No. 04-278

IN THE

Supreme Court of the United States

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

PETITIONER'S OPENING BRIEF

THOMAS S. RICE
ERIC M. ZIPORIN
Counsel of Record
Senter Goldfarb & Rice, L.L.C.
P.O. Box 22833
Denver, CO 80222
(303) 320-0509

JOHN C. EASTMAN
c/o Chapman University
School of Law
One University Drive
Orange, CA 92866

ERIK S. JAFFE
Erik S. Jaffe, P.C.
5101 34th Street, NW
Washington D.C. 20008

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether permitting a *procedural* due process claim against a local government for its failure to protect the holder of a partial restraining order from private violence, when the State itself provides no such remedy, so circumvents as to effectively repudiate this Court's holding in *DeShaney* rejecting a similar *substantive* due process claim?
2. If the Fourteenth Amendment's Due Process Clause is read to permit, via its procedural aspects, the same substantive claims already rejected by this Court in *DeShaney*, what kind of process is required for police inaction with respect to a partial restraining order *not* to violate the constitution?

PARTIES TO THE PROCEEDING

Petitioner: Town of Castle Rock, Colorado, a Colorado home rule municipal corporation.

Respondent: Jessica Gonzales, individually and as next friend of her deceased minor children Rebecca Gonzales, Katheryn Gonzales, and Leslie Gonzales.

Other Defendants Below: Aaron Ahlfinger, Robert S. Brink, and Marc Ruisi, current or former members of the Town of Castle Rock Police Department.

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INTRODUCTION

Respondent Jessica Gonzales ("Ms. Gonzales") suffered a grievous tragedy when her estranged husband shot and killed her three daughters before committing "suicide by cop" by opening fire at the local police station. Because Mr. and Ms. Gonzales were at the time in the middle of contentious divorce proceedings, the divorce court had issued a standard-form restraining order barring Mr. Gonzales from having

contact with Ms. Gonzales and the children except for specified "parenting time" to which he was entitled, including a prearranged mid-week dinner visit. The tragic events described above occurred during one such mid-week dinner visit.

Ms. Gonzales alleges that the dinner visit was not prearranged, and that Mr. Gonzales was therefore technically in violation of the restraining order. She further contends that the police department's failure to enforce the restraining order caused the tragic events, in violation of her right to due process under the Fourteenth Amendment.

Ms. Gonzales's allegations have yet to be proved, of course, as this case is here on the motion to dismiss filed by all Defendants, including Petitioner Town of Castle Rock ("Castle Rock"). The district court granted the motion to dismiss and the panel of the Tenth Circuit affirmed, holding that even if Ms. Gonzales could prove those allegations, this Court's decision in *DeShaney* v. *Winnebago Cty. Dept. of Soc. Servs*., 489 U.S. 189 (1989), barred Ms. Gonzales's claims to the extent they relied on the substantive component of the Due Process Clause. Ms. Gonzales did not petition for rehearing of that holding, and the *en banc* court left it undisturbed. It is therefore no longer at issue in this case.

What is at issue here is the *en banc* Tenth Circuit's holding that Ms. Gonzales was entitled to proceed with her claim against Castle Rock via the procedural component of the Due Process Clause. Most courts to have considered the issue have recognized such claims as simply a clever attempt at circumventing *DeShaney*, and rejected them. This Court should reject them as well.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 366 F.3d 1093 (CA10 2004) (*en banc*) and reprinted at pages 1a-94a of the Petition Appendix ("PA"). The panel opinion of the Court of Appeals is reported at 307 F.3d 1258 (CA10 2002)

(PA 99a-112a). The order of the District Court dismissing the complaint with prejudice is unreported, but is reproduced at PA 113a-123a.

STATEMENT OF JURISDICTION

The *en banc* decision of the Court of Appeals was entered on April 29, 2004 (PA 1a). A timely request for extension, filed on July 14, 2004, was granted by Justice Breyer on July 20, 2004, extending the time in which to file the petition for writ of certiorari until August 27, 2004. The Petition was filed on August 27, 2004, and granted by this Court on November 1, 2004. The jurisdiction of this Court is proper under 28 U.S.C. § 1254(1). Jurisdiction in the Court of Appeals was proper under 28 U.S.C. § 1291, and jurisdiction in the District Court was proper under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment provides:

> No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

Section 14-10-108 of the Colorado Revised Statutes ("C.R.S.") provides, in relevant part:

> (1) In a proceeding for dissolution of marriage, . . . (2) . . . either party may request the court to issue a temporary injunction: . . . (b) Enjoining a party from molesting or disturbing the peace of the other party or of any child; . . . .

C.R.S. § 18-6-803.5(3) provides, in relevant part:

> (a) Whenever a protection order is issued, the protected person shall be provided with a copy of such order. A peace officer shall use every reasonable means to enforce a protection order.

(b) A peace 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 peace officer has information amounting to probable cause that:

(I) The restrained person has violated or attempted to violate any provision of a protection order; and

(II) The restrained person has been properly served with a copy of the protection order or the restrained person has received actual notice of the existence and substance of such order.

(c) In making the probable cause determination described in paragraph (b) of this subsection (3), a peace officer shall assume that the information received from the registry is accurate. A peace officer shall enforce a valid protection order whether or not there is a record of the protection order in the registry.

(d) The arrest and detention of a restrained person is governed by applicable constitutional and applicable state rules of criminal procedure. The arrested person shall be removed from the scene of the arrest and shall be taken to the peace officer's station for booking, whereupon the arrested person may be held or released in accordance with the adopted bonding schedules for the jurisdiction in which the arrest is made. The law enforcement agency or any other locally designated agency shall make all reasonable efforts to contact the protected party upon the arrest of the restrained person. The prosecuting attorney shall present any available arrest affidavits and the criminal history of the restrained person to the court

> at the time of the first appearance of the restrained person before the court.
>
> (e) The arresting agency arresting the restrained person shall forward to the issuing court a copy of such agency's report, a list of witnesses to the violation, and, if applicable, a list of any charges filed or requested against the restrained person. The agency shall give a copy of the agency's report, witness list, and charging list to the protected party. The agency shall delete the address and telephone number of a witness from the list sent to the court upon request of such witness, and such address and telephone number shall not thereafter be made available to any person, except law enforcement officials and the prosecuting agency, without order of the court.

C.R.S. § 18-6-803.5(5) provides:

> A peace officer arresting a person for violating a protection order or otherwise enforcing a protection order shall not be held criminally or civilly liable for such arrest or enforcement unless the peace officer acts in bad faith and with malice or does not act in compliance with rules adopted by the Colorado supreme court.

C.R.S. § 18-6-803.5(7) provides:

> The protection order shall contain in capital letters and bold print a notice informing the protected person that such protected person may either initiate contempt proceedings against the restrained person if the order is issued in a civil action or request the prosecuting attorney to initiate contempt proceedings if the order is issued in a criminal action.

STATEMENT OF THE CASE

In *DeShaney*, this Court held that the substantive component of the Due Process Clause of the Fourteenth Amendment did not provide a cause of action against state and local governments and government officials for failure to protect individuals from the violent acts of other private individuals (other than under special circumstances not at issue here). Nevertheless, on June 23, 2000, Respondent Jessica Gonzales brought such a suit in the United States District Court for the District of Colorado against Petitioner Town of Castle Rock and three of its police officers (collectively, "Castle Rock defendants"), seeking $30 million in compensatory damages (as well as punitive damages and attorneys fees) after her three children were tragically murdered by her then-estranged husband, Simon Gonzales. PA 129a.

At the conclusion of their state-court divorce proceedings, Mr. Gonzales had been issued a perfunctory, standard-form partial restraining order directing him to avoid contact with Ms. Gonzales and her children other than during "parenting time" to which he was "entitled" every other weekend, for two weeks during the summer, and during a pre-arranged mid-week dinner visit. Complaint ¶ 9 (PA 125a-126a).[1] Ms.

