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**No. 76181**

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**IN THE COURT OF APPEALS OF OHIO  
FOR THE EIGHTH APPELLATE DISTRICT**

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**CITY OF CLEVELAND,  
Appellant**

**v.**

**CLEVELAND POLICE PATROLMAN'S ASSOCIATION,  
Appellee**

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**BRIEF ON BEHALF OF APPELLANT OF AMICI CURIAE  
NATIONAL NETWORK TO END DOMESTIC VIOLENCE AND**

**NATIONAL NETWORK TO END DOMESTIC VIOLENCE FUND**

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June \_\_\_\_, 1999

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## **STATEMENT OF THE ASSIGNMENT OF ERROR**

Amici assert that the trial court erred in finding that the Domestic Violence Offender Gun Ban, 18 U.S.C. 922(g)(9) (attached hereto as Exhibit 1), violated the Fifth Amendment of the U.S. Constitution. See Trial Court Order.

## **STATEMENT OF ISSUES**

The issue presented for review is whether Congress acted rationally in finding that the pressing national need to reduce the incidence and severity of domestic violence justified limiting access to guns when people are convicted of domestic violence misdemeanors.

## **STATEMENT OF CASE**

This case involves the application of a convicted child abuser to be reinstated to the police force. The trial court in this case erroneously applied the standard for review of the Domestic Violence Offender Gun Ban. Amici were instrumental in passage of the Domestic Violence Offender Gun Ban, and are leaders in national discussions to address issues of domestic violence and firearm use. The outcome of this appeal is likely to establish new precedent regarding the constitutionality of the law, and is of general interest to amici nationwide.

## **STATEMENT OF FACTS**

Amici adopts the statement of facts as set forth in appellant's brief.

## SUMMARY OF ARGUMENT

Domestic violence is a national crisis. Congress has responded by enacting numerous statutes designed to address this nefarious problem. Chief among these is 18 U.S.C. § 922(g)(9) the Domestic Violence Offender Gun Ban, which addresses the lethal and widespread connection between domestic violence and guns.

Domestic violence offenses are widely treated as misdemeanors, and law enforcement officers who commit brutal acts of violence against their spouses and intimate partners are even more frequently afforded lenient treatment. Therefore, Congress acted in a wholly rational manner by preventing all misdemeanor batterers from obtaining guns. For these reasons, the statute plainly survives rational basis scrutiny and the opinion of the trial court should be REVERSED.

**I. THE PRECEDENT ON WHICH THE TRIAL COURT RELIED IS NO LONGER GOOD LAW: THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT HAS RECONSIDERED ITS POSITION AND RULED THAT THE DOMESTIC VIOLENCE OFFENDER GUN BAN IS CONSTITUTIONAL UNDER THE COMMERCE CLAUSE AND THE SECOND, FIFTH AND TENTH AMENDMENTS.**

The Cuyahoga County Court of Common Pleas here based its opinion entirely, and without extended discussion, on the decision of the federal Court of Appeals of the District of Columbia Circuit in Fraternal Order of Police v. United States, 152 F.3d 998 (D.C.Cir. 1998) (“FOP I”). In FOP I, as the trial court here explained, the D.C. Circuit held that “§ 925 of the Gun Control Act of 1968, amended, 18 U.S.C. § 921 et seq, was unconstitutional insofar as it withheld the public interest exception from persons convicted of domestic violence misdemeanors while permitting it for those convicted of domestic violence felonies.” The trial court here, in other words, explicitly based its

decision on the conclusion that Officer Marek had been denied equal protection under the law, and based that conclusion entirely on the D.C. Circuit's 1998 opinion.

