No. 04-278

October Term, 2005

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES

Respondent.

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

Brief *Amicus Curiae* of the American Civil Liberties Union and ACLU of Colorado, Hon. John J. Gibbons, Hon. Timothy K. Lewis, AALDEF, California Women's Law Center, National Asian Pacific American Women's Forum, National Partnership for Women & Families, Northwest Women's Law Center and Women's Law Project in Support of Respondent

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INTEREST OF AMICI CURIAE[1]

The *American Civil Liberties Union* (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae.* More specifically, the ACLU has frequently taken the position in a variety of contexts that the state is properly held liable when its own actions place identified and vulnerable individuals at increased risk of harm. Battered women who have obtained orders of protection fit easily within this category and have been a longstanding concern of the ACLU's Women's Rights Project, which was founded in 1972. The proper resolution of this case is therefore a matter of substantial interest to the ACLU and its members. The ACLU of Colorado is one of the ACLU's state affiliates.

The *Honorable John J. Gibbons* served as a judge on the United States Court of Appeals for the Third Circuit from 1970 to 1990, and as Chief Judge from 1987 to 1990.

The *Honorable Timothy K. Lewis*, Schnader Harrison Segal & Lewis, LLP, is a former Assistant United States Attorney, and served as a Judge for the United States District Court for the Western District of Pennsylvania and the United States Third Circuit Court of Appeals. He has long been

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[1] Letters from petitioner and respondent indicating consent to file this brief are on file with the Clerk. Pursuant to Rule 37.6, no counsel for any petitioner or respondent authored this brief in whole or in part. Nor did any person or entity other than amici make a monetary contribution to the preparation or submission of this brief.

committed to ensuring due process rights for all Americans and the just and fair application of the law in all cases.

The *Asian American Legal Defense and Education Fund* (AALDEF), founded in 1974, is a non-profit organization based in New York City. AALDEF defends the civil rights of Asian Americans nationwide through litigation, legal advocacy and dissemination of public information. Many Asian Americans rely on police departments to enforce protective orders. The proper resolution of this case is therefore a matter of substantial interest to AALDEF.

The *California Women's Law Center* (CWLC) is a statewide, nonprofit law and policy center that works to ensure that life opportunities for women and girls are free from unjust social, economic and political constraints. In 1999, CWLC established its Murder at Home Project to advance legal, community and media responses to domestic violence and domestic violence homicide. The resolution of issues raised in this case has a significant impact on the enforcement of restraining orders. Therefore, CWLC has a compelling interest in this case.

Founded in 1996, the *National Asian Pacific American Women's Forum* (NAPAWF) is dedicated to forging a grassroots progressive movement for social and economic justice and the political empowerment of Asian Pacific American (APA) women and girls. Survivors of domestic violence in the APA community often confront barriers to receiving police protection, such as discrimination, language barriers, and fear of deportation. As a result, many APA women find the police less responsive to enforcing their protection orders against their abusers, and will often forgo seeking legal assistance altogether. The proper resolution of this case is therefore a matter of substantial interest to NAPAWF.

The *Northwest Women's Law Center* (NWLC) is a regional non-profit public interest organization that works to

advance the legal rights of all women. The NWLC serves as a regional expert on advancing the law to assist survivors of domestic and sexual violence. Of particular relevance to this case, the NWLC has led regional litigation efforts on behalf of victims of domestic and sexual violence who sought assistance from law enforcement but were not protected from further abuse. Therefore, NWLC has a compelling interest in this case.

The *Women's Law Project* is a non-profit feminist legal advocacy organization founded in 1974. Its mission is to abolish sex discrimination and the injustices created by gender stereotyping, and to advance the legal, health, and economic status of women and their families. The Law Project has represented domestic violence survivors and service agencies as plaintiffs or *amici curiae* in numerous cases, including *Schieber v. Philadelphia*, involving municipal liability under a state-created danger theory for police response to a deadly assault on a woman. The proper resolution of this case is therefore a matter of substantial interest to The Law Project.

