08-6183-cv

To Be Argued By:
NATASHA OELTJEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-6183-cv

ROY DEN HOLLANDER; SEAN MOFFETT;
BRUCE CARDOZO; DAVID BRANNON,

Plaintiffs-Appellants,

—v.—

UNITED STATES OF AMERICA; DIRECTOR OF THE U.S. CITIZENSHIP AND IMMIGRATION SERVICES; DIRECTOR OF THE DEPARTMENT OF HOMELAND SECURITY; DIRECTOR OF THE EXECUTIVE OFFICE FOR IMMIGRATION,

Defendants-Appellees.

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

BRIEF FOR DEFENDANTS-APPELLEES

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UNITED STATES OF AMERICA; DIRECTOR OF THE U.S. CITIZENSHIP AND IMMIGRATION SERVICES; DIRECTOR OF THE DEPARTMENT OF HOMELAND SECURITY; DIRECTOR OF THE EXECUTIVE OFFICE FORE IMMIGRATION REVIEW,

Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES

Preliminary Statement

Plaintiffs-appellants Roy Den Hollander ("Hollander"), Sean Moffett ("Moffett"), Bruce Cardozo ("Cardozo"), and David Brannon ("Brannon") (collectively, "plaintiffs") seek review of a December 4, 2008 judgment of the United States District Court for the Southern District of New York (Pauley, J.), dismissing their complaint for lack of subject-matter

jurisdiction pursuant to Rule 12(b)(1) of the Rules of Civil Procedure.

Plaintiffs are four individuals who purport to represent a class of U.S. citizen males whose marriages to alien wives ended in divorce, and who seek to have several immigration-related provisions of the Violence Against Women Act ("VAWA") declared unconstitutional. In particular, they object to provisions (1) permitting an alien who has been abused by a U.S. citizen or lawful permanent resident ("LPR") spouse to acquire permanent residency without the participation of the alien's spouse, and (2) forbidding the disclosure of an alien's immigration records to the spouse, while permitting limited disclosure to the alien, the alien's attorney, and certain government agencies.

In their amended complaint, plaintiffs alleged that these VAWA provisions induced their alien ex-wives to marry them, and later to make false allegations of abuse, for the sole purpose of gaining legal status in the United States. They further alleged, on information and belief, that their ex-wives accused them of abuse during the ex-wives' immigration proceedings, and, presumably, prevailed in their applications for relief. On this basis, plaintiffs contended that the application procedures established by VAWA deny the aliens' U.S. citizen husbands due process and freedom of speech, because the husbands cannot submit testimony and evidence on their own behalf during their wives' immigration proceedings. Similarly, because their alien wives can make such submissions in proceedings to determine their own immigration status, plaintiffs contended that the proceedings deny the estranged husbands equal protection, based on both gender and

citizenship. In addition, they claimed that the existence of records of these proceedings creates an unacceptable risk of public disclosure of their ex-wives' allegations concerning plaintiffs' conduct, thereby damaging plaintiffs' reputations. Finally, plaintiffs claimed that the VAWA provisions amounted to bills of attainder against U.S. citizen males. For these reasons, plaintiffs sought an order declaring the challenged provisions unconstitutional, enjoining their operation in any current or future proceeding relating to plaintiffs' ex-wives, and compelling the Government to institute new procedures. The district court ruled that plaintiffs lacked standing to bring these challenges.

The district court's judgment should be affirmed, because plaintiffs failed to meet the threshold standing requirements. Most fundamentally, plaintiffs have suffered no injury-in-fact, because the VAWA provisions at issue neither subject plaintiffs to any proceeding, nor penalize them. Rather, VAWA simply creates a substantive basis for immigration relief for a class that allegedly includes plaintiffs' alien wives or ex-wives, while establishing procedures for immigration authorities to determine whether an applicant is entitled to relief under the statute. U.S. citizens simply are not parties to a spouse's immigration proceedings, and have no legally cognizable interest in the outcome of those proceedings, nor are they injured if they are excluded from such proceedings.

Second, to the extent plaintiffs claim injury based on threat of harm to their reputations resulting from their ex-wives seeking relief under VAWA, this threat is not sufficiently real or immediate to constitute a present injury. Plaintiffs do not allege that any information

relating to their ex-wives' VAWA proceedings has been disclosed, nor point to any circumstance suggesting that any disclosure is likely, much less imminent. No VAWA provision requires defendants to disclose information under any circumstance, nor provides the ex-wives with any incentive to disclose information.

Finally, to the extent plaintiffs seek relief from various harms that they assert were induced by the existence of VAWA—such as their arrests based on allegedly fraudulent police complaints—these harms are not reasonably traceable to defendants, nor redressable in this action. As the district court observed, injuries stemming from separate state-law proceedings can more appropriately and directly be challenged in those proceedings. By contrast, even if the Court were to order all of plaintiffs' proposed reforms to the VAWA, their arrest records would remain, and the alleged threat to their reputations would not be redressed.

Even if the Court were to find that plaintiffs had standing to assert some of their claims, moreover—which they do not—the dismissal of the complaint should still be affirmed pursuant to Rule 12(b)(6), for failure to state a claim upon which relief can be granted. To survive a motion to dismiss, a complaint must contain sufficient factual allegations to plausibly give rise to entitlement to relief, and here, the amended complaint failed to meet this standard. Plaintiffs failed to state a due process claim where their allegations failed to establish that they had any liberty interest implicated by the VAWA procedures. Nor did they state a First Amendment claim, where none of their allegations plausibly showed that defendants penalize

or limit their speech in any manner. Their gender- and nationality-based equal protection claims likewise fail, because the provisions are neutral on their face, and plaintiffs cannot show that they are similarly situated to the aliens who allegedly receive preferential treatment. Finally, plaintiffs' bill of attainder claims are meritless; no VAWA provision inflicts any punishment against them, nor can any intent to harm them reasonably be inferred from the statutory history.

Dismissal was thus warranted under Rule 12(b)(6) as well as 12(b)(1), and the appeal should be denied.

Counterstatement of Jurisdiction

The Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. Contrary to plaintiffs-appellants' contention, *see* Brief of Plaintiffs-Appellants ("Br.") at 1, the district court lacked subject-matter jurisdiction over their amended complaint, because plaintiffs lacked standing.

Issues Presented for Review

1. Whether the district court correctly determined that plaintiffs lacked standing to challenge the constitutionality of a series of VAWA provisions, where they failed to demonstrate any real and immediate injury-in-fact, reasonably traceable to defendants' actions and redressable in this federal court action.

2. Whether, even disregarding plaintiffs' lack of standing, the judgment should be affirmed because the amended complaint fails to state a claim on which relief can be granted.

Statement of Facts

A. The Statutory Provisions at Issue

1. The VAWA Amendments to the Immigration Laws

The term "VAWA" refers to a series of statutes, first enacted in 1994, which encompassed a number of amendments to the Immigration and Nationality Act ("INA"). One goal of this legislation was to relieve aliens whose U.S. citizen spouses were abusing them from the need to depend on that spouse to obtain legal immigration status. *See* Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994) ("VAWA 1994"). Previously, an alien seeking LPR status based on her marriage to a U.S. citizen or LPR generally needed that spouse to file an immigrant visa petition on her behalf.* *See* 8 U.S.C. § 1154(a)(1) (1993) (repealed). Congress was concerned that immigrant women were often pressured into remaining in abusive marriages, because their husbands could threaten that they otherwise would withdraw visa petitions, thereby putting the wives at risk of

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* This brief refers to applicants using female pronouns; nevertheless, on their face, the VAWA provisions apply equally to both male and female victims of domestic violence. *See* 61 Fed. Reg. 13061, 13062 (Mar. 26, 1996) (noting that, "[a]lthough the title of the [VAWA] reflects the fact that many abuse victims are women, abused spouses and children of *either sex* may benefit from these provisions") (emphasis added).

deportation. *See* 61 Fed. Reg. 13061, 13061-62 (Mar. 26, 1996) (noting that "some abusive citizens . . . misuse their control over the petitioning process . . . . to perpetuate domestic abuse").

VAWA 1994 amended the INA to allow such an alien to "self-petition" with the former INS* for immigrant classification. To prevail, she was required to demonstrate that she was married to a U.S. citizen or LPR, was eligible for immigrant classification based on that relationship, was residing in the United States and had, at some point, lived there together with the spouse, entered into the marriage in good faith, was a person of good moral character, would experience "extreme hardship" if deported, and, during the marriage, either she or her child "was battered or subjected to extreme cruelty perpetuated by the alien's spouse." *See* H.R. Rep. No. 103-395 (1993), at 23-24; *see also* 8 U.S.C. § 1154(a)(1); 8 C.F.R.§ 204.2(c)(1)(i). If the petition is granted, the alien can apply to adjust her status to that of an LPR; if it is denied, removal proceedings may be initiated.

VAWA 1994 also provided a remedy for battered spouses who had already been placed in removal proceedings, by relaxing the requirements for the form

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* The former INS ceased to exist of March 1, 2003, and was reconstituted into two agencies within the new Department of Homeland Security (" 'DHS"): the United States Citizenship and Immigration Services ("CIS"), which handles applications for benefits, and the United States Immigration and Customs Enforcement ("ICE"), which controls removal proceedings. *See Saleh v. Gonzales*, 495 F.3d 17, 20 n.3 (2d Cir. 2007).

of relief known as "suspension of deportation." *See* VAWA 1994 § 40703(a) (codified at 8 U.S.C. § 1254(a)) (repealed 1996); *Hernandez v. Ashcroft*, 345 F.3d 824, 832 (9th Cir. 2003). When this form of relief was repealed in 1996, the form of relief which replaced it, known as "cancellation of removal," included a similar provision particular to battered spouses. *See* Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, § 304(a)(3), 110 Stat. at 3009-596-606 (1996) (amending the INA to add, *inter alia*, section 240A, now codified at 8 U.S.C. § 1229b). Normally, a nonpermanent resident seeking cancellation of removal must demonstrate, *inter alia*, that she has been physically present in the United States for ten years, and that her removal would result in "exceptional and extremely unusual hardship" to a U.S. citizen or LPR relative. 8 U.S.C. § 1229b(b)(1). If the alien can demonstrate that she was "battered or subjected to extreme cruelty" by a U.S. citizen spouse or parent, however, she can become eligible after only three years of physical presence, upon showing that otherwise she personally would suffer hardship that is merely "extreme." 8 U.S.C. § 1229b(b)(2). If she prevails in her application, then her status is adjusted to that of an LPR. 8 C.F.R § 240.70(c); *see Hernandez*, 345 F.3d at 831-32 (describing application procedures).

Both in benefit proceedings before CIS and removal proceedings before ICE, the adjudicator is to consider "any credible evidence" that the alien submits. *See* 8 U.S.C. §§ 1154(a)(1)(J), 1229b(b)(2)(D). The determination of how much weight should be given to that evidence is within the adjudicator's sole discretion, *id.* §§ 1154(a)(1)(J), 1229b(b)(2)(D). This standard was established in response to concerns that a more rigid

standard would impose an unrealistic burden on aliens who had been subjected to extreme coercion and abuse. *See* Martha Davis & Janet Calvo, INS Interim Rule Diminishes Protection for Abused Spouses and Children, 68 Interpreter Releases 665, 668-69 (1991). The alien, nonetheless, retains the burden of proving eligibility for the benefit sought. *See* 8 U.S.C. § 1361.

