

FEB 11 2002

COMMONWEALTH OF KENTUCKY  
FAYETTE CIRCUIT COURT THIRD DIVISION  
CASE NO. 02-XX-00003

JAMIE LEIGH HARRISON

APPELLANT

V.

JOSHUA WARREN HARRISON

APPELLEE

MOTION AND ORDER FOR THE  
NATIONAL NETWORK TO END DOMESTIC VIOLENCE AND THE NOW  
LEGAL DEFENSE AND EDUCATION FUND  
TO APPEAR AS *AMICI CURIAE* AND  
FILE A BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT

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By undersigned counsel, the National Network to End Domestic Violence  
("NNEDV") and the NOW Legal Defense and Education Fund ("NOW") respectfully  
request leave to appear as *amici curiae* and file the accompanying brief in support of

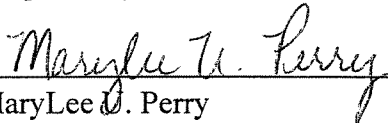
Appellant Jaimie Leigh Harrison. This case, which has garnered national attention, involves a controversial order that implicates serious constitutional issues. *Amici* believe that their national perspective on issues of domestic violence, familiarity with case law addressing the proper scope of remedy for crimes of domestic violence, and combined knowledge of social science research dealing with the issues raised in this appeal, will assist this Court in making a sound disposition of the important questions raised in this case.

Through this submission, NNEDV and NOW seek to fulfill “the classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of [the parties’] counsel, and drawing the court’s attention to law that escaped consideration.” *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). NNEDV and NOW’s request for leave to participate as *amici* here will not disrupt the briefing schedule, undermine the orderly presentation of argument, delay in any way the resolution of this action, or raise questions unrelated to this litigation. Rather, *amici*’s participation in this case aids the Court by addressing more thoroughly the important issues of law and policy at stake in this appeal.

This case concerns matters of critical importance to *amici*. They are committed to protecting the interests of domestic violence victims across the nation, and to insuring that the nation’s domestic violence laws are effectively and properly enforced. In particular, they desire to assist the victims of domestic violence in overcoming the many obstacles victims may face in putting an end to the violence that endangers their lives and well being. Thus, *amici* are vitally interested in the outcome of this case.

For the foregoing reasons, NNEDV and NOW respectfully request that this Court grant their application for leave to appear as *amici curiae* and file the accompanying brief in support of Appellant Jaimie Leigh Harrison.

Respectfully submitted,

  
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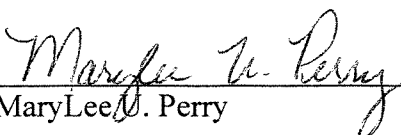
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Dated: February 11, 2002

### CERTIFICATE OF SERVICE

Pursuant to Rule 73.03(1) of the Kentucky Rules of Civil Procedure, the undersigned certifies that on the 11th day of February, 2002, she served a true copy of the Motion for Leave to Appear as *Amici Curiae*, by first class mail postage prepaid, to Joshua Warren Harrison, 543 Sheridan Drive, Lexington, KY 40503; Hon. Pamela Ledgewood, 271 W. Short Street, Suite 205, Lexington, KY 40507; and a courtesy copy to Fayette County District Judge, Megan Lake Thornton, 136 Martin Luther King, Jr. Blvd., Lexington, KY 40507.

  
MaryLee D. Perry

COMMONWEALTH OF KENTUCKY  
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**ORDER**

Upon Motion of the National Network to End Domestic Violence (“NNEDV”) and the NOW Legal Defense and Education Fund (“NOW”), to appear as Amici Curiae in the above-referenced matter, and the Court being sufficiently advised:

IT IS HEREBY ORDERED THAT the Motion of the National Network to End Domestic Violence (“NNEDV”) and the NOW Legal Defense and Education Fund (“NOW”), to appear as Amici Curiae is hereby sustained.

So ORDERED this \_\_\_\_\_ day of February, 2002.

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Judge, Fayette Circuit Court

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## **INTEREST OF *AMICI CURIAE***

The *National Network to End Domestic Violence* (“NNEDV”) is a not-for-profit organization incorporated in the District of Columbia since 1995. NNEDV is a network of state domestic violence coalitions, representing over 2,000 member programs nationally. NNEDV serves as the national voice of battered women and their children and those who provide direct services to them. From testifying before Congress to serving on task forces, NNEDV is a leading voice among domestic violence advocates in public policy. For battered women, the importance of protective orders cannot be understated. Without protection, victims could not safeguard themselves or their children, nor could they attempt to rebuild their lives. For this reason, the district court erred in using protective orders to punish the victims rather than the perpetrators.

