

FILED  
COURT OF APPEALS  
DIVISION II

2014 NOV 21 PM 2:28

STATE OF WASHINGTON

No. 46014-9-II

IN THE COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

DEPUTY

---

Brandy Leavitt,

Petitioner/Appellant,

v.

Joseph J. Leavitt,

Defendant/Respondent.

---

BRIEF OF AMICI CURIAE THE DOMESTIC VIOLENCE  
LEGAL EMPOWERMENT AND APPEALS PROJECT, THE  
NATIONAL ASSOCIATION OF WOMEN LAWYERS, THE  
WOMEN'S LAW PROJECT, THE BATTERED WOMEN'S  
JUSTICE PROJECT, AND PROFESSOR JANE STOEVER

---

K&L GATES LLP

Robert B. Mitchell, WSBA # 10874

Laura K. Clinton, WSBA # 29846

Heidi C. Garcia, WSBA # 41399

Erica Franklin, WSBA # 43477

Aaron Millstein, WSBA # 44135

Raina Wagner, WSBA # 45701

925 Fourth Avenue, Ste 2900

Seattle, WA 98104-1158

(206) 623-7580

Attorneys for Amici

*The Domestic Violence*

*Legal Empowerment and*

*Appeals Project, The*

*National Association of*

*Women Lawyers, The*

*Women's Law Project, The*

*Battered Women's Justice*

*Project, and Professor Jane*

*Stoever*

ORIGINAL

## TABLE OF CONTENTS

	Page
INTRODUCTION .....	1
IDENTITY AND INTEREST OF AMICI .....	2
STATEMENT OF THE CASE.....	2
ARGUMENT.....	2
I. Denying survivors long-term DVPOs and requiring them to pursue a separate action is dangerous and disempowering.....	2
A. Short-term DVPOs do not adequately protect survivors ....	2
1. Short-term DVPOs force survivors into dangerous physical contact with their abusers.....	4
2. Short-term DVPOs expose survivors to additional psychological harm. ....	7
B. Requiring a survivor to pursue protection in family court deprives her of the autonomy and self-empowerment that are primary goals of the Domestic Violence Prevention Act.....	9
II. Denying survivors long-term DVPOs unless they pursue a family law action raises constitutional concerns. ....	11
A. Survivors have a fundamental right to personal choice in matters of marriage and family.....	11
B. Refusing to grant a statutory remedy after the petitioner has met her burden of proof undermines her fundamental right of access to the courts. ....	14
III. National trends favor longer-term DVPOs, not short-term ones. ....	16
CONCLUSION.....	20

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Federal Cases</b>	
<i>Boddie v. Connecticut</i> , 401 U.S. 371 (1971).....	15
<i>Bounds v. Smith</i> , 430 U.S. 817 (1977).....	15
<i>Boy Scouts of Am. v. Dale</i> , 530 U.S. 640 (2000).....	14
<i>Griffin v. Illinois</i> , 351 U.S. 12 (1956).....	16
<i>Harrison v. Springdale Water &amp; Sewer Comm'n</i> , 780 F.2d 1422 (8th Cir. 1986) .....	16
<i>La Buy v. Howe's Leather Co., Inc.</i> , 352 U.S. 249 (1957).....	16
<i>Moore v. City of East Cleveland</i> , 431 U.S. 494 (1977).....	12
<i>Stanley v. Illinois</i> , 405 U.S. 645 (1972).....	13
<i>Swekel v. City of River Rouge</i> , 119 F.3d 1259 (6th Cir. 1997) .....	15
<i>W. Virginia State Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943).....	14
<i>Zablocki v. Redhail</i> , 434 U.S. 374 (1978).....	13, 14

## State Cases

<i>Benson v. Muscari</i> , 769 A.2d 1291 (Vt. 2001).....	18
<i>Champagne v. Champagne</i> , 708 N.E.2d 100 (Mass. 1999) .....	5
<i>Copp v. Liberty</i> , 952 A.2d 976 (Me. 2008).....	18
<i>Danny v. Laidlaw Transit Servs., Inc.</i> , 165 Wn.2d 200 (2008) .....	1, 17
<i>Gelfond v. District Court in and for Second Jud. District</i> , 504 P.2d 673 (Colo. 1972).....	16
<i>Gourley v. Gourley</i> , 158 Wn.2d 460 (2006) .....	7, 14
<i>Lite v. McClure</i> , 120 Haw. 386, 2009 WL 1263099 (Haw. Ct. App. 2009) .....	18
<i>Moreno v. Naranjo</i> , 987 N.E.2d 550 (Mass. 2013) .....	20, 21
<i>Pike v. Maguire</i> , 716 N.E.2d 686 (Mass. App. Ct. 1999) .....	5
<i>Rinas v. Engelhardt</i> , 818 N.W.2d 767 (N.D. 2012) .....	18
<i>Sinclair v. Sinclair</i> , 914 N.E.2d 1084 (Ohio Ct. App. 2009).....	19, 20
<i>Washburn v. Federal Way</i> , 169 Wn. App. 588 (2012) .....	4
<i>Webster v. Webster</i> , 166 Wn. App. 1037, 2012 WL 628228 (Feb. 28, 2012).....	9

