No. B288730

IN THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION 4

ADALI LUGO,
Appellant,

v.

MOISES CORONA,
Respondent.

On Appeal From The Superior Court For Los Angeles County,
Hon. Timothy Martella, Commissioner, Case No. 17PDRO00492

APPLICATION TO FILE AMICUS CURIAE BRIEF; PROPOSED AMICUS CURIAE BRIEF OF THE CALIFORNIA WOMEN'S LAW CENTER IN SUPPORT OF APPELLANT

Amy C. Poyer (SBN 277315)
CALIFORNIA WOMEN'S
LAW CENTER
360 N. Pacific Coast Hwy.
Suite 2070
El Segundo, C.A. 90245

Theane Evangelis (SBN 243570)
Michael Holecek (SBN 281034)
GIBSON DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, C.A. 90071
(213) 229-7000
tevangelis@gibsondunn.com
mholecek@gibsondunn.com

Daniel Osher*
GIBSON DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
dosher@gibsondunn.com
*Admitted only in Washington State; practicing under the supervision of Principals of the Firm

Counsel for Amicus Curiae The California Women's Law Center

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APPLICATION TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 8.200(c) of the California Rules of Court, California Women's Law Center ("CWLC") respectfully submits this application and proposed *amicus curiae* brief in support of Appellant Adali Lugo. CWLC seeks to file the attached proposed brief to explain that the trial court in this case committed legal error by concluding that an existing criminal protective order barred it from issuing a restraining order under the Domestic Violence Protection Act ("DVPA"). CWLC also seeks to explain why the trial court's error, if repeated, will endanger Californians seeking protection against domestic violence.

The proposed brief first argues that the trial court's reasoning is contrary to the text, structure, and legislative intent of the DVPA and other important Family Code provisions, as well as guidance from the Judicial Council. It then explains that criminal and civil restraining orders must be permitted to coexist because they serve different purposes, follow different procedures, and authorize different forms of relief. Last, the proposed brief explains that the trial court's error particularly endangers a significant portion of individuals who seek the DVPA's protections in California: monolingual Spanish speakers who lack access to legal representation.

INTEREST OF *AMICUS CURIAE*

CWLC is a statewide, nonprofit law and policy center whose mission is to break down barriers and advance the potential of women and

girls through transformative litigation, policy advocacy, and education. For 30 years, CWLC has placed a particular emphasis on eradicating all forms of discrimination and violence against women. CWLC has submitted several amicus briefs before this Court and before the California Supreme Court on legal issues affecting survivors of domestic violence and campus sexual assault. CWLC has co-sponsored bills fighting for the rights of those victimized by gender-based violence, including the Justice for Victims Act (SB 813) in 2016, which eliminated the statute of limitations on rape and other felony sex crimes in California. We have developed extensive educational resources on sexual violence and teen dating violence, and have conducted legal trainings for other attorneys and members of the public on these issues. CWLC has first-hand knowledge of the interactions and differences between criminal and civil domestic violence protections, as well as the crucial role the DVPA plays in protecting domestic violence victims.

PROPOSED *AMICUS CURIAE* BRIEF

INTRODUCTION

On August 13, 2017, Adali Lugo's husband strangled and threatened to kill her. Sadly, Ms. Lugo is not alone. In 2017, California authorities received nearly 170,000 calls regarding incidents of domestic violence. (See *Crime Statistics: Domestic Violence*, California Dep't of Justice <http://openjustice.doj.ca.gov/crime-statistics/domestic-violence>.)

In an effort to combat this abuse, California passed the Domestic Violence Protection Act ("DVPA") nearly forty years ago. In its current form, the DVPA provides domestic violence victims with a wide array of protections against abusers. These protections go well beyond an order limiting contact between the abuser and victim; they also permit a victim to seek child and animal custody determinations, property and insurance allocations, and child and spousal support. These protections are vital in supporting a domestic violence victim's efforts to regain an independent, abuse-free life.

After her husband's attack, Ms. Lugo invoked the DVPA's protections by submitting a petition for a restraining order to protect herself and her children. In addition to physical protection from her husband, Ms. Lugo sought an order awarding her custody of her children, the right to record unlawful contact by her husband, and legal control over a shared vehicle and her cell phone. She also asked the court to prevent her husband

from altering her or her children's insurance coverage. She asked for these protections because without them, Ms. Lugo's husband could continue to control the family members' lives, and she would be helpless against the risk of future violence. As the Legislature intended, the DVPA would be utilized to protect victims and their children from the myriad effects of domestic abuse.

Yet, despite the fact that Ms. Lugo demonstrated her entitlement to these protections, the trial court inexplicably denied Ms. Lugo's petition. The court's rationale for doing so was that there was a criminal protective order in place at the time that prohibited her husband from contacting her or her children. Because an existing form of relief was in place, the court explained, it saw no reason to grant the DVPA protections Ms. Lugo sought.

Amicus submits this brief to explain why the trial court's reasoning reflects an incorrect and dangerous understanding of the relationship between California's criminal and civil domestic violence protections. There is no legal authority that prohibits a court from issuing a DVPA restraining order when a criminal protective order otherwise exists. To the contrary, the relevant statutory language and structure makes clear that the Legislature intended such criminal and civil orders to coexist. This was sound policy: criminal protective orders and DVPA restraining orders serve different purposes and place the victim in much different roles. And

as Ms. Lugo's case demonstrates, the DVPA calls for a much wider and varied range of victim protections than a criminal court will normally provide.

The trial court's error is also particularly problematic for a significant portion of DVPA petitioners who, like Ms. Lugo, are monolingual Spanish speakers and lack access to legal representation when filing a petition. Their experiences make it even more crucial for this Court to clarify that California law not only permits, but encourages, courts to issue coexisting criminal protective orders and DVPA restraining orders.