2. VAWA Confidentiality Provisions

VAWA 1994 also enacted certain confidentiality protections for domestic violence victims. *See* VAWA 1994 § 40508. In 1996, Congress enacted a more extensive scheme prohibiting the release of information relating to a battered spouse's immigration case. *See* IIRIRA § 384 (codified at 8 U.S.C. § 1367). Congress further expanded upon these protections in the 2000 and 2005 VAWA reauthorization acts. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No.106-386, Div B, Title V, § 1513(d) (2000); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, Title VIII, Subtitle B, § 817 (2006). One of Congress's primary goals was to prohibit the disclosure of VAWA immigration application materials to accused batterers, in order to ensure the effectiveness of the application procedures. *See* 151 Cong. Rec. E2605, E2607 (daily ed. Dec. 18, 2005) (statement of Rep. Conyers) (stating that the confidentiality provisions "are designed to ensure that abusers and criminals cannot use the immigration system against their victims," by, for example, "using DHS to obtain information about their victims, including the existence of a VAWA immigration petition, interfering with or undermining their victims' immigration cases, and encouraging immigration

enforcement offices to pursue removal actions against their victims").

These confidentiality provisions, which are triggered when an alien files a VAWA application with either CIS or ICE, prevent the Attorney General or any federal agency from (1) making an "adverse determination of admissibility or deportability of an alien . . . using information furnished solely by . . . a spouse or parent who has battered the alien or subjected the alien to extreme cruelty," or (2) permitting "use by or disclosure to anyone (other than a sworn officer or employee of the Department, or bureau or agency thereof, for legitimate Department, bureau, or agency purposes) of any information which pertains to an alien who is the beneficiary" of a VAWA application—unless and until "the application for relief has been denied and all opportunities for review of the denial have been exhausted." 8 U.S.C. § 1367(a)(1), (2).

The statute provides several limited exceptions under which such information can be disclosed. *Id.* § 1367(b). In particular: (1) the Attorney General "may" permit the disclosure of information "to law enforcement officers to be used solely for a legitimate law enforcement purpose," *id.* § 1367(b)(2); (2) information may be disclosed "if all the battered individuals in the case are adults and they have all waived the restrictions of such subsection," *id.* § 1367(b)(4); (3) the Attorney General "may" disclose information "to Federal, State, and local public and private agencies providing benefits, to be used solely in making determinations of eligibility for benefits," *id.* § 1367(b)(5); and (4) "Government entities adjudicating applications . . . may, with the prior written consent of

the alien involved, communicate with nonprofit, nongovernmental victims' service providers for the sole purpose of assisting victims in obtaining victim services from programs with expertise working with immigrant victims," *id.* § 1367(b)(7).

The statute also provides civil penalties for violations of the confidentiality requirements: "[a]nyone who willfully uses, publishes, or permits information to be disclosed in violation of this section . . . shall be subject to appropriate disciplinary action and subject to a civil money penalty of not more that $5000 for each violation." 8 U.S.C. § 1367(c).

B. Plaintiffs' Amended Complaint Challenging the Constitutionality of the VAWA Provisions

On February 14, 2008, plaintiffs filed suit in the United States District Court for the Southern District of New York. (JA 2). In an amended complaint filed on May 2, 2008, they raised a number of constitutional challenges to the VAWA, and sought declaratory and injunctive relief. (JA 6-33). These challenges are best summarized as follows:

1. Due Process

First, plaintiffs contended that the VAWA provisions present an undue risk of harm to their "reputations, honor and integrity" (JA 22, ¶ 148), infringing upon procedural due process under the Fifth Amendment. Specifically, they contended that the proceedings by which an alien may obtain legal status through VAWA —such as self-petitioning under 8 U.S.C. § 1154(a)(1) and cancellation of removal under 8 U.S.C. § 1229b(b)(2)—are fundamentally unfair because they

permit a U.S. citizen male to be found "guilty" of abuse, while denying him the opportunity to defend himself. (JA 21, ¶ 142). To this end, they challenged: (1) the "any credible evidence" standard of proof in 8 U.S.C. §§ 1154(a)(1)(J) and 1229b(b)(2)(D), which permits decisions based exclusively on "incompetent evidence" submitted by the wife, such as "unproven police complaints" and "temporary orders of protection issued in *ex parte* proceedings" (JA 26, ¶ 179); and (2) the prohibition in 8 U.S.C. § 1367(a)(1)(A) against making an adverse determination on a VAWA application based solely on information from the applicant's husband, thus assertedly preventing the latter from submitting any "exculpatory" evidence. (JA 23-24, ¶¶ 162-63).

Plaintiffs also contended that the VAWA provisions violate plaintiffs' substantive due process rights. For example, they asserted that the "secrecy" provision "abridges class members' rights to freedom of choice in marital decisions by presenting them with a Faustian choice of acceding to the criminal demands of an alien wife to sponsor her for permanent residency or a Star Chamber proceeding by which the defendants find a class member guilty." (JA 22, ¶ 146). They further claimed that these provisions cause the federal government to "invade the privacy interests of class members in matters such as marriage, procreation, contraception, family relationships, and child rearing" (JA 22, ¶ 147).

2. First Amendment Protections

Second, plaintiffs claimed that the VAWA provisions violate their First Amendment rights. In particular, they claimed that the confidentiality requirement in

8 U.S.C. § 1367(a)(2) "infringe[s] class members' First Amendment rights to speak by denying them any opportunity to be heard on their own behalves [sic] in order to counter accusations and prevent findings of 'battery.' " (JA 21, ¶ 143). Further, they contended that because the terms in 8 C.F.R. § 204.2(c)(1)(vi) that set forth what an allegedly battered spouse must show—*i.e.*, battery, extreme cruelty, and overall pattern of violence—"fail to provide a reasonable criteria by which any American man could conform his conduct in order to escape the application of the statutes to him if he chose to exercise his right to bring a foreign wife home," (JA 30, ¶ 213), they (1) are "void for vagueness and overbreadth," (JA 27, ¶¶ 188-204); and (2) "chill a class member's freedom of speech." (JA 28, ¶ 197).

3. Equal Protection

Third, plaintiffs contended that the VAWA provisions deny them equal protection under the Fifth Amendment, based on both national origin and gender. Plaintiffs claim that "on their face," the secrecy provisions of 8 U.S.C. § 1367 "invidiously discriminate" against U.S. citizens, "because the secrecy of the proceedings apply [sic] only to U.S. citizens, but not to their alien wives." (JA 23, ¶¶ 158-159). They further claimed that the "any credible evidence" standard of 8 U.S.C. §§ 1154(a)(1)(J) and 1229b(b)(2)(D), together with 8 U.S.C. §1367(a)(1)'s prohibition on finding a VAWA applicant deportable based solely on information furnished by her spouse, reflect national origin discrimination "by giving an alien's word credibility while discounting the believability of a U.S. citizen's statement." (JA 24, ¶ 169).

Moreover, while conceding that the VAWA provisions are facially gender-neutral, plaintiffs claimed that they violate equal protection as applied, because they "were intended and are overwhelmingly used by alien wives against citizen husbands." (JA 23, ¶ 160). They further asserted that a VAWA proceeding initiated by an alien male "would likely fail because of the favoritism given females by the VAWA Unit at the [CIS] Vermont Service Center." (JA 23, ¶ 161).

4. Bills of Attainder

Finally, Plaintiffs-Appellants claimed that these VAWA provisions amount to "bills of attainder," because they are designed to punish "American men who look overseas for wives," (JA 29, ¶ 205), and moreover, to "punish *all* American men by effectively limiting their freedom of choice to wives in America because marriage to and divorce from an alien wife makes any citizen man vulnerable to false allegations of [abuse] without any legal recourse to disprove those allegations." (*Id.*, ¶ 206) (emphasis added).

C. The Factual Allegations in Plaintiffs' Amended Complaint

In connection with their claims of injury allegedly caused by the VAWA, plaintiffs alleged as follows:

1. Roy Den Hollander

Hollander claimed, "on information and belief," that when he refused to sponsor his Russian citizen wife for an immigrant visa petition, and instead sought divorce, his wife "fabricate[d] an alternative means to permanent residency using the VAWA abused wife

route." (JA 13, ¶¶ 57-67). To this end, she obtained a temporary protection order in family court, based on false accusations of extortion and threats, which order was later dismissed for failure to prosecute. (JA 14, ¶¶ 67-69). Believing that she had been placed in deportation proceedings, Hollander attempted to intervene, by providing DHS with evidence of her criminal and immigration violations. (JA 14-15, ¶¶ 73, 76-78). When he later learned that she was still living and working in the United States, he inferred that in order for her to be "legally working, . . . she must have used or [be] using the VAWA process* to acquire legal permanent residency." (JA 16, ¶¶ 83-84).**

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* In light of 8 U.S.C. § 1367, DHS has neither confirmed nor denied that any of plaintiffs' ex-wives filed any application for relief pursuant to VAWA.

** Hollander's allegations were also the subject of a prior lawsuit, in which he alleged that his ex-wife, her divorce lawyers, several exotic dancing clubs, members of organized crime groups, and a New York City police detective conspired against him, in violation of the Racketeer Influenced and Corrupt Organizations Act. *See Hollander v. Flash Dancers Topless Club*, 340 F. Supp. 2d 453, 455-57 & n.3 (S.D.N.Y. 2004) (PKC), *aff'd*, 2006 WL 267148 (2d Cir. Feb. 3, 2006). His complaint was dismissed for failure to state a claim, because he "failed to adequately allege causation and injury." *Id.* at 462.

2. Sean Moffett

Moffett married a Guatemalan citizen, who subsequently "falsely accused him of assault, had him arrested, and with the aid of the courts forced him out of the house he paid for." (JA 17, ¶¶ 87-89). Moffett's wife later obtained a one-year order of protection (*id.*, ¶¶ 90-91), and when they divorced, she was awarded child support (*id.* ¶ 94). "On information and belief," Moffett's ex-wife "is currently pursuing permanent residency through the VAWA process," (*id.*, ¶ 95), with the assistance of a "feminist advocacy and legal aide group," (*id.*, ¶ 93).

3. Bruce Cardozo

Cardozo married a Ukrainian citizen who later had him arrested and obtained an order of protection, based on false allegations of abuse. (JA 18, ¶¶ 98, 104-05). Cardozo was "unable to change jobs" because of this order, in that "[c]orporations usually check whether applicants have restraining orders filed against them, and if so, usually deny the applicant a job, which is what happened to Mr. Cardozo." (*Id.*, ¶ 108). Cardozo incurred legal fees of over $40,000 from various matters relating to his ex-wife, who ultimately "used VAWA to acquire permanent residency." (*Id.*, ¶¶ 110-11).

4. David Brannon

Brannon sponsored a Russian citizen for a fiancée visa and a temporary green card. (JA 19, ¶¶ 115-117). Divorce proceedings are now pending, and he believes that his wife "has or will shortly pursue permanent residency through [the] VAWA process." (*Id.*, ¶¶ 123, 125). When Brannon first attempted divorce, he was

served with an order of protection based on false allegations of abuse, "ordered out of the house that he had bought with his own money," and rendered "homeless for nine days at a cost of $500." (*Id.*, ¶¶ 119-20). His "financial costs" have since approached $22,000. (*Id.*, ¶ 124).

