

Case No. 02-70988

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAURA LUIS-HERNANDEZ,
Petitioner-Appellant,
v.
IMMIGRATION AND NATURALIZATION SERVICE,
Respondent-Appellee.

APPEAL FROM THE
BOARD OF IMMIGRATION APPEALS
NO. A72-644-485

**BRIEF AMICI CURIAE OF
THE NATIONAL IMMIGRATION PROJECT,
NOW LEGAL DEFENSE AND EDUCATION FUND,
AND FAMILY VIOLENCE PREVENTION FUND
IN SUPPORT OF APPELLANTS
SEEKING REVERSAL OF THE
DECISION ON REVIEW**

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The *amici* submit this memorandum in support of Appellant seeking reversal of the April 4, 2002 decision of the Board of Immigration Appeals (“BIA” or “the Board”) denying her request for suspension of deportation filed under Section 244(a)(3) of the INA, which was enacted into law as a part of the Violence Against Women Act of 1994 (“VAWA”).¹ This Court should correct the Board’s erroneous interpretation of the VAWA suspension statute’s “extreme cruelty” standard, which contrary to the Board’s decision does not require that a “battery must actually occur in this country.” (BIA Dec. at 4). Section 244(a)(3) requires that the alien have been “battered *or subjected to extreme cruelty* in the United States.” INA §244(a)(3); 8 U.S.C. §1254(a)(3) (emphasis added). The regulations further clarify that the standard includes “acts that, in and of themselves, may not initially appear violent but that are part of an overall pattern of violence.” 8 C.F.R. §204.2(c)(1)(vi) (1997).

In this case, Appellant’s abuser severely beat her in Mexico, tracked her to California where she had fled in secret in fear of her life, and by using lies and coercion, tricked her to return with him to Mexico where he escalated his life-threatening abuse. An analysis of “extreme cruelty” as defined by family law and

¹ The Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902-55 (codified in scattered sections of 8 U.S.C., 18 U.S.C. and 42 U.S.C.).

social science evidence demonstrate that such behavior satisfies the “extreme cruelty” standard of §244(a)(3).

INTEREST OF THE AMICI

This brief *amici curiae* is submitted on behalf of the Family Violence Prevention Fund, the National Immigration Project of the National Lawyers Guild, and NOW Legal Defense and Education Fund. These national organizations provide assistance to victims of domestic violence, and they are the leading domestic violence, immigration law, and women’s rights organizations in this area. All *amici* have substantial knowledge of the problem of domestic violence, the procedures for combatting the problem nationwide and internationally, and the particular dynamics of domestic violence experienced by immigrant victims. The *amici* are concerned that the Board’s interpretation of §244(a)(3) effectively eliminates “extreme cruelty” from the statute and flatly contradicts congressional intent. Moreover, the Board’s interpretation suggests that non-physical domestic violence is permissible under VAWA.

Pursuant to Federal Rule of Appellate Procedure 29(b), this brief is accompanied by a Motion for Leave to File, which more fully describes the interests of *amici*.

ARGUMENT

I. VAWA PROVISIONS MUST BE INTERPRETED TO PROTECT DOMESTIC VIOLENCE VICTIMS AS INTENDED

A. The History, Scope and Purpose of VAWA

Congress passed the Violence Against Women Act in 1994 following years of investigation into the problem of domestic violence. Its legislative history reflects the shocking toll of domestic violence:

- At least 3 to 4 million women in the U.S. are abused by their husbands annually, and over sixty percent of victims are beaten while pregnant.²
- One fifth of all reported aggravated assaults involving bodily injury have occurred in domestic situations.³
- One third of domestic attacks are felony rapes, robberies, or aggravated assaults. Of the remaining two thirds, involving simple assaults, almost one-half resulted in serious bodily injury.⁴

² H.R. Rep. No. 395, 103d Cong., 1st Sess., 26 (1993). However, most national estimates derive from surveys that exclude those who are very poor, who do not speak fluent English, whose lives are especially chaotic, or who are hospitalized, homeless, institutionalized, or incarcerated. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 801, 809 (1994); Angela Browne, *Violence Against Women by Male Partners: Prevalence, Outcomes and Policy Implications*, 48 Am. Psychol. 1077 (1993). Experts have put the number of women battered each year closer to six million. Klein & Orloff, *supra*, at 809 & n.11.

³ *Staff of Senate Comm. on the Judiciary*, 102d Cong., 2d Sess., *Violence Against Women: A Week in the Life of America*, 32 (Comm. Print 1992) (hereinafter *Judiciary Committee Report*).

⁴ S. Rep. No. 138, 103d Cong., 1st Sess., 41 (1993).

- More than one of every six sexual assaults per week is committed by a family member.⁵
- One third of all women who are murdered die at the hands of their husbands or boyfriends, and one million women seek medical attention each year for injuries caused by their male partners.⁶

These statistics, relied on by Congress in formulating the VAWA, actually underestimate the extent of the problem, as more recent research indicates that between 50% to 80% of intimate partner abuse incidents go unreported.⁷

In addition to severity of violence, VAWA's legislative history shows that, unlike other crimes, intimate partner abuse consists of *chronic* violence. It is characterized by persistent intimidation and repeated physical and psychological harm. Absent intervention, it is almost guaranteed that the same woman will be assaulted over and over by her mate.⁸ Studies also indicate that repeated violence escalates in severity over time. One report notes that in over half of the cases involving women who were murdered by their husbands, the police had been

⁵ *Id.* at 38.

⁶ *Id.* at 41.