STATUTORY OVERVIEW

California law provides domestic violence victims with physical and financial protections through a series of interrelated and overlapping provisions of the Family, Penal, and Welfare and Institution Codes.

The DVPA, located at Family Code sections 6200 to 6389, permits law enforcement and domestic violence victims to petition a court for various forms of relief. "Domestic violence" under the DVPA is abuse perpetrated against a current or former spouse; current or former cohabitant; someone with whom the respondent has or previously had a dating or engagement relationship; someone with whom the respondent has had a child; a child of the petitioner or respondent; or others closely related to the respondent. (Fam. Code, § 6211.) "Abuse" includes: intentionally or recklessly causing, or attempting to cause, bodily injury; sexual assault;

placing a person in reasonable apprehension of imminent serious bodily injury to the same person or another; or engaging in conduct discussed in Family Code section 6320, which includes harassing, attacking, striking, stalking, and threatening. (Fam. Code, § 6203, subd. (a).) A DVPA petitioner need not show that such abuse resulted in physical injury or assault. (*Id.* § 6203, subd. (b).)

I. DVPA Orders

The DVPA gives courts authority to issue three types of orders: (1) ex parte emergency protective[1] orders ("emergency protective orders"), (2) temporary ex parte restraining orders ("ex parte restraining orders"), and (3) restraining orders issued after notice and hearing ("post-hearing restraining orders"). A court issues an emergency protective order upon the request of a law enforcement officer, who must demonstrate a reasonable ground to believe there is an immediate and present danger of domestic violence, elder abuse, or child abuse or abduction. (Fam. Code, §§ 6250, 6251.) An emergency protective order expires upon the later of (1) the

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[1] Under the DVPA, a "protective order" has a narrower definition than a "restraining order." An order is "protective" if it includes a restraining order of the type discussed in Family Code sections 6320, 6321, or 6322. (Fam. Code, § 6218.) Those three provisions govern orders that, respectively, prevent a party from engaging in certain physical actions against another person (*e.g.*, molesting, attacking, and stalking), exclude a party from the family home, and otherwise prohibit a party from engaging in a "specified behavior that the court determines is necessary to effectuate orders under Section 6320 or 6321."

"close of judicial business of the fifth court day following the day of [the order's] issuance," and (2) the "seventh calendar day following the day of [the order's] issuance." (*Id.* § 6256.)

A court issues an ex parte or post-hearing restraining order upon request of the victim herself, who must offer "reasonable proof of a past act or acts of abuse." (Fam. Code, § 6300.) A court generally must act on an ex parte restraining order petition the same day it is filed (*id.* § 6326), and an order granting such a petition lasts no more than 25 days (*id.* § 6327 [incorporating *id.* §§ 240–246]). A post-hearing restraining order may last up to five years (subject to certain specific exceptions) and may be extended. (*Id.* § 6345(a)–(b).) A willful and knowing violation of any DVPA order is punishable as a misdemeanor under Penal Code section 273.6. (Fam. Code, § 6388.)

II. Criminal Protective Orders

Penal Code section 136.2 governs criminal protective orders,[2] which

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[2] In contrast to the DVPA, which makes an explicit distinction between "protective" and "restraining" orders under its provisions, different courts use the terms "protective" and "restraining" interchangeably when referring to criminal orders under Penal Code section 136.2. (Compare *Babalola v. Superior Court* (2011) 192 Cal.App.4th 948, 950 [referring to such orders as "criminal protective orders"]; with *In re B.S., Jr.* (2009) 172 Cal.App.4th 183, 186, 191 [referring to the same as a "criminal restraining order"].) To avoid confusion, this brief refers to any order under Penal Code section 136.2 as a "criminal protective order."

come in two forms: pre-judgment and post-judgment. A criminal court may issue a pre-judgment criminal protective order when the prosecutor shows "a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur." (Penal Code, § 136.2, subd. (a)(1).) If the defendant is charged with a crime involving domestic violence or a sex offense, the court must, on its own, consider issuing a pre-judgment protective order. (*Id.* § 136.2, subd. (e).)

A court may issue a post-judgment criminal protective order following the defendant's conviction. If a defendant is convicted of a crime involving domestic violence or a sex offense, the sentencing court must consider, on its own, including a criminal protective order lasting no more than ten years as part of the sentence. (Penal Code, § 136.2, subd. (i)(1).) When there is clear and convincing evidence that a witness has been harassed, the court must also consider issuing a post-judgment criminal protective order barring the defendant from any contact with that witness. (*Id.* § 136.2, subd. (i)(2).) A person who violates any criminal protective order under Penal Code section 136.2 may be charged with the crime of witness tampering in violation of Penal Code section 136.1 and contempt of the court. (*Id.* § 136.2, subd. (b).)

III. Other Statutory Domestic-Violence Protections

Other statutory provisions empower courts to issue orders protecting individuals from domestic violence. First, during the pendency of a

petition to declare a child a dependent or ward of the juvenile court, the juvenile court may issue an ex parte order enjoining acts against a child to prevent abuse, including excluding a person from a dwelling. (Welf. & Inst. Code, § 213.5, subd. (a)–(b).) Second, apart from the DVPA, the Family Code also gives courts the power to issue an ex parte temporary custody order—for which a hearing must normally follow within 20 days—upon a showing of immediate harm to a child. (Fam. Code, §§ 3062, 3064.) Third, the Welfare and Institutions Code also gives courts the power to issue orders protecting elders or dependent adults from abuse. (Welf. & Inst. Code, § 15657.03.) While these additional civil restraining order authorities are no less important than the DVPA in California's efforts to prevent domestic violence, this brief focuses primarily on the interactions and differences between criminal protective orders and DVPA restraining orders.

