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LEGISLATIVE OFFICE

[illegible] domestic viole [illegible] on the lives of women and their families. Through passage of the Violence Against Women Act (VAWA) of 1994 and its reauthorization in 2000 and 2005, Congress has taken important steps in providing legal remedies and services for survivors of intimate partner abuse, sexual assault, and stalking. These efforts are vital to ensuring that women and their children can lead lives free of abuse.

The ACLU has been a leader, for decades, in the battles to ensure women's full equality. We have taken an active role at the local, state, and national levels in advancing the rights of survivors of domestic violence, sexual assault, and stalking by engaging in litigation, legislative and administrative advocacy, and public education. As such, we believe reauthorization of VAWA should be a top priority for this Congress. The legislation currently before the Senate contains several important and laudable provisions that will greatly improve the nation's response to domestic violence, dating violence, sexual assault and stalking. We support the advancement of these provisions. Unfortunately, S. 1925, as reported out of the Senate Judiciary Committee on February 7, 2012, also contains several provisions that raise significant civil liberties concerns and which we oppose.

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A. Expanding Housing Protections in VAWA

In the last VAWA reauthorization, Congress specifically acknowledged the interconnections between housing and abuse.[1] It recognized that domestic violence is a primary cause of homelessness; that 92% of homeless women have experienced severe physical or sexual abuse at some point in their lives; that victims of violence have experienced discrimination by landlords; and that victims of domestic violence often return to abusive partners because they cannot find long-term housing.[2] The ACLU has represented victims of violence who faced eviction because of the abuse perpetrated by their batterers, and worked closely with survivors, advocates, and housing managers to preserve their access to safe housing.[3]

VAWA's current housing protections make it unlawful to evict survivors of domestic violence, dating violence and stalking from certain federal housing programs solely because the tenant is a survivor. We are pleased that S. 1925 strengthens the current housing protections in several critical ways.

1. VAWA 2011 applies protections consistently across housing programs

VAWA currently covers only the public housing and Section 8 programs, leaving tens of thousands of victims of violence in other subsidized housing programs without protection.[4] Section 601 of S. 1925 extends VAWA's protections to other programs, including the Low-Income Housing Tax Credit program; Section 811 supportive housing for persons with disabilities; Section 202 supportive housing for the elderly; the McKinney-Vento homelessness programs; Section 236 low-income housing; Section 221(d)(3) low-income housing; the HOME Investment Partnership Program; the Housing Opportunities for Persons with AIDS (HOPWA) program; and the rural housing assistance programs provided under sections 514, 515, 516, 533 and 538 of the Housing Act of 1949.[5] Extending VAWA's protections to these supported housing programs will promote consistency across programs and provide many more survivors with the protections they deserve.

2. VAWA 2011 protects survivors of sexual assault

Section 601 also extends VAWA's housing protections to sexual assault survivors. Currently, VAWA covers only victims of domestic violence, dating violence, and stalking, leaving victims of non-intimate partner sexual assault vulnerable to evictions related to the violence committed against them. The bill addresses these concerns by explicitly including sexual assault victims among those who are covered by VAWA's housing protections.

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[1] *See* 42 U.S.C. § 14043e (2011).
[2] Lisa A. Goodman et al., *No Safe Place: Sexual Assault in the Lives of Homeless Women* (2006), *available at* http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=558; Lenora Lapidus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 J. GENDER, SOC. POL'Y & LAW 377 (2003).
[3] Information about these cases can be found at www.aclu.org/fairhousingforwomen.
[4] 42 U.S.C. § 1437d (2011); 42 U.S.C. § 1437f (2011).
[5] Violence Against Women Reauthorization Act of 2011, S. 1925, 112th Cong., § 601 (as reported by S. Comm. on the Judiciary, Feb. 7, 2012) [hereinafter S. 1925].

3. VAWA 2011 requires policies on emergency relocation

Currently, VAWA provides no specific mechanism for survivors to relocate, on an emergency basis, to other subsidized or affordable housing. This omission left housing providers unclear as to how they could help survivors move to different housing without violating other obligations under federal law, and it has forced survivors to choose between their safety and their housing subsidy. The legislation requires housing providers to adopt an emergency transfer policy that allows survivors to transfer to another safe housing unit, where available, if the survivor expressly requests the transfer and the survivor reasonably believes that he or she is threatened with imminent harm if he or she remains at the current dwelling. Section 601 will also require the Department of Housing and Urban Development (HUD) to establish policies and procedures under which a survivor seeking emergency relocation can receive, subject to availability, a Section 8 voucher.