D. The Relief Sought in the Amended Complaint

In their prayer for relief, plaintiffs sought a declaration that a number of VAWA provisions are unconstitutional, and nominal damages "as vindication for the violation of [their] rights." (JA 31, ¶ 219(a), (d)). In addition, plaintiffs demanded a number of specific injunctions against DHS:

(1) "to put a halt to the application of these statutes and regulations in VAWA proceedings that are currently under way," (JA 31, ¶ 219(b));

(2) "to prevent the future application of these statutes and regulations to future and current class members"—*if* any of them "once again marr[ies] a foreign female," (*id.* ¶ 219(c));

(3) granting them access to their ex-wives' immigration records, (*id.* ¶ 219(e));

(4) granting them each an opportunity to "contest the findings and decisions that hold him responsible for 'battery,'" a "neutral decision maker," and a "right to appeal in the same fashion . . . [as] his alien wife," (*id.* ¶ 219(f));

(5) requiring the "institution of procedures that allow a class member to prevent the disclosure of

information relating to him on grounds the information is false or invades his privacy interests," (*id.* ¶ 219(g));

(6) barring the "execution of affidavits of support against class members pending the contesting of the findings against them," (*id.* ¶ 219(h));

(7) requiring the government to "specifically define the conduct that they label 'battery,' 'extreme cruelty,' and " 'overall pattern of violence,' " (*id.* ¶ 219(i));

(8) requiring that the "VAWA self-petitioning process be removed from the Vermont [CIS] center and de-centralized into the [CIS] district offices," (*id.* § 219 (j)); and

(9) requiring that all "advocacy groups that participate in the VAWA process take affirmative action to expand their client base to include a nearly equal number of foreign men married to U.S. citizen females or have their federal funding stopped," (*id.* ¶ 219(k)).

E. The District Court's Order Granting the Government's Motion to Dismiss

On July 28, 2008, the Government moved to dismiss the amended complaint for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), arguing that plaintiffs lacked standing, and in the alternative, for failure to state a claim upon which relief could be granted pursuant to Fed. R. Civ. P. 12(b)(6). (JA 3). On September 29, 2008, the district court heard oral argument. (*Id.*).

On December 3, 2008, the district court issued an order granting the Government's motion, holding that

plaintiffs lacked standing. (JA 34). In reaching this conclusion, the district court reasoned that plaintiffs had failed to demonstrate an injury-in-fact underlying any of their claims, where (1) they pointed to "no element of the VAWA statutory scheme that result[ed] in any actual detriment to them"; (2) this statutory scheme did "not provide for criminal or civil proceedings against plaintiffs"; and (3) any prospective harm that might result from separate proceedings, such as "fraudulent police complaints, arrests, and temporary restraining orders," could be addressed within those proceedings. (JA 39).

The district court further concluded that plaintiffs had "fail[ed] to allege an injury-in-fact resulting from the disclosure of alleged domestic abuse by their alien spouses in the VAWA Process." (JA 39). Observing that none of plaintiffs had "allege[d] that any disclosure in fact occurred, or that any government entity [had] threatened to authorize such disclosure," the district court reasoned that any alleged injury was "purely speculative." (*Id.*). Finally, the district court concluded that plaintiffs failed to allege injury-in-fact with respect to their First Amendment or bill of attainder claims, because they failed to allege that they had " 'sustained, or [were] immediately in danger of sustaining, a direct injury as the result' " of any executive or legislative action. (JA 40 (quoting *Laird v. Tatum*, 408 U.S. 1, 13 (1972) (internal quotation marks omitted)).

Accordingly, the district court concluded that plaintiffs had "fail[ed] to meet their burden of establishing an injury-in-fact sufficient to support Article III standing," and dismissed the amended complaint on that basis. (JA 40). The district court did

not address the Government's alternative argument that plaintiffs failed to state a claim. (JA 40).

Summary of Argument

The district court's dismissal of the amended complaint for lack of standing should be affirmed. Most fundamentally, the allegations in the amended complaint failed to make even a *prima facie* showing that plaintiffs, who are U.S. citizens, have sustained or are in immediate danger of sustaining any injury-in-fact as a result of VAWA's provisions affording aliens immigration benefits or relief from removal. None of these provisions authorizes any criminal or civil penalty against plaintiffs. Moreover, plaintiffs are not parties to their ex-wives' immigration proceedings; indeed, U.S. citizens have never been considered to have any enforceable right in their alien spouses' immigration proceedings. Thus, because plaintiffs have no direct legal stake in such proceedings, defendants' conduct does not implicate their First or Fifth Amendment rights. *See infra* Point I.D.1.

To the extent plaintiffs claimed injury based on the possibility of future disclosure of their ex-wives' immigration records, this harm was too speculative to confer standing. No plaintiff alleged that his own ex-wife's records had been disclosed, nor alleged any specific facts to suggest that disclosure or publicity was imminent. That the statute governing confidentiality of VAWA records permits limited disclosure to specified groups creates no inherent risk of further disclosure, where nothing in any VAWA provision creates such an incentive. Any subjective risk plaintiffs perceive,

therefore, does not rise to the level of a presently cognizable injury. *See infra* Point I.D.2.

Nor can plaintiffs establish standing by pointing to injuries allegedly experienced in separate proceedings initiated by their ex-wives, because these harms are neither fairly traceable to any conduct by defendants, nor redressable in this action. Even if the Court were to grant each of plaintiffs' sweeping demands for injunctive relief, and to restructure the immigration laws to conform to their specifications, the incentives for aliens to exploit those laws would persist, and any arrests in plaintiffs' records would remain. *See infra* Point I.D.3. Plaintiffs cannot circumvent any of these standing deficiencies simply by claiming to represent a class; none has alleged that he personally sustained the requisite injury-in-fact, and thus none may seek relief in this action. *See infra* Point I.D.4.

Moreover, even if the allegations in the amended complaint were sufficient to establish standing, which they are not, they are insufficient to state a claim upon which relief can be granted, and thus the district court's judgment should be upheld based on Rule 12(b)(6). Plaintiffs failed to state a due process claim, because their allegations failed to establish any liberty interest at stake in defendants' actions with respect to their ex-wives. *See infra* Point II.C.1. Nor did plaintiffs state a First Amendment claim, because they did not allege that defendants restrict their speech through punitive measures, nor through any measures that could reasonably be viewed as coercive. *See infra* Point II.C.2. Plaintiffs also failed to state an equal protection claim based on either gender or nationality. The VAWA provisions are neutral on their face, and to the extent

they provide procedural advantages to allegedly battered alien spouses in immigration proceedings, such advantages do not constitute a detriment to citizens such as plaintiffs, who are not similarly situated. *See infra* Point II.C.3. Finally, there is no merit to plaintiffs' bill of attainder claims, where no provision of the VAWA directly punishes, or could reasonably be construed as intending to punish, U.S. citizen males. *See infra* Point II.C.4. Accordingly, the appeal should be denied.

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT FOR LACK OF SUBJECT-MATTER JURISDICTION BECAUSE PLAINTIFFS LACK STANDING

A. Standard of Review

A district court's determination that it lacks subject matter jurisdiction—including that it lacks standing—is reviewed for clear error for factual findings and *de novo* for legal conclusions. *See Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (citation omitted)); *see also W.R. Huff Asset Mgmt Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 106 (2d Cir. 2008) ("We review *de novo* whether a plaintiff has constitutional standing to sue.").

B. Standards Governing Motions to Dismiss Under Fed. R. Civ. P. 12(b)(1)

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Luckett v. Bure*, 290 F.3d 493, 496 (2d Cir. 2002) (quoting *Makarova*, 201 F.3d at 113). Where jurisdiction is challenged "solely on the pleadings and supporting affidavits," the plaintiff need only make a *prima facie* showing of jurisdiction. *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994). To determine whether a plaintiff has met this burden, the court does not "draw 'argumentative inferences' in the plaintiff's favor." *Id.* (quoting *Atlantic Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd.*, 968 F.2d 196, 198 (2d Cir. 1992)). The Court does, however, construe jurisdictional allegations liberally and take as true uncontroverted factual allegations. *Id.* As the party invoking the court's jurisdiction, however, the plaintiff bears the ultimate burden of establishing that subject-matter jurisdiction exists. *See Makarova*, 201 F.3d at 113 (citing *Malik v. Meissner*, 82 F.3d 560, 562 (2d Cir. 1996)).

C. The Doctrine of Standing and Injury

Article III of the United States Constitution limits the jurisdiction of the federal courts to actual "cases" or "controversies." U.S. Const. Art. III, § 2; *see also Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 471 (1982). This limitation on judicial power requires, *inter alia*, that a litigant have "standing" before he may invoke a court's power. "In essence, the question of standing is whether

the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Thus, the doctrine of standing focuses a court's attention on the party seeking to invoke the court's jurisdiction, and not the underlying issues that the party seeks to raise on the merits. *Flast v. Cohen*, 392 U.S. 83, 99 (1968). If a litigant "lacks standing" to assert a claim, then a court "lacks subject matter jurisdiction to entertain a request for such relief." *Shain v. Ellison*, 356 F.3d 211, 215 (2d Cir. 2004) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 154-55 (1990)). The court, moreover, "is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore*, 495 U.S. at 155-56.

The Supreme Court has established three "irreducible constitutional" elements of standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, the plaintiff must have suffered a concrete and particularized "injury in fact," meaning an injury that is actual or imminent, not conjectural or hypothetical. *See id.* (internal citations and quotation marks omitted). Second, the plaintiff's injury must be fairly traceable to the defendant's action, not caused by a third party not before the court. *See id.* (citations omitted). Third, it must be likely—not merely speculative—that the injury will be redressed by a favorable decision. *See id.* at 561 (citations omitted).

The injury requirement is viewed as the most critical; "[r]equiring an injury is key to assuring that there is an actual dispute between the adverse litigants and that the court is not being asked for an advisory opinion." Erwin Chemerinsky, *Federal Jurisdiction*

§ 2.3.2, at 52-53 (1989). To establish such a dispute, the litigant must establish he has "sustained or is immediately in danger of sustaining some direct injury . . . that [is] both 'real and immediate.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *see also Warth*, 422 U.S. at 501 (injury must be "distinct and palpable"). By contrast, an injury which is hypothetical in nature, or is abstract and based on "speculation and conjecture," *Rizzo v. Goode*, 423 U.S. 362, 372 (1976), is insufficient to support a finding that a litigant has the necessary "personal stake in the outcome of the controversy." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

Moreover, while past injury creates standing to seek damages, a litigant seeking declaratory or injunctive relief "cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future." *Deshawn E. v. Safir*, 156 F.3d 340, 344 (2d Cir. 1998) (citing *Lyons*, 461 U.S. at 105-06). Finally, although the requirements for standing to seek declaratory relief are not as strict as those for injunctive relief, *see Levin v. Harleston*, 966 F.2d 85, 90 (2d Cir. 1992), plaintiffs seeking a declaratory judgment are not exempt from the requirement that they demonstrate a live controversy. *See Golden v. Zwickler*, 394 U.S. 103, 110 (1969) (no federal court has "jurisdiction to pronounce any statute, either or a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudicate the legal rights of litigants in actual controversies").