*NOW Legal Defense and Education Fund* is a leading national civil rights organization that performs a broad range of legal and educational services in support of women’s efforts to eliminate sex-based discrimination and to secure equal rights. NOW Legal Defense fund has been engaged on many fronts in efforts to eliminate gender-motivated violence. Most notably, NOW Legal Defense chaired the national task force that was instrumental in passing the historic Violence Against Women Act (“VAWA”) and maintains a national legal clearinghouse that tracks legal developments under VAWA. Furthermore, NOW Legal Defense’s Immigrant Women Program is actively involved in policy efforts to promote greater legal protections for battered immigrant women. These women, in particular—for a variety of reasons related to their legal status as immigrants—have an especially great need for access to mechanisms of judicial intervention such as protective orders.

## STATEMENT OF FACTS

*Amici* adopt the statement of facts set forth in the Brief of Appellant Jamie Leigh Harrison.

## SUMMARY OF ARGUMENT

Emergency Protective Orders (“EPOs”) provide a critical first line of defense for victims seeking protection from domestic violence. Every year, Kentucky courts issue over 20,000 EPOs to ensure that victims of domestic violence receive the “effective, short-term protection” mandated by the Kentucky legislature. In this case, however, the district court misused an emergency protective order to penalize, rather than protect, a victim of domestic violence.

Domestic violence is a terrifying reality for women<sup>1</sup> and children across the country. Millions of women are physically abused by their husbands or partners each year.<sup>2</sup> The effects of this violence are severe, and physical injuries are only the most visible consequences. Access to the courts to obtain civil protection orders is critically important to addressing family violence. Penalizing victims of domestic violence for “violating” protection orders entered against their abusers would only discourage victims of abuse from seeking the protection of the law when they need it most. Such ill-advised “intervention” would only make it harder for victims to summon the courage to seek judicial relief and ultimately to escape their violent relationships.

Kentucky, along with most states across the nation, has enacted a comprehensive statutory scheme to confront the problem of domestic violence. The district court’s ruling here undermines the vital safeguards established by that statutory scheme. Specifically, Kentucky

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<sup>1</sup> The victims of domestic violence are nearly always women. The United States Department of Justice estimates that 85 percent of reported assaults on partners or ex-partners are committed against women. Callie Marie Rennison & Sarah Welchans, U.S. Dep’t of Justice, *Intimate Partner Violence* at 1 (2000).

<sup>2</sup> See Patricia Tjaden & Nancy Thoennes, *Extent, Nature, and Consequences of Intimate Partner Violence*, Research Report of Findings from the National Violence Against Women Survey, U.S. Dep’t of Justice (July 2000).

law, like that of many other states, does not permit courts to find petitioners in contempt of court for “violating” the provisions of emergency protective orders unless a separate petition for an emergency protective order independently alleging domestic abuse committed by the petitioner has been filed by the respondent and entered by the court. In the absence of such a petition, the *ex post facto* imposition of criminal contempt violates the central tenets of due process: fair notice and meaningful opportunity to be heard. The district court’s ruling offends both law and policy, and must be reversed.

**I. Misusing Protective Orders to Penalize Victims of Domestic Violence Discourages Victims from Seeking Relief from the Judicial System.**

Penalizing victims of domestic violence who purportedly “violate” their own EPOs threatens to destroy the faith of victims in the very system charged with their protection. As an initial matter, the district court’s off-the-cuff remark that the parties had “involved [the] court in [their] personal business” betrays a fundamental misunderstanding about the role of courts in protecting victims of domestic violence. Violence against a family member—like a violent attack on any unrelated person—is a crime, not “personal business.” Domestic violence is “a serious public safety issue worthy of priority response.”<sup>3</sup> In recognition of these important public goals, courts must perform their crucial role in offering judicial relief to victims who have taken the difficult step of seeking such relief.<sup>4</sup> Subjecting victims of domestic violence to threats

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<sup>3</sup> See *Crime in Kentucky: Commonwealth of Kentucky 1999 Crime Report* (2001).