ARGUMENT

I. California Law Encourages Coexisting Criminal Protective Orders and DVPA Restraining Orders.

There is no support for the proposition that an existing criminal protective order bars a court from issuing a restraining order under the DVPA. To the contrary, the Legislature has engaged in "consistent and repeated efforts to ensure the courts utilize *all* available tools, including [criminal protective orders], to safeguard victims of domestic abuse."

(*Babalola v. Superior Court* (2011) 192 Cal.App.4th 948, 963 [italics added].) The language and structure of the relevant statutory provisions demonstrate this intent by making clear that courts should permit coexisting criminal protective orders and DVPA restraining orders. The Judicial Council has also advised that such coexisting orders are proper.

A. The Legislature Envisioned Coexisting and Overlapping Criminal Protective Orders and DVPA Restraining Orders.

Two statutory provisions explicitly demonstrate the Legislature's intent that criminal protective orders and DVPA restraining orders be permitted to coexist. First, in Penal Code section 136.2, subdivision (f), the Legislature ordered the Judicial Council to promulgate protocols "for the timely coordination of all orders against the same defendant and in favor of the same named victim or victims," and further specified that these protocols "shall permit a family or juvenile court order to coexist with a criminal court protective order." Second, Family Code section 6227 states that the DVPA's remedies "are in addition to any other civil and criminal remedies that may be available to the petitioner."

Beyond those explicit statements, the Legislature's creation of enforcement-precedence rules to be applied when criminal protective orders and DVPA restraining orders overlap indicates an assumption that they will coexist. Under Penal Code section 136.2, unless a DVPA emergency protective order is in place, a criminal protective order issued in a case

involving a domestic violence or a sex offense "has precedence in enforcement over a civil court order against the defendant." (Penal Code, § 136.2, subd. (e)(2); *id.*, § 136.2, subd. (c)(1)(A).) This rule would be superfluous if civil restraining orders and criminal protective orders could not coexist.

The DVPA contains similar precedence rules. (See Fam. Code, §§ 6383, subd. (h)(2) [setting precedence rules for four different types of restraining order interactions, including the circumstance under which "there are both civil and criminal orders regarding the same parties"]; 6405, subd. (b) [implementing the precedence rules in § 6383(h)(2) in the context of foreign domestic violence protection orders].) These precedence rules assume that criminal protective orders and DVPA restraining orders will overlap. By choosing to clarify how law enforcement should respond to overlapping orders, rather than prohibiting the overlap, the Legislature clearly chose to permit criminal protective orders and DVPA restraining orders to coexist.

The Fourth District's analysis in *In re B.S., Jr.* (2009) 172 Cal.App.4th 183, is instructive. There, after a criminal court issued a protective order against a child's father, a juvenile court issued a civil restraining order under Welfare and Institutions Code section 213.5 prohibiting the father from contacting the mother or child. (*Id.* at pp. 187–188.) Both the criminal and juvenile court orders instructed that if any of

their provisions conflicted, law enforcement must enforce the criminal order, but that any non-conflicting terms in the juvenile order would "remain in full force." (*Ibid.*) On appeal, the court rejected the father's argument that the existing criminal protective order precluded the juvenile court from issuing its own restraining order. The court explained that the precedence rules and Penal Code section 136.2, subdivision (f)'s instruction discussed above—ordering the Judicial Council to promulgate protocols enabling coexistence—"evidently contemplates the issuance of a criminal [protective] order, despite a preexisting civil restraining order, or vice versa." (*Id.* at p. 191; *see also id.* at p. 192 ["[T]he Legislature has clearly provided that a criminal court [protective] order and a juvenile court restraining order must be allowed to coexist; we cannot nullify this directive based on our judgment as to whether this is good public policy."].) The same applies in the context of the DVPA: the Legislature's precedence rules and instructions to the Judicial Council make clear that criminal protective orders and DVPA restraining orders can coexist.

Even if these provisions somehow did not make the Legislature's intent clear, the DVPA's remedial character requires courts to construe it to permit coexisting criminal protective orders and DVPA restraining orders. The DVPA is a remedial statute. (See *Oriola v. Thaler* (2000) 84 Cal.App.4th 397, 409 [refusing to inspect a personal relationship too closely to determine whether it was "domestic" because doing so "could

frustrate the remedial purposes of the DVPA"]; *Caldwell v. Coppola* (1990) 219 Cal.App.3d 859, 863 [describing the DVPA as California's answer to "public concern" about domestic violence].) A remedial statute must be "liberally construed to promote its purpose"; this means a court must grant relief "unless clearly forbidden," and when the statute's "meaning is doubtful," a court must construe it "to suppress the mischief at which it is directed." (*East West Bank v. Rio Sch. Dist.* (2015) 235 Cal.App.4th 742, 748.) The DVPA's express purpose is to "prevent acts of domestic violence." (Fam. Code, § 6220.) Therefore, to the extent the DVPA is ambiguous as to whether an existing criminal protective order precludes the issuance of a DVPA restraining order, the trial court in this case was obligated to conclude that it does not, so that Mr. Lugo could be further protected from the risk of future domestic violence.

B. The Judicial Council Has Stated that Criminal Protective Orders and Civil Restraining Orders Can, and Should, Coexist.

According to the Judicial Council, courts should not deny civil restraining order requests on the ground that a criminal protective order already protects the petitioner. After an exhaustive review of publications, California court practices, public comments, and member discussions, the Judicial Council's Domestic Violence Practice and Procedure Task Force noted in its final report that a court "should consider [a DVPA] application *even when a criminal protective order* [] *exists*." (Judicial Council of

California, *Recommended Guidelines & Practices for Improving the Administration of Justice in Domestic Violence Cases* (2008) at pp. 13, 17, <http://www.courts.ca.gov/documents/dvpp_rec_guidelines.pdf> [italics added].)

