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INS Investigative Actions at Shelters Jeopardize Victims' Safety

For millions of women and children, violent physical, mental and emotional trauma is part of everyday life.² Among the many that face this daily violence are non-citizen women and children.³ Throughout the United States, immigrant women⁴ and children are often victims of

¹ This memorandum was prepared with the assistance of James A. Ferg Cadima and Leigh Taylor, Law Clerks with the Immigrant Women's Program at NOW Legal Defense and Education Fund.

² See generally Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, Extent, Nature, and Consequences of Intimate Partner Violence: Findings From the National Violence Against Women Survey, iv (2000) (estimating 30.4% of women are physically abused by a husband or a male co-habitant at some point in their lives); Giselle Aguilar Hass, Mary Ann Dutton & Leslye E. Orloff, Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications, in Domestic Violence: Global Response 93, 94 (2000) (finding that Latinos residing in the United State a particularly vulnerable population when faced with domestic violence scenarios atop other life barriers); 146 Cong. Rec. S10188, S10195 (daily ed. Oct. 11, 2000) (citing a need to amend immigration law to address a growing problem faced by battered immigrant women by introducing immigration provisions of VAWA 2000 geared at "improv[ing] on efforts made in VAWA 1994 to prevent immigration law from being used by an abusive citizen or lawful permanent resident spouse from reporting abuse or living [sic] the abusive relationship"); S. Rep. 101-545, at 37 (1990) (finding spouse abuse to be serious, chronic, and national in scope); S. Rep. No. 101-138, at 37 (1993) (noting that Surgeon Generals have repeatedly warned that family violence poses the single largest health threat to adult women).

³ See Leslye E. Orloff & Rachel Little, Somewhere to Turn: Making Domestic Violence Services Accessible to Battered Immigrant Women: A "How To" Manual for battered Women's Advocates and Services Providers 141 (1999) (stating that battered immigrant women are not only threatened in the same capacity as citizen battered women; but also face additional misinformed views based upon information provided by their abusers that include threats from their abusers related to their dependency on the batterer for immigration status); H.R. Rep. 103-395, at 26-27 (1993) (finding domestic battery problems are "terribly exacerbated in marriages where one spouse is not a citizen, and the non-citizens' [sic] legal status depends on his or her marriage to the abuser"); Michelle Anderson, Note, A License to Abuse: The Impact of Conditional Status on Female Immigrants, 102 Yale L. J. 1401, 1402

crimes committed against them including domestic violence, rape, torture, kidnapping, trafficking, incest, domestic violence, sexual assault, female genital mutilation, involuntary servitude or being held hostage. Often immigrant women and children suffer abuse at the hands of those they should be closest to including immediate family members, US citizen and non-citizen alike. Battered women's shelters offer a much-needed place of escape and protection for these battered immigrant women and their children and can also offer shelter in certain instances to other immigrant crime victims such as victims of trafficking. The acute crisis of these immigrant crime victims calls for a compassionate response from the Service.

Despite reduction in access to public benefits for immigrants generally, immigrant women without regard to immigrant status still qualify for certain life-saving social services, including admission into battered women's shelters. Accordingly, INS efforts to assist immigrant women and children in finding safe haven from violence rest squarely on sound public policy. Since the passage of the Violence Against Women Act (VAWA) in 1994, the Service established an excellent VAWA unit at the Vermont Service Center for the processing of VAWA self-petitioning cases. This VAWA unit has developed expertise and demonstrated sensitivity to the plight of battered immigrant women while fairly carrying out their adjudicative functions. In sensitively implementing VAWA, the Service joined the growing national effort to secure safety and refuge for battered immigrant women and children.⁵ Issuance of policy

(1993) (estimating that domestic violence to be more prevalent among immigrant women than among US citizens); Wendy Lin, Is INS Hinderling Abused Wives? Rules Said to Undermine Law Meant to Help Them, Newsday, July 8, 1991, at 21 (noting that in 1990 half of battered clients at New York Asian Women's Center in Manhattan were conditional residents and 90% of victims of domestic violence at the Victims' Services Agency office in Jackson Heights, Queens were immigrants).

⁴ For the purposes of this memorandum the terms "immigrant women" and "battered immigrant women" includes non-citizens with legal immigration status (both immigrant and non-immigrant) and non-citizens who are undocumented.

⁵ The passage of the Violence Against Women Act of 2000 (VAWA 2000) created a new nonimmigrant visa for some battered noncitizen and other crime victims not protected by the original Violence Against Women Act of 1994. The U-visa is deigned for noncitizen crime victims who have suffered substantial physical or mental abuse flowing from criminal activity and who have mustered the courage to cooperate with government officials investigating or prosecuting such criminal activity. Victims of a broad range of criminal activity listed in the

guidance banning or discouraging enforcement actions or subpoenas at battered women's shelters would further this same protective goal and would be consistent with the positions adopted by the Attorney General⁶ and with other branches of federal government.⁷

While the Service, Congress, state legislatures, and the courts have recently begun to recognize and respond to this national crisis, counseling and shelter programs have since the mid-1970s been providing the most effective, and in some communities the only, services provided to victims of domestic violence. For many battered women the advocacy services that shelters offer make access to the courts and governmental services possible. As immigrant demographics have shifted over the past decade,⁸ battered women's shelters across the country have had to learn to respond to the unique needs of battered immigrant women. While some barriers arise from cultural and linguistic differences, other obstacles to successfully leaving an abusive relationship are rooted in misinformation about the legal and social service safety nets available. Battered women's shelters strive to overcome these barriers and to reach out to battered immigrant women and their children to encourage them to use shelter services and take

legislation may qualify for U-visas. Many victims will be women and children and include, but are not limited to, victims of domestic violence. See INA § 101(a)(15)(U) (2001) (codified at 8 U.S.C. § 1101(a)(15)(U)) (defining a new class of nonimmigrant visa for victims of criminal activity); INA § 214(o) (2001) (codified at 8 U.S.C. § 1184[(p)](o)) (listing petitioning procedure for U-visas).

⁶ See Atty. Gen. Or. 2353-2001, 66 Fed. Reg. 3613 (Jan. 16, 2001).

⁷ See Letter from the U.S. Dep't of Housing and Urban Development to HUD Funds Recipients of 1/19/2001, at 2 (clarifying that "HUD-funded programs that provide emergency shelter and transitional housing . . . are to make these services equally available to all needy persons, including aliens who are not 'qualified aliens'" under federal law); U.S. Dep't of Health and Hum. Services, Office of Civ. Rts., Fact Sheet on Access to HHS-Funded Services for Immigrant Survivors of Domestic Violence, at <http://www.hhs.gov/ocr/immigration/bifsltr.html> (Jan. 19, 2001) (clarifying that battered women's shelters are among the HHS funded programs available to battered immigrant women and their children).

⁸ See Steven A. Camarota, Immigrants in the United States-1998, A Snapshot of American's foreign-born Population, in Backgrounder (Ctr. For Immigration Studies), Jan. 1999, at 1 (approximating "26.3 million immigrants now live in the United States, the largest number ever recorded in the nation's history, and a 33 percent increase over 1990"); D'Vera Cohn & Darryl Fears, Hispanics Draw Even With Blacks In New Census; Latino Population up 60% Since 1990, Wash. Post, Mar. 7, 2001, at A1 (reporting "unexpected increase in Hispanics is probably due mainly to high levels of immigration and poor [Census 1990] counting in the past."); Robert A. Rosenblatt, Ricardo Alonso-Zaldivar & Robin Fields, Latino, Asian Populations Rise Sharply; Census: New Multiracial Figures Find a Substantial Growth of Immigrants in Nontraditional Regions, L.A. Times, Mar. 9, 2001, at A1 (placing the "rapid growth of Latino and Asian populations . . . in areas of the Deep South and Midwest"); Frank James, Number of Asians in U.S. Soars; Group Join Hispanics as Fastest-Growing Minorities, Mar. 13, 2001, at 1 (reporting Asians joined Latinos "in showing the highest growth rates").

advantage of the life saving protection shelters offer. NOW Legal Defense urges the Service to implement policies that do not frustrate battered immigrants' abilities to access the humanitarian services battered women's shelters provide. The Service can best achieve this end by issuing policy directives that will bring an end to certain enforcement actions including raids and subpoenas of battered women's shelters.

The process of leaving an abusive home is daunting and shelters are among the few "safe spaces" and forms of assistance available to battered immigrant women. Under circumstances in which they fear for their own lives and the safety of their children, battered immigrant women develop trusting relationships with shelter workers with whom they share the most intimate details of their lives, including the abuse they have suffered at the hands of a loved one, in order to obtain safety, legal redress and reach financial independence. Curtailing INS investigative enforcement practices would assist battered immigrant women by removing a significant barrier to their finding safe refuge.

Furthermore, NOW Legal Defense believes that Service enforcement practices on shelters have a chilling effect on all women accessing battered women's services, citizen and immigrant alike. When INS raids or subpoenas a shelter, usually based on a tip or lead provided by an abuser, the community confidence in the shelter as a safe haven and confidential space for battered women is undermined. A policy directive is desperately needed so that battered women's shelter confidentiality and safety can be guaranteed to all women. There is great societal interest in ending domestic violence. As set out below, limiting the executive investigatory function of the Service would further that national interest.

I. INS Investigative and Enforcement Actions at Battered Women’s Shelters Deny Battered Immigrant Women and Children the Right of Access to Battered Women’s Shelters⁹

In 1996, the Personal Responsibility and Work Opportunities Reconciliation Act¹⁰ (PRWORA) was signed into law. PRWORA excludes immigrants based on their status from eligibility for most “[f]ederal public benefit[s],”¹¹ state-administered “federal programs,”¹² and “state and local public benefits.”¹³

However, under PRWORA, certain publicly funded services were left unaffected and thereby still accessible to all immigrants without regard to immigration status. Among these exemptions from immigrant ineligibility were those publicly funded programs and services deemed necessary for the protection of life and safety. Both the express language of PRWORA and its implementing regulations make clear that battered women’s shelters and domestic violence services fall within the “program[s] or service[s] deemed necessary for the protection of life and safety” exemption and are accordingly to remain to open to immigrant women fleeing domestic violence.

