

**TO THE HONORABLE MEMBERS OF THE  
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,  
ORGANIZATION OF AMERICAN STATES:**

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**PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS  
OF JESSICA GONZALES BY THE UNITED STATES OF AMERICA  
AND THE STATE OF COLORADO, WITH REQUEST FOR AN  
INVESTIGATION AND HEARING ON THE MERITS**

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## INTRODUCTION

In 1999, Jessica Gonzales, a victim of domestic violence, obtained a domestic violence restraining order that limited the access of her estranged husband, Simon Gonzales, to her, the children, and the family home. On June 22, 1999, Mr. Gonzales abducted their three daughters from the home, in violation of the restraining order. Ms. Gonzales repeatedly called her local Castle Rock Police Department and asked them to locate her husband and the children and enforce the order. The police did nothing, though they were obligated under state law to arrest any individual who violated a restraining order. Ten hours later, Mr. Gonzales arrived at the police station and opened fire. The police immediately shot and killed Mr. Gonzales, and then discovered the murdered bodies of the Gonzales children – Leslie, 7, Katheryn, 8, and Rebecca, 10 – in the back of his pickup truck. Ms. Gonzales sued the Castle Rock Police Department and certain individual officers<sup>1</sup> under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Her claims were dismissed by the District Court, reinstated by the Court of Appeals, but then ultimately rejected by the United States Supreme Court on June 27, 2005.

Ms. Gonzales petitions this Honorable Commission for relief to compensate her for the harms she and her children have suffered as a result of the United States' failure to investigate Mr. Gonzales' unlawful and violent behavior, protect Ms. Gonzales and her children, and provide Ms. Gonzales with an appropriate remedy for these violations. Unfortunately, as discussed in this petition, Ms. Gonzales' case is by no means unique. In fact, it is representative of the plight of countless victims of domestic violence in the

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<sup>1</sup> This petition often uses the terms "police department" and "individual police officers" interchangeably. Both categories refer to State actors under international human rights law, thus making the distinction between them irrelevant.

United States, the vast majority of whom are women and children. Injured and abused by their intimate partners, many victims will turn to the police and the legal system for recourse, but only some will have their needs adequately met.

This complaint arises from three separate but related human rights violations. First, despite Ms. Gonzales' repeated and urgent entreaties to the Castle Rock Police Department to enforce her order of protection and locate her children, the police did nothing. They failed to investigate the children's disappearance, even after Ms. Gonzales learned where her husband had taken the children and notified the police with this information. In so doing, the police engaged in a widespread, systemic, and longstanding practice of treating domestic violence as a less serious crime than other crimes and marginalizing domestic violence victims on the basis of their gender. The police also shirked their responsibility under international human rights law to provide special protections to women and children, especially those who are victims of domestic violence. In failing to investigate the complaint of Ms. Gonzales, a victim of domestic violence, and in failing to enforce her order of protection, the United States violated Articles I, II, VII, and XXIV of the American Declaration on the Rights and Duties of Man (hereafter "American Declaration").

Second, by ignoring Ms. Gonzales' pleas for assistance, the police department failed to act to protect the children's lives and Ms. Gonzales' rights to dignity and humane treatment, and to guarantee their fundamental rights to the protection of privacy, the family, and the home. These are clearly-established duties of the State under the American Declaration and other international human rights law, and they are of particular importance here because they involve the responsibility of the police to protect women

and children from suffering domestic violence. In failing to protect Ms. Gonzales and her children from the grave harms which they suffered, the United States violated Articles I, II, V, VI, VII, IX, and XXIV of the American Declaration.

Third, the Supreme Court's rejection of Ms. Gonzales' due process claims and Colorado's strict sovereign immunity laws have left Ms. Gonzales without a remedy for the harms she and her children suffered. Had Ms. Gonzales been provided with an adequate legal remedy, she would have been compensated both financially and, more importantly, through a legal declaration that her rights had been violated. However, the Supreme Court's decision in *Castle Rock v. Gonzales* and the Colorado law granting immunity to police officers deny such a remedy. In failing to provide either a state or federal remedy, the United States has left Ms. Gonzales with no recourse for the violations of her and her children's rights by the police. This unfair result condones and even promotes the widespread non-enforcement of restraining orders by the police as well as the culture of impunity that exists for law enforcement in the domestic violence context. In denying Ms. Gonzales a remedy for the wrongs she has suffered, the United States violated Articles I, II, VII, and XXIV of the American Declaration.

In her petition, Ms. Gonzales requests monetary compensation for the violation of her rights under the American Declaration; adoption by the United States, and especially the State of Colorado, of necessary measures to deter the commission of domestic violence crimes; and an advisory opinion from the Inter-American Court of Human Rights regarding the nature and scope of United States obligations under the American Declaration in light of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará) and the

Convention on the Elimination of All Forms of Discrimination Against Women  
(CEDAW).

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **A. Summary of Facts**

Jessica Gonzales was born in 1966 to parents from St. Louis Valley, Colorado. She grew up in Pueblo, Colorado, where she met her future husband, Simon Gonzales, while still in high school. Jessica moved to Denver when she was 19 to work and attend community college. In 1990, she and Simon were married, and in 1998 they moved to Castle Rock, Colorado with the hopes that this small town would provide a safe and pleasant environment to raise a family.

Mr. Gonzales had always demonstrated unpredictable behavior, but in 1996, he began demonstrating increasingly erratic and emotionally abusive behavior towards Ms. Gonzales and their children. Around this time, he became heavily involved with drugs and became increasingly distant and despondent around his family. Mr. Gonzales' behavior soon worsened and he began breaking his children's belongings, threatening to kidnap the children, and exhibiting suicidal behavior. In 1999, when Mr. Gonzales tried to hang himself in the family garage, Jessica Gonzales decided that he posed too great a danger to her and her children. She filed for divorce and Mr. Gonzales moved out of the house.

Mr. Gonzales continued to display frightening behavior despite Ms. Gonzales' attempts to separate from him. This behavior worsened when he found out that she had begun dating someone else. He repeatedly broke into their house, stole Ms. Gonzales' wedding ring and other jewelry, changed the locks, and, on one occasion, loosened the water valves, flooding the entire residence. He also stalked her and the children, at times even hiding in or near Ms. Gonzales' home and threatening her and the children when



they arrived. Ms. Gonzales called the police on several occasions to report these incidents, but they often dismissed her as only calling when it was convenient for her.

When Mr. Gonzales was allowed to spend time with the children, they would return home scared and tell Ms. Gonzales that they did not like spending time with their father and his girlfriend, Rosemary Young. During one such visit with the children, Mr. Gonzales was arrested for road rage after he had sped down the highway, chasing and threatening another driver with his children riding along in the car without the protection of their seatbelts. Upon information and belief, Mr. Gonzales had had five other run-ins with the police in the early 1999.

On May 21, 1999, Ms. Gonzales applied for and obtained from the Douglas County, Colorado District Court a temporary restraining order against Mr. Gonzales, who by then was estranged from the family.<sup>2</sup> In large part because of Mr. Gonzales' history of unpredictable behavior, the restraining order directed Mr. Gonzales not to molest or disturb the peace of Ms. Gonzales or their three daughters, Rebecca (age 10), Kathryn (age 8), and Leslie (age 7), excluded Mr. Gonzales from the family home, and criminalized any violation of the order's terms.<sup>3</sup> The reverse side of the order reiterated the requirements of Colorado's mandatory arrest law<sup>4</sup> in a "Notice to Law Enforcement Officials" that stated: "You shall use every reasonable means to enforce this restraining

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<sup>2</sup> Ms. Gonzales obtained her restraining order pursuant to § 14-10-108(2)(b)-(c) of the Colorado Uniform Dissolution of Marriage Act, which authorizes state courts to award an order "enjoining a party from molesting or disturbing the peace of the other party or of any child [or] excluding a party from the family home . . . upon a showing that physical or emotional harm would otherwise result."

<sup>3</sup> See Ex. A.

<sup>4</sup> As discussed *infra*, domestic violence mandatory arrest laws require police to make an arrest when there is probable cause to believe that an individual has violated an order of protection or otherwise engaged in specified domestic violence crimes. Colorado's mandatory arrest law, C.R.S. § 18-6-803.5(3), requires peace (police) officers to "use every reasonable means to enforce a protection order" and to "arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that . . . the restrained person has violated or attempted to violate any provision of a protection order. . . ."

order. You shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of the restrained person when you have information amounting to probable cause that the restrained person has violated or attempted to violate any provision of this order. . . .”<sup>5</sup> At the time of its issuance, the restraining order was entered into the Colorado Bureau of Investigation’s central registry of restraining orders, a computerized central database registry that is accessible to any state or local law enforcement agency connected to the Bureau, including the Castle Rock Police Department.<sup>6</sup> It was served on Simon Gonzales on June 4, 1999. Effective as of June 4, 1999, the state court, as part of Ms. Gonzales’ divorce action and upon stipulation of the parties, made permanent the temporary restraining order, together with slight modifications that granted Ms. Gonzales sole physical custody of the three girls and permitted Mr. Gonzales occasional visitation (“parenting time”) with the children.<sup>7</sup>

On June 22, 1999, between 5:00 p.m. and 5:30 p.m., unbeknownst to Ms. Gonzales, Simon Gonzales abducted Rebecca, Katheryn, and Leslie while they were playing outside their house. No advance notice or arrangements had been made for Mr. Gonzales to have parenting time with the children that evening. Ms. Gonzales soon realized the girls were gone and, suspecting that Mr. Gonzales had kidnapped them, telephoned the Castle Rock Police Department at approximately 5:50 p.m. to ask for assistance with locating them. She notified the police that she had a restraining order against Mr. Gonzales, that she suspected her husband had abducted the children in violation of the restraining order, and that no visitation had been scheduled for that day. Ms. Gonzales expected the police to come to the scene immediately upon receiving her

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<sup>5</sup> See Ex. A.

<sup>6</sup> See C.R.S. § 18-6-803.7 (Colorado’s central registry statute).

<sup>7</sup> See Ex. B.

call for help. However, by 7:15 p.m. they still had not arrived. Ms. Gonzales called the police department again, and at approximately 7:30 p.m., Officers Brink and Ruisi were dispatched to respond to her call.

When the officers arrived approximately thirty minutes later at Ms. Gonzales' home, she handed them a copy of the restraining order and asked that it be enforced as the law required and that her children be returned to her immediately. They looked at the order, and told Ms. Gonzales that her husband, as the children's father, had a right to see them. Ms. Gonzales pointed out that the judge's specific instructions in the order limiting her husband's "parenting time" were issued in direct response to his erratic, destructive, and suicidal behavior, which had frightened the children. The officers responded that there was nothing that they could do to enforce the order and suggested that Ms. Gonzales call the police department again if Mr. Gonzales did not return with the three children by 10:00 p.m. The officers documented neither Ms. Gonzales' statements nor their visit to her home, which was fleeting, lasting no more than ten minutes. They did not appear to consider the issue urgent or life threatening.

Ms. Gonzales began to panic. Her children had disappeared, likely at the hands of their erratic father, but the police appeared not to share her concern that something might be gravely wrong. She remained hopeful, though increasingly doubtful, that the children would soon turn up or that the police would begin to take her concerns seriously.

Shortly after 8:30 p.m., Mr. Gonzales called Ms. Gonzales on his cellular telephone and told her that he and the three children were at Elitch Gardens, an amusement park in Denver. He told her that he wanted to rekindle their relationship, and when she refused, he responded, "well then I know what I need to do." Soon thereafter,

Ms. Gonzales received several calls from Mr. Gonzales' girlfriend, Rosemary Young, who asked Ms. Gonzales about Simon Gonzales' mental health history, his capacity for harming himself or his children, and his access to firearms. Ms. Young told Ms. Gonzales that earlier that day, Mr. Gonzales had threatened to drive off a cliff. Ms. Gonzales had never met Ms. Young before. Upon receiving Ms. Young's call and that of Mr. Gonzales, she became concerned that something was gravely wrong.

Ms. Gonzales immediately called the Castle Rock Police Department and spoke with Officer Brink. She described her conversations with her husband and Ms. Young, and reiterated her concerns that Mr. Gonzales was mentally unstable and that he might harm himself and the three children. She asked Officer Brink to immediately dispatch an officer to locate Mr. Gonzales or his vehicle at Elitch Gardens, call the Denver police, and/or put out a statewide All Points Bulletin (an electronic dissemination of wanted person information, also known as an "APB") for Simon Gonzales and the three children. She also urged him to question Ms. Young about Mr. Gonzales' mental state and his suicidal threats earlier that day. Officer Brink refused to comply with these requests, stating that Elitch Gardens was outside of his jurisdiction and that Ms. Young had not broken any laws. His only reaction to Ms. Gonzales' urgent pleas for assistance was to tell her to wait until 10:00 p.m. to see whether her husband turned up with the children. From this call, Ms. Gonzales got the distinct impression that the police viewed her as an unjustifiably distressed mother who was simply wasting their time.

Ms. Gonzales reluctantly complied with Officer Brink's instructions, and called the Police Department again at 10:10 p.m. to report that the children were still missing. Ms. Gonzales was deeply distressed, and the police officers' inaction only exacerbated

her anxiety. She again asked Officer Brink to put out an APB and contact the Denver police. Again, he dismissed her request, telling her that he “didn’t see what the big deal was,” and demanded that she continue to wait, this time until midnight.

By midnight, Ms. Gonzales was extremely frightened, believing that the situation was urgent and that she could not depend on the police to locate the children. She decided to attempt to find the children herself. Ms. Gonzales called Ms. Young and arranged to meet her at Mr. Gonzales’ apartment in order to begin to look for the children. Upon arriving at the apartment and finding it empty, Ms. Gonzales called the police on her cellular telephone, told them that the three children were still missing, and asked that they meet her at the apartment complex. She explained to the dispatcher that Rosemary Young was planning to meet her there and that if the police came, they would have the opportunity to question Ms. Young. The dispatcher told her to wait at the apartment until a police officer arrived. No officer came.

At approximately 12:50 a.m., Ms. Gonzales went to the Castle Rock police station. There she met with Detective Ahlfinger, who took an incident report from her. He took down a description of what the children were wearing and told Ms. Gonzales that he would attempt to locate Mr. Gonzales and the children, but did not ask any other questions. Like Officer Brink, Detective Ahlfinger made no reasonable attempts to enforce the restraining order or to locate Mr. Gonzales and the children. Instead, after taking Ms. Gonzales’ statement, he went to dinner. Upon information and belief, the Castle Rock Police Department did not respond to any emergencies that evening that prevented them from allocating resources to assist in locating the children and enforcing the terms of the restraining order.

At approximately 3:20 a.m. on June 23, 1999, Simon Gonzales appeared at the police station and opened fire with a semi-automatic handgun he had purchased earlier that evening, shortly after he had abducted the three children. Police officers shot him dead on the scene. The officers then found the bodies of the three children, whom Mr. Gonzales had murdered earlier that night, inside his truck.

Ms. Gonzales was and remains deeply traumatized by the loss of her daughters. Had she known that the police would do nothing to locate her children or enforce the terms of her restraining order, she would have done more herself to locate the children that night and perhaps would have succeeded in averting this tragedy. Ms. Gonzales suffered and continues to suffer from the consequences of that night, and has undergone extensive counseling for her trauma.

## **B. Procedural Background**

Ms. Gonzales filed suit in the United States District Court for the District of Colorado under 42 U.S.C. § 1983,<sup>8</sup> alleging that the City of Castle Rock and Officers Ahlfinger, Brink, and Ruisi had violated her rights under the Due Process Clause of the Fourteenth Amendment, which provides that no State shall “deprive any person of life, liberty, or property, without due process of law.”<sup>9</sup>

The United States Supreme Court has repeatedly construed the Fourteenth Amendment’s Due Process Clause to cover both a “guarantee [of] fair process” and “a substantive sphere as well, barring certain government actions regardless of the fairness

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<sup>8</sup> 42 U.S.C. § 1983 provides that “Every person who, under color of [law] . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .”

<sup>9</sup> U.S. Const. amend. XIV, § 1.

of the procedures used to implement them.”<sup>10</sup> In *Sacramento v. Lewis*, the Supreme Court explained that “[s]ince the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action. . . . We have emphasized time and again that the touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective.”<sup>11</sup>

The substantive sphere of the Due Process Clause protects “certain fundamental rights and liberty interests” from government interference through statutory or executive action, “regardless of the fairness of the procedures used to implement them.”<sup>12</sup> By contrast, the procedural component transcends “fundamental” rights to include interests “created and . . . defined by . . . an independent source such as state law.”<sup>13</sup> “In procedural due process claims, the deprivation by state action of a[n] . . . interest in ‘life, liberty, or property’ is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*” – that is, without adequate procedures.<sup>14</sup>

Ms. Gonzales’ complaint encompassed both substantive and procedural due process challenges. In the substantive due process context, Ms. Gonzales argued that she and her daughters had a right to police protection against harm from her husband.<sup>15</sup> In the procedural due process context, she argued that she possessed a protected property

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<sup>10</sup> *Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (quoting *Washington v. Glucksburg*, 521 U.S. 702, 719 (1997)).

<sup>11</sup> 523 U.S. at 845-46 (internal quotations and citations omitted).

<sup>12</sup> *Id.* at 840.

<sup>13</sup> *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

<sup>14</sup> *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (emphasis in original).

<sup>15</sup> *Gonzales v. City of Castle Rock*, 307 F. 3d 1258, 1262 (10<sup>th</sup> Cir. 2002).

interest in the enforcement of the terms of her restraining order and that the Castle Rock police officers' arbitrary denial of that entitlement without due process violated her rights.<sup>16</sup>

The District Court dismissed her case on both claims, finding that Ms. Gonzales had failed to state a claim under the Fourteenth Amendment for the deprivation of either substantive or procedural due process rights.<sup>17</sup> On appeal, a panel of the Tenth Circuit Court of Appeals affirmed in part and reversed in part.<sup>18</sup> First, the panel held that Ms. Gonzales' substantive due process claim was foreclosed by *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*,<sup>19</sup> in which the Supreme Court held that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."<sup>20</sup> However, the panel also found that Colorado's mandatory arrest statute had created a constitutionally protected entitlement of which Ms. Gonzales had been deprived, in violation of her procedural due process rights.<sup>21</sup>

On *en banc* review,<sup>22</sup> the Tenth Circuit affirmed. The *en banc* court held that Ms. Gonzales' domestic abuse restraining order, coupled with Colorado's mandatory arrest statute, gave her a constitutionally protected entitlement because the order "took away the officers' discretion to do nothing and instead mandated that they use every reasonable

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<sup>16</sup> *Id.* at 1264; *see also Gonzales v. City of Castle Rock*, 366 F. 3d 1093, 1099-1100 (10<sup>th</sup> Cir. 2004) (*en banc*).