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[1] A modification to the initial temporary restraining order was entered by the Douglas County, Colorado district court on June 4, 1999. Both the initial and the modified restraining orders were submitted to the district court as attachments to defendants' motion to dismiss. The modified order (of which the lower courts apparently took judicial notice) provides, in part:

> 1. The temporary restraining order that has been previously filed by the Petitioner [Ms. Gonzales] shall be come (sic) permanent, however, said restraining order shall be modified to allow Respondent [Mr. Gonzales] to pick up the minor children from the home of the Petitioner for parenting time purposes. The remaining terms of the restraining order shall remain in effect and may be modified (or dissolved if Petitioner deems it appropriate) at permanent orders.

Gonzales contended in her federal complaint that the partial restraining order, together with Colorado Revised Statutes § 18-6-803.5(3), bestowed upon her and her children a "property right" to police protection, and that the failure of Castle Rock police officers to protect her children (by arresting Mr. Gonzales after Ms. Gonzales informed the police that he had taken the children around dinner-time on a Tuesday evening) "constituted a denial of the due process rights of [Ms. Gonzales] and the three children in violation of the Due Process Clause of the Fourteenth Amendment . . . and 42 U.S.C. § 1983." Complaint ¶¶ 18, 20 (PA 128a).[2]

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* * *

4. Respondent, upon reasonable notice, shall be entitled to a mid-week dinner visit with the minor children. Said visit shall be arranged by the parties.

Appellant's Tenth Circuit Appendix, p. A-30; *see also* Complaint ¶ 9 (PA 125a-126a). Although the language of the modified restraining order makes it debatable whether Mr. Gonzales was even in violation of the restraining order at the time he took the children for a mid-week dinner visit, that potential factual dispute is not material to the legal issue presented here, namely, whether Castle Rock can be held liable for failing to arrest Mr. Gonzales after receipt of Ms. Gonzales's alleged report of a violation.

[2] Curiously, Ms. Gonzales did not allege in her complaint that she ever notified the police of her contention that Mr. Gonzales was actually in violation of the restraining order. She alleged only that Mr. Gonzales had taken the children mid-week around dinner time without her permission. Complaint ¶ 10 (PA 126a). She did not allege that she had informed the police that she had not given her permission for the dinner-time visit, but simply alleged that she showed to the police the restraining order, which expressly allowed mid-week dinner visits. Complaint ¶¶ 9, 11-12 (PA 126a). Based on these allegations (which Petitioner disputes), the police might reasonably have believed that Mr. Gonzales was not in violation of the order, either because he had not been served with it, or because he had permission for the Tuesday dinner visit, or because Ms. Gonzales had, contrary to the terms of the restraining order, unreasonably denied permission for a mid-week dinner visit. After all, the modified order entered on June 4, 1999 uses the same word to describe Ms. Gonzales's obligation to arrange a mid-week dinner visit that she now

The Castle Rock defendants moved to dismiss the complaint, contending that it failed to state a claim, that the individual police officers were entitled to qualified immunity, and that Ms. Gonzales had not alleged facts sufficient to establish municipal liability by the Town of Castle Rock. PA 116a. After briefing and a hearing, the district court (Daniel, J.) dismissed the case with prejudice for failure to state a claim. PA 122a.

Although Ms. Gonzales had only generically alleged a violation of her due process rights, Complaint ¶ 20 (PA 128a), the district court treated the complaint as having alleged violations of both the substantive and procedural components of the Due Process Clause, PA 117a, 120a. The court dismissed the substantive due process claim, correctly holding that, under *DeShaney*, a State's failure to protect an individual from private violence does not violate substantive due process absent circumstances not applicable in this case. PA 119a-120a.

Recognizing that this Court's holding in *DeShaney* was limited to the substantive component of the Due Process Clause, PA 120a n.2, the district court separately considered whether Ms. Gonzales's complaint raised a procedural due process claim, namely, whether Castle Rock, by failing to enforce the partial restraining order as specified by state law, deprived her of a property interest in police protection without proper procedure, PA 120a. Finding that the enforcement obligations contained in the Colorado statute arise only upon a finding of probable cause by the police, the district court held that the Ms. Gonzales did not have a protectable property interest and that her complaint therefore did not allege facts sufficient to support a violation of the procedural component of the Due Process Clause. PA 122a.

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claims is the basis for Petitioner's obligation to arrest Mr. Gonzales for allegedly not having done so. *See* June 4 Order, *supra* n. 1 ("a mid-week dinner visit . . . *shall* be arranged by the parties" (emphasis added)).

On timely appeal after final judgment was entered, a panel of the United States Court of Appeals for the Tenth Circuit (Seymour, J., joined by McWilliams and Gibson,[3] JJ.) agreed with the district court that *DeShaney* barred Ms. Gonzales's substantive due process claim, but reversed the district court's holding that the procedural due process claim was likewise barred. PA 106a. Relying on the fact that the procedural due process claims had been left unaddressed in *DeShaney*, and distinguishing the decisions of two other circuit courts of appeals that had refused to permit *DeShaney* to be circumvented by the simple expedient of recasting substantive due process claims in procedural due process garb, the panel held that the use of the mandatory "shall" in C.R.S. § 18-6-803.5(3) gave Ms. Gonzales an "entitlement" to police protective services that enjoyed procedural due process protection against state deprivation under *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972) . PA 106a-111a.

The Tenth Circuit granted the Castle Rock defendants' petition for rehearing *en banc* and ordered additional briefing to address "1) whether CRS 18-6-803.5(3) in conjunction with the restraining order issued by the Colorado court created a property interest entitled to due process protection and, 2) if so, what process was due." PA 98a. After re-argument, a closely-divided, 6-5 *en banc* court followed the panel's lead and reversed the district court's dismissal of Ms. Gonzales's procedural due process claim.[4]

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[3] Hon. John R. Gibson, Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

[4] The *en banc* court was not asked to address the district court's dismissal of Ms. Gonzales's substantive due process claim and the panel's affirmance of that aspect of the district court's holding, so the panel decision affirming dismissal remains undisturbed. PA 9a n. 3. Thus, any challenge to *DeShaney*'s substantive due process holding has been waived and is no longer an issue in this case.

Judge Seymour, writing for the 6-member *en banc* majority, held that the partial restraining order, coupled with the statutory enforcement mechanism, conferred on Ms. Gonzales and her daughters "an interest in a specific benefit to which [they had] 'a legitimate claim of entitlement.'" PA 13a (quoting *Roth*, 408 U.S., at 577). The Court further held that procedural due process required Castle Rock to afford notice and a hearing to Ms. Gonzales before it failed to enforce the partial restraining order that had been issued to Mr. Gonzales. PA 30a, 32a, 42a. The Court also recognized, however, that because no "reasonable officer would have known that a restraining order, coupled with a statute mandating its enforcement, would create a constitutionally protected property interest," the individual police officers (though not the Town of Castle Rock itself) were entitled to qualified immunity. PA 43a.

Four separate opinions were filed by the five dissenting judges.

Judge Kelly, joined by Chief Judge Tacha and Judge O'Brien, viewed the relevant statute as providing only a *procedure* for the enforcement of protective orders and rejected the procedural due process claim, noting that "[i]t has always been the law that mere procedure contained in a statute does not create a property interest—were it otherwise every statute prescribing procedure would confer procedural due process rights." PA 47a-48a (citing *Olim* v. *Wakinekona*, 461 U.S. 238, 250-51 (1983)). He found that the Colorado statute, viewed as a whole, did not mandate a particular result and therefore did not create a protectable property interest. PA 49a. He found the majority's decision to the contrary to be in conflict with, among other cases, the Eighth Circuit's decision in *Doe* v. *Hennepin County*, 858 F.2d 1325, 1328 (CA8 1988), and he found the majority's insistence that Castle Rock should have afforded notice and a hearing to Ms. Gonzales before failing to enforce the protective order an "utter impracticality" at odds with the *en*

banc decision of the Seventh Circuit in *Archie* v. *City of Racine*, 847 F.2d 1211, 1217 (CA7 1988) (*en banc*). PA 51a, 58a.