D. The District Court Properly Dismissed the Complaint for Lack of Subject-Matter Jurisdiction Because No Plaintiff Alleged Injury-in-Fact Sufficient to Establish Standing

1. Plaintiffs Failed to Allege Any Injury-in-Fact Inherent in VAWA's Provisions for Immigration Benefits and Relief

The district court properly dismissed the amended complaint for lack of standing because, as a threshold matter, VAWA's provisions affording aliens immigration benefits or relief from removal simply do not cause any actionable injury to U.S. citizens such as plaintitffs. *See Lujan*, 504 U.S. at 560 (requiring plaintiff to allege "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent"). As the district court recognized (JA 39), the fundamental flaw with plaintiffs' arguments is that they are premised on a nonexistent right of plaintiffs to participate in their ex-wives' civil immigration proceedings. (JA 21, ¶¶ 142-50, 24, ¶¶ 154-68). Plaintiffs simply are not parties to those proceedings,* nor, as the district court further observed,

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* Citizen spouses have never been considered parties to an alien's immigration proceedings, nor to have any enforceable rights in those proceedings. *See Burrafato v. U.S. Dep't of State*, 523 F.2d 554, 555 (2d Cir. 1975) ("no constitutional right of a citizen spouse" is implicated in decision whether or not to deport alien); *Noel v. Chapman*, 508 F.2d 1023, 1027-28 (2d Cir. 1975) (same; citing cases).

does any part of the VAWA "provide for criminal or civil proceedings against plaintiffs." (JA 39). Indeed, the immigration authorities presiding over VAWA proceedings have no authority to take any action against plaintiffs. Thus, as non-parties with no stake in the outcome of such immigration proceedings,* plaintiffs fail to assert any injury directly attributable to defendants. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (rejecting ex-wife's equal protection challenge against state's failure to prosecute her former husband, because "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution"); *contrast Gully v. Nat'l Credit Union Admin. Bd.*, 341 F.3d 155, 161 (2d Cir. 2003) (litigant had standing to challenge administrative board's decision because she was the "*subject* of [its] disciplinary hearing") (emphasis added).

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* Plaintiffs take issue with the district court's characterization of their asserted interest as a "desire to see [their] former spouse[s] deported" (JA 39), claiming that the district court violated Rule 12(b)(1) standards by dismissing the complaint based on an "archaic, stereotypical insinuation about American husbands." Br. at 61. Not only do plaintiffs ignore that certain allegations in their amended complaint tend to support the district court's observation—such as Hollander's allegations that he provided DHS with evidence of his ex-wife's criminal and immigration law violations (JA 14-16, ¶¶ 73, 76-78)—but they still fail to identify what direct, cognizable interest they have at stake in a proceeding that does not concern their own legal rights or obligations.

Plaintiffs are simply incorrect to the extent they claim that their "lack of notice and opportunity to be heard," Br. at 32, in itself, constitutes injury. *See Allen v. Wright*, 468 U.S. at 737, 757 n. 22 (1984) (to allege Fifth Amendment violation, plaintiffs must identify "some concrete interest with respect to which [they were] personally subject to discriminatory treatment"); *cf. Valley Forge*, 454 U.S. at 482 ("[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III") (internal citations omitted). Because plaintiffs have no life, liberty or property interest in their ex-wives' immigration proceedings, there is no potential deprivation against which to measure what process is due.

Essentially, plaintiffs' various challenges to the conduct of VAWA-related immigration proceedings amount to a claim that female alien applicants are simply given too many procedural protections in such proceedings (JA 24-25, ¶¶ 169-76)—a claim which cannot, in itself, constitute injury to plaintiffs. Such protections for aliens exist only because of DHS's power to deport them—a power which has absolutely no bearing on the legal rights of citizens such as plaintiffs. *Cf. Allen*, 468 U.S. at 757-58 & n. 22 (parents of black children in public schools lacked standing to challenge IRS's failure to deny tax-exempt status to racially discriminatory private schools, because such action had no bearing on the education of their own children, who had never attended or been excluded from the latter schools). Thus, absent any direct, personal deprivation at stake for plaintiffs, defendants' treatment of their ex-wives in immigration proceedings does not implicate

plaintiffs' own Fifth or First Amendment rights. *See id.* at 755 (only those persons who are "personally denied equal treatment" by the challenged discriminatory conduct can demonstrate injury sufficient for standing).*

2. Plaintiffs' Asserted Injury Based on the Possibility of Future Disclosures Was Insufficiently "Real and Immediate"

To the extent plaintiffs' purported injury was premised on the possibility of future disclosure of their ex-wives' immigration records, the district court correctly determined that this injury was too speculative to confer standing. (JA 39-40); *see Rizzo*, 423 U.S. at 372 (no standing where threat based on "speculation and conjecture"). Although a threat of future harm may, in some circumstances, be considered sufficiently real and immediate to confer standing, *see Baur v. Veneman*, 352 F.3d 625, 634 (2d Cir. 2003) (accepting this theory in specific context of food and drug safety suits), the difficulty of making such a

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* Plaintiffs' gender-based equal protection claim, moreover, can be summarily rejected. Not only are the VAWA provisions gender-neutral on their face, but plaintiffs—U.S. citizens, who have no need to avail themselves of any provision for relief under VAWA—lack standing to bring an as-applied challenge to the conduct of immigration proceedings under VAWA. While an alien male whose VAWA application was denied might plausibly raise an equal protection challenge alleging disparate treatment of VAWA claims by male aliens, plaintiffs have no stake in the outcome of such an individual's application.

showing increases as the risk becomes more attenuated. *See Nat'l Council of La Raza v. Gonzales*, 468 F. Supp. 2d 429, 438-41 (E.D.N.Y. 2007) (discussing limitations on theory of injury premised on threat of future harm), *aff'd*, 238 Fed. App'x 848 (2d Cir. 2008).

Here, the link between plaintiffs' alleged injury and VAWA was too attenuated to render the risk a present injury. *See id.* at 443 (injury claim was too speculative where it was premised on an " 'accumulation of inferences' " based on government maintenance of criminal database) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 497(1974)); *see also Lee v. Oregon*, 107 F.3d 1382 (9th Cir. 1997) (terminally ill patient lacked standing to challenge assisted suicide law where the asserted injury—the possibility that she would commit suicide against her true intent—rested on too many contingencies and third-party actions). Plaintiffs' asserted due process injury—*i.e.*, risk of harm to reputation, resulting from third- or fourth-party disclosure of records (JA 22, ¶ 154)—rested on a number of contingencies that may never occur, while their asserted free speech restriction—*i.e.*, fear of making certain statements to an alien wife, because she may later use his statements as evidence of abuse in a VAWA proceeding, the record of which could later harm the husband's reputation, if publicized (JA 28, ¶¶ 196-98)—rested on even more.* The district court properly

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* Another fundamental flaw with these theories is that none of plaintiffs alleges he is currently in a marriage in which his speech or "freedom of choice in marital decisions" (JA 22, ¶ 146) is restricted. To the extent plaintiffs claim that the VAWA provisions act as

declined to recognize these contingencies as present injuries.

No plaintiff alleged that his own ex-wife's records had been released. *See La Raza*, 468 F. Supp. 2d at 444 (finding no injury, in part because plaintiffs challenging Government's maintenance of their immigration data failed to "allege[] a single instance in which the [Government] exchanged that information with any unauthorized official or entity"). Their asserted injury was based entirely on a series of assumptions about what might occur should any record be released in the future. (JA 8-9, ¶¶ 21- 24; 22-23, ¶¶ 151-57). Courts, however, have consistently declined to find injury sufficient to confer standing where the challenged government program involves only the collection and maintenance of personal data, without more. *See Laird*, 408 U.S. at 11-13 (collecting cases); *see also id.* at 14 (finding no injury based solely on existence and operation of Army's intelligence-gathering and distribution system); *MacArthur Foundation v. FBI*, 102 F.3d 600, 606 (D.D.C. 1996) (no standing based solely on FBI's maintenance of a file on foundation, where foundation pointed to no facts suggesting how

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a "deterrent to any American man marrying a foreign female, which has the effect of confining him to the pool of feminists and female allies of the feminists in America—an infringement of his freedom of choice in marital affairs" (JA 30, ¶ 214)—none alleges that he has any immediate plans to marry a particular foreign female, which he would carry out, but for the VAWA. *Cf. Lujan*, 504 U.S. at 564 (injury not "imminent"if premised on vague " 'some day' intentions").

that file might be made public); *La Raza*, 468 F. Supp. 2d at 441-42 (no standing where plaintiffs whose names were entered into criminal database pointed to no circumstances suggesting they would be targeted for arrest as result); *New Alliance Party v. FBI*, 858 F. Supp. 425, 432 (S.D.N.Y. 1994) (members of political party had no standing to make First Amendment challenge to FBI's investigation of their activities where their asserted injury was based "solely on hypothetical speculation about how the information gathered by the FBI might be used against the party in the future").

By contrast, cases holding that the requisite injury does exist generally involve a statute or programthat makes the risk of disclosure explicit, or mandatory upon fulfilment of specified conditions. *See Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123,128-29 (1951) (charitable organizations designated as "Communist" by the Attorney General had standing to challenge those designations where executive order directed him to distribute list of so-designated organizations to all federal departments and agencies, and distribution "resulted in nationwide publicity"); *Gully*, 341 F.3d at 160 n.1, 162 (plaintiff established sufficient threat of harm to reputation where administrative board's order concluding she had engaged in misconduct was posted on its website); *Valmonte v. Bane*, 18 F.3d 992, 999 (2d Cir. 1994) (plaintiff had adequately pled injury where New York statute *required* disclosure of records naming individuals accused of child abuse to specified prospective employers).

Plaintiffs' claims here fall in the speculative category, because plaintiffs can point to no VAWA

provision which, in itself, creates a substantial likelihood of disclosure. *See Laird*, 408 U.S. at 11. Determinations on individual VAWA applications are not published. No VAWA provision mandates disclosure in any particular circumstance. At most, certain subsections of 8 U.S.C. § 1367 permit disclosure under limited circumstances. Specifically, subsections 1367(b)(2), (4), (5) and (7) permit information regarding a VAWA application to be disclosed to law enforcement officials, to "Federal, State, and local public agencies providing benefits" to the alien wives, and to "non-profit, nongovernmental victims' service providers."

The only allegations in the amended complaint suggesting that any of these exceptions might apply were that Moffett's and Brannon's ex-wives were receiving assistance from non-profit service providers. (JA 17, ¶ 93; 18, ¶ 122). The applicable subsection, however, permits disclosure to such organizations "for the sole purpose of assisting victims in obtaining victim services," and moreover, provides that such organizations are themselves "bound by the provisions" of the statute. 8 U.S.C. § 1367(b)(7). Thus, Moffett and Brannon can hardly claim that the organizations assisting their ex-wives are likely to disclose information when the statute not only bars them from doing so, but also subjects them to sanctions and monetary penalties if they make such disclosures. *See* 8 U.S.C. § 1367(c) (providing that anyone who discloses or permits disclosure of information relating to a VAWA applicant "shall" be subject to disciplinary and monetary sanctions). Finally, to the extent plaintiffs claim that their ex-wives themselves may publicize the information, *after* receiving the immigration benefits they sought under VAWA, they fail to point to any

circumstances or incentives that would create an immediate risk of such disclosure—much less any incentive provided by VAWA.