STATEMENT OF THE CASE

On May 21, 1999, Respondent Jessica Gonzales obtained a temporary restraining order against her estranged husband, Simon Gonzales, who had a history of abusive and erratic behavior. On June 4, 1999, a state trial court issued a permanent restraining order after determining that Mr. Gonzales posed a threat of physical or emotional harm to his family. The restraining order was issued in accordance with the standards prescribed by state law, and commanded in part that Mr. Gonzales "not molest or disturb the peace of [Ms. Gonzales] or . . . any child." Pet. App. at 3a. The order excluded Mr. Gonzales from the family home and directed him to stay 100 yards away from the property at all times. *Id.; see also* Colo. Rev. Stat. § 14-10-108(2)(c) (party can be excluded from family home upon a showing that physical or

emotional harm would otherwise result). Mr. Gonzales was permitted to visit with his children on alternate weekends, for two weeks during the summer, and, with advance notice to Ms. Gonzales, once a week for dinner. *Id.* at 5a.

The order included a statement instructing law enforcement officials that they

> 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 been properly served with a copy of this order or has received actual notice of the existence of this order.

Pet. App. at 17a. Officers were directed to enforce the order "even if there is no record of it in the restraining order central registry." *Id.* Finally, the order commanded that the officers "shall take the restrained person to the nearest jail or detention facility utilized by your agency." *Id.* Each of these mandates reflected the obligations imposed on peace officers by state law. *See* Colo. Rev. Stat. § 18-6-803.5(3)(b) (peace officer "shall arrest" or seek a warrant for arrest "when the peace officer has information amounting to probable cause" that a restraining order has been violated).

The order was served on Mr. Gonzales by local officials and was entered into the State's central registry. *See* Colo. Rev. Stat. § 18-6-803.7(2)(b). Less than three weeks after the permanent order was issued, Mr. Gonzales took his three daughters from their home without prior arrangement and without their mother's knowledge—in clear violation of the order's terms. Pet. App. at 5a. After Ms. Gonzales discovered that her daughters were missing, she called the Castle Rock Police Department for assistance. Two officers came to her home shortly after 7:30 pm, reviewed the restraining order, and informed Ms. Gonzales that there was nothing they could do. They told her to call back after 10:00

pm if the children had not been returned home. At 8:30 pm, Ms. Gonzales reached Mr. Gonzales on his cell phone and learned that he and the children were at an amusement park in Denver. Ms. Gonzales immediately called the police, told them where to find Mr. Gonzales and the children, and again asked them to arrest him for violating the restraining order. Again, the officers declined to take any action. When she called a third time shortly after 10:00 pm, the police dispatcher told her to wait until midnight. At 12:50 am, after yet another call for assistance had gone unanswered, Ms. Gonzales drove to the police station. An officer took an incident report but made no attempt to locate Mr. Gonzales or enforce the restraining order. Pet. App. at 5a-6a. He instead left for dinner. Pet. App. at 5a.

At 3:20 am, Mr. Gonzales drove to the Castle Rock Police Station and opened fire with a semi-automatic weapon he had purchased shortly after abducting his children. He was shot dead at the scene. The police officers later discovered his three murdered daughters in the cab of his truck. Pet. App. at 6a.

Individually and on behalf of her deceased children, Ms. Gonzales filed an action in the United States District Court for the District of Colorado under 42 U.S.C. § 1983 against the Town of Castle Rock and three of its police officers, alleging violations of the Fourteenth Amendment's guarantee of due process of law. The district court dismissed the action pursuant to Fed. R. Civ. P. 12(b)(6). Pet. App. at 113a. On appeal, a panel of the Court of Appeals for the Tenth Circuit affirmed the district court's dismissal of her claim as to the substantive component of the Due Process Clause, but reversed the district court's ruling that Ms. Gonzales had failed to state a claim for a violation of procedural due process. Pet. App. at 99a. On rehearing en banc, the Tenth Circuit held that Ms. Gonzales was entitled to proceed against the Town of Castle Rock on her procedural due process claim, but ruled that the individual police officers

were entitled to the defense of qualified immunity. Pet. App. at 1a-94a.

On November 1, 2004, this Court granted the Town of Castle Rock's petition for writ of certiorari.

SUMMARY OF ARGUMENT

The Court of Appeals correctly held that respondent Jessica Gonzales had stated a claim for relief by asserting that petitioner's duty to enforce the restraining order against her estranged husband created a property interest under Colorado law, and that petitioner's utter failure to enforce that order without meaningful consideration or explanation violated even the most minimal notions of procedural due process. Like the Tenth Circuit's dissenting judges, petitioner primarily and persistently claims that this decision "circumvents," "overrules," and "undermines" this Court's holding in *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989), which held that the substantive guarantees of the Due Process Clause do not generally require the government to protect an individual from third-party violence. *See, e.g.,* Pet. Br. at i, 15, 20. Petitioner's belief that *DeShaney* provides the appropriate reference point is misguided and flawed, for a number of reasons.