⁹ Battered women and children are entitled to access to battered women’s shelters under Attorney General Order 2353-2001, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, the Violence Against Women Act of 2000, and the right to other publicly funded programs and services under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

¹⁰ P.L. 104-193, 110 Stat. 2260 (codified beginning at 8 U.S.C. §§ 1610 et seq.).

¹¹ 8 U.S.C. § 1611(a) (2001) (excluding aliens who are not qualified aliens as defined in 8 U.S.C. § 1641 as ineligible for any federal public benefits).

¹² 8 U.S.C. § 1612(a) (2001) (excluding aliens who are not qualified aliens as defined by 8 U.S.C. § 1641 as ineligible for specified Federal programs administered by the Supplemental Security Income program under title XVI of the Social Security Act, 42 U.S.C. §§ 1381 et. seq., and the Food Stamp program as defined in section 3(h) of the Food Stamp Act of 1977, 7 U.S.C. § 2011(h)).

¹³ See 8 U.S.C. § 1621(a) (2001) (excluding qualified aliens as defined by 8 U.S.C. § 1641, nonimmigrants as defined by the INA and aliens who are paroled into the United States under section 212(d)(5) of the INA as ineligible for state or local public benefits such as retirement, welfare, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit).

First, the express statutory language of PRWORA clearly cites “crisis counseling and intervention, and short-term shelter”¹⁴ as within this aforementioned life and safety exemption from ineligibility. Also, Congress delegated further determination of what public benefits are deemed necessary for the protection of life and safety, and thereby still immigrant accessible, to the “sole and unreviewable discretion” of the Attorney General.¹⁵ On January 16, 2001, the Attorney General finalized regulations specifying what community programs were “necessary for protection of life or safety” under PRWORA.¹⁶ The Attorney General’s final regulations deem the following programs as within the meaning of community based, in-kind “programs, services or assistance” necessary for the protection of life and safety of immigrants:

*crisis counseling and intervention programs, services and assistance relating to child protection, adult protection services, violence and abuse prevention, victims of domestic violence and abuse prevention, victims of domestic violence or other criminal activity [and] . . . short-term shelter or housing assistance for the homeless, for victims of domestic violence, or for runaway, abused, or abandoned children.*¹⁷

Simply put, battered immigrant women are as a matter of federal law eligible for admission and treatment at battered women’s shelters across the country without regard to their citizenship or immigration status. NOW Legal Defense believes the Attorney General’s charge of securing access to programs, services and assistance necessary for protection of life and safety must take priority over INS investigative efforts within a women’s battered shelter for two reasons.

¹⁴ 8 U.S.C. § 1611(b)(1)(D) (2001) (reading as codified as “[p]rograms, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General, in the Attorney General’s sole and unreviewable discretion . . .”).

¹⁵ Id.

¹⁶ Atty. Gen. Or. 2353-2001, 66 Fed. Reg. 3613 (Jan. 16, 2001). See also Letter from the U.S. Dep’t of Housing and Urban Development to HUD Funds Recipients of 1/19/2001, at 1; U.S. Dep’t of Health and Hum. Services, Office of Civ. Rts., Fact Sheet on Access to HHS-Funded Services for Immigrant Survivors of Domestic Violence, at <http://www.hhs.gov/ocr/immigration/bifsltr.html> (Jan. 19, 2001).

¹⁷ Att. Gen. Or. 2353-1001, 66 Fed. Reg. 3616.

First, unchecked INS investigative authority within battered women's shelters has a chilling effect on battered immigrant women and children keeping them from receiving the humanitarian, life-saving services which they need and are legally entitled to receive. Secondly, unchecked INS investigative authority within these shelters has a concomitant chilling effect on all battered women including VAWA self-petitioners, U-Visa eligible immigrants, battered legal permanent residents and citizen victims of abuse. The more often law enforcement authorities pierce the protective veil of a women's shelter the more likely that all women, regardless of immigration or citizenship status, will not turn to their local battered women's shelter for support. In order to avoid such unintended and undesirable results, NOW Legal Defense believes the Service should issue a policy directive prohibiting and discouraging enforcement practices that cross the threshold of a battered women's shelter.

Beyond shelter access, battered immigrant women including VAWA eligible battered immigrants are, as a matter of recent federal law, eligible for other public benefits and services.¹⁸ After the passage of the Violence Against Women Act of 1994 (VAWA 1994),¹⁹ it became evident that securing an avenue to immigration status alone was not enough to end domestic violence for battered immigrant women. For many battered immigrant women, valiant attempts to leave abusive relationships were easily frustrated by the lack of access to publicly funded resources. PRWORA's broad exclusion of noncitizens from publicly funded programs and

¹⁸ See "The Illegal Immigration Reform and Immigrant Responsibility Act of 1996," Pub. L. No. 104-208, Division C, Title III, Subtitle A, § 308(g)(8)(E), Title V, Subtitle A, § 501, Sept. 30, 1996, 110 Stat. 3009-624 (codified at 8 U.S.C. § 1641(c) (1996)) (redefining certain battered immigrants as qualified aliens for qualification for welfare and public benefits).

¹⁹ Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sub-sections of 8, 18 and 42 U.S.C. (1994)).

services left battered immigrant women economically dependent on their batterers and unable to escape the daily violence they faced at home.²⁰

Without access to public benefits the Congressional purposes of VAWA 1994 were being thwarted. While many battered immigrant women qualified for the stable immigration status offered by VAWA 1994,²¹ they were not applying because they continued to be locked by economics to their abusive relationships.²² In 1996, as part of the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), Congress attempted to correct this unintended effect of welfare reform and restored some public benefits to battered immigrants.²³ Four groups of battered immigrants benefited from the expanded access to benefits that IIRAIRA secured. Specifically, VAWA self-petitioners and VAWA cancellation and suspension applicants, battered immigrants who were the beneficiaries of an I-130 family based visa application filed by an abusive U.S. citizen spouse or lawful permanent resident spouse or parent; and battered immigrants who were conditional or lawful permanent residents who had previously been barred from access to public benefits by deeming, all became eligible for expanded benefits under IIRAIRA. One of the critical forms of assistance domestic violence shelter staff provide is advocacy that helps shelter residents access public benefits. Thus, INS investigative efforts aimed at shelters and their residents not only disrupt a battered immigrant

²⁰ With the passage of PRWORA in 1996, battered immigrant women inadvertently became one subsection of noncitizen excluded from many federal and state social services, programs and benefits that would have facilitated successful separation from an abuser.

²¹ Under VAWA 1994's self-petitioning provision, an abused spouse or child of a US citizen or lawful permanent resident may file their own petition to commence the process of becoming a permanent resident, rather than depending on the abusive parent or spouse to file the petition. A spouse with an abused child may also file a petition for themselves and their child, based on the abuse suffered by the child. In order to qualify for self-petitioning, the individual must demonstrate that she has been battered or been the subject of extreme cruelty. See generally INA §§ 204(a)(1)(A)(iii) & (B)(ii), 204(a)(1)(A)(iv) & (B)(iii), 204 (a)(1)(A)(iii) & (B)(ii) (2001) (codified at 8 U.S.C. § 1154).

²² See Catherine T. Kennedy and Karen R. Brown, Report from the Front Lines: the Impact of Violence on Poor Women 10-11 (NOW Legal Defense and Education Fund, 1996) (citing economic dependence of women upon their abusive partners as one of the primary reasons battered women remain in violent relationships).

²³ 8 U.S.C. § 1641(c) (2001) (as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) (clarifying as a definitional matter that certain battered immigrants are to be treated as "qualified aliens" for purposes of determining welfare and public benefits eligibility).

woman's right to access to shelter, but also disrupt her access to other forms of public assistance services to which she is entitled, as a matter of federal law, and needs in order to successfully leave a violent relationship.

Additionally, the Battered Immigrant Women Protection Act of 2000,²⁴ enacted as part of the Violence Against Women Act of 2000 (VAWA 2000), was crafted to continue the work of the VAWA 1994. VAWA 2000's immigration provisions were specifically designed to "improve efforts made in VAWA 1994 to prevent immigration law from being used by an abusive citizen or lawful permanent resident spouse as a tool to prevent an abused immigrant spouse from reporting abuse or leaving the abusive relationship."²⁵ Congress' goal in enacting VAWA 2000 was to interfere with the abusive spouse's ability to "blackmail and control" immigrant spouses so that they could "free themselves of abusive relationships and report abuse without fear of immigration law consequences controlled by their abusive citizens or lawful permanent resident spouse or parent."²⁶

VAWA 2000's immigrant provisions specifically address the "residual immigration law obstacles standing in the path of battered immigrant spouses and children seeking to free themselves from abusive relationships that either had not come to the attention of the drafters of VAWA 1994 or that have arisen since as a result of 1996 changes to immigration law."²⁷ VAWA 2000's immigration improvements were crafted to remove perverse incentives that existed in immigration law that could lead a battered immigrant who qualifies for immigration relief under VAWA to choose to stay with her abuser rather than file for immigration status on

²⁴ Pub. L. 106-386, Div. B [The Violence Against Women Act of 2000], Title V [Battered Immigrant Women], 114 Stat. 1464 (Oct 28, 2000).

²⁵ 146 Cong. Rec. S10188, S10195 (daily ed. Oct. 11, 2000) (ordering the publication of two section-by-section analyses of the provisions contained in Title V of the Violence Against Women Act in the Congressional Record).

²⁶ Id.

