

No. 07-608

In the United States Supreme Court

UNITED STATES OF AMERICA, *Petitioner,*

v.

RANDY EDWARD HAYES, *Respondent.*

*On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit*

**BRIEF AMICUS CURIAE OF
BRADY CENTER TO PREVENT GUN VIOLENCE,
INTERNATIONAL ASSOCIATION OF CHIEFS OF
POLICE, MAJOR CITIES CHIEFS, NATIONAL
SHERIFFS' ASSOCIATION, NATIONAL ORGANIZATION
OF BLACK LAW ENFORCEMENT EXECUTIVES,
HISPANIC AMERICAN POLICE COMMAND
OFFICERS ASSOCIATION, POLICE EXECUTIVE
RESEARCH FORUM, NATIONAL BLACK POLICE
ASSOCIATION, NATIONAL LATINO PEACE OFFICERS
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STATEMENTS OF INTEREST¹

Brady Center to Prevent Gun Violence

The Brady Center to Prevent Gun Violence is a non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. The Brady Center has a substantial interest in ensuring that federal gun laws are properly interpreted to allow strong government action to prevent gun violence. Through its Legal Action Project, the Brady Center has filed numerous briefs *amicus curiae* in cases involving the interpretation of federal firearms laws.

International Association of Chiefs of Police

The International Association of Chiefs of Police is the largest organization of police executives and line officers in the world, representing more than 20,000 members in 112 countries.

¹ Pursuant to Supreme Court Rule 37.3(a), the *amici curiae* state that the parties have consented to the filing of this brief and letters of consent have been filed in the office of the Clerk. Pursuant to Supreme Court Rule 37.6, the *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party made a monetary contribution intended to fund the preparation or submission of this brief. *Amici curiae* further state that no one other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

Major Cities Chiefs

The Major Cities Chiefs is composed of police executives heading the fifty-six largest police departments in the United States, protecting roughly forty percent of America's population.

National Sheriffs' Association

The National Sheriffs' Association ("NSA"), now in its sixty-seventh year of serving law enforcement and other criminal justice professionals of the nation, is a non-profit organization dedicated to raising the level of professionalism among those in the criminal justice field. Through the years, NSA has provided programs for Sheriffs, their deputies, chiefs of police, and others in the field of criminal justice to perform their jobs in the best possible manner and to better serve the people of their cities, counties or jurisdictions. NSA represents more than 3,000 of the nation's sheriffs.

National Organization of Black Law Enforcement Executives

The National Organization of Black Law Enforcement Executives represents 3,500 members nationwide, primarily police chiefs, command-level officers, and criminal justice educators.

Hispanic American Police Command Officers Association

The Hispanic American Police Command Officers Association represents 1,500 command law enforcement officers and affiliates from municipal

police departments, county sheriffs' offices, and state and federal agencies.

Police Executive Research Forum

The Police Executive Research Forum is a national membership organization of progressive police executives dedicated to improving policing through research and involvement in public policy debate.

National Black Police Association

The National Black Police Association represents approximately 35,000 individual members and more than 140 chapters.

National Latino Peace Officers Association

The National Latino Peace Officers Association is the largest Latino law enforcement organization in the United States, with a membership including chiefs of police, sheriffs, police officers, parole agents, and federal officers.

Legal Community Against Violence

Legal Community Against Violence ("LCAV") is a public interest law center dedicated to preventing gun violence, formed in the wake of the 1993 assault weapon massacre at 101 California Street in San Francisco. The nation's only organization devoted exclusively to providing legal assistance in support of gun violence prevention, LCAV assists cities and counties in crafting a variety of local regulations to fit community needs.

School Safety Advocacy Council

The School Safety Advocacy Council, a national organization with expertise on school-based policing, trains law enforcement and school officials to address issues of child safety at school and in the community.

SUMMARY OF THE ARGUMENT

The Fourth Circuit ruling, if allowed to stand, could re-arm thousands of convicted domestic violence abusers, placing in jeopardy the family members of these abusers as well as the law enforcement officers summoned to address such violence. In deviating from the uniform statutory interpretation of nine other Circuit Courts, the Fourth Circuit misconstrued the plain meaning and legislative intent of 18 U.S.C. §§ 921(a)(33) and 922(g)(9) (“the Lautenberg Amendment”), heightening the risk of violence by convicted domestic violence abusers armed with firearms.

Congress enacted the Lautenberg Amendment to prevent dangerous domestic violence abusers from having access to firearms. Law enforcement officers respond to more than two million domestic violence assaults annually, and these crimes constitute as much as one-third of all violent crimes in the United States. Women are more than twice as likely to be shot by their male intimates as they are to be shot, stabbed or killed in any other way by a stranger.

Our society asks police officers to walk into these dangerous confrontations knowing that an officer who responds as a peacekeeper often becomes a target of violence. A recent study concluded that 14% of all police officer deaths occurred during a response to domestic violence calls. As summed up by the Chairman and CEO of the National Law Enforcement Officers Memorial Fund:

No assignment poses more uncertainty and danger to a law enforcement professional than a domestic disturbance call. The circumstances are emotionally charged, and weapons, alcohol and drugs are often involved. An officer who responds as a peacekeeper often becomes a target of the violence.²

If the Fourth Circuit ruling is upheld, it will represent the first time since enactment of the Brady Law in 1993 that thousands of dangerous persons will have their names removed from the National Instant Criminal Background Check System (NICS). Such a purging of names of dangerous, convicted abusers will allow them to purchase firearms again, thereby creating a public safety crisis and immediately endangering countless abuse victims and the law enforcement officers who must respond to domestic violence conflicts.