Judge McConnell, joined by Chief Judge Tacha and Judges Kelly and O'Brien, dissented to note that even if the restraining order coupled with the Colorado statute created a property interest, Ms. Gonzales's complaint raised only a substantive and not a procedural due process claim. "Only when a plaintiff asserts that government action is procedurally unfair—usually for lack of a hearing—does the balancing test of *Mathews* v. *Eldridge*, 424 U.S. 319, 333-35 (1976), invoked by the majority [rather than the more stringent 'shocks the conscience' test of *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998)] . . . apply," wrote Judge McConnell, "yet Ms. Gonzales's complaint contains no reference to procedural issues in any form." PA 60a. He believed that the majority's holding to the contrary was at odds with *Lewis*, 523 U.S., at 846, and that the substantive relief sought by Ms. Gonzales was "in marked contrast" to the procedural relief sought in "the Supreme Court's procedural due process cases, on which the majority relie[d]." PA 63a (*citing, e.g.*, *Roth*). Significantly, Judge McConnell noted that "[i]f the majority is correct, it will always be possible for plaintiffs to re-characterize their substantive due process claims against arbitrary action by executive officials as 'procedural due process' claims, thus avoiding the Supreme Court's exacting 'shocks the conscience' test and getting, instead, the balancing test of *Mathews*"—a maneuver rejected by this Court in *Reno* v. *Flores*, 507 U.S. 292, 308 (1993). PA 65a-66a.

Judge O'Brien, joined by Chief Judge Tacha and Judge Kelly, noted that the majority's decision ignored the guiding principles announced in *DeShaney* and was in conflict with decisions from the Sixth, Seventh, and D.C. Circuits as well as the Supreme Court of Tennessee, the District of Colorado,

and the Northern District of West Virginia. PA 67a (citing cases).

Judge Hartz, joined by Chief Judge Tacha and Judge Kelly, also dissented to caution courts against reading "full enforcement" statutes such as the Colorado statute at issue here too literally. Referencing the classic work on the subject by Professor Kenneth Culp Davis, POLICE DISCRETION, he noted that even "full enforcement" statutes "permit the exercise of police discretion regarding how much, and even whether, to enforce particular criminal statutes." PA 92a-93a. Finally, he noted that even if Colorado's statute could be read to confer on Ms. Gonzales procedural due process rights in connection with a decision whether to enforce the partial restraining order, she was given all that *procedural* due process could require under the circumstances: an opportunity to present evidence of the violation of the order and to argue why an arrest was proper. PA 94a. To hold otherwise, as the majority did, was to convert the procedural due process claim into a substantive due process claim (contrary to *DeShaney*).

SUMMARY OF ARGUMENT

This Court should reject the Tenth Circuit's effort to circumvent *DeShaney* for several reasons. First, in light of this Court's holding in *DeShaney* that the substantive component of the Fourteenth Amendment's Due Process Clause does not impose on state and local governments an affirmative obligation to prevent private-party violence, this Court should be wary of *ever* recognizing a non-traditional *Roth*-type property interest in police enforcement procedures, infringement of which would depend on the substantive result to establish a prima facie claim of procedural failure every time the police were unsuccessful in protecting against private-party violence. *DeShaney* certainly does not compel, and arguably counsels against, recognition of the procedural due process claim accepted by

the Tenth Circuit below. The "nature" of the interest asserted by Ms. Gonzales is simply not within the contemplation of the "liberty" or "property" protected by the Due Process Clause. Instead, as several of the dissenting judges correctly noted below, Ms. Gonzales's complaint is not really about any lack of process—she actually had the opportunity to be heard, on several occasions—but about the police department's alleged failure to respond to her requests in the way she would have liked. The alleged procedural failing derives only from the lack of a favorable result, and the only curative procedural remedy would presumably be one that guaranteed Ms. Gonzales a different result. That is a substantive due process claim challenging the outcome, not a procedural due process claim concerned about the kind of hearing provided, and if the Tenth Circuit's rule were to prevail, *DeShaney* would effectively be overruled, as every *substantive* claim barred by *DeShaney* could simply be recast as a *procedural* claim now permitted by the Tenth Circuit.

Second, even if this Court is inclined to recognize some kind of *Roth*-type property interest in police enforcement procedures, the Colorado enforcement scheme at issue here, properly interpreted, has not created any such property interest. When read in context, both of the statute as a whole and against the backdrop of the traditional discretion afforded to law enforcement, Colorado's enforcement regime is merely directory, not mandatory. Moreover, even if the word "shall" in the statute is read as mandatory rather than merely directory, it simply mandates police procedures; it does not create a *Roth*-type property interest either in police protection or in enforcement according to those procedures. Mere procedure contained in a statute does not create a property interest. By discovering a *Roth*-type property interest in the context of a state statute that itself affords no liability remedy, the Tenth Circuit has required Colorado to recognize, as a matter of constitutional obligation, a

substantive right that neither the Constitution (per *DeShaney*) nor the State had established.

Third, the Tenth Circuit's decision, if affirmed by this Court, will open up a hornets' nest of issues with respect to the kind of process that would be required before a state agency *fails* to prevent private violence in any particular case. Will listening to a complaint from the other end of a telephone line be an adequate hearing, or will police be obligated in every instance to hear the complaint in person? (Both forms of hearing were provided to Ms. Gonzales in this case.) Can whatever hearing is deemed to be required even be conducted by the police, or will a "neutral" magistrate of some kind need to be appointed? What will constitute sufficient notice that the police are not going to be able to act to prevent private violence that only becomes known in hindsight? These, and undoubtedly numerous other similarly intractable issues, only serve to highlight what Judge Kelly below correctly described as the "utter impracticality" of extending the requirements of procedural due process to failure-to-protect claims.

Finally, ratification of the Tenth Circuit's decision would convert hundreds of state procedural mandates into constitutional claims, abolishing as a matter of federal constitutional law the discretion traditionally afforded law enforcement officials, even when the States themselves have disavowed liability remedies. The expansion in both liability and litigation will have devastating consequences both for the public safety and for municipal governments throughout the Nation. Every telephone call received by a police dispatcher that alleges a violation of a restraining order containing the word "shall" would have to be given the highest priority and afforded federally imposed procedures, for example, in order to avoid constitutional liability, no matter how urgent or severe other matters may be. Whether a state legislature could *ever* undermine executive discretion in such a fashion without also undermining core separation

of powers principles is questionable; the federal courts certainly should not hold a legislature to have done so *by implication*.

ARGUMENT

I. The Procedural Due Process Claim Allowed Below Is Not Sanctioned By, and Would Effectively Overrule, *DeShaney*.

This Court in *DeShaney* reserved the question whether the *procedural* component of the Fourteenth Amendment's Due Process Clause (as opposed to its *substantive* component) would give rise to constitutional liability when a State failed to protect against private-party violence in the face of a *Roth*-type property interest to such protection. The Tenth Circuit, however, erroneously treated that reservation as an acknowledged exception to the *DeShaney* rule, and then read it so broadly as effectively to swallow the *DeShaney* rule itself. There are good reasons for this Court to reject the Tenth Circuit's circumvention of *DeShaney*.

