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

RESPONDENT'S BRIEF ON THE MERITS

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ADDITIONAL STATUTORY PROVISIONS

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) excluding a party from the family home or from the home of the other party upon a showing that physical or emotional harm would otherwise result.

C.R.S. § 14-10-109 states:

> The duties of peace officers enforcing orders issued pursuant to section 14-10-107 or 14-10-108 shall be in accordance with section 18-6-803.5, C.R.S., and any rules adopted by the Colorado supreme court pursuant to said section.

C.R.S. § 18-6-803.7 provides in relevant part:

> (1) As used in this section:
>
> (a) "Bureau" means the Colorado bureau of investigation.
>
> (b) "Protected person" means the person or persons identified in the restraining order as the person or persons for whose benefit the restraining order was issued.
>
> (c) "Registry" means a computerized information system.

(d) "Restrained person" means the person identified in the order as the person prohibited from doing the specified act or acts.

(e) "Restraining order" means any order that prohibits the restrained person from contacting, harassing, injuring, intimidating, molesting, threatening, or touching any person, or from entering or remaining on premises, or from coming within a specified distance of a protected person or premises, that is issued by a court of this state or an authorized municipal court, and that is issued pursuant to . . . section 14-10-108, C.R.S.,. . . .

(f) "Subsequent order" means an order which amends, modifies, supplements, or supersedes a restraining order.

(2)(a) There is hereby created in the bureau a computerized central registry of restraining orders which shall be accessible to any state law enforcement agency or to any local law enforcement agency having a terminal which communicates with the bureau. The central registry computers shall communicate with computers operated by the state judicial department.

(b) Restraining orders and subsequent orders shall be entered into the registry by the clerk of the court issuing the restraining order; except that orders issued pursuant to sections 18-1-1001 and 19-2-707, C.R.S., shall be entered into the registry only at the discretion of the court or upon motion of the district attorney. The clerk of the court issuing the restraining order shall be responsible for updating the registry electronically in a timely manner to ensure the notice is as complete and accurate as is reasonably possible with

regard to the information specified in subsection (3) of this section.

(c) The restrained person's attorney, if present at the time the restraining order or subsequent order is issued, shall notify the restrained person of the contents of such order if the restrained person was absent when such order was issued.

(d) Restraining orders and subsequent orders shall be placed in the registry not later than twenty-four hours after they have been issued; except that, if the court issuing the restraining order or subsequent order specifies that it be placed in the registry immediately, such order shall be placed in the registry immediately.

(e) Upon reaching the expiration date of a restraining order or subsequent order, if any, the bureau shall note the termination in the registry.

(f) In the event the restraining order or subsequent order does not have a termination date, the clerk of the issuing court shall be responsible for noting the termination of the restraining order or subsequent order in the registry.

(3)(a) In addition to any information, notice, or warning required by law, a restraining order or subsequent order entered into the registry shall contain the following information, if such information is available:

(I) The name, date of birth, sex, and physical description of the restrained person to the extent known;

(II) The date the order was issued and the effective date of the order if such date is different from the date the order was issued;

(III) The names of the protected persons and their dates of birth;

(IV) If the restraining order is one prohibiting the restrained person from entering in, remaining upon, or coming within a specified distance of certain premises, the address of the premises and the distance limitation;

(V) The expiration date of the restraining order, if any;

(VI) Whether the restrained person has been served with the restraining order and, if so, the date and time of service; and

(VII) The amount of bail and any conditions of bond which the court has set in the event the restrained person has violated a restraining order.

(b) If available, the restraining order or subsequent order shall contain the fingerprint based state identification number issued by the bureau to the restrained person.