First, *DeShaney* was a substantive due process case, while this Court is reviewing Jessica Gonzales's claim for procedural due process. The interests protected by the substantive and procedural contours of the Due Process Clause are distinct and, correspondingly, the frameworks for analysis are not the same for both. It is often true that a claim improperly asserted under one constitutional provision may still present a valid issue under a different constitutional guarantee. *See, e.g., Whren v. United States*, 517 U.S. 806 (1996); *Quill v. United States*, 504 U.S. 298, 313 (1992), *Perry v. Sinderman*, 408 U.S. 593, 598 (1972). In this case,

respondent raised two separate claims under the Due Process Clause: one substantive and one procedural. Contrary to petitioner's contention, respondent's substantive and procedural due process claims do not rise and fall together.

Second, while *DeShaney* rejected the argument that the Due Process Clause imposes a general, affirmative obligation on the government to protect the life, liberty, and property of its citizens from the actions of third parties, it did not consider a situation in which a court's specific findings trigger specific statutory requirements that such protection be provided.

Third, and relatedly, the holding in *DeShaney* did not impact the unique constitutional role accorded to the courts, nor did it disturb the long line of cases protecting an individual's fundamental right of access to the courts. Ms. Gonzales's due process claim, rooted in the restraining order granted by the state court, thus stands apart from *DeShaney*'s analytical framework.

Finally, *DeShaney* recognized that the government can through its own actions assume an obligation to protect individuals from third-party violence. Describing the dangers that Joshua DeShaney faced from his father, the Court noted that the state "played no part in their creation, nor did it do anything to render him any more vulnerable to them." 489 U.S. at 201. The same cannot be said here. Notwithstanding a specific judicial finding that Mr. Gonzales posed a threat to his wife and children, and the issuance and service of an order that notified police of their statutory obligation to take certain specific actions should the order be violated, the police shirked their responsibility and thus left Ms. Gonzales and her children at increased risk of violence. For these reasons, the decision below neither contradicts nor undermines this Court's holding in *DeShaney*.

ARGUMENT

THE COURT OF APPEALS DID NOT CIRCUMVENT OR UNDERMINE *DESHANEY* WHEN IT CONCLUDED THAT JESSICA GONZALES CAN ASSERT A PROCEDURAL DUE PROCESS CLAIM AGAINST THE TOWN OF CASTLE ROCK.

I. *DeShaney* Considered Only the Substantive Guarantees of the Due Process Clause, Which Are Sharply Distinct from Its Procedural Protections.

In *DeShaney*, this Court emphasized that the claim under consideration was **not** "that the State denied [the petitioner] protection without according him appropriate procedural safeguards" but rather "that it was categorically obligated to protect him in these circumstances." 489 U.S. at 195 (citations omitted). Although the Court rejected the latter, substantive claim, it explicitly declined to address the former, and it is precisely that type of procedural claim that Ms. Gonzales asserts here. *See id.* at 195 n.2. The express reservation of the procedural issue in *DeShaney* underscores the petitioner's error in assuming that the Court's analysis in that case forecloses Ms. Gonzales's claim that government officials violated her Fourteenth Amendment right to procedural due process.

Petitioner's assumption contradicts this Court's repeated guidance that the substantive and procedural guarantees of the Due Process Clause serve discrete purposes and are subject to distinct analyses. This Court has repeatedly construed the Due Process Clause to cover both a "'guarantee [of] fair process'" and "a substantive sphere as well." *Sacramento v. Lewis,* 523 U.S. 833, 840 (1998) (quoting *Washington v. Glucksberg,* 521 U.S. 702, 719 (1997)). The substantive sphere protects "certain fundamental rights and

liberty interests" from government interference through either statutory or executive action, "regardless of the fairness of the procedures used to implement them." *Id.* at 840. The procedural component, by contrast, transcends "fundamental" rights to include interests "created and . . . defined by . . . an independent source such as state law," *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). "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. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (internal citations omitted) (emphasis in original).