Upholding the Fourth Circuit's ruling will threaten victims of abusers who were convicted or entered guilty pleas over more than a decade. Convicted domestic violence misdemeanants in more than half of the states in the Nation will be permitted to re-arm themselves, as these states do not have laws that include a domestic relationship as an element of the relevant crime. For more than a

² National Law Enforcement Officers Memorial Fund, *Domestic Violence Takes a Heavy Toll on the Nation's Law Enforcement Community*, available at http://www.nleomf.com/media/press/domestic_violence07.htm (accessed May 13, 2008).

decade these states have relied on an interpretation of the Lautenberg Amendment that disarmed convicted domestic violence abusers regardless of whether the domestic relationship was an element of the underlying misdemeanor crime. Even in states that have laws that include such a relationship as an element, prosecutors have been free to bring charges or accept pleas that do not include the relationship as an element of the crime, while knowing that such dangerous persons will still be barred from possessing firearms.

At the time of its enactment, only 17 of the 50 states had misdemeanor statutes that would have qualified under 18 U.S.C § 921(a)(33) if the domestic relationship were a required element of the offense. Congress could not have intended such a limited application to so widespread a problem. Indeed, Senator Lautenberg, the legislation's chief sponsor, made clear it did not, identifying the statute's purpose as "clos[ing] this dangerous loophole" in which "over 30 states" treated spousal abusers as misdemeanants still eligible to possess firearms.³

The Fourth Circuit's interpretation cannot be reconciled with the language of the Lautenberg Amendment, its legislative history, its consistent interpretation by courts of all other circuits and its application by the Attorney General of the United States. The decision of the Fourth Circuit – which is contrary to the plain language and intent of the statute at issue here and would create a public safety

³ 142 Cong. Rec. S10377-01, 10378 (1996).

nightmare for the victims of thousands of domestic violence abusers – should be reversed.

ARGUMENT

I. Domestic Violence Is a Pervasive National Public Safety Problem Made More Deadly When Abusers Have Access to Firearms

Domestic violence is a pervasive public safety problem exacerbated when abusers have access to firearms.⁴ Approximately 1.3 million women and 835,000 men are physically assaulted by an intimate partner annually in the United States.⁵ Many more domestic violence crimes are never reported.⁶

⁴ The Lautenberg Amendment defines a “misdemeanor crime of domestic violence” as an offense that “(i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.” 18 U.S.C. § 921(a)(33).

⁵ Patricia Tjaden & Nancy Thoennes, Nat’l Inst. of Justice & Ctrs. for Disease Control and Prevention, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women*, NCJ 183781, at iv (Nov. 2000), available at <http://www.ncjrs.gov/pdffiles1/nij/183781.pdf>. About 22% of women and 7% of men report having been physically assaulted by an intimate partner. *Id.*

⁶ See, e.g., *Reporting Crime to the Police 1992-2000*, Bureau of Justice Statistics Special Report, U.S. Dep’t of Justice, at 5,

About one-quarter of all nonfatal violent crimes are committed by intimate partners.⁷ One study found that family violence accounted for 33% of violent crimes, with 53% of those crimes between spouses.⁸ Almost 50% of intimate partner assaults resulted in arrests.⁹

More chilling is the fact that, on average, 3.5 people are killed by intimate partners every day in

available at <http://www.ojp.usdoj.gov/bjs/pub/press/fvspr.pdf> (54% of violent and seriously violent crimes committed by intimate partners reported to police).

⁷ Callie Marie Rennison, Bureau of Justice Stat., U.S. Dep't of Justice, *Intimate Partner Violence, 1993-2001*, NCJ 197838 (Feb. 2003) (in 2001, 23% of non-fatal violent crimes committed by intimate partners).

⁸ Matthew R. Durose et al., Bureau of Justice Stat., U.S. Dep't of Justice, *Family Violence Statistics*, NCJ 207846 at 2. Between 2001 and 2005, about 22% of violent crimes against women were committed by intimate partners. Shannon Catalano, Bureau of Justice Stat., U.S. Dep't of Justice, *Intimate Partner Violence in the U.S.*, at 1, available at <http://www.ojp.usdoj.gov/bjs/intimate/victims.htm> (analyzing crimes reported by police in 18 states and the District of Columbia). According to another recent report, 39.7% of reported assault and intimidation cases in 2000 were between intimate partners. *Id.* at 52. David Hirschel, et al., *Explaining the Prevalence, Context, and Consequences of Dual Arrest in Intimate Partner Cases, Final Report to the DOJ*, at xiii (Apr. 2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/218355.pdf>. [hereinafter *Explaining the Prevalence*].

⁹ *Explaining the Prevalence*, *supra* note 8, at 60.

the United States.¹⁰ Intimate partner homicides account for between one-third to one-half of all female homicides.¹¹ Every year in the United States, between 1000 and 1600 women die at the hands of their male partners, often after a long escalating pattern of battering.¹²

Policies that prohibit batterers from possessing firearms reduce the fatal and non-fatal use of guns by batterers. Studies indicate that prohibiting violent misdemeanants from possessing firearms is associated with a specific decrease in the risk of arrest for new firearm crimes and violent crimes.¹³

¹⁰ Elizabeth Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 *Evaluation Rev.* 313 (2006).

¹¹ Catalano, *supra* note 8, at 1 (30%); Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 *Am. J. of Pub. Health* 1089 (2003) (40%-50%) [hereinafter *Risk Factors for Femicide*]. According to the FBI, 1,117 of the total 3,156 women murdered in 2006 (35%) were murdered by a current or ex spouse/common law spouse or a boyfriend. Federal Bureau of Investigation's 2006 Crime in the United States, *Supplemental Homicide Report*, available at http://www.fbi.gov/ucr/cius2006/offenses/violent_crime/murder_homicide.html (Tables 1 and 9).

¹² U.S. Dep't of Justice, National Institute of Justice, No. 250, *Intimate Partner Homicide*, at 27, available at <http://www.ncjrs.gov/pdffiles1/jr000250.pdf>.