**State Statutes**

RCW 10.99.010 .....17  
RCW 26.50 .....21  
RCW 26.50.025(2).....19  
RCW 70.123.010 .....17

**Constitutional Provisions**

Fourteenth Amendment .....12  
Wash. Const. Article I, § 10.....15  
Washington Constitution .....15

**Other Authorities**

Alex Tizon, *Death of a Dreamer*, The Seattle Times (Apr. 21, 1996) .....5  
Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 *Juv. & Fam. Ct. J.* 1 (1992) .....6  
Einat Peled, *Parenting by Men Who Abuse Women: Issues and Dilemmas*, 30 *Brit. J. Soc. Work* 25 (2000).....6  
James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (1999).....10  
Jane K. Stoeber, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67 *Vand. L. Rev.* 1015 (2014).....3  
Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 *Am. U. J. Gender, Soc. Pol'y & L.* 657 (2003) .....6, 8

Joan Zorza, <i>Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women</i> , 29 Fam. L. Q. 273 (1995).....	5
Judith E. Koons, <i>Gunsmoke and Legal Mirrors: Women Surviving Intimate Battery and Deadly Legal Doctrines</i> , 14 J. L. & Pol’y 617, 658-59 (2006).....	10
Judith Lewis Herman, <i>Trauma and Recovery: The Aftermath of Violence—From Domestic Abuse to Political Terror</i> (1992) .....	8
Juvenile & Family Court Judges, <i>Civil Protection Orders: A Guide for Improving Practice</i> (2010).....	11
Marisa Silenzi Cianciarulo & Claudia David, <i>Pulling the Trigger: Separation Violence as a Basis for Refugee Protection for Battered Women</i> , 59 Am. U. L. Rev. 337, 350-51 (2009).....	3
Martha R. Mahoney, <i>Legal Images of Battered Women: Redefining the Issue of Separation</i> , 90 Mich. L. Rev. 1, 29 n. 117 (1991).....	3
Mary Przekop, <i>One More Battleground: Domestic Violence, Child Custody, and the Batterers’ Relentless Pursuit of their Victims Through the Courts</i> , 9 Seattle J. Soc. Just. 1053 (2011).....	6
Matthew J. Carlson et al., <i>Protective Orders and Domestic Violence: Risk Factors for Re-Abuse</i> , 14 J. Fam. Violence 205 .....	4
Sally F. Goldfarb, <i>Reconceiving Civil Protection Orders for Domestic Violence</i> .....	10
Victoria L. Holt et al., <i>Civil Protection Orders and Risk of Subsequent Police-Reported Violence</i> , 288 J. Am. Med. Ass’n 589 (reprinted 2002).....	4
Victoria L. Holt et al., <i>Do Protection Orders Affect the Likelihood of Future Partner Violence and Injury?</i> , 24 Am. J. Preventive Med. 16 (2003).....	4

## INTRODUCTION

The Washington legislature recognized in 1979 that domestic violence “accounts for a ‘significant percentage’ of violent crimes in the nation and is disruptive of ‘personal and community life.’” *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 208-09 (2008) (quoting RCW 70.123.010). Thirty-five years later, 20 people in the U.S. experience intimate partner violence every minute.<sup>1</sup> There are 10,000,000 annual acts of domestic violence,<sup>2</sup> with a death toll of some 1,500.<sup>3</sup>

One of the ways in which state legislatures have addressed the epidemic of intimate partner violence is through the domestic violence protection order (“DVPO”), a survivor-initiated and empowering civil remedy. A DVPO cannot be effective, however, unless it extends for an adequate period of time. *Amici* agree with Petitioner that the Washington legislature intended a typical DVPO to issue for a year. But even if trial

---

<sup>1</sup> See *Injury Prevention & Control*, Centers for Disease Control and Prevention, <http://www.cdc.gov/violenceprevention/nisvs/> (last visited Nov. 18, 2014).

