already proven so as to be "uncontroverted," since the plaintiff must not be put to the test to prove his allegations at the pleading stage, *see* Hickman v. Taylor, 329 U.S. 495, 500-01 (1947). As for "argumentative inferences," it comes from a 1925 U.S. Supreme Court case dealing with federal question jurisdiction—not standing: Norton v. Larney, 266 U.S. 511, 515. For standing, the standard is all reasonable inferences in favor of the plaintiffs.

2. Doctrine of standing and injury

The Government states "the doctrine of standing focuses a court's attention on the party seeking to invoke the court's jurisdiction...," Gov't Brf. p. 24, but leaves out the reason, which is stated in the very next sentence of the case the Government relied on: "[t]he 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy

as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" Flast v. Cohn, 392 U.S. 83, 99 (1968)(quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). The Class Representatives argue sufficient adverseness in their Brief at p. 25.

The Government cites Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), as holding the plaintiff's injury must "not [be] caused by a third party not before the court." (Gov't Brf. p. 24). Lujan, however, actually states the injury is "not ... the result [of] the independent action of some third party not before the court." Lujan at 560 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)(emphasis added)). The Government misleadingly expanded the restriction to all third-parties regardless of whether third-party acts were caused by the Government in order to counter the Class Representatives argument that VAWA causes alien wives to institute *ex parte* state actions to obtain documents useable as primary evidence in finding citizen husbands committed abuse. (Class Rep. Brf. pp. 26-30). The Government later admits in its Brief "[a] litigant is not precluded from establishing standing where the injury is attributable to a third party not before the court..." (Gov't Brf. p. 35).

Standing injuries may result from action by third-parties because fairly traceable injuries do not require the defendants' actions to be the last step in the

chain of causation, Bennett v. Spear, 520 U.S. 154, 168-69 (1997), and it matters not whether that last step is a discretionary decision, *see* F.E.C. v. Akins, 524 U.S. 11, 25 (1998), for standing can be based on a prediction that remedial benefits will flow from nonparties behavior in response to a decision making rule, Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 74-75 (1978).

The Government asserts that for injunctive relief a litigant cannot rely on past injury, Gov't Brf. p. 25, but fails to qualify that statement as the U.S. Supreme Court has done: (1) "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury," and (2) "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974). The Class Representatives allege both past wrongs indicating an immediate threat of more and continuing adverse effects.

In presenting the doctrine of standing, the Government misleadingly edited court statements, used quotes out-of-context, and failed to fully communicate the law in order to raise the standing hurdles higher than they are. It did, however, accurately state that "past injury creates standing to seek damages...." (Gov't Brf. p. 25). The Class Representatives seek nominal damages for the past violations of their rights; therefore, they have standing.

3. Injury-in-fact

The Class Representatives arguments are not premised on a right to participate in their alien wives' immigration proceedings, but on their fundamental rights as U.S. citizens to participate in Government proceedings that make fact-findings they committed "battery," "extreme cruelty," or an "overall pattern of violence" against their alien wives. The Class Representatives simply ask that when the most powerful government in the history of the world determines whether they committed crimes or civil wrongs, they be allowed to speak on their own behalf, submit evidence in their favor, and make objections before an impartial adjudicator.

The Government wrongly relies on Burrafato v. U.S. Dep't of State, 523 F.2d 554, 555 (2d Cir. 1975) and Noel v. Chapman, 508 F.2d 1023, 1027-28 (2d Cir. 1975) for its contention that the Class Representatives have no constitutional rights when it comes to the Government finding they committed abuse. (Gov't Brf. p. 26 & footnote). Those cases did not involve VAWA or the Government making fact-findings of abuse against U.S. citizens. The cases only dealt with the deportation of alien spouses who argued that such deportation violated their U.S. spouses' rights to keep their families intact. This Court found no such constitutional right. The Class Representatives are not arguing to keep their families intact.