A Judicial Council brochure available on the judiciary's website also informs readers that criminal protective orders and DVPA restraining orders may coexist. Entitled *How Does A Criminal Protective Order Help Me?*, the brochure offers information about what criminal protective orders do and how the state enforces them. (Judicial Council of California, *How Does A Criminal Protective Order Help Me?* <http://www.courts.ca.gov/documents/CPO1.pdf>.) A question on the second page of the brochure asks, "Can I get more legal protection?" to which the brochure answers:

> Yes. *Ask for a Civil Restraining Order in family court*. The judge can order the defendant to: stay away from you, your children, relatives, or others who live with you; not contact you; move out of your house; follow child custody, visitation, and child support orders; pay certain bills; go to counseling.

(*Id.* at 2 [italics added].) This message is clearly a reference to the DVPA—as explained below, the DVPA specifically enumerates these forms of relief. By stating that a domestic violence victim can obtain such protections while a criminal protective order is also in effect, the Judicial Council has made clear its position that courts should permit such orders to coexist.

II. Differences Between Criminal Protective Orders and DVPA Restraining Orders Make Coexistence Imperative.

Criminal protective orders and DVPA restraining orders differ in significant ways. First, they serve different purposes. Second, the procedures they involve—particularly the victim's role in them—differ greatly. Finally, the types of protections expressly provided by the DVPA extend well beyond those a criminal court will normally consider.

A. Criminal Protective Orders and DVPA Restraining Orders Serve Different Purposes.

Criminal protective orders and DVPA restraining orders differ in substance and procedure because they serve different purposes. The DVPA's singular focus is "to prevent acts of domestic violence, abuse, and sexual abuse and to provide for a separation of the persons involved in the domestic violence for a period sufficient to enable these persons to seek a resolution of the causes of the violence." (Fam. Code, § 6220.)

By contrast, while criminal protective orders protect victims in effect, they serve other purposes as well. Criminal protective orders are generally "focuse[d] on preserving the integrity of the criminal court proceedings and protecting those participating in them." (Domestic Violence Remedies in California Family Law Cases (Cont.Ed.Bar 2009 supp.) [hereafter "Domestic Violence Remedies"] Domestic Violence, Harassment, and the Family Law Client, § 1.20, p. 17.) In this respect, criminal protective orders play an important role in the criminal justice

system: a victim is much more likely to cooperate in the criminal prosecution of an abuser if the court takes action to assure the victim's protection. But while criminal protective orders "are important to victims seeking criminal prosecution, they often are not considered 'an independent vehicle for protecting victims,' as are civil restraining orders, and are viewed more as part of the 'case-processing strategy' in criminal prosecution." (Note, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of Efficacy* (2002) 11 S. Cal. Interdisc. L.J. 361, 365.)

At bottom, while victim protection is one of multiple reasons a court will decide to issue a criminal protective order, the DVPA ensures that the court focuses solely on victim protection. The *victim*—not the integrity of the court's proceedings—is the focus of the DVPA's protections. For this reason, the procedures involved in crafting these orders, and the substantive content included in them, often differ significantly.

B. Unlike in the Criminal Context, the DVPA Maximizes Victim Participation and Empowerment.

Because the DVPA's provisions focus primarily on protecting a domestic violence victim and preventing future acts of abuse, victims interact with very different procedures in the DVPA and criminal contexts. The DVPA gives domestic violence victims significantly more procedural rights than Penal Code section 136.2. These differences show why criminal protective orders and DVPA orders must be permitted to coexist: if they

cannot, a criminal protective order's existence will bar a victim from taking advantage of the procedural protections expressly provided by the DVPA.

First, the procedures involved in obtaining criminal protective orders and DVPA restraining orders differ in important ways.[3] Perhaps most important is that the victim in the DVPA context may participate in the hearing and be involved in crafting the requested relief. There is no requirement that the victim be heard when a criminal court considers the propriety of a protective order. In fact, because the victim "may not be present at the time the [criminal protective] order is issued," the Center for Judicial Education and Research suggests that criminal courts instruct prosecutors to deliver and explain the order to the victim *after* the court issues its decision. (Cal. Judges Benchbook: Domestic Violence Cases in Criminal Court (CJER 2018) § 4.16(2), at p. 71 [hereafter Benchbook].) Without the victim's presence in the courtroom—or even if the victim is present but cannot effectively convey important information—the court misses crucial information relevant to the criminal protective order's appropriate scope. And if, in turn, the criminal protective order's existence bars the victim from obtaining a DVPA restraining order, the victim is left

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[3] For purposes of this discussion, references to DVPA restraining orders concern ex parte and post-hearing restraining orders, which are obtained by a petitioner, as opposed to emergency protective orders, which are obtained by law enforcement.

without protections tailored to his or her family's needs.

The DVPA, by contrast, gives the victim—the one who needs the protection—decisionmaking power by allowing her to decide what protections to seek and when to seek them. Thus, unlike the criminal justice system, which "is rarely victim oriented," the DVPA's procedures will often "empower the victim." (Buzawa & Buzawa, Domestic Violence: The Criminal Justice Response (3d ed. 2003) pp. 7, 236.)

Second, a DVPA petitioner can challenge adverse rulings. As this case demonstrates, when a court denies relief sought in a DVPA petition, the petitioner may appeal. In fact, to ensure meaningful review of a petition denial, the DVPA requires courts to explain their reasoning when denying a petition. (Fam. Code, § 6340, subd. (b) ["The court shall, upon denying a petition under this part, provide a brief statement of the reasons for the decision in writing or on the record. A decision stating 'denied' is insufficient."]; see also *Jamie G. v. H.L.* (2018) 25 Cal.App.5th 794, 806–807 [explaining that such explanation requirements advance the goals of (1) enabling effective appellate review, (2) creating a "body of precedent . . . to produce consistent and predictable result," and (3) enabling researchers to "determine whether the applicable rule is consistent and predictable in application, or whether amendment of the rule or its application is in order" [quoting American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations (2002) ch.

1, topic 3, § 1.02, com. a, p. 97].)