⁷ Patricia Tjaden & Nancy Thoennes, *Extent, Nature, and Consequences of Intimate Partner Violence*, U.S. Dep't of Justice, *Research Report of Findings from the National Violence Against Women Survey* (2000) at v, 49-54 (female respondents reported only one fifth of rapes, one quarter of physical assaults, and one-half of stalkings)
<http://virlib.ncjrs.org/VictimsOfCrime.asp> (hereinafter *DOJ Report*).

called at least five times previously.⁹ Stalking behavior also is part of the chronic and repetitive nature of domestic violence.¹⁰

Congress passed VAWA to recognize violence against women as a crisis demanding national attention, protect domestic abuse victims, and criminally prosecute the abusers. VAWA thus authorizes interstate enforcement of protection orders, commands full faith and credit for such orders, and ensures confidentiality between victims of domestic violence and their counselors. VAWA represents Congress' attempt to address domestic violence in a new, enlightened manner.

B. Section 40703 of VAWA Was Enacted to Protect Battered Immigrant Women

Consistent with its purpose to prevent domestic violence, Congress sought to ensure that all women subjected to domestic violence – battery or extreme cruelty – would benefit from VAWA's provisions. In particular, Congress offered protection to victims of abuse and access to criminal prosecution of abusers by crafting VAWA protections specifically designed to help immigrant victims.

(...continued)

⁸ S. Rep. No. 545, 101st Cong., 2d Sess., 36 (1990).

⁹ *Id.* at 37; see also Angela Browne, *When Battered Women Kill* 105-07 (1987) (aggressive acts often increase in number and severity over time as abusers become desensitized to violence).

Congress amended the nation's immigration laws to address the unique predicament faced by immigrant women who are caught in an abusive relationship. Congress recognized that immigration laws actually fostered the abuse of many immigrant women by placing their ability to gain permanent lawful immigration status in the complete control of the abuser – their U.S. citizen or lawful permanent resident spouse. *See* H.R. Rep. No. 395, at 26-27.

Congress enacted Section 40703 of VAWA, initially codified at 8 U.S.C. §1254(a)(3), to alleviate this problem by giving battered immigrant women and children some measure of control over their immigration status. *Id.* at 25. VAWA established a suspension of deportation remedy to protect of immigrant spouses who have been battered or subjected to extreme cruelty by a spouse who is a citizen or lawful permanent resident, and allowed the Attorney General the discretion to suspend deportation and adjust the status of the battered immigrant to lawful permanent resident. 8 U.S.C. §1254(a)(3). Among other things, this section provided that battered immigrants could be granted legal resident status through suspension of deportation procedures after only three years of continuous

(...continued)

¹⁰ *Judiciary Committee Report, supra* note 3, at 7; *DOJ Report, supra* note 7, at iii, 14 (2000 survey showed intimate partner stalking is more prevalent than earlier estimates).

residence in the U.S., instead of the minimum seven years required of other applicants. *Compare* 8 U.S.C. §1254(a)(1) & (2) *with* 8 U.S.C. §1254(a)(3).

C. By Defining an “Extreme Cruelty” Standard that Encompasses Psychological and Emotional Abuse, Congress Extended VAWA Protection to Immigrant Women and Children Without Requiring that They Suffer Their First Beating

In 1996 Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”),¹¹ which erected new barriers to gaining lawful permanent residence for many family-based petitioners¹² and eliminated suspension of deportation, replacing it with the more limited cancellation of removal.¹³ At the same time, however, Congress included exceptions from many of the new restrictive provisions for those who had approved VAWA petitions¹⁴ or who could qualify under the VAWA provisions.¹⁵ Unlike other forms of suspension, Congress did not eliminate VAWA suspension or heighten the

¹¹ Illegal Immigration Reform and Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (hereinafter “IIRIRA”).

¹² *See, e.g.*, new INA §§212(a)(4)(C)(ii) (new enforceable affidavits of support) and 212(a)(9)(B) and (C) (new “unlawful presence” bars to admission).

¹³ *See* INA §240A, 8 U.S.C. §1229b, replacing former INA §244.

¹⁴ INA §212(a)(4)(C)(I)(I) & (II) (exemption from enforceable affidavit of support requirement).

¹⁵ INA §212(a)(9)(B)(iii)(IV), referencing INA §212(a)(6)(A)(ii) (exception to three- and ten-year unlawful presence bars).

eligibility standard;¹⁶ instead, it transformed former INA §244(a)(3) into the new cancellation §240A(b)(2).

The goal of this clear statutory language was to wrest control over the immigration status of immigrant spouses and children from an abusive citizen or lawful permanent resident spouse or parent earlier in an abusive relationship rather than later. Immigrant victims of domestic violence protected by VAWA are by definition people who by virtue of their spousal or parent-child relationship with a citizen or lawful permanent resident, absent abuse, would have legal immigration status. Through “extreme cruelty,” Congress made immigration relief available to immigrant victims without unconscionably requiring that they await their first beating.

As before, applicants for cancellation of removal who have been battered or subjected to extreme cruelty¹⁷ need only show three years of continuous physical presence¹⁸ and “extreme hardship to the alien, the alien’s child, or (in the case of

¹⁶ Compare new INA §240A(b)(1), requiring ten years of continuous physical presence and proof of “exceptional and extremely unusual” hardship to a U.S. citizen or lawful permanent resident spouse, parent or child, *with* former INA §244(a)(1), requiring seven years of continuous physical presence and a showing of “extreme hardship” to the “alien or to his spouse, parent, or child.”

¹⁷ INA §240A(b)(2)(A), 8 U.S.C. §1229b(b)(2)(A).