<sup>4</sup> See Leslye Orloff, *Issuance of Civil Protective Orders, in Domestic Violence in Civil Court Cases: A National Model for Judicial Education* (1994) (“Protective orders are recognized as a powerful tool to reduce violence[.] . . . [I]n the majority of cases, they have proved effective in reducing or eliminating further abuse.”). See also Susan Keilitz, et al., Report, U.S. Dep’t of Justice, *Civil Protection Orders: Victims’ Views on Effectiveness* (1998).

of fines and jail terms will only discourage them from seeking access to legal remedies in the first place.<sup>5</sup>

In most instances, a protective order is the first official legal intervention in a domestic violence case. As such, protective orders send a strong message to the victim, the abuser, and the community that the court takes partner abuse seriously and considers it in the best interest of society to intervene to protect the victim while holding the abuser fully accountable.<sup>6</sup> It is vitally important for this message to be unequivocal, given that most victims are only able to escape from an abusive situation after several attempts to do so, and in fact subject themselves to greater risk of physical harm by attempting to *leave* the relationship.<sup>7</sup> A victim who has already placed herself at risk by seeking judicial intervention should not be treated like a criminal by the system charged with her protection. A victim who is brave enough to petition the court for a protective order, and then finds her own conduct restrained when she has neither committed a crime and nor been subject to a counter petition, will lose faith in the judicial system. Without the faith that the system can help them, many women would remain trapped in abusive relationship.

Although many people believe that victims of domestic violence can easily leave an abusive home or relationship, this is not necessarily true.<sup>8</sup> Violent relationships are characterized

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<sup>5</sup> A recent study by the Department of Justice affords a sobering view of the extent of this problem. For example, nearly all of the domestic violence victims surveyed maintained that they did not report an initial physical assault by an intimate partner because they did not believe that the police would do anything. See Patricia Tjaden & Nancy Thoennes, *Extent, Nature, and Consequences of Intimate Partner Violence*, Research Report of Findings from the National Violence Against Women Survey, U.S. Dep't of Justice (July 2000).

<sup>6</sup> See generally, e.g., Catherine E. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 901 (1993).

<sup>7</sup> See L. Okun, *Termination or Resumption of Cohabitation in Woman Battering Relationship: A Statistical Study*, reported in *Coping with Family Violence: Research and Policy Perspectives* 113 (G. Hotaling et al., eds. 1988); see also Special Report, *Violence Against Women: Estimates From The Redesign Survey*, Bureau of Justice Statistics at 4 (Aug. 1995).

<sup>8</sup> See Sara M. Buel, *Fifty Obstacles to Leaving, A.K.A. Why Victims Stay*, 28 Colo. Law. 19 (1999).

by substantial power disparities that make leaving very difficult, particularly for women with children.<sup>9</sup> Economic control is an important component of the abuser's system of maintaining control over the victim.<sup>10</sup> A woman who decides to leave her abuser faces great economic challenges regardless of her income level because she frequently has to leave behind her only financial resources or support.<sup>11</sup> Women also face social pressure to maintain their relationships. They may believe that society, the legal system, and their communities consider dissolution of their relationships undesirable. Victims courageous enough to take the first step in overcoming all these obstacles by seeking an emergency protective order do not deserve to be subjected to further fear and intimidation by the court.

Furthermore, restraining the rights of domestic violence victims will significantly undercut the vital sense of control and well-being that many victims experience after applying for protective orders.<sup>12</sup> Studies have shown that the mere act of applying for a protective order is associated with helping victims improve their sense of well-being and control. In one study, for example, over 70 percent of the participants reported an immediate improvement in their lives, while in follow-up interviews that proportion increased to 85 percent; 80 percent reported that

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<sup>9</sup> See Ethan Brennan Lauer, *Housing and Domestic Abuse Victims: Three Proposals for Reform in Minnesota*, 15 *Law & Ineq.* 471, 477 (1997) (describing how "violent relationships are characterized by 'great power disparities'").

<sup>10</sup> Numerous victims are forced to go back to their abusers because of lack of money or housing. U.S. Gen. Accounting Office, *Domestic Violence: Prevalence and Implications for Employment Among Welfare Recipients* 7-8 GAO/HEHS 99-12 (1998) (detailing evidence that desire for economic control underlies many brutal crimes against women).

<sup>11</sup> See Leslye Orloff, *Lifesaving Welfare Safety Net Access for Battered Immigrant Women and Children: Accomplishments and Next Steps*, 7 *Wm. & Mary J. Women & L.* 597, 616-17 (2001).