The decision in FOP I, however, is no longer good law. Soon after it issued its opinion in FOP I, the D.C. Circuit granted the federal government's petition for rehearing. 159 F.3d 1362 (D.C.Cir. 1998). The court then reversed itself, conceding that its initial decision – the decision relied on exclusively by the trial court here – was wrong.<sup>1/</sup>

The D.C. Circuit acknowledged that it had considered the equal protection issue improvidently in FOP I, without giving the United States an adequate opportunity to respond to an argument that the appellant had first raised in its reply brief. Id. at \*3. Now, having heard the arguments on both sides, the court acted on Justice Frankfurter's venerable advice that “[w]isdom too often never comes, and so one ought not to reject it merely because it comes too late.”<sup>2/</sup>

The D.C. Circuit's reconsideration was firmly rooted in its realization of the circumstances and factors that motivated Congress to pass the Domestic Violence Offender Gun Ban. The court recognized that § 925(a)(1) treats domestic violence misdemeanants more seriously than domestic violence felons; however, because domestic violence misdemeanants are not a “suspect class” for equal protection purposes, the court ruled that the statute must be sustained “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”<sup>3/</sup>

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<sup>1/</sup> Fraternal Order of Police v. United States, 1999 WL 218442 (D.C.Cir. April 16, 1999) (“FOP II”).

<sup>2/</sup> FOP II at \*1 (quoting Henslee v. Union Planters Nat. Bank & Trust Co., 335 U.S. 595, 600 (1949)).

<sup>3/</sup> FOP II at \*4 (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993)) (emphasis added).

The D.C. Circuit then determined that Congress’s disparate treatment of domestic violence misdemeanants and felons was perfectly reasonable in light of the magnitude and seriousness of domestic violence and the existing state and federal limits on felons’ access to guns. The court reaffirmed its previous conclusion “that a special focus on domestic violence misdemeanants, as opposed to other misdemeanants, was not irrational under the norms of equal protection jurisprudence.”<sup>4/</sup> And it now held that, “on reflection,” it was “not unreasonable for Congress to believe that existing laws and practices adequately deal with the problem of issuance of official firearms to felons but not to domestic violence misdemeanants.”<sup>5/</sup> The court therefore held that the statute at issue did not violate the Equal Protection Clause, nor did it violate the Commerce Clause, the Second Amendment or the Tenth Amendment.

With the decision in FOP II, the jurisprudential basis for the trial court’s decision to reinstate Officer Marek has evaporated. Though neither FOP I nor FOP II is binding here, the D.C. Circuit’s evolution on the issue, from an uninformed “No” to a fully-informed “Yes,” offers a vivid illustration and a useful guide for analysis. The purpose of this amicus brief is to supplement the D.C. Circuit’s conclusions, and to assist the appellant in demonstrating to this Court that the domestic violence gun ban rationally promotes not merely a legitimate but an essential societal interest.

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<sup>4/</sup> FOP II at \*5.

<sup>5/</sup> Id. at \*4.

## II. DOMESTIC VIOLENCE IS A SERIOUS CRIME WITH TRAGIC CONSEQUENCES FOR MILLIONS OF WOMEN AND CHILDREN NATIONWIDE.

Violence against women is an enormous problem throughout the United States.<sup>6/</sup> A recent study reports that 5.9 million assaults are perpetrated against women annually.<sup>7/</sup> The United States Department of Justice estimates that three out of every four women will be the victims of a violent crime at some point during their lives.<sup>8/</sup> Police departments nationwide report that domestic violence arrests are continuing to rise.<sup>9/</sup> Estimates of the number of women severely injured each year by their partners range from at least two million to four million and higher.<sup>10/</sup>

Accurate identification of the prevalence of domestic abuse is difficult because many women are reluctant to report abuse or seek help. Still, results of a 1998 survey show that 76 percent of these women are raped and/or physically assaulted by a current or former spouse, cohabitating partner, or

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<sup>6/</sup> This section focuses on violence against women because the victims of domestic violence and sexual assault are nearly always women. The United States Department of Justice estimates that 95% of reported assaults on spouses or ex-spouses are committed by men against women. See H. Douglas, Assessing Violent Couples, 72(9) Families in Society 525-535 (1991). Children also suffer significant injuries at the hands of abusers, however. See, e.g., D. Brookoff, et. al., Characteristics of participants in domestic violence: assessment at the scene of domestic assault, 277 J. Am. Med. Assoc. 1369 (1997) (describing the prevalence of domestic violence assaults on children).