¹⁸ INA §240A(b)(2)(B), 8 U.S.C. §1229b(b)(2)(B).

an alien who is a child) to the alien's parent.”¹⁹ As noted by the INS General Counsel, the fact that Congress “left intact” the extreme hardship standard is significant.²⁰ “Congress thus intended to apply a lower standard to battered spouses and children.”²¹

In October of 2000, bipartisan efforts led to the passing of the Battered Immigrant Women Protection Act as part of the Violence Against Women Act of 2000 (“VAWA 2000”).²² Congress intended the immigration provisions of VAWA 2000 to aide battered immigrants by eliminating residual obstacles or “catch-22” glitches impeding immigrants seeking to escape from abusive relationships.²³ By removing strict evidentiary requirements to show “extreme hardship,” expanding categories of immigrants eligible for VAWA protection, improving battered immigrant access to public benefits, restoring protections

¹⁹ INA §240A(b)(2)(E), 8 U.S.C. §1229b(b)(2)(E).

²⁰ Paul W. Virtue, Office of General Counsel, “*Extreme Hardship*” and *Documentary Requirements Involving Battered Spouses and Children*, Memorandum to Terrance O’Reilly, Administrative Appeals Office (Oct. 16, 1998), at 6-7, *reprinted in* 76(4) Interpreter Releases 162 (Jan. 25, 1999).

²¹ *Id.* at 7.

²² The Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified in scattered sections of 8, 18, 20, 28, 42, and 44 U.S.C.) (Oct. 28, 2000).

²³ The Violence Against Women Act of 2000 Section-by-Section Summary, Vol. 146, No. 126 Cong. Rec., 106th Cong., 2nd Sess., at S10195 (Oct. 11, 2000).

offered under the VAWA of 1994 but affected by the passage of subsequent laws, and providing other measures of protection to battered immigrants, VAWA 2000 advanced Congress's express and unequivocal intent to "ensure that domestic abusers with immigrant victims are brought to justice and that the battered immigrants Congress sought to help in the original Act are able to escape the abuse."²⁴

D. Congress Defined "Extreme Cruelty" to Encompass Physical, Psychological, and Emotional Abuses

Under the VAWA suspension of deportation provisions, an immigrant woman is entitled to protection if she had been "battered or subjected to extreme cruelty" by her U.S. citizen or lawful permanent resident spouse. 8 U.S.C. §1229b(b)(2) (2000); 8 U.S.C. §1254(a)(3) (repealed 1996). On its face, the statute protects victims who have experienced "extreme cruelty" but no battery.

The regulations confirm that "battery or extreme cruelty" includes "acts that, in and of themselves, may not initially appear violent but that are part of an overall pattern of violence." 8 C.F.R. §204.2(c)(1)(vi). "Violence" too is not limited to physical acts; instead "[p]sychological or sexual abuse or exploitation . . . shall be considered acts of violence." *Id.* Under the supplementary information written by the Department of Justice in promulgating the interim regulations, the standard

²⁴ *Id.*

“includes, but is not limited to, being the victim of any act or threatened act of violence . . . which results or threatens to result in physical or *mental injury*.” 61 Fed. Reg. 13061 (1996) (emphasis added) A cohesive interpretation of the statute and its supplemental authority requires “extreme cruelty” to include psychological abuse that results in actual or threatened physical or mental injury, even where such abuse initially may not seem violent but is “part of an overall pattern” of physical or mental abuse.²⁵

II. **“EXTREME CRUELTY” ENCOMPASSES PHYSICAL, PSYCHOLOGICAL, AND EMOTIONAL ABUSES**

As explained above, the statutory language, regulations, and related INS guidance recognize that “extreme cruelty” includes behavior that falls short of violence and includes psychological abuse. This definition comports with national and international definitions of domestic violence, family law definitions of “extreme cruelty,” and social science evidence.

A. **Domestic Violence Is Universally Recognized to Include Physical, Psychological, and Emotional Components.**

²⁵ See also Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 Hofstra L. Rev. 1191, 1204 (1993) (“Dimensions of abusive behavior that occur within intimate relationships can be categorized as physical, sexual, and psychological.”) (hereinafter Dutton, *Women’s Responses*).

Several international organizations concur that definitions of domestic violence should not be restricted to physical abuse, but must include other elements such as psychological, sexual, and emotional harm.²⁶ Specifically, the United Nations has defined domestic violence as “all acts of gender-based *physical, psychological, and sexual abuse*” that includes, *inter alia*, “threats, intimidation, coercion, stalking, [and] humiliating verbal abuse.”²⁷ In recognizing the psychological element of domestic violence, the report highlights the similarities between domestic violence and torture:

Battered women, like official torture victims, may be explicitly punished for infraction of constantly changing and impossible to meet rules. Both may be intimidated and broken by the continual threat of physical violence and verbal abuse; and both may be most effectively manipulated by intermittent kindness.

²⁶ See, e.g., The United Nations Fourth World Conference on Women Platform for Action, *Violence Against Women*, ¶113, (1995) (“The term ‘violence against women’ means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty.”)
<<http://www.un.org/womenwatch/daw/beijing/platform/violence.htm>>; Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *Article 2* (1994) (“Violence against women shall be understood to include physical, sexual and psychological violence.”)
<<http://www.oas.org/cim/english/convention%20violence%20against%20women.htm>>.

²⁷ *Report of the Special Rapporteur on Violence Against Women*, ¶11 (Feb. 1996) (emphasis added)
<<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/0a7aa1c3f8de6f9a802566d700530914?Opendocument>>.

Id. ¶47. Such acts of psychological cruelty constitute domestic violence under international law.