The Government misleadingly states, "the immigration authorities presiding over VAWA proceedings have no authority to take any action against plaintiffs." (Gov't Brf. p. 27). Those authorities have the power to make fact-findings that the Class Representatives abused their alien wives, **8 U.S.C. § 1154(a)(1)(A)(iii)(I)(bb)** & **(II)(aa)(CC)(ccc)**; the power to decide what conduct constitutes "battery," "extreme cruelty," or an "overall pattern of violence," **61 Fed. Reg. 13,065-66**; the power to reject evidence submitted by the Class Representatives and to arbitrarily decide the credibility and weight of evidence, **8 U.S.C. § 1154(a)(1)(J)**, **8 U.S.C. § 1367(a)(1)(A)**, **8 C.F.R. § 204.2(c)(2)(iv), 61 Fed. Reg. 13,066**; the power to use privacy information and false information in making their fact-findings, id; the power to release privacy and false information to third parties, **8 U.S.C. § 1367(b)(2)(4)(5) & (7)**; the power to force the Class Representatives to support their alien wives to the extent of 125% of the poverty level when without VAWA, the wives would have been deported, 8 U.S.C. § 1183a; the power to limit the Class Representatives to only two fiancée visas for alien spouses since VAWA will effectively prevent any waiver, USCIS Memorandum, International Marriage Broker Regulation Act Implementation Guidance, Michael Aytes, HQOPS Docket # USCIS-2008-0070, 07/21/2006, www.uscis.gov. In sum, they have the power to ruin a man's life because he married a foreigner.

The Government relies on Linda R. S. v. Richard D., 410 U.S. 614 (1973), to inappropriately narrow standing injury to only those situations where a person is subjected to or threatened with prosecution. (Gov't Brf. p. 27). That is false, as the Class Representatives' Brief makes clear at pp. 20-21.

The Government also uses Linda R.S. to argue that the Class Representatives have "no stake in the outcome of [VAWA] immigration proceedings...." (Gov't Brf. p. 27). The Class Representatives have never claimed to possess a right to have their alien wives deported or that they possess immigration rights.[3] They do claim, however, that when the Government makes fact-findings behind closed doors that they committed crimes or civil wrongs and then disseminates that information to third parties, the Class Representatives definitely have a stake in opposing and challenging those findings and preventing their dissemination because such violates the following fundamental rights:

1. freedom of speech,[4] Class Rep. Brf. pp. 33-34, 55-57;

2. freedom of choice in marital relations,[5] Class Rep. Brf. pp. 35;

[3] The Government made an assertion in its motion papers in the district court that the Class Representatives alleged injury because their wives were not deported. That was false then, and it is false now. Although now the Government's invented assertion—which the lower court wrongly relied on as an allegation made by the Class Representatives—is that the Amended Complaint "tend[s] to support the district court's observation...," Gov't Brf. p. 27 footnote, an observation originally made by the Government. I have to give the Government credit; it got the lower court to believe its assertion was made by the Class Representatives, and now represents that assertion as the lower court's observation.

[4] When the Amended Compliant was filed, Brannon was still married to his alien wife and still curtailing his protected speech so that it would not be used against him in VAWA proceedings. (Amended Complaint ¶ 123, App. 19).

3. freedom from unilateral invasion of privacy, Class Rep. Brf. pp. 37-43;

4. freedom from reputational harm that limits employment opportunities or infringes a state right, Class Rep. Brf. pp. 39-43;

5. freedom of access to deportation proceedings, Amended Complaint ¶¶ 3, 210, App. 6, 30;

6. the right to an impartial adjudicator, Class Rep. Brf. p. 43;

7. equal protection, Class Rep. Brf. pp. 47-55;[6]

8. the right to know what conduct is proscribed by the terms "battery," "extreme cruelty," and "overall pattern of violence," Class Rep. Brf. pp. 55-57; and

9. the right not to be punished by bills of attainder without employing the adversarial procedure known as a trial.

The above rights denied the Class Representatives are not only provided their alien wives, but are enhanced for the alien wives by the very denial of them to

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[5] When the Class Representatives marriages fell apart, they were all faced with the Faustian choice of acceding to the demands of their alien wives to commit perjury by sponsoring them for permanent residency or a Star Chamber proceeding by which the Government finds they committed crimes or civil wrongs. (Amended Complaint ¶ 146, App. 22). That's a past deprivation of marital choice for which they request nominal damages.

[6] The Amended Complaint also alleges an equal protection violation in that the one-sided VAWA procedure favors citizen wives married to alien males over citizen husbands married to alien females. (Amended Complaint ¶ 161, App. 23). This discrimination is even supported by the Government, which states, "an alien male whose VAWA application was denied might plausibly raise an equal protection challenge alleging disparate treatment of VAWA claims by male aliens...." (Gov't Brf. p. 29 footnote). If an alien male can bring an equal protection action because of the disproportionate success of alien females with VAWA, that means citizen wives are being treated preferentially in the proceedings that find abuse as compared to citizen husbands.

their citizen husbands. The alien wives can speak on their own behalf; say whatever they want without concern that it will be contradicted; present evidence, whether false, misleading or accurate; appeal any decision; and limit the dissemination of any fact-findings concerning their citizen husbands.