<sup>7/</sup> Patricia Tjaden and Nancy Thoennes, Prevalence, Incidence, and Consequences of Violence Against Women, National Institute of Justice, at 5 (1998).

<sup>8/</sup> Staff of Senate Comm. on the Judiciary, 102d Cong., Violence Against Women 3 (1992).

<sup>9/</sup> Cheryl Hanna, The Paradox of Hope: The Crime and Punishment of Domestic Violence, 39 Wm. & Mary L. Rev. 1505, 1517 (1998) (citation omitted).

<sup>10/</sup> Statistical evidence documenting the number and frequency of women who are abused annually varies. In 1995 Congress found that four million women are battered by their partners each year. See H.R.Rep. No. 103-711, 103rd Cong., at 4, reprinted in 1995 U.S.C.C.A.N. 1839, 1851-52. But see Mary C. Carty, Comment, Doe v. Doe and the Violence Against Women Act: A Post-Lopez Commerce Clause Analysis, 71 St. John's L. Rev. 465 (1997) (indicating that 15% of murders with

date.<sup>11/</sup> Other reports in the early 1990s found that ongoing domestic abuse accounted for 22 percent to 35 percent of emergency room visits by women in the United States.<sup>12/</sup>

The nature of domestic violence is that it frequently does not come to the attention of the criminal justice system until the victim is severely beaten. Domestic violence is characterized by a pattern of abusive behavior,<sup>13/</sup> verbal and physical, which escalates in frequency and severity over time.<sup>14/</sup> Recidivism rates for domestic violence are high.<sup>15/</sup> One study shows that 47 percent of admitted batterers report three or more assaults per year.<sup>16/</sup> By the time an incident of domestic violence is reported to the police, numerous other incidents will likely have occurred without intervention from the justice system.

As disturbing as the high rate of abuse is, the alarmingly high correlation between domestic violence and murder of women brings into sharp relief the need Congress saw to limit access to deadly weapons. A 1996 study based upon the Federal Bureau of Investigation's Supplemental Homicide Report found that female murder victims were more than 12 times as likely to have been killed by a man

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known relationship involved "intimates" and that 50% of American couples have had violent incident, with female victim in 90% of incidents) (citation omitted).

<sup>11/</sup> Tjaden and Thoennes, supra note 7, at 8.

<sup>12/</sup> See T. Randall, Domestic Violence Intervention Calls for More Than Treating Injuries, 264 J. Amer. Med. Assoc. 939 (1990).

<sup>13/</sup> C.F. Klein and L.E. Orloff, Providing Legal Protection for Battered Women an Analysis of State Statutes and Case Law, 21 Hofstra L. Rev. 801, 900, n. 599 (1993).

<sup>14/</sup> Violence Against Women: Relevance for Medical Practitioners, 267 J. Amer. Med. Assoc. 3184 (1992).

<sup>15/</sup> P.A. Langan and C.A. Innes, Preventing Domestic Violence Against Women, Bureau of Justice Statistics Special Report NCJ-102937 (1986).