B. Case Law Recognizes that “Extreme Cruelty” Takes Non-Physical Forms.

Although the definition of “extreme cruelty” under §244(a)(3) is a matter of first impression before this Court, Congress legislated against an extensive common law backdrop of family law cases defining extreme cruelty.²⁸ The BIA has yet to issue a published decision in any case under the VAWA provisions including those involving extreme cruelty.²⁹ Cases analyzing “extreme cruelty” in the context of assigning fault in divorce proceedings show that courts include an array of psychological and emotional abuse in their “extreme cruelty” definitions. These courts also make clear that physical violence is not a prerequisite to extreme cruelty. Instead, those who employ non-physical abuse such as stalking, lying, social isolation, possessiveness, harassment, threats, and economic abuse are found

²⁸ Norman J. Singer, *Sutherland Statutory Construction* §50:03 (6th ed. 2000) (“The interpretation of well-defined words and phrases in the common law carries over to statutes dealing with the same or similar subject matter.”); §50:04.

²⁹ The Board previously determined that extreme cruelty does not require a showing of intent. Order, *In re N-A-J*, Nov. 29, 2001 (unpublished BIA opinion) (“The plain language of section 244(a)(3) of the Act does not require that the alien establish intent in order to prove extreme cruelty.”).

(continued...)

to meet the standard. Laura's husband Refugio exhibited many of these behaviors in Mexico (in addition to the extreme physical abuse perpetrated there),³⁰ and exhibited several others in the U.S.³¹ Each is discussed below.

1. Types of "Extreme Cruelty" Recognized by Family Law

a. Stalking

Stalking is generally defined as the intentional commission of more than one act which reasonably would – and in fact does – cause a victim to fear serious bodily injury.³² Over the last decade, every state has passed an anti-stalking law making such behavior a crime.³³ A 1996 study estimated that over one million women are stalked every year; roughly one third of that number of men are stalked annually.³⁴ Most female victims (59%) are stalked by a current or former intimate partner; the majority of those women (81%) were also physically assaulted by that

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Amici are unaware of any Board decisions directly addressing the non-physical elements of "extreme cruelty.

³⁰ See *infra* at 25.

³¹ See *infra* at 24-25.

³² U.S. Department of Justice Office for Victims of Crime, *Strengthening Antistalking Statutes*, 1 (2002)
<<http://www.ojp.usdoj.gov/vawo/statistics.htm>>.

³³ *Id.*

³⁴ *Stalking in America: National Violence Against Women Survey*
<<http://www.nvc.org/src/Statistics/nvawsurvey.html>>.

partner.³⁵ Stalking often causes tremendous psychological distress and can lead to employment problems and economic difficulties for the victim.³⁶ It is a crime of intimidation perpetrated by individuals who often cannot maintain stable and healthy relationships, have difficulty establishing an identity, and desire attention.³⁷

Family law cases recognize stalking as “extreme cruelty.” Stalking behavior contributing to a finding of “extreme cruelty” may run from loitering outside or driving past the victim’s home³⁸ to following the victim and engaging in a high-speed car chase.³⁹ Similar behavior regularly induces courts to issue protective orders, where the standard is “fear of imminent bodily harm.” Courts have issued protective orders against spouses who peered inside, loitered outside,

³⁵ *Id.*

³⁶ *Id.* (as a result of stalking, 30% of female victims and 20% of male victims sought counseling; 26% of victims lost time from work; and 7% never returned to work).

³⁷ Jennifer L. Bradfield, *Anti-Stalking Laws: Do They Adequately Protect Stalking Victims?*, 21 Harv. Women’s L.J. 229, 235 (1998).

³⁸ *Rakestraw v. Rakestraw*, 717 So.2d 1284, 1286 (Miss.Ct.App. 1998) (affirming cruelty finding while noting that witnesses identified such behavior as stalking whereas the stalking spouse characterized it as “attempt[ing] to reconcile the relationship”).

³⁹ *Fuchs v. Fuchs*, 216 A.D.2d 628, 628 (N.Y.App.Div. 1995); *Christenson v. Christenson*, 472 N.W.2d 279, 280 (Iowa 1991) (high speed car chase is “domestic abuse”).

or drove around a partner's home,⁴⁰ appeared at the house unannounced and caused a verbal scene,⁴¹ or tracked them outdoors.⁴²

b. Lying

Lying that constitutes "extreme cruelty" may take many forms in family law. Spouses may make false, denigrating accusations about their partners, either directly to their partners or to others.⁴³ Lies told between spouses may be especially cruel where they are clearly intended to cause distress.⁴⁴ Intent is not necessary, however. In facts strikingly similar to those here, the Supreme Court of South Dakota said: "[The wife] relied on [her husband's] marriage promises, and

⁴⁰ *Knuth v. Knuth*, 1992 Minn. App. LEXIS 696, at *2 (1992); *State of Wisconsin v. Sarlund*, 407 N.W.2d 544 (Wisc. 1987).

⁴¹ *Boniek v. Boniek*, 443 N.W.2d 196, 197-98 (Minn.Ct.App. 1989).

⁴² *Knuth*, 1992 Minn. App. LEXIS 696, at *2; *Christenson*, 472 N.W.2d at 280; *Sarlund*, 407 N.W.2d at 544.

⁴³ *Pompa v. Pompa*, 259 A.D.2d 338, 338 (N.Y.App.Div. 1999) (false insulting accusations are cruel and inhuman treatment); *Richard v. Richard*, 711 So.2d 884, 886 (Miss. 1998) (same).

The phrase "cruel and inhuman treatment" used in *Pompa* and other cases is identical to "extreme cruelty." Divorce courts regularly use the terms "extreme cruelty," "cruel and inhuman conduct" and "cruel and inhuman treatment" interchangeably. *Pearson v. Pearson*, 129 N.E. 349, 350 (N.Y. 1920) (finding "the terms 'extreme cruelty' and 'cruel and inhuman conduct' are equivalent"); *Mathewson v. Mathewson*, 69 A. 646, 648 (Vt. 1908) (equating "cruelty," "extreme cruelty," and "cruel and inhuman treatment").