<sup>17</sup> 307 F. 3d at 1260-61.

<sup>18</sup> *Id.*

<sup>19</sup> 489 U.S. 189, 195 (1989).

<sup>20</sup> *Id.* at 1262-63 (quoting *DeShaney*).

<sup>21</sup> *Id.* at 1263-67.

<sup>22</sup> "*En banc*" is a term used to refer to the hearing of a case by all the judges of a court. United States Courts of Appeals sometimes grant rehearing *en banc* to reconsider a decision of a three-judge panel of the court, where the case concerns a matter of public importance or the panel's decision appears to conflict with a prior decision of the court.



means, up to and including arrest, to enforce the order's terms.”<sup>23</sup> The court pointed to the order’s mandatory language as restricting officer discretion,<sup>24</sup> a conclusion supported by the authorizing statute’s legislative history.<sup>25</sup> Finally, the court turned to the question of whether Ms. Gonzales received the process she was due prior to denial of this entitlement.<sup>26</sup> At minimum, the court explained, the Constitution required the police to listen to Ms. Gonzales’ request for enforcement, make any inquiries necessary to determine whether there was probable cause to arrest, and inform Ms. Gonzales of any decision not to arrest and the reason for it.<sup>27</sup> The court concluded that the Castle Rock police had failed to follow these basic steps and had, as a result, provided Ms. Gonzales with “[no] process whatsoever.”<sup>28</sup>

On June 27, 2005, the Supreme Court reversed the Tenth Circuit and ruled against Ms. Gonzales.<sup>29</sup> In a 7-2 decision written by Justice Scalia, the Court held that Ms.

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<sup>23</sup> 366 F. 3d at 1106.

<sup>24</sup> *See id.* at 1101-07.

<sup>25</sup> *See id.* at 1107-08 (“[T]he legislative history for the statute [Colo. Rev. Stat. § 18-6-803.5]. . . emphasizes the importance of the police’s mandatory enforcement of domestic restraining orders. . . . Recognizing domestic abuse as an exceedingly important social ill, lawmakers ‘wanted to put together a bill that would really attack the domestic violence problems . . . and that is that the perpetrator has to be held accountable for his actions, and that the victim needs to be made to feel safe. . . . First of all, . . . *the entire criminal justice system must act in a consistent manner, which does not now occur. The police must make probable cause arrests. The prosecutors must prosecute every case. Judges must apply appropriate sentences, and probation officers must monitor their probationers closely. And the offender needs to be sentenced to offender-specific therapy. So this means the entire system must send the same message and enforce the same moral values, and that is abuse is wrong and violence is criminal.* And so we hope that House Bill 1253 starts us down this road.’ . . . The Colorado legislature clearly wanted to alter the fact that the police were not enforcing domestic abuse restraining orders.”) (emphasis added) (citing Transcript of Colorado House Judiciary Hearings on House Bill 1253, February 15, 1994; Michael Booth, *Colo. Socks Domestic Violence*, Denver Post, June 24, 1994, at A1; John Sanko, *Stopping Domestic Violence: Lawmakers Take Approach of Zero Tolerance as They Support Bill, Revamp Laws*, Rocky Mountain News, May 15, 1994, at 5A).

<sup>26</sup> 366 F. 3d at 1110.

<sup>27</sup> *Id.* at 1116.

<sup>28</sup> *Id.* at 1111.

<sup>29</sup> *Town of Castle Rock, Colo. v. Gonzales*, 125 S.Ct. 2796 (2005). The only issue raised before the Supreme Court was whether Ms. Gonzales’ procedural due process rights had been infringed by the Castle Rock Police Department’s failure to enforce her restraining order. Ms. Gonzales did not appeal the 10<sup>th</sup> Circuit’s holding that she and her children had no substantive due process right to police protection because, as the 10<sup>th</sup> Circuit ruled, such a claim was foreclosed by *DeShaney v. Winnebago Cty. Dep’t of*

Gonzales’ due process rights had not been violated because, despite Colorado’s mandatory arrest law and the express and mandatory terms of her restraining order, she had no personal entitlement to police enforcement of the order. First, the Court concluded, “[w]e do not believe that these protections of Colorado law truly made enforcement of restraining orders *mandatory*.”<sup>30</sup> For the majority, the Colorado legislature’s repeated use of the apparently mandatory word “shall” was not enough to overcome the traditional judicial assumption that police have discretion in deciding when and how to enforce the law.<sup>31</sup> The Court held that because the word “shall” is also used in non-mandatory laws that define police duties, this word did not support the conclusion that the Colorado legislature truly meant to make arrest mandatory when a restraining order was violated.<sup>32</sup>

The Court also reasoned that it was unclear whether the preprinted notice to law-enforcement personnel on the back of Ms. Gonzales’ restraining order required the police to arrest Mr. Gonzales, seek a warrant for his arrest, or enforce the order in some other way, and that this uncertainty was further evidence of police discretion over enforcement.<sup>33</sup> “Such indeterminacy is not the hallmark of a duty that is mandatory. Nor can someone be safely deemed ‘entitled’ to something when the identity of the alleged entitlement is vague,” the Court explained.<sup>34</sup>

The Court found that even if the domestic violence mandatory arrest law was in fact mandatory, this would not necessarily mean that the *victim* of domestic violence had

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*Soc. Servs.*, 489 U.S. 189. See also *Castle Rock, Colo. v. Gonzales*, 125 S.Ct. 2796 (Stevens, J., dissenting) (“It is perfectly clear . . . that neither the Federal Constitution itself, nor any federal statute, granted [Jessica Gonzales] or her children any individual entitlement to police protection.”) (citing *DeShaney*).

<sup>30</sup> *Id.* at 2805.

<sup>31</sup> *Id.* at 2805-06.

<sup>32</sup> *Id.* at 2806-07.

<sup>33</sup> *Id.* at 2807-08.

<sup>34</sup> *Id.* at 2807.

a personal entitlement to the enforcement of the order.<sup>35</sup> The statute did not explicitly state that an individual holding a restraining order had a right to police enforcement of a restraining order, but instead, simply required the police to enforce the order.<sup>36</sup> The Court refused to assume that the statute was meant to create “a personal entitlement [for a victim] to something as vague and novel as enforcement of restraining orders,” rather than to simply protect the public interest in punishing criminal behavior.<sup>37</sup> According to the Court’s logic, even if the police had a general obligation to arrest Simon Gonzales under Colorado law, this obligation would have had nothing to do with any rights or entitlements that Ms. Gonzales personally had to his arrest.<sup>38</sup>

Finally, the Court reasoned, even if Colorado had imposed a mandatory duty to arrest on the police, and even if this duty were understood to create an entitlement for the individual holding a protective order, “it is by no means clear that an individual entitlement to enforcement of a restraining order could constitute a ‘property’ interest for purposes of the Due Process Clause.”<sup>39</sup> While nontraditional property such as civil service jobs or entitlements to welfare benefits have previously been recognized as property under the Due Process Clause, enforcement of a restraining order was fundamentally different because, the Court reasoned, such enforcement had no ascertainable monetary value to the victim.<sup>40</sup> According to the Court, the government-provided service of arresting someone who violated a restraining order only “indirectly or incidentally” benefited the holder of the restraining order.<sup>41</sup> The Court suggested that it

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<sup>35</sup> *Id.* at 2808.

<sup>36</sup> *Id.* at 2808-09.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 2809.

<sup>40</sup> *Id.* at 2809-10.

<sup>41</sup> *Id.* at 2810.

was very unlikely that the Due Process Clause would protect such an indirect benefit.<sup>42</sup> Because the Court found that Ms. Gonzales had no entitlement to enforcement of her protective order under the Due Process Clause, it did not go on to consider whether she had been deprived of that entitlement without a hearing or other minimal procedural safeguards required by the Constitution.

In their joint dissent, Justice Stevens and Justice Ginsburg pointed out that the majority's opinion ignored the clear language and intent of the Colorado statute, which, like domestic violence mandatory arrest statutes throughout the country, responded to a persistent pattern of nonenforcement of domestic violence laws. To them, the express language of the statute was "unmistakable[ly]" intended to remove police discretion from the decision whether or not to arrest an individual who violated a protective order, and "undeniably create[d] an entitlement to police enforcement of restraining orders."<sup>43</sup> In this context, the dissent argued, Colorado's use of the word "shall" in its domestic violence mandatory arrest laws was more mandatory than in other statutes.<sup>44</sup> Furthermore, they argued, the Court has never "required the object of an entitlement to be some mechanistic, unitary thing,"<sup>45</sup> as the majority asserted. The dissent also argued that the Colorado statute had in fact required enforcement for the violation of a domestic violence restraining order for the benefit of "'a specific class of people' – namely, recipients of [such] orders."<sup>46</sup> In concluding that arrest was mandated for the benefit of

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 2816-2820 (Stevens, J., dissenting).

<sup>44</sup> *Id.* at 2818.

<sup>45</sup> *Id.* at 2820.

<sup>46</sup> *Id.* at 2821.

the community at large, the dissent reasoned, the majority had divorced the statute from its obvious context in an overly formalistic analysis.<sup>47</sup>

Finally, the dissent stated, the majority drew a false distinction between an entitlement to police protection and entitlements to other government services that are protected by the Due Process Clause, such as public education and utility services, when it suggested that an entitlement to police enforcement of a restraining order is simply not the sort of “concrete” and “valuable” property that the Due Process Clause protects.<sup>48</sup> The dissenters concluded that Ms. Gonzales had an entitlement to police enforcement of her protective order, and because the state had failed to give her any process whatsoever in depriving her of this entitlement, she had “clearly allege[d] a due process violation” under the Fourteenth Amendment of the United States Constitution.<sup>49</sup>

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<sup>47</sup> *Id.* at 2821-22.

<sup>48</sup> *Id.* at 2823.

<sup>49</sup> *Id.* at 2823-25.

## **BACKGROUND AND PATTERNS**

### **A. Domestic Violence in the United States**

In the United States between one and five million women suffer nonfatal violence at the hands of an intimate each year.<sup>50</sup> Domestic violence affects individuals in every racial, ethnic, religious, and age group and at every income level, in rural, suburban, and urban communities, but it is overwhelmingly a crime against women. Women are five to eight times more likely than men to be the victims of domestic violence.<sup>51</sup> According to the United States Justice Department, between 1998 and 2002 in the United States, 73% of family violence victims were female, 84% of spouse abuse victims were female, and 86% of victims of violence committed by a boyfriend or girlfriend were female.<sup>52</sup>

Not only are women more likely than men to experience violence at the hands of an intimate partner, the difference between women's and men's rate of physical assault by intimate partners increases as the seriousness of the assault increases. For example, while women were two to three times more likely than men to report that an intimate partner threw something that could hurt them or pushed, grabbed, or shoved them, they

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<sup>50</sup> Centers for Disease Control and Prevention, *Costs of Intimate Partner Violence Against Women in the United States* 18 (2003) (estimating 5.3 million intimate partner assaults against women in the United States each year); Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, NCJ 181867, *Extent, Nature and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Study* 26 (2000).

<sup>51</sup> Lawrence A. Greenfeld, *et al.*, U.S. Dep't of Justice, *Violence by Intimates* 38 (1998).

<sup>52</sup> Durose, Matthew R., *et al.*, U.S. Dep't of Justice, *Family Violence Statistics* 1, 10 (2005). Family violence is defined as any crime in which the victim or offender are related by blood, marriage, or adoption. It thus includes violence by parents against children, violence between siblings, violence by a husband against a wife, *etc.*, but does not include violence between unmarried partners. *See also* Callie Marie Rennison & Sarah Welchans, U.S. Dep't of Justice, NCJ 178247, *Intimate Partner Violence* 1 (2000) (finding women to be the victims in about 85% of crimes committed by intimate partners in the United States in 1998). Some data suggest that the numbers are even more disproportionate. *See, e.g.*, Caponera, Betty, *Incidence and Nature of Domestic Violence in New Mexico V: An Analysis of 2004 Data from the New Mexico Interpersonal Violence Data Central Repository* (June 2005) (finding that 94% of all adult victims served by domestic violence service providers in the state of New Mexico in 2005 were female).

were seven to fourteen times more likely than men to report that an intimate partner beat them up, choked or tried to drown them, or threatened them with a gun or knife.<sup>53</sup>

Women are far more likely than men to be murdered by their partners.<sup>54</sup> On average, more than three women are murdered by their husbands or boyfriends in the United States every day.<sup>55</sup> In 1996 alone, over 1,800 murders could be attributed to intimates, and nearly 75% of those murdered were women.<sup>56</sup> From 1981 to 1998, the estimated number of domestic violence fatalities in the United States exceeded 300,000.<sup>57</sup> Approximately one third of the women murdered in the United States each year are killed by an intimate partner.<sup>58</sup>

According to the National Institute of Justice and the Centers for Disease Control, 26% of women, compared to 8% of men, report having been assaulted by an intimate partner in their lifetime.<sup>59</sup> According to another governmental source, one-third of women in the United States experience at least one physical assault by a partner during adulthood.<sup>60</sup> Given that many who experience domestic violence are hesitant to report it

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<sup>53</sup> Tjaden & Thoennes, *supra*, at 17.

<sup>54</sup> See Colorado Coalition Against Domestic Violence, *Law Enforcement Training Manual 1*, 1-5 (2d ed. 2003) (reporting that 42% of all female homicide victims were killed by an intimate partner); *Surveillance for Homicide Among Intimate Partners*, U.S. Centers for Disease Control and Prevention (October 2001) (finding that domestic violence murders account for 33% of all female murder victims and only 5% for male murder victims).

<sup>55</sup> Senator Joseph R. Biden, Jr., Subcommittee on Crime, Correction & Victims' Rights, Ten Years of Extraordinary Progress: the Violence Against Women Act (2004).

<sup>56</sup> Greenfeld, *supra*, at 1.

<sup>57</sup> *Surveillance for Homicide Among Intimate Partners*, U.S. Centers for Disease Control and Prevention (October 2001). Similar statistics in other states reveal the extent of domestic violence-related fatalities across the United States. See, e.g., California Criminal Justice Statistics Center (CJSC), *Review of Domestic Violence Statistics* (recording 187 domestic violence homicides in California in 2003); Chicago Police Department, *Quarterly Domestic Violence Statistical Summary, Year-to-Date* (June 2005) (reporting 17 domestic violence homicides in the first six months of 2005 for the city of Chicago).

<sup>58</sup> See *supra* note 50.

<sup>59</sup> Tjaden & Thoennes, *supra*, at 9.

<sup>60</sup> Senator Joseph R. Biden, Jr., Subcommittee on Crime, Correction & Victims' Rights, Ten Years of Extraordinary Progress: the Violence Against Women Act (2004) at 30.

due to feelings of shame, a fear of retaliation, or a belief that the violence is a private matter, these statistics may understate the incidence of domestic violence.<sup>61</sup>

Not all women in the United States are equally likely to experience domestic violence. While domestic violence occurs at all income levels, poor women experience victimization by intimate partners at much higher rates than women with higher household incomes; between 1993 and 1998, women with annual household incomes of less than \$7,500 were nearly seven times as likely as women with annual household incomes over \$75,000 to experience domestic violence.<sup>62</sup> Data indicate that women are at much greater risk of domestic violence when their partners are experiencing job instability or when the couple reports financial strain.<sup>63</sup>

Children are also the victims of family violence. Studies have found that children are much more likely to be physically abused in homes where domestic violence occurs.<sup>64</sup> In the state of Colorado, for example, where Ms. Gonzales resided during the relevant time period, three out of the 51 domestic violence-related fatalities reported in 2003 were children.<sup>65</sup> In Chicago, five out of seventeen domestic violence fatalities reported in the first six months of 2005 were children.<sup>66</sup>

The United States government has acknowledged the scope and severity of domestic violence. In 1992, the United States Supreme Court recognized that 4 million

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<sup>61</sup> See Kerry Murphy Healey & Christine Smith, National Institute of Justice, U.S. Dep't of Just., *Research in Action, Batterer Programs: What Criminal Justice Agencies Need to Know* 1, 2 (1998) (noting that some researchers estimate that "as many as six in seven domestic assaults go unreported").

<sup>62</sup> Tjaden & Thoennes, *supra*, at 4.

<sup>63</sup> Michael L. Benson & Greer Litton Fox, U.S. Dep't of Justice, Nat'l Inst. of Justice, *When Violence Hits Home: How Economics and Neighborhood Play a Role* 2 (2004).

<sup>64</sup> Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse*, in *Feminist Perspectives on Wife Abuse* 158, 162 (Dersti Yillo & Michele Gofrad, eds., 1998).

<sup>65</sup> Colorado Coalition Against Domestic Violence, *Domestic Violence Facts and Statistics*.

<sup>66</sup> Chicago Police Department, *Quarterly Domestic Violence Statistical Summary, Year-to-Date* (June 2005).



women in the United States are the victims of severe assaults by male partners each year and that one-fifth to one-third of all women will be the victims of domestic assault in their lifetime.<sup>67</sup> In 1994, the United States Congress passed the Violence Against Women Act (VAWA). VAWA was reauthorized and expanded in 2000 and again in 2005. VAWA funds a wide variety of programs that address domestic violence and includes many provisions addressing the needs of victims. For instance, the 1994 law created federal criminal penalties for abusers in some circumstances.<sup>68</sup> VAWA also makes it easier for immigrant victims of domestic violence to separate from their abusers without risking deportation.<sup>69</sup> It created a National Domestic Violence Hotline<sup>70</sup> and provides grants to state and local governments that adopt policies encouraging arrests in cases of domestic violence.<sup>71</sup>

Prior to passing VAWA, Congress amassed a great deal of data on violence against women and its effects in the United States. The Congressional hearings, testimony, and reports addressing this topic in the four years prior to VAWA indicated, for instance, that up to 50% of homeless women and children are homeless because they are fleeing domestic violence.<sup>72</sup> Congress cited evidence that “battering ‘is the single

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<sup>67</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 891 (1992).

<sup>68</sup> 18 U.S.C. § 2261 (2005).

<sup>69</sup> *See, e.g.*, 8 U.S.C. § 1154(a)(1)(A)(iii) (2005); 8 U.S.C. § 1229b(b)(2) (2005).

<sup>70</sup> 42 U.S.C. § 10416 (2005).