²⁷ INA § 212(p) (2001) (added by Sec. 1505(f), Title V [Battered Immigrant Women Protection Act of 2000], Div. B [Violence Against Women Act of 2000], Pub. L. 106-386 [Victims of Trafficking and Violence Protection Act of 2000], 114 Stat. 1464 (Oct 28, 2000)).

her own and to restore and expand access to a variety of legal protections for battered immigrants so they may flee violent homes, obtain court protection, cooperate in the criminal prosecution of their abusers and take control of their lives without fearing deportation.

VAWA 2000 ushered in other forms of relief, above and beyond shelter access and public benefits eligibility, available to battered immigrant women. Through section 1513(b) of VAWA 2000, Congress created a new nonimmigrant visa, the U-visa, for battered noncitizens and other crime victims not protected by VAWA 1994.²⁸ The U-visa is designed for noncitizen crime victims who have suffered substantial physical and mental abuse flowing from criminal activity and who have mustered the courage to cooperate with government officials investigating or prosecuting such criminal activity. The U-visa not only assists the crime victim but also assists law enforcement at every stage of their enforcement activities. That is one of the reasons the law targets “criminal activity” as opposed to “crimes” because prosecutors and other criminal investigators must obtain witness help and cooperation at every stage of a criminal investigation.

With VAWA self-petitioning and the U-visa available to battered undocumented immigrant women, virtually all immigrant women who qualify for residence at a domestic violence shelter when they flee an abusive relationship will likely qualify for some form of immigration relief. Thus, INS enforcement actions at shelters will merely have the net effect of deporting battered immigrants who may qualify for either VAWA or U-Visa protection but who were never informed about the possibility.

In sum, NOW Legal Defense believes that the express language of the PRWORA’s life and safety exceptions, Attorney General Order No. 2353-2001, implementing regulations under PRWORA, IIRAIRA’s clarification that certain battered immigrant women qualified as “qualified aliens” for purposes of public benefits access, VAWA 1994’s immigration provisions,

²⁸ See INA § 101(a)(15)(U) (2001) (codified at 8 U.S.C. 1101(a)(15)(U)).

and VAWA 2000's introduction of the U-visa, taken together guarantee the right to shelter access, expand access to public benefits assistance and expand the ability of most battered immigrant shelter residents to attain legal immigration status regardless of their previous immigration status, or lack thereof. NOW Legal Defense respectfully requests that the Service issue internal guidance limiting enforcement activities directed at battered women's shelters so that battered immigrant women may safely access the domestic violence services offered by shelter staff that battered immigrants and their children so desperately need and are entitled to receive under federal law.

II. INS is Prohibited by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 from Relying on Information Provided in Whole or in Part by Abusers or Their Agents and Should Not be Expending Limited Service Investigative Resources on Battered Immigrants who are Likely to Qualify for Immigration Benefits

In virtually all instances where INS agents or border patrol officers receive information that an undocumented female immigrant is being housed at a battered women's shelter that information has been provided by her abuser directly or through second-hand information provided by an agent of the abuser.²⁹ Under section 384 of IIRAIRA, Service reliance on information provided by abusers is expressly prohibited and subject to disciplinary action and/or fines if the source of the tip is the abuser himself. Specifically, section 384, as codified, in pertinent part provides:

*[I]n no case may the Attorney General, or any other official or employee of the Department of Justice (including any bureau or agency of such Department)—
(1) make an adverse determination of admissibility or deportability of an alien under the Immigration and Nationality Act . . . using information furnished solely by —*

²⁹ See Sana Loue, *Intimate Partner Violence: Societal, Medical, Legal and Individual Responses* 104 (2001) (citing anecdotal evidence that “[i]mmigration attorneys have frequently observed that an undocumented individual often comes to the attention of the INS as a result of a well-placed telephone call by his or her intimate partner”).

- (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 to 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 a 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), or
 - (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 and the alien did not actively participate in such battery or cruelty
- (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 . . . as an alien (or parent of a child) who has been battered or subjected to extreme cruelty.³⁰

Legislative purpose is presumed expressed by the ordinary or plain meaning of the words used within a statute.³¹ Here, the language of the statute makes clear that where an abusive husband or agent provides information relating to his battered wife, no official employee of the Department of Justice may use that information to make an adverse finding of admissibility or deportability. A natural reading of the statute implies that the purpose behind it is both to protect the battered victim and also to prevent the batterer or his agent from using the government to further abuse and control their victims. This interpretation is supported by the legislative history of IIRAIRA.

The protections found in IIRAIRA § 384 were first introduced in Congress in 1995 by Representative Pat Schroeder (D-CO) as an amendment to an earlier incarnation of IIRAIRA.³²

In presenting the amendment, Representative Schroeder explained:

³⁰ 8 U.S.C. § 1367 (2001).

³¹ See INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987) (stating that “ordinary and obvious meaning of the phrase is not to be lightly discounted” when giving effect to immigration law); Matter of Fesale, Interim Decision 3256 (BIA 1995) (stating “in all cases involving statutory construction, the starting point must be the language employed by Congress, and it is assumed that the legislative purpose is expressed by the ordinary meaning of the words used”); Orcale v. Sundonner 523 U.S. 75 (1998).

³² See Full Committee Mark Up: Hearing on H.R. 2202 Before the House Judiciary Committee, 104th Cong. (Sept. 19, 1995) reprinted in Federal News Service.

*[This amendment] deals with the very essential issue of confidentiality vis-à-vis battered women and children. I think we all know confidentiality is a matter of life and death whether or not they are citizens or whether they are immigrants. And that we must make sure that if there's some kind of battering going on, that the INS is not breaching confidentiality. As you know abusers can be anyone and basically what we're doing here is making sure that decisions affecting a battered woman's immigration couldn't be based on statements of the abuser. That giving the abuser the ability to influence the INS would give the abuser control over the victim's status.*³³

The only concerns raised in response to the introduction of Representative Schroeder's amendments related to the scope of its "absolute language." Representative Lamar Smith (R-TX), a principal author of IIRAIRA and the Chairman of the Immigration and Claims Subcommittee of the Judiciary Committee, noted:

*In the first line there's language to the introduction "in no case may the Attorney General or any other official use information furnished by an abusive spouse or family member." I'm just wondering if that should be somewhat modified . . . we might need to write in certain exceptions to the absolute language that the amendment contains.*³⁴

The amendment was temporarily withdrawn, exceptions were added, and the revised amendment³⁵ was reintroduced on March 19, 1996 as part of an amendment package introduced by Representative Smith himself; the language, as-reintroduced and without subsequent change, eventually became section 384 of IIRAIRA.³⁶ The history of section 384 confirms the purpose of the statute evident in its language: to protect battered immigrant women and to thwart efforts

³³ *Id.* (emphasis added); cf. S. Rep. No. 545 101st Cong. 2d Sess. 38 (1990); H.R. Rep. No. 395, 103d Cong., 1st Sess. 25 (1993) (evidencing that IIRAIRA § 384 was merely the latest in a series of federal legal reforms aimed at protecting battered immigrants and preventing abusers from using the immigration processes to control and manipulate their victims).

³⁴ *Id.*

³⁵ Section 384 of IIRAIRA, as codified, contains exceptions which allow the Attorney General to disclose information to law enforcement officials to be used solely for legitimate law enforcement activities, for purposes of judicial review, if waived by the battered adult herself, and to governmental officials providing benefits pursuant to PRWORA. *See* 8 U.S.C. §§ 1367(b)(1)-(5) (2001) (listing the exceptions that are part of the final version of section 384 of IIRAIRA).

³⁶ *See* 143 Cong. Rec. H2378 (daily ed. March 19, 1996) (considering H.R. 22002 to amend the Immigration & Nationality Act).

by abusive spouses to use the INS to further their manipulation and control. Furthermore, section 384 expressly prohibits INS investigative efforts if initiated by a disgruntled abuser who is legally related to or formerly legally related to or residing with the battered woman. Such a federal prohibition rests on sound public policy.

Abusers or their agents are the only persons who could “benefit” from revealing the location of a battered immigrant women’s shelter to INS or sending INS officers to locate his wife at a shelter whose location is undisclosed. Neither the shelter nor the battered immigrant woman profits from sharing shelter location information with anyone.³⁷ The location of most shelters is not publicly known in order to promote resident safety at the shelter. A shelter’s core function of providing women and children safe haven is met significantly by keeping shelter location and street address from public knowledge.

Within this safe environment, recuperative and rehabilitative services are offered to victims of domestic violence. Moreover, shelters further meet this goal by guarding, with guarantees of confidentiality, the names of and information about those battered women and children housed within that particular shelter. Upon entering a battered women’s shelter, both the service provider and the battered woman operate on an expectation of confidentiality as to the battered women’s presence at the shelter and shelter record information.

In order to find the location of a shelter that has an undisclosed address, abusers will use any means available to them. Some will stalk their victim and try to follow her from work or her child’s school so as to locate the address of the shelter. Others will try to appeal to a court, perhaps in a custody case to order the disclosure of the shelter location because it is the current

³⁷ Shelters make it a practice to create a safety plan for battered women living at their facilities. The structuring of these plans is aimed at increasing the woman’s safety. If for example, the victim of the battering leaves for placement at a shelter, medical personnel will redact mention of her new address so not even family and friends have access to her new location information. Tremendous efforts are invested in increasing the safety afforded to battered women. Confidentiality is central to securing this safety. See Sana Loue, *Intimate Partner Violence: Societal, Medical, Legal and Individual Responses* 89-90 (2001) (summarizing some strategies employed by medical and shelter workers to secure battered women’s safety).

“residence” of the child. Still others will try to pry this information from law enforcement officers, medical personnel or others who may know the location. Some enlist the help of INS agents to locate a battered immigrant spouse, intimate partner or dependent who maybe residing at a shelter, the location of which is undisclosed.