¹³ Garen J. Wintemute, et al., Violent Prevention Research Program, *Effectiveness of Denial of Handgun Purchase by Violent Misdemeanants*, *Journal of the American Medical*

Risk of arrest was directly related to the number of prior convictions subjects had acquired.¹⁴ Denial of a handgun purchase has its greatest effect in reducing the risk of a first arrest for a gun crime.¹⁵

On the other hand, allowing domestic violence abusers access to firearms is strongly associated with intimate partner female homicide.¹⁶ A gun-owning abuser has a much greater likelihood of using a gun in the worst incident of abuse – female homicide.¹⁷ The presence of a gun in a violent home substantially elevates the risk that domestic violence will turn deadly.¹⁸ When domestic violence incidents involve a firearm, the abuse is twelve times more likely to result in death compared to abuse incidents that do not involve a firearm.¹⁹ The mere presence of a gun in the home of an abuser makes an abused woman at

Association, at 2 (May 29, 2002), *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/197063.pdf>.

¹⁴ *Id.* at 41.

¹⁵ *Id.* at 42.

¹⁶ *Risk Factors for Femicide*, *supra* note 11, at 1090 & 1092.

¹⁷ *Id.* at 1092.

¹⁸ Shannon Frattaroli & Jon S. Vernick, *Separating Batterers and Guns*, 30 *Evaluation Rev.* 296 (2006); Emily F. Rothman et al, *Gun Possession Among Massachusetts Batterer Intervention Program Enrollees*, *Evaluation Review* Vol. 30 No. 3, 283 (June 2006)

¹⁹ *Id.*

least six times more likely than other abused women to be killed.²⁰

Women are more than twice as likely to be shot by their male intimates as they are to be shot, stabbed, or killed in any other way by a stranger.²¹ While the number of homicides of women by strangers has decreased, the number of homicides by intimates with handguns has increased.²² In each year from 1980 to 2000, 60 – 70% of batterers who killed their female intimate partners used firearms to do so.²³ Moreover, an abuser's previous threats with a weapon or threats to kill are associated with substantially higher risks for female homicide.²⁴ It has been found that women who were threatened

²⁰ National Institute of Justice, *Intimate Partner Homicide*, *supra* note 12 at 16. Another analysis showed that prior domestic violence in the household made a woman 14.6 times more likely, and having one or more guns in the home made a woman 7.2 times more likely, to be the victim of domestic violence homicide. James E. Bailey, MD, MPH, et al., *Risk Factors for Violent Death of Women in the Home*, *Archives of Internal Medicine* 157, No. 7 (1997): 777-782.

²¹ Susan B. Sorenson, *Firearm Use in Intimate Partner Violence*, 30 *Evaluation Rev.* 229, 232 (2006).

²² *Id.* at 233.

²³ Emily F. Rothman, *Batterers' Use of Guns to Threaten Intimate Partners*, 60 *J. Am. Med. Women's Ass'n* 62, 62 (2005).

²⁴ *Risk Factors for Femicide*, *supra* note 11, at 1092.

with a gun or assaulted with a gun are twenty times more likely to be subsequently murdered.²⁵

In addition to death, domestic violence abusers armed with guns cause other harm to their victims. Sixteen of every 1,000 U.S. women have been threatened with a gun, and seven in 1,000 women have had a gun used against them by an intimate partner.²⁶ Firearms are used by many domestic violence offenders to intimidate the victim.²⁷ Guns are used to coerce behaviors, such as sexual relations, or as a means to inflict terror.²⁸

Previous criminal involvement or homicidal behavior has also been shown to be associated with the use of guns by batterers who kill or threaten to kill intimate partners.²⁹ In one study of all batterers

²⁵ *Id.*; National Institute of Justice, *Intimate Partner Homicide*, *supra* note 12, at 16.

²⁶ Sorenson, *supra* note 21, at 235.

²⁷ Int'l Ass'n of Chiefs of Police, *Taking a Stand: Reducing Gun Violence In Our Communities*, at 16 (2007), available at <http://www.theiacp.org/documents/pdfs/publications/acf1875.pdf>. Obvious threats include pointing the gun at the victim, however, other threats are intended (and perceived) based on the act of cleaning a gun, or shooting a gun outside either at a target or randomly.

²⁸ Sorenson, *supra* note 20, at 235.

²⁹ Rothman, *supra* note 23 at 62. See also Jacqueline C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, NIJ Issue No. 250, 17 (2003), available at <http://www.ncjrs.gov/pdffiles1/jr000250e.pdf> (women whose

enrolled in Massachusetts' batterer programs from 2002 – 2005, the batterers who reported gun possession were a “dangerous subgroup” who reported, among other things, attempting homicide and using a firearm to threaten an intimate partner.³⁰

Domestic violence abusers also impose substantial costs on society. The costs of domestic violence exceed \$5.8 billion each year, with nearly \$4.1 billion in direct medical and mental health related costs, and nearly \$1.8 billion in indirect costs from lost productivity and lost lifetime earnings.³¹ It

partners were violent outside the home were twice as likely than other women to be murdered by their partner); Lawrence A. Greenfeld et al., *Violence by Inmates*, Bureau of Justice Statistics Factbook, U.S. Dep't of Justice, at vi, 23 & 26 (March 1998), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf> (among those in local jail convicted of intimate violence, 78% had a prior conviction history, and most of these had a history of convictions for violence; 2 out of 3 State prisoners serving time for intimate violence had a prior conviction history; nearly 40% of convicted violent offenders in local jails who committed crimes against intimates had a criminal justice status at the time of the offense; chronic violence offenders accounted for 3 in 10 of State prisoners serving time for violence against an intimate partner, and nearly 6 in 10 local jail inmates convicted of intimate violence).

³⁰ Rothman, *supra* note 18, at 283, 291.

³¹ Nat'l Ctr. For Injury Prevention and Control, Ctrs. For Disease Control and Prevention, *Costs of Intimate Partner Violence Against Women in the United States*, at 2 (2003), available at http://www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf.

has been estimated that the lifetime medical costs in one year alone for all U.S. gunshot injuries was \$2.3 billion, of which \$1.1 billion was paid by U.S. taxpayers.³²

II. Allowing Convicted Domestic Violence Abusers to Arm Themselves With Firearms Will Endanger Law Enforcement Officers

Allowing convicted domestic violence abusers to arm themselves with firearms not only jeopardizes abusers' family members, but also places law enforcement officers at a heightened risk of death or injury. Over one-third of law enforcement deaths that occur in the line of duty are the result of gunfire.³³ On average, 55 officers are killed annually by firearms.³⁴

A substantial number of police officer deaths result when officers respond to domestic violence incidents.³⁵ Eighty-one law enforcement officers were killed when responding to domestic disturbance

³² Philip J. Cook et al., *The Medical Costs of Gunshot Injuries in the United States*, 282 J. Am. Med. Ass'n 447, 447 (1999) (costs for injuries in 1994).