4. VAWA 2011 requires notice of housing rights

Current law provides only that public housing authorities must give tenants notice of their VAWA housing rights. Section 601 makes VAWA's notice provision more effective by clarifying that notice must be given when an individual applies for federally-supported housing, when the tenant moves into the federally supported housing unit, and when an eviction proceeding is initiated against the individual.

B. LGBT Protections

We are pleased that VAWA 2011 explicitly includes coverage of lesbian, gay, bisexual, and transgender (LGBT) victims, who are underserved and often face discrimination when accessing services. The reauthorization includes a non-discrimination provision that would prohibit any program or activity funded by the legislation from excluding from participation, denying benefits to or discriminating against any person based on his or her actual or perceived race, color, religion, national origin, sex, gender identity, sexual orientation, or disability.[6]

Additionally, S. 1925 includes the LGBT community in two different VAWA grant programs – STOP Grants and Underserved Population Grants.[7] Finally, the reauthorization amends the campus crime reporting statute to require campuses to collect and distribute statistics on hate crimes based on gender identity and national origin.[8] This change would more closely mirror the Hate Crime Statistics Act, which requires the FBI to collect statistics on hate crimes based on race, gender and gender identity, religion, disability, sexual orientation, and ethnicity.

These LGBT-inclusive provisions represent a critical step forward for VAWA, ensuring that it reaches those most in need of its services, regardless of sexual orientation or gender identity. The need could not be clearer. Studies indicate that LGBT people experience domestic violence at roughly the same rate as the general population. However, it is estimated that fewer than one

6

consistent with [the Department of Justice's] PREA standards. This would ensure that there are not differing standards for jails based on the federal, state, or local detainees held, as well as help with the swift and successful implementation of final PREA standards."

2. Protection of battered immigrants

Title VIII of the bill strengthens existing federal protections for immigrant victims by modifying current provisions established through past bipartisan bills to ensure that these protections actually work as intended. These protections are necessary because immigrant survivors are particularly vulnerable to violence and are often forced to choose between living with abuse and facing deportation. Nearly 75% of abused immigrant women in one survey reported that their spouses had never filed immigration applications for them, even though they were eligible for legal status. Abusers who eventually filed for their immigrant spouses waited almost 4 years to do so.[11] Moreover, victims without legal status can be half as likely as those with stable status to call police.[12] VAWA's immigration provisions address these vulnerabilities by taking away the ability of an abuser to manipulate a victim's fears about her immigration status. Title VIII carries out this intent by including dating violence and stalking as qualifying crimes for eligibility for U visa relief, clarifying the evidentiary requirements for a U visa, and addressing the backlog in U visa applications.

E. New Aggravated Felony under Immigration Law

Section 1008 of S.1925, an amendment adopted by the Judiciary Committee, would prospectively make third drunk-driving convictions with a one-year sentence an "aggravated felony" under the immigration laws. This is regardless of the underlying conduct's severity, even if the conviction is for a misdemeanor that results in a year-long suspended sentence with no jail time served. The "aggravated felony" designation is known as the "immigration death penalty" because it subjects people to mandatory detention and mandatory deportation. Since 1996 Congress has voted only once to expand the aggravndaanky ent5T4(ggr)3(a)T2 1 Tf 0omans has8(i)-2(on ongo l(he)4ess aC4(l(d spl)-2(v)4(n3(e) Tc 0.022(y)2vTd ( )Tj 0-171(y)20lC Tw [3(e)k2)3(s)(vot)a)4(ray)2 1996 -2(i)-.(i)-1(s i)f 0.001.13 Td ( )9 1008 of1(s i)f 0.001.13 Td (20 1008 ofn)2(U)4(v)2(is)1()3(SM)1 c

This provision would also override well-settled Supreme Court case law on aggravated felony "crimes of violence." The Court has unanimously held that drunk driving does not constitute a crime of violence because "[t]he ordinary meaning of this term, combined with [the statutory definition's] emphasis on the use of physical force against another person . . . suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses."[13] Enacting this provision would run contrary to the accepted legal understanding that crimes of violence exclude accidental or negligent conduct; in the Court's words, making DUI a crime of violence "would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes."