Similarly, a person’s immigration status is usually not public knowledge. Accordingly, few undocumented immigrants openly share their non-citizenship status with others. Battered women’s shelter staff make standard the practice of limiting staff knowledge regarding a client’s immigration status,³⁸ as status is not relevant to whether or not a battered women receives services and protection from a shelter.³⁹ These three factors combined – (1) abusers and their agents are the sole parties who profit from locating an undocumented spouse or partner at a shelter, from disclosing shelter location, or from obtaining confidential information from shelter records that the abuser can not legally obtain from INS; (2) relative privacy of a person’s immigration status; and (3) shelter practice not to disclose shelter location, names of residents, and information about the residents to the general public for safety concerns – leave the abuser or his agent the only parties with knowledge of a battered immigrant woman’s immigration status and the location of a shelter who would have any incentive to share this information with the Service and who would profit from such disclosure.

In virtually all circumstances, when INS agents or border patrol officers receive the information that an undocumented female immigrant is being housed at a battered women’s shelter, the source of the information is the abuser or his agent. This is true whether or not the INS agent knows at the time the information is received that the source is her abuser. No person

³⁸ See e.g. Leslye E. Orloff & Rachel Little, Somewhere to Turn: Making Domestic Violence Services Accessible to Battered Immigrant Women: A “How To” Manual for battered Women’s Advocates and Services Providers 76-95,112-124 (1999) (summarizing federal law that imposes duties on shelters receiving federal funds and how to best alter shelter protocols to accommodate the needs of battered immigrant women seeking shelter services); Leti Volpp, Working with Battered Immigrant Women: A Handbook to Make Services Accessible 19 (1995).

³⁹ *Supra* note 6-7.

other than her abuser or his agent would have access to such guarded information on immigration status and would have the incentive to go to the extraordinary means necessary to discover location of a battered women's shelter or enlist the assistance of an INS officer to locate the shelter and confirm the abuse victim's residence there. Furthermore, the only conceivable motives for an abuser to share such information with the Service are retaliatory, vindictive, to avoid prosecution, or for other less-than-honorable purposes.

When the Service pays heed to such bad-faith actors, the Service has in effect become the tool of an abuser seeking to further harass his former victim(s). Accordingly INS agents should always be suspicious of any informant who leads the Service to the doorstep of a battered women's shelter. When INS officers are provided information that an undocumented immigrant female can be found at a specific address and that address turns out to be a battered women's shelter, INS officials must presume that the source of that information is an abuser and must not rely on that information in any enforcement action.

The Service undermines the public's trust when it assists such bad faith actors. Since such information is at the very least suspect, we believe that Service reliance on such informant leads is counter to sound public policy and reasonable enforcement practices.

Not only are such investigative practices unsound, but also federal law expressly prohibits them.⁴⁰ Unfortunately, the life-saving protection offered by section 384 can be frustrated if untrained INS officers allow themselves to become used by abusers who enlist friends or other accomplices to serve as straw men making informant reports triggering INS investigation efforts against battered non-citizen women housed at a battered women's shelter. While the law is currently unclear regarding a prohibition against reliance on information transmitted to the Service by a third-party agent of an abuser, in keeping with the spirit of section

⁴⁰ *Supra* note 17.

384 and sound public policy, the Service should issue a policy directive clarifying that any investigative tip that points to a battered women's shelter as the location for an undocumented immigrant is likely to be traced back to the abuser himself.

Although INS agents could seek and receive other reliable, independent information, the detrimental effect to battered women and children from INS actions raiding or subpoenaing information from battered women's shelters far outweighs any interest INS may have in apprehending any particular undocumented battered immigrant woman who qualifies to be a battered women's shelter resident because of the crimes and abuses committed against her. We respectfully request that the Service issue a policy directive that would prevent investigative efforts at battered women's shelters that are triggered by any person including bad-faith actors, both abuser and agent alike. This approach would be consistent with and will be supportive of Congress' and the Attorney General's directives to assure that all battered women, citizen and non-citizen alike, can safely, securely and easily access battered women's shelters without risking danger either from their abusers or from INS.

This approach would also benefit the Service by protecting its officers from unwittingly or unknowingly violating the provisions of section 384 of IIRAIRA that prohibit the Service from relying on information provided by abusers.⁴¹ This section subjects those who "willfully use, publish, or permit information to be disclosed" to "appropriate disciplinary action" and a "civil money penalty of not more than \$5,000 for each such violation."⁴² Issuing guidance prohibiting enforcement actions at shelters offers INS agents protection from otherwise being enlisted by an abuser, unknowingly enticed into violating the provisions of section 384 and from being subjected to fines and potentially jail time.

⁴¹ Section 384 of IIRAIRA does not provide for any affirmative defenses for violating the ban on use of batterer-derived information.

⁴² Pub. L. No. 104-208, Div. C. Title III, § 384, Sept. 30, 1996, 110 Stat. 3009-552 (codified at 8 U.S.C. § 1367(c)).

Setting aside the distinction of which investigative leads are expressly prohibited and which ones are not, NOW Legal Defense believes that any investigative lead that directs the Service to a battered women's shelter squanders limited INS resources considering the independent immigration status that is now available to the vast majority of battered immigrant women who would be shelter residents.

Besides offering immigration relief to many immigrants who were not covered by VAWA 1994's immigration protection (VAWA self-petitions), section 1513 of VAWA 2000 also extends IIRAIRA section 384 confidentiality protections, discussed above, explicitly to certain non-citizen crime victims, including battered immigrants, who would be eligible to apply for a U-visa.⁴³ Congress enacted section 1513 to create a new nonimmigrant visa classification in order to "strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes" and to "facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status."⁴⁴ Therefore under VAWA 2000, any non-citizen domestic violence victim who has suffered substantial physical or mental injury and who is willing to cooperate in a criminal investigation or prosecution could receive U-visa protection whether or not she is married to or living with her abuser.⁴⁵

Since VAWA 2000 provides most battered immigrant women shelter residents with an effective means to attain temporary status, any Service effort to remove them from a shelter only serves to frustrate their efforts to obtain lawful immigration status they may qualify for and to receive the battered women services they desperately need. The investment of limited INS

⁴³ See INA § 101(a)(15)(U) (2001) (added by Sec. 1513, Title V [Battered Immigrant Women Protection Act of 2000], div. B [Violence Against Women Act of 2000], Pub. L. 106-386 [Victims of Trafficking and Violence Protection Act of 2000], 114 Stat. 1464 (Oct 28, 2000). (codified at 8 U.S.C. 1101(a)(15)(U)).

⁴⁴ See Pub. L. 106-386, Div. B [The Violence Against Women Act of 2000], Title V [Battered Immigrant Women], §§ 1513(a)(2)(A)-(B), 114 Stat. 1464 (Oct. 28, 2000).

⁴⁵ Id.

investigative resources on a battered immigrant woman, who can now initiate an immigration case to attain legal immigration status independent of her abuser and can concomitantly help the government enforce criminal laws prohibiting abuse in its many forms, runs counter to and undermines Congressional efforts to offer protection to those same battered women.

Accordingly, any efforts that the Service can engage in to further instruct and solidify the prohibition on Service reliance on any investigative tips that lead to the door of a battered women's shelter would be most welcome and would facilitate the ability of battered immigrant women apply for VAWA protection and U-visas. This approach will also help prosecutors gather evidence against their abusers.

III. Issuance of a Directive Not to Raid, Subpoena, or Seek Information from Battered Women's Shelters is Sound Exercise of "Prosecutorial Discretion" as Defined by and Consistent with Commissioner Meissner's Memorandum to Regional Directors, District Directors, Chief Patrol Agents, and Regional and District Counsel

On November 17, 2000, Commissioner Doris Meissner issued an intra-agency memorandum (Meissner Memorandum) outlining the principles that Service personnel should use in exercising the Service's prosecutorial discretion and making discretionary decisions. In pertinent part, the Meissner Memorandum states:

[s]ervice officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process – from planning investigations to enforcing final orders – subject to their chains of command and to the particular responsibilities and authority applicable to their specific position.⁴⁶

Moreover, the Meissner Memorandum offers specific guidance to “promote efficient and effective enforcement of the immigration laws and the interests of justice.” Thus, all INS

⁴⁶ Memorandum from Commissioner Doris Meissner to Regional Directors, District Directors, Chief Patrol Agents, and Regional and District Counsel, at <http://www.ins.gov/graphics/lawregs/handbook/discretion.pdf> (Nov. 17, 2000) (emphasis added).

officers and agent are expected to exercise discretion in appropriate cases until further guidance on specific types of cases is issued.

The Service should now direct Service personnel to exercise prosecutorial discretion to not initiate INS investigative efforts at, within or on battered women's shelters. This approach will enhance protection to battered immigrant non-citizen women and their children while at the same time protecting INS officials from being held liable from violating IIRAIRA's section 384 confidentiality provisions.

The Meisner Memorandum defines the favorable exercise of prosecutorial discretion as one in which a decision is made not to assert the full scope of INS' enforcement authority as permitted by law. NOW Legal Defense agrees with this definition and enforcement priority. Furthermore, should INS decide as a matter of prosecutorial discretion not to conduct any enforcement activities at battered women's shelters, such a decision would not pose problems for the Service with either the Congress or the courts. Congress has spoken clearly. Several laws in 1994, 1996 and 2000 were all designed to enhance protections for battered immigrants.⁴⁷ If INS were to exercise its discretion to choose not to carry out enforcement actions at shelters the reaction from Congress would be positive, not negative.

Similarly, agency discretion maybe outside the scope of judicial review especially in immigration enforcement matters.⁴⁸ Accordingly, the Service should exercise this discretion to clearly define internal enforcement priorities and expound upon the full meaning of "favorable exercise of prosecutorial discretion," in order to direct and encourage Service personal not to assert enforcement power against battered immigrant women housed in battered women's

⁴⁷ Section I of this letter outlines the recent Congressional efforts aimed at protecting battered immigrant women.