STATEMENT OF THE CASE

The Respondent, Jessica Gonzales, brought an action under 42 U.S.C. § 1983 in the United States District Court for the District of Colorado against the Petitioner and three of its police officers. Ms. Gonzales' complaint alleged that the due process rights of her and her three (now deceased) daughters under the Fourteenth Amendment to the United States Constitution had been violated by the individual police officers because of their failure and

refusal to enforce a restraining order against Ms. Gonzales' estranged husband. The complaint also asserted a claim against the Petitioner based on its failure to train its law enforcement officers properly, and its maintenance of an official custom or policy of failing and refusing to respond properly to restraining order violations, pursuant to *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

Before any answer to the complaint was filed, the district court dismissed the complaint on a motion made under Fed. R. Civ. P. 12(b)(6), holding that neither the procedural nor substantive components of the Due Process Clause provided the basis for a cognizable claim against the Petitioner or any of the individual officers. PA at 113a-123a. A panel of the Tenth Circuit Court of Appeals unanimously affirmed the district court's ruling as to the substantive due process claim, but reversed the district court's determination that Ms. Gonzales failed to state a cognizable claim for the violation of her and her daughters' procedural due process rights. PA at 99a-112a. On rehearing *en banc*, the Tenth Circuit Court of Appeals held that Ms. Gonzales was entitled to proceed against the Petitioner on her *Monell* procedural due process claim, but further held that the individual police officers were entitled to qualified immunity as to the procedural due process claim against them. PA at 1a-44a.

On May 21, 1999, Ms. Gonzales obtained a temporary restraining order limiting her husband's ability to have contact with her and their daughters, aged ten, nine and seven. The restraining order was issued by a state court in accordance with Colo. Rev. Stat. § 14-10-108, and commanded in part that Mr. Gonzales "not molest or disturb the peace of [Ms. Gonzales] or . . . any child." PA at 89a-92a. The restraining order further stated "the court . . .

finds that physical or emotional harm would result if you are not excluded from the family home," and directed Mr. Gonzales to stay at least 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). Neither parent nor the daughters could unilaterally change the terms of the order because it explicitly states:

> IF YOU VIOLATE THIS ORDER THINKING THE OTHER PARTY OR A CHILD NAMED IN THIS ORDER HAS GIVEN YOU PERMISSION, YOU ARE WRONG, AND CAN BE ARRESTED AND PROSECUTED. THE TERMS OF THIS ORDER CANNOT BE CHANGED BY AGREEMENT OF THE OTHER PARTY OR THE CHILD(REN), ONLY THE COURT CAN CHANGE THIS ORDER.

The restraining order also contained explicit terms directing law enforcement officials that they "shall use every reasonable means to enforce" the restraining order, they "shall arrest" or where impractical, seek an arrest warrant for those who violate the restraining order, and they "shall take the restrained person to the nearest jail or detention facility. . . . " *Id*.

Upon the trial court's issuance of the restraining order, and pursuant to Colo. Rev. Stat. § 18-6-803.7(2)(b), the order was entered into the state's central registry for such protective orders, which is accessible to all state and local law enforcement agencies. On June 4, 1999, the order was served on Mr. Gonzales. On that same date, upon "having heard the stipulation of the parties, and after placing the parties under oath and examining the parties

as to the accuracy of the Stipulation . . . and finding that [the] Stipulation [was] in the best interests of the minor children," 10th Cir. Appdx. at A-30; PA at 125a-126a, the state court made the restraining order permanent. The order's terms were slightly modified to detail Mr. Gonzales' rights to parenting time with his daughters on alternative weekends, and for two weeks during the summer. The order also allowed Mr. Gonzales "upon reasonable notice . . . a mid-week *dinner* visit with the minor children. Said visit shall be arranged by the parties." *Id*. (emphasis added). Finally, the order allowed Mr. Gonzales to collect the girls from Ms. Gonzales' home for the purposes of parental time. However, all other portions of the temporary restraining order remained in force, including its command that Mr. Gonzales was excluded from the family home and that he could not "molest or disturb the peace" of Ms. Gonzales or the girls. *Id*.