While Ms. Gonzales's procedural and substantive due process claims arise from the same basic set of facts, the interests for which constitutional protection is claimed is distinct. The substantive claim she initially raised—which the Court of Appeals held was foreclosed by *DeShaney* (incorrectly, we believe, *see infra* Parts II-IV)—sought redress for the loss of her children's lives. Her procedural claim, by contrast, stems from the legislatively- and judicially-created property interest in enforcement of the restraining order: the state statute governing protective orders, and the specific order issued to Ms. Gonzales, granted her an entitlement that local officers would enforce the order when certain circumstances, alleged to be present in her case, arose. The procedural claim thus implicates the police department's washing its hands of the order, without procedures sufficient to ensure that its decision was the result of a fair process. Ms. Gonzales's interest in being provided fair procedures before the police deprived her of her property interest in the order's enforcement is constitutionally distinct from Ms. Gonzales's substantive interest in preventing the tragic results that flowed from their failure to do so.

Petitioner's contention that acceptance of Ms. Gonzales's procedural claim "circumvents" the holding in

DeShaney ignores the distinction between the two types of interests protected by the Due Process Clause, and the different constitutional analyses to which they are subject. It is often the case that an interest protected by the procedural component of the Due Process Clause is **not** a fundamental right that triggers the Clause's substantive guarantees, *see, e.g., Hewitt v. Helms,* 459 U.S. 460, 471 (1983), or that government action is found to violate substantive due process protection, even when adequate procedures were in place. *See, e.g., Lawrence v. Texas,* 539 U.S. 558 (2003). The tests used by the Court in evaluating the two types of claims are quite distinct, and as *DeShaney* itself makes clear, the Court engaged only in a substantive analysis in deciding that case.

Petitioner's error in conflating the different legal frameworks is underscored by comparing the procedural analysis employed by the court below with that applicable to substantive due process claims. In addressing Ms. Gonzales's procedural due process claim, the Tenth Circuit first concluded that the right to police enforcement of the order "fits within the other types of *Roth* entitlements acknowledged by the Supreme Court and is properly deemed a property interest" that was subject to due process protections, *see* Pet. App. at 28a, and then held that Ms. Gonzales had stated a claim by alleging that the Castle Rock police officers denied her "the opportunity to be heard at a meaningful time and in a meaningful manner" before refusing to enforce the order, *see id.* at 30a. In establishing what process was due, the Tenth Circuit followed this Court's precedents to balance Ms. Gonzales's interest in having the order enforced, the risk of an erroneous deprivation, the use of additional safeguards that would have aided in preventing a wrongful deprivation, and the fiscal or administrative burden that the additional procedural requirements would entail. *Id.* at 38a-41a.

Ms. Gonzales's substantive due process claim, had it proceeded, would have presented two very different questions: (1) whether there was a deprivation of a constitution

protected fundamental right or liberty interest; and (2) whether the challenged official conduct was "'arbitrary in the constitutional sense.'" *See Lewis*, 523 U.S. at 846 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 129 (1992)). In a case such as this one challenging executive abuse of power, the "cognizable level" of arbitrary action is "that which shocks the conscience." *Lewis*, 523 U.S. at 846. This standard is not a "calibrated yard stick," *id.* at 847, and "duplicates no traditional category of common-law fault." *Id.* at 848.

As set forth in the opinion of the Tenth Circuit and in her brief to this Court, Ms. Gonzales has properly pled a procedural due process claim challenging the police failure to provide adequate procedural safeguards (or any procedural safeguards) in refusing to enforce the restraining order—an entitlement conferred upon her by state law and judicial order. That claim is independent of any potential substantive claim that state actors engaged in reckless and willful misconduct that resulted in the murder of her three young daughters.

II. Ms. Gonzales's Claim Rests On The Particularized Obligations Set Forth In the Restraining Order, Not The Type of General Obligation Addressed in *DeShaney*.

The court-issued restraining order and the statutory provisions for mandatory arrest, the terms of which are reflected in the order's notice, stand in stark contrast to the situation considered in *DeShaney*. That case stands for the proposition "[a]s a general matter" that "a State's failure to protect an individual against private violence . . . does not constitute a violation of the Due Process Clause." 489 U.S. at 197. In this case, however, the restraining order was predicated on a judicial determination that Mr. Gonzales posed a threat of physical or emotional harm to his family. Pet. App. at 3a (restraining order); Colo. Rev. Stat. § 14-10-108 (2)(C) (1999). The state court had thus formally

recognized the danger to the Gonzales family. No such finding took place in *DeShaney*. There, the sole judicial determination was that Joshua DeShaney should be returned to the custody of his father. *See* 489 U.S. at 192.