<sup>71</sup> 42 U.S.C. § 3796hh (2005).

<sup>72</sup> S.Rep. No. 101-545, p. 37 (1990) (citing E. Schneider, *Legal Reform Efforts for Battered Women: Past, Present, and Future* (July 1990)).

largest cause of injury to women in the United States.”<sup>73</sup> Congress also noted that “arrest rates may be as low as 1 for every 100 domestic assaults.”<sup>74</sup>

Since passage of VAWA, public statements by United States officials and agencies have reiterated that domestic violence inflicts a heavy toll on the country. For instance, in 2002, President George W. Bush noted that in 2000 “almost 700,000 incidents of violence between partners were documented in our Nation, and thousands more [went] unreported. And in the past quarter century, almost 57,000 Americans were murdered by a partner.”<sup>75</sup>

### **B. Law Enforcement’s Response to Domestic Violence in the United States**

Enforcement of criminal laws against domestic violence is not alone sufficient to provide women trapped in violent relationships the resources to escape abuse and keep their families safe. However, an effective law enforcement response to those victims who seek police assistance is a necessary component of government efforts to protect the safety and the human rights of victims of domestic violence and their families.

In the United States, however, domestic violence was historically considered a family matter, rather than an issue for law enforcement.<sup>76</sup> While wifebeating was legally prohibited by the end of the nineteenth century, as long as domestic violence took place behind closed doors, police and courts would rarely interfere.<sup>77</sup> This policy of

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<sup>73</sup> S.Rep. No. 101-545, at 37 (quoting Van Hightower & McManus, *Limits of State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies*, 49 Pub. Admin. Rev. 269 (May/June 1989)).

<sup>74</sup> S.Rep. No. 101-545, at 38 (citing Dutton, *Profiling of Wife Assaulters: Preliminary Evidence for Trimodal Analysis*, 3 Violence and Victims 5-30 (1988)).

<sup>75</sup> Proclamation No. 7601, 67 Fed. Reg. 62,169 (Oct. 1, 2002); *see also* Proclamation No. 7717, 68 Fed. Reg. 59,079 (October 8, 2003).

<sup>76</sup> *See generally* Reva B. Siegal, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2118 (1996).

<sup>77</sup> Betsy Tsai, Note, *The Trend Toward Specialized Domestic Violence: Improvements on an Effective Innovation*, 68 Fordham L. Rev. 1285, 1289-90 (2000).

noninterference was thought “to protect the privacy of the family and to promote ‘domestic harmony.’”<sup>78</sup>

In the 1960s and 70s, the women’s movement in the United States brought increased attention to the problem of domestic violence.<sup>79</sup> Nevertheless, police policy and practice continued to address domestic violence as a private matter rather than a crime. Police were advised to encourage informal resolution of domestic violence complaints, while ignoring the imbalance of power between the abuser and the victim and the criminal behavior of the abuser. The 1967 Manual of the International Association of Police, for example, explained, “in dealing with family disputes, the power of arrest should be exercised as a last resort.”<sup>80</sup> As late as 1973, the American Bar Association recommended that police resolve “conflict such as that which occurs between husband and wife . . . without reliance upon criminal assault or disorderly conduct statutes.”<sup>81</sup> Throughout the country many police departments encouraged their officers to treat domestic violence as a family matter. The Oakland, California Police Department’s 1975 training manual stated that the officer’s role in a domestic violence incident was “more often that of a mediator and peacemaker than enforcer of the law . . . . Normally, officers should adhere to the policy that arrests shall be avoided.”<sup>82</sup> Similarly, the State of Michigan instructed law enforcement to “[a]void arrest if possible” and to “[a]ppeal to

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<sup>78</sup> Siegal, *supra*, at 2118.

<sup>79</sup> E.g., Marion Wanless, Note, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But is It Enough?*, 1996 U. Ill. L. Rev. 533, 536 (1996).

<sup>80</sup> Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. Crim. L. & Criminology 1, 11 (1992).

<sup>81</sup> American Bar Ass’n, Project On Standards For Criminal Justice, *Standards For The Urban Police Function* 12 (1973).

<sup>82</sup> Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. Crim. L. & Criminology 46, 48 (1992).

their [complainant's] vanity” to discourage initiation of criminal proceedings.<sup>83</sup> In 1984, the U.S. Attorney General’s Task Force on Family Violence concluded that the failure of law enforcement to arrest for domestic violence crimes was a primary obstacle to addressing domestic violence in the United States effectively.<sup>84</sup>

In an attempt to provide protection to victims of domestic violence in the face of law enforcement resistance to treating such violence as a crime, beginning in 1970 states across the country adopted legislation permitting judges to issue civil orders of protection (also known as restraining orders) to victims of domestic violence who show that they fear physical harm from their abuser.<sup>85</sup> Such protective orders typically enjoin a respondent from harming or contacting the holder of the order and can also address child custody and visitation, possession of a joint residence, payment of child or spousal support, and the like. Today civil protective orders are available to domestic violence victims in every state in the United States.<sup>86</sup> A judge can hold abusers who violate protective orders in contempt, and every state provides criminal penalties for violations of civil orders of protection.<sup>87</sup>

In a further attempt to address the hesitance of police to arrest in domestic violence cases, 31 states, including Colorado, have established mandatory arrest laws, which curb police discretion in domestic violence cases.<sup>88</sup> In general, these laws require police to make an arrest when there is probable cause to believe that an individual has

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<sup>83</sup> *Id.* at 49.

<sup>84</sup> U.S. Dep’t of Justice, *Attorney General’s Task Force on Family Violence: Final Report* 16-18 (1984).

<sup>85</sup> *See generally, e.g.*, Leigh Goodman, *Law Is the Answer? Do We Know That For Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 St. Louis U. Pub. L. Rev. 7, 10-11 (2004).

<sup>86</sup> *See* National Network to End Domestic Violence, Fact Sheet, *State Protection Order Laws* (2005) (collecting statutes).

<sup>87</sup> National Network to End Domestic Violence, Fact Sheet, *Criminal Violations* (2005) (collecting statutes).

<sup>88</sup> *Id.*; *see also* National Network to End Domestic Violence, Fact Sheet, *Mandatory Arrest* (2005) (collecting statutes).

violated an order of protection or otherwise engaged in specified domestic violence crimes. For example, Colorado law states that an officer “*shall* arrest, or if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person” when the officer has probable cause to believe that the individual has violated a restraining order of which he or she had notice.<sup>89</sup> Some of these mandatory and pro-arrest policies were adopted in the wake of the federal VAWA, which required these policies as a condition for various grants to state and local governments.<sup>90</sup>

Police enforcement of protective orders through arrest and other means is crucial to protecting women’s safety, as an order alone does not guarantee that violence will end. For example, one study conducted in Colorado found that 60% of protective orders were violated in the year after they were issued; nearly a third of women with protective orders reported violations that involved severe violence.<sup>91</sup> The likelihood of post-order abuse is even greater for women with children, such as Ms. Gonzales.<sup>92</sup> As a result, individuals who obtain protective orders depend on and expect police assistance in enforcement of these orders. For instance, one study of battered women seeking protective orders found that even though 86% of them believed that their assailant would violate the order, a full 95% were confident that the police would respond rapidly to these violations.<sup>93</sup>

Statistics show that when police *do* respond to a violation of a protective order by arresting the offender, they reduce the risk of re-offense.<sup>94</sup> In Denver, Colorado, for

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<sup>89</sup> Colo. Rev. St. § 18-6-803.5(3) (emphasis added).

<sup>90</sup> 42 U.S.C. § 3796hh.

<sup>91</sup> U.S. Department of Justice, National Institute of Justice, *Legal Interventions in Family Violence: Research Findings and Policy Implications* 50 (1998).

<sup>92</sup> *Id.*

<sup>93</sup> Karla Fischer & Mary Rose, *When “Enough is Enough”: Battered Women’s Decision Making Around Court Orders of Protection*, 41 *Crime & Delinquency* 414, 417 (1995).

<sup>94</sup> Deborah Epstein, *Procedural Justice: Tempering the State’s Response to Domestic Violence*, 43 *Wm. & Mary L. Rev.* 1843, 1854 (2002).

instance, where 87% of violators were arrested, there was only a 2% rate of re-offense. In the state of Delaware, where 55% of violators were arrested, 10.9% re-offended; and in Washington, D.C., where 41% of violators were arrested, there was a 11.9% re-offense rate.<sup>95</sup> More broadly, available data indicate that when men are arrested for assaulting their female partners, they are approximately 30% less likely to assault their partners again than are men who are not arrested.<sup>96</sup>

Despite the utility of arrests in reducing domestic violence offenses, many police departments and police officers in the United States fail to provide meaningful enforcement of protective orders or otherwise respond effectively to domestic violence. First, when victims of domestic violence obtain emergency *ex parte* protective orders, too often law enforcement fails to serve these orders. For instance, a 2005 California study showed that more than 30 percent of protection orders in large counties and more than 25 percent of protection orders in small counties were unserved.<sup>97</sup> A study in Maryland found that law enforcement failed to serve *ex parte* orders in 50% of the cases surveyed.<sup>98</sup> A study of rural Kentucky counties found 47% of *ex parte* orders were not served; some counties had nonservice rates as high as 91%.<sup>99</sup> An order that has not been served on the batterer is unenforceable and thus does not provide protection.

Second, when women who are being abused seek assistance from the police, in many jurisdictions police fail to respond. A study conducted in the state of Texas, for

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<sup>95</sup> Susan L. Keilitz et al., National Ctr. For State Courts, *Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence* (1997).

<sup>96</sup> Christopher Maxwell et. al, National Institute for Justice Research In Brief, *The Effect of Arrest on Intimate Partner Violence: New Evidence from the Spouse Assault Replication Program* 9 (July 2001).

<sup>97</sup> Report to the California Attorney General, *Keeping the Promise: Victim Safety and Batterer Accountability* 1, 35-36 (2005).

<sup>98</sup> Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 Am. U. J. Gender Soc. Pol’y & L. 499, 509 (2003).

<sup>99</sup> T.K. Logan et al., *Protective Orders in Rural and Urban Areas: A Multiple Perspective Study*, 11 Violence Against Women 876, 889 & 899 (2005).

example, demonstrated that out of 2,096 battered women's calls for service, police responded to the calls in only one-third of the cases.<sup>100</sup>

Moreover, when police officers do respond to a domestic violence call, their responses are often inadequate. Approximately half of all calls to police departments reporting violent crime arise from domestic violence.<sup>101</sup> Nevertheless, in some jurisdictions, domestic violence-related calls for service are routinely treated as a low priority.<sup>102</sup> Domestic violence victims have reported that law enforcement responds within five minutes of the call for service in only 25% of cases.<sup>103</sup> Slow response times are a particular problem for women in rural areas.<sup>104</sup>

Nationally, police question a witness or suspect in only 29% of domestic violence cases, and in only 6% of domestic violence cases do police search for or collect evidence.<sup>105</sup> Police officers promise surveillance or investigation in a mere 4% of domestic violence cases.<sup>106</sup> A 2001 study of the Metropolitan Police Department in Washington, D.C., found that 89% of women surveyed said that the police did not take pictures of the crime scene, 66% said the police did not photograph their injuries; and 69% said the police did not inquire if there was a history of abuse by the assailant. Perhaps most disturbingly, 83% of those surveyed said the police did not ascertain if they had a protective order against their abuser.<sup>107</sup>

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<sup>100</sup> Susanne Browne, *Due Process and Equal Protection Challenges to the Inadequate Responses of the Police in Domestic Violence Situations*, 68 S. Cal. L. Rev. 1295, 1298 (1995).

<sup>101</sup> Feminist Majority Foundation, *Domestic Violence Facts* (2001).

<sup>102</sup> Zorza, *supra*, at 47.

<sup>103</sup> U.S. Dep't of Justice *Violence Between Intimates* 1, 5 (1994).

<sup>104</sup> Judith Wuest & Marilyn Merritt-Gray, *Not Going Back: Sustaining the Separation in the Process of Leaving Abusive Relationships*, 5 *Violence Against Women* 110, 122 (1999).

<sup>105</sup> Greenfeld, *supra*, at 27.

<sup>106</sup> *Id.*

<sup>107</sup> Michael Cassidy et al., *The Victims' View: Domestic Violence and Police Response*, Paper presented to the World Congress of Criminology, Societe Internationale de Criminologie (August 2003).

Even when police department policies require incident reports be filed in domestic violence cases, police often fail to document their responses to domestic violence calls. For instance, in 2000, in Washington, D.C., no report was made of approximately two-thirds of police responses to domestic violence calls, despite department policy requiring such a report in every instance.<sup>108</sup>

Police fail to make arrests in response to complaints of domestic violence in jurisdictions across the United States, despite mandatory arrest laws and despite high volumes of calls to police reporting violations of orders of protection.<sup>109</sup> Nationally, a Department of Justice report indicates that only one out of five domestic violence offenders are arrested at the scene.<sup>110</sup>

A national study of data collected between 1992 and 1994 concluded that despite widespread adoption of mandatory arrest laws and policies, police were still less likely to make an arrest when a husband was accused of feloniously assaulting his wife than in other felony assault cases.<sup>111</sup> If the victim was poor or non-white or lived in a central city, the police were less likely to arrest than if the victim was white, wealthier, or lived in a suburban area.<sup>112</sup> As the authors of the study noted, “In most states, coherent lines of authority do not exist to translate official legislative policy into recognizable criminal justice action.”<sup>113</sup> Consistent with this conclusion, a 2005 national study based on 2000 data found that police were only 5% more likely to make domestic violence arrests in

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<sup>108</sup> *Id.*

<sup>109</sup> E. Buzawa, & C. Buzawa, *Do Arrests and Restraining Orders Work?* 239 (1996).

<sup>110</sup> Greenfeld, *supra*, at 20.

<sup>111</sup> Edem F. Avakame & James J. Fyfe, *Differential Police Treatment of Male-on-Female Spousal Violence*, 7 *Violence Against Women* 22, 35-36 (2001).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 36.



mandatory arrest jurisdictions than in jurisdictions without such policies.<sup>114</sup> The study concluded that even in mandatory arrest jurisdictions, arrests were made only half the time.<sup>115</sup>

Data collected from mandatory arrest jurisdictions throughout the United States support these conclusions and highlight the consistent police failure to arrest domestic violence perpetrators. For example:

## In Colorado, a state with a mandatory arrest law, police received 16,080 domestic violence calls from October 1, 1999, through September 30, 2000, but made only 4,619 arrests (29%).<sup>116</sup>

## In New York City, out of 233,617 domestic incidents reported in 2001, only 23,905 (around 10%) resulted in arrests, despite New York's mandatory arrest law.<sup>117</sup>

## In New York State, another 2001 study found in cases where New York law required arrest, police actually made arrests fewer than 60% of the time where suspects had fled the scene. In other domestic violence cases, where New York law encouraged but did not require arrest, the rate of arrest for suspects who had fled the scene was significantly lower.<sup>118</sup> In Minneapolis, Minnesota one study found that out of 21,000 emergency

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<sup>114</sup> David Eitle, *The Influence of Mandatory Arrest Policies, Police Organizational Characteristics, and Situational Variables on the Probability of Arrest in Domestic Violence Cases*, 51 *Crime & Delinquency* 573, 591 (2005).

<sup>115</sup> *Id.*

<sup>116</sup> Billie Stanton, *Arrests Valid, Not "Mandatory"*, Denver Post, November 12, 2000, at M01.

<sup>117</sup> "Mandatory Arrest: Original Intentions, Outcomes in Our Communities, and Future Directions," conference booklet, Columbia Law School 17 (June 17, 2005).

<sup>118</sup> New York State Office for the Prevention of Domestic Violence, *Family Protection and Domestic Violence Intervention Act of 1994: Evaluation of the Mandatory Arrest Provisions*, Final Report to the Governor and Legislature (2001).

domestic violence calls, only 3,200 (15%) arrests were made.<sup>119</sup> In Minneapolis in 2000, when the suspect had fled the scene by the time the police had arrived, as was the case in 61% of misdemeanor domestic violence cases, police made arrests only 2% of the time.<sup>120</sup>

¶ In the entire state of California in 2003, although 194,288 victims called the police to seek assistance with a domestic violence situation, and 106,731 of these calls involved a weapon, only 48,854 arrests (25% of total) were made for domestic violence.<sup>121</sup>

¶ In Washington, D.C., a 2001 study found that despite a mandatory arrest policy, victims reported that no arrests were made in 61% of domestic violence cases.<sup>122</sup> Even when the victim had sustained injuries and the assailant was on the scene when the police arrived, arrests were made in only 50% of cases.<sup>123</sup>

Police officers often respond inadequately to domestic violence because they rely on gender stereotypes about domestic violence, which lead them to disbelieve and blame victims.<sup>124</sup> For instance, studies of police response to rural victims of domestic violence have found that police officers' belief that men have the right to exercise authority over

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<sup>119</sup> Chanen, David, *Charge urged in handling domestic abuse; An audit says Minneapolis police can take steps when they first arrive at a scene that will help better prosecute cases*, Star Trib. (Minn., MN), Nov. 10, 2000, at 1B.

<sup>120</sup> Sharonna Lee et al., *Case Processing of Misdemeanor Domestic Violence Cases, Year 1: Initial Police Response to Arraignment*, A Report from the BWJP Safety and Accountability Audit of Minneapolis 13, 18 (2000).

<sup>121</sup> Report to the California Attorney General, *supra* note 97, at 11 (2005).

<sup>122</sup> Cassidy et al., *supra* note 107.

<sup>123</sup> *Id.*

<sup>124</sup> Amy Eppler, Note, *Battered Women and the Equal Protection Clause: Will the Constitution Help them When the Police Won't?*, 95 Yale L.J. 788, 798 (1986); Joan Zorza, Symposium on Domestic Violence Criminal Law, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. Crim. L. & Criminology 46, 47-52 (1992).

women impedes timely and effective police responses.<sup>125</sup> A 2002 study of police response to domestic violence victims in a rural Texas county found police officers often failed to enforce the state’s mandatory arrest law. The head of the largest municipal police force in the county explained, “The goal is to never make an arrest.”<sup>126</sup> Another police chief in the county stated, “I would hate to go in and arrest a man because she is mad and is making accusations.”<sup>127</sup>

Police response to domestic violence may be inadequate in part because many police officers in the United States are themselves perpetrators of domestic violence. Studies indicate as many as 40% of police officer families experience domestic violence, a rate approximately four times the national average.<sup>128</sup> Victims of domestic violence perpetrated by police officers typically believe that seeking the assistance of law enforcement will be useless. Unfortunately, they are often right. Studies indicate that police officers accused of domestic violence generally face minimal or no consequences.<sup>129</sup>

Inadequate recordkeeping and reporting of domestic violence-related crimes are also commonplace within police departments.<sup>130</sup> Accurate statistics on police response to domestic violence have proven difficult to obtain, if they exist at all. An open records request involving a representative sample of police departments across the United States

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<sup>125</sup> Nikki R. Van Hightower & Joe Gorton, *A Case Study of Community Based Responses to Rural Women Battering*, 8 *Violence Against Women* 845, 847 (2002).