***DeShaney* did not embrace the procedural due process claim sanctioned by the Tenth Circuit below.**

In footnote 2 of its opinion in *DeShaney*, this Court declined to consider whether a state statute might provide individuals with an "entitlement" to receive governmental protective services that would enjoy procedural due process protection under *Roth*. *DeShaney*, 489 U.S., at 195 n.2. One legal scholar grappling with the import of that footnote has contended that this Court therefore only "[be]grudging[ly]" left open the possibility that a State statute might create procedural due process rights in protective services provided by the State. James T. R. Jones, *Battered Spouses' Section 1983 Damage Actions Against the Unresponsive Police After* DeShaney, 93 W. VA. L. REV. 251, 308 (1991). Professor David Strauss went even further, stating that it is not a stretch to call *DeShaney* a "case involving procedural due

process" because "the distinction between substantive and procedural due process is blurred in cases of this kind." David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 Sup. Ct. Rev. 53, 60 (1989). While Professor Strauss acknowledged that neither the Court nor the plaintiffs characterized *DeShaney* as a procedural due process case, he contended that "the characterization should not dictate the way in which the case is analyzed, and there is no indication in the opinion that it did affect the Court." *Id*. Although Professor Strauss ultimately disagreed with the holding in *DeShaney*, that holding is not at issue here, and hence Professor Strauss's recognition that the analysis should be the same under either procedural or substantive due process requires the same result here as in *DeShaney*.

This Court itself demonstrated a sensible reluctance to permit procedural claims to circumvent the absence of substantive rights by citing *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972), in its brief discussion of the procedural due process claim that the *DeShaney* petitioners had not advanced. *See DeShaney*, 489 U.S., at 195. *Morrissey* involved a parolee's due process challenge to the revocation of his parole without a hearing. In deciding to extend procedural due process protections to parole revocations, this Court cautioned that the crux of the question whether the requirements of due process even apply in a given circumstance "is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." 408 U.S., at 481. This Court specifically warned in *Morrissey* that its due process flexibility was not a blank check for courts to impose due process requirements hither and yon in the first instance:

> To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due;

> it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

Morrissey, 408 U.S., at 481. The *Morrissey* Court then assessed the "nature of the interest of the parolee in his continued liberty," and ultimately concluded that it was such as to bring it within the protection of the Fourteenth Amendment. An assessment of the "nature" of Ms. Gonzales's claimed interest leads to the opposite result here.

The "nature" of Ms. Gonzales's asserted interest is not within the contemplation of the "liberty or property" language of the Fourteenth Amendment.

Every ground on which the *Morrissey* Court relied in reaching its determination that the nature of a parolee's interest in continued liberty is such as to fall within the protection of the Fourteenth Amendment demonstrates a stark contrast between the parolee's interest and the interest asserted by Ms. Gonzales here. A parolee exercises "liberty" in the way the word has been traditionally understood, even if only a conditional liberty. *Id*., at 482. He has at least an implicit promise that his parole will be revoked only if he breaches the parole conditions. *Id*. Revocation of parole often results in lengthy incarceration. *Id*. And, one might add, revocation of parole required an affirmative act by the government.

In contrast, the interest Ms. Gonzales claims here—the right to have her ex-husband arrested any time the police have probable cause to believe he violated the restraining order in any particular, however small—is neither "liberty" nor "property" in the way those words have traditionally been understood. There may be a lot of reasons why police might not be able to enforce the restraining order, even if there was probable cause to think it had been violated. Police often must balance competing law enforcement demands, any of which could have potentially serious consequences to the

public, but it is only the rare instance in which police judgments regarding the balancing of those demands nonetheless leads to a tragic outcome. The importance of any given interest cannot be assessed only in hindsight, but has to be taken in context of the discretion required by the broader and often life-threatening demands on police time more generally. And finally, the government *inaction* alleged here is simply not comparable to the government *action* necessary to revoke parole at issue in *Morrissey*.

Roth itself, which is the touchstone for Ms. Gonzales's procedural due process claim, bolsters the point. *Morrissey* was cited by this Court in *Roth* for the proposition that "to determine whether due process requirements apply in the first place, [courts] must look not to the 'weight' but to the nature of the interest at stake." *Roth*, 408 U.S., at 570-71 (citing *Morrissey*, 408 U.S., at 481). The "nature" of the interest in *Roth* was not such as to give rise to due process protections because Roth had only an abstract desire and unilateral expectation that his employment contract would be renewed, not a legitimate entitlement to renewal of the contract.

The "nature" of the interest claimed by Ms. Gonzales here is likewise not within the contemplation of the "liberty or property" protected by the Fourteenth Amendment. Unlike the interest sought to be protected in *Morrissey* (not being in jail), or even the interest sought but rejected in *Roth* (continued employment), the interest at issue here is merely some sort of reasonable enforcement, *if* there is probable cause (the quintessential discretionary decision police make every day), and arrest, *if* practical. The nature of interest claimed by Ms. Gonzales is, in other words, quite uncertain.

Ms. Gonzales was not given 24-hour police protective service that arguably would have afforded her a legitimate entitlement *from the government*. *Cf., e.g.*, *Youngberg* v. *Romeo*, 457 U.S. 307 (1982). Rather, she was given an order restraining *Mr. Gonzales*, with certain procedures designed,

by Respondent's own admission, "*to provide guidance* to law enforcement agencies in how to go about enforcing" the restraining order. *See* Appt.'s Tenth Circuit Opening Br., at 7 (emphasis added). Those procedures were not even implicated unless the police had information amounting to probable cause that the order had been violated, and even then the particular result Ms. Gonzales desired—arrest—was but one of several alternatives permitted by the statutory scheme. Police were also specifically authorized merely to seek a warrant for an arrest if an immediate arrest was "impractical under the circumstances," C.R.S. § 18-6-803.5(3)(b), and were impliedly authorized to use other "reasonable means" to enforce the restraining order, C.R.S. § 18-6-803.5. Moreover, Ms. Gonzales was herself free to initiate contempt proceedings against Mr Gonzales. C.R.S. 18-6-803.5(7). With so many statutorily-authorized enforcement options available, Ms. Gonzales simply did not have a legal entitlement to the one particular enforcement procedure she wanted. Rather, she had only an "abstract desire" or "unilateral expectation" that the restraining order would be enforced by an arrest.[5] That is not sufficient to establish a *Roth*-type property interest.

If the Tenth Circuit's rule is adopted by this Court, every *substantive* due process claim could simply be recast as a *procedural* due process claim, severely undermining *DeShaney*.

Several of the dissenting judges correctly noted below that Ms. Gonzales's complaint is not really about any lack of process—she actually had the opportunity to be heard, on several occasions—but about the police department's alleged

[5] It is not even clear from the complaint that Ms. Gonzales actually sought an arrest rather than merely the return of her children. *See* Complaint ¶ 12, PA 126a (alleging that Ms. Gonzales showed police "a copy of the TRO and requested that it be enforced and the three children be returned to her immediately").

failure to respond to her requests in the way she would have liked. *See, e.g.*, PA 63a (McConnell, J., dissenting) ("She cannot say she was not given a chance to be heard. She called several times and explained the situation to the police, and she met with the police in person both at her home and at the police station. The problem is not that she was denied a hearing, but that the officers failed to do their duty. The problem was with the result"). That is a substantive due process claim challenging the outcome, not a procedural due process claim concerned about the kind of hearing provided, and if the Tenth Circuit's rule to the contrary were to prevail, *DeShaney* would effectively be overruled.

While the failure to perform a state-law procedural duty may or may not give rise to a state-law claim,[6] if that is all it takes to establish a constitutional claim as well, and the supposed procedures required are actually a requirement to satisfy the *substantive* duty, then the difference between substantive and procedural due process becomes meaningless. *Id*., at 65a ("If the majority is correct, it will always be possible for plaintiffs to re-characterize their substantive due process claims against arbitrary action by executive officials as 'procedural due process' claims, thus avoiding the Supreme Court's exacting 'shocks the conscience' test and getting, instead, the balancing test of *Mathews.* It will always be possible to say that, before they took the complained-of action, the executive officials should have engaged in some additional deliberative process, which might have averted the problem."); *id*., at 66a-67a ("The effect of allowing claims that are essentially substantive to masquerade as procedural is to collapse the distinction between the two components of due process and to expand greatly the liability of state and local governments"); *cf. Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 541 (1985) ("the Due Process

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[6] Colorado permits tort claims against government officials, for example, for willful and wanton misconduct. C.R.S. § 24-10-118 (2004).

Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. 'Property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty").

Even if limited to cases where restraining orders are involved, the Tenth Circuit's approach substantially undermines *DeShaney* and shifts constitutional responsibility for private violence onto government's shoulders. Moreover, as is more likely, if the reasoning of the Tenth Circuit decision is followed in all cases where a statutory obligation is made specific to an individual in numerous other ways beyond protective orders, then *DeShaney* will largely become meaningless.

Every other circuit to have considered the issue has rejected the Tenth Circuit's reasoning.

Every other circuit to have considered the issue presented here has rejected it, primarily on the ground that it would circumvent *DeShaney*. For example, in *Doe by Nelson* v. *Milwaukee County*, 903 F.2d 499 (CA7 1990), the Seventh Circuit, in an opinion by Judge Easterbrook, considered the identical procedural due process claim successfully pressed before the Tenth Circuit here. Wisconsin law mandated certain investigator procedures once a report of child abuse was received, so "[f]aced with the obstacle posed by *DeShaney* to their substantive due process challenge, the Does . . . attempted to assert a violation of their *procedural* due process rights." 903 F.2d, at 502. The Seventh Circuit rejected the Does' attempt to circumvent *DeShaney*, both because of the "elusiveness of the Does' claimed entitlement"—essentially a claim for procedure before being deprived of procedure—and because it could not conceive of any process that "could possibly suffice to prevent the wrongful 'deprivation' of an investigation that [was]

supposed to be accomplished within 24 hours of the filing of the report." *Id*., at 504. The Court realized that if such claims were allowed, fire departments would "be required to hold a hearing before failing to appear at a reported blaze, lest it run afoul of the Fourteenth Amendment," and that "[s]uch a rule would trivialize the Constitution . . . ." *Id*., at 504-05.

The D.C. Circuit reached the same conclusion six years later in *Doe by Fein* v. *District of Columbia*, 93 F.3d 861 (CADC 1996). District of Columbia law mandated certain procedures upon the receipt of a report of child neglect. *See id*., at 867 n.8 (citing statutory provisions). Nevertheless, the court rejected the procedural due process claim raised in the case as "severely flawed." *Id*., at 868. "[S]tate-created *procedures* do not create" an entitlement protected by the Due Process Clause, held the court, unless the plaintiff could "show that the procedures that the [government] allegedly failed to follow were enacted pursuant to a substantive constitutional obligation to protect [the plaintiff] from abuse or neglect"—a showing foreclosed by *DeShaney*. *Id*. Indeed, the D.C. Circuit, unlike the Tenth Circuit below, found the procedural due process claim "to be little more than a recasting of the substantive due process claim rejected by the Supreme Court in *DeShaney*." *Id*.; *see also Jones* v. *Union County, Tennessee*, 296 F.3d 417, 419 (CA6 2002) (finding a *Roth*-type claim for failure to serve a protection order and to provide the required protection "simply misplaced"); *cf*. *Hennepin County*, 858 F.2d, at 1328-29 (pre-*DeShaney* case rejecting *Roth*-type claim to provision of child welfare services).

To be sure, the Tenth Circuit attempted below to distinguish some of these conflicting decisions, primarily by asserting that the property interest here was created by a restraining order in conjuction with a statute, not by a statute alone. PA 10a n.4. That distinction simply is unavailing. As Judge Kelly correctly noted in his dissenting opinion, the

distinction drawn by the Tenth Circuit majority between procedures mandated by a statute, and those mandated by a restraining order *coupled with* a statute, is "largely a distinction without a difference." PA 45a. Moreover, it does not even serve to distinguish several of the conflicting circuit decisions, even if it had merit. *Jones*, for example, clearly involved both an ex parte restraining order and mandatory statutory language. 296 F.3d, at 420. *Doe by Nelson* and *Doe by Fein* both involved specific reports of child neglect that triggered the statutory enforcement procedures for a particular person, just as the restraining order provided to Ms. Gonzales below triggered the procedures specified by Colorado law *on behalf of a particular person . . . .*" Pet. App. 18a n.9 (emphasis added). The broad, undifferentiated mandate of a state statute becomes focused on particular individuals (and hence gives rise to a protectable property interest under the Tenth Circuit's holding) as much by the filing of a specific child abuse report with an executive branch official as by the reporting that a specific restraining order issued by a judicial official has been violated. Indeed, if the Tenth Circuit decision is read to support the proposition that a protectable, *Roth*-type property interest arises *only* when a judicial order is coupled with mandatory language in a state statute, then it would seem that *only* the courts are capable of creating *Roth*-type interests—certainly not a result envisioned by this Court in *Roth* itself.

In sum, none of the other Circuits to have considered the issue presented here have permitted a procedural due processs claim to circumvent this Court's holding in *DeShaney*. The Tenth Circuit below read footnote 2 in *DeShaney* as not only authorizing but embracing an exception large enough to swallow the *DeShaney* rule itself. This Court's passing reference to *Roth* should not be so read; its citation of *Morrissey* suggests that it did not envision a *Roth*-type exception of anywhere near the breadth of that adopted by the Tenth Circuit below, if at all; and the ongoing

vitality of the sensible rule adopted in *DeShaney* depends on not creating a *Roth*–type exception of such breadth.

II. Colorado Law Did Not, and the Federal Courts Therefore Cannot, Create a *Roth*-Type Property Interest in Enforcement of Restraining Orders.

Even if some sort of the procedural due process claim not considered in *DeShaney* were now to be recognized, this Court made clear in *DeShaney* that, under *Roth*, it would first look to state law to determine whether a *Roth*-type interest even existed. As described in *Roth*:

> [P]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Roth, 408 U.S., at 577.

Properly interpreted, Colorado law has not created a *Roth*-type entitlement here, and the decision by the Tenth Circuit to the contrary has supplanted the State's enforcement procedures with a court-imposed regime of constitutional liability.

A. Colorado has simply established directory procedures for enforcement of restraining orders.

The Tenth Circuit held that mandatory language (the word "shall") in the boilerplate "Notice to Law Enforcement Officials" section on the back side of the standard-form restraining order issued to Mr. Gonzales, which parrots mandatory language in a state statute, conferred on Ms. Gonzales a property interest in police enforcement *vel non* that can only be deprived in accord with procedural due process requirements. Yet read against existing state rules

and understandings, as *Roth* requires, Colorado law has not created any such entitlement.

The back side of the temporary restraining order issued to Mr. Gonzales contains the following, pre-printed "Notice to Law Enforcement Officials," which closely tracks the language of Section 18-6-803.5(3) of the Colorado Revised Statutes set forth above, *supra*, at 3:

> YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING 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 AND THE RESTRAINED PERSON HAS BEEN PROPERLY SERVED WITH A COPY OF THIS ORDER OR HAS RECEIVED ACTUAL NOTICE OF THE EXISTENCE OF THIS ORDER. YOU SHALL ENFORCE THIS ORDER EVEN IF THERE IS NO RECORD OF IT IN THE RESTRAINING ORDER CENTRAL REGISTRY. YOU SHALL TAKE THE RESTRAINED PERSON TO THE NEAREST JAIL OR DETENTION FACILITY UTILIZED BY YOUR AGENCY. YOU ARE AUTHORIZED TO USE EVERY REASONABLE EFFORT TO PROTECT THE ALLEGED VICTIM AND THE ALLEGED VICTIM'S CHILDREN TO PREVENT FURTHER VIOLENCE. YOU MAY TRANSPORT, OR ARRANGE TRANSPORTATION FOR, THE ALLEGED VICTIM AND/OR THE ALLEGED VICTIM'S CHILDREN TO SHELTER.