<sup>16/</sup> U.S. Dep't of Justice, Uniform Crime Reports, Crime in the United States, at n. 601, 603 (1994).

they knew as by a male stranger.<sup>17/</sup> In over half of these cases, the victims were wives or intimate acquaintances of their killers.<sup>18/</sup> In 1992, the federal government reported that nearly 30 percent of all female homicide victims were killed by husbands, former husbands, or boyfriends.<sup>19/</sup> The results of a 1998 survey show that women face more serious threats of violence from intimate partners than do men; women are 7 to 14 times as likely to report incidents of serious violence, including choking, attempted drowning, threats of gun violence, and actual gun violence.<sup>20/</sup> A recent analysis of female homicides in New Mexico between 1990 and 1993 found that nearly half were committed by a current or former male intimate partner.<sup>21/</sup> Another recently published study of murder-homicides in North Carolina between 1988 and 1992 reported that in 86 percent of the cases the woman was murdered by her current or former partner.<sup>22/</sup> Of those women who experienced a history of domestic violence, nearly half had previously sought legal protection from the murderer through an arrest warrant or restraining order.<sup>23/</sup> Moreover, in nearly half those cases, the injuries extended to the woman's children, or those of the murderer.<sup>24/</sup>

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<sup>17/</sup> When Men Murder Women: An Analysis of 1996 Homicide Data, Violence Policy Center at 3 (1998) (“1996 Homicide Study”).

<sup>18/</sup> Id.

<sup>19/</sup> See National Domestic Violence Awareness Month, Proclamation No. 6829, 60 Fed. Reg. 51,879 (1995) (citing Department of Justice statistics).

<sup>20/</sup> Tjaden and Thoennes, supra note 7.

<sup>21/</sup> J. Arbuckle, et. al., Safe at home? Domestic violence and other homicides among women in New Mexico, 27 Ann. Emerg. Med., 210-5 (Abstract) (1996).

<sup>22/</sup> E. Morton, et al., Partner Homicide-Suicide Involving Female Homicide Victims: a Population-based Study in North Carolina, 1988-1992, 13 Violence Vict. (2): 91-106 (Abstract) (Summer 1998).

<sup>23/</sup> Id.

<sup>24/</sup> Id.

Domestic violence is a complicated and serious public safety crisis. Because of the manner in which abusive behavior is manifested, and the need to act before such behavior takes a deadly turn, Congress could rationally have envisioned the need to target specific criminal offenses as part of its effort to address this problem.

### **III. FIREARMS THREATEN TO EXACERBATE AN ALREADY DEADLY CRISIS.**

Statistics show that perpetrators of domestic violence use guns in their attacks with alarming frequency. In 1993, over half of domestic violence attacks involved firearms.<sup>25/</sup> Not only are firearms the ultimate tool of intimidation,<sup>26/</sup> they are also the ultimate deadly weapon. More women are killed with handguns than with all other weapons combined.<sup>27/</sup>

Experts have stated that the likelihood of death in an attack is related to the weapon chosen, and the use of firearms is far more likely than other weapons to end in death.<sup>28/</sup> A 1994 study shows that 68 percent of domestic violence homicides are from firearms.<sup>29/</sup> The Journal of the American Medical Association reported that domestic violence assaults involving guns are 12 times more likely to result in death than are those without guns.<sup>30/</sup> Domestic violence homicides are 7.8 times more likely to

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<sup>25/</sup> Id.

<sup>26/</sup> Melanie L. Mecka, Note, Seizing the Ammunition from Domestic Violence: Prohibiting the Ownership of Firearms by Abusers, 29 Rutgers L. J. 607, 608 (1998) (“A gun is a great intimidator – the ultimate power tool in the arsenal of a batterer.”).

<sup>27/</sup> 1996 Homicide Study, supra n.17, at 4.

<sup>28/</sup> Carolyn Rebecca Block and Antigone Christakos, Intimate Partner Homicide in Chicago Over 29 Years, 41 Crime & Delinquency 496, 504-505 (1995) (citations omitted).

<sup>29/</sup> Judith Bonderman, Firearms and Domestic Violence in The Impact of Domestic Violence on Your Legal Practice, Presentation to the American Bar Association Commission on Domestic Violence, at 9-12 (1996) (data for 1994).