<sup>126</sup> *Id.* at 859.

<sup>127</sup> *Id.*

<sup>128</sup> National Center for Women & Policing, *Police Family Violence Fact Sheet* (2001) (citing P.H. Nedig et al., *Interspousal Aggression in Law Enforcement Families: A Preliminary Investigation*, 15 *Police Studies* 30 (1992)).

<sup>129</sup> *See id.*

<sup>130</sup> *See, e.g.,* Caponera, *supra* note 52 (noting that in New Mexico “[t]here are numerous administrative and procedural issues that affect accurate reporting of domestic violence ranging from whether and how police offense incident reports are written, how these reports are entered into law enforcement databases or otherwise counted, what aggregate information is submitted . . . and how information is entered . . . . [P]rocedures in law enforcement *affect the incidence rate* in [New Mexico].”) (emphasis added).

revealed that very few police departments keep specific data on domestic violence arrests or complaints.<sup>131</sup> Domestic violence crimes are consistently miscategorized or undercategorized by officers responding to calls for service.<sup>132</sup> In Ms. Gonzales's town of Castle Rock, Colorado, for example, police officers do not characterize any calls as "domestic violence-related," even today. It is thus impossible to fully analyze many police departments' response to domestic violence calls.<sup>133</sup>

When police fail to comply with mandatory arrest laws and enforce protective orders, obtaining such an order can endanger domestic violence victims by giving them a false sense of security.<sup>134</sup> "A woman who has not received an order of protection and still believes herself to be in grave physical danger is more likely to seek other help than a woman who believes she will be protected by the state."<sup>135</sup> For instance, if a woman knows that the police will not assist her, she might feel compelled to undertake more drastic steps to protect herself from her abuser, such as changing her residence, job, or schedule; arranging for constant close supervision of her children; going into hiding; moving into a shelter; buying a weapon for self-defense; hiring a private security guard; or filing a criminal complaint against her abuser. The police protection promised by mandatory arrest laws and protective orders leads women not to take such steps.

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<sup>131</sup> In November 2005, Counsel for Petitioner submitted open records requests to thirteen representative police departments across the United States asking for data and statistics pertaining to domestic violence crimes committed in the departments' jurisdictions during the years 1999-2005. To date, eight police departments have responded. Only three (Denver, Philadelphia, and Houston) compile some sort of data concerning the number of domestic violence calls for service, domestic violence incident reports, and/or domestic violence-related arrests in their jurisdictions. However, these data are quite limited. For example, they do not document the gender of the victim and perpetrator, the physical injuries complained of by the victim, the type of crime committed, or whether or not a weapon was involved.

<sup>132</sup> Phone Conversation between Counsel for Petitioner and Kim Brooks, Legal Advisor to the Baton Rouge Police Department, Nov. 29, 2005.

<sup>133</sup> Phone Conversation between Counsel for Petitioner and Deanne Durfee, Deputy Town Attorney, Town of Castle Rock, Nov. 30, 2005.

<sup>134</sup> U.S. Department of Justice, Office for Victims of Crime, *Enforcement of Protective Orders* 5 (2002).

<sup>135</sup> Caitlin E. Borgman, Note, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect DeShaney?*, 65 N.Y.U. L. Rev. 1280, 1309 (1990).

Police protection of women who obtain protective orders is especially necessary because the act of seeking a protective order may cause a batterer to retaliate. The batterer will often view the restraint of his relationship by the court as a loss of control over his victim. Because “the struggle to control the woman . . . lies at the heart of battering,”<sup>136</sup> an abuser may feel motivated to use violence to reassert the control that has been stripped by a victim’s resort to the courts.<sup>137</sup> Thus, when women decide whether to seek a protective order, they must weigh the possibility of increased violence against the promise of police protection offered by a protective order.

Without adequate police enforcement, obtaining an order of protection may only serve to heighten the danger to victims of domestic violence. Such a result conflicts with the very purpose for which mandatory arrest laws and state protection order laws were enacted.

### **C. Denial of Legal Remedies for Police Failure to Respond to Domestic Violence**

When police fail to fulfill their legal obligations in domestic violence cases, in most jurisdictions in the United States victims of domestic violence do not have an avenue to hold the police legally accountable for their failures. In light of the Supreme Court’s decision in *Town of Castle Rock v. Gonzales*,<sup>138</sup> this is true now more than ever before.

In many states, the doctrine of sovereign immunity sharply limits the ability of victims of domestic violence to sue police departments for torts such as negligence when they fail to execute their legal duties. In general, sovereign immunity shields government

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<sup>136</sup> Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 56 (1991)

<sup>137</sup> See *Caldwell v. City of Louisville*, 120 Fed. Appx. 566, 571 n.7 (6th Cir. 2004) (recounting expert testimony that abusers become more violent after victim seeks help from criminal justice system).

<sup>138</sup> 125 S.Ct. 2796 (2005).

officials from liability with certain exceptions set out in each state's law. Under Colorado state law, for example, regardless of any duties imposed by Colorado's mandatory arrest statute, government actors such as the police officers who ignored Ms. Gonzales' pleas for assistance are immune from liability unless a plaintiff can demonstrate that the officers' acts were "wanton and willful."<sup>139</sup> The "wanton and willful" standard means a Colorado plaintiff cannot recover in a tort suit against a police department unless she can show that the police purposefully acted or failed to act with the conscious belief that this would probably cause harm to her.<sup>140</sup> Such a showing will be impossible to make in most circumstances, and especially in domestic violence cases, because a domestic violence injury typically results from a third party abuser's intervening violent act.<sup>141</sup>

Other states pose different sovereign immunity obstacles. For instance, a Massachusetts statute explicitly provides immunity to a municipality for failing to execute an arrest and for failing to prevent or diminish harm caused by a third party.<sup>142</sup> A Massachusetts court has interpreted these provisions to mean that there is no means under state law for holding officers liable for a failure to follow a mandatory arrest statute.<sup>143</sup>

Some states recognize that a special relationship between the police and a domestic violence victim can create an exception to the general sovereign immunity rule for police departments, but narrowly define how such a special relationship may be

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<sup>139</sup> Col. Rev. Stat. § 24-10-118(2)(a).

<sup>140</sup> See *Terror Min. Co. v. Roter*, 866 P.2d 929, 934 (Colo. 1994).

<sup>141</sup> Indeed, courts have showed reluctance to conclude that police inaction (or inadequate action) is the legal cause of criminal behavior. See, e.g., *Leake v. Cain* (720 P.2d 152, 160-61 (Colo. 1986); *Potter v. Thieman*, 770 P.2d 1348, 1351-52 (Colo. Ct. App. 1989); *Whitcomb*, 731 P.2d at 751-52.

<sup>142</sup> M.G.L.A. 258 § 10(h), (j).

<sup>143</sup> *Ford v. Town of Grafton*, 693 N.E.2d 1047 (Mass. App. Ct. 1998).

proven. These states require both that a specific promise of assistance be made to the individual by the police department and that the individual actually rely on that promise to her detriment. For instance, New York courts have held that a protective order is a specific promise of assistance.<sup>144</sup> However, in order to overcome the police department's immunity, an individual must show "justifiable reliance" on this promise.<sup>145</sup> In New York, courts have held that an individual does not justifiably rely on a protective order when she knows that her abuser is at large and that the police may be unable or unwilling to restrain him.<sup>146</sup> In other words, a victim's awareness that the police may inadequately enforce a protective order, and her attempts to protect herself in the face of that knowledge, may render the police immune from any liability for inadequately enforcing that order.

In recognition of the failure of state courts and state law enforcement to address domestic violence effectively, in the 1994 VAWA, Congress declared that all citizens had a civil right to be free from gender-motivated violence and created a federal cause of action permitting victims of gender-motivated violence to sue the perpetrators of this violence for denying them this right.<sup>147</sup> In *United States v. Morrison*, the Supreme Court struck down this provision, holding that issues such as violent crime and family relationships—in other words, the issues that are central to the problem of violence against women—are "local," rather than "national,"<sup>148</sup> and thus that the United States Congress had no power under the Constitution to create a remedy for victims of gender-

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<sup>144</sup> *Mastroianni v. County of Suffolk*, 691 N.E.2d 613 (N.Y. 1997).

<sup>145</sup> *Id.*

<sup>146</sup> *Finch v. Saratoga*, 758 N.Y.S.2d 220, 223 (2003); *Clark v. Ticonderoga*, 737 N.Y.S.2d 412, 415 (N.Y. Sup. Ct. 2002).

<sup>147</sup> 42 U.S.C. § 13981.

<sup>148</sup> 529 U.S. 598, 617-18 (2000).

motivated violence against their attackers.<sup>149</sup> In light of *Morrison*, women no longer can obtain a remedy for the violence against them through VAWA.

Nor does federal constitutional law typically provide a remedy when police failure to enforce protective orders or otherwise respond to domestic violence harms women and their families. In *DeShaney v. Winnebago County Department of Social Services*, the U.S. Supreme Court held that the Due Process Clause of the Constitution does not generally impose any substantive obligation on the government to protect an individual from third-party violence.<sup>150</sup> This precedent has led most federal and state courts to reject domestic violence victims' claims that inadequate police response violated their substantive due process rights.<sup>151</sup>

In *Castle Rock v. Gonzales*, the case at issue here, the U.S. Supreme Court again refused to provide a remedy to victims of domestic violence when it found that the arbitrary refusal of the police to perform their mandatory duties under state law did not violate the Due Process Clause of the Constitution.<sup>152</sup> As set out above, the Court held that despite Colorado's mandatory arrest law, Ms. Gonzales had no personal entitlement to police enforcement of her restraining order.<sup>153</sup>

Because of this case law, in many jurisdictions in the United States, victims of domestic violence who are harmed by a police failure to provide an adequate response to domestic violence will no legal remedy by which they may hold the police accountable for these failures.

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<sup>149</sup> *Id.*

<sup>150</sup> 489 U.S. 189 (1989).

<sup>151</sup> *E.g.*, *Jones v. Union County*, 296 F.3d 417 (6<sup>th</sup> Cir. 2002); *Sheets v. Mullins*, 287 F.3d 581 (6<sup>th</sup> Cir. 2002); *Soto v. Flores*, 103 F.3d 1056 (1<sup>st</sup> Cir. 1997); *Pinder v. Johnson*, 54 F.3d 1169 (4<sup>th</sup> Cir. 1995); *Ford*, 693 N.E.2d at 1047.

<sup>152</sup> 125 S.Ct. 2796 (2005).

<sup>153</sup> *Id.*



## LEGAL ARGUMENT

### **I. MS. GONZALES' PETITION IS ADMISSIBLE UNDER THE COMMISSION'S RULES OF PROCEDURE.**

#### **A. Ms. Gonzales Has Properly Exhausted Domestic Remedies.**

Article 31 of the Rules of Procedure of the Inter-American Commission on Human Rights sets forth as a prerequisite for admissibility that the “remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.”<sup>154</sup> In the instant case, Ms. Gonzales presented her Constitutional due process claims to the domestic federal courts, and on June 27, 2005, the United States Supreme Court rejected those claims. Ms. Gonzales has thus exhausted all appeals.

#### **B. Ms. Gonzales Has Filed Within a Reasonable Time and Thus is Within the Statute of Limitations.**

Ms. Gonzales' petition also meets the terms of Article 32(1) of the Rules of Procedure, which requires that petitions “are lodged within a period of six-months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies.”<sup>155</sup> As the six-month deadline on Ms. Gonzales' due process claims will not expire until December 27, 2005 (six months after the publication of the Supreme Court's decision), her petition meets the timeliness requirements of Article 32(1).

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<sup>154</sup> Rules of Procedure of the Inter-American Commission on Human Rights, approved 4-8 Dec. 2000, amended 7-25 Oct., 2002 and 7-24 Oct., 2003, art. 31 [hereinafter *Rules of Procedure*].

<sup>155</sup> *Rules of Procedure*, art. 32(1).

### **C. There Are No Parallel Proceedings Pending.**

Article 33 of the Rules of Procedure renders a petition inadmissible if its subject matter “is pending settlement pursuant to another procedure before an international governmental organization . . . or, . . . essentially duplicates a petition pending or already examined and settled by the Commission or by another international governmental organization . . . .”<sup>156</sup> The subject of this petition is not pending settlement and does not duplicate any other petition in any other international proceeding.

### **D. The American Declaration of the Rights and Duties of Man Is Binding on the United States.**

As the United States is not a party to the Inter-American Convention on Human Rights, it is the Charter of the Organization of American States (OAS Charter) and the American Declaration that establish the human rights standards applicable in this case. Signatories to the OAS Charter are bound by its provisions,<sup>157</sup> and the General Assembly of the OAS has repeatedly recognized the American Declaration as a source of international legal obligation for OAS member states.<sup>158</sup> This principle has been affirmed by the Inter-American Court, which has found that that the “Declaration contains and defines the fundamental human rights referred to in the Charter,”<sup>159</sup> and by

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<sup>156</sup> *Rules of Procedure*, art. 33.

<sup>157</sup> Charter of the Organization of American States, 119 U.N.T.S. 3, *entered into force* December 13, 1951; amended by Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A, *entered into force* Feb. 27, 1970; amended by Protocol of Cartagena, O.A.S. Treaty Series, No. 66, 25 I.L.M. 527, *entered into force* Nov. 16, 1988; amended by Protocol of Washington, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005, *entered into force* September 25, 1997; amended by Protocol of Managua, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009, *entered into force* January 29, 1996. *See also* I/A Comm. H.R., *James Terry Roach and Jay Pinkerton v. United States*, Case 9647, Res. 3/87, 22 September 1987, Annual Report 1986-87, ¶ 46.

<sup>158</sup> *See, e.g.*, OAS General Assembly Resolution 314 (VII-0/77) (June 22, 1977) (charging the Inter-American Commission with the preparation of a study to “set forth their obligation to carry out the commitments assumed in the American Declaration of the Rights and Duties of Man).

<sup>159</sup> I/A Court H.R., *Advisory Opinion OC-10/89, July 14, 1989, "Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights,"* Ser. A N° 10, ¶43, 45.

the Commission, which has recognized the American Declaration as a “source of international obligations” for OAS member states.<sup>160</sup>

Moreover, the Commission’s Rules of Procedure establish that the Commission is the body empowered to supervise OAS member states’ compliance with the human rights norms contained in the OAS Charter and the American Declaration. Specifically, Article 23 of the Commission’s Rules provides that “[a]ny person . . . legally recognized in one or more of the Member States of the OAS may submit petitions to the Commission . . . concerning alleged violations of a human right recognized in . . . the American Declaration of the Rights and Duties of Man,”<sup>161</sup> and Articles 49 and 50 of the Commission’s Rules of Procedure confirm that such petitions may contain denunciations of alleged human rights violations by OAS member states that are not parties to the American Convention on Human Rights.<sup>162</sup> Likewise, Articles 18 and 20 of the Commission’s statute specifically direct the Commission to receive, examine, and make recommendations concerning alleged human rights violations committed by any OAS member state, and “to pay particular attention” to the observance of certain key provisions of the American Declaration by states that are not party to the American Convention including significantly the right to life and the right to equality before law, protected by Articles I and II respectively.

Finally, the Commission itself has consistently asserted its general authority to “supervis[e] member states’ observance of human rights in the Hemisphere,” including

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<sup>160</sup> See e.g., Report No. 74/90, Case 9850, Hector Geronimo Lopez Aurelli (Argentina), Annual Report of the IACHR 1990, ¶. III.6 (quoting I/A Court H.R., Advisory Opinion OC-10/89, ¶ 45); see also *Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02, December 27, 2002, ¶ 163.

<sup>161</sup> *Rules of Procedure*, art. 23 (2000).

<sup>162</sup> *Rules of Procedure*, arts. 49, 50 (2000).

those rights prescribed under the American Declaration, and specifically as against the United States.<sup>163</sup>

In sum, all OAS member states, including the United States, are legally bound by the provisions contained in the American Declaration. Ms. Gonzales has alleged numerous violations of the American Declaration and the Commission has the necessary authority to adjudicate them.

**E. The Commission Should Interpret the Human Rights Provisions Contained in the American Declaration in the Context of Recent Developments in International Human Rights Law.**

International tribunals, including the Inter-American Court, have repeatedly found that international human rights instruments must be interpreted in light of the evolving norms of human rights law expressed in the domestic, regional, and international contexts. Thirty-five years ago, the International Court of Justice (ICJ) pronounced, “an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation.”<sup>164</sup>

More recently, the Inter-American Court, in considering the relationship between the American Declaration and the American Convention, referenced this ruling in its finding that “to determine the legal status of the American Declaration it is appropriate to look to the inter-American system of today in light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and

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<sup>163</sup> Detainees in Guantanamo Bay, Cuba, Request for Precautionary Measures, Inter-Am. C.H.R. (March 13, 2002) at 2. See also I/A Comm. H.R., *James Terry Roach and Jay Pinkerton v. United States*, Case 9647, Res. 3/87, 22 September 1987, Annual Report 1986-87, ¶¶ 46-49 (affirming that, pursuant to the Commission’s statute, the Commission “is the organ of the OAS entrusted with the competence to promote the observance of and respect for human rights”).

<sup>164</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 21 June 1971.

significance which that instrument was believed to have had in 1948.”<sup>165</sup> Again, in 1999, the Court reasserted the importance of maintaining an “evolutive interpretation” of international human rights instruments under the general rules of treaty interpretation established in the 1969 Vienna Convention.<sup>166</sup> Following this reasoning, the Court subsequently found that the U.N. Convention on the Rights of the Child, having been ratified by almost all OAS member states, reflects a broad international consensus (*opinio juris*) on the principles contained therein, and thus could be used to interpret not only the American Convention but also other treaties relevant to human rights in the Americas.<sup>167</sup>

The Commission has also consistently embraced this principle and specifically in relation to its interpretation of the American Declaration. For example, in the *Villareal* case, the Commission recently noted that “in interpreting and applying the American Declaration, it is necessary to consider its provisions in the context of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member states against which complaints of violations of the Declaration are properly lodged. Developments in the corpus of international human rights law relevant in interpreting and applying the American Declaration may in turn be drawn from the provisions of other prevailing international and regional human rights instruments.”<sup>168</sup> Adopting this

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<sup>165</sup> I/A Court H.R., Advisory Opinion, *supra* note 159, ¶ 37.