Moreover, the caseworkers who intermittently visited the DeShaney home enjoyed wide discretion to choose (or, regretfully, to fail to choose) an appropriate course of action for Joshua. In contrast, the restraining order prescribed continuing duties on the part of law enforcement that were not a matter of discretion, thus creating a wholly different form of relationship with Ms. Gonzales, the holder of the order. Upon a showing of probable cause that Mr. Gonzales had breached the order, the police officers were required to arrest him (or, if impractical, issue a warrant for his arrest). Pet. App. at 4a (notice to law enforcement officials on reverse side of restraining order); Colo. Rev. Stat. § 18-6-803.5 (3)(b) (1999). The police had no discretion to ignore the statute, the court's findings that Mr. Gonzales posed a threat to his wife and family, the court's notice of their statutory obligations, or Ms. Gonzales's repeated calls for enforcement.

Holding the Town of Castle Rock accountable for the failure to perform what was required under the order is therefore entirely consistent with *DeShaney*. By virtue of the court-issued restraining order, the government stepped into the fray between Ms. Gonzales and her estranged husband. It placed its imprimatur on the framework that would govern their interactions (*e.g.*, weekend parenting time, mid-week dinner visits with notice, etc.), *see* Pet. App. at 5a, and voluntarily obligated itself to aid the Gonzales family should Mr. Gonzales depart from that framework. Unlike *DeShaney*, where the Court declined to impose on the government a duty that was not already in place, *see* 489 U.S. at 189, this case involves the government's arbitrary failure to live up to a duty that arose out of its own affirmative acts; a duty that was directed toward particular individuals and strictly defined by the terms of the restraining order.

III. Unlike *DeShaney,* This Case Implicates Ms. Gonzales's Fundamental Right of Access To the Courts.

This case also implicates fundamental rights that were not at issue in *DeShaney*. *DeShaney* concerned only Joshua's liberty interest in "freedom from … unjustified intrusions on personal security," 489 U.S. at 195, and it concluded that on the facts of that case, the state could not be held responsible for the infringement of that interest. While this case implicates similar liberty interests, also at stake is Ms. Gonzales's fundamental right of meaningful access to the courts, a right protected by the Due Process Clause. *Tennessee v. Lane,* 124 S. Ct. 1978, 1988 (2004); *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982); *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971). Implicit in this core constitutional value is that any judgment obtained shall be enforced or, at least, shall not be undone by arbitrary executive action.

Though in many respects the Constitution may be a "charter of negative rather than positive liberties," *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 812 F.2d 298, 301 (7th Cir. 1987), with respect to the role of state courts, it expressly imposes a number of affirmative obligations upon the government. *See*, *e.g.*, U.S. Const. art. IV, § 1, cl. 1 (full faith and credit to the laws and judgments of other states); U.S. Const. amend. VI (speedy and public trials, compulsory process, assistance of counsel); U.S. Const. amend. VII (duty to preserve civil trial by jury). These textual obligations trigger corollary obligations directly under the Due Process Clause. *See, e.g., Powell v. Alabama*, 287 U.S. 45, 72 (1932) (holding that due process requires, as a "logical corollary from the constitutional right to be heard by counsel," that state trial courts provide counsel for indigent criminal defendants).

Of particular relevance to this case, "a State must afford to all individuals a meaningful opportunity to be heard

in its courts." *Lane*, 124 S. Ct. at 1981. Moreover, the Court has construed the Due Process Clause to preserve this fundamental right of access to the courts in fact as well as in theory. *See id*. (listing obligations, including state duty to waive filing fees in certain criminal and civil cases; to provide transcripts at state expense; to appoint counsel on direct felony appeals)*; see also Bounds v. Smith*, 430 U.S. 817 (1977) (cataloguing additional obligations arising from the right of access to the courts).

Among the obligations implicit in the Constitution's promise of meaningful access to the courts is a government duty to ensure that court orders and judgments are respected and enforced. *See, e.g., Plyer v. Moore*, 100 F.3d 365, 373 (4th Cir. 1996) ("We have little trouble accepting the proposition that the right of access to the courts necessarily includes the right to enforce a judgment once it is obtained."); *cf. Brinkerhoff-Faris Trust & Savs. Co. v. Hill*, 281 U.S. 673, 682 (1930) (observing that due process requires the States to provide "so[illegible]real opportunity" for individuals to protect and enforce their rights). "Due process" is meaningless if the end result of such process—a court order—is of no force or effect. *Cf. Cooper v. Aaron*, 358 U.S. 1 (1958).