⁴⁴ See, e.g., *Perret v. Saacks*, 612 So.2d 925, (La.Ct.App. 1993) (extreme cruelty by falsely telling spouse his father had suffered heart attack).

[the husband] made no attempt to seek counseling or to try and make the marriage work. The court concluded that, '[the husband] has been guilty of extreme cruelty toward [his wife], by his breach of the marriage contract.'"⁴⁵

Family law cases also look at lying in the context of "condonation."

Condonation can be a defense against charges of extreme cruelty in a divorce proceeding where one spouse behaves cruelly, but his or her partner accepts the behavior and continues the marriage.⁴⁶ Courts regularly reject a condonation defense and find extreme cruelty where, *as here*, a spouse convinces his or her partner to return through lies or false promises.⁴⁷ For example, where a spouse "induced by fraud the resumption of marital relations" by insincerely promising to end certain behavior, a marriage was properly dissolved due to extreme cruelty even if no new blatant misconduct followed the lies.⁴⁸

c. Social Isolation

⁴⁵ *Osman v. Keating-Osman*, 521 N.W.2d 655, 657 (S.D. 1994).

⁴⁶ *Thompson v. Thompson*, 9 A. 888, 888-90 (Maine, 1887).

⁴⁷ *Gilliam v. Gilliam*, 776 S.W.2d 81 (Tenn.Ct.App. 1988).

⁴⁸ *Id.*; *Keenan v. Keenan*, 105 N.W.2d 54, 57 (Mich. 1960) (affirming divorce on extreme cruelty grounds and denying condonation claim where "the brief reconciliation rested on the bases of promises and assurances given by defendant to plaintiff which were not kept, and which inferentially were not made in good faith").

Perpetrators of domestic violence often use social isolation to prevent their victims from understanding their true situations, from seeking help, and from escaping. An abuser may limit the victim's ability to use the phone,⁴⁹ may prohibit her from going to work or school,⁵⁰ having contact with family or friends,⁵¹ or attending other social activities.

Immigrant women are uniquely vulnerable to the negative effects of social isolation by their abusers.⁵² An abuser may prevent his victim from learning English and by so doing make it difficult for her to obtain access to health care, social workers, battered women's advocates, immigration authorities, police, and

⁴⁹ See, e.g., *Harshbarger v. Harshbarger*, 1993 Ohio App. LEXIS 3125, at *3 (Ohio Ct. App. 1993) (husband's limit on wife's phone conversations contributed to extreme cruelty finding).

⁵⁰ Family Violence Prevention Fund, *Domestic Violence in Civil Court Cases*, at 23 (1992).

⁵¹ *Robinson v. Robinson*, 722 So.2d 601, 603 (Miss. 1998) (cruel and inhuman treatment: husband "restrict[ed] her social life to the point of telling her who she could be friends with, what social functions she could attend, and where and under what circumstances she could go anywhere"); *Gazzillo v. Gazzillo*, 379 A.2d 288, 291 (N.J. Sup. Ct. 1977) (refusal to permit wife to invite relatives to visit them supports extreme cruelty finding); *McFall v. McFall*, 136 P.2d 580, 582 (Cal. Ct. App. 1943). ("forbidd[ing] defendant to keep company with her friends or to bring her friends to their home" contributes to extreme cruelty finding).

⁵² Giselle Aguilar Hass et al., *Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications*, *Domestic Violence: Global Responses*, 93, 105 (2000) ("Immigration-related abuse is a critical way in

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courts.⁵³ In many cases, the immigrant woman is already isolated by living in a new country with no supportive community, family, and friends so that the additional isolation by the abuser leaves the immigrant victim with no accessibility to the outer world.⁵⁴

d. Possessiveness, Harassment, and Controlling Behavior

Acts of jealousy and possessiveness are a common behavior for those who commit domestic violence.⁵⁵ Abusers may dominate the victim's autonomy and decisionmaking to extreme lengths.⁵⁶ Such domination also may take the form of

(...continued)

which batterers of immigrant women exert power and control; it is a key element of extreme cruelty, dominance and isolation.”).

⁵³ Leslye E. Orloff *et al.*, *With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 Family L. Quarterly 313, 316-17 (1995).

⁵⁴ *Id.*

⁵⁵ Diana Follimstad *et al.*, *The Roles of Emotional Abuse in Physically Abusive Relationships*, 5 J. Family Violence 113 (1990).

⁵⁶ *Keller v. Keller*, 763 So.2d 902, 904 (Miss.Ct.App. 2000) (demand that wife give up custody of son contributed to cruel and unusual punishment); *Richardson v. Richardson*, 186 A.D.2d 946 (N.Y.App.Div. 1992) (daily multi-hour arguments and not allowing wife to fall asleep until she agreed he was right contribute to finding of cruel and inhuman treatment); *Veach v. Veach*, 392 P.2d 425, 429 (Idaho 1964) (“continuing course of unrelenting domination” supports extreme cruelty finding).

forcing one's religion on one's spouse, particularly where that religion may reinforce the abuser's ability to control the spouse.⁵⁷

Courts have found extreme cruelty where controlling spouses illegally record their spouse's telephone conversations,⁵⁸ install surveillance equipment in their home to monitor their spouse,⁵⁹ or open their mail.⁶⁰ Protective orders are also issued for unwanted communications, including repeated phone calls or letters.⁶¹

e. Threats

Abusers use many different kinds of threats to maintain their control over their victims. It is well-documented, for example, that abusers use gestures such as

⁵⁷ *Muhammad v. Muhammad*, 622 So.2d 1239, 1241-42, 1248-49 (Miss. 1993) (cruel and inhuman treatment where husband's religion forced wife to surrender control over her privacy, finances, phone calls, mail, diet, child care decisions, and ability to leave the community); *Hybertson v. Hybertson*, 582 N.W.2d 402, (S.D. 1998) (extreme cruelty where husband's religion made wife feel "like she and the children were living in a 'Gestapo' environment").