Accordingly, plaintiffs' asserted injury amounts to little more than their subjective fear that these records may be used in the future, *see* JA 9, ¶ 24 ("[a]nticipation of this future harm is in itself a present and continuing harm")—which cannot, without more, confer standing. *See Laird*, 408 U.S. at 13-14 ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm"); *La Raza*, 468 F. Supp. 2d at 441 (no standing based "solely upon fear"); *see also id.* at 438 ("'were all purely speculative 'increased risks' deemed injurious, the entire requirement of 'actual injury' would be rendered moot, because all hypothesized, non-imminent injuries could be exalted as 'increased risk of future injury'"). Plaintiffs' mere "speculation that at some point in the future some unauthorized party may access" the information from their ex-wives' records relating to plaintiffs "does not satisfy the requirement that plaintiffs identify an 'actual or imminent,' 'concrete and particularized' injury." *La Raza*, 468 F. Supp. 2d at 438.

3. Plaintiffs' Alleged Injuries From Other Proceedings Were Neither Fairly Traceable to VAWA nor Redressable in This Action

Finally, the district court correctly concluded that plaintiffs failed to establish injury-in-fact by referring to injuries that they allegedly experienced in separate proceedings initiated by their ex-wives. (JA 39). Although the individual plaintiffs each made

allegations of specific harm inflicted by third parties, these injuries do not suffice to confer standing, because they are neither fairly traceable to any conduct by defendants, nor redressable by this Court. *See Allen*, 468 U.S. at 757-58 (alleged injury not fairly traceable to government conduct where "line of causation" was "attenuated at best"); *see also New Alliance Party*, 858 F. Supp. at 433 (plaintiffs failed to establish traceability where "any stigmatization [they] suffer[ed] could be traced to . . . statements and publications made by private individuals and organizations," rather that to the FBI investigation that plaintiffs challenged). A litigant is not precluded from establishing standing where the injury is attributable to a third party not before the court; however, the " 'indirectness of the injury . . . may make it substantially more difficult to meet the minimum requirements of Art. III.' " *Allen*, 468 U.S. at 758 (quoting *Warth*, 422 U.S. at 505); *see also Lujan*, 594 U.S. at 562 (same). Plaintiffs have not met these requirements here.

For example, each plaintiff alleged that he was arrested, or had a temporary order of protection entered against him in a state court, based on false charges of abuse. (JA 13-19, ¶¶ 67-69, 89, 104-05, 120). In addition, Cardozo was allegedly denied a job, he surmises as the result of a background check. (JA 18, ¶ 108). Plaintiffs offered no allegations to suggest, however, that any criminal charge was entered, or background check denied, based on information obtained from a VAWA proceeding or record.*

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* The connection between VAWA and plaintiffs' other allegations of harm—including that Moffett's wife

Indeed, to the extent they complained of unjustified orders of protection or criminal charges, plaintiffs' true grievance is not with the VAWA so much as with their ex-wives, or the state law procedures that their ex-wives allegedly employed. (JA 7, ¶11). The asserted link between the VAWA and those proceedings is attenuated: plaintiffs theorize that the existence of the VAWA creates incentives for alien females (fraudulently) to pursue criminal charges and restraining orders, thus causing state courts (improperly or unconstitutionally) to issue them, with such records never being expunged, such that the U.S. citizen husbands may have difficulty passing background checks and thus obtaining future employment. *See* Br. at 26-29. Not only are these links highly tenuous, but, as the district court also observed (JA 39), redress is both available and more appropriately sought within those proceedings where, unlike in VAWA immigration proceedings, plaintiffs are parties. *See La Raza*, 468 F. Supp. 2d at 439 (plaintiffs lacked standing to challenge statute requiring the placement of their immigration data into database, in part because if such listings resulted in arrest, plaintiffs would "have due process opportunities to challenge the basis of their arrest"); *see also San Diego*

"looted his bank account" (JA 17, ¶ 90), that child support was awarded to Moffett's wife (JA 17, ¶ 94), that Brannon has been "ordered out" of his own house (JA 19, ¶ 120), and that plaintiffs have incurred substantial legal fees, apparently in connection with their divorce proceedings (JA 18, ¶ 111, JA 19, ¶ 124)—is even more tenuous, and in any event, is not explained in the amended complaint.

County Gun Rights Comm. v. Reno, 98 F.3d 1121, 1131 & n.3 (9th Cir. 1996) (plaintiff lacked standing to challenge federal Crime Control Act on the basis that it would force him to comply with allegedly unconstitutional city ordinances, in part because his proper remedy was "directly to challenge the ordinances by a suit against the City").

Thus, whereas plaintiffs have direct opportunities to defend themselves if faced with criminal charges, to seek to expunge criminal records, and to independently challenge the issuance of an *ex parte* restraining order or the denial of a job,* they cannot obtain meaningful redress in this action. In their prayer for relief, plaintiffs sought a broad restructuring of DHS's procedures for adjudicating VAWA applications, essentially to create a role for themselves in such adjudications. (JA 31, ¶ 219). They fail to demonstrate, however, how the institution of these supposedly fairer procedures would remove the incentive for their alien wives to pursue the arrests and restraining orders that would later serve as evidence in a VAWA proceeding, in the first instance. Even if a citizen husband had every

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* While plaintiffs asserted in the amended complaint that they would "most likely have no cause of action to redress the harm done" if one of their ex-wives disclosed information from a VAWA proceeding (JA 22, ¶ 154), and may have difficulty bringing other actions against their ex-wives (JA 23, ¶¶ 155-57), none alleges that he has made any such attempt. More importantly, plaintiffs made *no* allegations regarding the insufficiency of procedures to redress harms resulting from state law proceedings.

opportunity to challenge his wife's allegations in immigration court, and even if DHS then denied the wife's VAWA application, the record of the husband's arrests and restraining orders would remain in the state's criminal database. Plaintiffs argue on appeal that their chances of preventing the entry of charges, or of expunging their records, would increase if they had access to their ex-wives' VAWA records, which would expose the ex-wives' "motive to lie in order to win permanent residency through VAWA." Br. at 29. This assertion is entirely speculative, however, and is not supported by any allegation that plaintiffs tried to impeach their ex-wives in any state proceeding but were prevented from doing so by VAWA.* Thus, many of the mechanisms for harming the husband's reputation exist and operate independently from the VAWA, and even if the Court were to grant all the relief plaintiffs sought, their grievances would not be redressed. *See Lujan*, 504 U.S. at 568-69 (plaintiffs failed to demonstrate redressability where order from Court to Secretary of the Interior to revise regulation where that regulation was not necessarily binding on parties more directly responsible for harm).

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* Although plaintiffs claim in their brief that the amended complaint contained such an allegation with respect to Moffett, Br. at 29, the actual pleading alleges only that Moffett was falsely accused and arrested, and mentions no attempt to impeach his ex-wife's credibility. (JA 17, ¶ 89).

4. Plaintiffs Are Not Exempt From Standing Considerations Simply Because They Purport to Represent a Class

Finally, plaintiffs cannot circumvent these fundamental standing requirements by claiming to represent a class; none has established the requisite redressable injury regardless of how they style their complaint. *See O'Shea*, 414 U.S. at 494 ("if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.") (citations omitted); *see also Doe v. Blum*, 729 F.2d 186, 190 n.4 (2d Cir. 1984) (satisfaction of injury requirement must be determined with respect to named plaintiffs). Here, none of the named plaintiffs has pointed to any legally cognizable injury to himself, nor have plaintiffs pointed to any instance of a U.S. citizen male sustaining any of the injuries about which they speculate in the amended complaint. That such a hypothetical individual may exist does not transform plaintiffs' grievances with VAWA into a justiciable case or controversy. *Warth*, 422 U.S. at 502 (in purported class action, plaintiffs must allege that "they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent").

POINT II

IN THE ALTERNATIVE, THE DISMISSAL OF THE AMENDED COMPLAINT SHOULD BE AFFIRMED BASED ON PLAINTIFFS' FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. The Judgment May Be Affirmed for Any Reason Supported by the Record

Even if the Court were to find that plaintiffs had standing to assert any of their claims—which they do not—the district court's dismissal of the complaint should still be affirmed on the basis of Fed. R. Civ. P. 12(b)(6), because the amended complaint fails to state a claim upon which relief can be granted. It is well established that the Court "need not affirm for the reasons expressed by the district court but may affirm on any ground supported by the record." *McNally Wellman Co. v. New York State Elec. & Gas Corp.*, 63 F.3d 1188, 1194 (2d Cir. 1995) (citing *Revak v. SEC Realty Corp.*, 18 F.3d 81, 83 (2d Cir. 1994)).

B. Standards Governing Motions to Dismiss Under Fed. R. Civ. P. 12(b)(6)

Dismissal under Rule 12(b)(6) is appropriate if a plaintiff fails to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). On a motion to dismiss pursuant to Rule 12(b)(6), the Court accepts the factual allegations in the complaint as true and draws all reasonable inferences in favor of the plaintiff. *See Johnson v. Rowley*, 569 F.2d 40, 43 (2d Cir. 2009). As the Supreme Court clarified, the factual allegations must, nevertheless, be sufficient to render a plaintiff's entitlement to relief plausible, rather than merely

speculative. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007) ("Factual allegations must be enough to raise the right to relief above the speculative level"); *see also id.* at 557-60 (overruling the former "no set of facts" standard for 12(b)(6) motions and requiring factual allegations justifying plausible basis for entitlement to relief).* As the Supreme Court further clarified in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009), this new, stricter standard applies to "all civil actions."

As *Twombly* and *Iqbal* make clear, conclusory allegations are not entitled to a presumption of truth, *Iqbal*, 129 S. Ct. at 1949-50, nor are legal conclusions, *id.* at 1949; *see also L'Europeenne de Banque v. La Republica de Venezuela*, 700 F. Supp. 114, 122 (S.D.N.Y. 1988) (legal conclusions, deductions, or opinions couched as factual allegations are not given a presumption of truthfulness). In addition, pursuant to *Iqbal*, a court must also determine whether the factual allegations "plausibly give rise to an entitlement to relief." 129 S. Ct. at 1950. Thus, even if the allegations in the complaint are "consistent with" the conclusion that the defendant violated the law, dismissal is appropriate if the defendant's action is "more likely explained by lawful . . . behavior." *Id.*

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* To the extent plaintiffs claim error in the district court's citation of the former standard (Br. at 24; JA 38), this argument is plainly meritless. Even assuming the district court did apply this outdated standard, plaintiffs can hardly establish prejudice from this alleged error, where the former standard was more generous to plaintiffs, and thus its application could only have benefitted plaintiffs.

C. Plaintiffs Failed to State Any Plausible Claim for Relief

The dismissal of plaintiffs' amended complaint should be affirmed because the complaint fails to state any "plausible claim for relief." *Id.* at 1950 ("only a complaint that states a plausible claim for relief survives a motion to dismiss").