By contrast, because the victim is not a party to the related criminal case, she likely lacks standing to appeal a court's criminal protective order if it fails to provide the protections she needs. (See Penal Code, §§ 1235, subd. (a) [only the parties "to a felony case may appeal"]; 1466 [only the People and the defendant may appeal a "judgment or order" in an infraction or misdemeanor case]; see also *People v. Subramanyan* (2016) 246 Cal.App.4th Supp. 1 [holding that, even under Marsy's law—which gives victims the power to enforce their right to criminal restitution—a victim cannot appeal a restitution order].) The court's error in this case underscores a troubling consequence of this dynamic: if a criminal court erroneously refuses to grant certain protections in a criminal protective order, and that order's existence bars the victim from seeking that relief under the DVPA, the victim has nowhere else to turn. These circumstances would needlessly prevent the victim from receiving the protections she needs, despite the Legislature's intent that courts use "all available tools" to prevent further abuse. (*Babalola*, *supra*, 192 Cal.App.4th at p. 963.)

Third, the durational limitations of criminal protective orders and DVPA restraining orders differ in crucial ways. As noted above, a DVPA

post-hearing restraining order can last up to five years.[4] (Fam. Code, § 6345, subd. (a).) Within three months of the original order's termination, the petitioner can seek a five-year renewal. (*Ibid.*)

By contrast, divisions of this Court have indicated that a pre-judgment criminal protective order is "operative only during the pendency of criminal proceedings." (*Ponce*, *supra*, Cal.App.4th at p. 383 [quoting *People v. Selga* (2008) 162 Cal.App.4th 113, 118–119].) In light of that limitation, the trial court's reasoning in this case can produce a dangerous and unwarranted scenario in the event that the criminal charges against the abuser are dismissed. In that scenario, the criminal proceedings have ended; the criminal court may therefore decide that the criminal protective order must also be terminated. And if that order's previous existence barred a victim from seeking a DVPA restraining order before the dismissal of the charges, a gap in protection would result between the moment of the termination and the time the victim can obtain DVPA relief. Making matters worse, this gap would occur when the risk of further violence is particularly high: the aggravation, stress, and embarrassment the abuser experiences as a result of the criminal proceedings "may actually increase

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[4] The durations of other DVPA restraining orders—"custody, visitation, support, and disposition of property"—are limited by the specific statutes governing those subject areas. (See Fam. Code, § 6345, subd. (b).)

an aggressor's hostility and anger that may in turn be directed toward the victim" and others. (Buzawa, *supra*, at p. 7; see also Lerman, *A Model State Act: Remedies for Domestic Abuse* (1984) 21 Harv. J. on Legis. 61, 104 [noting that the "need for protection may be even greater during criminal proceedings because of the threatening effect of prosecution and the consequent risk of reprisals"].)

Fourth, there are meaningful differences between the procedures involved in modifying and terminating criminal protective orders and DVPA restraining orders. Under the DVPA, if the respondent asks a court to modify or terminate a protective order, the court may not act on that request until the petitioner is notified. (Family Code § 6345, subd. (d) [requiring the court to "deny the motion to modify or terminate the order without prejudice or continue the hearing" until the protected party is properly notified]). Penal Code section 136.2, by contrast, requires only that the protected party be notified *after* a court modifies or terminates the criminal protective order. (Penal Code § 136.2, subd. (a)(1)(G)(*i*).)

While the California Victim's Bill of Rights—as amended by the passage of Marsy's Law—does give crime victims a right to "reasonable notice of all public proceedings . . . and to be present at all such proceedings" (Cal. Const., art. I, § 28, subd. (b)(7)), this notice guarantee does not match the DVPA's procedures for at least two reasons. First, it provides a victim with these rights only "upon request." (*Ibid.*) Second,

even if the right to notice applied universally, it is not clear that the government's failure to provide this notice precludes the court from modifying or terminating a criminal protective order in the way the DVPA does. In *People v. Superior Court (Thompson)* (1984) 154 Cal.App.3d 319, a division of this Court held that an analogous statutory provision did not preclude a criminal court from sentencing a defendant despite the failure to notify the victim. There, the People challenged the criminal court's jurisdiction to proceed with a sentencing hearing in the face of a violation of Penal Code section 1191.1, which requires a probation officer to give a victim "adequate notice . . . of all sentencing proceedings" and also provides a victim with "the right to attend" sentencing hearings. (*Id.* at p. 322, fn. 1.) Because this language is "directory, as distinguished from mandatory," the Court concluded that the probation officer's failure to notify the victim did not deprive the court of jurisdiction to hold the hearing and determine the defendant's sentence. (*Id.* at p. 322.) The same might also apply to the Victim's Bill of Rights notification guarantee, which contains language similar to Penal Code section 1191.1.

Fifth, unlike Penal Code section 136.2, the DVPA expressly offers a petitioner the opportunity to bring a "support person" of her choice to the hearing. (Fam. Code, § 6303.) The support person, who need not meet any special qualification, serves the role of "provid[ing] moral and emotional support" for the petitioner by reassuring her that she "will not be injured or

threatened by the other party during the proceedings," even though during the hearing she must come "in close proximity" to her abuser. (*Id.* § 6303, subd. (a).) Unless the support person presents some sort of threat to the proceedings, a court must permit the support person to sit at the petitioner's table if the petitioner is not represented by counsel. (*Id.* § 6303, subd. (b)–(e).) The support person's presence increases the petitioner's likelihood of success: she is more likely to obtain the relief sought when she can "present an appearance of a calm demeanor" at the hearing and offer a full description of the abuse, despite many victims' common—yet quite understandable—"unwillingness . . . to discuss the details of abuse in front of an audience." (Buzawa, *supra*, at p. 241.) By bolstering the petitioner's confidence and helping assure her of her safety, the support person's presence helps avoid the "attrition by many victims" in obtaining potentially life-saving protections. (*Ibid.*) In criminal cases, by contrast, victims do not have a protected right to the benefit of a support person during hearings.