In this instance, Ms. Gonzales's only meaningful opportunity to enforce the restraining order was to call upon police officers to perform their duties. For one, "the crowded nature of state court dockets, and the difficulty of getting persons who violate court orders in front of a judge, motivated the Colorado General Assembly, in part, in its crusade against domestic violence to create an additional enforcement mechanism." *See* Brief of *Amici Curiae* Int'l Municipal Lawyers Assoc. and Nat'l League of Cities *et al*. at 6. More fundamentally, the kidnapping of respondent's children by her husband created an emergency situation that could not be remedied by later hauling the kidnapper into court on contempt charges. In situations like the one confronting Ms. Gonzales, a timely police response may be the only realistic

way for a restraining order to be enforced. Petitioner's alleged policy or custom of refusing to enforce restraining orders duly issued by state courts thus presents a due process claim that was neither raised nor addressed by *DeShaney*.

IV. *DeShaney* Does Not Bar Due Process Claims Where, as Here, Government Actors Have Placed Citizens At a Heightened Risk of Danger.

DeShaney also does not control in the present circumstances because, unlike *DeShaney,* the government's actions affirmatively subjected Ms. Gonzales and her children to increased danger. This Court in *DeShaney* explained that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." 489 U.S. at 201. The State was immune from liability in that instance because it had merely acquiesced in—but not contributed to—the victim's danger. Conversely, the Courts of Appeals have overwhelmingly recognized that *DeShaney* does not control if state actors either created or exacerbated the danger faced by an individual.[2] This "state-created danger" exception to *DeShaney*'s general rule vindicates the principle originally articulated by Judge Posner: "If the state puts a man in a position of danger from private persons and then fails to

[2] *See, e.g.*, *Martin v. Shawano-Gresham School Dist.*, 295 F.3d 701, 708 n.7 (7th Cir. 2002); *Nicini v. Morra*, 212 F.3d 798, 807 n.6 (3d Cir. 2000) (en banc); *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1087 (9th Cir. 2000); *Hasenfus v. LaJeunesse*, 175 F.3d 68, 73 (1st Cir. 1999); *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1415 (5th Cir. 1997); *Gazette v. City of Pontiac*, 41 F.3d 1061, 1065 (6th Cir. 1994); *Dwares v. City of New York*, 985 F.2d 94, 98-99 (2d Cir. 1993); *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992).

protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

Courts have recognized, for example, that *DeShaney* does not foreclose a due process claim when a police officer stopped a pedestrian who was walking home intoxicated on a cold winter night, told her companion that he was free to go, and then left her to continue to make her way home alone. *Kneipp v. Teddler*, 95 F.3d 1199, 1209 (3d Cir. 1996). In that case, the court held that the intervention of government actors left the individual more vulnerable than she otherwise would have been. Likewise, *DeShaney* was determined not to bar a claim against a state officer who told a mother to stop making allegations of child abuse against her children's father because these allegations were traumatizing the children. *Currier v. Doran*, 242 F.3d 905, 921-22 (10th Cir. 2001). The court found that the official's discouragement increased the children's vulnerability to abuse. *Id.* Similarly, the general rule in *DeShaney* was not applied when police responded to a 911 call reporting screams from an apartment; knocked on the apartment door; and took no action when no response ensued other than instructing neighbors to call 911 again if they heard further noises. *Schieber v. City of Philadelphia*, 156 F. Supp. 2d 451 (E.D. Pa. 2001). The court in that case concluded that the police enhanced the danger to the individual inside the apartment by making it less likely that the neighbors would otherwise intervene. *Id.*[3]

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[3] On appeal, the Third Circuit found that the plaintiffs had nevertheless failed to establish a violation of due process because they had failed to demonstrate the requisite culpability on behalf of the police—that is, the behavior of the police was not deliberately indifferent and so did not shock the conscience. *Schieber v. City of Philadelphia*, 320 F.3d 409 (3d Cir. 2003). This is a separate component of substantive due process analysis, distinct from the (continued…)

Restraining orders can be, and are, a source of vital protection to the women and families who seek them. For many, the mere availability of police enforcement is sufficient to stop the harassing or abusive behavior; for some, the fact of police enforcement is a necessity. The protection afforded by these orders loses its potency, however, if they are not backed by meaningful, principled enforcement at the local level. The failure to enforce orders not only means that the government delivers less than is promised, but it can actually exacerbate the danger that drives women to seek such orders in the first place. Unfortunately, "the issuance of an order of protection results in a high likelihood of retaliation by the batterer." Caitlin E. Borgman, Note, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect DeShaney?*, 65 N.Y.U. L. Rev. 1280, 1308 (1990). The possibility of post-order abuse is even greater for women, like Ms. Gonzales, who have custody of the children. U.S. Department of Justice, National Institute of Justice, Legal Interventions in Family Violence: Research Findings and Policy Implications 50 (1998).