<sup>166</sup> I/A Court H.R., *Advisory Opinion OC-16/99, October 1, 1999, “The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law,”* Ser. A No. 16, ¶¶ 114-15 (citing, *inter alia*, the decisions of the European Court of Human Rights in *Tryer v. United Kingdom* (1978), *Marckx v. Belgium* (1979), and *Louizidou v. Turkey* (1995)); see also I/A Court H.R., *Advisory Opinion OC-18/03, September 17, 2003, “Juridical Condition and Rights of the Undocumented Migrants,”* Ser. A No. 18, ¶ 120 (citing Advisory Opinion OC-16/99.).

<sup>167</sup> I/A Court H.R., *Advisory Opinion OC-17/2002, August 28, 2002, “Juridical Status and Human Rights of the Child,”* Ser. A No. 17, ¶¶ 29-30.

<sup>168</sup> *Ramón Martínez Villareal v. United States*, Case 11.753, Report No. 52/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 821 (2002) ¶ 60 (citing *Garza v. United States*, Case N° 12.243, Annual Report of the IACHR

approach the Commission has looked to numerous international and regional treaties as well as decisions of international bodies to interpret rights under the American Declaration.<sup>169</sup>

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2000, ¶¶ 88-89); see also *Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004), ¶¶ 86-88; *Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02, -Am. C.H.R., Doc. 5 rev. 1 at 860 (2002), ¶¶ 96-97.

<sup>169</sup>See, e.g., IACHR, *Report On The Situation Of Human Rights Of Asylum Seekers Within The Canadian Refugee Determination System*, Country Report, OEA/Ser.L/V/II.106, Doc. 40 rev., Feb. 28, 2000, ¶¶ 28, 159, 165 (referencing the U. N. Convention on the Rights of the Child to interpret Canada's responsibilities to asylum seekers under the American Declaration and the OAS Charter); *Maya Indigenous Community*, *supra* note 168, ¶¶ 112-120, 163, 174 (referencing the American Convention, jurisprudence of the Inter-American Court, and the United Nations Convention on the Elimination of Racial Discrimination (CERD) to interpret the rights to property, equality before the law, and judicial protection for indigenous peoples contained in the American Declaration); *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Report No. 54/01, Inter-Am. C.H.R., OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2001) (referring to the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará) in determining Brazil's obligations under the American Declaration to effectively prosecute domestic violence-related crimes).

**II. THE PREVENTABLE DEATHS OF PETITIONER’S CHILDREN AND HARMS SUFFERED BY PETITIONER VIOLATED THEIR RIGHTS TO LIFE AND PERSONAL SECURITY UNDER ARTICLE I, THEIR RIGHTS TO SPECIAL PROTECTION UNDER ARTICLE VII, AND THEIR RIGHTS TO PROTECTION OF FAMILY AND HOME UNDER ARTICLES V, VI, AND IX OF THE AMERICAN DECLARATION.**

Ms. Gonzales and her three children were the tragic victims of gender-based and domestic violence. Domestic violence causes mental and physical injuries comparable to torture and other universally recognized human rights violations. Significantly, these rights include, *inter alia*, the right to life, the right to humane treatment, and the right to private and family life, all of which are either expressly or implicitly protected by the American Declaration. Indeed the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, which defines and prohibits violence against women, is based on the rights articulated in the American Declaration. Because acts of domestic violence are perpetrated by private persons, the state ordinarily does not incur responsibility for them. However, as discussed further below, if an individual victim of domestic violence can demonstrate that either (1) the state systematically failed to provide for judicial investigation, prosecution and punishment, or compensation of domestic violence cases; or (2) the legal system in any state failed to provide for judicial investigation, prosecution and punishment, or compensation for such violence, responsibility for the victim’s injuries attaches to the state. As detailed in the Background and Patterns section of this petition, the United States has failed to adequately investigate and prosecute domestic violence cases, and Ms. Gonzales is but one of many victims of this widespread and systematic failure on the part of the State.

Here, Ms. Gonzales' and her three children's rights to life, humane treatment, and private and family life were violated, and the United States, because it failed to affirmatively protect these rights and compensate Ms. Gonzales for her injuries, is liable under Articles I, V, VI, and IX of the American Declaration.

**A. Article VII of the American Declaration Obligates the United States to Promote the Right of Protection From Gender-based and Domestic Violence.**

Under the Inter-American system for the protection of human rights, states are responsible for their failure to effectively protect women and children from gender-based and domestic violence. States may be held responsible when judges, police, and other state officials fail to investigate, prosecute, and punish such acts, thus failing in their duty to protect women's and children's fundamental human rights.

In the case of *Velásquez Rodríguez*, the inter-American Court held that states have an affirmative obligation to investigate, prosecute, and punish human rights violators, and that this duty must be implemented through the state's judicial tribunals.<sup>170</sup> Specifically, the Court found that the State had an obligation "to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."<sup>171</sup> In establishing this principle, the Court set forth a reasonableness standard for the general positive obligation on states to prevent human rights violations.<sup>172</sup>

Significantly, the Court also held that a state's obligation to take reasonable steps to prevent human rights violations extends not only to the actions of agents of the state, but also, in circumstances such as those present here, to actions perpetuated by private

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<sup>170</sup> *Velásquez Rodríguez* Case, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988).

<sup>171</sup> *Id.* at ¶ 166.

<sup>172</sup> *Id.* at ¶ 174.



actors, a principle long recognized in the inter-American and European human rights systems, as well as under the International Covenant on Civil and Political Rights.

In the *Velásquez* case, for example, the inter-American Court held that “when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention . . . the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.”<sup>173</sup>

As the Court found, a State is held responsible for the acts of private persons “not because of the act itself, but because of the lack of due diligence to prevent the violation or respond to it . . .” According to the Court, state responsibility for the acts of private persons attaches either when the violation of an individual’s rights “has occurred with the support or acquiescence of the government, or when the State has allowed the act to take place without taking measures to prevent it or to punish those responsible.”<sup>174</sup>

The European Court of Human Rights has likewise found that in certain circumstances states assume affirmative obligations to protect the right to life. For example, in *Osman v. United Kingdom*,<sup>175</sup> the Court noted that the right to life implies “in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.”<sup>176</sup> The Court went on to hold that states assume such responsibility where “authorities [know] or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual . . . [and fail]

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<sup>173</sup> *Id.* at ¶ 176.

<sup>174</sup> *Id.* at ¶ 173. The Commission too has long recognized affirmative obligations of a state to protect the right to life, both from violations by state and non-state actors. For example, in *Mendes v. Brazil*, Case 11.405, Report N° 59/99, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 399 (1998), the Commission held Brazil responsible for failure to investigate and punish murders committed by private agents.

<sup>175</sup> 1998-VIII Eur. Ct. H.R. (1998).

<sup>176</sup> *Id.* at ¶ 115.

to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”<sup>177</sup>

Finally, the U.N. Human Rights Committee has interpreted article 2 of the International Covenant on Civil and Political Rights<sup>178</sup> to impose an obligation on states to take necessary steps to prevent violations of rights protected by the Convention by private as well as by state actors.<sup>179</sup>

The obligation on states to take affirmative measures to protect rights from violation by state and non-state actors extends not only to the right to life but to all rights protected under the American Declaration. Although in *Velasquez* the Court dealt specifically with protection of the right to life, its decision should not be interpreted restrictively in light of the Court’s general holding that the state has a duty to ensure the “full and free exercise and enjoyment of human rights.”<sup>180</sup>

Other international bodies have similarly held that the state’s affirmative obligations extend to other rights, including the rights to humane treatment and private and family life. For example, in *M.C. v. Bulgaria*,<sup>181</sup> the European Court of Human Rights held that Bulgaria had violated the rights of a 14-year-old alleged rape victim to be free from inhuman or degrading treatment and to privacy guaranteed under Articles 3 and 8 of the European Convention by failing to fully and effectively investigate the rape

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<sup>177</sup> *Id.* at ¶ 116. Cf. *Younger v. United Kingdom* (decision on admissibility), Eur. Ct. H.R. p. 22 (2000) (finding no violation of positive obligation to protect against prison suicide when authorities had no knowledge of mental health problems or suicidal tendencies); *Osman v. United Kingdom*, 1998-VIII Eur. Ct. H.R. (1998) at ¶¶ 118-121 (finding no violation of positive obligation when police had no knowledge that killer was mentally ill or prone to violence, and no proof that killer was responsible for prior non-violent incidents of harassment).

<sup>178</sup> International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

<sup>179</sup> Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) ¶ 8.

<sup>180</sup> See *supra* at note 170.

<sup>181</sup> 2003-I Eur. Ct. H. R. 646.

allegations. The Court concluded that “[w]hile the choice of the means to secure compliance with [international human rights] law . . . is in principle within the State’s margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions.”<sup>182</sup> Specifically in relation to the right to humane treatment, the Court found that the general obligation on states to protect human rights “requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals.”<sup>183</sup>

While the American Declaration imposes a general obligation on states to protect rights from violation by the state and private persons, Article VII imposes a *specific* obligation on States to take additional measures to affirmatively protect the rights of women and children.<sup>184</sup> This obligation extends to preventing violations both by the state itself and by private persons. Article VII of the American Declaration itself identifies women and children as individuals whose rights, because of their status, are in need of heightened protection by the state.<sup>185</sup> In relation to children, both the Commission and the Court, consistent with their interpretative mandates,<sup>186</sup> have repeatedly analyzed the rights of the child protected under the American Declaration by reference to the U.N.

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<sup>182</sup> *Id* at 150.

<sup>183</sup> *Id.* See also Human Rights Committee, General Comment 31, *supra* note 179 ¶ 8 (noting states’ obligation to protect against violations of the right to privacy, torture and other cruel, inhuman or degrading treatment by state as well as private persons).

<sup>184</sup> Article VII establishes the right of “[a]ll women, during pregnancy and the nursing period, and all children . . . to special protection, care and aid.” As discussed *infra*, a contemporary interpretation of Article VII requires the State to provide special protections for women at all stages of their lives – not only during the nursing period.

<sup>185</sup> See, e.g., *Michael Domingues v. United States*, Case 12.285, Report No. 62/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 913 (2002) ¶ 83 (noting that Article 19 of the American Convention (rights of the child) and Article VII of the American Declaration reflect “the broadly-recognized international obligation of states to provide enhanced protection to children”).

<sup>186</sup> See, e.g., I/A Court H.R., Advisory Opinion OC-1/82, September 24, 1982 (Ser. A) No.1 at ¶ 43.

Convention on the Rights of the Child,<sup>187</sup> a treaty that highlights the particular vulnerability of children and imposes additional obligations on state parties to take additional measures to ensure their right to life and physical integrity.<sup>188</sup> The Committee on the Rights of the Child has said that States Parties must “ensur[e] that all domestic legislation is fully compatible with the Convention and that the Convention’s principles and provisions can be directly applied and appropriately enforced.”<sup>189</sup>

The U.N. Human Rights Committee as well as the European Court of Human Rights have also recognized the need for States to provide additional measures of protection when the rights of children and other vulnerable groups are at issue.

In its General Comment 17, to Article 24 of the International Covenant on Civil and Political Rights (rights of the child) the Committee states that “the implementation of this provision entails the adoption of special measures to protect children, in addition to

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<sup>187</sup> G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990 (CRC).

<sup>188</sup> See Art. 6 (requiring States Parties to ensure “the survival and development of the child”); Art. 19 (states Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse .... while in the care of parent(s), legal guardian(s) or any other person who has care of the child”).

<sup>189</sup> See, Committee on the Rights of the Child, General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child (Thirty-fourth session, 2003), U.N. Doc. CRC/GC/2003/5 (2003); See also Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, OEA/Ser.L/V/II.106, Inter-Am. C.H.R. (Feb. 28, 2000); Case 10.911, Report N° 7/94, Hernández (El Salvador), Annual Report of the IACHR (1993), at 191 and ff; Cases 10.227 and 10.333, Report N° 8/92, Julio Ernesto Fuentes Perez, William Fernandez Rivera, and Raquel Fernandez Rivera (El Salvador), Annual Report of the IACHR (1991) at 119 (referencing CRC); Villagran Morales et al. Case (the “Street Children” Case), Judgment of Nov. 1999 (Ser. C) No. 63; Inter-Am. Ct. H. R., Juridical status and human rights of the child, Advisory Opinion OC-17/02, August 28, 2002, Inter-Am. Ct. H.R. (Ser. A) No. 17 (2002) (interpreting Convention in the light of CRC, at ¶ 54 noting that “children have the same rights as all human beings – minors or adults – and also special rights derived from their condition, and these are accompanied by specific duties of the family, society and the State,” and at ¶ 88 noting also that “children’s rights require that the State not only abstain from unduly interfering in the child’s private or family relations, but also that, according to the circumstances, it take positive steps to ensure exercise and full enjoyment of those rights.”).

the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant.”<sup>190</sup>

Similarly, in *Z and Others v. United Kingdom*,<sup>191</sup> a case in which social workers had failed to intervene to protect children from an abusive parent notwithstanding their awareness that the children had been subjected to severe abuse and neglect in the past, the European Court held that States are responsible for taking measures to “provide effective protection, in particular, of children and other vulnerable persons to prevent ill-treatment of which the authorities had or ought to have had knowledge.”<sup>192</sup>

The Inter-American system, including the American Declaration, also recognizes that women, especially victims of domestic violence, are in need of additional measures of protection by the state. For example, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women,<sup>193</sup> which defines and prohibits violence against women, reaffirms the right of every woman to have her physical, mental, and moral integrity respected, and the right to personal security. Article 7 requires that states “agree to pursue, by all appropriate means and without delay, policies to prevent, punish, and eradicate” violence against women and imposes on them a specific obligation to “adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity.”<sup>194</sup> Numerous other international treaties and agreements

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<sup>190</sup> Human Rights Committee, General Comment 17, Article 24 (Thirty-fifth session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 144 (2003) at ¶1.

<sup>191</sup> Eur. Ct. H.R. (2001), ¶ 73.

<sup>192</sup> See also, *Z and Others v. United Kingdom*, Eur. Ct. H.R. (2001), ¶¶ 74-75; *A v. United Kingdom*, 1998-VI Eur. Ct. H.R. (1998), ¶ 22.

<sup>193</sup> 33 I.L.M. 1534 (1994), entered into force March 5, 1995.

<sup>194</sup> *Id.* at 7(d).

impose similar such obligations on states to ensure that women are effectively protected from domestic violence.<sup>195</sup>

In sum, the American Declaration imposes affirmative obligations on states to ensure that individuals, and in particular women and children, are effectively protected from acts of gender-based and domestic violence.

## **B. Article I – right to life and personal security.**

### **1. Violation of Rebecca, Katheryn, and Leslie Gonzales’ Right to Life**

Article I of the American Declaration guarantees the right to life. The failure of Colorado state police to take reasonable steps that would have prevented the murder of Rebecca, Katheryn, and Leslie Gonzales by Ms. Gonzales’ estranged husband, Simon Gonzales, constitutes a violation of their right to life. Article I provides that “[e]very human being has the right to life, liberty and the security of his person.” The Commission has defined the right as “a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.”<sup>196</sup>

In the Inter-American system, the right to life is the most fundamental right, as without it the enjoyment of other rights cannot be fulfilled.<sup>197</sup> The importance of the right is reflected in its incorporation in every major international human rights

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<sup>195</sup> See e.g., Vienna Declaration and Programme of Action, 1993 World Conference on Human Rights, U.N. Doc. A/Conf. 157/24 (1993), 32 I.L.M. 1661 (1993), art. 18; Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979); *Implementation of the Nairobi Forward-Looking Strategies for the Advancement of Women*, G.A. Res. 161, U.N. GAOR, 49th Sess., Agenda Item 97, U.N. Doc. A/Res/49/161 (1995).

<sup>196</sup> *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997) ¶ 170.

<sup>197</sup> See e.g., *Gary T. Graham (Shaka Sankofa) v. United States*, Case 11.193, Report No. 97/03, Inter-Am. C.H.R., OEA/Ser.L/V/II.114 Doc. 70 rev. 1 at 705 (2003) ¶ 26 (“[T]he right to life is widely recognized as the supreme right of the human being, respect for which the enjoyment of other rights depends”).

instrument.<sup>198</sup> In the *Velasquez* case, the Court held that states must protect those persons within their jurisdiction from violations of the right to life.<sup>199</sup> As a result, the failure of the U.S. legal system to effectively protect Ms. Gonzales' children from deprivation of the right should be interpreted as inconsistent with United States' obligations under Article I of the American Declaration.

## **2. Violation of Jessica Gonzales' Right to Life**

The abduction of Ms. Gonzales' three children by her estranged husband was an act of domestic violence intended by him to punish her personally, to intimidate her, and to cause her severe mental anguish and distress. It was an act of gender-based violence which violated her fundamental human rights as a woman, including, significantly, her own right to life protected under Article I of the American Declaration.

Although the right is principally aimed at protecting against arbitrary deprivations of life by the state or its agents, the Commission has found the right implicated in a broad range of situations, which do not necessarily result in death, including detentions, forcible repatriations, and environmental pollution.<sup>200</sup> As the Inter-American Court has recently concluded, the right "includes, not only the right of every human being not to be deprived

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<sup>198</sup> Universal Declaration of Human Rights, GA Res. 217A(111), UN Doc. A/810 (1948) [hereinafter Universal Declaration of Human Rights]; International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 21 UN GAOR (Supp. N° 16) at 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976 [hereinafter International Covenant on Civil and Political Rights] African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, art. 4; American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992) art. 4; [European] Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS 5), 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, and 8 which entered into force on 21 September 1970, 20 December 1971 and 1 January 1990 respectively, art. 2.

<sup>199</sup> *Supra* note 170, ¶ 166.