Finally, the DVPA gives courts express authority to appoint counsel to represent petitioners in a proceeding to enforce an existing DVPA restraining order. (Fam. Code, § 6386, subd. (a).) As this Court has recognized, the vast majority of DVPA litigants lack access to counsel. (*Ross v. Figueroa* (2006) 139 Cal.App.4th 856, 861, fn. 3 [citing an estimate that more than 90 percent of litigants in domestic violence

restraining order cases appear without legal representation].) The appointment of counsel in this context not only makes effective enforcement of DVPA restraining orders more likely, but also will often provide a domestic violence victim with her first opportunity to consult with an attorney.

C. The DVPA Calls for A Wider Range of Victim Protections than Penal Code Section 136.2.

If the trial court's erroneous reasoning in this case is repeated by other courts, domestic violence victims will almost always be denied protections made explicitly available to them by the DVPA. That is because the DVPA expressly provides for several forms of relief not envisioned by Penal Code section 136.2.

First, the DVPA gives a court the power to issue an order "determining the temporary custody and visitation of a minor child." (Fam. Code, § 6323.) A custody determination immediately following an instance of domestic violence is critical to the child's health and future wellbeing. Because childhood trauma is "cumulative," "the greater the number of episodes of trauma experienced over time, the worse the effect." (de Jong, *Domestic Violence, Children, & Toxic Stress* (2016) 22 Widener L. Rev. 201, 203.)

As this Court has noted, abuse against a parent harms a child regardless of whether the child is directly abused: "[b]oth common sense

and expert opinion indicate spousal abuse is detrimental to children." (*In re R.C.* (2012) 210 Cal.App.4th 930, 942 [quoting *In re Heather A.* (1996) 52 Cal.App.4th 183, 194].) "[E]ven if they are not physically harmed, children suffer enormously from simply witnessing the violence between their parents." (Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions* (1991) 44 Vand. L.Rev. 1041, 1055–1056.) Studies also suggest that spousal abuse "harms children even if they do not witness it." (Fields, *Impact of Spouse Abuse on Children & Its Relevance in Custody & Visitation Decisions in New York State* (1994) 3 Cornell J.L. & Pub. Pol'y 221, 228.) And "the overlap between children witnessing domestic violence and being abused themselves has been widely documented." (*Perez v. Torres-Hernandez* (2016) 1 Cal.App.5th 389, 402–403 (conc. opn. of Streeter, J.); see also Cahn, *supra*, at p. 1056 [reviewing studies indicating that "children of abusive fathers are likely to be physically abused themselves"].) While criminal protective orders—like the one in this case—may order a defendant not to contact a child, criminal courts rarely, if ever, render custody determinations.

Second, the DVPA provides a victim with several forms of financial protections. It permits courts to give "temporary use, possession, and control of real or personal property of the parties" to the petitioner and also order that payments be made on "liens or encumbrances coming due" while a restraining order is in effect. (Fam. Code, § 6324.) It also enables courts

to issue orders restraining the respondent from shielding community, quasi-community, or separate property. (*Id.* § 6325 [incorporating Fam. Code, § 2045].) A court may also order a DVPA respondent not to take actions that would detrimentally affect insurance coverage or benefits belonging to the petitioner or her children. (*Id.* § 6325.5.) And after providing the respondent with notice and a hearing, a court may order the respondent to pay child and/or spousal support. (*Id.* § 6341.)

The DVPA also gives a petitioner the ability to recover attorney's fees and costs if she prevails. (Fam. Code, § 6344.) As noted above, the vast majority of DVPA petitioners lack access to an attorney. And even when a petitioner might have access to counsel, "[n]ot infrequently, a married abuser may have control over all the parties' community funds and will appear in the court with an attorney in the hope that the victim will have to fend for him- or herself." (Domestic Violence Remedies, *supra*, at § 1.14, p. 14.) Without the DVPA's fee-shifting mechanism, most domestic violence victims will have no opportunity to seek legal assistance before filing a DVPA petition.

A court may also order a DVPA respondent to pay the petitioner restitution for loss of earnings and out-of-pocket expenses resulting from abuse, such as medical care and temporary housing. (Fam. Code, § 6342.) While victims of crimes in California have two other opportunities to seek restitution, the DVPA's restitution procedures are better suited to domestic

violence victims' needs. These alternative avenues for obtaining restitution are: (1) a restitution award following the defendant's conviction (see Penal Code, § 1202.4), and (2) a claim to the California Victim Compensation Board (see Gov. Code, §§ 13950–13966). With respect to the former, unlike a criminal restitution order, a DVPA petitioner need not wait for the respondent to be convicted of any crime before obtaining restitution. And as to the latter, the DVPA is a much more convenient vehicle for obtaining restitution, as it provides the opportunity to seek both physical protections and financial relief in one centralized location. The fewer the number of government entities with which a domestic violence victim must interact, the more likely she is to obtain all the relief to which she is entitled.

