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STATE OF WASHINGTON
Case No. 93645-5

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WASHINGTON STATE
SUPREME COURT

Court of Appeals No. 336492-III

ESMERALDA RODRIGUEZ,

Petitioner,

v.

LUIS DANIEL ZAVALA

Respondent.

AMICUS BRIEF OF LEGAL VOICE IN SUPPORT OF PETITION FOR REVIEW

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ORIGINAL

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I. INTRODUCTION AND INTEREST OF AMICUS

This case involves a profound misapplication of RCW 26.50, the Domestic Violence Prevention Act. The Act is expressly designed to prevent further abuse of victims of domestic violence and their household members. Never has an appellate tribunal of this State interpreted the Act to prohibit entry of an order protecting the preverbal child of a victim of domestic violence, simply because that child did not directly witness an act of violence against his victim mother. The Court of Appeals' reasoning has dangerous implications for children and protection order petitioners across this state. Because the question of whether the Domestic Violence Prevention Act requires an outcome so incongruous with its purpose is one of substantial public importance, *Amicus* urges this Court to grant review.

Amicus Legal Voice was a key proponent of the Domestic Violence Prevention Act at its passage in 1984, and a leading advocate in the Legislature and the courts for its ongoing implementation ever since. Founded in 1978 as the Northwest Women's Law Center, Legal Voice is a non-profit public interest legal organization dedicated to advancing women's legal rights. The organization advocates for an improved legal response to intimate partner violence, and has long sought to ensure that Washington State laws and policies live up to the promise of preventing violence and ensuring the safety of survivors and their families.

II. STATEMENT OF THE CASE

The predicament of the child L.Z. and his mother is thoroughly explained in the Petition for Review. *Amicus* adopts that statement.

III. ARGUMENT

This Court may grant review of a Court of Appeals opinion when it presents a question of "substantial public importance." RAP 13.4(b)(4); *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). Domestic violence, unfortunately, remains "a problem of immense proportions." Laws of 1992, ch. 111, § 1. The Domestic Violence Prevention Act was intended to improve Washington State's response to the scourge of domestic violence by providing effective relief for victims and their families from ongoing and future violence. *See* RCW 26.50.030; Laws of 1992, ch. 111, § 1; *Danny v. Laidlaw Transit Servs.*, 165 Wn.2d 200, 209, 193 P.3d 128 (2008). The Act has proved effective, but its role in preventing future violence will be significantly undermined if the Court of Appeals' reasoning is left intact.

Under that reasoning, victim parents with preverbal children will be either forced to bring in expert testimony about the impact of domestic violence on infants and toddlers, or be denied relief. This is not only unnecessary under the statute; in a system where the vast majority of protection order petitioners are *pro se*, it is untenable. The danger of this

result cannot be understated. When young children are left unprotected, they are subject to additional risks of harm, as are their victim parents, who are more easily manipulated and put in harm's way by abusers' ongoing and unfettered access to their children.

A. **The Domestic Violence Prevention Act is meant to provide an efficient, effective remedy against ongoing domestic violence and to prevent future violence.**

The purpose of the Domestic Violence Prevention Act is to provide domestic violence survivors with "easy, quick, and effective access" to a critical tool to help stop the violence and prevent future incidents: the domestic violence protection order. Laws of 1992, ch. 111, § 1. *See also In re Marriage of Stewart*, 133 Wn. App. 545, 552, 137 P.3d 25 (2006). In the more than three decades since the Act was first passed, lawmakers have made numerous changes to ensure survivors access to the most effective relief. *See, e.g.* RCW 26.50.030 Findings – 1992 c 111.

The Legislature is wise to emphasize access to DVPOs, because studies demonstrate that they work. One study based on interviews with Seattle-area survivors found that, over nine months, women who obtained such orders experienced seventy percent fewer incidents of physical violence than women who did not receive orders.[1] Women with domestic

[1] Victoria L. Holt et al., *Do Protective Orders Affect the Likelihood of Future Partner Violence and Injury?*, 24 Am. J. Preventive Med. 16, 20 (2003) (finding that civil

violence protection orders in place were also less likely to experience almost all other forms of abuse.[2]

Similarly, a Kentucky Study confirmed that domestic violence protection orders effectively prevent or, at minimum, drastically reduce the severity and frequency of re-abuse.[3] A Texas study found that the mere act of *applying* for an order significantly reduced average levels of violence for a year following application, with even greater reductions reported by survivors who actually received protection orders.[4] As survivors report, DVPOs demonstrate to their abuser they "mean[] business," "proved something" to abusers and survivors, and countered the abuser's belief that "he had power over me."[5]

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protection orders are one of the few domestic violence intervention mechanisms that are demonstrably effective).