⁴⁸ See Heckler v. Chaney, 470 U.S. 821, 831 (1985) (reiterating a the Supreme Court's long-held view that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion"); Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, 490-91 (1999) (upholding judicial restraint as greater in the immigration context and insulating a prosecutor's motives and decision making).

shelters or against the battered women's shelter. Otherwise, uninformed and zealous agents may hinder the vital work that battered women's shelters perform around the country and at the same time risk becoming liable for breaching IIRAIRA's section 384 confidentiality provisions.

It is well documented that battered women's shelters have limited shelter beds and resources and cannot serve all who need their assistance.⁴⁹ Moreover, limited by financial realities, shelter staff are extremely judicious in who they admit. Through training and extensive experience, shelter staff regularly identify those most in need of domestic violence services.⁵⁰ Shelter staff carefully screen applicants and use their expertise to assure that only those who are truly victims of domestic violence are accepted for placement in shelter programs.

The heightened scrutiny that front-line shelter staff impose on all applicants assures that only persons who are victims of domestic violence are offered refuge within a battered women's shelter.⁵¹ As such, any Service enforcement against an immigrant admitted to a battered women's shelter who has suffered greatly at the hands of her abuser is not the kind of exercise of prosecutorial discretion called for in the Meissner Memorandum.

In sum, NOW Legal Defense believes that no governmental purpose is furthered by harassing someone who is courageously seeking safe shelter and other medical, counseling, supportive, rehabilitative and humanitarian services offered by shelter staff and programs. Since the Meissner Memorandum deems an "apparent conflict between any . . . specific policy requirements and [the prosecutorial discretion] guidelines" as ripe for resolution, we believe the

⁴⁹ See Maria Foscarinis, Downward Spiral: Homelessness & Its Criminalization, 14 Yale L. & Pol'y Rev. 1, 13-16 (1996) (discussing how discrepancy between need for shelter beds and resources is extremely high nationwide); Catherine F. Klein & Leslye E. Orloff, Providing Legal Protection for Battered Women: An Analysis of State Statutes & Case Law, 21 Hofstra L. Rev. 801, 934 n. 844 (1993) (listing various statistical findings evidencing shelter shortages nationwide).

⁵⁰ See, e.g., Sana Loue, Intimate Partner Violence: Societal, Medical, Legal and Individual Responses 87 (2001) (summarizing screening protocols for the identification and treatment of victims of domestic violence).

⁵¹ It is important to note that some domestic violence shelters will also accept trafficking victims as residents. All of the discussions above with regard to the need for safety and confidentiality and likelihood that the shelter resident will qualify for legal immigration status apply equally to trafficking victims.

Service should issue a policy directive firmly limiting all INS investigative efforts⁵² against immigrant women receiving shelter services since they are outside reasonable constructions of prosecutorial discretion and are officially discouraged.

IV. INS Enforcement Actions at Battered Women’s Shelters Run the Risk of Violating Battered Immigrant Women’s Fourth Amendment Rights and Violating State Confidentiality Laws

In U.S. v. Verdugo-Urquidez,⁵³ the Supreme Court acknowledged that immigrants do indeed enjoy certain constitutional rights⁵⁴ “when they have come within the territory of the United States and developed substantial connections with the country.”⁵⁵ In Verdugo-Urquidez, the Supreme Court expressly put to rest any misconstructions that the Fourth Amendment does not apply to immigrants within the United States.⁵⁶ The Verdugo-Urquidez Court stated that all prior statements on whether the Fourth Amendment applied to undocumented immigrants “are therefore not dispositive of how the Court would rule on a Fourth Amendment claim by illegal aliens in the U.S.”⁵⁷ Stated differently, immigrants are not excluded from Fourth Amendment protections outright. Up and until the U.S. Supreme Court clearly rules on this point, NOW

⁵² This would include seeking out immigrants residing in battered women’s shelters who are allegedly undocumented, subpoenaing shelter records, and requesting information about shelter residents or any other INS enforcement activities.

⁵³ 494 U.S. 259 (1990) (discussing the applicability of the Fourth Amendment to a Mexican citizen and resident apprehended by United States officials, working with Mexican authorities, conducting warrantless searches of defendant’s residence in Mexico). In Verdugo-Urquidez, the U.S. Supreme Court specifically refused to decide whether an illegal alien who lived in the United States would be one of “the people” protected by the Fourth Amendment. Accordingly, the applicability of the Fourth Amendment to noncitizens within the United States remains unresolved. However, undocumented immigrants living in the United States who have been subjected to incidents of domestic violence here would be able to establish the requisite “connection” with this country required fall within the group of “the people” provided Fourth Amendment protection. This is particularly true for VAWA eligible battered immigrants and other battered immigrants whose abusers are U.S. citizens, legal permanent residents or other immigrants granted other forms of legal immigration status in the United States.

⁵⁴ See, e.g., Plyer v. Doe, 457 U.S. 202, 211-12 (1982) (holding immigrant to be protected by the Equal Protection Clause), Kwong Hai Shew v. Colding, 344 U.S. 590, 596 (1953) (finding resident immigrants to be “persons” within the meaning of the Fifth Amendment), Bridges v. Wixon, 326 U.S. 135, 148 (1945) (holding resident immigrants have First Amendment rights), Wong Wing v. US, 163 U.S. 228, 238 (1896) (holding resident immigrants to have Fifth and Sixth Amendment rights).

⁵⁵ See U.S. v. Verdugo-Urquidez, 494 U.S. at 270-71.

⁵⁶ See Verdugo-Urquidez, 494 U.S. at 272-73.

⁵⁷ See 494 U.S. at 272-73.

Legal Defense believes that the Service must respect the Fourth Amendment rights of all immigrants, especially those of battered immigrant women. Since the Supreme Court has repeatedly issued rulings that secure constitutional protections and fundamental rights for immigrants, including First, Fifth, Sixth and Fourteenth Amendment rights, there is no reason to believe Fourth Amendment rights are per se inapplicable to immigrants, including battered immigrants.⁵⁸

Battered non-citizen women easily meet the standard articulated in Verdugo-Urquidez. They clearly falls under the meaning of “people” for Fourth Amendment purpose and have the requisite “significant voluntary connection with the United States, the violence, their relationship with the abuser and often U.S. born children, to avail themselves of Fourth Amendment protections. Battered immigrant women who flee an abusive home are often times the spouses, former spouses or intimate partners of US citizens, lawful permanent residents or non-immigrant visa holders. All have been the victims of crimes within the United States, usually multiple domestic violence crimes. Specifically, those who qualify to self-petition, for VAWA based relief⁵⁹ or to file for a U-visa have been victims of serious crimes committed against them while they were present in the US. Furthermore, battered immigrant women are valuable witnesses for prosecutors assisting the state in making their case against the abuser. NOW Legal Defense believes these contacts to be significant enough to qualify battered immigrant women as “people” for Fourth Amendment purposes.

⁵⁸ See, Plyer v. Doe, 457 U.S. 202, 211-12 (1982) (holding immigrants to be protected by the Equal Protection Clause), Kwong Hai Shew v. Colding, 344 U.S. 590, 596 (1953) (finding resident immigrants to be “persons” within the meaning of the Fifth Amendment), Bridges v. Wixon, 326 U.S. 135, 148 (1945) (holding resident immigrants have First Amendment rights), Wong Wing v. US, 163 U.S. 228, 238 (1896) (holding resident immigrants to have Fifth and Sixth Amendment rights).

⁵⁹ See INA §§ 204(a)(1)(A)(iii), (A)(iv), (B)(ii), (B)(iii) (2001) (codified at 8 U.S.C. § 1154) (summarizing who qualifies for self-petitioning); INA § 240A(2) (2001) (codified at 8 U.S.C. § 1229b) (summarizing the requirements for cancellation of removal for battered immigrant women).

Furthermore, the Service concedes that the Fourth Amendment applies to service investigative functions.⁶⁰ The Service has affirmatively argued before the Supreme Court that the Service has its own “comprehensive scheme for deterring Fourth Amendment violations by its officer. Since the Service affirmatively offers that it “safeguards the rights of those”⁶¹ with Fourth Amendment protections, NOW Legal Defense urges the Service to instruct its agents to respect battered immigrant women’s Fourth Amendment rights.

As battered women face numerous barriers in leaving violent relationships, there is little reason for the Service to complicate this difficult and dangerous process any further. Real world concerns such as what impact such transition will have on dependent children, having limited employment options, having little or no property in her own name, lacking access to cash and bank accounts, fearing loss of custody of dependent children, and fearing the escalation of the level of violence, all make leaving an abusive relationship that much harder. The numerous attempts and the courage that it takes a battered woman and her dependents to flee a home riddled with domestic violence is mind boggling, but battered women and battered immigrant women manage to take this courageous step every day.

There are heightened risks in leaving abusive situations. Domestic violence often escalates over time in frequency, intensity, and duration⁶² but almost always escalates when the batterer discovers or believes that the victim is about to or actually has left him.⁶³ These

⁶⁰ See INS v. Lopez-Mendoza, 468 U.S. 1032, 1044-45 (1984) (citing INS briefs to support this proposition).

⁶¹ See 486 U.S. at 1044-45.

⁶² See Sana Loue, Intimate Partner Violence: Societal, Medical, Legal and Individual Responses 2 (2001) (stating that emotional and physical abuse are often intimately related as where one may subside the other will be effectuated by the batterer in the interim); Kristina Rose, U.S. Dep’t of Justice, Domestic Violence Statistics 12 (1989).