<sup>30/</sup> L.E. Saltzman, et al., Weapon Involvement and Injury Outcomes in Family and Intimate Assaults, 267 J. Amer. Med. Assoc. 22 (1992). This report also found that “firearms were three times more

occur in homes with guns than homes without.<sup>31/</sup> The occurrence is even higher in homes with histories of domestic violence, as guns in the home are a key factor in the escalation of nonfatal spousal abuse to homicide.<sup>32/</sup>

The statistics reveal a stark reality – guns exacerbate the already pervasive problem of domestic violence. The use of firearms intensifies the severity of the violence and increases the likelihood that spouses and children will be killed by their abuser.

While the use of guns in domestic attacks is endemic on a nationwide scale, the problem is even more urgent in an important cross-section of our society – the police force. It is estimated that at least 1,000 officers nationwide have domestic violence convictions.<sup>33/</sup> In one survey, approximately 40 percent of police officers reported marital conflicts involving physical aggression during the previous year.<sup>34/</sup> This rate of violence is considerably higher than that reported from a random sample of civilians, and somewhat higher than military samples.<sup>35/</sup> In another survey, officers ranking sergeants and

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likely to result in deaths than assaults involving knives or other cutting instruments and 23.4 times more likely to result in death than family and intimate assaults involving other weapons or bodily force.”

<sup>31/</sup> Arthur L. Kellerman, et. al., Gun Ownership as a Risk Factor for Homicide in the Home, 329 *New Eng. J. Med.* 1084, 1087 (1993). A 1997 study that examined the risk factors of violent death for women in the home found that when there were one or more guns in the house the risk of homicide increased more than three times. See 1996 Homicide Study at 12 (citing James E. Bailey, “Risk Factors for Violent Death of Women in the Home,” 157 *Arch. Internal Med.* 777-782 (1997)).

<sup>32/</sup> 1996 Homicide Study, *supra* n.17, at 12.

<sup>33/</sup> Carla Crowder, Police Fight Strict Gun Law, *The Denver Rocky Mountain News*, Oct. 29, 1998, at 5A.

<sup>34/</sup> Peter H. Neidig, et al., Interspousal Aggression in Law Enforcement Families, A Preliminary Investigation, *International Review of Development*, at 30 (1992).

<sup>35/</sup> Id. at 35.

above (and averaging 19 years in law enforcement) reported rates of domestic violence of 24 percent.<sup>36/</sup>

The plight of spouses, partners and children abused by police officers is made even more desperate by the tremendous obstacles faced in reporting the incidents and getting help. The code of silence among officers makes victims reluctant to come forward.<sup>37/</sup> These victims have little confidence that their spouse or partner's colleagues pursue disciplinary actions or criminal charges as appropriate.<sup>38/</sup> These fears are not unfounded.

In a 1995 survey of 123 police agencies nationwide, 28.4 percent reported increases in domestic violence in cases involving on- or off-duty officers in the past 24 months.<sup>39/</sup> Yet this survey also found that 45.3 percent of departments have no specific policy of dealing with domestic violence among police officers.<sup>40/</sup> Police departments "tend to regard domestic assault as more a private than a criminal matter."<sup>41/</sup> Moreover, even among departments that have policies in place, only 19 percent terminate officers for second sustained complaints.<sup>42/</sup> Just over 48 percent of departments initiate

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<sup>36/</sup> Peter H. Neidig, et al., FOP Marital Aggression Survey, National FOP Journal, at 25 (1992).

<sup>37/</sup> L.D. Lott, Deadly Secrets, Violence in the Police Family, FBI Law Enforcement Bulletin, at 13 (1995). See also Stephanie Mencimer, Battered Blue, Washington City Paper, Aug. 23-29, 1996, at 23 (stating that of the one or two District of Columbia police officers accused of committing domestic violence per month, few are arrested due to the unwillingness of officers to arrest fellow members of the force).

<sup>38/</sup> Policing's dirty little secret?, 17 Law Enforcement News (April 15, 1991).