Despite the order's terms, on Tuesday, June 22, 1999, sometime between 5:00 and 5:30 p.m., Mr. Gonzales abducted the girls while they were playing outside their home. Mr. Gonzales had not given Ms. Gonzales advanced notice of his interest in spending time with his daughters on that Tuesday night, nor had the two previously agreed upon a mid-week visit. When Ms. Gonzales realized her daughters were missing, she suspected that Mr. Gonzales, who had a history of erratic behavior and suicidal threats, had taken them. At approximately 7:30 p.m., she made her first phone call to the Castle Rock police department requesting assistance in enforcing the restraining order against her husband. Officers Brink and Ruisi were sent to her home. Upon their arrival, she showed them a copy of the restraining order, and asked that it be enforced and her children returned to her immediately. In contradiction

to the order's terms, the Officers "stated that there was nothing they could do about the [restraining order] and suggested that Plaintiff call the Police Department again if the children did not return home by 10:00 p.m." PA at 126a-127a.

About an hour later, Ms. Gonzales spoke to Mr. Gonzales on his cellular telephone and he told her he was with the girls at Elitch Gardens, an amusement park in Denver. She immediately made a second call to the Castle Rock police department, and spoke with Officer Brink, requesting that the police find and arrest Mr. Gonzales. Officer Brink refused to do so, and suggested Ms. Gonzales wait until 10:00 p.m. to see if the girls returned home. Shortly after 10:00 p.m., Ms. Gonzales called the police department and reported to the dispatcher that her daughters had yet to be returned home by their father. She was told to wait for another two hours. At midnight, she called the police department again and informed the dispatcher her daughters were still missing. She then proceeded to Mr. Gonzales' apartment complex and found no one at home. From there, she placed a fifth call to the police department and was advised by the dispatcher to wait at the apartment complex until the police arrived. No officers ever came to the complex, and at 12:50 a.m., Ms. Gonzales went to the Castle Rock police station, where she met with Officer Ahlfinger. Officer Ahlfinger took an incident report from Ms. Gonzales, but he made no further effort to enforce the restraining order against her husband or to find her children. Instead, he went to dinner. PA at 126a-127a.

At approximately 3:20 a.m., nearly eight hours after Ms. Gonzales first contacted the police department, Mr. Gonzales arrived at the Castle Rock police station in his

truck. He got out and opened fire on the station with a semi-automatic handgun he had purchased soon after abducting his daughters. He was shot dead at the scene. The police found the bodies of the three girls, who had been murdered by their father earlier that evening, in the cab of the truck. PA at 127a.

SUMMARY OF THE ARGUMENT

The issue before this Court is distinct from the substantive due process claim addressed by this Court in *DeShaney v. Winnebago County Dep't of Soc, Servs.*, 489 U.S. 189 (1989). This Court is not being asked to address whether Ms. Gonzales had a substantive right under the Constitution to receive government protection that could not be denied without a reasonable justification in the service of a legitimate government objective. Rather, this Court must determine whether the state of Colorado created for Ms. Gonzales an entitlement that cannot be taken away from her without procedural due process, and if so, whether Castle Rock's arbitrary denial of that entitlement was procedurally unfair under the well-pleaded facts of Ms. Gonzales' complaint.

The state court's issuance of the restraining order to Ms. Gonzales, containing mandatory language and specific objective criteria curtailing the decisionmaking discretion of police officers, clearly commanded that the domestic abuse restraining order be enforced. The mandatory statute, its legislative history, and the grant of immunity to officers for the erroneous enforcement of restraining orders provides added weight to this conclusion. For this Court to hold otherwise would render domestic abuse

restraining orders utterly valueless and law enforcement agencies completely unaccountable to the legislative or judicial branches of government.

"It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). There can be no doubt Ms. Gonzales and her daughters relied on the State's promises of enforcement of the restraining order to go about their daily lives. Nor can there be any doubt, based upon the factual allegations contained in Ms. Gonzales' complaint (which must be taken as true at this stage of the proceedings), that their reliance was arbitrarily undermined by the failure of the Castle Rock police to enforce the restraining order, resulting in an unspeakably tragic outcome.