The collection of financial protections offered by the DVPA is vital to ensuring that domestic abuse victims can establish a post-abuse identity and live independent of an abuser. Because they can "be thrown into poverty when they leave an abusive relationship," domestic violence victims commonly cite economic dependency "as the primary reason [they] do not separate from abusers." (Carey & Solomon, *Impossible Choices: Balancing Safety & Security in Domestic Violence Representation* (2014) 21 Clinical L.Rev. 201, 216.) In fact, a victim's financial dependency is often a symptom of the abuse itself. Domestic violence is commonly the result of a "desire of the batterer to control the victim." (Lerman, *supra*, at p. 111.) "Sometimes, this quest for control is expressed not only through

physical abuse, but also through the appropriation of the victim's personal possessions, especially those items which give the victim economic freedom or geographic mobility." (*Ibid.*) It is therefore common for abusers to "restrict women's access to money and destroy their personal property in an effort to gain control over them or keep them in a state of fear." (Fischer et al., *Culture of Battering & the Role of Mediation in Domestic Violence Cases* (1993) 46 S.M.U. L.Rev. 2117, 2121–2122 [footnotes omitted].) The DVPA's financial protections also produce the additional benefit of making a domestic violence victim more likely to cooperate in the criminal prosecution of the abuser. (See Kirsch, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?* (2001) 7 Wm. & Mary J. Women & L. 383, 392 [describing results of interviews with prosecutors, defense attorneys, judges, and victim-witness advocates, who "overwhelming[ly]" agreed that the reason domestic violence victims were reluctant to "cooperate in the prosecution of their abusers" was "the limited financial resources of the victim and her financial dependence on the abuser"].)

Finally, a recently added, but no less important, protection offered by the DVPA is a court's ability to direct a wireless telephone service provider to transfer to the petitioner the rights to a particular telephone number. (Fam. Code, § 6347 subd. (a).) This is an essential tool in helping a victim regain her independence. Ensuring victims have continued access

to a telephone "ensures that they are able to make appointments, find safe shelter and communicate with counselors or legal advocates." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1407 (2015-2016 Reg. Sess.) as amended Apr. 22, 2015, p. 2.) Moreover, in a time in which almost all cell phones have GPS capabilities, an abuser with rights to a victim's cell phone has the ability to track the victim's whereabouts. Relief under this provision thus helps to "halt[] GPS tracking and stalking" of domestic violence victims. (*Ibid.*)

Section 136.2, by contrast, calls for a significantly smaller universe of protections, which are generally limited to prohibiting a person from taking any *physical* action in relation to another. First, a criminal protective order may include an order of the type discussed in Family Code section 6320. (Penal Code, § 136.2, subd. (a)(1)(A).) Section 6320 permits a court to prohibit a person from "molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, credibly impersonating . . . , falsely personating . . . , harassing, telephoning, . . . destroying personal property, contacting, . . . , coming within a specified distance of, or disturbing the peace of" a victim and other family or household members, and also to grant a person exclusive care, possession, or control of any animals. (Fam. Code, § 6320, subd. (a)–(b).) Second, a criminal court may order any person not to engage in witness tampering or obstruct justice, or to refrain from contacting any specific witness or victim. (*Id.* § 136.2,

subd. (a)(1)(B)–(D).) Finally, a criminal court may (1) instruct law enforcement to provide protection for a victim, witness, or family member of either; (2) protect a victim or witness from all, or certain types, or contact by the defendant; (3) require the defendant to relinquish and refrain from obtaining any firearms; and (4) call for electronic monitoring of the defendant. (*Id.* § 136.2, subd. (a)(1)(F)–(G).)

It is true that Penal Code section 136.2's list of available protections is not exhaustive. (Penal Code, § 136.2, subd. (a)(1) [a criminal court may "issue orders, including, *but not limited* to" those enumerated in section 136.2, subdivision (a) (italics added)].) But criminal protective orders with forms of relief exceeding those enumerated in section 136.2(a) are relatively rare. (See Benchbook, *supra*, § 4.2.A [noting the absence of case law "addressing the issue of additional or other discretionary orders under § 136.2(a)"].) And even if they were common, the limited victim participation in the criminal context makes it a poor fit for the non-physical restraining orders outlined above. As noted, there is no guarantee that the victim attends the hearing during which the court crafts a criminal protective order. Even if a criminal court thought it was appropriate to protect the victim and her children by, for example, transferring control of certain property or making a custody determination, the victim's absence would make that endeavor nearly impossible. (See also Lerman, *supra*, at p. 105 [suggesting "some criminal judges will not be comfortable ruling on

such a broad range of issues" normally considered by a family law court when facing a request for domestic violence protections].)

In sum, the procedural and substantive differences between criminal protective orders and DVPA restraining orders make clear that they play different roles in California's effort to protect domestic violence victims. Orders issued under the DVPA are better tailored to the specific needs of the victim and her family, and they empower the victim by putting her in control of her own protections. The trial court in this case misconstrued these differences, and in doing so, put Ms. Lugo and her family in danger.

III. The Experiences of Unrepresented Monolingual Spanish Speakers Who Seek DVPA Protections Highlight the Need to Correct the Trial Court's Legal Error.

A domestic violence victim's journey through simultaneous criminal and civil proceedings is almost always arduous. As one commentator has described:

> It is difficult to overestimate the obstacles battered women face pursuing complementary relief through multiple cases. To initiate each case the victim must master an unfamiliar set of court procedures and wait in line for hours. . . . For a person in crisis, who may be recovering from a beating the night before, these obstacles can prove insurmountable. An added complication is that a criminal case is brought by a prosecutor, whom the victim may perceive as "her" lawyer, but who actually represents the government's sometimes divergent interests; civil cases may involve a different attorney for each litigation or, more typically, no legal assistance at all.

(Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the*

Roles of Prosecutors, Judges, & the Court System (1999) 11 Yale J.L. & Feminism 3, 25 [footnotes omitted].) This is particularly true for the many women in California who, like Ms. Lugo, are monolingual Spanish speakers who lack access to representation when seeking domestic violence protection.