<sup>12</sup> See Jeffrey Fagan, *The Criminalization of Domestic Violence: Promises and Limits* (1995) (noting that protective orders provide the benefits of being victim-initiated, timely, and offering "a wide range of specific interventions or relief that address extralegal concerns of safety and economic being").

they felt safer.<sup>13</sup> Subjecting victims to fees and jail time for any contact with their abusers would inject fear and uncertainty at precisely the point when it is most critical for victims to experience a sense of control over their own lives and be able to trust in the judicial system.

## **II. Refusing To Insist That Batterers Take Full Responsibility For Their Violent Behavior Jeopardizes The Safety of Domestic Violence Victims.**

The district court's ruling mischaracterizes domestic violence as a "mutual" crime, rather than the misconduct of the perpetrator. When courts penalize victims and perpetrators alike, the batterer need not take full responsibility for his or her violent behavior. So-called "mutual" enforcement orders weaken the justice system's insistence on individual accountability, and in so doing send a mixed message that can severely diminish the value of a protective order to the victim.<sup>14</sup> That approach also can minimize perpetrators' exposure to sanctions for violating protective orders, thereby weakening their effectiveness as deterrents to further abuse.

Furthermore, misapplying protective orders to both victims and perpetrators can lead to unpredictable enforcement of protective orders, thereby jeopardizing the safety of victims. Under such a regime, law enforcement officers called to the scene of a domestic violence incident would frequently have no way to determine who needed to be arrested, and might resolve the dilemma by arresting both parties, further victimizing the real victim. As one judge put the matter,

This practice of mutual restraining orders, while perhaps well-intentioned, causes more problems than it attempts to solve. It hinders rather than assists the enforcement of domestic violence laws. Judicial officers may believe they are addressing the issue of family violence but mutual restraining orders can actually endanger, rather than protect, the victim. . . . [M]utual restraining orders also

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<sup>13</sup> See Susan Keilitz, et al., *Civil Protection Orders: Victims' Views on Effectiveness*, U.S. Dep't of Justice (1998).

<sup>14</sup> See Fagan, *The Criminalization of Domestic Violence* (pointing out that victims who seek protective orders often rely on the threat of prosecution over their assailants as a means of terminating the relationship and escaping the violence).

diminish the principal goal of a restraining order, which is to provide protection from domestic violence to one who has been subjected to it.<sup>15</sup>

Both the executive and legislative branches of Kentucky have indicated their objection to such a result.<sup>16</sup> The district court essentially took an “end-run” around these critical statutory safeguards, unilaterally insisting that the victim should be subjected to the constraints applicable to the respondent under the EPO.

In addition, the misuse of protective orders against the victims of domestic violence would create a perverse incentive for perpetrators to avoid sanctions for their misbehavior by claiming falsely that they were in the victim’s presence by invitation.<sup>17</sup> Where an order applies to the perpetrator alone, the likelihood of such evasion is diminished. There is nothing fundamentally “unfair” about insisting that if the abuser, who is the subject of the order, is invited by the victim to engage in behavior prohibited by it, only the abuser can be held accountable for the decision to violate the order. In many states, for example, statutes or case law make clear that no action or lack thereof on the part of the victim can give the restrained party “permission” to violate the court’s order, as the victim is neither a party to the action nor subject to the court’s order.<sup>18</sup> Indeed, the U.S. Attorney General’s Task Force has long

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<sup>15</sup> *Pearson v. Pearson*, 488 S.E.2d 414 (W. Va. 1997) (Workman, C.J., dissenting).

<sup>16</sup> *See, e.g.*, Governor’s Office of Child Abuse and Domestic Violence Services, *Model Domestic Law Enforcement Policy* at IV.B.2.d (4), available at <<http://www.state.ky.us/agencies/gov/dmviol/lawpolcy.htm>> (last visited Feb. 8, 2002) (emphasizing that arresting both parties is not the preferred response); *see also* Ky. Rev. Stat. 403.735 (requiring mutual protective orders to be “sufficiently specific to apprise any peace officer as to which party has violated the order if there is probable cause to believe a violation of the order has occurred”).

<sup>17</sup> *See, e.g.*, Report of the Louisiana Protective Order Registry, *Protective Orders: Frequently Asked Questions*, available at <<http://www.lpor.org/pofaq.htm>> (last visited Feb. 8, 2002) (emphasizing that abusers frequently claim that they are in the victim’s presence (and in violation of the protective order) at the victim’s invitation, when such is not the case).