³³ Int'l Ass'n of Chiefs of Police, *supra* note 27, at 26.

³⁴ *Id.* at 28

³⁵ National Law Enforcement Officers Memorial Fund, *supra* note 2.

calls from 1996 to 2005, or 14% of law enforcement deaths during that period.³⁶

According to the Officer Down Memorial Page, Inc., 65 officers were killed by gunfire in 2007, and 11 of those 65 officers were killed while responding to a domestic dispute call.³⁷

Behind these bare statistics are police officers who served in the line of duty for many years before facing their death at the hands of domestic abusers:

On May 3, 2008, Deputy Sheriff William Howell Jr. was killed while responding to a domestic violence disturbance in Orangeburg, South Carolina. Deputy Howell had arrived at a female's home to assist her in removing belongings from the home, when a male suspect opened fire with a rifle and shot Deputy Howell in the neck. Deputy Howell had served in law enforcement for a total of

³⁶ *Id.*. The FBI reported that from 1996-2005, 59 officers were feloniously killed where the circumstance at the scene of the incident was a "family quarrel." U.S. Department of Justice Federal Bureau of Investigation *Law Enforcement Officers Killed and Assaulted 2005* (Tables 1 and 20), available at <http://www.fbi.gov/ucr/killed/2005/feloniouslykilled.htm> (accessed May 14, 2008).

³⁷ 2007 Total Line of Duty Deaths by Gunfire, The Officer Down Memorial Page, Inc., available at <http://www.odmp.org/search.php?searching=1&yearfrom=2007&yearto=2007&cause=19> (accessed May 22, 2008).

sixteen years, and was survived by a wife and three sons.³⁸

Deputy Sheriff Paul Steven Habelt and Deputy Sheriff Tony Ogburn were shot and killed on May 17, 2007 after responding to a domestic violence call in Payne Springs, Texas. When the officers arrived at the scene, the male suspect opened fire on the officers with a high powered rifle. Another officer responding with Deputies Habelt and Ogburn was also wounded at the scene. Deputy Habelt had served in law enforcement for 43 years and was survived by his wife and six children.³⁹ Deputy Ogburn had served with the Henderson County Sheriff's Department for eight years, and had previously served with the Malakoff Police Department. He was survived by his wife and four children.⁴⁰

³⁸ 2008 The Officers Down Memorial Page Remembers . . . , The Officer Down Memorial Page, Inc., *available at* <http://www.odmp.org/officer/19358-deputy-sheriff-william-howell-jr> (accessed May 22, 2008).

³⁹ 2007 The Officers Down Memorial Page Remembers . . . , The Officer Down Memorial Page, Inc., *available at* <http://www.odmp.org/officer/18885-deputy-sheriff-paul-steven-habelt> (accessed May 22, 2008).

⁴⁰ 2007 The Officers Down Memorial Page Remembers . . . , The Officer Down Memorial Page, Inc., *available at*

Domestic disturbances are over-represented in assaults and injuries to police officers.⁴¹ According to the FBI, of officers assaulted or injured when responding to a call for police assistance, 30% occurred during domestic violence calls.⁴² This was the category with the highest percentage of police officer assaults, with the next highest category, “attempting other arrests,” totaling only 16% of officer assaults. In a Charlotte, North Carolina study from 1988 to 1990, domestic disturbance incidents produced 11.8 percent of the assaults to police officers and 9.6 percent of the injuries inflicted on officers.⁴³ The same study demonstrated that domestic disturbance incidents were also more likely to produce multiple officer victims of assault and injury.⁴⁴ In a 1991 study of a Midwestern police department’s domestic violence arrest policies, 78.4 percent of the officers indicated that they had been

<http://www.odmp.org/officer/18886-deputy-sheriff-tony-price-ogburn> (accessed May 22, 2008).

⁴¹ J. David Hirschel et al., *The Relative Contribution of Domestic Violence to Assault and Injury of Police Officers*, Justice Quarterly, Vol. 11 No. 1 at 107 (March 1994).

⁴² Nat’l Law Enforcement Officers Mem’l Fund, *supra* note 34.

⁴³ J. David Hirschel et al., *supra* note 41.

⁴⁴ *Id.* at 109.

physically assaulted in the course of effecting an arrest in a domestic violence call.⁴⁵

Not only do domestic violence incidents pose a risk of injury or death to individual police officers, but police departments spend a disproportionate amount of resources attempting to combat domestic violence. Woman-battering incidents constitute the largest category of calls screened by police officers each year.⁴⁶ Nationwide, 15 to 40 percent of all calls for police assistance are family disturbances.⁴⁷ According to the Bureau of Justice Statistics in 2000, reporting of abuse incidents increased from 48% in 1993 to 59% in 1998, and there has been an increase in arresting suspected batterers.⁴⁸ The Charlotte-Mecklenburg Police Department, for example, responds to approximately 30,000 domestic violence calls annually.⁴⁹ Preliminary data from the Charlotte Mecklenburg Police Department indicated

⁴⁵ Paul C. Friday, Scott Metzgar, and David Walters, *Policing Domestic Violence: Perceptions, Experience, and Reality*, Criminal Justice Review 198, 203 (Georgia State University 1991).

⁴⁶ Paul C. Friday et al., *Evaluating the Impact of a Specialized Domestic Violence Police Unit*, Research Report: U.S. Department of Justice, at 9 (May 25, 2006).