Domestic violence victims such as Ms. Gonzales "are most likely to be killed while taking steps to end the relationship with the abuser or while seeking help from the legal system," Deborah Epstein, et al., *Confronting Domestic Violence and Achieving Gender Equality: Evaluating* Battered Women & Feminist Lawmaking *by Elizabeth Schneider*, 11 Am. U. J. Gender Soc. Pol'y & L. 465, 476 (2003), and a restraining order implicates both risk-factors. First, the act of seeking an order of protection is generally a signal that the marriage or relationship is ending. *See* Karla Fischer & Mary Rose, *When "Enough is Enough": Battered Women's Decision Making Around Court Orders of Protection*, 41

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question of whether any constitutionally protected interest is implicated at all.

Crime & Delinquency 414, 418 (1995). This separation often provokes retaliatory violence. *See* Ronet Bachman & Linda E. Saltzman, U.S. Department of Justice, Violence Against Women: Estimates from the Redesigned National Crime Victimization Survey (1995); Desmond Ellis & Walter S. DeKeseredy, Marital Status and Woman Abuse: the Dad Model (1989); *see generally* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1 (1991) (explaining dynamics and prevalence of separation assault).

Second, the mere fact that a woman seeks protection in court may well motivate her batterer to retaliate. *See* Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 Geo. Public Pol'y Rev. 51, 56 (2000). In some instances, the batterer will use violence to pressure his victim to keep him out of trouble with law enforcement. *See* Barbara Hart, *Battered Women and the Criminal Justice System*, 36 Am. Behavioral Scientist 624, 626 (1993) (documenting, in the analogous context of criminal prosecution, that "[b]atterers may, in fact, escalate their violence to . . . coerce her into seeking termination of the prosecution."). Moreover, 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," Mahoney, *supra*, at 56, an abuser such as Mr. Gonzales may have felt motivated to use violence to reassert his control that had been stripped by his wife's resort to the courts.

Accordingly, the protective order granted by the State and served on her estranged husband exposed Ms. Gonzales to a risk of retaliatory violence against herself and her children, and the order, pursuant to state statute, appropriately tasked the police with mitigating that risk. A similar situation was presented in *Caldwell v. City of Louisville*, No. 03-5342, 2004 WL 2829026 (6th Cir. Dec. 9, 2004), in which the Court of Appeals held that a municipality would be liable under the

Fourteenth Amendment if it was deliberately indifferent to a domestic violence victim's safety after it increased the risk that she would be abused. In that case, the police had encouraged a battered woman to file a criminal complaint against her boyfriend that eventually led to his arrest, but then had—for no reason—failed to rearrest the abuser after learning that he had mistakenly been released. *See id.* at *1-2. While the unexecuted arrest warrant lingered, the abuser strangled and killed the woman. *Id.* at *2. The court held that the city "undertook some affirmative conduct which ultimately increased [the victim's] harm," *id.* at *6, relying on expert opinion that "[p]erpetrators of domestic violence are known to be more likely to increase the frequency and severity of their abuse in the period immediately after the victim seeks assistance from the Criminal Justice System." *Id.* at *9 n.7 (internal quotations omitted). This expert—a former police chief with over twenty-five years experience as an officer—elaborated that abusers are often more dangerous after government intervention because they "try to reassert their power and control over the victim." *Id.* (internal quotations omitted).

Thus, when women such as Jessica Gonzales seek refuge from their batterers, they must weigh the possibility of increased violence against the symbolic and practical protection that a restraining order could provide. In making the decision to seek the order, one can assume that Ms. Gonzales took the order at face value and relied on the State's promise that law enforcement officials would assist her:

> NOTICE TO LAW ENFORCEMENT OFFICIALS: YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS 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 … ANY PROVISION OF THIS ORDER…. YOU SHALL ENFORCE THIS ORDER EVEN IF THERE IS NO RECORD OF IT…. YOU ARE AUTHORIZED TO USE EVERY REASONABLE EFFORT TO PROTECT THE ALLEGED VICTIM AND THE ALLEGED VICTIM'S CHILDREN TO PREVENT FURTHER VIOLENCE.