<sup>2</sup> *Id.*

<sup>3</sup> *Injury Prevention & Control—Intimate Partner Violence: Consequences*, Centers for Disease Control and Prevention, <http://www.cdc.gov/violenceprevention/intimatepartnerviolence/consequences.html> (last visited Nov. 19, 2014). Both men and women are victims of domestic violence, but the majority (including nearly 80 percent of individuals murdered by their intimate partners) are women. *Id.* In recognition of these facts, and the specific facts of this case, *Amici* use the feminine when the context requires a singular pronoun.

courts have discretion to issue a DVPO for less than a year under some circumstances, they abuse their discretion by issuing a short-term DVPO and requiring a survivor to seek protection in family court because she is married to or has children in common with her abuser. Such orders are contrary to public policy, raise significant constitutional concerns, and fly in the face of a national trend towards long-term DVPOs.

### **IDENTITY AND INTEREST OF AMICI**

The Domestic Violence Legal Empowerment and Appeals Project, the National Association of Women Lawyers, the Women's Law Project, the Battered Women's Justice Project, and Professor Stoeber are all committed to advancing legal protections for domestic violence survivors through education and advocacy.<sup>4</sup>

### **STATEMENT OF THE CASE**

*Amici* adopt Ms. Leavitt's Statement of the Case.

### **ARGUMENT**

#### **I. Denying survivors long-term DVPOs and requiring them to pursue a separate action is dangerous and disempowering.**

##### **A. Short-term DVPOs do not adequately protect survivors.**

Short-term DVPOs, such as the one issued in this case, reflect a fundamental misunderstanding of the nature of domestic violence and the

---

<sup>4</sup> *Amici's* Motion for Leave to File Brief of *Amicus Curiae* details their expertise and interests and is incorporated herein by reference.

danger that survivors face when they seek protection from their abusers. Domestic violence is part of “a *pattern of systematic abuse* by which the abuser seeks to dominate his partner through the *use of power and control tactics* including emotional, sexual, and physical violence.”<sup>5</sup> For too many survivors, attempting to leave the relationship leads to further abuse and escalated violence.<sup>6</sup> This is because abuse is not simply a function of proximity, but rather reflects the abuser’s desire to possess, dominate, and control the survivor.

Thus, domestic violence does not end when a survivor decides to leave a relationship. On the contrary, the very act of separation often causes an intensification of the abuse as the abuser attempts to reassert control over the survivor. Studies show that a survivor’s risk of harm increases by *seventy-five percent* after separation, and this increased risk continues for years.<sup>7</sup> Our courts have seen examples, as when Paul Kim stabbed Baerbel Roznowski to death in 2008 after he was served with her

---

<sup>5</sup> Marisa Silenzi Cianciarulo & Claudia David, *Pulling the Trigger: Separation Violence as a Basis for Refugee Protection for Battered Women*, 59 Am. U. L. Rev. 337, 350-51 (2009) (emphasis added).

<sup>6</sup> Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 29 n.117 (1991).

<sup>7</sup> Jane K. Stoeber, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67 Vand. L. Rev. 1015, 1025 (2014) (citations omitted).

restraining order.<sup>8</sup> Because of the increased and lasting risk of harm to a survivor who leaves an abusive relationship, short-term orders are less effective in reducing violence than long-term orders.<sup>9</sup>

*1. Short-term DVPOs force survivors into dangerous physical contact with their abusers.*

As a threshold matter, short-term orders require a survivor to return frequently to court to renew the order's protections, thereby "increas[ing] contact with the abuser, which may increase the risk of harm" to the survivor. *See Champagne v. Champagne*, 708 N.E.2d 100, 102 n.2 (Mass. 1999). When, as here, the survivor is forced to seek this protection through a separate family court action, that contact may be ongoing over the course of numerous—and, often, emotionally charged—

---

<sup>8</sup> *See, e.g., Washburn v. Federal Way*, 169 Wn. App. 588 (2012).

