Legal Voice
Women's rights. Nothing less.

907 Pine Street
Suite 500
Seattle, WA 98101

T 206-682-9552
F 206-682-9556

LegalVoice.org

January 25, 2017

Hon. Thomas J. Wynne, Chair
Judicial Information Systems Data Dissemination Committee
Washington State Administrative Office of the Courts
18000 International Blvd. Suite 1106
SeaTac, WA 98188

Dear Judge Wynne and Members of the Committee:

We write to urge this Committee to take immediate action to bring Washington State into compliance with 18 U.S.C. § 2265(d)(3), a provision of the federal Violence Against Women Act (VAWA) that prohibits states from making certain protected information about survivors of domestic violence available on the Internet. This is not the first time we have brought this request to this Committee. This letter explains the history of Section 2265 and our advocacy to this Committee, documents how the current state of online access to Washington court records violates VAWA, and provides our suggestions for bringing our state into compliance with VAWA. Victim safety, and Washington State law and policy that favor protections for survivors of domestic violence, are at stake.

Background

18 U.S.C. § 2265(d)(3) was enacted as part of VAWA's 2005 reauthorization, with the purpose of eliminating one of the many barriers that dissuades domestic violence survivors from seeking the aid of the legal system for protection from domestic violence. Section 2265(d)(3) provides:

(d)Notification and Registration

(3) Limits on internet publication of registration information

A State, Indian tribe, or territory ***shall not make available publicly on the Internet any information regarding the registration, filing of a petition for, or issuance of a protection order, restraining order or injunction, restraining order, or injunction in either the issuing or enforcing State, tribal or territorial jurisdiction, if such publication would be likely to publicly reveal the identity or location of the party protected under such order.*** A State, Indian tribe, or territory may share court-generated and law enforcement-generated information contained in secure, governmental registries for protection order enforcement purposes.

(Emphasis added.) While this provision leaves to the states the decision whether records relating to protection orders should be considered *public* records, it prohibits states from disseminating *online* any such records that would be "likely to publicly reveal the identity or location of the party protected under such order." *Id.*

Beginning in 2006, Legal Voice (then the Northwest Women's Law Center) and the Washington State Coalition Against Domestic Violence (WSCADV) approached this Committee to share our concerns that Washington State was in violation of Section 2265(d)(3). At the time, Washington State had made court dockets searchable by litigant name online through JIS/SCOMIS, and many Washington State counties were already operating or were beginning to operate their own electronic databases to facilitate easier public access to court records. We articulated to the Committee our concern that, to comply with VAWA, Washington needed to take steps to ensure that information that might reveal the identity or location of a person who filed for a protection order was not publicly available through those publicly accessible databases.

Over the course of subsequent meetings and negotiations, the then-members of this Committee took the position that this section of VAWA applied only to "foreign" protection orders registered in the courts of this state, and that it did not prohibit the state from making identifying information relating to protection orders that originated in Washington publicly available on the Internet. We strongly disagreed with that interpretation, and urged the Committee to comply with VAWA's requirement that all information that could identify a domestic violence victim's name or whereabouts be kept off the Internet. The Committee declined to take such action.

Section 2265(d)(3) Applies to Both Domestic and Foreign Protection Orders

As we previously informed the Committee beginning in 2006, 18 U.S.C. § 2265(d)(3) makes no distinction between "foreign" protection orders registered in Washington courts and "domestic" protection orders issued by Washington courts. To the contrary, by its plain language the statute expressly reaches *both* foreign and domestic protection orders, as it applies to protected information concerning a protection order "in either the issuing or enforcing State."

The legislative history of 18 U.S.C. § 2265(d)(3) adds further credence to the plain language reading of the statute. The internet publication prohibition in VAWA 2005, as originally introduced, was located in a section of the legislation concerning general grant conditions that was wholly unrelated to full faith and credit and would have amended another statute, 42 U.S.C. § 3796gg-1, not 18 U.S.C. § 2265. *See* H.R. 3420, 109th Cong. (2005). The Senate version of VAWA 2005 relocated the publication prohibition, substantively unchanged, to a section concerning full faith and credit. *See* S. Amdt. 2681, 109th Cong. (2005). The legislative record from this action does not contain any statements about the reason for this move. *See* 151 Cong. Rec. H12075-12125 (daily ed. December 17, 2005). This substitute bill passed and became

Public Law 109-162, enacting VAWA 2005. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162 (2005). Though both the House Judiciary Committee Report on the original bill and legislative record vote on the decisive Senate amendment evidence a wealth of concern among lawmakers for victim privacy generally, neither record contains any mention of a specific intent for the publication prohibition to apply exclusively to foreign orders. *See Id.,* H. Rep. No. 109-233 (2005).