<sup>18</sup> *See, e.g.*, N.Y. Fam. Ct. Act 841 (the victim cannot be sanctioned for violation of any portion of an order issued on his or her behalf); *accord* Me. Rev. Stat. Ann. 19-776.8; Il. Rev. Stat. 2312-20; Pa. 23-6113. *See also* *People v. Townsend*, 538 N.E.2d 1297 (Il. 1989) (alleged invitation by victim to violate order did not free perpetrator from conviction for willful contempt of the court order).



recommended that courts specifically admonish the offender that *any* contact with the protected party, even if initiated by that party, may constitute a violation of the protective order.<sup>19</sup>

Most battered women make several attempts to leave abusive relationships before they ultimately succeed. Recognizing this reality, Kentucky law, like the protective order law of all other states, offers protection to victims whether or not they have left their abusers. Even where emergency relief was needed to stop violence, couples do sometimes reconcile. Many states have even enacted statutes clarifying that protective orders are not revoked upon reunification of the parties.<sup>20</sup> In other states, courts have held that victims who reunite with their spouses while a protective order is in place do not waive the right to enforce that order.<sup>21</sup>

The district court's ruling here stands in sharp contrast to these flexible approaches, which more adequately respond to the obstacles that domestic violence victims face in escaping abuse. First, and most obviously, there are usually strong emotional ties between victims of domestic abuse and their assailants. These ties understandably make simply walking away from the relationship extremely difficult. Second, the victim may be financially dependent on her assailant or may face a severely diminished standard of living if separated.<sup>22</sup> Third, the victim may be unable to break completely from the assailant because of their children, whose well-

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<sup>19</sup> See *Attorney General's Report on Violence*, Final Report, U.S. Dep't of Justice at 43 (1984).

<sup>20</sup> See, e.g., Ca. Pen. C Section 13710(b); Minn. Stat. §§ 518b.01(6)(d), 518B.01(14)(e); N.H. 173B:4V.

<sup>21</sup> See *Cole v. Cole*, 556 N.Y.S.2d 217 (N.Y. 1990) (holding that victim who reunited for two months with her husband against whom she had a protective order did not waive the right to enforce the order). In the instant case, the victim could not have "violated" the order *obtained by the victim against the respondent* by virtue of the contact between the parties. Whether or not a respondent violates a restraining order with a "no-contact" provision, there is no restriction on the victim under the order and therefore her conduct cannot be penalized.

<sup>22</sup> See, e.g., Laura Waxman & Reny Trupin, *A Status Report on Hunger and Homelessness in America's Cities: 1997* (citing a survey conducted by the U.S. Conference of Mayors in which 44 percent of the cities surveyed identified domestic violence as the primary cause of homelessness).

being and safety the victim must also consider in deciding whether to risk the enhanced violence that often occurs when leaving the abusive relationship.

Thus, many factors influence a victim's decision to leave an abusive relationship, including financial considerations, lack of job skills or other resources, love for the offender, and "belief in traditional values of keeping families together and remaining married."<sup>23</sup> It is also important to acknowledge that victims use many different strategies to escape the violence and abuse in their lives, some easily recognizable—calling the police, obtaining a protective order, going to a shelter, filing for divorce—and other less obvious strategies.<sup>24</sup> Most importantly, "[e]ach time a battered woman employs any type of strategy successfully, its effectiveness serves to strengthen her perception of control[.]"<sup>25</sup> Thus, "a sensitive, adequate, and effective system of community, legal, and social supports is critical to battered women as they make their way through a labyrinth of obstacles toward ending the violence in their lives." *Id.*

Protective orders often function as the lynchpin of the victim's legal and extralegal support system. Appropriately drawn, such orders can safeguard the victim, while taking account of the difficulties victims face in leaving abusive relationships. In contrast, punishing victims of domestic violence with contempt—or the threat of contempt—only exacerbates the problem.

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<sup>23</sup> See Carol E. Jordan, *The Psychological Impact of Domestic Violence on Domestic Violence Victims and Child Witnesses*, issued by the Governor's Office of Child Abuse and Domestic Violence Services, available at <<http://www.state.ky.us/agencies/gov/domviol/impact.htm>> (last visited Feb. 8, 2002).

<sup>24</sup> See Mary Ann Dutton, *Empowering and Healing the Battered Woman: A Model for Assessment and Intervention* at 41 (1992).