⁴⁷ Brecci, Michael G., *Chapter 4: Police Response to Domestic Violence*, Crisis Intervention in Criminal Justice/Social Service 102, 102 (4th Ed. 2006).

⁴⁸ Paul C. Friday et al., *supra* note 46 at 9-10.

⁴⁹ *Id.*

that in 2003, 56.5% of all calls for assistance were domestic violence calls.⁵⁰ In New York County, New York, in 2007, 4,461 arrests were identified as involving domestic violence, and of those, the vast majority were charged as misdemeanors.⁵¹

The danger of assault or death involved in police work has additional costs for police departments and for police officers: “it results in hazardous duty pay, early retirement programs, use of bulletproof vests, and specialized training in backup assistance and weapon retention.”⁵² The specter of danger is a major source of stress for police officers and their families.⁵³

Police officers are uniquely positioned to see the effects of domestic violence and guns. As one author put it:

The police are the gatekeepers to the criminal justice system. They are the first responders to problems that occur

⁵⁰ *Id.* at 12.

⁵¹ In 2007, of 4461 arrests flagged by the New York County District Attorney's Office as involving “domestic violence”, 3218 were misdemeanor arrests. Interview by Margaret Dale, Partner, Proskauer Rose LLP with Lisa Kellachan, Assistant District Attorney, New York County District Attorney's Office Domestic Violence Unit (May 20, 2008).

⁵² Hirschel, *supra* note 41, at 115.

⁵³ *Id.*

in the community. How they handle a problem determines how involved other branches of the criminal justice system will become.⁵⁴

Police officers are also uniquely positioned to become a secondary victim of domestic violence. For example, in states with mandatory domestic violence arrest policies or statutes, police officers are required to put themselves in harm's way.⁵⁵

The International Association of Chiefs of Police, in a 2007 Report on "Reducing Gun Violence In Our Communities," recommended that to keep police officers safe, federal and state governments should "reduc[e] the firepower available to criminals" and

⁵⁴ Brecci, Michael G., *supra* note at 47.

⁵⁵ Twenty-two states and the District of Columbia require mandatory arrests in domestic violence situations. See Alaska Stat. § 18.65.530 (2008); Ariz. Rev. Stat. Ann. § 13-3601(B) (2008); Colo. Rev. Stat. Ann. § 18-6-803.6 (West 2008); Conn. Gen. Stat. Ann. § 46b-38b (a) (West 2008); D.C. Code Ann. § 16-1031 (2008); Iowa Code Ann. §§ 236.12 (2) (West 2008), Kan. Stat. Ann. § 22-2307 (b)(1) (2008); La. Rev. Stat. Ann. § 46-2140 (1) (2008); Me. Rev. Stat. Ann. tit 19-A § 4012 (5) (2008); Miss. Code Ann. § 99-3-7 (3) (West 2008); Mo. Ann. Stat. § 455.085.1 (West 2008); Nev. Rev. Stat. Ann. § 171.137 (West 2008); N.J. Stat. Ann. § 2C:25-21 (West 2008); N.Y. Crim. Proc. Law § 140.10 (4)(c) (McKinney's 2008); Ohio Rev. Code Ann. § 2935.032 (A)(1)(a) (West 2008); Or. Rev. Stat. Ann. § 133.055 (2)(a) (West 2008); R.I. Gen. Laws § 12-29-3 (2008); S.C. Code Ann. § 16-25-70 (2007); S.D. Codified Laws Ann. §§ 23A-3-2.1 (2008); Utah Code Ann. § 77-36-2.2 (West 2008); Va. Code Ann. § 19.2-81.3 (West 2008); Wash. Rev. Code Ann. §10.31.100 (2) (West 2008); Wis. Stat. Ann. § 968.075(3)(West 2008).

“[r]equir[e] judges and law enforcement to remove guns from situations of domestic violence . . .”⁵⁶ In light of the danger posed by armed abusers, the report also recommended that federal, state, and local laws authorize law enforcement officers to remove all guns and ammunition from the scene of a domestic violence incident and that judges be required to order the removal of guns and ammunition from domestic violence misdemeanants.⁵⁷ If the Fourth Circuit ruling is upheld, however, convicted domestic violence abusers will be permitted to re-arm and thus pose a great risk to the public and law enforcement officers.

Prompt intervention in domestic violence situations is necessary to ensure the safety of abuse victims. Intervention with women at risk for abuse decreases intimate partner homicide.⁵⁸ Arrest is instrumental in reducing abuse.⁵⁹ Further, in up to 80 percent of intimate partner homicides, the man physically abused the woman before the murder.⁶⁰

⁵⁶ Int’l Association of Chiefs of Police, *supra* note 27, at 6.

⁵⁷ *Id.* at 17.

⁵⁸ *Risk Factors for Femicide*, *supra* note 11, at 1092.

⁵⁹ Friday, Paul C., Metzgar, Scott, and Walters, David, *Policing Domestic Violence: Perceptions, Experience, and Reality*, Criminal Justice Review 198, 200 (Georgia State University 1991).

⁶⁰ National Institute of Justice, *Intimate Partner Homicide*, *supra* note 12, at 18.

Four to five percent of women who have experienced non-lethal intimate partner violence have reported that their partners threatened them with a gun at some point in their lives.⁶¹

Police officers are only doing their job when they intervene in domestic violence conflicts to protect public safety and prevent injury or death at the hands of domestic abusers. The Fourth Circuit ruling, if upheld, will allow thousands of convicted abusers to arm themselves with guns, placing law enforcement officers who respond to domestic violence calls in jeopardy of personal injury or death.

III. The Fourth Circuit's Interpretation of the Lautenberg Amendment Is Counter to Congressional Intent and Will Put More Guns In the Hands of Domestic Violence Abusers.⁶²

A. Congress Did Not Intend To Allow the Possession of Firearms for Domestic Violence Misdemeanants Convicted in States Without a Specific Domestic Violence Assault or Battery Statute

Because domestic violence is a pervasive national epidemic, the Lautenberg Amendment was enacted to establish a “zero tolerance when it comes to guns

⁶¹ Rothman, *supra* note 23.