[2] *Id.*

[3] TK Logan, Robert Walker, William Hoyt, & Teri Faragher, THE KENTUCKY CIVIL PROTECTIVE ORDER STUDY: A RURAL AND URBAN MULTIPLE PERSPECTIVE STUDY OF PROTECTIVE ORDER VIOLATION CONSEQUENCES, RESPONSES, AND COST, 97-98, 103 (2009) (over a six-month period, half of the Kentucky Study participants' protection orders prevented *any* incidents of re-abuse, and of those who experienced additional abuse, the severity of the abuse was significantly reduced).

[4] Julia Henderson Gist et al., *Protection Orders and Assault Charges: Do Justice Interventions Reduce Violence Against Women*, 15 Am. J. Fam. L. 59, 67-68 (2001).

[5] James Ptacek, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES, 165-66 (1999).

Division III's ruling undermines this critical tool to fight abuse, by adding an unnecessary evidentiary burden when a survivor seeks to protect young minors in her household.

B. Division III's unnecessary misconstruction of the DVPA violates legislative policy aimed at protecting families.

Four sentences from the Division III decision expose the error which, respectfully, could unravel the sum and purpose of the DVPA:

> The domestic violence prevention act does not cover fear of a kidnapping. The act does not allow an order protecting a child because of the parent's fear of physical or psychological harm to the child. Domestic violence, under RCW 26.50.010(1), embraces "fear of imminent physical harm, bodily injury or assault, between family or household members." We construe this language to be the fear possessed by the one seeking protection, not fear that another family member has of harm to the one for who protection is sought. *Rodriguez v. Zavala*, No. 33649-2 III, Slip Opinion, p.10.

Statutory interpretation is a question of law reviewed de novo. *W. Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000). When statutory language is plain, the statute is not open to construction or interpretation. *Green River Cmty. Coll., Dist. No. 10 v. Higher Ed. Pers. Bd.*, 95 Wn.2d 108, 113, 622 P.2d 826 (1980) *as modified* (1981). Courts interpret or construe statutes *only* when the meaning is ambiguous. *State v. Watson,* 146 Wn.2d 947, 954, 51 P.3d 66 (2002). "A statute is ambiguous if it can be reasonably interpreted in more than one

way. However, it is not ambiguous simply because different interpretations are conceivable." *Id.* at 955.

Here, RCW 26.50's language is plain, and needs no construction: a petitioner can seek a DVPO on behalf of himself or herself, *and* on behalf of minor family or household members. RCW 26.50.020(1)(a) (emphasis added). Once the petitioner proves that *he or she* was subjected to domestic violence at the hands of the respondent (i.e., "between family members," a phrase expressly found to be unambiguous,[6]) the court may order relief for the petitioner *and* for family or household members. RCW 26.50.060.[7] For example, the court may "restrain the respondent from having any contact with the victim of domestic violence or the victim's *children or members of the victim's household.*" RCW 26.50.060(1)(h) (emphasis added).

Nothing in the statute requires a petitioner to prove that each family member has separately met the definition of domestic violence victimization to be included in the survivor's protection order. Indeed, RCW 26.50.0601(h), among other provisions, demonstrates that the statute contemplates the opposite. Moreover, interpreting the statute to require

[6] *Neilson ex rel. Crump v. Blanchette,* 149 Wn. App. 111, 116, 201 P.3d 1089 (2009), *as amended* (Apr. 28, 2009). People who share a child are "family members." RCW 26.50.010

[7] In fact, far too often in amicus's opinion, a failure to gain protection on behalf of minor household members may trigger a dependency filing. *See* RCW 13.34.030(6)(c) *et seq.*

such a finding is counterintuitive. It would mean that any time a child slept through domestic violence perpetrated against a parent, or was at school when a parent suffered domestic abuse, that their parent's request for a protection order based on that incident could not include the child.[8] Not only would that be an absurd result under the language of the statute itself, it would keep domestic abuse survivors tethered to their abusers to their detriment, and the detriment of their children.

C. Requiring a petitioner to prove that each and every child in the household experienced domestic violence puts abuse survivors and their children at greater risk.

1. Perpetrators of intimate partner violence frequently use children to control or manipulate the battered partner.

Having a child with an abusive partner makes it exponentially more difficult to safely leave the relationship.[9] Unfortunately, abusers frequently use children as a tool of manipulation and power,[10] and the legal system as their methodology. The legal rights of the abusive parent – which are

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[8] The evidentiary challenges of proving a toddler's fear of violence presents a separate maze of difficulties. *See State v. Hunsaker*, 39 Wn. App. 489, 491, 693 P.2d 724 (1984) ("[In Division III's] research of recent reported decisions in this jurisdiction, the youngest competent witness appears to be 4½.").