<sup>9</sup> *See, e.g., Victoria L. Holt et al., Do Protection Orders Affect the Likelihood of Future Partner Violence and Injury?*, 24 *Am. J. Preventive Med.* 16, 18-19 (2003) (rates of abuse decreased with longer protection orders); Victoria L. Holt et al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, 288 *J. Am. Med. Ass'n* 589, 589 (reprinted 2002) (concluding that year-long DVPOS "are associated with a significant decrease in risk of police-reported violence against women by their male intimate partners"); Matthew J. Carlson et al., *Protective Orders and Domestic Violence: Risk Factors for Re-Abuse*, 14 *J. Fam. Violence*, 205, 215 (survivors with one-year orders experienced a greater decrease in abuse than those with shorter orders); *see also* Stoeber, *supra* note 7, at 1066 (describing multiple studies finding a correlation between the duration of a protection order and a survivor's safety, which researchers have described as a "dose-response relationship according to the duration of the [DVPO]").

proceedings. Each court appearance is a challenge to the abuser's dominance and control of the survivor, and hence is *per se* a powerful potential trigger for the abuser's rage and escalated violence.<sup>10</sup> At their worst, these interactions can be fatal, such as the 1995 King County courthouse murder of Susana Blackwell, her two friends, and her unborn child by her husband when she sought dissolution of their brief, violent marriage.<sup>11</sup> Longer-term orders, in contrast, minimize the contact between the parties, thereby limiting opportunities for further abuse.

The risks of short-term protection orders extend beyond the adult survivor to her children due to the unavoidable reality that many domestic violence perpetrators also abuse their children.<sup>12</sup> As with adult survivors, the risks to children increase substantially after separation.<sup>13</sup>

---

<sup>10</sup> See Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 Fam. L.Q. 273, 290 (1995) (studies show increased risk of homicide during extended divorce and child custody proceedings); see also *Pike v. Maguire*, 716 N.E.2d 686, 688 (Mass. App. Ct. 1999) (custody fights are "notoriously volatile").

<sup>11</sup> Alex Tizon, *Death of a Dreamer*, The Seattle Times (Apr. 21, 1996), <http://community.seattletimes.nwsourc.com/archive/?date=19960421&slug=2325181>.

<sup>12</sup> See Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of their Victims Through the Courts*, 9 Seattle J. Soc. Just. 1053, 1054 (2011) ("[B]etween 50 and 70 percent of children growing up in violent homes will be physically abused.").

<sup>13</sup> See, e.g., Einat Peled, *Parenting by Men Who Abuse Women: Issues and*

Abuse of the child may be a means of perpetrating emotional abuse against a partner, or punishing the survivor for leaving; it may also be a function of the abuser's personality and/or controlling nature.<sup>14</sup> The result is the same: when a court declines to grant a full year of protection, both the survivor and her children are put at unnecessary additional risk. This is particularly troubling in this case, as the presence of children appears to have been the reason Ms. Leavitt was denied a long-term DVPO in the first place.<sup>15</sup>

The order below reflects judicial concern that relief should be sought in the family law proceeding so that the abuser's rights (particularly as they relate to child custody) are respected. This concern, however sincere, is unwarranted: The abuser can seek modification of

---

*Dilemmas*, 30 Brit. J. Soc. Work 25, 28 (2000) ("Separation of their parents seems to increase, rather than decrease, children's exposure to violence. Certainly, separation significantly increases the danger of abuse and murder for abused women.") (citations omitted); Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 Juv. & Fam. Ct. J. 1, 33 (1992) ("Abuse of children by batterers may be more likely when the marriage is dissolving. . . .").

<sup>14</sup> Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 Am. U. J. Gender, Soc. Pol'y & L. 657, 704 (2003) ("At its extreme, this need to punish the mother can lead to the batterer's decision to kill her children."); Hart, *supra* note 13 at 33-34 ("When a [survivor] has separated from her batterer . . . he may turn to abuse and subjugation of the children as a tactic . . .").

<sup>15</sup> RP 1:17-2:16.

the DVPO in the family court at any time to obtain access to the children, as warranted.<sup>16</sup> Until that happens, the survivor has the benefit of the DVPO's protections. In contrast, when a short-term DVPO is entered, the *survivor* bears the risk that the DVPO will lapse before the survivor (or the family court) is able to take further action, leaving the survivor without any protection in the meantime. This danger is highlighted by the social science research indicating that survivors with children are *more* likely to experience violence following the entry of a DVPO than those without children.<sup>17</sup> Thus, while a long-term DVPO does not infringe on the abuser's rights in any appreciable way, a short-term DVPO absolutely risks a survivor's bodily integrity and right to be free from domestic violence.