⁵⁸ *Gascon v. Gascon*, 187 A.D.2d 955, 955 (N.Y.App.Div. 1992).

⁵⁹ *H.E.S. v. J.C.S.*, 793 A.2d 780 (N.J.Super. 2002) (such conduct constituted harassment and stalking).

⁶⁰ *Knuth*, 1992 Minn. App. LEXIS 696, at *2.

⁶¹ *Sarlund*, 407 N.W.2d at 544 (unwanted calls and letters contribute to extreme cruelty finding); *Johnson v. Cegielski*, 393 N.W.2d 547 (Wisc.Ct.App. 1986) (issuing protective order after defendant "called his ex-wife at work seventy-five times within a period of a month"); *see also* (continued...)

standing very close, clenching fists, sending warning looks, and displaying weapons to intimidate their victims.⁶² The abuser may not only threaten to harm his victim, but may also threaten to hurt people and things the victim cares about, such as her children, other members of her family, pets, and property.⁶³

f. Immigration Related Abuse

Abusers of immigrant women often threaten to report their victims to the government and especially to the immigration authorities.⁶⁴ Research published since Congress passed VAWA confirms that abusers use control over immigration status as a tool to lock their abused spouses and children in abusive relationships.⁶⁵ This research found that among abused immigrant women who were married to citizens or lawful permanent residents, 72.3% of their abusive spouses never filed

(...continued)

Hobbs v. Hobbs, 987 S.W.2d 844, 847 (Tenn.Ct.App. 1998) (repeated threatening phone calls).

⁶² Family Violence Prevention Fund, *Domestic Violence in Civil Court Cases* (1992) at 23-24.

⁶³ Barbara Hart, *Children of Domestic Violence: Risks and Remedies*, 8 Protective Service Quarterly (Winter 1993); *Iowa v. Zeien*, 505 N.W.2d 498 (Iowa 1993); *Kreitz v. Kreitz*, 750 S.W.2d 681 (Mo.Ct.App. 1988).

⁶⁴ Leti Volpp, *Working with Battered Immigrant Women: A Handbook to Make Services Accessible* 6 (1995).

⁶⁵ Hass, *supra* note 52, at 105-07; Mary Ann Dutton *et al.*, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 Geo. J. Pov. L. & Pol'y. 245, 259 (2000) (hereinafter Dutton, *Help-Seeking Behaviors*).

family based immigration petitions,⁶⁶ while the rest subjected their spouses to lengthy delays before filing.⁶⁷

In addition to demonstrating that abusers use immigration status to establish power and control over their victims, this same research found that immigration related abuse is often a lethality predictor and that the level of abuse is likely to escalate.⁶⁸ Physically and sexually abused immigrant women experienced immigration related abuse at rates significantly higher than rate experienced by psychologically abused women.⁶⁹ Immigration related abuse includes but is not limited to threats of deportation, not filing papers, or calling INS.⁷⁰ Just as a cut telephone cord may provide corroborating evidence of abuse in domestic violence cases, immigration related abuse provides corroborating evidence of physical and sexual abuse of immigrant victims.⁷¹ Further, when immigration related abuse occurs in emotionally abusive relationships that do not yet include physical or

⁶⁶ Dutton, *Help-Seeking Behaviors*, *supra* note 65, at 259.

⁶⁷ *Id.* (noting mean delay of 3.97 years).

⁶⁸ Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women*, 10 Am. U. J. Gender Soc. Pol'y & L. 95, 111 (2002).

⁶⁹ Hass, *supra* note 52, at 105-09.

⁷⁰ *Id.* at 108.

⁷¹ Orloff & Kaguyutan, *supra* note 68, at 111.

sexual abuse, it is a likely predictor of escalating abuse.⁷² Thus, immigration related abuse is a factor that contributes to extreme cruelty.

g. Economic Abuse

Many abusers, particularly those of immigrant women, use restrictions on their victims' economic freedom to dominate them. Immigrant women report that lack of access to economic resources is the single largest barrier to leaving an abusive relationship.⁷³ Abusers prevent their victims from participating in the labor market or sabotage their paid work.⁷⁴ Moreover, they control the victims' access to money by taking their salaries, making them ask for money, and not giving them access to checking accounts. Abusers may also destroy family property, especially if they suspect that their victim plans to leave the

⁷² Hass, *supra* note 52, at 109.

⁷³ Dutton, *Help-Seeking Behaviors*, *supra* note 65, at 295-96; *see generally* Leslye Orloff, *Lifesaving Welfare Safety Net Access for Battered Immigrant Women and Children: Accomplishments and Next Steps*, 7 *Wm. & Mary J. Women & L.* 597, 617-21 (2001).

⁷⁴ *New York Victim Service Agency Report on the Costs of Domestic Violence* (1987); Susan Schechter & Lisa T. Gray, *A Framework for Understanding and Empowering Battered Women, in Abuse and Victimization Across the Life Span* 242 (1988).

relationship.⁷⁵ Abusers of immigrant women may force their victim to work illegally or harass her at the only job at which her visa permits her to work legally.

g. Degradation

Abusers use a variety of methods to degrade and humiliate their victims. They may call the victims insulting names, constantly criticize them, blame them for problems they cannot control, and force them to engage in illegal activities, drug abuse, and prostitution.⁷⁶

2. Laura Experienced Non-Physical Abuse in the U.S. Qualifying as “Extreme Cruelty” Under Family Law

Refugio committed several of the above behaviors against Laura while she was in the U.S., including possession and harassment, stalking, lying, and social isolation. After Refugio stabbed Laura and she escaped in secret to her sister in California,⁷⁷ Refugio obtained her sister’s phone number from Laura’s neighbor and called repeatedly “every day” (ER 247); this behavior indicates Refugio’s need to control and possess Laura. Refugio stalked Laura by traveling two hundred

⁷⁵ Family Violence Prevention Fund, *Domestic Violence in Civil Court Cases* 23 (1992).