⁶³ See Ann Jones, Next Time, She’ll Be Dead: Battering & How to Stop It 130 (2d ed. 2000) (criticizing the scrutiny of battered women who do not leave a domestic violence situation as a judgment that avoids addressing the greater social concern of why men batter in the first place); Alyce D. LaViolette and Ola W. Barnett, It Could Happen to Anyone: Why Battered Women Stay 6 (2d ed. 2000) (stating that leaving, which was once thought to be the only avenue to safety, has been proven not to be as safe as once believed); Penelope Eileen Bryan, Women’s Freedom to Contract at Divorce: A Mask for Contextual Coercion, 47 Buffalo L. Rev. 1153, 1219-34 (1999) (discussing how battered women comply with a batterer’s articulated and anticipated demand even in divorce negotiations); Catherine F. Klein & Leslye E. Orloff, Providing Legal Protection for Battered Women: An Analysis of State

concerns of heightened risk of violence upon leaving are all the more acute for battered immigrant women for the simple fact that the abuser has far more tools at his disposal to threaten, harass, intimidate and hold over his former victim. Specifically, an abuser can and often does control a battered immigrant woman's immigration status.⁶⁴ Thus, battered immigrant women are at heightened danger of facing barriers to leaving not only from the abuser but also from immigration procedures triggered by the abuser's reports to the INS.

Nowhere is the need for access to the social services safety net more acute than for battered immigrant women who leave their abusive partners. Immigrant women disproportionately are benefactors of dependant immigrant visa applications and others, including abused girlfriends of US citizens, may have lacked any access to legal immigration status until the passage of VAWA 2000. With limited options, limited kinship networks, limited-English skills and limited information about protections offered by US laws for battered women, battered immigrant women are far more likely to have to depend on the social service safety net when leaving abuse at home. When battered immigrant women cannot access a shelter when fleeing abuse many become effectively homeless or are forced to return to their abusers. For battered immigrant women who do find the courage to escape and are lucky enough to secure a shelter bed, the battered women's shelter becomes the immigrant battered women's home.

Statutes & Case Law, 21 Hofstra L. Rev. 801, 815-16 (1993); Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issues of Separation, 90 Mich. L. Rev. 1, 5-7, 65-68 (1991) (naming this phenomenon "separation assault").

⁶⁴ See Mary Ann Duton, Leslye E. Orloff & Giselle Aguilar Hass, Characteristics of Help-Seeking Behaviors, Resources & Service Needs of Battered Immigrant Latinas: Legal & Policy Implications, 245 Geo. J. Poverty Law & Pol'y 245, 250 (2000) (addressing how immigration impacts immigrant Latina help-seeking behaviors when considering leaving a domestic violence situation).

Absent consent or exigent circumstances, the U.S. Supreme Court has clearly and continually upheld the heightened protection from law enforcement activities in the home.⁶⁵ In Weeks v. United States,⁶⁶ the Supreme Court summarized the Framers' intent underpinning the Fourth Amendment and announced the exclusionary rule for illegal searches conducted by federal officers.⁶⁷ The Weeks Court held "that a man's house was his castle" and this notion is the core of the Fourth Amendment. Similarly, in Payton v. New York, the Supreme Court held:

*The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home – a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally established the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." . . . In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstance, that threshold may not be reasonably crossed without a warrant.*⁶⁸

⁶⁵ See Payton v. New York, 445 U.S. 573, 576, 583-84 (1980) (explaining that Fourth Amendment "prohibits police from making a warrantless and nonconsensual entry into a suspect's home" and tracing common law notion of "indiscriminate searches and seizures conducted under the authority of 'general warrants'[as] immediate evils" that are the underpinning motivation behind the Framers' adoption of the Fourth Amendment). The home as site of heightened Fourth Amendment protections has repeatedly been articulated through U.S. Supreme Court case law. See also Weeks v. United States, 232 U.S. 383, 390 (1914) (acknowledging that framers intended Fourth Amendment to "enact[] into the fundamental law ... that a man's house was his castle"); Johnson v. United States, 333 U.S. 10, 14 (1948) (declaring that without warrant requirement, Fourth Amendment would be "a nullity and leave the people's homes secure only in the discretion of police officers"); Welsh v. Wisconsin, 466 U.S. 740, 748 (1984) (pointing out that "it is axiomatic" that Fourth Amendment's main purpose is to protect against physical entry of home); United States v. Dunn, 480 U.S. 294, 301 (1987) (holding "the centrally relevant consideration [in determining whether an area counts as curtilage or open fields is] [] whether the area in question is so intimately tied to the home itself that it should be placed under the home's umbrella of Fourth Amendment protection.") (internal quotation marks omitted); Arizona v. Hicks, 480 U.S. 321, 327 (1987) (emphasizing that warrantless searches and seizure in homes are presumptively unreasonable); New York v. Burger, 482 U.S. 691, 700 (1987) (noting that expectation of privacy in commercial setting is less than in home); Wilson v. Arkansas, 514 U.S. 927 (1995) (unanimous) (holding that the Fourth Amendment incorporates the common law knock and announce requirement for law enforcement to enter a home and holding that "in some circumstances an officer's entry into a home might be unreasonable under the Fourth Amendment.")

⁶⁶ 232 U.S. 383 (1914).

⁶⁷ The Weeks decision was limited to illegal searches conducted by federal officers where the illegally seized evidence was sought to be admitted in federal criminal proceeding. The Weeks decision was the exercise of the Court's supervisory power over the federal courts expressing the interest in judicial integrity requiring that federal courts not sanction illegal searches by admitting the fruits of illegality into evidence. The Weeks exclusionary rule was subsequently extended to the states through Wolf v. Colorado, 338 U.S. 25 (1949) and Mapp v. Ohio, 367 U.S. 643 (1961). But see INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (allowing illegally seized evidence to be used in deportation proceedings).

⁶⁸ 445 U.S. 573, 589-90 (1984).

Modern trends in the application of Payton indicate growing willingness of courts to extend privacy interests protected by Payton to those not fortunate enough to have a fixed and stable home. For example, some courts have held that the term “home” must be flexibly applied to include public areas in which homeless persons have established a living space.⁶⁹ By all indications, battered immigrant women who flee abusive relationships are in effect homeless and those immigrant battered women who are accepted into a battered women’s shelter affirmatively establish a living-space within the shelter. Just as homeless shelters fall within the meaning of “home” for the purposes of the Fourth Amendment, a battered women’s shelter also comes within the same definition. Furthermore, if the privacy interests of a homeless person can be recognized and protected under the Fourth Amendment at a homeless shelter, there is no reason why the privacy interest of a battered immigrant woman cannot likewise be recognized and protected within the confines of a battered women’s shelter.

Under both federal law and state law, battered women’s shelters are required to operate in a manner that guarantees heightened confidentiality to the women they serve. For example, federal statutes, such as the Family Violence Prevention and Services Act⁷⁰ and the Victims of Crime Act,⁷¹ through Spending Powers require that domestic violence shelters receiving federal funding assure confidentiality of all client records and are barred from revealing information that is identifiable to a specific person.⁷² Similarly, the United State Postal

⁶⁹ See Community Non-Violence v. U.S. Marshals Service, 797 F. Supp. 7 (D.C.D.C. 1992) (clarifying that the Payton rule applies to arrests conducted in homeless shelters). But see US v. Ruckman, 806 F.2d 1471 (10th Cir. 1986) (holding arrests of a homeless person cannot violate Payton even if in a place a homeless person calls home)

⁷⁰ 42 U.S.C. § 10402(a)(2)(E) (2001).

⁷¹ 42 U.S.C. § 10604(d) (2001).

⁷² See, e.g., 42 U.S.C. § 10402(a)(2)(E) (2001) (forbidding grants to any program without “documentation that procedures have been developed . . . to assure the confidentiality of records pertaining to any individual provided family violence prevent or treatment services . . .”).

Service was directed by statute to implement regulations “to secure the confidentiality of domestic violence shelters and abused persons’ addresses.”⁷³

As will be discussed more fully in the next section, state legislatures have also enacted laws specifically designed to protect the confidentiality of battered women by restricting access to information that would reveal their locations.⁷⁴ In short, both federal and state laws recognize that battered women’s shelters and services and the persons using these services must be afforded confidentiality to assure privacy and safety of women and children residing at battered women’s shelters.

Confidentiality and privacy are crucial to the work shelters do. Women in shelters must have an expectation of privacy.⁷⁵ In order for battered women’s shelters to successfully assist battered women, citizen and immigrant alike, safely to escape their abusers, shelters must protect the information they are given about women who seek their help. Confidentiality, and the concomitant expectation of privacy that it affords, are the cornerstones of successful shelter programs. Without confidentiality, few battered women would seek help for fear their abusers would learn of their disclosures and retaliate against them. Accordingly, both state and federal laws mandate that battered women’s shelters operate in a manner that offers a broad grant of privacy to those who reside under the shelter’s roof.

To offer any real protection for shelter residents every woman, citizen and immigrant alike, must have an expectation of privacy upon entering a shelter. Issuance of field guidance by INS confirming that INS enforcement officers will not raid, subpoena or seek information from

⁷³ See 42 U.S.C. § 13951 (2001).

⁷⁴ See e.g., Mass. Ann. Laws ch. 209A, § 8 (2000) (protecting confidentiality of minors); N.J. Stat. § 2C:25-26 (2001); Tex. Fam. Code § 85.0007 (2000); Wis. Stat. § 813.125(5m) (2000), *id.* at § 895.67(2)(a) (2000) (covering battered mothers and children).

⁷⁵ See Alyce D. LaViolette & Ola W. Barnett, *It Could Happen to Anyone: Why Battered Women Stay* 151-52 (2d ed. 2000) (recounting the double-bind some battered women find when confidentiality is guarded at varying levels from absolute privacy as in the case of a shelter contrasted with looser notions of privacy at medical centers which may force disclosure of her and her child’s address to receive medical attention which in many states is thereby discoverable by her former abuser who is the other legal guardian of the child).

shelters is consistent with other federal and state laws and with the INS confidentiality rules included in section 384 of IIRAIRA. Service enforcement activities that invade the confidentiality that exists at shelters must simply be restricted.