[9] *See, e.g.*, Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 Vand. L. Rev. 1041, 1051 (1991).

[10] *See, e.g.*, Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 S.M.U. L. Rev. 2117, 2122-2123 (1993) (abusive partners frequently threaten to harm or kidnap their victims' children).

constitutional in nature – require that the abused parent utilize the legal system to ensure protective parenting arrangements. All too frequently, a parent must do this without legal representation.[11] Violent partners use this system to their advantage; abusive fathers are more likely to seek child custody than non-abusive fathers, and when they do, they succeed in gaining it more than 70 percent of the time.[12] Battling such threats increases emotional trauma, financial burden and job loss, and results in pressure to settle or return to the abuser.[13]

But even short of retaining custody, abusive partners frequently use the children to continue the abuse of their victim parents. For example, visitation exchanges of children present opportunities for further abuse.[14] "One study indicated that during visitation contacts, 5% of abusive fathers

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[11] *See* Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* 25 (2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/JusticeGaInAmerica2009.authcheckdam.pdf (throughout the U.S., an extremely high numbers of litigants in family law cases appear *pro se*).

[12] American Bar Association Commission on Domestic Violence, *10 Custody Myths and How to Counter Them*, 4 ABA Commission on Domestic Violence Quarterly E-Newsletter 3 (July 2006).

[13] Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of their Victims Through the Courts*, 9 Seattle J. for Soc. Justice 1053, 1081-85 (2010).

[14] *See, e.g.*, Janice Drye, *The Silent Victims of Domestic Violence: Children Forgotten by The Judicial System*, 34 Gonz. L. Rev. 229, 234-235 (1999).

threaten to kill the mother, 34% threaten to kidnap the children, and 25% threaten to hurt the children."[15] These threats, all too often, materialize.

2. Children are harmed by unfettered, ongoing contact with a parent who is abusive to their other parent.

There is extensive literature on the impact of domestic violence on children;[16] this brief can only touch on it. Abusers, when limited in their access to their victims, frequently adjust their abuse to get their way, and may turn the abuse from the (now protected) adult to the child.[17] As the 2006 Washington State Domestic Violence Manual for Judges explains:

> [The court] should not assume that the children are not in physical danger simply because there was no evidence of physical harm in the past. There have been a number of cases where children were killed or harmed for the first time during or immediately following legal proceedings. The violence had been directed at the adult victim in the past, but when it appears that the adult victim is no longer under their control, some batterers will direct their violence against the children.[18]

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[15] *Id.*

[16] *Id. at* 232 (explaining the multiple harms, including physical and psychological injury, that children may suffer when their parent is abused, and noting that "[e]ven if children do not directly observe abuse or, as infants, are too young to realize the dynamics between their parents, battering often creates tension and stress.").

[17] Joan Zorza, *Batterer Manipulation and Retaliation in the Courts: A Largely Unrecognized Phenomenon Sometimes Encouraged by Court Practices*, 3 DOMESTIC VIOLENCE REPORT 67, 67 (1998); WASHINGTON STATE GENDER AND JUSTICE COMMISSION, DOMESTIC VIOLENCE MANUAL FOR JUDGES 2006, at 2–3 (2007).

[18] *Id.*

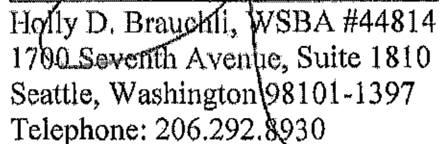
The Court of Appeals' reading of the statute increases the chance for emotional and physical retaliation against both the victim parent and child. This outcome violates the Legislature's goals in creating a civil process designed to ensure efficient, effective protection for victims and their household members against domestic abuse.

IV. CONCLUSION

As the Court of Appeals acknowledged, domestic violence is a "blight" on society. *Rodriguez v. Zavala*, No. 33649-2 III, Slip Opinion, p. 10. The tools that our society has created to try and address this blight must remain meaningful for survivors and their families. Increasing the burden on parents of young children who cannot express their fear of abuse, or children who were absent when abuse occurred, undermines the Domestic Violence Prevention Act in both letter and spirit. As this proposition is one of substantial public importance, *Amicus* respectfully requests that this Court grant review of this decision.

DATED: November 18, 2016

BULLIVANT HOUSER BAILEY PC



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Good Afternoon,

Attached for filing please find:

1. Motion for Leave to File Amicus Brief of Legal Voice in Support of Petition for Review; and
2. Amicus Brief of Legal Voice in Support of Petition for Review.

The case information is as follows:

Esmeralda Rodriguez v. Luis Daniel Zavala
Court of Appeals No. 336492-III

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