⁷⁶ See, e.g., *Pfalzgraf v. Pfalzgraf*, Slip Opinion, 14-CA-79 (Ohio Ct. App. 1979); *Gazillo v. Gazillo*, 379 A.2d 288 (N.J. Ch. 1979).

⁷⁷ Tr. at 35 (“I didn’t go to my family in Mexico, because he knew where my family lived and my children lived. And I was afraid that he will follow me and he will kill me.”).

miles from Mexicali to Los Angeles to track her down and bring her home. (ER 248.) Upon confronting Laura in California, Refugio acted remorseful, falsely promised never to beat Laura again, and falsely promised to seek counseling in Mexico. (ER 248-49.) When they returned he refused to see the counselor Laura arranged (ER 248-49) and soon escalated his violence by stabbing Laura (ER 249). Additionally, Refugio's stalking of Laura to California caused her social isolation upon her return to the U.S. by alienating Laura from her sister, Manrice Hernandez; Laura testified that she could no longer seek shelter with Manrice because Refugio knew that address and Laura feared that he would find her and kill her. (ER 252.) The combination of these coercive and destructive behaviors qualify as extreme cruelty under § 244(a)(3).

In addition, Refugio savagely beat Laura in Mexico and subjected her to extreme psychological abuse, showing that his actions in the U.S. are part of an "overall pattern of violence." Refugio's assaults on Laura in Mexico were so severe that they resulted in permanent scarring following repeated battery of her head and permanent disablement of her hand where he stabbed her. (ER 243-46; 249; 268-77.) Refugio also socially isolated Laura by imprisoning her in their home for two days after attacking her with a knife and refusing to allow her to seek medical treatment. (ER 251-52; 268.) Refugio constantly degraded Laura by frequent verbal abuse, insults, and name-calling. (ER 243; 277.) These acts

provide further context to Refugio's U.S. behavior and situate it within an "overall pattern of violence." Refugio committed physical and psychological abuse in Mexico, then followed Laura to California to continue the psychological abuse and to deceive her into returning to Mexico where he could and did persevere in his physical and psychological abuse. The psychological abuse and stalking Refugio committed in the U.S. are part of an overall pattern of abuse constituting extreme cruelty.

III. THE ACTS THAT OCCURRED IN THE UNITED STATES CONSTITUTE "PART OF AN OVERALL PATTERN OF VIOLENCE" QUALIFYING AS "EXTREME CRUELTY."

Domestic violence commonly occurs as a cycle of behavior; courts and social scientists agree that evidence of abuse must be viewed in context to be correctly understood.⁷⁸ Acts that may not appear abusive to an observer take on added meaning when viewed from the perspective of a victim who has experienced

⁷⁸ *Rykhus v. Rykhus*, 319 N.W.2d 167 (S.D. 1982) ("We must view the evidence in light of the full context of the marriage and not in light of isolated incidents."); Dutton, *Women's Responses*, *supra* note 25, at 1206 ("Although a set of discrete abusive incidents can typically be identified within an abusive relationship, an understanding of the dynamic of power and control within an intimate relationship goes beyond these discrete incidents.").

past abuse.⁷⁹ The regulations account for this phenomenon by defining extreme cruelty to include “acts that, in and of themselves, may not initially appear violent but that are part of an overall pattern of violence.” 8 C.F.R. §204.2(c)(1)(vi). Under this rubric, Refugio’s behavior of calling, following, coercing, and lying to Laura in Los Angeles must be understood as part of a cycle surrounded at both ends by beatings that caused Laura to fear for her life.

A. Domestic Violence Often Manifests as a Cycle.

Domestic violence results from an abusive partner’s need to exercise power and control over his mate and has been described as a “pattern of interaction” comprised of physical, sexual, and psychological elements.⁸⁰ When such a pattern of violence develops, it is often unnecessary for the abuser to resort to violence to control his victim. A single violent incident in the past often remains a strong enough threat to effectively control the victim and gain obedience. When the victim shows signs of resistance, the abuser merely resorts to violence to reestablish control. In this manner, a pattern of interactions changes the dynamics of the relationship. The victim comes to recognize certain non-violent cues as

⁷⁹ *Dutton, Women’s Responses*,, *supra* note 25, at 1206 (“[B]ehavior which may not be considered threatening by the recipient in one relationship may be considered a clear sign of danger in another relationship, due to the context of prior violence and abuse in which the behavior occurs.”).

predictors of violence, and the “meaning of the communication extends far beyond what is being said or done in the moment.”⁸¹

In addition, the disparate pieces of a domestic violence cycle may arrange themselves in an identifiable pattern. Psychologist Lenore Walker describes the domestic violence cycle as stages of positive and negative emotional response, coercion, and physical abuse, which often include a tension-building, acute-battering, and contrite-loving phase.⁸² Although this pattern does not apply to every domestic violence victim,⁸³ it does apply to many domestic violence victims,⁸⁴ including Laura.

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⁸⁰ Mary Ann Dutton, *The Dynamics of Domestic Violence: Understanding the Response from Battered Women*, 68 Fla. B.J. 24, 24 (1994).