<sup>25</sup> See Mary Ann Dutton, Leslye E. Orloff, and Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources, and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, Vol. 7, No. 2, *Georgetown J. on Poverty Law & Policy* 245, 248 (2000).

### III. So-Called “Mutual” Protective Orders Are Contrary to Public Policy.

In this case, the respondent did not petition the court for a “mutual” protective order. There was no proof of violence perpetrated by the petitioner and no “mutual” enforcement order was issued. The district court, however, effectively treated a protective order intended for the *victim’s* protection as though it were a “mutual” protective order restraining the victim’s conduct as well as the abuser’s. Setting aside the district court’s lack of statutory authority to restrain the victim without any petition for relief against her, the district court’s ruling also thwarts key policy objectives. Because so-called “mutual” protective orders discourage victims of domestic violence from seeking legal protection, create confusion among police officers charged with the critical task of enforcing protective orders, hinder the justice system’s efforts to hold the perpetrators of domestic violence accountable for their own actions, and undermine the efforts of victims to gain control over their own lives, they are strongly disfavored as a matter of public policy.

For example, The Model Code on Domestic and Family Violence, developed by the National Council of Juvenile & Family Court Judges, expressly prohibits “mutual” protective orders, on grounds that such orders “create due process problems as they are issued without prior notice, written application, or finding of good cause,” are “difficult for law enforcement officers to enforce,” and “ineffective in preventing further abuse.”<sup>26</sup> The American Judges Association has categorically rejected “mutual” restraining orders, concluding that such orders are simply “not appropriate.”<sup>27</sup> Federal law expressly conditions certain grants to the states on certification “that their laws, policies, or practices prohibit issuance of mutual restraining orders of protection

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<sup>26</sup> See *Model Code on Domestic and Family Violence*, National Council of Juvenile and Family Court Judges, Sec. 310 (1994).

except in cases where both spouses file a claim and the court makes detailed findings of fact indicating that both spouses acted primarily as aggressors and that neither spouse acted primarily in self-defense[.]”<sup>28</sup>

Kentucky law carefully tracks these requirements. It requires the filing of a separate petition for a “mutual” protective order to be issued. Further, an out-of-state “mutual” protective order will be enforced in Kentucky only if the issuing court has made specific findings that each party in a separate order was entitled to an order of protection.<sup>29</sup> This practice is consistent with due process, the collective judgment of courts and commentators, and the statutory scheme for protecting victims of domestic violence.

#### **IV. The District Court’s Misuse of a Protective Order to Punish the Victim of Domestic Violence is Contrary to Law.**

The district court’s ruling is at odds with the plain language of Kentucky’s domestic violence statutes. In Kentucky, like most other states, victims of domestic violence may petition a court for a protective order, which will issue upon a showing of “the presence of an immediate and present danger of domestic violence and abuse.”<sup>30</sup> Kentucky law also permits, in very limited circumstances, courts to issue so-called “mutual protective orders”<sup>31</sup> to restrain the conduct of the petitioner as well as the respondent. But a court may not issue a “mutual” protective order unless the respondent files a separate petition and independently demonstrates “the presence of an immediate and present danger:” “A Court may issue mutual protective

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(Continued . . .)

<sup>27</sup> See American Judges Association, *Domestic Violence & The Court Room: Do Not Blame the Victim*, available at <<http://aja/ncsc.dni.us/domviol/page2.html>> (last visited Feb. 6, 2002).

<sup>28</sup> 42 U.S.C. § 3796hh(c)(3).

<sup>29</sup> See *Model Domestic Violence Law Enforcement Policy* at V.C.2 note.

<sup>30</sup> See Ky. Rev. Stat. 403.735(1), 403.740(1).

orders *only* if a *separate* petition is filed by the respondent.”<sup>32</sup> Furthermore, the statute charges courts with the additional responsibility of insuring that all “mutual” protective orders are “sufficiently specific to apprise any peace officer as to which party has violated the order if there is probable cause to believe a violation of the order has occurred.”<sup>33</sup> These additional procedural safeguards are needed to protect the petitioner’s due process rights, and to avoid confusion among police officers charged with the difficult task of enforcing “mutual” protective orders. *See Bays v. Bays*, 779 So. 2d 754 (La. 2001) (holding that the court’s entry of a protective order in the absence of a separate petition violated due process).