PA 91a-92a.[7]

The conditional and discretionary nature of this supposed "mandate" to law enforcement officials is evident throughout, beginning with the very first sentence directing police to use "every *reasonable* means" to enforce the order. PA 91a (emphasis added). Law enforcement is not directed to make an "arrest" in every instance, but may instead seek a warrant for arrest whenever arrest "would be impractical under the circumstances," and in either case only when the officer has "information amounting to probable cause that the restrained person has violated or attempted to violate any provision" of the order. PA 92a. The back side of the restraining order also contains a notice to restrained parties that bolsters the conditional and discretionary nature of the obligation imposed on law enforcement officials: The restrained person "*may* be arrested without notice if a law enforcement officer has probable cause to believe that [the restrained person has] knowingly violated" the order. PA 91a (emphasis added).

Additionally, section 18-6-803.5(5) gives police immunity from suit when "arresting a person for violating a protection order *or otherwise enforcing a protection order*," thus indicating that enforcement other than arrest is contemplated by the statutory scheme. The Colorado Governmental Immunity Act immunizes law enforcement officers from suit except for "willful and wanton" conduct, C.R.S. § 24-10-118, thereby further suggesting that Colorado did not intend to create a property interest, the deprivation of which could subject law enforcement officers to constitutional remedies much more far-reaching than the remedies permitted by state law. Moreover, an arrest (and subsequent prosecution) for

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[7] The text of the restraining order that was included in the Petition Appendix at 89a-92a inadvertently omitted from page 92a the phrase, "AND THE RESTRAINED PERSON HAS BEEN PROPERLY SERVED WITH A COPY OF THIS ORDER." That omission has been corrected in the block quotation above.

violating the terms of a restraining order, which Ms. Gonzales believes is mandatory, would be unconstitutional if the conduct had already resulted in the imposition of criminal contempt sanctions by the court itself. *See In re Marriage of Helmich*, 937 P.2d 897, 901-02 (Colo. App. 1997) (Criswell, J., concurring in part and dissenting in part) (citing *Blockburger* v. *United States*, 284 U.S. 299 (1932); *United States* v. *Dixon*, 509 U.S. 688 (1993)); *see also* C.R.S. § 18-6-803.5(3)(d) ("The arrest and detention of a restrained person is governed by applicable constitutional and applicable state rules of criminal procedure").

A simple example demonstrates the common-sense reading of the Colorado enforcement regime as discretionary and conditional rather than mandatory. The initial restraining order provided, *inter alia*, that Mr. Gonzales "shall remain at least 100 yards away from [Ms. Gonzales's home] at all times." PA 90a.[8] There is no *mens rea* requirement in the order itself (although the pre-printed notice to restrained parties on the back of the order makes clear that a "knowing violation" of the order would be a crime, and the Colorado Supreme Court has read a "knowing" requirement into the statute, *see People v. Coleby*, 34 P.3d 422, 424 (Colo. 2001)). Read strictly, therefore, the notice to law enforcement language would have required police either to arrest Mr. Gonzales or seek a warrant for his arrest if he was even inadvertently one foot inside the 100-yard mark, when a simple "step back" request would have sufficed. That absurd result[9] hardly qualifies as a "reasonable means" of

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[8] As noted in note 1 above, the order was subsequently modified to permit Mr. Gonzales to pick up the children directly from Ms. Gonzales's home for the "parenting time" to which he was entitled, including a mid-week dinner visit.

[9] Another absurdity results from the interplay between the *mens rea* requirement for successful criminal prosecution, and the facial lack of any such requirement for an arrest to be required (as Ms. Gonzales

enforcing the restraining order, so the mandatory "shall arrest" language must obviously be read in light of the "reasonable means" requirement of the first sentence. *See State* v. *Nieto*, 993 P.2d 493, 501 (Colo. 2000) (statutory terms must be read in light of the entire statute, and be interpreted so as to avoid absurdity). As a result, at least some measure of the reasonable discretion traditionally afforded to law enforcement is introduced into the whole enforcement scheme. *See, e.g.*, *People* v. *Hauseman*, 900 P.2d 74, 78 (Colo. 1995) (describing police discretion in conducting an inventory search); *May* v. *People*, 636 P.2d 672, 682 (Colo. 1981) (discussing discretion in law enforcement); *Cooper* v. *Hollis*, 600 P.2d 109, 111 (Colo. App. 1979) ("it is frequently said that a police officer exercises discretion when making decisions in the performance of his duties" (though only policy-making decisions are entitled to qualified immunity)).

Yet even that level of discretion destroys Ms. Gonzales's claim of entitlement. As Judge Kelly correctly noted in his dissenting opinion below, this Court has repeatedly held that mandatory language in a state statute or regulation creates a liberty or property interest protected by the Due Process Clause only if the language "require[s] that a *particular* result is to be reached upon a finding that the substantive predicates are met." PA 48a (quoting *Kentucky Dep't of Corr.* v. *Thompson*, 490 U.S. 454, 464 (1989)) (emphasis added); *see also Olim*, 461 U.S., at 249-50 (finding no liberty interest in limiting prison transfers where regulations did not place substantive limits on discretion); *Sandin* v. *Conner*, 515 U.S. 472, 481 (1995) (holding that liberty interest is created only where mandatory language and substantive predicates "would produce a particular outcome").

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interprets the restraining order and statutory language) for even inadvertent violations of the restraining order.

The "substantive predicate" here—a finding of probable cause by police—is a predicate with almost infinite gradations, depending on the particular facts and circumstances of each case. *See, e.g.*, *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964); *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949). Even assuming the probable cause predicate was crystal clear in every instance, however, there are at least two, and perhaps many more, possible results permitted once that predicate is met, not the single "particular result" required by *Thompson*. Police may make an arrest, or they may merely seek a warrant for an arrest if an arrest is impractical under the circumstances. C.R.S. § 18-6-803.5(3)(b). Additionally, they apparently may use other "reasonable means" of enforcing the restraining order in the traditional exercise of their own judgment. C.R.S. § 18-6-803.5(3)(a); *see also* C.R.S. § 18-6-803.5(5) ("A peace officer arresting a person for violating a protection order *or otherwise enforcing a protection order*" shall not be liable absent bad faith) (emphasis added).

What the entirety of the text strongly suggests here is confirmed by Colorado's own courts interpreting the word "shall" in analogous statutes. Although the word "shall" within a statute is generally presumed to be mandatory, *Morgan* v. *Genesee Co., LLC*, 86 P.3d 388, 393 (Colo. 2004), the Colorado courts have recognized that the presumption obtains "[*u*]*nless the context indicates otherwise*." *DiMarco* v. *Department of Revenue, Motor Vehicle Division*, 857 P.2d 1349, 1352 (Colo. App. 1993) (emphasis added). Oftentimes, the word is merely "directory," and not mandatory. *Id*. "'Shall,' in addition to its mandatory meaning, also can mean 'should,' 'may,' or 'will.'" *Verrier* v. *Colorado Dep't of Corrections*, 77 P.3d 875, 878 (Colo. App. 2003) (citing BLACK'S LAW DICTIONARY 1379 (7th ed. 1999)). It should be read and considered in conjunction with the statute as a whole, and should not be read so as to lead to an absurd result. *Nieto*,

993 P.2d, at 501. On both counts, this statute's "shall" must be read as directory rather than mandatory.

Moreover, this entire statutory enforcement scheme operates against a background of discretion on the part of law enforcement officials in determining whether to make an arrest in particular circumstances. *Hauseman*, 900 P.2d, at 78; *May*, 636 P.2d, at 682; *Cooper*, 600 P.2d, at 111. Thus, the context—both textual and background—in which the word "shall" appears in the restraining order and parallel statute strongly indicates that it is directory, not mandatory. As such, it does not give rise to a *Roth*-type property interest protected by procedural due process requirements.

Even if "shall" is read as mandatory, Colorado has simply mandated enforcement procedures; it has not created a property interest either in ongoing police protection or in enforcement according to those procedures.

Beyond its interpretive error in treating Colorado's statutory scheme as mandatory rather than directory, the Tenth Circuit also erroneously conflated procedural requirements with substantive right.