2. *Short-term DVPOs expose survivors to additional psychological harm.*

Short-term orders pose harms beyond the increased risk of physical violence. These include the unnecessary logistical and financial burdens visited on a survivor who must repeatedly return to court, such as lost work time, childcare and transportation costs, and legal costs and fees. Of greater concern, ongoing court contact can have tremendously

---

<sup>16</sup> *Gourley v. Gourley*, 158 Wn.2d 460, 447 (2006) (noting that year-long DVPO was subject to modification in family court proceeding).

<sup>17</sup> Stoever, *supra* note 7, at 1048.

negative psychological effects.<sup>18</sup> Seeing the abuser, or even the prospect of doing so, is likely to cause a survivor extreme stress, even trauma. In addition, the survivor may be forced to relive the abuse by having to retell the story repeatedly in order to establish that continued protection is warranted.

The nature of family law proceedings—often complicated, protracted, and bitter—can facilitate ongoing psychological and emotional abuse. Once physical violence is made more difficult by a DVPO, abusers may use the legal system to continue to harass the survivor.<sup>19</sup> By forcing a survivor into family court proceedings in order to obtain sustained protection from violence, a trial court may unwittingly become complicit in ongoing abuse.

DVPOs were designed to be streamlined, expedited processes precisely to minimize the obstacles and burdens to domestic violence

---

<sup>18</sup> *Id.* at 1026-27 (for abuse survivors, “returning to court every year to seek extensions of the court’s protection is a physically and psychologically dangerous prospect”); Judith Lewis Herman, *Trauma and Recovery: The Aftermath of Violence—From Domestic Abuse to Political Terror*, 72 (1992) (“If one set out by design to devise a system for provoking intrusive post-traumatic symptoms, one could not do better than a court of law.”).

<sup>19</sup> Mahoney, *supra* note 6, at 44. Likewise, abusers may turn to civil litigation or other court process to harass the survivor. *See, e.g., Webster v. Webster*, 166 Wn. App. 1037, 2012 WL 628228 \*8 (Feb. 28, 2012) (reviewing DVPO respondent’s attempts to use civil litigation to intimidate and harass survivor; awarding sanctions for frivolous claims).

survivors seeking legal protections. The Washington legislature's protection order process was expressly intended to provide survivors of domestic violence "easy, quick and effective access to the court system." Laws of 1992, ch. 111, § 1 (restated in Laws of 1993, ch. 350, § 1). Requiring a survivor to repeatedly return to court in order to receive the legal protection to which she is entitled undermines this explicit statutory goal and is likely to exacerbate and extend her trauma.

B. Requiring a survivor to pursue protection in family court deprives her of the autonomy and self-empowerment that are primary goals of the Domestic Violence Prevention Act.

DVPOs give survivors a critical tool to overcome the cycle of powerlessness and control that is at the core of domestic violence. In a study of Boston-area courts, for example, women reported that their DVPOs showed their abuser they "meant business"; "proved something to him and . . . to myself"; countered the abuser's belief that "he had power over me . . . [as] it got him to back off and realize that he couldn't treat me like he did"; and made them "feel less powerless, like there's something to do."<sup>20</sup> The process enables the survivor to "regain a sense of control, which in turn enables [her] to take further steps toward improving" her

---

<sup>20</sup> James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses*, 165-66 (1999).

life.<sup>21</sup> Indeed, many survivors have said that the process of obtaining a DVPO is “empowering . . . because it allows them to stand up to the abuser.”<sup>22</sup>

The DVPO process empowers survivors by providing “each victim the right to obtain relief tailored to her needs and remains petitioner-driven throughout.” Thus, “[a]n effective [DVPO] system is designed to ensure that each victim can choose how and when to access the system, what relief to request, and when to exit the system. The voluntary nature of this process centralizes the victim’s autonomy.”<sup>23</sup> This is essential:

The first principle of recovery is the empowerment of the survivor. She must be the author and arbiter of her own recovery. Others may offer advice, support, assistance, affection, and care, but not cure. Many benevolent and well-intentioned attempts to assist the survivor founder because this fundamental principle of empowerment is not observed. No intervention that takes power away from the survivor can possibly foster her recovery, no matter how much it appears to be in her immediate best interest.<sup>24</sup>

---

<sup>21</sup> Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 *Cardozo L. Rev.* 1487, 1514-15 (2008); see also Judith E. Koons, *Gunsmoke and Legal Mirrors: Women Surviving Intimate Battery and Deadly Legal Doctrines*, 14 *J. L. & Pol’y* 617, 658-59 (2006).