Further, NOW Legal Defense strongly believes that the privacy interests of battered immigrant women are protected under Fourth Amendment prohibition against warrantless searches. Both VAWA and U-visa applicants need protection from their abusers and access to stable immigrant status so they can seek court protection and cooperate in their abuser's prosecution. Battered immigrant women who can self-petition, to obtain VAWA protection from deportation or removal, or apply for a U-visa also provide vital information that assists the Service in gaining access to information that may be useful in INS enforcement and benefit granting functions with regard to their abusers. The facts of their US residence, their intimate relationship with their abuser, often with citizen children born to them in the US, and the crimes committed against them constitute affirmative facts that can easily be construed as the "significant voluntary connections with the United States" and guarantees them the right to be free from warrantless searches and seizures and help them profit from the warrant requirements of the Fourth Amendment.

The Immigration and Nationality Act expressly limits the warrantless enforcement power of Service officers and employees to areas outside "dwellings."⁷⁶ Fourth Amendment principles and federal law indicate a preference for Service enforcement with a warrant. In the instances to date that have been reported to us in which the INS attempted enforcement actions at shelters, particularly the New Mexico case, INS sought to carry out enforcement action at a shelter without a warrant.

⁷⁶ 8 U.S.C. § 1357(a)(3) (2001) (excluding Service agents' powers without warrants to locals outside dwellings).

The Warrant Clause imposes a probable cause standard for the issuance of such a particularized warrant. However federal law explicitly prohibits Service personnel from relying on information provided by the abuser or an agent of the abuse living under the same roof as the abuser.⁷⁷ Absent independent and reliable information unconnected to the abuser, Service personnel will have difficulty obtaining sufficient untainted evidence that rises to the level of probable cause for the issuance of a warrant to enter a battered women's shelter.

The policy guidance issued by INS should address three issues. First, INS must not raid, subpoena or seek information from battered women's shelters.⁷⁸ Second, INS should not seek a warrant to seize information a shelter may possess or persons residing at a shelter. Third, INS should not intimidate shelter residents or staff in order to search the premises without a warrant. Although, Fourth Amendment protections would allow INS to seek a warrant to intrude on the privacy rights of battered immigrants residing in shelters, seeking such a warrant would be bad public policy. It would undermine the safety and confidentiality of the shelter as a safe haven for battered women and would make INS officers susceptible to becoming tools of the abusers who want to use INS to harm immigrant family violence victims. INS can also become a tool of the abusers by subpoenaing shelter records at the batterer's request or on INS's own initiative. Issuing guidance directing all INS personnel not to conduct any investigative or enforcement actions at battered women's shelters will also prevent INS officers from getting around the Fourth Amendment's warrant requirement by coercing, threatening, or intimidating shelter staff or residents into allowing "consensual" search and turning over a battered immigrant shelter resident or records or information about her. Using intimidation and exercising warrants to conduct any form of investigation or enforcement action at a battered women's shelter would be

⁷⁷ See 8 U.S.C. §§ 1367(a)-(c) (2001)

⁷⁸ INS should not use subpoenas to replace warrants in order to summons a victim to testify or for an arrest.

an exercise of prosecutorial discretion in a manner that would run counter to the protective purpose of VAWA 1994 , IIRAIRA section 384 and VAWA 2000.

V. INS Investigative Issuing of Subpoenas Directed at Battered Women’s Shelters Run the Risk of Violating Federal and State Confidentiality Requirements for Battered Women’s Shelter Services

Privacy and confidentiality are the cornerstones of all successful counseling and shelter programs. Without them, few battered women would seek help for fear that their abusers would learn of their disclosures and retaliate against them. Without assurances of privacy and confidentiality, few battered women would be able to implement the safety plans they need to protect themselves and their children. The physical danger faced by battered women underscores the necessity for confidentiality in the relationship they have with their counselors that is protective of the battered woman’s privacy. Accordingly, privacy and confidentiality have become the benchmarks of the comprehensive services offered by shelter programs to all battered women.⁷⁹

Widespread recognition of the importance of such a comprehensive approach to domestic violence underscores society’s commitment to effective service delivery for battered women.⁸⁰

⁷⁹ Leslye E. Orloff & Rachel Little, Somewhere to Turn: Making Domestic Violence Services Accessible to Battered Immigrant Women: A “How To” Manual for battered Women’s Advocates and Services Providers 125-141 (1999) (summarizing strategies to help shelter workers respect and protect the confidences they offer to battered immigrant women seeking domestic violence services).

⁸⁰ For example, on the federal level alone, passage of the VAWA in 1994 was preceded by four years of hearings. See, e.g., Domestic Violence: Terrorism in the Home, Hearing before the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources, 101st Cong., 2d Sess. (1990) (S. Hearing 101-897); Women and Violence, Hearing before the Senate Committee on the Judiciary, 101st Cong., 2d Sess. (1990); Violence Against Women: Victims of the System, Hearing on S. 15 before the Senate Committee on the Judiciary, 102d Cong., 1st Sess. (1991) (S. Hearing 102-369); Violence Against Women, Hearing before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, 102d Cong., 2d Sess. (1992); Hearing on Domestic Violence, Hearing before the Senate Committee on Judiciary, 103d Cong., 1st Sess. (1993) (S. Hearing 103-596); Violent Crimes Against Women, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993) (S. Hearing 103-726); Violence Against Women: Fighting the Fear, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993) (S. Hearing 103-726); Violence Against Women: Fighting the Fear, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993) (S.

In addition to the various medical professions,⁸¹ and federal and state lawmakers have recognized two necessary components for the provision of comprehensive services to battered women: (1) protecting the privacy of battered women; and (2) protecting the confidentiality of their relationship with support services.⁸²

On the federal level, the Family Violence Prevention and Services Act, for example, forbids grants to any program without “documentation that procedures have been developed, and implemented including copies of the policies and procedure, to assure the confidentiality of records pertaining to any individual provided family violence prevention or treatment services by any program . . . and provide assurances that the address or location of any shelter-facility . . . will, except with written authorization of the person or persons responsible for the operation of such shelter, not be made public.”⁸³ Similarly, the Victim of Crime Act limits officers and employees of the federal government and recipients of federal grants under the Crimes Victims

Hearing 103-878); Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess. (1993); Domestic Violence: Not Just a Family Matter, Hearing before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, 103d Cong., 2d Sess. (1994).

⁸¹ The Department of Health and Human Services (HHS) recently released final medical privacy regulations, which were published in the Federal Register on December 28, 2000. These new rules provide important new privacy protections for victims of domestic violence. HHS set April 14, 2001 as the effective date. Health care providers, health plans and health clearinghouses must comply within two years. Small health plans must comply within three years. See Family Violence Prevention Fund, Summary of New Federal Medical Privacy Protections for Victims of Domestic Violence, at <http://www.fvpf.org/health/privacyprotections.html>. The most current federal privacy standards are available in electronic form at <http://aspe.hhs.gov/admsimp/>. Additionally, the American Medical Association has always made it a policy to that where possible, informed consent should be obtained before personally identifiable health information is used for any purpose. See American Medical Association, H-315.978 Privacy and Confidentiality, at http://www.ama-assn.org/apps/pf_online/pf_online?f_n=resultLink&doc=policyfiles/HOD/H-315.978.HTM&s_t=privacy&catg=AMA/CnB&catg=AMA/CEJA&catg=AMA/HOD&&nth=1&&st_p=0&nth=21&.

⁸² Of course, this recognition of the centrality that confidentiality plays in the healing process for domestic violence abuse survivors has long been known by domestic violence services workers. See, e.g., Christopher B. Daily, YWCA, Ordered to Release Rape Counseling Files, to Seek New Law, Washington Post, June 24, 1994, at A24 (quoting a domestic violence worker as saying “Rape crisis centers can’t function without confidentiality. Victims must choose between prosecution and healing. If they choose prosecution, they must suffer in silence” as confidential information provided to counselors become discoverable under court proceedings).

⁸³ 42 U.S.C. § 10402(a)(2)(E) (2001).

Fund from “reveal[ing] any research or statistical information . . . identifiable to any specific private person”⁸⁴

Furthermore, state legislatures have also acted specifically to protect the confidentiality of battered women by restricting access to information that would reveal their locations. Some states legislatures have passed statutory provisions that require, or at least allow, courts to keep addresses of battered women confidential.⁸⁵ Other state legislatures have acted to permit a domestic abuse survivor to remove her driver’s license and registration information from public record.⁸⁶

Colorado’s legislature went as far as to create legislation that allows a battered woman to make any public record confidential if she submits an affidavit stating that she believes she will be harassed or threatened with bodily harm.⁸⁷ New Jersey and Washington have each enabled a battered woman to register to vote without disclosing her street address.⁸⁸ Many state legislatures have passed legislation that guards the confidentiality of communications between a counselor and a crime victim by enacting a counselor-victim privilege.⁸⁹

These enactments of counselor-victim privileges have been a recent trend, with most statutes having been passed since 1980. There is evidence that this privilege will only grow and

⁸⁴ 42 U.S.C. § 10604(d) (2001).

⁸⁵ See, e.g., Mass. Ann. Laws ch. 209A, § 8 (2000); N.J. Stat. § 2C:25-26 (2001); Tex. Fam. § 85.007 (2000); Wis. Stat. § 813.125(5m) (2000); id. at § 895.67(2)(a) (2000).

⁸⁶ See, e.g., Ark. Code Ann. §§ 27-50-906 to -908 (2000); Cal. Veh. Code § 1808.21 (2001); Minn. Stat. § 171.12 (2000).

⁸⁷ See C.R.S. § 24-72-204 (2000).

⁸⁸ See N.J. Stat. §§ 2C:25-26, 19:31-3.2 (a) (2001); Rev. Code Wash. (ARCW) §§ 40.24.010 to .070 (2001). The New Jersey legislature enacted its statute after a court held that a battered woman could register to vote without disclosing her street address. See D.C. v. Superintendent of Elections, 618 A.2d 931, 932 (N.J. Super. Ct. 1992).