Judge Kelly aptly described in his dissenting opinion below that the Colorado statute (and TRO) at issue here sets out a criminal offense "and then contains procedure on how the offense is to be prosecuted." PA 47a. He then noted that mere procedure contained in a statute does not create a property interest. *Id*. (citing *Olim*, 461 U.S., at 250-55); *see also* PA 74a (O'Brien, J., dissenting) (making similar point).

This Court's decision in *Olim*, relied on by Judge Kelly, involved a procedural due process claim by a prisoner challenging the decision by Hawaii prison officials to transfer him to a prison in California in violation of the procedures mandated by Hawaii law. 461 U.S., at 243. Rejecting the claim that the mandatory language in the State's regulations created a protectable liberty interest, this Court noted:

> Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement . . . . The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, . . . but in making that choice the State does not create an independent substantive right.

Id., at 250-51.

The Tenth Circuit's approach focusing on the mandatory language in the Colorado arrest procedure, rather than on the nature of the interest alleged, was explicitly rejected by this Court in *Sandin* as erroneously based on the "somewhat mechanical dichotomy" between mandatory and discretionary state procedures. 515 U.S., at 479. Even mandatory procedures do not create a protectable interest, according to the Court in *Sandin*, when the "nature" of the interest addressed by the procedures is not an interest of "real substance." *Id.*, at 480.

Sandin involved prison procedures, of course, but there is no coherent reason for applying its holding that statutory procedural mandates do not create constitutionally protectable interests in the prison setting but not in the law enforcement setting at issue here, at least with respect to Ms. Gonzales's claim of entitlement to those procedures.[10] *Sandin* is, therefore, all but dispositive. Colorado's use of

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[10] This Court did suggest in *Sandin* that part of the old jurisprudence it was abandoning in the case, namely, the drawing of negative inferences from mandatory language in the text of prison regulations, "may be entirely sensible in the ordinary task of construing a statute defining rights and remedies available to the general public." 515 U.S., at 481. But that bit of *dicta* suggests only that *Mr. Gonzales* would have a right *not to be arrested—i.e.,* not to be deprived of his traditional liberty interest in freedom from restraint—without a finding of probable cause, not that *Ms. Gonzales* has a constitutionally-protected interest in having him arrested upon a finding of probable cause.

"shall" in its statutory enforcement scheme, even if read as mandatory, does not confer upon Ms. Gonzales a constitutional entitlement to have her ex-husband arrested. Rather, it only establishes state procedures for the enforcement of ordinary criminal law, which per *DeShaney* does not create a substantive constitutional right.

By invoking *Roth* to impose procedural due process liability, the Tenth Circuit has created a federal remedy that supplants the much more limited remedies provided by Colorado itself.

One of the reasons given by this Court in *Sandin* for abandoning the methodology previously employed in *Hewitt* v. *Helms*, 459 U.S. 460 (1983), was the "undesirable effect" that the *Hewitt* approach had "led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." 515 U.S., at 482. This Court further noted that the *Hewitt* approach ran "counter to the view expressed in several of [this Court's] cases that federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." *Id*., at 482-83 (citing *Wolff* v. *McDonnell*, 418 U.S. 539, 561-63 (1974); *Hewitt*, 459 U.S., at 470-471; and *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977)).

What is true in the prison setting at issue in *Sandin* is equally true of law enforcement activities more generally, including those at issue here. Federal courts ought to afford appropriate deference and flexibility to state officials trying to balance numerous, volatile, and often competing law enforcement obligations.

Colorado has sought to direct the efforts of law enforcement by providing guidelines for the enforcement of restraining orders, but it provided law enforcement officers immunity from suit for any failure to follow those guidelines unless their conduct was "willful and wanton," and even then

authorized tort remedies, not constitutional ones. *Sandin* counsels that Colorado's enforcement regime should be given deference by the federal courts, not trumped with an expansive reading of the Due Process Clause.

III. Affording Procedural Due Process Requirements Before State Officials *Fail* to Protect Against Private-Party Violence Would Be Utterly Impractical.

Judge Easterbrook's decision for the Seventh Circuit in *Doe by Nelson* highlights another important basis for rejecting the Tenth Circuit's rule in this case. He could not conceive of any process that "could possibly suffice to prevent the wrongful 'deprivation' of an investigation that [was] supposed to be accomplished within 24 hours of the filing of the report." 903 F.2d, at 504. Yet conceiving of appropriate procedures before a police department *fails* to enforce a restraining order is just what the Tenth Circuit has now required of the district courts under its jurisdiction.

Just framing the question demonstrates the difficulty with the Tenth Circuit's position. This is not a case where the police department affirmatively sought to have Ms. Gonzales's protection order revoked, where requirements of notice and a hearing before a neutral arbiter would make some sense. Rather, the Tenth Circuit majority has now required some kind of process every time the police fail to act, or decline to act with sufficient dispatch, at the behest of one who holds a protection order, apparently without regard to whether the requested action was warranted, whether the necessary manpower was available, or even whether a city-wide emergency prevented an immediate response.

Just what level of process will be required under such a regime was largely left unanswered by the Tenth Circuit majority, which mentioned only a "right to be heard" "at a meaningful time and in a meaningful manner." PA 30a (quoting *Mathews*, 424 U.S., at 333). Whatever is required at

this "meaningful hearing," it is apparently more than that suggested by Judge Hartz in dissent: the right to "(1) to present evidence of a violation of the order and (2) to argue why an arrest is the proper response to the violation." PA 91a. Ms. Gonzales *was* afforded that opportunity. That the police allegedly did not act on the information she provided, or allegedly did not, in hindsight, reach the correct judgment, is not a function of the process that was afforded, but of the substantive conclusion reached (assuming it was even a *conclusion*, rather than merely inadvertent inaction), as Judge McConnell correctly pointed out in his dissent. PA 58a.

Nevertheless, if the Tenth Circuit's decision were to be adopted by this Court, the lower courts will be required to undertake the tall task of designing the procedures that will be required before a police officer *fails* to act, and to hold municipal governments to the predictably disastrous consequences of liability for violating whatever procedures are conceived.

IV. Expanding Constitutional Liability in this Case Would Open the Door to Thousands, if Not Millions of Claims, Supplanting State Tort Law and Imposing Crushing Levels of Liability on State and Local Governments.

B. The Tenth Circuit's decision would convert hundreds of procedural mandates into constitutional claims.

Under the Tenth Circuit's reasoning, countless other statutes already on the books will give rise to constitutional claims asserting procedural due process violations whenever the police or other governmental officials are unsuccessful at thwarting private violence. In Massachusetts, for example, "Law enforcement officers *shall* use every reasonable means to enforce . . . abuse prevention orders." Mass. Gen. Laws ch. 209A, § 7. As with the Colorado statutory scheme at

issue here, the Massachusetts statute contains mandatory language and is coupled with a particular prevention order. In Minnesota, "A peace officer *shall* arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated [a domestic abuse protection] order." Minn. Laws § 518B.01(e). Again, mandatory language is coupled with a protection order.

Other events may also trigger procedures specified in a state enforcement statute. For example, In New Jersey, "The Bureau of Children's Services . . . *shall* upon receipt of [a] report [of suspicious injury to a child], take action to insure the safety of the child." N.J. Stat. Ann. § 9:6-8.18. *See also, e.g.*, 750 Ill. Comp. Stat. 60/304 ("Whenever a law enforcement officer has reason to believe that a person has been abused, neglected, or exploited by a family or household member, the officer shall immediately use all reasonable means to prevent further abuse, neglect, or exploitation"); Ore. Rev. Stat. § 133.055(2)(a) ("when a peace officer responds to an incident of domestic disturbance and has probable cause to believe that an assault has occurred between family or household members, . . . the officer *shall* arrest and take into custody the alleged assailant"); Tenn. Code Ann. § 36-3-611(a)(2) ("Any law enforcement officer *shall* arrest the respondent without a warrant if . . . [t]he officer has reasonable cause to believe the respondent has violated or is in violation of an order for protection") (emphasis added throughout).