The process set up in Colorado's statutory scheme was that the police must, in a timely fashion, consider the merits of any request to enforce a restraining order and, if such a consideration reveals probable cause, the police must enforce the order. Here, Ms. Gonzales alleges that due to the city's policy and custom of failing to properly respond to complaints of restraining order violations, she was denied the process laid out in the statute. The police did not consider her request in a timely fashion, but instead repeatedly required her to call the station over several hours. The statute promised a process by which her restraining order would be given vitality through careful and prompt consideration of an enforcement request, and the Constitution requires no less. Denial of that process drained all of the value from her property interest in the restraining order.

If one considers the Constitutional process to include a right to be heard, Ms. Gonzales was deprived of that process because, according to her allegations, the police never "heard" nor seriously entertained her request to enforce and protect her interests in the restraining order. Alternatively, if one considers that the process to which she was entitled was a bona fide consideration by the police of a request to enforce a restraining order, she was denied that process as well. According to Ms. Gonzales' allegations, the police never engaged in a bona fide consideration of whether there was probable cause to enforce the restraining order. Their response, in other words, was meaningless, which rendered her property interest in the restraining order a nullity.

Based on the well-pleaded facts of Ms. Gonzales' complaint, she has adequately stated a procedural due process claim upon which relief can be granted. She had a property interest in the enforcement of the restraining order which was allegedly taken from her without due process of law. Her § 1983 action should therefore proceed in the trial court.

ARGUMENT

I. NO *DESHANEY* CONFLICT EXISTS.

The Fourteenth Amendment specifies that no State shall "deprive any person of life, liberty, or property, without due process of law. . . . " U.S. Const. Amend. XIV, § 1. This Court, in *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989), emphasized that "the Due Process Clause of the Fourteenth Amendment was intended to prevent government from 'abusing [its] power,

or employing it as an instrument of oppression'" and "'to secure the individual from the arbitrary exercise of the powers of government.'" (citations omitted). While *DeShaney* held that the Due Process Clause of the Fourteenth Amendment generally confers no affirmative right to protection against private violence, it entirely declined to address whether the State can deprive a private individual of such protection, without any procedural due process whatsoever, once it has been given by the State. In *DeShaney*, 489 U.S. 189, 195 n.2 (1989), this Court stated: "Petitioners also argue that the Wisconsin child protection statutes gave Joshua an 'entitlement' to receive protective services in accordance with the terms of the statute, an entitlement which would enjoy due process protection against state deprivation under our decision in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)."

The issue before this Court is distinct from the substantive due process claim addressed in *DeShaney*. Castle Rock asserts that, by concluding that Ms. Gonzales has a protected property right in the enforcement of her restraining order, the Tenth Circuit Court of Appeals has carved out an exception contrary to *DeShaney* and the general rule that the state does not have an affirmative duty to protect individuals from private third parties. However, *DeShaney* limited its constitutional review to whether a substantive due process right to government protection exists in the abstract, and specifically did not decide whether a state might afford its citizens an "entitlement" to receive protective services in accordance with the terms of a court order and statute, which would enjoy procedural due process protection against state deprivation under *Roth*.

A procedural due process claim is based on "a denial of fundamental procedural fairness," while a substantive claim is based on the "exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998). Ms. Gonzales is not alleging that Castle Rock's denial of her enforcement rights arose out of unjustified governmental action. Rather, her claim is that it was procedurally unfair for the Castle Rock police arbitrarily to decline to perform duties required of them pursuant to a mandatory court order which provided her a substantive property right under state law, and pursuant to a state statute commanding the same. Moreover, Ms. Gonzales is not asserting she has a right in the rare air to specific police action. Rather, pursuant to her restraining order and Colorado statutory law, the state of Colorado gave Ms. Gonzales a protected interest in police enforcement action. Hence, her case clearly falls within the rubric of procedural due process and should be analyzed as such.