Just because the Government has extensive power over aliens does not mean it has the power to violate the rights of its citizens in finding they committed domestic violence, especially when it does not even have the power to violate those same rights of aliens. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

4. Actual and Imminent Injuries

The Government limits its argument concerning actual and imminent injuries to the disclosure to third parties of its fact-findings that the Class Representatives committed crimes or civil wrongs. (Gov't Brf. pp. 29-34). The Government argues such disclosure is solely based on "subjective fear"; therefore, it is speculative. Disclosure of such information is actually mandated by statute and the Attorney General. 8 U.S.C. § 1641(b); Qualified Alien Status and Eligibility Under Title IV, 62 Fed. Reg. 61366; Class Rep. Brf. Addendum pp. 81, 89. The Government also ignores other allegations of actual or imminent harm that do not deal with disclosure.

"Actual" means something received, or in existence or taking place at the present time. Webster's Third New International Dictionary, ed. 1993.

"Imminent" means a person "is realistically threatened by a repetition of [the violation]," L.A. v. Lyons, 461 U.S. 95, 109 (1983), for which past wrongs are evidence, O'Shea v. Littleton, 414 U.S. 488, 496 (1974).

The Amended Complaint alleges that Moffett and Brannon's alien wives are, on information and belief, engaging in or about to engage in the one-sided VAWA process to find their husbands committed abuse. (Amended Complaint ¶¶ 95, 125, App. 17, 19). The allegations are "on information and belief" because the VAWA secrecy provisions prevent the Class Representatives from finding out any information about such proceedings without court ordered discovery. Since this case is on the pleadings, and there has been no discovery, the allegations are assumed true.

The procedure that will find two of the Class Representatives committed crimes or civil wrongs was, at the time of filing the Amended Complaint, ongoing or in the near future. Since that procedure infringes their rights, it amounts to an invasion of legally protected interests, which are injuries. Lujan, 504 U.S. at 560. Moffett and Brannon's injuries are "actual" in that they were presently occurring, or "imminent" in that they were about to occur. Additionally, "[w]here the harm alleged is directly traceable to a written policy there is an implicit likelihood of its repetition in the immediate future." Fortyune v. Am. Multi-Cinema, Inc., 364 F.3d

1075, 1081 (9th Cir. 2004). The one-sided VAWA procedure is a written process, so the harm to Moffett and Brandon was imminent, if not actual.

Whether the procedure is still ongoing as of the date of this Reply with respect to Moffett and Brannon is unknown and unknowable to them because of VAWA secrecy. This factual issue, however, can be resolved by this Court requiring the district court to hold an evidentiary hearing. Munoz-Mendoza v. Pierce, 711 F.2d 421, 425 (1st Cir. 1983)(the "court must resolve any genuine disputed factual issue concerning standing, either through a pretrial evidentiary proceeding or at trial itself").

As for the disclosure to third parties of the Government's fact-findings, the Class Representatives are kept, if not in the dark, at least in the twilight by VAWA secrecy. They have no certain way of determining whether the disclosure has occurred, is presently occurring, or will likely occur without an evidentiary hearing.

They do, however, have VAWA's requirements and logic. For example, Moffett and Brannon know that their alien wives were receiving benefits from legal-aid nonprofits supported, in part, by VAWA. (Amended Complaint ¶¶ 93, 122, App. 17, 19). For alien wives to receive aid from such "benefit providers," the alien wives must meet the requirements of being a "qualified alien." 8 U.S.C. § 1641(b); Qualified Alien Status and Eligibility Under Title IV, 62 Fed. Reg.

61366; Class Rep. Brf. Addendum pp. 81, 89. The benefit providers are mandated with the task of determining whether Moffett and Brannon's wives were "qualified aliens," id. p. 90, which means they were "battered or subjected to extreme cruelty in the United States by a spouse" and "if (in the opinion of the agency [benefit provider] providing such benefits) there is a substantial connection between such battery or cruelty and the need for the benefits to be provided...." **8 U.S.C. § 1641(c)(1)(A)**; 62 Fed. Reg. 61366(I)(2) & (3); Addendum pp. 81, 89. Since the wives received assistance from the benefit providers, they were not only deemed qualified by the providers but such qualification, as required by the law, was verified with the Government. Qualified Alien Status and Eligibility Under Title IV, 62 Fed. Reg. 61344.