F. Combatting Violence Against Native American Women

1. <u>VAWA 2011 removes legal barriers to prosecuting domestic violence crimes</u>

The crisis of violence against Native American women has been well documented.[14] Native American women are almost three times as likely to be raped or sexually assaulted as all other

unwilling to investigate or prosecute, victims are left without legal protection or redress and abusers act with increasing impunity.

VAWA 2011 takes an important step forward to address this legal impediment by restoring tribal authority to exercise concurrent criminal jurisdiction over non-Indian perpetrators of domestic violence and dating violence that occurs in the Indian country of a participating tribe. In doing so, S. 1925 appropriately empowers tribal governments to more fully respond to the cycle of violence in Indian country and to hold perpetrators, no matter their race or ethnicity, accountable.

2. VAWA 2011 clarifies tribal authority regarding protection orders

S. 1925 correctly asserts and clarifies that tribal courts have full civil jurisdiction to issue and enforce protection orders involving any person, Indian or non-Indian, thereby confirming the intent of ofl(y)2l(y)2err6(r)hor20oychrrn 1 Tf .36 0ont-6(r)o 2d(--10(a)-1 Tf)]TJn1 Tf .36 0on2p4(t)-2(74

may be legitimately proscribed.[26] As written, section 107 of VAWA 2011 would be both vague and overbroad, and should be amended to carve out First Amendment-protected speech.

2. VAWA 2011 would inappropriately expand existing cyber-stalking law

As amended, section 107 of VAWA 2011 would significantly expand existing cyber-stalking law, codified at 18 U.S.C. § 2261A (2006), which, notably, was recently invalidated in an as-applied constitutional challenge.[27] *Cassidy* involved the posting of offensive and possibly threatening messages on publicly accessible blogs and on Twitter.[28] The comments at issue, though crude and in poor taste, were critical of a public religious figure, which raised additional First Amendment concerns. Further, and crucially, the comments were posted on what the court found to be the equivalent of a physical bulletin board, from which, unlike direct one-on-one threats, the individual targeted can "avert[] her eyes" and avoid any harm.[29]

As amended by section 107, section 2261A would provide the government even more leeway to target the kind of protected speech at issue in *Cassidy*.

First, the revised statute would remove the requirement of actual harm. Under current law, the defendant must (1) travel in interstate or foreign commerce with the requisite intent, and the travel must "*[p]lace [the victim] in reasonable fear of the death of, or serious bodily injury to, or cause[] substantial emotional distress to*" *the victim or certain close family members*; or (2) use the mail, any interactive computer service or any facility of interstate or foreign commerce, with the requisite intent, "*in a course of conduct that causes substantial emotional distress to [the victim] or places [the victim] in reasonable fear of the death of, or serious bodily injury to*," the victim or certain close family members.[30] Under section 107, the amended statute would merely require that the speech be "reasonably expected to cause substantial emotional distress."[31] Accordingly, purely private speech that is [redacted] by the intended recipient would become criminal, as would postings in an online public forum like Twitter without any showing that the speech had any harmful effect on a third party. While the amended section does limit the specific intent requirement to "the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate," the terms "harass" and "intimidate" will still cover protected speech.

Second, section 107 would add two additional electronic facilities that, if used, could trigger the statute. Currently, § 2261A only lists "interactive computer service," which is defined in 47 U.S.C. § 230(f) as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." Section 107 would add to "interactive computer service" both "electronic communication service[s]" and "electronic communication system[s] of

[26] Brief for Am. Civil Liberties Union Found. of Or., Inc. as Amicus Curiae Supporting Affirmance at 3, Planned

interstate commerce."[32] To the extent these added terms are intended to broaden the scope of the statute to online public forums like Facebook or Twitter, they must be accompanied by an amendment clarifying that First Amendment-protected communications are exempt from the scope of this statute, or they should be removed.[33]

3. The existing cyber-s

In October 2011, the United States Sentencing CC