<sup>22</sup> Goldfarb, *supra* note 21, at 1515 (citations omitted).

<sup>23</sup> Emilie Meyer & Maureen Sheeran, National Council of Juvenile & Family Court Judges, *Civil Protection Orders: A Guide for Improving Practice*, 5 (2010).

<sup>24</sup> Herman, *supra* note 18, at 133.

Where a survivor and abuser have children in common, family court proceedings may be necessary to address issues such as dissolution and custody. But it is for the parties, not the government, to decide whether and when to pursue those actions. Where a trial court denies a survivor the statutory remedy specifically intended for her benefit—even though she proves abuse—the court inadvertently perpetuates a cycle that the DVPO remedy was expressly intended to disrupt.

**II. Denying survivors long-term DVPOs unless they pursue a family law action raises constitutional concerns.**

In addition to endangering survivors and being contrary to public policy, denying survivors access to a full DVPO outside of a family law action implicates fundamental rights.

A. Survivors have a fundamental right to personal choice in matters of marriage and family.

Compelling a domestic violence survivor to pursue a family law action (most commonly a dissolution or custody case) in order to obtain long-term protection from her abuser intrudes on her fundamental freedoms of personal choice. The United States Supreme Court “has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.” *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (internal quotation omitted) (striking down ordinance

limiting occupancy of dwelling unit to single family). Determining one's familial status has long been recognized as a fundamental right. *See Zablocki v. Redhail*, 434 U.S. 374, 385 (1978) (striking down state law requiring a person to become current on child-support payments before obtaining a marriage license); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The rights to conceive and to raise one's children have been deemed essential.") (internal quotation omitted).

There are a host of reasons a survivor may choose not to pursue a divorce or custody action after obtaining a DVPO that have nothing to do with the need for the DVPO. Divorce can have significant financial repercussions, including litigation costs, tax, retirement, insurance, military, healthcare, pension, and other potentially detrimental collateral effects. Divorce and custody can implicate religious and cultural traditions, immigration issues, and other matters unrelated to the need to restrain an abuser from further violence.<sup>25</sup> A survivor is as entitled as any other individual to determine whether pursuing a family law action at any given time is in her best interests and those of her children.

By conditioning a survivor's ability to obtain a long-term DVPO upon pursuing dissolution, custody, or other court action, a court intrudes on the survivor's fundamental right to determine her familial status. *Cf.*

---

<sup>25</sup> Stoeber, *supra* note 7, at 1035.

*Zablocki*, 434 U.S. at 385 (“[w]hile the outer limits of [the right of personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions *relating to marriage . . .*” (second alteration in original) (emphasis added) (internal quotation omitted)). The government is prohibited from burdening fundamental rights or compelling conduct that interferes with a fundamental right, without a compelling reason. See *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (government may not compel speech); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (government may not infringe freedom of expressive association). For this reason, the judiciary may not compel a person to remain married or to pursue a divorce, separation, or custody action in order to obtain an order of protection necessary for her safety.

Where government action significantly interferes with the exercise of a fundamental right, it must be supported by sufficiently important state interests and closely tailored to effectuate only those interests. *Zablocki*, 434 U.S. at 388. Here, no important state interests are served by conditioning a survivor’s long-term protection on the concurrent pursuit of

a family law proceeding,<sup>26</sup> and (even if there were such interests) the condition is not narrowly tailored. Refusing to grant a long-term DVPO unless a survivor pursues a family law action inappropriately impinges on her constitutional right to determine her own familial status.

B. Refusing to grant a statutory remedy after the petitioner has met her burden of proof undermines her fundamental right of access to the courts.

As the United States Supreme Court has recognized, access to the courts is a fundamental right of every individual, essential to the protection of individual rights.<sup>27</sup> See *Bounds v. Smith*, 430 U.S. 817, 828 (1977). The right goes beyond an individual's ability to physically enter the courthouse, and "insures that access to courts will be adequate, effective, and meaningful." *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir. 1997) (internal quotations and citation omitted). Meaningful access to the courts is the necessary means by which justice is served. See *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). It presumes

---

<sup>26</sup> There is no legitimate state interest in a survivor's pursuit of divorce or custody, and a survivor's interest in safety outweighs an abuser's interests in unfettered access to children. Cf. *Gourley*, 158 Wn.2d at 468 (respondent's interests in care and custody did not outweigh state interest in preventing further domestic violence; approving one-year DVPO).