⁸¹ *Id.*; Judith Herman, *Trauma and Recovery*, 77 (1992) (“[P]erpetrator may use violence infrequently, as a last resort. It is not necessary to use violence often to keep the victim in a constant state of fear.”); Liz Kelly, *How Women Define Their Experiences of Violence*, in *Feminist Perspectives on Wife Abuse* 123 (1990) (battering as “frequent, life threatening violence” is a stereotype that “seldom fit[s] women’s experiences”).

⁸² Lenore E.A. Walker, *The Battered Woman Syndrome*, 126-38 (2d ed. 2000).

⁸³ Mary Ann Dutton, *Validity of “Battered Woman Syndrome” in Criminal Cases Involving Battered Women* (1996) (hereinafter Dutton, *Validity of BWS*).

⁸⁴ Walker determined the existence of a tension-building phase in 65% of her study group and found evidence of loving contrition afterwards in 58% of the group. Walker, *supra* note 82, at 128.

Laura testified, for example, that following a beating in which Refugio smashed her head against a wall, leaving a scar (ER 243), the tension abated and Refugio returned to being the man that she fell in love with: “After the assault that I had he would become the same man that I knew. He was very good and he will behave very well.” (ER 245.) Once Laura fled to California, Refugio’s actions clearly follow the pattern of the contrite-loving phase studied by Walker, in which a batterer may “apologize profusely, try to assist his victim, show kindness and remorse, and shower her with gifts and/or promises.”⁸⁵ Refugio did all of these things. “He was crying. He asked me forgiveness and he said that he wouldn’t do it again. . . . I felt bad, because he had told me that he needed me and at that time I was still in love with him.” (ER 247-48.) In addition, he promised to seek counseling if Laura would return to Mexico with him. (ER 248-49.) Because he lied to her about his intentions to reform and perhaps for reasons that may include traumatic bonding,⁸⁶ Stockholm Syndrome,⁸⁷ and cultural norms that lead victims to equate abuse with affection,⁸⁸ Laura did return to Mexico with her husband.

⁸⁵ *Id.* at 127.

⁸⁶ Dutton, *Validity of BWS*, *supra* note 83, at 15, (“In traumatic bonding, a battered woman who experiences chronic and escalating violence can come to see the batterer as all-powerful, on the one hand, and to believe that she cannot survive without him, on the other.”); Donald Dutton & S.L. Painter, *Traumatic Bonding: The Development of Emotional Attachments in*
(continued...)

Once in Mexico, Refugio soon exhibited the same symptoms that had previously caused Laura to flee in fear for her life, including the tension-building phase (he refused to see the counselor that Laura found, ER 248-49) and acute-battering phase of the cycle (he beat Laura savagely, stabbed her hand with a knife, ER 248-49, and prevented her from fleeing or seeking medical care, ER 251-52; 268). Viewed in context with these actions, Refugio's apologies, expression of affection, and false promises in the U.S. fit into "an overall pattern of violence;" in

(...continued)

Battered Women and Other Relationships of Intermittent Abuse, 6
Victimology 139 (1981).

⁸⁷ Dee L.R. Graham *et al.*, *Survivors of Terror: Battered Women, Hostages and the Stockholm Syndrome*, in *Feminist Perspectives on Wife Abuse* (Kersti Yllo & Michele Bograd eds., 1990). Psychologist Mary Ann Dutton has explained how this phenomenon may affect a domestic violence victim: "[T]he extreme imbalance of power between abuser and victim can actually lead to the development of a strong emotional bonding, accomplished primarily through the abuser's threats to harm the victim, the victim's perception of the abuser's ability to do so, the victim's inability to escape and social isolation, and the victim's perception of some degree of kindness shown by the abuser." Dutton, *Women's Responses*, *supra* note 25, at 1224-25. Such a reaction comports with our facts, where Laura believed Refugio would kill her and fled in secrecy, only to find herself unable to escape after Refugio found her, followed by Refugio's show of remorse and affection.

⁸⁸ Klein & Orloff, *supra* note 2, at 111 ("Twenty-six percent of victims and thirty-one percent of batterers interpret battering as a sign of love."); Dutton, *Women's Responses*, *supra* note 25, at 1220 (attributing battered victim's sympathy for their abusers to cognitive dissonance and preexisting emotional attachment); Herb Goldberg, *The Dynamics of Rage Between the Sexes in a Bonded Relationship*, in *Clinical Approaches to Family Violence* 59, 60-67 (1982).

fact this stage is vital to the cycle because it “provides the positive reinforcement for remaining in the relationship.”⁸⁹ Refugio’s promises and remorse may appear harmless to an outsider, but these behaviors in context contribute to severe psychological abuse by perpetuating the relationship. Amnesty International, for example, defines “psychological torture” to include “occasional random and variable indulgences that keep alive false hopes that the torture will stop.”⁹⁰ Because this contrite loving phase is part of an overall pattern of violence, for statutory purposes it does not matter that the physical violence occurred in Mexico, so long as this *part* of the overall pattern of abuse occurred in the United States.

CONCLUSION

For these reasons, *amici* respectfully request that this Court reverse the BIA decision.

⁸⁹ Walker, *supra* note 82, at 127; Dutton, *Women’s Responses*, *supra* note 25, at 1220 n.6.

⁹⁰ Dutton, *Women’s Responses*, *supra* note 25, at 1206-07; *see also* text *supra* at 12-13.

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(C) and Circuit Rule 32-1, Appellant's counsel certifies that this brief used proportionally spaced typeface of 14 points and contains 6983 words.

Respectfully submitted,



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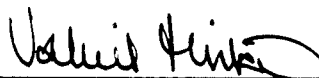
October 15, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2002, true copies of the foregoing Motion were sent by Federal Express next day delivery to the Clerk of this Court and to Counsel for Appellee listed below, and by First-Class Mail to other Counsel for Appellant listed below.

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