Monolingual Spanish-speaking women facing domestic violence are in particular need of the DVPA's expressly enumerated protections. Because the "immigration process often leads to the fragmentation of the extended family which Latina women could traditionally rely upon to resolve conflict," they can experience "[s]ocial isolation, exacerbated by lack of social contacts, geographic isolation, and limited mastery of English or cultural alienation." (Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources & Service Needs of Battered Immigrant Latinas: Legal and Policy Implications* (2000) 7 Geo. J. Poverty L. & Pol'y 245, 252.) These circumstances make it easier for an abuser "to ignore social sanctions, promote[] increased marital dependence and increase[] intra-familiar exclusivity and intensity," all of which combine to "increase[] the risk for family violence." (*Ibid.*) Accordingly, "[i]mmigrant women who encounter language barriers, cultural differences, and stereotyping by mainstream society are often invisible [even] to the anti-domestic violence movement." (Orloff et al., *Battered Immigrant Women's Willingness to Call for Help & Police Response* (2003) 13 UCLA Women's L.J. 43, 46

[footnote omitted].)

The trial court's legal error in this case would make it even more difficult for these victims to seek legal protections. If a victim does not speak English, it is less likely that she will be able to participate effectively, if at all, in a criminal court's crafting of a protective order. (See Orloff, *supra*, at p. 74 [describing results from a survey of immigrant domestic violence victims indicating "two-thirds of the time when police arrived [to the scene of a domestic violence incident] they did not attempt to communicate with the battered immigrant victims in Spanish either directly or through an interpreter"].) As discussed above, when the victim cannot effectively participate in the proceedings leading to a criminal protective order, that order can easily fail to provide the victim with all appropriate protections. And if the criminal order bars her ability to seek further DVPA protection, the victim has no other avenue for relief. The DVPA's procedures, by contrast, offer a better chance for an unrepresented monolingual Spanish-speaking victim to seek the protections she needs by, for example, guaranteeing her the opportunity to bring and utilize a support person for all proceedings. (Fam. Code, § 6303, subd. (d).)

Unrepresented monolingual Spanish-speaking domestic violence victims also face unique difficulties in navigating the procedures of enforcing existing restraining orders. (See Wood, *VAWA's Unfished Business: The Immigrant Women Who Fall Through the Cracks* (2004) 11

Duke J. Gender L. & Pol'y 141, 151 [noting that even when translating services are available, "Spanish-speaking immigrants may have difficulty understanding law enforcement and court procedures"].) The threat of enforcement is integral to a restraining order's effectiveness, particularly in the period immediately following its issuance, which can be the "most dangerous time" for a victim. (Fischer, *supra*, at p. 2138.) The DVPA's express call to courts to appoint counsel to represent petitioners in protective-order enforcement proceedings (see Fam. Code, § 6386, subd. (a)) provides a crucial tool in protecting monolingual Spanish-speaking victims who otherwise lack access to such assistance.

Finally, the financial remedies made expressly available to DVPA petitioners particularly benefit monolingual Spanish-speaking domestic-violence victims. "For immigrant Latinas, the issues inherent in their immigration and residency status in the U.S., together with their having fewer personal resources and limited access to community resources as new arrivals, add to their disadvantage and entrap them further in the intimate violence." (Dutton, *supra*, at p. 250.) As a result, "[i]mmigrant women . . . face greater financial risks in separating from an abusive partner." (Carey & Solomon, *supra*, at p. 229.) The DVPA's financial protections are meant to resolve this exact problem. But if the existence of a criminal protective order bars the issuance of a DVPA order, it is extremely unlikely such victims will be able to take advantage of those

protections.

The relief made available by the DVPA is thus particularly important when the victim is a monolingual Spanish speaker who lacks access to representation. Because those forms of relief are vital to victims' escape from the cycle of abuse, the trial court's legal error must be fixed.

CONCLUSION

The Legislature has instructed courts to use all tools available to them in protecting the safety and financial security of domestic violence victims. The trial court's decision to deny Ms. Lugo's DVPA petition on the ground that a criminal protective order was in effect at the time not only ignored its own obligations under the DVPA, but it also frustrated the complementary relationship between criminal protective orders and civil restraining orders. If not corrected, this error will limit the effectiveness of California's carefully crafted domestic violence protections and will endanger domestic violence victims and their families.

Dated: February 14, 2019

Respectfully submitted,

/s/ Theane Evangelis
Theane Evangelis

Theane Evangelis
Michael Holecek
GIBSON DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, C.A. 90071

Daniel Osher*
GIBSON DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
*Admitted only in Washington State; practicing under the supervision of Principals of the Firm

Amy C. Poyer
CALIFORNIA WOMEN'S
LAW CENTER
360 N. Pacific Coast Hwy.
Suite 2070
El Segundo, C.A. 90245

CERTIFICATE OF WORD COUNT

Pursuant to rule 8.204(c) of the California Rules of Court, the undersigned hereby certifies that the foregoing Proposed *Amicus Curiae* Brief is in 13-point times New Roman font and contains 7,959 words, including footnotes, according to the word count generated by the computer program used to produce this brief.

Dated: February 14, 2019 /s/ Theane Evangelis
Theane Evangelis

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 1517 W. Beverly Blvd. Los Angeles California 90026.

On February 14th, 2019, I served a copy of the foregoing documents described as: **APPLICATION TO FILE AMICUS CURIAE BRIEF** and **PROPOSED AMICUS CURIAE BRIEF OF THE CALIFORNIA WOMEN'S LAW CENTER IN SUPPORT OF APPELLANT** on all interested parties in this action as follows.

BY MAIL: On the above-mentioned date, I enclosed a true copy of the above-mentioned documents in a sealed envelope addressed as indicated below and placed the enveloped for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope with postage fully prepaid. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing set forth in this declaration.

Katelyn Rowe
Counsel for Appellant Adali Lugo
555 West Fifth Street
Suite 4000
Los Angeles, C.A. 90013
(213) 896-6007

Moises Corona, Pro Per
659 W. Avenue 28
Los Angeles, C.A. 90065

Los Angeles Superior Court – Pasadena Courthouse
Hon. Timothy Martella, Dept. S
300 East Walnut St.
Pasadena, C.A. 91101
(626) 396-3327

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 14th, 2019, at Los Angeles, California.

/s/ Howard Vasquez
Howard Vasquez