<sup>27</sup> Access to justice also holds a prominent place among the individual rights protected by the Washington Constitution. Wash. Const. art I, § 10 ("Justice in all cases shall be administered openly, and without unnecessary delay.").

the availability of judicial relief without abridgement of fundamental rights. *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422, 1428 (8th Cir. 1986); *see also Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (“Both equal protection and due process emphasize the central aim of our entire judicial system—all people . . . stand on an equality before the bar of justice in every American court.”) (citation omitted).

Although not every forum or process limitation violates the right to access the courts, that right is undermined when a petitioner with standing is denied a statutory remedy for which she has met her burden of proof. Further, when a judge refers survivors to family court instead of granting the full statutory relief requested, the court comes dangerously close to abdicating its judicial authority to decide the matter before it. *Cf. La Buy v. Howe's Leather Co., Inc.*, 352 U.S. 249, 259-60 (1957) (trial court abdicated judicial constitutional responsibilities by referring case to another factfinder rather than deciding issues presented); *Gelfond v. District Court in and for Second Jud. District*, 504 P.2d 673, 673 (Colo. 1972) (same). *Amici* urge the Court to avoid any ruling in this case that will encourage trial courts to condition long-term protections upon pursuing collateral legal action, because this impairs survivors' rights in the areas of family decision-making and reduces their access to the courts.

### **III. National trends favor longer-term DVPOs, not short-term ones.**

Beginning in the 1970s, legislatures throughout the country adopted anti-domestic violence laws. These laws addressed the criminal justice response, such as mandatory arrest laws,<sup>28</sup> but they also created a new, survivor-initiated and autonomy-enhancing remedy—the DVPO.<sup>29</sup> Washington was a leader in this national legislative movement, enacting two anti-domestic violence statutes in 1979.<sup>30</sup> In 1984, the legislature adopted the current statute, recognizing DVPOs “as ‘a valuable tool to increase safety for victims and to hold batterers accountable.’” *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 209 (2008).

While states (including Washington) have amended their DVPO statutes in various ways over the years, one trend in particular is notable: states have moved away from short-term DVPOs towards those of longer duration. At least eighteen state legislatures have increased the available duration of DVPOs since 2000.<sup>31</sup>

---

<sup>28</sup> Stoever, *supra* note 7, at 1041-42.

<sup>29</sup> *Id.* at 1042.

<sup>30</sup> See RCW 70.123.010 (funding DV shelters); RCW 10.99.010 (law enforcement to treat DV with same seriousness as similar crimes).

<sup>31</sup> S.B. 789, 82d Legis., Reg. Sess. (Tex. 2011); S.B. 490, 2010 Legis., Reg. Sess. (W. Va. 2010); S.B. 134, 2010 Leg., Reg. Sess. (Ala. 2010); H.R. 336, 145th Gen. Assemb., 2d Reg. Sess. (Del. 2010); H.D. 971, 2009

At the same time, courts in other jurisdictions increasingly recognize the benefit of longer-term DVPOs and the inappropriateness of considering irrelevant factors such as marital status or parenthood in determining the duration of a DVPO. In recent years, appellate courts across the nation have upheld DVPOs with durations ranging from five to ten years. *See, e.g., Lite v. McClure*, 120 Haw. 386, 2009 WL 1263099, \*1 (Haw. Ct. App. 2009) (approving ten-year DVPO); *Copp v. Liberty*, 952 A.2d 976, 977 (Me. 2008) (six-year DVPO); *Benson v. Muscari*, 769 A.2d 1291 (Vt. 2001) (five-year DVPO); *see also Rinas v. Engelhardt*, 818 N.W.2d 767, 771-72 (N.D. 2012) (five years). In each case, the court concluded that long-term protection was necessary and reasonable in light of the particular facts. In some cases, the parties had children in common and the long-term DVPO meant that the abuser would not have contact with the child until after the child reached the age of majority. *See, e.g., Copp*, 952 A.2d at 979-80.