<sup>200</sup> See, e.g., *Parque São Lucas v. Brasil*, Case 10.301, Report No. 40/03, Inter-Am. C.H.R., OEA/Ser.L/V/II.114 Doc. 70 rev. 1 at 677 (2003) (detention of prisoners); The Haitian Centre for Human Rights, et al. *supra*, (forcible repatriation of Mariel Cubans); IACHR, Report on the Situation of Human Rights in Ecuador 1996, at 88, OEA/Ser.L/V/II.96 Doc. 10 rev.1 (1997) (environmental pollution).

of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence.”<sup>201</sup> The Commission as well as other international bodies have come to similar conclusions.<sup>202</sup>

This definition would include the guarantee to be free from domestic violence. Indeed, Article 4 of the inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women explicitly provides that the right to life is implicated by acts of domestic violence. The Commission, too, has found that acts of violence against women “constitute human rights violations [under the Convention],” including violations of the right to life.”<sup>203</sup>

International human rights bodies have also consistently reaffirmed that domestic violence impacts upon the right to life of women. For example, in General Comment 19, the U.N. Committee on the Elimination of All Forms of Discrimination Against Women has recognized that gender-based violence is an extreme form of discrimination that “impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under specific human rights conventions,” including the right to life.<sup>204</sup> Even the United States itself has publicly conceded that “violence

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<sup>201</sup> Inter-Am. Ct. H.R., Villagran Morales et al. Case (the “Street Children” Case), Judgment of Nov. 19, 1999 (Ser. C) No. 63, at ¶144.

<sup>202</sup> See e.g., Status of Human Rights in Several Countries: Guatemala, in Annual Report of the Inter-American Commission of Human Rights 1991, O.A.S. Doc. OEA/Ser.L/V/III.25 doc.7, at 213 (1992) (finding that “respect for rights linked to life and integrity should go hand in hand with improvements in the population’s living standards ...”); The Right to Life (Art. 6): General Comment No. 6, 37 U.N. GAOR, Hum. Rts. Comm., 16<sup>th</sup> Sess., Supp. No. 40, Annex V, ¶ 5, U.N. Doc. A/37/40 (1982).

<sup>203</sup> Report on the Situation of Human Rights in Brazil, OEA/Ser.L/V/II.97, Doc. 29 rev.1, 29 September 1997, Chapter VIII, ¶ 30; see also, *Fernandes v. Brazil*, supra note 169 at ¶54.

<sup>204</sup> General Recommendation No. 19, Committee on the Elimination of All Forms of Discrimination Against Women, 11<sup>th</sup> Sess., U.N. Doc. CEDAW/C/1992/L.1/Add. 15 (1992) ¶ 8; See also, Human Rights Committee, General Comment 28, Equality of rights between men and women (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) at ¶¶ 10,11, 14, 16, 21; General Assembly, Resolution A/Res/58/147, *Elimination of Domestic Violence Against Women*, February 19, 2004 (collating international treaties and other instruments that recognize violations of women’s rights as violations of human rights norms, including the right to life).



against women implicates already existing human rights, and is already covered by existing human rights instruments, particularly the Convention on the Elimination of All Forms of Discrimination Against Women.”<sup>205</sup>

The gender-based violence experienced by Ms. Gonzales violated her right “to live her life in dignity” in violation of Article I. In the circumstances, the State is responsible for the violation. While the state went some way towards affirmatively protecting her right to life through the issuance of the protective order, it did not go far enough to avoid responsibility for Mr. Gonzales’ actions. The Colorado police had affirmative obligations to take effective measures to prevent Mr. Gonzales from subjecting her to acts of violence. The police failed to do so and thus assume responsibility for the violation of Ms. Gonzales’ right to life under Article I.

### **3. Violation of Jessica Gonzales’ Right to Humane Treatment**

The United States’ actions also violated Ms. Gonzales’ right to humane treatment protected under Article I of the Declaration. Although, this right is not explicitly recognized under Article I, the Commission has interpreted this Article to include similar protections to those rights protected under Article 5 of the American Convention.<sup>206</sup>

Article 5, sections (1) and (2) respectively, establish the right of every person to respect for their “physical, mental and moral” integrity and to be free from “cruel, inhuman or degrading treatment.” Article I guarantees analogous rights.

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<sup>205</sup> Inter-American Commission for Women, *Reply of the Government of the United States of America*, OEA/ser.L/II.2.26, CIM/doc.5/92 add. 1 at 3 (Sept. 21, 1992).

<sup>206</sup> *Report on Terrorism and Human Rights*, Inter-American C.H.R. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, ¶ 155 (noting that while the American Declaration lacks a general provision on the right to humane treatment, the Commission has interpreted Article I as containing a prohibition similar to that of Article 5 of the American Convention) (citing Case 9437, Report N° 5/85, Juan Antonio Aguirre Ballesteros (Chile), Annual Report of the IACHR 1984-1985).

Significantly, the protections encompassed by Article 5 --- and hence Article I --- are much broader in scope than mere protection from physical mistreatment; rather they extend to any act that is “clearly contrary to respect for the inherent dignity of the human person” and specifically include acts that cause psychological and emotional damage.<sup>207</sup>

**C. Article I of the American Declaration Recognizes The Right to be Free from Physical Mistreatment as well as Psychological and Emotional Damage.**

Although the substance of the Article 5 right to be free from “cruel, inhuman or degrading treatment” is not defined in the two inter-American treaties that specifically refer to it, namely the American Convention and the Inter-American Convention to Prevent and Punish Torture, certain guiding principles as to its content can be derived from the jurisprudence of the Inter-American Court and Commission for the purpose of determining relevant proscribed conduct. Consistent with its interpretative mandate, the Commission and the Court have drawn on other international instruments as well as the decisions of other international bodies interpreting them to define the content of the norm. Significantly, both the Commission and the Court have found that proscribed conduct need not necessarily be physical in nature but rather may include conduct that causes psychological and moral suffering.<sup>208</sup> Accordingly, the Commission and the Court have found that acts resulting in “emotional trauma,”<sup>209</sup> “trauma and anxiety,”<sup>210</sup>

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<sup>207</sup> Inter-Am. Ct. H. R., Castillo Paez Case, Judgment of Nov. 3, 1997 (Ser. C) No. 35, ¶¶ 63, 66.

<sup>208</sup> See Annual Report of the IACHR 1997, ¶ 77 regarding, *Luis Lizardo Cabrera v. Dominican Republic*, Case 10.832 citing Eur. Comm. H.R., *The Greek Case*, 12 Y. B. Eur. Conv. on H.R. 12; I/A Court H.R., *Loayza Tamayo Case*, September 19, 1997, Ser. C. No 33 at ¶57.

<sup>209</sup> See e.g., IACHR, Report No. 47/96, Case 11.436, *Survivors of the “13 de marzo” (Cuba)*, in IACHR Annual Report 1996, at 132, ¶ 106, OEA/Ser.L/V/II.95, Doc. 7 rev. (1997) (finding Cuba responsible for violating the personal integrity of 31 survivors of a refugee boat fleeing to U.S. as a consequence of the emotional trauma resulting from the shipwreck caused by Cuba).

<sup>210</sup> See, e.g., IACHR, Report No. 32/96, Case 10.553, *Maria Mejia (Guatemala)*, Oct. 16, 1996, in IACHR Annual Report 1996, *supra*, ¶ 60 (Guatemalan military officials found liable for causing “trauma and anxiety to the victims [constraining] their ability to lead their lives as they desire”).

and “intimidation” or “panic”<sup>211</sup> violate Article 5. The Commission has also found that acts affecting an individual’s “personal self-esteem .... translate[] into important damage to moral integrity.” And, that any act that “affects the normal development of daily life and causes great tumult and perturbation to him and his family,” “seriously damages his mental and moral integrity” in violation of Article 5(1).<sup>212</sup>

**D. Ms. Gonzales’ Status as a Woman and a Survivor of Domestic Violence Should Be Taken Into Consideration in the Commission’s Assessment of Her Allegations of Inhumane Treatment.**

Both the Commission and Court have held that each allegation of “cruel, inhuman or degrading” treatment should be assessed on a case-by-case basis, taking into consideration the particular circumstances of the petitioner. Significantly, the Commission and Court have found that the *sex* of the alleged victim will have an important bearing on whether alleged conduct constitutes “cruel, inhuman or degrading” treatment.<sup>213</sup>

This factor was considered by the Commission in the case of *X and Y v. Argentina*.<sup>214</sup> The case involved a practice in Argentina of subjecting women wishing to have personal contact visits with an inmate to vaginal inspections. In their assessment as to whether these inspections amounted to a violation of Article 5 of the American Convention, or were rather justified as a legitimate security measure by the state, the

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<sup>211</sup> See, e.g., *id.* at ¶ 61 (finding Guatemalan military responsible for actions designed to “intimidate” and “panic” among community members).

<sup>212</sup> See also Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 151 (2003) at ¶ 2 (noting that the purpose of the ICCPR’s prohibition of torture and other cruel, inhuman or degrading treatment is to protect both the dignity and the physical and mental integrity of the individual).

<sup>213</sup> Luis Lizardo Cabrera, *supra* note 208 at ¶ 78, citing *Ireland v. United Kingdom*, 5310/71 (1978) E.C.H.R. 1 at ¶¶ 162-163; See also, *Tyrer v. United Kingdom*, Judgment of April 25, 1978, Ser. A. No 26, ¶ 28 ff.

<sup>214</sup> Case 10.506, X and Y (Argentina), Report 38/96, Annual Report of the IACHR 1996, ¶¶ 54-71.

Commission stated that in balancing the competing interests, the state would be held to a “higher standard,” given that the measures were specifically directed against women. Taking both sides into account, the Commission found that the practice violated Article 5.

Taking into consideration Ms. Gonzales’ status as a woman and a victim of domestic violence, this Commission in its assessment of her allegations of inhumane treatment must also interpret Article I in light of inter-American and international human rights instruments that relate to these specific issues. Foremost among the relevant inter-American human rights instruments in this regard is the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women.<sup>215</sup>

Article 1 of the Convention provides that “[v]iolence against women shall be understood to include physical, sexual, and *psychological* violence ... (a) that occurs within the family or domestic unit ....” Subsection (c) of this article also notes that violence against women includes physical, sexual and, psychological violence “that is perpetrated or condoned by the state or its agents ....” Article 9, recognizing that certain women are in need of greater protection than others, requires that states “take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background .... [or] women subjected to violence while pregnant ....”<sup>216</sup>

The Commission has taken cognizance of the provisions of this Convention in its consideration of cases involving female victims, including those raising allegations of inhumane treatment.<sup>217</sup>

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<sup>215</sup> See *supra* at note 193.

<sup>216</sup> See also, Convention on the Elimination of All Forms of Discrimination against Women, *supra* note 195.

<sup>217</sup> See *Fernandes v. Brazil*, *supra* note 169.

Finally, the Commission has found that the right to humane treatment protected under Article I implicitly prohibits a variety of physical and dignitary harms specifically directed towards women.<sup>218</sup> Specifically, the Commission has noted that Article I protections include the right to personal integrity and protection against violence against women.<sup>219</sup>

As well as Ms. Gonzales' status as a woman and a victim of domestic violence, this Commission must also take into consideration her relationship to the other victims of the human rights violations. Significantly, in this regard the Commission has recognized that the mental suffering imposed on close relatives of victims of serious human rights violations in and of itself may constitute a separate and distinct violation of the right of such persons to humane treatment.<sup>220</sup> For example, in the *Perez Case*,<sup>221</sup> the Commission found that "the treatment extended to the petitioner, Delia Pérez de González, who had to stand by helplessly and witness the abuse of her three daughters by members of the Mexican Armed Forces and then to experience, along with them, ostracism by her community, constitutes a form of humiliation and degradation that is a violation of the right to humane treatment guaranteed by the American Convention."<sup>222</sup>

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<sup>218</sup> See, e.g., *Perez v. Mexico*, Case 11.565, Report No 129/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 232 (1999) at ¶ 94 (holding that rape by soldiers violated the right to humane treatment); *Raquel Martin Mejía v. Peru*, Case 10.970, Report No. 5/96, Inter-Am. CHR, OEA/Ser.L/V/II.91 Doc. 7 at 157 (1996) (holding that sexual abuse by members of security forces violated right to physical and mental integrity); *María Mamérita Mestanza Chavez v. Peru*, Case 12.191, Report No. 66/00, Inter-Am. CHR, OEA/Ser.L/v/II.111 Doc. 20 rev. at 350 (2000) ¶ 1 (holding case of forced sterilization of women admissible under Article 4 right to life and Article 5 right to humane treatment); *X and Y v. Argentina*, *supra* note 214 at ¶ 116 (holding that requirement of vaginal inspections as a condition of prison visits without judicial and appropriate medical guarantees violated, among others, Article 5 right to humane treatment).

<sup>219</sup> See, IACHR, Report of the Inter-American Commission on Human Rights on the Status of Women in the Americas, OEA/Ser.L/V/II.100 Doc. 17, October 13, 1998, Chapter III(C)(2).

<sup>220</sup> See also, Inter-Am. Ct. H. R., Street Children Case, *supra*, at ¶¶ 174-176.

<sup>221</sup> *Perez v. Mexico*, *supra* note 218, ¶ 53.

<sup>222</sup> *Id.*

Both the United Nations Human Rights Committee and the European Court of Human Rights have also found that close relatives of human rights victims, such as mothers, could themselves be victims of human rights violations by virtue of the mental suffering they experience. In *Quinteros v. Uruguay*,<sup>223</sup> for example, the Human Rights Committee found that “it underst[ood] the deep sadness and anxiety that the author of the communication suffer[ed] owing to the disappearance of her daughter and the continuing uncertainty about her fate and her whereabouts. The author had the right to know what had happened to her daughter. In this respect, she is also a victim of the violations of the [International] Covenant [on Civil and Political Rights], in particular of Article 7 [cf. Article 5 of the American Convention], suffered by her daughter.”<sup>224</sup>

Similarly, in *Kurt v. Turkey*,<sup>225</sup> the European Court held that a mother whose daughter was detained and disappeared by agents of the Turkish government was herself a victim of inhuman treatment in violation of Article 3 (prohibition on torture) of the European Convention.

Here, Ms. Gonzales was subjected to severe fear and anguish when she had to stand by helplessly, knowing that that her children were in grave danger. As a woman, a victim of the abductor’s violence in the past, and the mother of the abducted children, Ms. Gonzales was especially vulnerable to such psychological trauma. The harm she suffered as a direct consequence of her husband’s actions constitutes inhumane treatment in violation of Article I of the American Declaration. The Colorado police knew or ought to have known at the time of the existence of a real and immediate risk of psychological harm to Ms. Gonzales and yet failed to “take measures within the scope of their powers

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<sup>223</sup> July 21, 1983 (19th session) Communication N° 107/1981.

<sup>224</sup> *Id.* at ¶14.

<sup>225</sup> 1998-III Eur. Ct. H.R. (1998), pp. 1187, §§ 130-134.

which, judged reasonably, might have been expected to avoid that risk.”<sup>226</sup> Accordingly, the violation of Ms. Gonzales’ right to humane treatment under Article I of the Declaration can be attributed to the state.

**E. Article V– Protection Against Attacks on Private/Family Life, Article VI – Right to Establish a Family and Receive Protection Therefore, and Article IX – Inviolability of the Home.**

The State’s failure to intervene to protect the life of Ms. Gonzales’ three children and specifically to enforce the terms of the order of protection also violated her right to effective protection against attacks on her private life and that of her family and home as set forth in Articles V, VI, and IX of the American Declaration.<sup>227</sup>

Similar rights are enshrined in Article 11 of the American Convention, which the Commission may reference to give content to the more general but analogous rights protected under the Declaration. Article 11 of the Convention provides:

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to protection of the law against such interference or attacks.

In relation to Article 11, the Commission has interpreted the rights therein broadly, finding that they “guarantee a sphere that nobody can invade, an area that

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<sup>226</sup> Osman, *supra* note 175, ¶ 116.

<sup>227</sup> Article V of the Declaration provides: “Every person has the right to the protection of the law against abusive attacks upon his . . . private and family life.” Article VI provides: “Every person has the right to establish a family, the basic element of society, and to receive protection therefor.” Article IX provides: “Every person has the right to the inviolability of his home.”

belongs entirely to each individual.”<sup>228</sup> The Commission has found that torture, rape, and other sexual abuse constitute “a deliberate attack on dignity” in violation of the right to privacy.<sup>229</sup>

Although the Commission has found that the object of Article 11 is “essentially to protect the individual against arbitrary interference by public officials,”<sup>230</sup> as discussed above, under certain circumstances, states may be obliged to ensure an effective respect for the right to private or family life from violations by the state as well as private persons.

In *M.C. v. Bulgaria*, the European Court of Human Rights found that rape and other sexual abuse amounted *inter alia* to a violation of the petitioner’s right to privacy guaranteed by Article 8 of the European Convention.

Like rape and sexual abuse, domestic violence is unquestionably an abhorrent type of wrongdoing, with debilitating effects on its victims. The gender-based and domestic violence experienced by Ms. Gonzales was a deliberate attack on her dignity in the same way as if she had been raped or sexually abused. As a known victim of domestic violence, Ms. Gonzales was entitled to the effective protection of the State from further acts of violence that impinged upon her home and private life. Here, however, the Colorado police failed her. They either ignored or failed to enforce the express terms of the protective order, a measure specifically designed to protect her and her children from domestic violence. The failure of the police to act in the face of their knowledge of an imminent threat to Ms. Gonzales’ personal security and that of her children, and specifically their refusal to enforce the protective order, denied Ms. Gonzales an effective

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<sup>228</sup> X and Y v. Argentina, *supra* note 214, ¶ 91.

<sup>229</sup> Mejía v. Peru, *supra* note 218, ¶¶ 168, 200-201.

<sup>230</sup> X and Y v. Argentina, *supra* note 214, ¶ 91.



right to protection of her private and family life in violation of Articles V, VI, and IX of the American Declaration.

**III. THE UNITED STATES' FAILURE TO INVESTIGATE MS. GONZALES' COMPLAINTS AND PROVIDE HER WITH A REMEDY VIOLATED HER RIGHTS TO RESORT TO THE COURTS UNDER ARTICLE XVIII AND TO PETITION THE GOVERNMENT AND RECEIVE A PROMPT DECISION UNDER ARTICLE XXIV.**

Despite Ms. Gonzales' repeated and urgent entreaties to the Castle Rock Police Department to enforce her order of protection and locate her children, and despite the police department's obligation under state law to arrest any individual who violates a restraining order, the police did nothing. Although Ms. Gonzales' three children were murdered and she suffered severe psychological and emotional trauma as a direct result of the State's failure to enforce her order of protection, the courts refused to consider the merits of her case or to provide her with compensation or other relief for the violation of her rights. These actions of the State violated Articles XVIII and XXIV of the American Declaration.