A. The Opinion Below Properly Applied *Roth*.

This Court's analysis, therefore, must start with the familiar rule of *Roth*. In *Roth*, this Court noted that "property" is a "broad and majestic term." *Roth*, 408 U.S. at 571. This Court "made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money," *id*. at 571-72, and "may take many forms," *id*. at 576. "Property 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." *Id.* at 577. A property interest is created when a person has secured an interest in a specific benefit to which the individual has "a legitimate claim of entitlement." *Id.* The interest must be more than an "abstract need or desire" or a "unilateral expectation of" the benefit. *Id.*

This Court has accordingly identified property rights protected under the procedural due process clause to include continued public benefits. *Perry v. Sindermann,* 408 U.S. 593, 602-03 (1972) (a free education); *Goss v. Lopez,* 419 U.S. 565, 574 (1975) (garnished wages); *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 339 (1969) (professional licenses); *Barry v. Barchi,* 443 U.S. 55, 64 (1979) (driver's licenses); *Bell v. Burson,* 402 U.S. 535, 539 (1971) (causes of action); *Logan v. Simmerman Brush Co.,* 455 U.S. 422, 428 (1982) (the receipt of government services); *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 11-12 (1978) (utility services); *Mathews v. Eldridge,* 424 U.S. 319 (1976) (disability benefits); *Goldberg v. Kelly,* 397 U.S. 254, 262 (1970) (welfare benefits). Thus, the specific government benefit Ms. Gonzales claims, the government service of enforcing the objective terms of the court order protecting her and her children against her abusive husband, fits within the other types of *Roth* entitlements acknowledged by the Supreme Court and is properly deemed a property interest.

Although *DeShaney* made clear "that the Due Process Clauses generally confer no affirmative right to governmental aid," 489 U.S. at 196, a *Roth*-type entitlement is subject to procedural due process protections, and such protections are not contrary to *DeShaney*. The fact that, absent limited exceptions, there is no violation of the

substantive component of the Fourteenth Amendment's Due Process Clause if the State fails to protect against private violence does not mean that, once given by the State, the State can arbitrarily take such protections away without running afoul of the Clause's procedural component if they rise to the level of a *Roth*-type entitlement. Certainly, the State is under no affirmative obligation under the Due Process Clause to provide private citizens with such things as welfare or disability benefits, but, once such benefits that rise to the level of a *Roth*-type entitlement have been provided by the State, this Court consistently has held that they cannot arbitrarily be taken away without proper procedural due process protections.

B. The Circuit Court Cases Relied Upon By Petitioner Are Inapposite.

All of the cases relied upon by Petitioner in support of an alleged circuit conflict are readily distinguishable. None of those cases involved a restraining order violation, let alone the violation of a court order of any kind. Each of those cases addressed arguments that a violation of a state statute *alone* created some kind of protected property interest. *See, e.g., Jones v. Union County,* 296 F.3d 417 (6th Cir. 2002) (alleged failure by sheriff to serve *ex parte* protection order); *Doe by Fein v. District of Columbia,* 93 F.3d 861 (D.C. Cir. 1996) (alleged violation of District of Columbia statute regarding procedures for investigating child abuse and neglect); *Doe by Nelson v. Milwaukee County,* 903 F.2d 499 (7th Cir. 1990) (alleged violation of Wisconsin statute requiring social services department to investigate a report of child abuse within 24 hours); *Doe v. Hinnepin County,* 858 F.2d 1325 (8th Cir. 1988) (alleged violation of Minnesota statute regarding child abuse

investigations); *Pierce v. Delta County Dep't of Social Servs.*, 119 F. Supp. 2d 1139 (D. Colo. 2000) (alleged failure to report child abuse allegations, as required by Colorado statute); *Semple v. City of Moundsville,* 963 F. Supp. 1416 (N.D. W. Va. 1997) (alleged failure to advise of certain rights of domestic abuse victim or serve temporary protective order in violation of West Virginia statute). In the present case, the Tenth Circuit examined whether the terms of a court-issued restraining order *and* a statute mandating its enforcement created a property interest. None of the cases cited by Castle Rock contain an analogous fact pattern or analysis. Moreover, the Tenth Circuit in its recent opinion of *Jennings v. City of Stillwater,* 383 F.3d 1199 (2004), made clear that its opinion at bar is not to be construed as sanctioning the creation of a property interest out of a statutory mandate alone.