1. Due Process

Plaintiffs' due process claim fails as a matter of law because the allegations in the complaint fail to establish that defendants' actions deprive them of any liberty interest. *See Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972) (to claim a due process violation under the Fifth Amendment, plaintiff must first demonstrate that he has a constitutionally protected property or liberty interest at stake); *Valmonte*, 18 F.3d at 999 (same). Such interests "are not created by the Constitution," but rather "are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 577. While plaintiffs appear to claim that the threat to their reputations constitutes the deprivation of a liberty interest, Br. at 39, the Supreme Court has made clear that "loss of reputation must be coupled with some other tangible element in order to rise to the level of a protectible liberty interest." *Valmonte*, 18 F.3d at 999 (citing *Paul v. Davis*, 424 U.S. 693, 701 (1976)); *see also id.* at 1001 ("defamation is simply not enough to

support a cognizable liberty interest," nor are the "normal repercussions of a poor reputation").

Here, where plaintiffs fail to allege any facts suggesting that the government's maintenance of records gives rise to any specific risk of disclosure, nor places any certain burden on their future prospects for employment or other tangible benefit, they cannot show that any liberty interest is implicated. *See Paul*, 424 U.S. at 712 (where plaintiff could not show "denial of any right vouchsafed to him by the [Government]," he failed to allege deprivation of any liberty or property interest); *compare Valmonte*, 18 F.3d at 1001 (liberty interest implicated because statute's requirement to report crime to employers constituted tangible burden on plaintiff's employment prospects). The allegations in the amended complaint failed to establish a plausible claim that any of plaintiffs were denied any tangible benefits solely as a result of their ex-wives' VAWA applications. *See Iqbal*, 129 S. Ct. at 1950.

2. First Amendment

Likewise, plaintiffs failed to state a First Amendment claim, because the allegations in the amended complaint failed to establish a plausible claim that defendants have restricted their speech through any "threat, coercion or intimidation." *X-Men Security, Inc. v. Pataki*, 196 F.3d 56, 70 (2d Cir. 1999) (internal citations omitted).

The VAWA provisions neither prevent plaintiffs from speaking nor compel them to speak. To the extent plaintiffs complain that they are effectively barred from testifying or submitting evidence in their ex-wives' immigration proceedings (JA 24, ¶¶ 165, 167), their

argument essentially is that the evidentiary rules of these administrative proceedings unfairly restrict their speech. Yet they cite no authority for the proposition that there is a First Amendment right to speak in a particular legal proceeding concerning another individual. Moreover, the only statutory provision arguably restricting their "speech" is limited in scope: 8 U.S.C. § 1367(a)(1) provides only that DHS cannot make an "adverse determination of admissibility or deportability of an alien" based on information "furnished *solely*" by the allegedly abusive spouse (emphasis added). That defendants will not rely solely on information conveyed by any plaintiff, to make a determination having no bearing on that plaintiff's legal rights, cannot plausibly be considered a punitive or coercive limitation on plaintiffs' free speech rights.

To the extent plaintiffs claim that their speech is chilled by defendants' use of "vague" and "overbroad" terms to define which aliens are eligible to seek relief under VAWA, (JA 27-29, ¶¶ 188-204); *see* 8 C.F.R. § 204.2(c)(1)(vi) (providing that alien is eligible if during marriage to U.S. citizen she is subjected to "battery," "extreme cruelty," or an "overall pattern of violence"), their allegations again fail to establish any action by defendants that could reasonably be considered coercive. Defendants have no authority to take any direct action against plaintiffs as a result of any allegations by their ex-wives, and plaintiffs make no allegations of any other authority taking action based on such allegations. Moreover, if, as plaintiffs allege, their ex-wives will fabricate allegations of abuse in any event (JA 8, ¶¶ 15-16), then any chill that plaintiffs perceive cannot reasonably be considered

attributable to defendants' allegedly overbroad standards.

3. Equal Protection

Nor have plaintiffs stated an equal protection claim based on either gender or nationality. The statutory provisions are gender-neutral on their face, *see* 61 Fed. Reg. at 13062 ("abused spouses and children of either sex may benefit"), and apply to aliens abused by LPR aliens as well as U.S. citizens, *see* 8 U.S.C. § 1154(a)(1) (provisions apply to alien abused by either U.S. citizen or LPR spouse or parent). Moreover, plaintiffs' national-origin discrimination claim is even more dubious in the context of proceedings where only the alien is applying for a benefit, and the statutes provide neither a benefit nor a detriment for the spouse. *See Jankowski-Burczyk v. INS*, 291 F.3d 172, 176-78 (2d Cir. 2002) (it is well established that " 'the government can treat people differently if they are not similarly situated' ") (citing *Able v. United States*, 155 F.3d 628, 631 (2d Cir. 1998). Plaintiffs do not allege that they are similarly situated to their alien ex-wives in any meaningful way. Thus, their analogy to *Northeastern Fla. Assoc. Gen. Contracts Am. v. Jacksonville*, 508 U.S. 656, 666 (1993)—in which non-minority-owned businesses alleged an equal protection violation by pointing to their denial of an opportunity to "compete on an equal footing" with minority-owned businesses in contract-bidding process, *see* Br. at 53-54—is inapposite. For the reasons discussed in Section I.D.1, *supra*, plaintiffs are not, in any sense, "competing" with their alien ex-wives in the latter's immigration proceedings for any particular benefit or outcome, nor are they owed any treatment by

defendants of which they could plausibly claim they have been denied.

4. Bills of Attainder

Finally, plaintiffs fail to state a plausible claim that the VAWA provisions amount to bills of attainder against "American men who look overseas for wives." (JA 29, ¶ 205); *see also id.*, ¶ 26 (provisions "also punish all American men by effectively limiting their freedom of choice to wives in America"). A bill of attainder is a "law that legislatively determines guilt and *inflicts punishment* upon an identifiable individual without the provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977) (emphasis added); *see also Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984) (the "proscription against bills of attainder reaches only statutes that inflict punishment on the specified individual or group"). To determine whether a law constitutes a bill of attainder, courts consider whether: (1) the challenged statute falls within the historical meaning of legislative punishment; (2) the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and (3) the "legislative record evinces an intent to punish." *Nixon*, 433 U.S. at 473, 475-76. The VAWA immigration provisions cannot be considered punitive of men under any of these inquiries.

As discussed *supra*, the VAWA does not provide for any criminal or civil penalty against plaintiffs, and any subjective burdens they might perceive result only from legislation designed to "limit the ability of an abusive

citizen or [LPR] to use the immigration laws to further violence against a spouse or child in the United States." *See* 61 Fed. Reg. at 13062. Even accepting plaintiffs' assertions that the VAWA was in fact enacted to "allow allegedly abused women a fast-track to permanent residency,"(JA 29, ¶ 207), or to "placate the feminist lobby," (JA 30, ¶ 211), they point to nothing in the legislative history suggesting an intent to "punish[] the American man by violating his rights," (*id.*, ¶ 212). Absent such allegations, plaintiffs failed to state a plausible claim for relief. *See Iqbal*, 129 S. Ct. at 1950.

CONCLUSION

The appeal should be denied.

Dated: New York, New York
August 28, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 11,355 words in this brief.

PREET BHARARA,
United States Attorney for the Southern District of New York

By: NATASHA OELTJEN,
Assistant United States Attorney

ADDENDUM

Statutes

8 U.S.C. § 1154. Procedure for granting immigrant status.

(a) Petitioning procedure

(1)(A)(i) Except as provided in clause (viii), any citizen of the United States claiming that an alien is entitled to classification by reason of a relationship described in paragraph (1), (3), or (4)of section 1153(a) of this title or to an immediate relative status under section 1151(b)(2)(A)(i) of this title may file a petition with the Attorney General for such classification.

(ii) An alien spouse described in the second sentence of section 1151(b)(2)(A)(i) of this title also may file a petition with the Attorney General under this subparagraph for classification of the alien (and the alien's children) under such section.

(iii)(I) An alien who is described in subclause (II) may file a petition with the Attorney General under this clause for classification of the alien (and any child of the alien) if the alien demonstrates to the Attorney General that—

(aa) the marriage or the intent to marry the United States citizen was entered into In good faith by the alien; and

(bb) during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been

battered or has been the subject of extreme cruelty perpetrated by the alien's spouse or intended spouse.

(II) For purposes of subclause (I), an alien described in this subclause is an alien—

(aa)(AA) who is the spouse of a citizen of the United States;

(BB) who believed that he or she had married a citizen of the United States and with whom a marriage ceremony was actually performed and who otherwise meets any applicable requirements under this chapter to establish the existence of and bona fides of a marriage, but whose marriage is not legitimate solely because of the bigamy of such citizen of the United States; or
(CC) who was a bona fide spouse of a United States citizen within the past 2 years and—
(aaa) whose spouse died within the past 2 years;
(bbb) whose spouse lost or renounced citizenship status within the past 2 years related to an incident of domestic violence; or
(ccc) who demonstrates a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen spouse;
(bb) who is a person of good moral character;
(cc) who is eligible to be classified as an immediate relative under section 1151(b)(2)(A)(i) of this title or who would have been so classified but for the bigamy of the citizen of the United States that the alien

intended to marry; and
(dd) who has resided with the alien's spouse or intended spouse.

(iv) An alien who is the child of a citizen of the United States, or who was a child of a United States citizen parent who within the past 2 years lost or renounced citizenship status related to an incident of domestic violence, and who is a person of good moral character, who is eligible to be classified as an immediate relative under section 1151(b)(2)(A)(i) of this title, and who resides, or has resided in the past, with the citizen parent may file a petition with the Attorney General under this subparagraph for classification of the alien (and any child of the alien) under such section if the alien demonstrates to the Attorney General that the alien has been battered by or has been the subject of extreme cruelty perpetrated by the alien's citizen parent. For purposes of this clause, residence includes any period of visitation.

(v) An alien who–

(I) is the spouse, intended spouse, or child living abroad of a citizen who—

(aa) is an employee of the United States Government;

(bb) is a member of the uniformed services (as defined in section 101(a) of Title 10); or
(cc) has subjected the alien or the alien's child to battery or extreme cruelty in the United States; and
(II) is eligible to file a petition under clause (iii) or (iv), shall file such petition with the

Attorney General under the procedures that apply to self-petitioners under clause (iii) or (iv), as applicable.

(vi) For the purposes of any petition filed under clause (iii) or (iv), the denaturalization, loss or renunciation of citizenship, death of the abuser, divorce, or changes to the abuser's citizenship status after filing of the petition shall not adversely affect the approval of the petition, and for approved petitions shall not preclude the classification of the eligible self-petitioning spouse or child as an immediate relative or affect the alien's ability to adjust status under subsections (a) and (c) of section 1255 of this title or obtain status as a lawful permanent resident based on the approved self- petition under such clauses.

(vii) An alien may file a petition with the Secretary of Homeland Security under this subparagraph for classification of the alien under section 1151(b)(2)(a)(i) of this title if the alien—
(I) is the parent of a citizen of the United States or was a parent of a citizen of the United States who, within the past 2 years, lost or renounced citizenship status related to an incident of domestic violence or died;
(II) is a person of good moral character;
(III) is eligible to be classified as an immediate relative under section 1151(b)(2)(A)(i) of this title;
(IV) resides, or has resided, with the citizen daughter or son; and
(V) demonstrates that the alien has been battered or subject to extreme cruelty by the citizen daughter or son.