Article XVIII of the Declaration provides: "Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights." Article XXIV provides: "Every person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon."

Consistent with its interpretative mandate, the Commission must interpret Articles XVIII and XXIV in the light of the more specific but analogous terms of Article 25 of the American Convention. Article 25 provides: "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for

protection against acts that violate his fundamental rights . . . .”<sup>231</sup> The Commission has found that Article 25, taken together with Articles 1(1) and 2 of the Convention,<sup>232</sup> must be understood to encompass three separate but related elements: first, “the right of every individual to go to a tribunal when any of his rights have been violated,” second, the right “to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that will establish whether or not the violation has taken place,” and third, the right to have remedies enforced when granted.<sup>233</sup>

Importantly, in the context of Article XXIV of the Declaration, the right to “obtain a judicial investigation” should be understood to include not only the right to a judicial consideration of the merits of a case alleging the violation of fundamental human rights, but also the right to receive an adequate and prompt investigation of a complaint by the police. This is especially important for victims of crime, and even more so for victims of domestic violence, who may depend on the police as their first line of defense against their batterers’ attacks and on the judiciary to subsequently consider whether or not law enforcement’s response was adequate. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power has reaffirmed the importance of providing both “[j]udicial and administrative mechanisms” to “enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive, and accessible.”<sup>234</sup> Such procedures should include law enforcement investigations and judicial considerations that “[a]llow[] the views and concerns of

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<sup>231</sup> American Convention, art. 25.

<sup>232</sup> Article 1(1) of the Convention requires States to “to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms.” Article 2 requires States to “adopt . . . such legislative or other measures as may be necessary to give effect to those rights or freedoms.”

<sup>233</sup> *Mejía v. Peru*, *supra* note 218, 157, 190-1.

<sup>234</sup> The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. res. 40/34, annex, 40 U.N. GAOR Supp. (No. 53) at 214, U.N. Doc. A/40/53 (1985), ¶ 5.

victims to be presented and considered,”<sup>235</sup> “[i]nform[] victims of their role and the scope, timing, and progress of the proceedings and the disposition of their cases,”<sup>236</sup> “[p]rovid[e] proper assistance to . . . ,”<sup>237</sup> “[t]ak[e] measures to . . . ensure [victims’] safety, as well as that of their families,”<sup>238</sup> and “[a]void[] unnecessary delay.”<sup>239</sup>

Here, Ms. Gonzales was denied both an administrative (law enforcement) and a judicial investigation into the facts of her case, as well as recourse to the courts, and any form of compensation for the violation of her own and her three children’s fundamental rights. This denial constituted a violation of Articles XVIII and XXIV of the American Declaration.

**A. The Police Failed to Adequately Investigate Ms. Gonzales’ Complaint and the Judiciary Failed to Consider Her Case on the Merits, in Violation of Article XXIV.**

The Commission has found that Article 25 requires States to undertake a “purposeful investigation” of the facts involving alleged violations of fundamental rights. Such an investigation requires that a “competent state authority . . . undertake the investigation ‘as a specific juridical duty and not as a simple matter of management of private interests that depends on the initiative of the victim or his family in bringing suit or on the provision of evidence by private sources, without the public authority effectively seeking to establish the truth . . . .’”<sup>240</sup> In other words, the Commission has found that when violations of protected rights are alleged, state authorities must act with

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<sup>235</sup> *Id.* at ¶ 6(b).

<sup>236</sup> *Id.* at ¶ 6(a).

<sup>237</sup> *Id.* at ¶ 6(c).

<sup>238</sup> *Id.* at ¶ 6(d).

<sup>239</sup> *Id.* at ¶ 6(e).

<sup>240</sup> *Mejía v. Peru*, *supra* note 218.

“due diligence, i.e. with the existing means at its disposal, and . . . endeavor to arrive at a decision . . . .”<sup>241</sup>

Here, at the very outset, Colorado police violated Article XXIV by failing to proactively investigate Ms. Gonzales’ allegations that her children’s lives were in imminent danger and respond to her request for enforcement of her restraining order. Moreover, after Ms. Gonzales filed a federal complaint alleging violations of her own and her children’s legal rights, the courts refused to examine the merits of her case and thus refused to consider whether her fundamental rights had been violated. In dismissing her case on the grounds that no due process right existed, the Supreme Court denied Ms. Gonzales her day in court, in violation of Article XXIV.

**B. Ms. Gonzales was Denied Access to an Adequate Tribunal and the Enforcement of Remedies, in Violation of Articles XVIII and XXIV.**

The right of every individual to go to a tribunal to assert a violation of her rights is integrally bound up with the right to an adequate and effective remedy for any violation of these rights. The Commission has found that a tribunal should be available to all persons who allege violations of their fundamental rights and that the tribunal in question be one that is capable of providing a remedy that effectively and adequately addresses the infringement of the right alleged.<sup>242</sup> A State incurs international responsibility whenever, “for any reason, the alleged victim is denied access to a judicial

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<sup>241</sup> *Id.*

<sup>242</sup> *Velásquez Rodríguez Case*, *supra* note 170, ¶ 64; *see also Report on Terrorism and Human Rights*, Inter-American C.H.R. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, ¶ 334.

remedy,”<sup>243</sup> for example, where, as here, courts fail to recognize a particular cause of action.

Although Ms. Gonzales had access to an independent and impartial tribunal, and indeed was permitted to appeal her case all the way to the highest court of appeal in the United States – the U.S. Supreme Court – her case was dismissed without consideration on the merits. Consequently, she never received a legal remedy that should have included both monetary compensation and, more importantly, a legal declaration that her rights and the rights of her children had been violated.

Furthermore, the judiciary had an obligation to provide a remedy for the police officers’ refusal to enforce Ms. Gonzales’ restraining order. The order was a form of relief granted by a court of law, yet the Castle Rock police, when called upon by Ms. Gonzales to enforce the express terms of the order, failed to do so. Such inaction violated the express terms of the order, Colorado’s mandatory arrest law, and international human rights laws and principles, including the United Nations Code of Conduct for Law Enforcement Officials, which mandates police officers to “protect[] all persons against illegal acts” and “respect and protect human dignity and maintain and uphold the human rights of all persons.”<sup>244</sup> In failing to declare the officers’ actions unlawful and thus provide a necessary remedy, the courts denied Ms. Gonzales any recourse for the police department’s complete failure to comply with the explicit directives contained in the order.

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<sup>243</sup> Inter-Am. Ct. H. R., *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 28 of the American Convention on Human Rights), Advisory Opinion OC-9/87 of Oct. 6, 1987 (Ser. A) No. 9 (1987), at ¶ 9.

<sup>244</sup> United Nations Code of Conduct for Law Enforcement Officials, G.A.res. 34/169, annex, 34 U.N. GAOR Supp. (No.46) at 186, U.N. Doc. A/34/46 (1979), arts. 1, 2.

In sum, by failing to adequately investigate Ms. Gonzales' complaint, provide Ms. Gonzales access to a tribunal, ensure enforcement of her restraining order, and provide a remedy to address the lack of enforcement, the United States has violated Articles XVIII and XXIV of the American Declaration.

**IV. THE UNITED STATES' FAILURE TO PROVIDE MS. GONZALES WITH THE SUBSTANTIVE RIGHTS OUTLINED ABOVE VIOLATED HER RIGHT TO EQUALITY UNDER ARTICLE II.**

Article II of the American Declaration provides that “[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to . . . sex . . . or any other factor. . . .”<sup>245</sup> As the Commission has observed, the principle of non-discrimination established in Article II “is a particularly significant protection that permeates the guarantee of all other rights and freedoms under domestic and international law.”<sup>246</sup> The protections contained in Articles II and VII, discussed *supra*, arose in recognition of the unequal ways in which society has historically treated certain groups, including women, and the detrimental effects of such unequal treatment on these groups.<sup>247</sup> Indeed, the right to be free from discrimination on any basis is contained in nearly every major international human rights treaty.<sup>248</sup>

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<sup>245</sup> American Declaration, art. II.

<sup>246</sup> *Maya Indigenous Community v. Belize*, *supra* note 169, at ¶ 163. See also *María Eugenia Morales de Sierra v. Guatemala*, Case 11.625, Report No. 4/00, OEA/Ser. L/V/II.111 Doc. 20 rev. at 929 (2000), ¶ 36 (“the guarantees of equality and non-discrimination underpinning the American Convention and American Declaration of the Rights and Duties of Man reflect the essential bases for the very concept of human rights”); *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, I.A. Ct. H.R., Advisory Opinion OC-4/84, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984), ¶ 55 (“The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual.”).

<sup>247</sup> See *supra*, Background and Patterns section. As the Inter-American Commission has stated, “[i]t is a fact that permeates all sectors of society that violence essentially occurs as a consequence of the unequal relations between men and women. . . . The fundamental cause is attributed to the patriarchal system, which imposes hierarchy, domination, and authoritarian relations, and which assigns different roles to men and women.” I.A. Comm. H.R., Conclusions and Recommendations of the Inter-American Consultation on Women and Violence, at 4-5, OEA/ser. L/II.2.25, CIM/RECOVI/doc. 26/90 rev. 1 (1990).

<sup>248</sup> See American Convention, arts. 1(1), 2, 19, and 24; Universal Declaration of Human Rights, arts. 1, 2, and 7; International Covenant on Civil and Political Rights, arts. 2, 3, 24, and 26; International Covenant on Economic, Social and Cultural Rights, arts. 2 and 3; Convention on the Elimination of All Forms of Discrimination against Women, arts. 1-5 and 15; United Nations Declaration on the Elimination of Violence Against Women, Article 3; Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (“Convention of Belém do Pará”), arts. 4, 6; and European Convention on Human Rights, art. 14. See also OAS Charter, art. 3(I) (“the American States proclaim the fundamental rights of the individual without distinction as to . . . sex”).



The Commission has interpreted the right to be free from discrimination contained in Article II of the American Declaration to be analogous to the guarantees of equal protection of the law contained in Articles 1(1) and 24 of the American Convention and Article 4(f) of the Convention of Belém do Pará.<sup>249</sup> It has also required States to ensure that this right is affirmatively protected.<sup>250</sup> As the Commission stated in the case of *Maria da Penha Maia Fernandes*, a case which involved the failure of the Brazilian state to prosecute a domestic violence perpetrator, “[e]nsuring that women can freely and fully exercise their human rights is a priority in the Americas. The fundamental obligations of equality and nondiscrimination serve as the backbone for the regional human rights system.”<sup>251</sup>

Gender discrimination is manifested in many ways in the United States. One of its most insidious forms is domestic violence.<sup>252</sup> As discussed *supra*, social science evidence illustrates the many ways in which executive, judicial, and legislative structures throughout the United States systemically marginalize, re-victimize, and thereby discriminate against victims of domestic violence. Because the vast majority of domestic

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<sup>249</sup> See *Fernandes v. Brazil*, *supra* note 169, at ¶¶ 45-50 and 120 (“There is an integral connection between the guarantees set forth in the Convention of Belém do Pará and the basic rights and freedoms set forth in the American Convention in addressing the human rights violation of violence against women.”); *The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination*, I.A. Comm. H.R., OEA/Ser. L/V/II.117, Doc. 44, March 7, 2003, ¶ 103. Although the United States has not ratified the American Convention or the Convention of Belém do Pará, the principles set forth in these treaties provide useful guidance for understanding the principles of gender equality and non-discrimination set forth in the American Declaration, to which the United States is bound. Indeed, the Commission has noted that the Convention of Belém do Pará “reflect[s] a *hemispheric consensus* on the need to recognize the gravity of the problem of violence against women and take concrete steps to eradicate it.” *Id.* (emphasis added). See also I/A Court H.R., Advisory Opinion OC-10/89, *supra*, ¶¶ 37, 42-43 (“to determine the legal status of the American Declaration it is appropriate to look to the inter-American system of today in light of the evolution it has undergone since [its] adoption . . . , rather than to examine the normative value and significance which that instrument was believed to have had in 1948”).

<sup>250</sup> *Fernandes*, *supra* note 169; *The Situation of the Rights of Women in Ciudad Juárez*, *supra* note 249.

<sup>251</sup> *Fernandes*, *supra* note 169, ¶ 99.

<sup>252</sup> See Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation 19, Violence against women (Eleventh session, 1992), U.N. Doc. A/47/38 at 1 (1993) at ¶ 23.

violence victims are women,<sup>253</sup> because domestic violence is “a function of the belief . . . that men are superior and that the women they live with are their possessions or chattels that they can treat as they wish . . . ,”<sup>254</sup> and because domestic violence serves to deny and destroy women’s power and agency, perpetuate women’s dependence on men, and increase women’s vulnerability to violence,<sup>255</sup> human rights bodies have found the rights to equality, non-discrimination, and special protection for women under Articles II and VII of the Declaration to be implicated in cases involving the State’s failure to adequately respond to domestic violence.<sup>256</sup>

A domestic violence victim can show that a State has failed to respond adequately to her, and is thus responsible for violations of her rights under Article II and Article VII, when it has failed to use due diligence to prevent and/or respond to the private acts of violence committed against her. Specifically, due diligence includes: undertaking affirmative acts to prevent, investigate, and punish the harms from which the victim suffered; to protect the victim and provide a legal remedy for her as a woman at risk of or subjected to domestic violence; and to ensure that these obligations are given effect in the domestic legal system.<sup>257</sup> A failure to undertake these “concrete steps to eradicate [violence against women],”<sup>258</sup> the Commission and Court have emphasized, constitutes a violation of the principles of equality and non-discrimination contained in international

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<sup>253</sup> See *supra*, Background and Patterns (highlighting the vastly disproportionate number of female versus male domestic violence victims).

<sup>254</sup> U.N. Ctr. For Social Dev. & Humanitarian Affairs, *Violence Against Women in the Family*, U.N. Doc. ST/CSDHA/2, U.N. Sales No. E.89.IV.5 (1989).

<sup>255</sup> See Rhonda Copelon, “Recognizing the Egregious in the Everyday: Domestic Violence as Torture,” 25 *Colum. Hum. Rts. L. Rev.* 291, 305, 339 (Spring 1994).

<sup>256</sup> See, e.g., CEDAW Committee, Gen. Rec. 19, *supra* note 252, at ¶¶ 4,6, 7, 9; *Fernandes, supra* at note 169; *The Situation of the Rights of Women in Ciudad Juárez, supra* at note 249.

<sup>257</sup> See *Velásquez Rodríguez, supra* at note 170; Convention of Belém do Pará, Arts. 2, 7, 8, 9; *Fernandes v. Brazil, supra* at note 169, ¶¶ 45-58; *The Situation of the Rights of Women in Ciudad Juárez, supra* note 249, ¶¶ 99-107; CEDAW Committee, Gen. Rec. 19, *supra* at note 252, ¶ 9.

<sup>258</sup> *The Situation of the Rights of Women in Ciudad Juárez, Mexico, supra* note 249, at ¶ 103.

human rights law, and has the effect of “reinforcing systemic disadvantages which impede the ability of the victim to exercise a host of other rights and freedoms.”<sup>259</sup>

The Inter-American Commission and Court have repeatedly emphasized that a State’s failure to exercise due diligence in responding to private acts of violence often results in impunity for the abuser.<sup>260</sup> “The State has the obligation to use all the legal means at its disposal” to combat impunity for the commission of human rights violations, the Court has established, because such impunity fosters “chronic recidivism” of these violations and creates a situation of “total defenselessness of victims and their relatives.”<sup>261</sup> The Commission has expressed special concern when impunity is exercised at the expense of a protected class such as women, and, specifically, victims of domestic violence. Violence against women, the Commission has found, “has its root causes in concepts of subordination and discrimination,”<sup>262</sup> and “impunity confirms that such violence and discrimination [are] acceptable, thereby fueling [their] perpetuation.”<sup>263</sup>

**A. A State’s Failure to Exercise Due Diligence in Responding to Domestic Violence Constitutes a Violation of Article II of the Declaration.**

The Commission has found that a State that fails to prevent domestic violence; investigate, prosecute, and punish perpetrators; and protect and provide legal remedies for victims effectively condones and perpetuates “the psychological, social, and historical roots and factors that sustain and encourage violence against women,”<sup>264</sup> in violation of

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<sup>259</sup> *Sierra v. Guatemala*, *supra* note 246, ¶ 39; *see also The Situation of the Rights of Women in Ciudad Juárez*, *supra* at note 249, ¶ 103; *Fernandes v. Brazil*, *supra* at note 169, ¶¶ 42-43, 45-58.

<sup>260</sup> *The Situation of the Rights of Women in Ciudad Juárez*, *supra* at note 249, ¶ 127, 128; IACtHR, Paniagua Morales et al. Case, Judgment of March 8, 1998 (Merits), ¶ 173.

<sup>261</sup> *Id.*; *The Situation of the Rights of Women in Ciudad Juárez*, *supra* at note 249, ¶¶ 127-28.

<sup>262</sup> *The Situation of the Rights of Women in Ciudad Juárez*, *supra* at note 249, ¶ 164.

<sup>263</sup> *Id.* ¶¶ 127-28.

<sup>264</sup> *Fernandes v. Brazil*, *supra* note 169, ¶¶ 55-56 (“the failure to fulfill the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices. That general and

Article II. This is especially true when that State action (or inaction) is representative of a larger pattern, such as judicially-sanctioned patterns of impunity for domestic violence perpetrators and systemic police failure to address domestic violence. Thus, the Commission has paid particular attention to States' failure to guarantee the rights contained in Articles XVIII and XXIV of the American Declaration in a non-discriminatory fashion to victims of domestic violence.<sup>265</sup> Under these provisions, discussed in detail *supra*, the State must guarantee victims access to the courts and an adequate and prompt response from the police, and it must ensure that such actions comport with the important principles of equality and non-discrimination contained in Article II.

Discrimination against victims of domestic violence by the State usually stems from one of two sources. First, State officials often harbor negative gender stereotypes that cause them to respond to victims of domestic violence either inadequately or not at all. Second, State officials frequently implement policies and practices that, even if gender-neutral, have a disparate effect on victims. Both of these forms of discrimination condone and perpetuate domestic violence, thereby denying women equal protection of the law.

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discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of society, to take effective action to sanction such acts.”); *see also The Situation of the Rights of Women in Ciudad Juárez, supra* note 249, ¶ 165 (“When the killing, sexual abuse, or beating of women remain in impunity, and are effectively tolerated by the State, this sends a strong message to men, women and children. Violence is a learned behavior. That behavior cannot be changed and eradicated if old patterns of inequality and discrimination continue to be sustained in practice.”)