---

Legis., Reg. Sess. (Md. 2009); H.D. 182, 2008 Legis., Reg. Sess. (Md. 2008); S.F. 3492, 85th Legis., Reg. Sess. (Minn. 2008); H.R. 1149, 83d Legis., Reg. Sess. (S.D. 2008); H.R. 1293, 86th Gen. Assemb. Reg. Sess. (Ark. 2007); S. 1356, 59th Legis., 2d Reg. Sess. (Idaho 2006); H.R. 106, 58th Legis., Budget Sess. (Wyo. 2006); A.B. 99, 2005 Legis., Reg. Sess. (Cal. 2005); S.B. 1029, 2005 Gen. Assemb., 1st Sess. (N.C. 2005); H.R. 1717, 189th Gen. Assemb. Reg. Sess. (Pa. 2005); S.L. 170, 23d Leg., Reg. Sess. (Alaska 2004); H.R. 722, 2003 Legis., Reg. Sess. (Ga. 2003); S. 5532, 226th Legis., Reg. Sess. (N.Y. 2003); S. 69, 21st Legis. Reg. Sess. (Haw. 2001); H.R. 1717, 184th Gen. Assemb., Reg. Sess. (Pa. 2000).

Additionally, recent appellate decisions from Ohio and Massachusetts vacated short-term DVPOs where the trial court based its decision on factors such as the pendency of a divorce proceeding or the fact that the parties had children in common. As these courts recognized, marital status and children are not legitimate factors for determining a DVPO's duration, because they are irrelevant to how long the survivor needs protection.

In *Sinclair v. Sinclair*, 914 N.E.2d 1084 (Ohio Ct. App. 2009), a petitioner filed for divorce in addition to seeking a protection order. Although the evidence of domestic violence was uncontroverted and the statute permitted a five-year protection order, the trial court granted only a one-year order, reasoning that “there is no need to continue a civil protection order beyond a divorce proceeding.” *Id.* at 1085. On appeal, the petitioner argued that “the trial court abused its discretion by mistakenly concluding that a divorce decree stops the threat of domestic violence.” *Id.* The court of appeals agreed, noting that the Ohio statute (like Washington's<sup>32</sup>) provides that a protection order is available “in addition to, and not in lieu of, any other available civil or criminal remedies.” *Id.* at 1086 (citing R.C. 3113.31(G)).

---

<sup>32</sup> RCW 26.50.025(2) (“Relief under this chapter shall not be denied or delayed on the grounds that the relief is available in another action.”).

In *Moreno v. Naranjo*, 987 N.E.2d 550 (Mass. 2013), the petitioning survivor had a child in common with her abuser. Although the Massachusetts statute permitted the court to issue a full-year protection order, the trial court granted only a six-month order because of the court’s concern about “the impact that the order would have on [the abuser’s] visitation with the child.” *Id.* at 551. The appellate court rejected this consideration as irrelevant to the amount of time reasonably necessary to protect the survivor from further abuse.<sup>33</sup> *Id.* at 552.

Orders such as the one in this case erode Washington’s decades-long commitment to preventing domestic violence and helping survivors obtain safety. This Court should hold, as the *Moreno* and *Sinclair* courts recognized, that a trial court errs when it refuses to issue a full term DVPO based on considerations irrelevant to a survivor’s safety. The *only* relevant factor in determining the proper duration of a DVPO is the amount of time necessary to protect the survivor from further abuse. *See Sinclair*, 914 N.E.2d at 1086. A pending dissolution proceeding is irrelevant, because dissolution does not obviate further protection. *Id.* And the existence of children in common is not relevant because (i) temporary custodial rights can be addressed in the protection order, and (ii) the only issue that should

---

<sup>33</sup> Despite mootness concerns, *Moreno* addressed the legal issue, recognizing the case raised an “important concern.” 987 N.E.2d at 551.

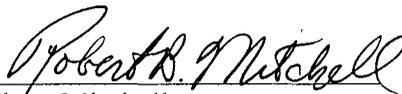
govern a decision about the length of a DVPO is the amount of time necessary to protect the survivor. *See Moreno*, 987 N.E.2d at 552.

### CONCLUSION

*Amici* urge the Court to hold that a trial court violates RCW 26.50, and abuses its discretion, when it issues a short-term domestic violence protection order and directs the survivor to seek additional protections in a family law proceeding. Such orders increase the risk of harm and intrude on constitutionally protected rights. Moreover, whether the survivor is married to or has children in common with her abuser is irrelevant to the sole issue before the court—namely, what is required for her protection.

RESPECTFULLY SUBMITTED on November 21, 2014.

K&L GATES LLP

By 

Robert Mitchell, WSBA # 10874

Laura Clinton, WSBA # 29846

Erica Franklin, WSBA # 43477

Heidi Craig Garcia, WSBA # 41399

Aaron Millstein, WSBA # 44135

Raina Wagner, WSBA # 45701

Attorneys for *Amici* DV LEAP, NAWL,  
WLP, BWJP, and Professor Stoeber