(viii)(I) Clause (i) shall not apply to a citizen of the United States who has been convicted of a specified offense against a minor, unless the Secretary of Homeland Security, in the Secretary's sole and unreviewable discretion, determines that the citizen poses no risk to the alien with respect to whom a petition described in clause (i) is filed.
(II) For purposes of subclause (I), the term "specified offense against a minor" is defined as in section 16911 of Title 42.
(B)(i)(I) Except as provided in subclause (II), any alien lawfully admitted for permanent residence claiming that an alien is entitled to a classification by reason of the relationship described in section 1153(a)(2) of this title may file a petition with the Attorney General for such classification.(I) Subclause (I) shall not apply in the case of an alien lawfully admitted for permanent residence who has been convicted of a specified offense against a minor (as defined in subparagraph (A)(viii)(II)), unless the Secretary of Homeland Security, in the Secretary's sole and unreviewable discretion, determines that such person poses no risk to the alien with respect to whom a petition described in subclause (I) is filed.
(ii)(I) An alien who is described in subclause (II) may file a petition with the Attorney General under this clause for classification of the alien (and any child of the alien) if such a child has not been classified under clause (iii) of section 1153(a)(2)(A) of this title and if the alien demonstrates to the Attorney General that—
(aa) the marriage or the intent to marry the lawful permanent resident was entered into in good faith

by the alien; and
(bb) during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse or intended spouse.
(II) For purposes of subclause (I), an alien described in this paragraph is an alien—
(aa)(AA) who is the spouse of a lawful permanent resident of the United States; or
(BB) who believed that he or she had married a lawful permanent resident of the United States and with whom a marriage ceremony was actually performed and who otherwise meets any applicable requirements under this chapter to establish the existence of and bona fides of a marriage, but whose marriage is not legitimate solely because of the bigamy of such lawful permanent resident of the United States; or
(CC) who was a bona fide spouse of a lawful permanent resident within the past 2 years and—
(aaa) whose spouse lost status within the past 2 years due to an incident of domestic violence; or
(bbb) who demonstrates a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the lawful permanent resident spouse;
(bb) who is a person of good moral character;
(cc) who is eligible to be classified as a spouse of an alien lawfully admitted for permanent residence under section 1153(a)(2)(A) of this title or who would have been so classified but for the bigamy of the lawful permanent resident of the United States that the alien intended to marry;

and
(dd) who has resided with the alien's spouse or intended spouse.
(iii) An alien who is the child of an alien lawfully admitted for permanent residence, or who was the child of a lawful permanent resident who within the past 2 years lost lawful permanent resident status due to an incident of domestic violence, and who is a person of good moral character, who is eligible for classification under section 1153(a)(2)(A) of this title, and who resides, or has resided in the past, with the alien's permanent resident alien parent may file a petition with the Attorney General under this subparagraph for classification of the alien (and any child of the alien) under such section if the alien demonstrates to the Attorney General that the alien has been battered by or has been the subject of extreme cruelty perpetrated by the alien's permanent resident parent.
(iv) An alien who—
(I) is the spouse, intended spouse, or child living abroad of a lawful permanent resident who—
(aa) is an employee of the United States Government;
(bb) is a member of the uniformed services (as defined in section 101(a) of Title 10); or
(cc) has subjected the alien or the alien's child to battery or extreme cruelty in the United States; and
(II) is eligible to file a petition under clause (ii) or (iii), shall file such petition with the Attorney General under the procedures that apply to self-petitioners under clause (ii) or (iii), as applicable.

(v)(I) For the purposes of any petition filed or approved under clause (ii) or (iii), divorce, or the loss of lawful permanent resident status by a spouse or parent after the filing of a petition under that clause shall not adversely affect approval of the petition, and, for an approved petition, shall not affect the alien's ability to adjust status under subsections (a) and (c) of section 1255 of this title or obtain status as a lawful permanent resident based on an approved self-petition under clause (ii) or (iii).
(II) Upon the lawful permanent resident spouse or parent becoming or establishing the existence of United States citizenship through naturalization, acquisition of citizenship, or other means, any petition filed with the Immigration and Naturalization Service and pending or approved under clause (ii) or (iii) on behalf of an alien who has been battered or subjected to extreme cruelty shall be deemed reclassified as a petition filed under subparagraph (A) even if the acquisition of citizenship occurs after divorce or termination of parental rights.
(C) Notwithstanding section 1101(f) of this title, an act or conviction that is waivable with respect to the petitioner for purposes of a determination of the petitioner's admissibility under section 1182(a) of this title or deportability under section 1227(a) of this title shall not bar the Attorney General from finding the petitioner to be of good moral character under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to

extreme cruelty.

(D)(i)(I) Any child who attains 21 years of age who has filed a petition under clause (iv) of subsection (a)(1)(A) or (a)(1)(B)(iii) of this section that was filed or approved before the date on which the child attained 21 years of age shall be considered (if the child has not been admitted or approved for lawful permanent residence by the date the child attained 21 years of age) a petitioner for preference status under paragraph (1), (2), or (3) of section 1153(a) of this title, whichever paragraph is applicable, with the same priority date assigned to the self-petition filed under clause (iv) of subsection (a)(1)(A) or (a)(1)(B)(iii) of this section. No new petition shall be required to be filed.

(II) Any individual described in subclause (I) is eligible for deferred action and work authorization.

(III) Any derivative child who attains 21 years of age who is included in a petition described in clause (ii) that was filed or approved before the date on which the child attained 21 years of age shall be considered (if the child has not been admitted or approved for lawful permanent residence by the date the child attained 21 years of age) a VAWA self-petitioner with the same priority date as that assigned to the petitioner in any petition described in clause (ii). No new petition shall be required to be filed.

(IV) Any individual described in subclause (III) and any derivative child of a petition described in clause (ii) is eligible for deferred action and work authorization.

(ii) The petition referred to in clause (i)(III) is a petition filed by an alien under subparagraph (A)(iii), (A)(iv), (B)(ii) or (B)(iii) in which the child is included as a derivative beneficiary.
(iii) Nothing in the amendments made by the Child Status Protection Act shall be construed to limit or deny any right or benefit provided under this subparagraph.
(iv) Any alien who benefits from this subparagraph may adjust status in accordance with subsections (a) and (c) of section 1255 of this title as an alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii).
(v) For purposes of this paragraph, an individual who is not less than 21 years of age, who qualified to file a petition under subparagraph (A)(iv) or (B)(iii) as of the day before the date on which the individual attained 21 years of age, and who did not file such a petition before such day, shall be treated as having filed a petition under such subparagraph as of such day if a petition is filed for the status described in such subparagraph before the individual attains 25 years of age and the individual shows that the abuse was at least one central reason for the filing delay. Clauses (i) through (iv) of this subparagraph shall apply to an individual described in this clause in the same manner as an individual filing a petition under subparagraph (A)(iv) or (B)(iii).
(J) In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) or clause (ii) or (iii) of subparagraph (B), or in making determinations under subparagraphs (C) and (D), the Attorney General shall consider any credible evidence relevant to the petition. The determination of what evidence is

credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

8 U.S.C. § 1229(b). Cancellation of removal; adjustment of status.

* * *

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
(B) has been a person of good moral character during such period;
(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and
(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) Special rule for battered spouse or child

(A) Authority : The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that—

(i)(I) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen (or is the parent of a child of a United States citizen and the child has been battered or subjected to extreme cruelty by such citizen parent);
(II) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a lawful permanent resident (or is the parent of a child of an alien who is or was a lawful permanent resident and the child has been battered or subjected to extreme cruelty by such permanent resident parent); or
(III) the alien has been battered or subjected to extreme cruelty by a United States citizen or lawful permanent resident whom the alien intended to marry, but whose marriage is not legitimate because of that United States citizen's or lawful permanent resident's bigamy;
(ii) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application, and the issuance of a charging document for removal proceedings shall not toll the 3-year period of continuous physical presence in the United States;

(iii) the alien has been a person of good moral character during such period, subject to the provisions of subparagraph (C);
(iv) the alien is not inadmissible under paragraph (2) or (3) of section 1182(a) of this title, is not deportable under paragraphs (1)(G) or (2) through (4) of section 1227(a) of this title, subject to paragraph (5), and has not been convicted of an aggravated felony; and
(v) the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

(B) Physical presence: Notwithstanding subsection (d)(2) of this section, for purposes of subparagraph (A)(ii) or for purposes of section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), an alien shall not be considered to have failed to maintain continuous physical presence by reason of an absence if the alien demonstrates a connection between the absence and the battering or extreme cruelty perpetrated against the alien. No absence or portion of an absence connected to the battering or extreme cruelty shall count toward the 90-day or 180-day limits established in subsection (d)(2) of this section. If any absence or aggregate absences exceed 180 days, the absences or portions of the absences will not be considered to break the period of continuous presence. Any such period of time excluded from the 180-day limit shall be excluded in computing the time during which the alien has been physically present for purposes of the 3-year requirement set

forth in this subparagraph, subparagraph (A)(ii), and section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(C) Good moral character: Notwithstanding section 1101(f) of this title, an act or conviction that does not bar the Attorney General from granting relief under this paragraph by reason of subparagraph (A)(iv) shall not bar the Attorney General from finding the alien to be of good moral character under subparagraph (A)(iii) or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty and determines that a waiver is otherwise warranted.

(D) Credible evidence considered: In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

8 U.S.C. § 1367. Penalties for disclosure of information.

(a) In general
Except as provided in subsection (b) of this section, in no case may the Attorney General, or any other official or employee of the Department of Justice, the Secretary of Homeland Security, the Secretary of State, or any other official or employee of the Department of Homeland Security or Department of State (including any bureau or agency of either of such Departments)—

(1) make an adverse determination of admissibility or deportability of an alien under the Immigration and Nationality Act [8 U.S.C.A. § 1101 et seq.] using information furnished solely by—

(A) a spouse or parent who has battered the alien or subjected the alien to extreme cruelty,
(B) a member of the spouse's or parent's family residing in the same household as the alien who has battered the alien or subjected the alien to extreme cruelty when the spouse or parent consented to or acquiesced in such battery or cruelty,
(C) a spouse or parent who has battered the alien's child or subjected the alien's child to extreme cruelty (without the active participation of the alien in the battery or extreme cruelty),
(D) a member of the spouse's or parent's family residing in the same household as the alien

who has battered the alien's child or subjected the alien's child to extreme cruelty when the spouse or parent consented to or acquiesced in such battery or cruelty and the alien did not actively participate in such battery or cruelty,
(E) in the case of an alien applying for status under section 101(a)(15)(U) of the Immigration and Nationality Act [8 U.S.C.A. § 1101(a)(15)(U)], the perpetrator of the substantial physical or mental abuse and the criminal activity,
(F) in the case of an alien applying for status under section 101(a)(15) (T) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(T)), under section 7105(b)(1)(E)(i)(II)(bb) of Title 22 under section 244(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1254a(a)(3)), as in effect prior to March 31, 1999, or as a VAWA self-petitioner (as defined in section 101(a)(51) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(51)), the trafficker or perpetrator,
unless the alien has been convicted of a crime or crimes listed in section 241(a)(2) of the Immigration and Nationality Act [8 U.S.C.A. § 1251(a)(2)]; or

(2) permit use by or disclosure to anyone (other than a sworn officer or employee of the Department, or bureau or agency thereof, for legitimate Department, bureau, or agency purposes) of any information which relates to an alien who is the beneficiary of an application for relief under paragraph (15)(T), (15)(U), or (51) of section 101(a) of the Immigration and Nationality

Act [8 U.S.C.A. § 1101(a)] or section 240A(b)(2) of such Act [8 U.S.C.A. § 1229b(b)(2)].
The limitation under paragraph (2) ends when the application for relief is denied and all opportunities for appeal of the denial have been exhausted.