In *Bays*, the Louisiana Supreme Court held that the lower court lacked authority even to *issue* a mutual protective order where the petitioner’s due process rights to a meaningful hearing had been violated. *Id.* The due process violation here is even more profound than in *Bays*. In this case, the victim had no notice that the court order—which on its face only restrained “the respondent”—would be read to prohibit any conduct by her. Clearly, the right to notice was not satisfied. Without any order (or basis for any order against her), she was held to be in contempt and fined. That result is unfair, unreasonable, and impermissible as a matter of constitutional due process. The Kentucky statute does not permit it and should not be interpreted to allow that result.

Specifically, nothing written in the order, nor set forth by Kentucky law, gave the victim any indication that the court had issued an order against her. To the contrary, under Kentucky law *no* valid EPO was—or could have been—issued against her. Kentucky law expressly

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<sup>31</sup> A “mutual protection order” is a restraining order that applies equally to both the petitioner and the respondent, subjecting both to contempt charges for any violation of the order. *See, e.g.*, Ky Rev. Stat. 403.735(2).

<sup>32</sup> *Id.* (emphasis added).

<sup>33</sup> Ky Rev. Stat. 403.735(2).

provides that emergency protective orders restrain only “the adverse party,” *i.e.*, the *perpetrator*—not the victim of domestic violence.<sup>34</sup> The EPO issued by the district court specifically “restrain[ed] *the [r]espondent* from any contact or communication with the [p]etitioner . . . [and] from committing further acts of domestic violence or abuse[.]” (emphasis added). Therefore, under the plain language of both the order and the statute—and in the absence of a separate petition by the respondent and an independent demonstration by him of domestic abuse—*no* emergency protective order could have been validly applied here.

Nor can the Court’s limited discretion to tailor the provisions of a protective order to the specific circumstances and needs of the *petitioner* justify what occurred here. There was no family violence initiated by the petitioner and thus no basis for restraining her conduct. There was in fact no order doing so. Quite starkly, the district court imposed an *ex post facto* criminal sanction against the victim of domestic violence. Kentucky law mandates that courts *must* interpret domestic violence statutes such as the protective order statute so as to effectuate the legislative purpose of “allow[ing] persons who are victims of domestic violence and abuse to obtain effective, short-term protection against further violence and abuse in order that their lives will be as secure and uninterrupted as possible.”<sup>35</sup> It is well settled that courts must construe statutes so as to avoid constitutional problems.<sup>36</sup>

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<sup>34</sup> See Ky. Rev. Stat. 403.740(1)(a)-(d).

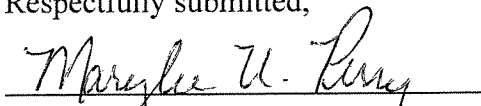
<sup>35</sup> See Ky. Rev. Stat. 403.715(1).

<sup>36</sup> *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988).

## CONCLUSION

An emergency protective order should be a shield that protects the victim of domestic violence, not a sword used to intimidate or coerce the victim. Penalizing victims as well as perpetrators of domestic abuse denigrates the statutory scheme carefully crafted to protect and assist the victims of domestic violence, discourages victims from seeking the judicial relief to which they are entitled under law, fails to hold lawbreakers sufficiently accountable for their own violent acts, and most importantly, jeopardizes the safety and well-being of victims attempting to escape the violence in their lives. Accordingly, the district court's ruling should be reversed.

Respectfully submitted,

  
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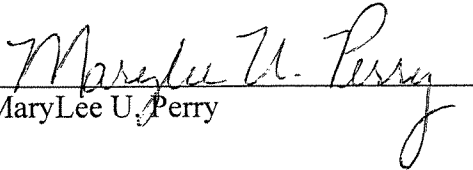
**Of Counsel**

**Counsel for *Amici Curiae***

Dated: February 11, 2002

## CERTIFICATE OF SERVICE

Pursuant to Rule 73.03(1) of the Kentucky Rules of Civil Procedure, the undersigned certifies that on the 11th day of February, 2002, she served a true copy of the Motion for Leave to Appear as Amici Curiae, by first class mail postage prepaid, to Joshua Warren Harrison, 543 Sheridan Drive, Lexington, KY 40503; Hon. Pamela Ledgewood, 271 W. Short Street, Suite 205, Lexington, KY 40507; and a courtesy copy to Fayette County District Judge, Megan Lake Thornton, 136 Martin Luther King, Jr. Blvd., Lexington, KY 40507.

  
MaryLee U. Perry