⁸⁹ See, e.g., Alaska Stat. § 18.66.2000 (2000) (victim counselor-victim privilege); Cal. Evid. Code § 1037.2 (2001) (domestic violence counselor-victim privilege); Conn. Gen. Stat. Ann. § 52-146k (2000) (battered woman’s counselor-victim privilege); 225 Ill. Comp. Stat. Ann. 107/75 (2000) (counselor-consulting person privilege); Mass. Gen. Laws. Ann. ch. 233, § 20J (2000) (domestic violence program worker-client privilege); N.H. Rev. Stat. Ann. §§ 173-C:1, 173-C:2 (2000) (domestic violence counselor-victim privilege); N.D. Cent Code § 14-07.1-18 (1999) (domestic violence program worker-client privilege); Wyo. Stat. §§ 1-12-116 (2000) (family violence advocate-victim privilege). More than half of the states have enacted statutes addressing the confidentiality of communications between counselors and sexual assault or domestic violence victims. See generally U.S. Dep’t of Justice, Report to Congress on the Confidentiality of Communications Between Sexual Assault or Domestic Violence Victims and Their Counselors, Findings and Model Legislation (1995).

continue to evolve. For example, the Ogalala Sioux Tribal Council recently enacted Ordinance 00-26, the Victim-Advocate Privilege Act, which provides that communications or observations between battered women and their advocates shall be privileged and confidential.”⁹⁰ In section V of the Victim-Privilege Act, the law provides that “[a]dvocates, shelter staff, or program staff will not substantiate, verify, or deny placement information or the whereabouts of any domestic violence victim, or any children involved, under the advocate-victim privilege.”⁹¹ Because of the increasing societal awareness about the problem of domestic violence, it is highly likely that many states, territories and tribal nations will continue to follow this trend and enact their own privilege status.

Furthermore, there is nothing that prevents current privilege protections from being expanded to explicitly cover advocate-victim communications. On the contrary, Congress has encouraged the growth of this privilege. The U.S. Supreme Court has interpreted congressional enactments as not instructing the courts to freeze the law of privileges; but instead, as instructing them to “continue [the law’s] evolutionary development.”⁹² In enacting Rule 501 of the Federal Rules of Evidence, Congress committed to the courts to consider “reason and experience” in developing the law of privilege without prescribing (or proscribing) any source of that wisdom.⁹³

Congress’ invitation to develop the law of privilege has been addressed by the Supreme Court. In *Jaffee v. Redmond*, the Supreme Court recognized a social worker-patient privilege.⁹⁴

⁹⁰ Victim-Advocate Privilege Act, Section III (A).

⁹¹ *Id.* at Section V (A).

⁹² See *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (quoting *Trammel v. United States*, 445 U.S. 40 at 47 (1980)).

⁹³ Fed. R. Evid. 501.

⁹⁴ The *Jaffee* Court confirmed that Rule 501 of the Federal Rules of Evidence authorized “recognition of new privileges on a case-by-case basis.” *Jaffee v. Redmond*, 518 U.S. at 9 (quoting S. Rep. No. 93-1277 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7059). Thus, courts have clear directional mandate to be careful not to close the door on the development of a counselor-battered woman privilege.

In reaching its conclusion, the Court used the test formulated by John Henry Wigmore.⁹⁵ To determine whether a new privilege would make sense, the Wigmore test asks:

- (1) whether the communication originated in a confidence that the information would not be disclosed;*
- (2) whether the element of confidentiality is essential to the full satisfactory maintenance of the relationship between the parties;*
- (3) whether the relationship between the parties is one which the opinion of the community ought to be sedulously fostered; and*
- (4) whether the injury to the relationship that would inure from the disclosure of the communication is greater than the benefit that would be gained from correct disposal of the litigation.*⁹⁶

As set forth above, all these elements weigh in favor of recognizing a limited privilege protecting confidential information provided by battered women and battered immigrant women to shelter counselors and workers. First, there is little question that when any battered woman, citizen and immigrant alike, divulges personal information to a domestic violence program from the first point through the day the battered immigrant woman is no longer receiving any shelter services. Such private information is disclosed only with the full expectation that all disclosures will be kept confidential.⁹⁷ Again, women, both citizen and immigrant alike, would not call or reveal their names to these programs if they believed their inquiry would create a record that was not entirely confidential.

Second, confidentiality is absolutely essential to maintaining the counselor-battered women relationship. Effective safety planning, counseling, assistance and support in accessing the justice system require each woman to reveal private, often intimate, details about herself, her relationship and the violence she suffered. The mere suggestion that the program could disclose this information would disrupt this critical relationship and force each woman, citizen and

⁹⁵ See 8 Wigmore, *Evidence* § 2285 (McNaughten rev. 1961) (delineating a four-part test).

⁹⁶ *Id.*

⁹⁷ Indeed, it is highly likely given this trend that a battered woman would reasonably believe the contents of her conversations with a domestic violence counselor – even her name – to be confidential. See *United States v. Moscony*, 927 F.2d 742, 752 (3d. Cir. 1991), *cert. denied*, 501 U.S. 1211 (1991) (stating “reasonable belief of the disclosing party is relevant to determining whether communications should be considered “confidential”).

immigrant alike, to weigh on her own the benefits of revealing these details against the cost of possible disclosure down the road. This would materially undermine the program’s ability to provide sufficient services to battered women.

Moreover, the “public ends” served by such a privilege are also particularly clear. As evidenced by the numerous federal and state programs serving battered women and their children, society believes the privilege at issue should be “sedulously fostered.” There is significant interest in protecting all women and children, citizen and immigrant alike, from physical and emotional abuse, and preserving the well being of healthy families. Finally, the “reason and experience” of state law, as well as many federal initiatives designed to help domestic violence victims discussed above, support the recognition of a limited privilege.

At least one federal court has taken this approach. In United States v. Lowe⁹⁸ The court reasoned that Jaffee was not technically on point because the communications were made to a “rape crisis center employee or volunteer” and not a “licensed social worker or psychotherapist.”⁹⁹ Nevertheless, the court concluded that “policies expressed in Jaffee” supported “some form of a federal privilege for communications with a rape crisis counselor”¹⁰⁰ The court reached this conclusion after noting that a majority of the states and the District of Columbia have enacted privileges for confidential communications between counselors and victims of sexual assault and domestic violence.¹⁰¹

Overall, federal and state law clearly underscores society’s commitment to effective service delivery to women and children seeking refuge at a battered women’s shelter. Yet, INS past efforts to raid, subpoena or seek information from battered women’s shelters runs counter to societal interest in securing effective services for victims of domestic violence. Specifically, the

⁹⁸ 948 F. Supp. 97 (D. Mass. 1996).

⁹⁹ Id. at 99.

¹⁰⁰ Id.

¹⁰¹ Id.

INS investigative efforts run the risk of (1) forcing or encouraging shelter program staff to violate the confidentiality provisions imposed under the Family Violence Prevention and Service Act and the Victim of Crime Act; (2) forcing or encouraging shelter program staff to reveal privileged information received in confidence which can violate state law; and (3) compromising the effectiveness of the services these shelter programs offer all women, citizen and immigrant alike.

Current federal law creates a tension of duties that is worthy of resolution. NOW Legal Defense recognizes the federal mandates and mission under which the enforcement branch of the INS operates, yet when the INS carries out its duties directed at battered immigrant women allegedly housed within a battered women's shelter such actions are cause for concern. Since section 384 of IIRAIRA clearly prohibits the Service from relying on batterer-derived information pointing to the entryway of a battered women's shelter, the Service must seek independent confirmation as to the location of the focus of the investigation before they may act on such a lead. It is this independent verification that is of much concern to NOW Legal Defense. If INS acts to confirm the location of battered immigrant woman to her abuser, the Service is simultaneously becoming a tool of the abuser and potentially violating IIRAIRA section 384 confidentiality provisions as the target of the investigation is overwhelmingly likely to be a VAWA or U-visa eligible applicant.

When INS seeks cooperation of shelter staff in enforcement actions shelter resident safety is compromised and places shelter workers in the position of risking failing to keep client confidences, thereby jeopardizing their funding under the Family Violence Prevention Services Act and the Victim of Crime Act. The funds are critical to continuation of work these shelters offer. Forgoing these funds in most cases is not an option. Furthermore, should a shelter be

forced to breach one client's confidence, the overall effectiveness of that program is compromised, thereby reducing the available services for all battered women.

Confidentiality is not just a convenience to battered women's shelters and the women they serve. It is a life and death issue of safety for the battered women and their children who use the shelter's services and for the shelter workers themselves. The immediate issuance of a policy directive would remedy the difficulties Service investigative efforts create for battered women's shelters.

Conclusion

Congress has repeatedly recognized that battered immigrant women are in desperate need of refuge, supportive services and stable immigration status and have since 1994 acted to pass several pieces of legislation designed to meet these needs. On several occasions, Congress has amended federal welfare, immigration, privacy/privilege law to ensure that battered immigrant women and their children can successfully leave an abusive home, thereafter access assistance from federal and state government services and do so in a manner respectful of their privacy and safety. Despite this growingly supportive climate, Service personnel continue to engage in enforcement activities that complicate and compromise safety that battered immigrant women who courageously take steps they and their children need to leave the violence they face at home. Such Service actions not only are unwise, but also they potentially compromise the funding, reputation, track records and services shelter programs offer to all battered women. Zealous service enforcement at any cost is unwise.

For all the foregoing reasons, NOW Legal Defense respectfully requests that the Service take all the necessary steps to prevent future incidents like the one in New Mexico. We believe issuing a policy guidance would be an important first step in this direction. Issuance of such

guidance would also be consistent with the Services' laudable recent track record of being responsive to the needs of battered immigrant women.

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