In believing that the State meant what it said in promising enforcement of the order, Ms. Gonzales would have been by no means atypical. One study of battered women seeking protective orders found that even though 86 percent of them believed that their assailant would violate the order, a full 95 percent were confident that the police would respond rapidly to these violations. Fischer & Rose, *supra*, at 417.

Ms. Gonzales's decision to seek the order was thus bound up with "the belief that some outside intervention would be available to" her, *id.*, even as the threat of violence in her life remained. The calculation that a woman must make in determining whether a protective order will enhance or compromise her safety is thus directly affected by representations that local law enforcement will enforce it. When that promise is unfulfilled, the issuance and service of a protective order itself heightens a woman's vulnerability. As the Department of Justice has recognized, "[u]nless protective orders are enforced, they can prove harmful to victims by creating a false sense of security." U.S. Department of Justice, Office for Victims of Crime, Enforcement of Protective Orders 5 (2002). For "[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." Borgman, *supra*, at 1309.

Accordingly, it is a "familiar" example of state-created danger when the State "induc[es] someone to rely on state protection and then fail[s] to provide it." Thomas A. Eaton & Michael Lewis Wells, *Governmental Inaction as a Constitutional Tort:* DeShaney *and its Aftermath*, 66 Wash. L. Rev. 107, 126 (1991). Had the government not led Ms. Gonzales to believe that the order would be enforced, she may have felt compelled to undertake more drastic self-help, such as changing her residence, job, or schedule; arranging for constant close supervision of her children; going into hiding; or "fleeing her home to seek protection at a shelter or with relatives or filing a criminal complaint to have the batterer prosecuted." *Borgman, supra*, at 1309. Although Ms. Gonzales might have felt that an enforced order was preferable to these more drastic and life-interrupting steps, undoubtedly she would have taken them if she felt that they were necessary to protect her own and her children's safety. *See L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992) (substantive due process violation resulting from inmate's rape of female prison guard; victim unprepared to defend or protect herself "because she had not been informed at hiring that she would be left alone with violent offenders.").

The police further enhanced the danger to Ms. Gonzales's daughters after her children were kidnapped. Rather than admitting that they would not enforce the order, the police repeatedly told Ms. Gonzales to wait for the return of her daughters, to call back later, or to wait for further police action that never materialized. Had they forthrightly refused to help her at the outset, Ms. Gonzales may well have taken other steps to protect her children: she might have looked for them herself, enlisted the aid of friends and other family, or perhaps even sought out a private investigator. *See, e.g.*, *Currier*, 242 F.3d at 922 (child protection worker increased danger by "discourag[ing] [mother] from seeking the help of other [child protective service] employees or other governmental sources of help such as the police."); *Schieber v. City of Philadelphia*, 156 F. Supp. 2d at 459, *rev'd on other*

grounds, 320 F.3d 409 (3d Cir. 2003) (police increased danger by failing to act after responding to scene of 911 call because their arrival made neighbors less likely to intervene on behalf of victim); *Sinthasomphone v. City of Milwaukee*, 785 F. Supp. 1343, 1349 (E.D. Wis. 1992) (police increased danger when soon-to-be murdered teenager left in custody of serial killer Jeffrey Dahmer; concerned citizen who subsequently called the police station assured by police that "everything was under control").

In sum, and in contrast to *DeShaney*, the government actors in this case increased the danger faced by Ms. Gonzales and her children by undertaking certain obligations to protect her and then repeatedly failing to fulfill these obligations. *DeShaney* also did not involve the type of mandatory obligations imposed by the Colorado state statute and particularized by the court order issued to Ms. Gonzales. Nor did *DeShaney* purport to address—indeed, it specifically reserved—the type of procedural due process claim advanced here. For all of these reasons, *DeShaney* does not foreclose respondent's claim that the Town of Castle Rock should be held liable for failing to provide adequate process before disobeying the court's command to protect her and her children.

CONCLUSION

For the foregoing reasons and those set forth in the Brief of Respondent Jessica Gonzales, the decision of the Tenth Circuit should be affirmed.

Respectfully Submitted,

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