⁶² *Amici* adopt the arguments put forth by the government that the Fourth Circuit improperly interpreted the plain language of the Lautenberg Amendment.

and domestic violence.”⁶³ As stated by Senator Lautenberg, “the amendment would prohibit any person convicted of domestic violence from possessing a firearm.”⁶⁴ Senator Lautenberg emphasized that the Amendment contains “the simplest words,” to ensure “that a spouse abuser, wife beater, or child abuser should not have a gun.”⁶⁵

In enacting this Amendment, Congress could not possibly have intended the distinction that abusers who violate “battery of a spouse” laws should not have guns, while people who batter their spouses but are only charged with simple battery may have guns. This is particularly true because Congress knew that many states simply do not have “battery of a spouse” type laws. When Congress passed the Lautenberg Amendment, only seventeen of the fifty states and Puerto Rico had a law that would qualify under section 921(a)(33), if the domestic relationship were a required element of the predicate offense.⁶⁶

As of 2006, fewer than half of the states had domestic assault statutes that included a domestic relationship element.⁶⁷ A majority of states, like

⁶³ 142 Cong. Rec. S11872-01, 11878 (1996).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *U.S. v. Smith*, 964 F. Supp. 286, 293 (N.D. Iowa 1997).

⁶⁷ *U.S. v. Heckenliable*, 446 F.3d 1048, 1051 -1052 (10th Cir. 2006) (citing *U.S. v. Barnes*, 295 F.3d 1354, 1364 n. 12 (D.C. Cir. 2002)).

New York, charge domestic violence offenders under their general assault laws.⁶⁸

Senator Lautenberg was clear that the new law defined a misdemeanor crime of domestic violence to include convictions for domestic violence-related crimes that do not have as an element proof of a domestic relationship:

Mr. President, *convictions for domestic violence-related crimes often are for crimes, such as assault, that are not explicitly identified as related to domestic violence.*⁶⁹

Senator Lautenberg urged local law enforcement authorities administering gun registration provisions “to thoroughly investigate misdemeanor convictions on an applicant’s criminal record to ensure that none involves domestic violence, before allowing the sale of a handgun.”⁷⁰

Senator Lautenberg’s commentary further establishes that the Amendment’s purpose was to close a nationwide “loophole” where, at the time, a person engaged in domestic violence could, in “over 30 states” be convicted of a misdemeanor and still be able to maintain firearms. Passage of the

⁶⁸ *See id.*

⁶⁹ 142 Cong. Rec. S11872-01, 11878 (1996) (emphasis added).

⁷⁰ *Id.*

Amendment was intended to seal this “loophole” nationwide. According to Senator Lautenberg:

In over 30 States, even today, beating your wife or your child is a misdemeanor. In just the past few years, some judges have demonstrated outrageous callousness and disregard for women's lives . . . Two-thirds of domestic violence murders involve firearms. In 150,000 cases of . . . spousal abuse, a gun is present. That means that perhaps it is put to a woman's head or put to her face in front of a child, or children, and even though the trigger is not pulled, the trauma is enormous. There is no reason for someone who beats their wi[fe] or abuses their children to own a gun. When you combine wife beaters and guns, the end result is more death.

This amendment would close this dangerous loophole and keep guns away from violent individuals who threaten their own families, people who have shown that they cannot control themselves and are prone to fits of violent rage directed, unbelievably enough, against their own loved ones . . . There is no margin of error when it comes to domestic abuse and guns. A firearm in the hands of an abuser all too often means death. By their nature, acts of domestic violence are especially

dangerous and require special attention.⁷¹

As Senator Lautenberg explained, the Amendment was intended to establish nationwide consensus in removing firearms from the hands of domestic violence perpetrators.⁷² The Fourth Circuit's interpretation re-opens precisely the loophole the Amendment was enacted to close.

Senator Feinstein's comments related to the Lautenberg Amendment likewise illustrate a broad nationwide application of the statute. According to Senator Feinstein, the statute was passed to address

⁷¹ 142 Cong. Rec. S10377-01, 10378 (1996) (emphasis added).

⁷² Multiple federal circuit courts have concurred that Senator Lautenberg's commentary evidences an intent by Congress that contradicts the Fourth's Circuit's reading of the statute. The First Circuit found Senator Lautenberg's commentary to be "particularly helpful" and "clearly demonstrate Congress's threshold understanding that 'misdemeanor crimes of domestic violence' would not be limited to those in which the relationship status was included as a formal element of the statute of conviction. *United States v. Meade*, 175 F.3d 215, 219 (1st Cir. 1999). As the First Circuit noted, "[p]erhaps most important, Senator Lautenberg's comments are perfectly consistent with the statutory language and the general purpose of the legislation, and promote a logically and linguistically coherent exegesis of the provision here at issue." *Id.* Similarly, the Fifth Circuit quoted the language of other Circuits in describing Senator Lautenberg's commentary as "most convincing." *United States v. Shelton*, 325 F.3d 553, 562 (5th Cir. 2003). The Eighth Circuit noted that Senator Lautenberg's comments "bolster our conclusion" that "Congress evinced its intent that the predicate offense need not contain a domestic relationship as an element." *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999).

“an estimated 2 million women [who] are victimized by domestic violence.”⁷³ Senator Feinstein went on to emphasize that the statute was meant to counteract “[o]utdated or ineffective laws [that] often treat domestic violence as a lesser offense.” According to Senator Feinstein:

Sometimes, victims are reluctant to cooperate for fear of more violence. And sometimes victims just don't want to pu[t] themselves through the ordeal of a trial. And finally, plea bargains often result in misdemeanor convictions for what are really felony crimes. As a result, Mr. President, many perpetrators of severe and recurring domestic violence are still permitted to posses[sic] a gun. Mr. President, these people are like ticking time bombs. It is only a matter of time before the violence get[s] out of hand, and the gun results in tragedy.