The Government, therefore, disclosed findings containing privacy or defamatory information about Moffett and Brannon to third-parties—the employees of the benefit providers. That's an injury, and it is not necessary for these benefit providers to further spread that information to fourth-parties outside their organizations. If they do, however, neither Moffett nor Brannon will have any legal recourse. (Class Rep. Brf. pp. 39-40). Sure, the employees may be fined a maximum of $5,000, but that money goes to the Government—not the persons whom the fourth-party disclosure harmed.

As for Den Hollander and Cardozo, VAWA secrecy prevents them from obtaining any information on whether their wives are also receiving aid from immigrant organizations supported by VAWA.

The Government wrongly claims that Laird v. Tatum, 408 U.S. 1 (1972), based its holding of no injury on the fact that the "collection and maintenance of personal data, without more," is no injury. Laird found no injury not because the military was only keeping personal data on the plaintiffs, but that the military was not keeping any data at all on them. The challenged surveillance program did not even include the plaintiffs. Id.

MacArthur Found. v. FBI, 102 F.3d 600 (D.D.C. 1996), is factually dissimilar. Standing did not exist for a nonprofit-corporation based on the future difficulties its current employees may have in finding jobs because the F.B.I. maintained records on the corporation. The court stated the entity "points to not a single ... employee whose job prospects have been dimmed because of the F.B.I. records." Id. at 606. Here, Cardozo specifically alleges that his arrest interfered with his ability to change jobs. (Amended Complaint ¶ 108, App. 18). Unlike Cardozo, the corporation in MacArthur was not arrested or subjected to a TRO.

The Government relies on another factually dissimilar case: New Alliance Party v. FBI, 858 F. Supp. 425 (S.D.N.Y. 1994). Members of the New Alliance Party challenged the FBI's investigation of the Party, but the court found they did

not have standing because "the facts do not suggest that the FBI investigated one person, had a specific objective, or had a specific means to accomplish that objective." Id. at 432. Here, the arrest and TRO records concern individual persons, the Class Representatives, and are on file with the FBI for the specific purpose of being disseminated to state, local, and private organizations. (Class Rep. Brf. p. 28).

5. Injuries from state proceedings are fairly traceable to VAWA and redressable by the relief requested.

Traceability is not as rigorous as proximate cause, Smith v. Block, 784 F.2d 993, 995 (9th Cir. 1986), and the injury can be indirect. "[T]he indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights.... Warth v. Seldin, 422 U.S. 490, 505 (1975).

The Government uses Allen v. Wright, 468 U.S. 737 (1984), to argue the state proceedings brought by the alien wives are too indirectly connected to the VAWA evidentiary requirements for finding abuse. In Allen, the IRS granted segregated schools tax-exempt status, and certain pupils charged that action prevented them from gaining an education in an integrated environment—the injury. The U.S. Supreme Court found the injury resulted from the "independent action" of the third-party schools, and, therefore, was sufficiently indirect from the IRS granting tax-exemptions. Allen at 758. The key term is "independent action" by third-parties.

Here the third-parties are the alien wives who filed false police complaints that led to arrests and swore-out fraudulent TROs. Whether they did this in order to meet the evidentiary requirements to assure a successful VAWA self-petition is a fact question that can only be resolved through discovery. However, the Amended Complaint alleges they did such, and at this point in the proceedings, the allegations are deemed true.

The Class Representatives do not allege that documents from VAWA proceedings were used against them, Gov't Brf. p. 35, but that documents were created in *ex parte* state proceedings, so they could be used by their alien wives in VAWA proceedings to find the Class Representatives committed abuse.

Moreover, it is a logical error to view VAWA in isolation to *ex parte* state domestic-violence proceedings, since VAWA considers such evidence as primary evidence and the nonprofit-organizations funded by VAWA consider state domestic-violence proceedings an integral step in achieving VAWA residency. VAWA organizations coach alien wives on what to say, what to do, and how to act in order to gain permanent residency through VAWA. KPHO TV News, Phoenix, Arizona, http://www.kpho.com/news/19329313/detail.html, April 29, 2009.