If Congress intended the statutory prohibition on internet publication to reach only *foreign* orders that were registered in another state, the original Pub. L. 109-162 VAWA 2005 language would have been completely sufficient. Pub. L. 109-162 prohibited the online publication of "any information regarding the ***registration or filing of*** a protection order, restraining order, or injunction in either the issuing or enforcing State, tribal or territorial jurisdiction [...] [emphasis added]". *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162 (2005). It is possible to interpret this "registration or filing of" language, in the context of its location within the full faith and credit section, as specifically and narrowly prohibiting disclosure of information regarding the inclusion of foreign orders in protection order registries. However, in 2006, shortly after the passage of VAWA 2005, Congress passed technical amendments to the law that modified the language in question. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005 Technical Amendments, Pub. L. No. 109-271 (2006). Public Law 109-271 retained reference to "registration," but additionally prohibited internet publication of information regarding "filing of ***a petition for, or issuance of*** [emphasis added]" orders. *Id.*

If 18 U.S.C. § 2265(d)(3) was intended to exclusively reach foreign orders, then the deliberate addition of publication prohibitions for information regarding "petitions for" and "issuance of" orders makes little sense. States do not readily have reason to possess information regarding petitions filed or decisions regarding issuance made in out-of-state courts -- neither of these forms of information are material to the full faith and credit enforcement of foreign orders, only orders themselves are. However, to state the obvious, states and localities *do* possess a great deal of information regarding petitions filed for orders as well as information on issuance of orders *that originate within their own domestic courts*. In order to read the 2006 amendments to have any meaning, they must be understood to clarify the prohibition on publication as applying to foreign *and* domestic orders and the accompanying procedural records. The 2006 Public Law 109-271 technical amendment should be interpreted, within the context of VAWA 2005 broadly, as well as the prior legislative history of 18 U.S.C. § 2265(d)(3), as an attempt to reconcile the intent for a general publication prohibition and original location of the language in a section pertaining to general grant conditions with its later move, text substantively unchanged, into a section pertaining to full faith and credit.

Lest this Committee have any doubt as to the meaning of this provision, the Department of Justice and the federal Office of Violence Against Women share our interpretation. We have attached a letter to us from the Principal Deputy Director of the Department of Justice's Office

of Violence Against Women, confirming that 18 U.S.C. § 2265(d)(3) applies to *all* protection and other domestic violence restraining orders *issued or registered* in Washington State.

Other States Comply with VAWA

Further, several other states provide models for how to comply. Since our discussions with the former members of this Committee, many states have acted to bring their court records dissemination rules in line with VAWA. At least four states – Michigan, Minnesota, Missouri, and Wyoming – have adopted court rules that cite 18 U.S.C. § 2265(d)(3) and prohibit remote access to protected information concerning *all* protection orders. *See* Mich. Court Rule 3.705(C); Minn. Rule of Public Access to Records of the Judicial Branch 8, Subd. 2(d)-(g) & cmt.; Mo. Court Operating Rule 2.04(b)(16); Wy. Rules Governing Redactions from Court Records, Rule 2. New Mexico's Legislature adopted language closely tracking 18 U.S.C. § 2265(d)(3) into a state statute. *See* N.M. Stat. § 40-13-12 ("A state agency, court or political subdivision . . . shall not make available publicly on the internet any information that would likely reveal the identity or location of the party protected under an order of protection."). In addition, without citation to VAWA, both California and Pennsylvania have adopted court rules that maintain the public nature of protection order proceedings, while limiting remote access as required by VAWA. California Rule of Court 2.503 provides "[r]ecords in a proceeding under the Family Code, including domestic violence prevention proceedings may be made available electronically only in the courthouse." In Pennsylvania, the judicial system's Electronic Case Record Public Access Policy Section 3.00 provides that victim and witness identifying information, including any party's address, are excluded from public electronic access.

Washington State Fails to Comply with Any Interpretation of Section 2265(d)(3).

Despite VAWA's clear directive, Washington State court records that include the identity and location of people protected by domestic violence protection orders remain accessible online. While this is not true in every county (for example, King County does not publish protection or anti-harassment order records online pursuant to King County Local General Rule 31), because it is true for the statewide Judicial Information System, it is ultimately true for every person protected by a domestic violence protection order in this state.

For example, Legal Voice searched for our own former and current domestic violence victim clients by name this month, using the free Judicial Information System Link, and using Pierce County's Legal Information Network Exchange System (LINX). We found our clients' names and dockets readily on JIS and LINX, including, on JIS, clients whose cases were filed in King County, where such records are not electronically available. Not only does JIS identify them as petitioners in domestic violence protection orders, it identifies the county in which they filed the proceeding. This is true for both protection orders issued here in Washington State and for one of our clients with a foreign protection order. Thus, even under the previous members of this Committee's inaccurate interpretation of VAWA, Washington State is not complying with the law.