(b) Exceptions

(1) The Attorney General may provide, in the Attorney General's discretion, for the disclosure of information in the same manner and circumstances as census information may be disclosed by the Secretary of Commerce under section 8 of Title 13.

(2) The Attorney General may provide in the discretion of the Attorney General for the disclosure of information to law enforcement officials to be used solely for a legitimate law enforcement purpose.

(3) Subsection (a) of this section shall not be construed as preventing disclosure of information in connection with judicial review of a determination in a manner that protects the confidentiality of such information.

(4) Subsection (a)(2) of this section shall not apply if all the battered individuals in the case are adults and they have all waived the restrictions of such subsection.

(5) The Attorney General is authorized to disclose information, to Federal, State, and local public and private agencies providing benefits, to be used solely in making determinations of eligibility for benefits pursuant to section 1641(c) of this title.

(6) Subsection (a) of this section may not be construed to prevent the Attorney General and the Secretary of Homeland Security from disclosing to the chairmen and ranking members of the Committee on the Judiciary of the Senate or the Committee on the Judiciary of the House of Representatives, for the exercise of congressional oversight authority, information on closed cases under this section in a manner that protects the confidentiality of such information and that omits personally identifying information (including locational information about individuals).

(7) Government entities adjudicating applications for relief under subsection (a)(2) of this section, and government personnel carrying out mandated duties under section 101(i)(1) of the Immigration and Nationality Act [8 U.S.C.A. § 1101(i)(1)], may, with the prior written consent of the alien involved, communicate with nonprofit, nongovernmental victims' service providers for the sole purpose of assisting victims in obtaining victim services from programs with expertise working with immigrant victims. Agencies receiving referrals are bound by the provisions of this section. Nothing in this paragraph shall be

construed as affecting the ability of an applicant to designate a safe organization through whom governmental agencies may communicate with the applicant.

(c) Penalties for violations
Anyone who willfully uses, publishes, or permits information to be disclosed in violation of this section or who knowingly makes a false certification under section 239(e) of the Immigration and Nationality Act [8 U.S.C.A. § 1229(e)] shall be subject to appropriate disciplinary action and subject to a civil money penalty of not more than $5,000 for each such violation.

(d) Guidance

The Attorney General and the Secretary of Homeland Security shall provide guidance to officers and employees of the Department of Justice or the Department of Homeland Security who have access to information covered by this section regarding the provisions of this section, including the provisions to protect victims of domestic violence from harm that could result from the inappropriate disclosure of covered information.

Regulations

8 C.F.R. § 204.2. Petitions for relatives, widows and widowers, and abused spouses and children.

* * *

(c) Self-petition by spouse of abusive citizen or lawful permanent resident—

(1) Eligibility—

(i) Basic eligibility requirements. A spouse may file a self-petition under section 204(a)(1)(A)(iii) or 204(a)(1)(B)(ii) of the Act for his or her classification as an immediate relative or as a preference immigrant if he or she:

(A) Is the spouse of a citizen or lawful permanent resident of the United States; (B) Is eligible for immigrant classification under section 201(b)(2)(A)(i) or 203(a)(2)(A) of the Act based on that relationship;

(C) Is residing in the United States;

(D) Has resided in the United States with the citizen or lawful permanent resident spouse;

(E) Has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage; or is that parent of a child who has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or

lawful permanent resident during the marriage;

(F) Is a person of good moral character;

(G) Is a person whose deportation would result in extreme hardship to himself, herself, or his or her child; and (H) Entered into the marriage to the citizen or lawful permanent resident in good faith.

(ii) Legal status of the marriage. The self-petitioning spouse must be legally married to the abuser when the petition is properly filed with the Service. A spousal self-petition must be denied if the marriage to the abuser legally ended through annulment, death, or divorce before that time. After the self-petition has been properly filed, the legal termination of the marriage will have no effect on the decision made on the self- petition. The self-petitioner's remarriage, however, will be a basis for the denial of a pending self-petition.

(iii) Citizenship or immigration status of the abuser. The abusive spouse must be a citizen of the United States or a lawful permanent resident of the United States when the petition is filed and when it is approved. Changes in the abuser's citizenship or lawful permanent resident status after the approval will have no effect on the self-petition. A self-petition approved on the basis of a relationship to an abusive lawful permanent resident spouse will not be automatically upgraded to immediate relative status. The self-petitioner would not be precluded, however, from filing a new self-petition for immediate relative classification after the abuser's naturalization,

provided the self-petitioner continues to meet the self-petitioning requirements.

(iv) Eligibility for immigrant classification. A self-petitioner is required to comply with the provisions of section 204(c) of the Act, section 204(g) of the Act, and section 204(a)(2) of the Act.

(v) Residence. A self-petition will not be approved if the self-petitioner is not residing in the United States when the self-petition is filed. The self-petitioner is not required to be living with the abuser when the petition is filed, but he or she must have resided with the abuser in the United States in the past.

(vi) Battery or extreme cruelty. For the purpose of this chapter, the phrase "was battered by or was the subject of extreme cruelty" includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence. The qualifying abuse must have been committed by the citizen or lawful permanent resident spouse, must have been perpetrated against the self-petitioner or the self-petitioner's child, and must have taken place during the self-petitioner's marriage to the abuser.

(vii) Good moral character. A self-petitioner will be found to lack good moral character if he or she is a person described in section 101(f) of the Act. Extenuating circumstances may be taken into account if the person has not been convicted of an offense or offenses but admits to the commission of an act or acts that could show a lack of good moral character under section 101(f) of the Act. A person who was subjected to abuse in the form of forced prostitution or who can establish that he or she was forced to engage in other behavior that could render the person excludable under section 212(a) of the Act would not be precluded from being found to be a person of good moral character, provided the person has not been convicted for the commission of the offense or offenses in a court of law. A self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she willfully failed or refused to support dependents; or committed unlawful acts that adversely reflect upon his or her moral character, or was convicted or imprisoned for such acts, although the acts do not require an automatic finding of lack of good moral character. A self-petitioner's claim of good moral character will be evaluated on a case-by-case basis, taking into account the provisions of section 101(f) of the Act and the standards of the average citizen in the community. If the results of record checks conducted prior to the issuance of an immigrant visa or approval of an application for adjustment of status disclose that the self-petitioner is no longer a person of good moral character or that he or she has not been a person of good moral character in the past, a pending self-

petition will be denied or the approval of a self-petition will be revoked.

(viii) Extreme hardship. The Service will consider all credible evidence of extreme hardship submitted with a self-petition, including evidence of hardship arising from circumstances surrounding the abuse. The extreme hardship claim will be evaluated on a case-by-case basis after a review of the evidence in the case. Self-petitioners are encouraged to cite and document all applicable factors, since there is no guarantee that a particular reason or reasons will result in a finding that deportation would cause extreme hardship. Hardship to persons other than the self-petitioner or the self-petitioner's child cannot be considered in determining whether a self-petitioning spouse's deportation would cause extreme hardship.

(ix) Good faith marriage. A spousal self-petition cannot be approved if the self-petitioner entered into the marriage to the abuser for the primary purpose of circumventing the immigration laws. A self-petition will not be denied, however, solely because the spouses are not living together and the marriage is no longer viable.

(2) Evidence for a spousal self-petition—

(i) General. Self-petitioners are encouraged to submit primary evidence whenever possible. The Service will consider, however, any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Service.

(ii) Relationship. A self-petition filed by a spouse must be accompanied by evidence of citizenship of the United States citizen or proof of the immigration status of the lawful permanent resident abuser. It must also be accompanied by evidence of the relationship. Primary evidence of a marital relationship is a marriage certificate issued by civil authorities, and proof of the termination of all prior marriages, if any, of both the self-petitioner and the abuser. If the self-petition is based on a claim that the self-petitioner's child was battered or subjected to extreme cruelty committed by the citizen or lawful permanent resident spouse, the self-petition should also be accompanied by the child's birth certificate or other evidence showing the relationship between the self-petitioner and the abused child.

(iii) Residence. One or more documents may be submitted showing that the self-petitioner and the abuser have resided together in the United States. One or more documents may also be submitted showing that the self-petitioner is residing in the United States when the self-petition is filed. Employment records, utility receipts, school records, hospital or medical records, birth certificates of children born in the United States, deeds, mortgages, rental records, insurance policies, affidavits or any other type of relevant credible evidence of residency may be submitted.

(iv) Abuse. Evidence of abuse may include, but is not limited to, reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel. Persons who have

obtained an order of protection against the abuser or have taken other legal steps to end the abuse are strongly encouraged to submit copies of the relating legal documents. Evidence that the abuse victim sought safe-haven in a battered women's shelter or similar refuge may be relevant, as may a combination of documents such as a photograph of the visibly injured self-petitioner supported by affidavits. Other forms of credible relevant evidence will also be considered. Documentary proof of non-qualifying abuses may only be used to establish a pattern of abuse and violence and to support a claim that qualifying abuse also occurred.

(v) Good moral character. Primary evidence of the self-petitioner's good moral character is the self-petitioner's affidavit. The affidavit should be accompanied by a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. Self-petitioners who lived outside the United States during this time should submit a police clearance, criminal background check, or similar report issued by the appropriate authority in each foreign country in which he or she resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. If police clearances, criminal background checks, or similar reports are not available for some or all locations, the self-petitioner may include an explanation and submit other evidence with his or her affidavit. The Service will consider other credible evidence of good moral character, such as affidavits from responsible

persons who can knowledgeably attest to the self-petitioner's good moral character.

(vi) Extreme hardship. Evidence of extreme hardship may include affidavits, birth certificates of children, medical reports, protection orders and other court documents, police reports, and other relevant credible evidence.

(vii) Good faith marriage. Evidence of good faith at the time of marriage may include, but is not limited to, proof that one spouse has been listed as the other's spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences. Other types of readily available evidence might include the birth certificates of children born to the abuser and the spouse; police, medical, or court documents providing information about the relationship; and affidavits of persons with personal knowledge of the relationship. All credible relevant evidence will be considered.

(3) Decision on and disposition of the petition—

(i) Petition approved. If the self-petitioning spouse will apply for adjustment of status under section 245 of the Act, the approved petition will be retained by the Service. If the self-petitioner will apply for an immigrant visa abroad, the approved self-petition will be forwarded to the Department of State's National Visa Center.

(ii) Petition denied. If the self-petition is denied, the self-petitioner will be notified in writing of the reasons for the denial and of the right to appeal the decision.

* * *

ANTI-VIRUS CERTIFICATION

Case Name: Hollander v. U.S.

Docket Number: 08-6183-cv

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **civilcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 8/28/2009) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: August 28, 2009

CERTIFICATE OF SERVICE

08-6183-cv Hollander v. USA

I hereby certify that two copies of this Brief for Defendants-Appellees were sent by Regular First Class Mail to:

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I also certify that the original and nine copies were also shipped via Hand delivery to:

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New York, New York 10007
(212) 857-8576

on this 28th day of August 2009.

Notary Public:

Sworn to me this

August 28, 2009

RAMIRO A. HONEYWELL
Notary Public, State of New York
No. 01HO6118731
Qualified in Kings County
Commission Expires November 15, 2012

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