<sup>39/</sup> Domestic Assault Among Police: A Survey of Internal Affairs Policies, Southwestern Law Enforcement Institute (1995).

<sup>40/</sup> Id. at 9.

<sup>41/</sup> Id.

<sup>42/</sup> Id.

suspensions for a second sustained complaint.<sup>43/</sup> The International Association of Chiefs of Police has recognized the problem of domestic violence among officers, recommending in a recently released model policy that departments remove officers convicted of misdemeanor domestic violence crimes.<sup>44/</sup> The inadequacy of internal disciplinary practices – where they exist at all – leaves little question that the families of abusive police officers are woefully unprotected.<sup>45/</sup> The evidence shows that domestic violence is a pervasive problem in our society, and that the use of firearms brings more certain -- and more tragic -- consequences.

Moreover, to the extent a domestic violence incident results in criminal charges, the batterer will more likely be charged and prosecuted as a misdemeanor. Serious acts of domestic violence are reduced to lesser offenses for several reasons. Prosecutors enjoy wide discretion in charging crimes. It may be that for the victim's safety or to ensure her full ability to participate in a sometimes lengthy criminal trial, the prosecutor may choose to bring the matter to trial as a misdemeanor. Or, as is many times the case in the overburdened court system, charges for serious acts of domestic violence are

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<sup>43/</sup> Id.

<sup>44/</sup> The International Association of Chiefs of Police, Draft Model Policy, June 1, 1998. The policy also recommends removal of domestic violence felons. Still, this development comes only recently, evidencing how relatively recent is the trend even among those called to enforce the law of recognizing the seriousness of this public safety crisis.

<sup>45/</sup> For all their clarity, statistics alone cannot describe adequately the thousands of spouses and children who suffer the terror of domestic violence. Consider Leanne Fitzgerald who was shot to death along with her 7-year-old daughter and 4-year-old son by her husband, a New York City police officer. Kevin Flynn, Before Death, Officer's Wife May Have Told Police of His Abuse, N.Y. Times, Sept. 30, 1998, at B1. Prior to her death, friends and relatives stated that Leanne had called her husband's precinct to report the recurring incidents of physical and emotional abuse. Or consider the woman in San Antonio who was shot to death by her estranged husband just six hours after asking police to protect her from him. Cindy Ramos, Anti-violence Efforts Begin in October, San Antonio Express-News, Sept. 30, 1998, at G1.

frequently pleaded down to misdemeanors.<sup>46/</sup> Lastly, only 20 percent of domestic abuse cases qualify as felony aggravated assault under state law.<sup>47/</sup>

The patterns associated with domestic violence are well-documented. An individual who commits one act of domestic abuse is many times more likely to commit another. These attacks will become increasingly violent. The presence of a firearm has been shown to transform such behavior into deadly violence. When prosecuted, however, domestic violence is more frequently treated as a misdemeanor. Given the patterns associated with domestic violence, a conviction for a misdemeanor domestic violence crime most often belies the frequency and severity of the acts. Taking guns away from misdemeanor batterers is therefore an essential element in a strategy of reducing the deadly consequences of domestic violence. Congress clearly recognized the significance of this approach, and its rational response should not be second-guessed.

## CONCLUSION

For the foregoing reasons, the opinion of the trial court should be REVERSED.

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<sup>46/</sup> Judy Mann, When an Abuser is Armed, The Washington Post, May 16, 1997, at E03.

<sup>47/</sup> Tom Diemer, Abuse Law Dividing Gun Control Advocates, The Plain Dealer, Nov. 17, 1997, at 1A.

Respectfully submitted,

THE AMICI CURIAE

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**CERTIFICATE OF SERVICE**

I, Valerie E. Hurt, hereby certify that on June \_\_\_\_, 1999 I caused to be served by a copy by First Class U.S. Mail, postage pre-paid, to the following counsel of record:

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