Something must be done to close this dangerous loophole. This amendment looks to the type of crime, rather than the classification of the conviction. Anyone convicted of a domestic violence offense would be prohibited from possessing a firearm. Fewer abusers will have guns, and fewer of the abused will wake up each morning wondering

⁷³ 142 Cong. Rec. S10379-01, 10380 (1996)

whether they will live through the day.⁷⁴

Senator Feinstein thus emphasized Congressional intent to close a “dangerous loophole” in state statutes and to look to the “type of crime” and not the “classification of the conviction” in order to provide fewer guns to abusers.⁷⁵ Combined with Senator Lautenberg’s comments, Senator Feinstein’s commentary demonstrates that the Fourth Circuit’s holding runs contrary to the intent of Congress.

Upon the passage of the Amendment, the Criminal Division of the United States Department of Justice issued an announcement in its Criminal Resource Manual that set out the definition of a “misdemeanor crime of domestic violence” and explained:

This definition includes all misdemeanors that involve the use or attempted use of physical force (e.g., simple assault, assault and batter), if the offense is committed by one of the defined parties. This is true whether or not the statute specifically defines the offense as a domestic violence misdemeanor.⁷⁶

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Criminal Resource Manual 1117 “Restrictions on the Possession of Firearms by Individuals Convicted of a Misdemeanor Crime of Domestic Violence,” *available at*

http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm01117.htm.

See also 27 C.F.R. Part 478.11. The regulations promulgated to implement the Lautenberg Amendment prohibit the sale, shipment, transportation, possession, or receipt of firearms by individuals convicted of a "misdemeanor crime of domestic violence," and make clear that this term was defined so as not to require that battery of a spouse be an element of the offense:

Misdemeanor crime of domestic violence. (a) Is a Federal, State or local offense that:

- (1) Is a misdemeanor under Federal or State law or, in States which do not classify offenses as misdemeanors, is an offense punishable by imprisonment for a term of one year or less, and includes offenses that are punishable only by a fine. (This is true whether or not the State statute specifically defines the offense as a "misdemeanor" or as a "misdemeanor crime of domestic violence." The term includes all such misdemeanor convictions in Indian Courts established pursuant to 25 CFR part 11.);
- (2) Has, as an element, the use or attempted use of physical force (e.g., assault and battery), or the threatened use of a deadly weapon; and
- (3) Was committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, (e.g., the equivalent of a "common law" marriage even if such relationship is not recognized under the law), or a person similarly situated to a spouse, parent, or guardian of the victim (e.g., two persons who are residing at the same location in

The Criminal Division announced that the bill passed with “almost unanimous support and represents Congress’s recognition that ‘anyone who attempts or threatens violence against a loved one has demonstrated that he or she poses an unacceptable risk, and should be prohibited from possessing firearms.’”⁷⁷

an intimate relationship with the intent to make that place their home would be similarly situated to a spouse).

See also Report on the Activities of the Committee on the Judiciary, H.R. 105-845 (at 88), summarizing the Amendment:

Passed during the 104th Congress, section 658 of the Omnibus Appropriations bill for fiscal year 1997 (H. Rept. 104-863) amended S S 921 and 922 of title 18, United States Code, to prohibit persons previously convicted of a misdemeanor crime of domestic violence from possessing a firearm. . . A ‘misdemeanor crime of domestic violence’ is defined under the new law as an offense that is (1) either a federal or state charge, and (2) has as an element the use or attempted use of physical force, or the threatened use of a deadly weapon, and (3) is committed by a current or former spouse, parent or guardian, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent or guardian, or by a person similarly situated as a spouse, parent or guardian.

⁷⁷ Criminal Resource Manual, *supra* note 76 (citing 142 Cong. Rec. S11872-01 (1996) (S. Lautenberg)).

The Criminal Division further explained that the Amendment “will assist in preventing those individuals who have demonstrated a propensity for domestic violence from obtaining a firearm,” will “assist law enforcement by providing a tool for the removal of firearms from certain explosive situations thus decreasing the possibility of deadly violence,” and “will serve as a federal prosecution tool in certain situations where alternatives have failed.”⁷⁸

Thus, at the time the bill was passed, the central agency responsible for the enforcement of federal laws recognized Congress’s intent to prohibit convicted domestic violence abusers from possessing firearms.

B. If the Fourth Circuit Ruling Is Upheld, Thousands of Convicted Abusers Will Have Their Names Purged From the List of Prohibited Gun Buyers, Posing a Public Safety Crisis and Endangering Countless Families and Law Enforcement Officers Who Respond to Domestic Conflicts

The Lautenberg Amendment prevented thousands of domestic violence abusers from obtaining firearms nationwide due to the Amendment’s successful interaction with the Brady Handgun Violence Prevention Act (“Brady Act”). The Brady Act required the Attorney General to “establish a national instant criminal background

⁷⁸ *Id.*

check system that any licensee may contact . . . for information, to be supplied immediately, on whether receipt of a firearm by a prospective transferee would violate section 922 of title 18, United States Code, or State law.”⁷⁹

Pursuant to that mandate, the Attorney General established and maintains the National Instant Criminal Background Check System (NICS) within the FBI.⁸⁰ The Brady Act authorized NICS to issue a denial only if it has concluded “that the receipt of a firearm” by the prospective transferee “*would violate*” federal or state law.⁸¹ Alternatively, NICS must issue a “proceed” if it has concluded that such receipt “*would not violate*” federal or state law.⁸²

Following the Lautenberg Amendment, NICS has denied firearms to applicants convicted of misdemeanor crimes of domestic violence regardless of whether the underlying offense has as an element that the defendant was in a domestic relationship with the victim.⁸³ This is consistent with the

⁷⁹ Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(b), 107 Stat. 1536, 1541 (1993).

⁸⁰ See 28 C.F.R. Part 25(A) (2006).

⁸¹ 18 U.S.C. § 922(t)(1)(B)(ii) (emphasis added).

⁸² 18 U.S.C. § 922(t)(2) (emphasis added).