<sup>265</sup> *See* Fernandes, *supra* at note 169; *The Situation of the Rights of Women in Ciudad Juárez, supra* at note 249.

**B. Governmental Responses to Domestic Violence Victims are Often Rooted in Negative Gender Stereotypes and Thus Perpetuate Inequality, in Violation of Article II’s Prohibition on Sex Discrimination.**

Negative stereotypes of women, and especially of domestic violence victims, infect the public and the private spheres. “The stereotypes associated with domestic violence victims include that the victim precipitates her own assault, that she is masochistic and either ‘likes’ or ‘deserves’ to be beaten, that she is ‘crazy,’ that even if she leaves one abusive relationship she will just find another, and that she is free to end her victimization at any time without assistance.”<sup>266</sup> Courts, legal academics, and social scientists have recognized that these gender stereotypes underlie the blame of battered women for the acts of their abusers. “Unlike other victims of violent crime, battered women are often viewed . . . as responsible for the crimes committed against them.”<sup>267</sup> Conversely, they are “believed to have the power to avoid the criminal assault through accommodating the perpetrator’s demands.”<sup>268</sup> When a battered woman departs from a stereotypical ideal of femininity – when she is poor, for instance, or minority, or

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<sup>266</sup> Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 Colum. J. Gender & L. 1, 22 (1998). See also *The Situation of the Rights of Women in Ciudad Juárez*, *supra* note 249, ¶ 125 (“there remains a significant tendency on the part of some officials to either blame the victim for placing herself in a situation of danger, or to seek solutions that emphasize requiring the victim to defend her own rights.”).

<sup>267</sup> Barbara Hart, *Battered Women and the Criminal Justice System*, 36 American Behavioral Scientist, 624, 626 (1993); see also, e.g., Wendy Fidkalo-Weight, *Women, Policing and Male Violence*, 10 Women’s Education 50 (1992) (book review) (noting that studies show police officers often view women as “tormentors,” justifying their abusers’ violence); Copelon, “Recognizing the Egregious in the Everyday,” *supra* note 255, at 317 and FN 85; *The Situation of the Rights of Women in Ciudad Juárez*, *supra* at note 249, ¶ 125; *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 701 (9<sup>th</sup> Cir. 1990) (police officer’s statement to a domestic violence victim that he did not blame her husband for hitting her because of the way she was carrying on strongly suggests animus against abused women and, thus, unlawful sex discrimination); *Smith v. Elyria*, 857 F. Supp. 1203, 1212 (N.D. Ohio 1994) (police policy for responding to domestic violence complaints that assumed the complainant was an upset and irrational woman unlikely to press charges and that the alleged abuser had the right to exercise dominion and control over the victim’s home was based on gender-stereotyped assumptions that might constitute unlawful discrimination on the basis of sex); *Bouley v. Young-Sabourin*, No. Civ. 1:03 CV 320, 2005 WL 950632 (D. Vt. March 10, 2005) (finding plaintiff stated a case of sex discrimination when she showed that less than 72 hours after her husband assaulted her, her landlord issued a notice to quit her apartment).

<sup>268</sup> Hart, *supra* note 267, at 626.

expresses anger about the abuse she has experienced – these negative, victim-blaming gender stereotypes are all the more common.<sup>269</sup>

Such victim-blaming attitudes have been found to be closely associated with traditional, stereotypic beliefs about gender roles. For instance, studies have found that individuals who endorsed traditional gender role attitudes were both more supportive of the use of violence against women<sup>270</sup> and more likely to blame female victims of violence for the abuse against them.<sup>271</sup> These gender stereotypes and victim-blaming attitudes lead many, including the police and the courts, to dismiss female victims of domestic violence as irrational, dishonest, and manipulative and to feel justified in ignoring or condoning the violence perpetrated against them.<sup>272</sup> Furthermore, to the extent police officers themselves perpetrate domestic violence or sympathize with perpetrators – and research indicates that this is the case at an alarmingly high rate – their response to domestic violence calls can create positive harm by re-victimizing the very individuals who have called the state authorities for help.<sup>273</sup>

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<sup>269</sup> Sharon Lamb, *Constructing the Victim: Popular Images and Lasting Labels, in New Versions of Victims: Feminists Struggle with the Concept* 108-138 (1999); Christine Noelle Becker, Note and Comment, *Clemency for Killers? Pardoning Battered Women Who Strike Back*, 29 Loy. L.A. L. Rev. 297, 319 (1995); Fenton, *supra*, at 25-27.

<sup>270</sup> LaVerne A. Berkel *et al.*, *Gender Role Attitudes, Religion, and Spirituality as Predictors of Domestic Violence Attitudes in White College Students*, 45 *Journal of College Student Development* 119 (2004).

<sup>271</sup> Cynthia E. Willis *et al.*, *Effects of Sex Role Stereotyping among European American Students on Domestic Violence Culpability Attributions*, 34 *Sex Roles* 475 (1996).

<sup>272</sup> See George S. Rigakos, *Constructing the Symbolic Complainant: Police Subculture and the Nonenforcement of Protection Orders for Battered Women*, 10 *Violence and Victims* 227, 233 (1995) (noting that sexism in some police departments “contributes to negative stereotypes of women [victims of domestic violence] as liars, manipulators, and unreliable witnesses”); Sally F. Goldfarb, “Applying the Discrimination Model to Violence Against Women: Some Reflections on Theory and Practice,” 11 *Am. U. J. Gender Soc. Pol’y & L.* 251, 255-56 (2003).

<sup>273</sup> See generally Wetendorf, Diane, *When the Batterer is a Law Enforcement Officer: A Guide for Advocates*, Battered Women’s Justice Project Criminal Justice Center 1, 9 (Feb. 2004); Diane Wetendorf, and Dottie L. Davis, *The Misuse of Police Powers in Office Involved Domestic Violence*, (2003), available at <http://www.abuseofpower.info/MisusePolicePower.pdf>.

These negative stereotypes of women work to condone and perpetuate domestic violence, in violation of Article II of the Declaration. State obligations under Article II mirror those under CEDAW, which requires States to “take all appropriate measures” to “modify the social and cultural patterns of conduct” that underlie discriminatory practices, “with a view to achieving the elimination of . . . practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”<sup>274</sup> State obligations in this area also reflect the principles contained in the Convention of Belém do Pará, which proclaims that the right of women to be free from gender violence includes the right to be “valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.”<sup>275</sup>

As the United Nations Special Rapporteur on Violence Against Women has observed, “At its most complex, domestic violence exists as a powerful tool of oppression. Violence against women in general, and domestic violence in particular, serve as essential components in societies which oppress women, since violence against women not only derives from but also sustains the dominant gender stereotypes and is used to control women in the one space traditionally dominated by women, the home.”<sup>276</sup> Similarly, the Committee on the Elimination of Discrimination Against Women (“CEDAW Committee”) has found that “[t]raditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread

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<sup>274</sup> Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981, art. 3.

<sup>275</sup> Convention of Belém do Pará, art. 6(b).

<sup>276</sup> Report Of The Special Rapporteur On Violence Against Women, Its Causes And Consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85, E/CN.4/1996/53, 6 Feb. 1996, ¶ 27.

practices involving violence or coercion . . .”<sup>277</sup> A State that fails to “take all appropriate measures” to eliminate such destructive stereotypes violates the core principles of non-discrimination and equal protection under Article II and international human rights law.<sup>278</sup>

**C. Governmental Policies and Practices in Responding to Domestic Violence, Even If Facially Neutral, Have a Disparate Effect on Women and Thus Violate Article II’s Prohibition on Sex Discrimination.**

A State’s implementation of an otherwise neutral policy or practice that has a negative effect on a disproportionate number of persons within a vulnerable group also constitutes unlawful discrimination in violation of Article II of the Declaration and other human rights instruments.<sup>279</sup> Thus, State policies or practices that have a greater adverse impact on women (a protected group under the Declaration) than on similarly-situated men and that have the effect of limiting women’s enjoyment of fundamental human rights are prohibited. As discussed in the Background and Patterns section, national and local data demonstrate that women are far more likely than men to be the victims of domestic violence, and so State policies that even unintentionally disparately affect victims violate the equal protection and non-discrimination guarantees of Article II.

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<sup>277</sup> CEDAW Gen. Rec. 19, *supra*, at ¶ 11.

<sup>278</sup> CEDAW art. 6(b); CEDAW, Gen. Rec. 19, *supra*, at ¶ 11; *Situation of Women in Ciudad Juárez, supra*.

<sup>279</sup> The CEDAW Committee has specifically found the definition of gender violence to include “violence that is directed against a woman because she is a woman *or that affects women disproportionately*.” CEDAW, Gen. Rec. 19, *supra*, at ¶6 (emphasis added). Additionally, the Convention on the Elimination of Racial Discrimination (CERD) Committee has found that a policy that has an “*unjustifiable disparate impact* upon a group distinguished by race, colour, descent, or national or ethnic origin” violates CERD’s prohibition on discrimination. Committee on the Elimination of Racial Discrimination, General Recommendation 14, Definition of Racial Discrimination (Forty-second session, 1993), U.N. Doc. A/48/18 at 114 (1994) (emphasis added). The CERD Committee has also noted that States must use special care to ensure that any restriction on the rights and freedoms guaranteed in Article 5 is “neither in purpose *nor effect* . . . incompatible with article 1.” Committee on the Elimination of Racial Discrimination, General Recommendation 20, The guarantee of human rights free from racial discrimination (Forty-eighth session, 1996), U.N. Doc. A/51/18, annex VIII at 124 (1996) (emphasis added).



A police department's policy or practice of assigning a low priority to calls alleging violations of restraining orders, even if implemented for an ostensibly reasonable and gender-neutral purpose, has a disparate impact on women because women are the vast majority of restraining order recipients. Women are also disproportionately affected by judicial procedures and practices that deny an open forum or an adequate remedy to compensate victims of domestic violence for the harms from which they suffered, even though these procedures and practices may not be intentionally discriminatory. Indeed, such policies and practices, even if gender neutral, marginalize and endanger women and thus prevent them from enjoying their right to be free from gender-based violence, a fundamental component of the non-discrimination guarantees of Article II of the Declaration and other international law.<sup>280</sup> In "affect[ing] women disproportionately,"<sup>281</sup> they foster the unequal protection of women and thus constitute impermissible disparate impact discrimination.

**D. The United States' Failure to Exercise Due Diligence in Responding to Ms. Gonzales' Complaint is Attributable to Negative Stereotypes and/or Discriminatory Practices of State Officers.**

Gender discrimination is the common thread running through the violations by the United States of Jessica Gonzales' rights under Articles I, V, VI, VII, IX, XVIII, XXIV, and XXV of the Declaration. The United States violated the Article II rights of Ms. Gonzales, a victim of domestic violence, when it failed to extend these other rights to her in a non-discriminatory way. Specifically, the State failed to exercise due diligence by investigating and responding to Ms. Gonzales' complaints; protecting Ms. Gonzales, her children, and her home; and providing Ms. Gonzales with an appropriate remedy for

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<sup>280</sup> See, e.g., CEDAW, Gen. Rec. 19, *supra*, at ¶¶ 4, 6.

<sup>281</sup> *Id.* at ¶ 6.

these violations. In so doing, the United States adopted and condoned pervasive negative gender stereotypes of women and reinforced the discriminatory structures that perpetuate domestic violence.

As discussed *supra*, the Castle Rock police failed, in violation of Article XXIV of the American Declaration, to properly investigate the disappearance of Ms. Gonzales' children, even after she learned where her husband had taken the children, notified the police with this information, and repeatedly stressed the emergency nature of the situation. Furthermore, by ignoring Ms. Gonzales' pleas for assistance, the police department also violated Articles I, V, VI, and IX because it failed to protect the children's lives and Ms. Gonzales' rights to dignity and humane treatment, and failed to guarantee their fundamental rights to the protection of privacy, the family, and the home. Through their response, the police engaged in a widespread, systemic, and longstanding practice of treating domestic violence as a less serious crime than other crimes and marginalizing domestic violence victims on the basis of their gender. The police also shirked their responsibility under Article VII of the Declaration and international human rights law to provide special protections to women and children, especially those who are victims of domestic and family violence. This discriminatory response violated Article II of the Declaration.

The police department's failure to respond to Ms. Gonzales was probably rooted in the negative stereotypes of domestic violence victims that the officers embraced, a facially-neutral police department policy of assigning lower priority to domestic violence calls, or, most likely, some combination of the two. Throughout the evening, the officers repeated to Ms. Gonzales their belief that her husband was the children's father, that he

had a right to spend time with his children, and that they “didn’t see what the big deal was” in a father spending time with his children. In making these statements, the officers revealed discriminatory biases that favored a father’s rights to spend time with his children over a mother’s rights to solicit police assistance in locating her missing children and enforcing her restraining order. The police likely dismissed Ms. Gonzales as a hysterical or irrational woman who was simply trying to “get back at” or “get even with” her husband. They utterly disregarded the emergency nature of the situation and instead embraced a view of Mr. Gonzales’ abduction as “parenting time.”<sup>282</sup> They may have also been carrying perceptions that crimes of violence against women and children matter less than crimes against men, and that violence in the home is a private matter. A State actor who acts upon such discriminatory perceptions and stereotypes in responding to a domestic violence victim violates Article II of the Declaration.

The police department’s lack of response may have also stemmed from a departmental policy or practice that assigned a low priority to responding to calls alleging violations of restraining orders – a common practice amongst police departments nationwide.<sup>283</sup> Such a policy is arguably gender-neutral, since both men and women can be recipients of such orders. However, as the literature demonstrates, the vast majority of

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<sup>282</sup> Because the Supreme Court dismissed Ms. Gonzales’ case on a motion to dismiss, no discovery had yet taken place. Thus, Counsel for Petitioner do not have information that would normally be obtained through discovery, such as the testimony of the police officers and other individuals involved in responding to Ms. Gonzales’ complaints, police records, and recordings of emergency “911” calls. Should this Honorable Commission undertake an investigation of the facts alleged in this Petition, it may gain access to information that will allow it to better determine what role negative gender stereotypes played in the police officers’ response to Ms. Gonzales.

<sup>283</sup> See *supra*, Background and Patterns. As noted *supra*, note 39, because this case was dismissed on procedural grounds, Counsel for Petitioner has little information on the Castle Rock Police Department’s general policies and practices for responding to alleged violations of restraining orders and other domestic violence calls. In November 2005, Counsel submitted an open records request to the Castle Rock Police Department requesting information on departmental policies, practices, and domestic violence statistics. To this date, the police department has not provided Counsel with the requested information. Should this Honorable Commission undertake an investigation of the facts alleged in this Petition, it may gain access to such information.

holders of restraining orders in the United States are women fleeing domestic violence. Thus, even if such a policy or practice were gender-neutral on its face, it would still constitute discrimination in violation of Article II because it has a greater negative impact on women than on men.

Additionally, the Supreme Court's rejection of Ms. Gonzales' due process claims and Colorado's strict sovereign immunity laws denied Ms. Gonzales a remedy for the harms she and her children suffered – a result that violates Article XVIII of the Declaration. Ms. Gonzales was due a legal remedy that included both monetary compensation and, more importantly, a legal declaration that her rights had been violated. In failing to provide either a state or federal remedy, the United States left Ms. Gonzales with no recourse for the violations of her and her children's rights by the police. This unfair result condones and even promotes the widespread non-enforcement of domestic violence restraining orders by the police as well as the culture of impunity that exists for law enforcement in the domestic violence context. Therefore, the State's failure to provide Ms. Gonzales with a remedy violates the prohibition on discrimination contained in Article II.

While the Supreme Court dismissed Ms. Gonzales' case on apparently gender-neutral grounds, the effect of this dismissal was to marginalize Ms. Gonzales as a domestic violence victim and to deny her a remedy for the harms from which she suffered due to the police department's failure to respond to her calls. This result reflects the common judicial practice in the United States of denying victims a legal recourse when law enforcement refuses to respect and ensure their fundamental human rights.<sup>284</sup> Even if the courts apply the law in an unbiased and non-discriminatory fashion, the

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<sup>284</sup> See *supra*, Background and Patterns.

prevalent practice of denying a remedy to victims of domestic violence violates Article II because it has a disproportionate impact on women.

The decisions made by law enforcement and the judiciary in this case denied Ms. Gonzales her rights under Articles I, V, VI, VII, IX, XVIII, and XXIV of the American Declaration. Because these decisions were grounded upon and served to reinforce a system that marginalizes domestic violence victims, and because these decisions sent a message to domestic violence perpetrators and police officers that their action (as in the case of perpetrators) or inaction (as in the case of police officers) will be met with impunity, they also violated the guarantees of equal protection and non-discrimination contained in Article II.

## CONCLUSION

The facts stated above establish that the United States of America and the State of Colorado have violated the rights of Jessica Gonzales under Articles I, II, V, VI, VII, IX, XVIII, and XXIV of the American Declaration. Ms. Gonzales and her children suffered grievous harms as a result of the State's failure to investigate Mr. Gonzales' unlawful and violent behavior, protect Ms. Gonzales and her children, and provide Ms. Gonzales with an appropriate remedy for these violations. The State's failure to use due diligence in responding to Ms. Gonzales' calls and its failure to guarantee her and her children fundamental human rights violated the American Declaration and other international human rights instruments.

Thus, the Petitioner asks that the Commission provide the following relief:

1. Declare Ms. Gonzales' petition to be admissible;
2. Investigate, with hearings and witnesses as necessary, the facts alleged by Ms. Gonzales in this petition;
4. Declare the United States of America to be in violation of Articles I, II, V, VI, VII, IX, XVIII, and XXIV of the American Declaration;
5. Recommend such remedies as the Commission considers adequate and effective for the violation of Ms. Gonzales' fundamental human rights, including:
  - (a) Monetary compensation for the violation of her own and her children's rights; and
  - (b) Adoption by the United States of measures aimed at eradicating domestic violence in the State of Colorado and throughout the country, including, *inter alia*, reform of state laws to ensure that the terms of domestic violence restraining orders

are effectively enforced in accordance with the law; the provision of legal remedies for victims who fail to receive such enforcement; the creation of support services for victims of domestic violence; and projects aimed at educating and sensitizing police officers on the root causes of domestic violence and its effects on its victims.

6. Request the Inter-American Court of Human Rights to deliver an advisory opinion on the nature and full extent of United States obligations under the American Declaration in light of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (“Convention of Belém do Pará”) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

Dated: December 23, 2005

Respectfully submitted:

Caroline Bettinger-López,

United States citizen

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