Washington State Can and Must Comply with VAWA

The experiences of survivors of domestic violence and the need to protect their safety means we can no longer wait for Washington State to comply with VAWA's directives. Moreover, while the VAWA statute does not clearly prescribe the enforcement actions that the federal government may take against states for violating this particular provision, we urge this Committee not to put Washington State at risk.

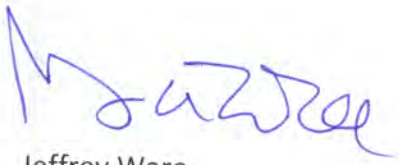
We recognize that Washington State has a strong public policy supporting open public access to court and government records. *See, e.g.,* GR 31. But the state also has equally strong public policy in favor of protecting the safety of survivors of domestic violence. *See, e.g., Danny v. Laidlaw*, 165 Wn.2d 200, 221 (2008) ("The legislative, judicial, and executive branches of government have repeatedly declared that it is the public policy of this state to prevent domestic violence by encouraging domestic violence victims to escape violent situations, protect children from abuse, report domestic violence to law enforcement, and assist efforts to hold their abusers accountable."). Both of those important interests may be accommodated by maintaining the public nature of domestic violence protection order proceedings, while ensuring that identifying and location information about victims are unavailable through public electronic systems. This could be accomplished in multiple ways – for example, through keeping all protection order records public at the courthouse but unavailable online, as King County has attempted to do; or by allowing online dissemination but requiring automatic redaction of the information protected by VAWA.

As officers of the court, we have the deepest respect for the Administrative Office of the Courts and all those who serve on its committees. We believe that this issue can and should be resolved quickly, in favor of Washingtonians who have been victimized by domestic violence. Please understand, however, that we are prepared to pursue litigation to enforce federal law if this issue cannot be resolved cooperatively. We therefore ask this Committee to recognize and take immediate action to fulfill Washington State's obligations under federal law.

Sincerely,

Sara L. Ainsworth
Advocacy Director
Legal Voice

Tamaso Johnson
Policy Director
Washington State Coalition
Against Domestic Violence



Jeffrey Ware
Counsel
Fenwick & West

U.S. Department of Justice

Office on Violence Against Women

Washington, DC 20530

January 19, 2017

BY E-MAIL DELIVERY

Sara J. Ainsworth
Advocacy Director
Legal Voice
907 Pine Street, Suite 500
Seattle, WA 98101
sainsworth@LegalVoice.org

Dear Ms. Ainsworth:

This is in response to your inquiry regarding the Office on Violence Against Women's (OVW's) interpretation of the scope of 18 U.S.C. 2265(d)(3), which prohibits States, Indian tribes, and territories from publishing information on the Internet regarding a protection order "if such publication would be likely to publicly reveal the identity or location of the party protected under such order." In particular, you asked for clarification whether section 2265(d)(3) applies only to foreign orders registered in or enforced by another jurisdiction or whether it applies also to protection orders issued by and within the publishing jurisdiction.

OVW's longstanding position is that section 2265(d)(3) prohibits a State, Indian tribe, or territory from making this information publicly available on the Internet regardless whether the underlying protection order is a foreign order from another jurisdiction or a domestic one issued by the publishing jurisdiction. Specifically, the statute provides that the jurisdiction "shall not make available publicly on the Internet any information regarding the registration, filing of a petition for, or issuance of a protection order . . . *in either the issuing or enforcing. . . jurisdiction*[.]" (emphasis added). Thus, the plain language of the provision covers Internet publication in both the issuing and enforcing jurisdiction. Moreover, the provision encompasses information regarding the *filing* of a petition for a protection order, which is not information that a jurisdiction called upon to enforce a foreign order would have.

I recognize that section 2265(d)(3) suffers from some drafting flaws that have led to confusion about its interpretation. Most significantly, the provision is grouped in a subsection with two other paragraphs regarding registration and enforcement of foreign orders and is itself entitled "Limits on Internet publication of registration information." Although this placement and title of the provision might suggest limiting the Internet prohibition to foreign orders, we maintain that jurisdictions are obligated to adhere to the plain language of the provision, which clearing covers issuing jurisdictions. Headings and placement may help interpret the meaning of a statute when its language is ambiguous, but they are of limited utility when the meaning of the provision is clear on its face.

Finally, I note that there are excellent policy reasons that a jurisdiction should avoid publishing on the Internet identifying information about a person protected by a protection order. Absent such a restriction, the Internet can be a powerful tool for identifying, locating, and harassing victims. To avoid having protection order information used to locate and endanger victims, it simply makes sense not to make such information publicly searchable on the Internet.

If Washington State has questions about how to implement the prohibition in section 2265(d)(3), OVW has national technical assistance providers that can provide recommendations about best practices.

I hope this information is helpful. If you have further questions, please contact OVW's senior attorney advisor, Jennifer Kaplan, at jennifer.kaplan@usdoj.gov.

Sincerely,

Bea Hanson
Principal Deputy Director