⁸³ See, e.g., National Instant Criminal Background Check Systems, 2001/2002 Operational Report at 23, available at <http://www.fbi.gov/hq/cjisd/nics/oper-rpt/oper-rpt-2001-2.pdf> (“Persons convicted in any court of a misdemeanor crime which has an element the use or attempted use of physical force or

definition of a “misdemeanor crime of domestic violence” contained in the Code of Federal Regulations.⁸⁴

The Brady Act has successfully prevented domestic violence batterers from obtaining guns. In 2005, 60,237 of the total 473,433 firearms purchase denials through NICS (almost 13%) were denials to applicants previously convicted of a misdemeanor crime where the victim was in a domestic relationship with them.⁸⁵ In 2003-2004, 15% of all applicants prohibited from purchasing firearms based on criminal histories were domestic violence misdemeanants.⁸⁶ Of the 3,429 retrievals of firearms

threatened use of a deadly weapon and the defendant was the spouse, former spouse”); Information Needed to Keep Guns out of the Hands of Persons Convicted of an MCDV,” *available at* <http://www.fbi.gov/hq/cjisd/nics/mcdvbrochure.pdf> (describing Gun Control Act definition of “misdemeanor crime of domestic violence” as a misdemeanor that has “as an element the use or attempted use of physical force, or the threatened use of a deadly weapon”; and “[a]t the time the offense was committed, the defendant was [in a domestic relationship with] the victim”).

⁸⁴ 27 C.F.R. Part 478.11 (quoted in full *supra* note 75).

⁸⁵ National Instant Criminal Background Check Systems, Operations 2005 at 11, *available at* http://www.fbi.gov/hq/cjisd/nics/ops_report2005/ops_report2005.pdf.

⁸⁶ National Instant Criminal Background Check Systems, 2003-2004 Operational Report at 10, *available at* http://www.fbi.gov/hq/cjisd/nics/ops_report2003-2004/ops_report2003-2004.pdf; National Instant Criminal Background Check Systems, 2001/2002 Operational Report at

sold in 2002, 1,052 (31%) were from persons convicted of a misdemeanor crime that was committed against a victim in a domestic relationship with the defendant where NICS uncovered evidence of the conviction after a gun was purchased.⁸⁷

If the Fourth Circuit's position is upheld, the names of thousands of convicted domestic batterers will have to be purged from the NICS database and those convicted abusers will be allowed to purchase and possess firearms. The chilling statistics on the use of guns by domestic violence batterers, discussed *supra*, makes almost certain increased fatal and non-fatal domestic violence against victims, and the police officers who respond to protect them.

C. More Than a Decade of Congressional Acquiescence in Court Interpretations of the Lautenberg Amendment Further Demonstrates That Past Court Rulings Interpreting This Amendment Comported With Congressional Intent to Disarm Convicted Domestic Abusers

Since enactment of the Lautenberg Amendment, Congress has been aware of court rulings broadly interpreting this Amendment and statistics from

5, available at <http://www.fbi.gov/hq/cjisd/nics/oper-rpt/oper-rpt-2001-2.pdf>.

⁸⁷ *National Instant Criminal Background Check Systems, 2001/2002 Operational Report* at 22-23, available at <http://www.fbi.gov/hq/cjpsid/nics/oper-rpt/oper-rpt-2001-2.pdf>.

NICS demonstrating the Amendment's dramatic and successful results in disarming dangerous domestic abusers.⁸⁸ Congress was also well aware of the federal regulations implemented pursuant to the Amendment. Yet, Congress has not amended the statute to reject the construction that NICS, the Code of Federal Regulations, the U.S. Attorney General and Courts of Appeals in nine circuits have given it. Moreover, Congress has amended the statute and even added to the definition of a "misdemeanor crime of domestic violence," yet has never attempted to undo the courts' interpretation of the Amendment. For example, in 2006, Congress amended the definition of "misdemeanor crimes of domestic violence" under Section 921(33)(A) to include "Tribal law," yet did not further amend the definition.⁸⁹

This congressional inaction in the face of a clear interpretation applied by the judiciary and federal agencies administering the statute demonstrates the legislative intent of the statute and is further

⁸⁸ See, e.g., NICS Improvement Amendments Act, Pub. L. No. 2, 122 Stat 2559-2560 (2008) (Congress' findings that between Nov. 30, 1998 and Dec. 31, 2004, NICS prohibited 916,000 individuals from purchasing guns, and processed 49,000,000 Brady background checks).

⁸⁹ Violence Against Women and Dep't of Act of 2005, Pub. L. No. 109-162, § 908(a), 119 Stat 2960 (2006).

support that the Fourth Circuit has improperly construed the Amendment.⁹⁰

⁹⁰ See *Monessen S.W. Ry. v. Morgan*, 486 U.S. 330, 338, 108 S. Ct. 1837, 1844 (1985) (where Congress amended FELA but never amended to clarify that prejudgment interest was permissible, court upheld judicial interpretation that prejudgment interest was not available: “we have recognized that Congress’ failure to disturb a consistent judicial interpretation of a statute may provide some indication that ‘Congress at least acquiesces in, and apparently affirms, that [interpretation].’”) (citations omitted); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 385-386 (1983) (“In light of this well-established judicial interpretation, Congress’ decision to leave Section 10(b) intact suggests that Congress ratified the cumulative nature of the Section 10(b) action.”); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.”); *Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 U.S. 616, 629, 107 S.Ct. 1442, 1450, n.7 (1987) (“Congress has not amended the statute to reject our construction, nor have any such amendments ever been proposed, and we therefore may assume that our interpretation was correct . . . Any belief in the notion of a dialogue between the judiciary and the legislature must acknowledge that on occasion an invitation declined is as significant as one accepted.”).

CONCLUSION

For the foregoing reasons, the Court of Appeals erred in finding that 18 U.S.C. § 922(g)(9) requires the underlying misdemeanor conviction to have, as an element, proof of a domestic relationship between the perpetrator and the victim. These *amici* respectfully request that the Judgment of the Court of Appeals be reversed, and judgment be entered for Petitioners.

June 16, 2008

Respectfully submitted,

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