Even assuming, *arguendo*, a narrow construction of the holding below as limited to situations where a restraining order combines with a statute to create a "property" interest, such situations will arise under numerous statutory schemes throughout the country. As *amici* have noted, nineteen states in addition to Colorado require an arrest where there is probable cause to believe that a protection order has been violated. Brief of *Amici Curiae* International Municipal

Lawyers Association and National League of Cities in Support of the Petition ("IMLA Br."), at 5 (citing statutes).

The Tenth Circuit's holding will also apply to other statutory provisions in Colorado and elsewhere. For example, section 19-3-316(1)(d) of the Colorado Revised Statutes provides: "At any time that [a] law enforcement agency . . . has reason to believe that a violation of [a child protection order] has occurred, it *shall* enforce the order." (Emphasis added). The child protection order, coupled with the mandatory language in the statute, will give rise to constitutional claims of municipal liability for every failure to protect against private violence. Not only will municipal governments be besieged with such claims, but they will effectively become insurers against third party violence should the Tenth Circuit's holding be allowed to stand.

Restraining orders are issued routinely in Colorado and throughout the country in a wide variety of cases. As *amici* have noted, such orders are issued in ordinary criminal cases in addition to domestic violence or custody cases. IMLA Br. at 4-5. A simple Westlaw search reveals over 4,000 cases discussing violations of restraining orders.[11] And the number of cases that actually made it into Westlaw surely underestimates the number of restraining orders issued, and even the number of violations of such orders, by a substantial amount. In short, there is nothing unique about the circumstances that gave rise to this case, and the Tenth Circuit's rule, if adopted by this Court, has the potential to spawn thousands of due process claims that could bankrupt municipal governments in the process, given the inevitability of less-than-perfect enforcement. Even if unsuccessful, the flood of claims would be a tremendous burden on municipal governments.

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[11] Search conducted on October 14, 2004 of all federal and state cases using the search phrase violat! /10 restraining /2 order, which yielded 4214 cases.

Alternatively, the decision could result in a weakening of state statutes for which victims' advocates have lobbied. *Compare* N.J. Stat. Ann. § 2C:25-7 (1981) (repealed 1982), with *id.* § 2C:25-23 (West Supp. 1992); *see also Developments in the Law: Legal Responses to Domestic Violence, Part IV*, 106 HARV. L. REV. 1551, 1564 n. 88 (May 1993) (New Jersey's action "may well be an example of how the prospect of the enforcement of entitlement rights through liability suits may in fact deter the kind of progressive legislation that battered women seek"); *Sandin*, 515 U.S., at 482 (rejecting claim that protectable liberty interests arise from mandatory procedural regulations because of the "undesirable" effect of creating "disincentives for States to codify prison management procedures in the interest of uniform treatment"). Federal courts should not lay such a heavy hand on evolving state efforts to address such quintessentially local issues of crime and violence. *Cf. Sandin*, 515 U.S., at 482 (describing as one "undesirable effect" of treating mandatory procedural regulations as a liberty interest "the involvement of federal courts in the day-to-day management of prisons").

Nor is the Tenth Circuit's reasoning limited to domestic violence statutes. A police officer's failure promptly to eject a trespasser would give rise to constitutional liability in the face of mandatory statutory language coupled with a specific ejectment order.[12] Police discretion in enforcing noise

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[12] *See, e.g.*, Ark. Code Ann. § 18-16-507 ("Upon receipt of a writ of ejectment from the clerk of the circuit court, the sheriff or police chief *shall immediately* proceed to execute the writ in the specific manner described in this section and, if necessary, ultimately by ejecting from the property described in the writ the defendant"); N.H. Rev. Stat. § 540:13-c ("a writ of possession shall be issued and the sheriff *shall evict* the tenant as soon as possible"); Virgin Islands Code § 407 ("In the event any person is illegally on the property of the hotel, the hotelkeeper may solicit the aid of any member of the police, and it *shall* be the obligation of every member of the Police Force, at the request of the hotelkeeper, to

ordinances would be replaced by a regime of constitutional liability for failure to enforce.[13] A State's failure promptly to enforce patent protection statutes would give rise to claims of constitutional violations.[14] And countless statutory mandates describing the rules by which police, fire fighters, and ambulance drivers undertake their jobs would result in constitutional claims for any shortcomings.[15]

The impact on State and Local Government would be devastating.

Judge O'Brien aptly described in his dissenting opinion below the new order that will prevail for municipal liability if the Tenth Circuit's decision is affirmed. "Qualified immunity has now been substantially eroded, if not eliminated," he said, "in all cases based upon mandatory and

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evict immediately such person from the property of the hotel and with the use of force no greater than the circumstances require").

[13] *See, e.g.*, D.C. Stat. § 22-1321 ("Whoever, with intent to provoke a breach of the peace, . . . acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others, . . . shall be fined not more than $250 or imprisoned not more than 90 days, or both");

[14] *See* N.D. Stat. § 4-24-13 ("Within sixty days from the date [samples from genetically-engineered crops] are taken, an independent laboratory shall conduct all tests to determine whether patent infringement has occurred").

[15] *See, e.g.*, Kan. Rev. Stat. § 189.940 ("upon approaching any red light . . . [the driver of an emergency vehicle] *shall* slow down as necessary for safety to traffic"); La. Rev. Stat. § 28:53 ("If necessary, peace officers shall apprehend and transport . . . a [substance abuse] patient on whom an emergency certificate has been completed to a treatment facility at the request of either the director of the facility, the certifying physician or psychologist, the patient's next of kin, the patient's curator, or the agency legally responsible for his welfare"); Maine Animal Welfare Act, Me. Rev. Stat. 7 § 3906-B(11) ("The commissioner, in cooperation with animal control officers, *shall* investigate complaints of cruelty to animals and enforce cruelty-to-animal laws"); Mass. Gen. L. Ann. 111C § 1 ("A[n emergency medical services] service zone provider shall be staffed and equipped to be available for primary ambulance service or EMS first response 24 hours a day, seven days a week").

directive language contained in a statute." PA 81a. "Almost any such case, cleverly pled, will survive a motion to dismiss and quite possibly a motion for summary judgment," he added, noting the "rippling effects" that will flow from the fact that "[w]ith the loss of immunity from liability goes the loss of immunity from suit." *Id.*

Judge O'Brien rhetorically wondered, for example, whether the Superintendent of the Colorado Mental Health Institute and the district attorney would be liable if, after having probable cause that a conditionally-released mentally ill patient was no longer eligible for conditional release, the patient caused some injury, or whether police departments would be liable to a victim of a drunk or underage driver for failing to ensure that no alcoholic beverages were ever sold by an unlicensed vendor—the relevant Colorado statutes contain the same kind of mandatory language found in the statute at issue here. *Id*. at 81a n.12 (citing Colo. Rev. Stat. §§ 16-8-115.5; 12-47-301(4)(a)).

Whether or not the States wish to become insurers against private violence and open themselves up to such crippling liability, it should be their decision, not the decision of the federal courts expansively interpreting the Due Process Clause.

CONCLUSION

For the foregoing reasons, the decision of the Tenth Circuit should be reversed, and the decision of the District Court granting Defendants' Motion to Dismiss should be reinstated.

Respectfully submitted,

THOMAS S. RICE
ERIC M. ZIPORIN
Counsel of Record
Senter Goldfarb & Rice, L.L.C.
P.O. Box 22833
Denver, CO 80222

JOHN C. EASTMAN
c/o Chapman University
School of Law
One University Drive
Orange, CA 92866

(303) 320-0509

ERIK S. JAFFE
Erik S. Jaffe, P.C.
5101 34th Street, NW
Washington D.C. 20008

Counsel for Petitioners

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