The Government relies on La Raza v. Gonzales, 468 F.Supp.2d 429, 439 (E.D.N.Y. 2007), to argue that redress from the injuries caused by the alien wives

instituting fraudulent *ex parte* state proceedings lies with the states. (Gov't Brf. p. 36). The Class Representatives refute that in their Brief at pp. 28-29.

The alleged injury in LaRaza was that aliens might be arrested as a result of information in government databases. When a person is arrested, they know it, they know the charges against them, and they can marshal evidence in their favor, including that in the prosecutor's possession. The Class Representatives, however, were prevented, and still are prevented, by VAWA secrecy from using evidence of their alien wives efforts to obtain VAWA residency as a motivation for bringing false state charges.

Were the Class Representatives granted access to VAWA records findings they committed abuse and provided with procedures to correct such records, Amended Complaint ¶ 219(f), App. 31, they would then be able to re-open state proceedings based on new evidence that calls into question the credibility of the key witnesses against them—their alien wives. With the corrected Federal records and new state court decisions, the Class Representatives would not need to expunge the previous records but only supplement them.

The Government argues that the Class Representatives can "independently challenge the issuance of an *ex parte* restraining order or the denial of a job...," Gov't Brf. p. 37, without receiving the relief they request. Any successful challenge to a TRO in state proceedings would have no impact on the Government

finding the Class Representatives committed abuse. Once the TRO is issued, the alien has her primary evidence of abuse for VAWA. The evidence becomes part of the Government's fact-findings, which the husband cannot reach through any state court, VAWA process, and, so far, the federal courts. That evidence is then subject to disclosure to third parties under **8 U.S.C. § 1367(b)(2)(4)(5) & (7)**. Where the TRO is dismissed, as in the cases of Den Hollander and Brannon, Amended Complaint ¶¶ 69, 121, App. 14, 19, the husband is prohibited from submitting the dismissal to the Government to prevent VAWA fact-findings against him.

As for independently challengingly the denial of a job, the Class Representatives simply ask the Government—how?

Were the Class Representatives permitted access and the means to correct VAWA fact-findings of their abuse, then, when applying for employment, they could use the corrected Federal records and the results of re-opened state proceedings to show a potential employer that the information in various databases is wrong, if it has not been already supplemented. Such would prevent the harm of being denied a job that currently exists for all of them and as happened to Cardozo.

The Government also argues that even if procedures for correcting records were provided the Class Representatives and the VAWA adjudications of them committing abuse used the adversarial system, their alien wives would still have an incentive "to pursue arrests and restraining orders." (Gov't Brf. p. 37). Once

again the Government reaches a factual conclusion on a pleadings motion, but more ludicrously, it claims that the adversarial process is no better at reaching the truth then listening to only one side. "The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking ...," Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring), and the framers of the Constitution "did not trust any government to separate the true from the false for us," Thomas v. Collins, 323 U.S. 516, 545 (1945)(Jackson, J., concurring)—that is done by the adversarial system. In the actual adjudication of abuse and the after-the-fact correction of findings, the Class Representatives ask for the adversarial process because human failings are such that when only one side is heard, facts are not limited by reality, but only by self-interested imagination.

The Government also asserts the Amended Complaint did not allege that VAWA secrecy violated Moffett's Sixth Amendment right by preventing him from exposing his alien wife's motive for filing false criminal charges against him. (Gov't Brf. p. 38). A claimant need not set out in detail all the facts on which a claim is based but only provide enough information to put the opposing party on notice of the claim. Erickson v. Pardus, 551 U.S. 89, 93 (2007)(citation omitted).

The Amended Complaint alleges throughout that the alien wives made false criminal charges against the Class Representatives in order to manufacture

documents for use in the VAWA process. (Amended Complaint ¶¶ 9-11, 69-70, 89-90, 104-05, 120, App. 7, 14, 17-19). When a person is faced with false criminal charges, it goes without saying that he will defend himself, which, to every lawyer includes attacking the accusers credibility. It is unrealistic for the experience attorneys of the Government to claim that they were taken by surprise with the Sixth Amendment argument. (Class Rep. Brf. p. 29).

CONCLUSION

The district court's decision should be reversed.

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CERTIFICATE OF COMPLIANCE

This reply brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(ii) by containing 6,984 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) by using Microsoft Word Times New Roman in font size 14.