Although most of these cases have arisen in the context of child abuse allegations, *Jones* and *Semple* did involve restraining orders, albeit in completely different contexts. In *Jones*, an ex-wife sued a county and sheriff's department under § 1983, alleging, among other things, that her *substantive* due process rights were violated when she was shot by her ex-husband after the sheriff's department failed to serve him with a protection order. She made no claim that her *procedural* due process rights were violated. While analyzing the ex-wife's claim of a "special relationship" with the defendants as a result of obtaining the protective order, the Sixth Circuit stated in dicta:

> In this connection, we note that Plaintiff's reliance upon *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), for the proposition that a violation of a state statutory provision may give rise to a

> violation of a substantive due process right under the Fifth or Fourteenth Amendment is simply misplaced. *Roth* is unavailing because that case only involved the entitlement to procedural due process arising from a property interest created by state law. In any event, this Court has held that a violation of a state statute does not create a liberty interest or property right under the Due Process Clause of the Fourteenth Amendment. *See Harrill v. Blount County, Tenn*, 55 F.3d 1123, 1125 (6th Cir. 1995) ("The violation of a right created and recognized only under state law is not actionable under § 1983.").

Jones, 296 F.3d at 529. The Sixth Circuit in *Jones* never undertook any procedural due process analysis because no such claim was asserted by the ex-wife.

In *Semple*, the administrators of the estates of a woman, her brother, and her friend who were murdered by the woman's boyfriend brought procedural due process claims against a municipality. Although the woman had obtained a protective order against the boyfriend, her brother and friend were not included in the order and the order did not prohibit the boyfriend from having contact with them. *Semple*, 963 F. Supp. at 1431. Furthermore, the order had never been served on the boyfriend. *Id*. Nonetheless, the plaintiffs in *Semple* claimed two distinct entitlements which allegedly derived from state statutes: as domestic violence victims, to be notified by the police of certain remedies available to them, and to timely service of the protective order issued against the boyfriend. *Id*. The *Semple* court found that, assuming that they were even applicable to the facts of the case, the statutes at issue merely codified certain procedures for dealing with domestic violence and/or child abuse and did "not address,

in any manner whatsoever, the service of a protective order." *Id.* at 1431-32. The court in *Semple* never addressed the issue of whether the plaintiffs had a property right in the enforcement of a protective order, because no such argument was ever advanced and the facts did not support such an argument in the first place. Simply stated, *Jones* and *Semple* involved very different fact patterns and claims from those at issue in this case.

II. COLORADO LAW CREATED A *ROTH*-TYPE ENTITLEMENT TO POLICE ENFORCEMENT OF RESPONDENT'S RESTRAINING ORDER

This Court, in *Roth*, held that property interests created by state law are afforded due process protection. 408 U.S. 564. "For purposes of a § 1983 action, whether a property interest exists is dependent on state law." *Bishop v. Wood*, 426 U.S. 341, 344 (1976). These interests "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* at 577, 92 S.Ct. at 2709. State law in the form of statutes, rules, regulations or policy statements may give rise to a protected liberty or property interest that cannot be infringed absent observations of due process. *Id.*

A. The Terms of the Restraining Order and Colorado's Statutory Enforcement Scheme Are Much More Than Mere "Directory Procedures."

The Tenth Circuit emphasized that Ms. Gonzales' entitlement to police enforcement of the restraining order against Mr. Gonzales arose when the state court judge issued the order, which defined Ms. Gonzales' rights. The restraining order was granted to Ms. Gonzales based on the court's finding that "irreparable injury would result to the moving party if no order were issued," PA at 89a-90a, and that "physical or emotional harm would result if [Mr. Gonzales was] not excluded from the family home." *Id.* By its specific terms, the order made clear that Mr. Gonzales could not "molest or disturb the peace" of Ms. Gonzales or her children. *Id.* Likewise, the order gave notice to Mr. Gonzales that he could "be arrested without notice if a law enforcement officer [had] probable cause to believe that [he] knowingly violated the order." *Id.* at 91a.

The restraining order's language also clearly evinced the state's intent that its terms be enforced by the police. Included within the order was a notice to law enforcement officials stating "[y]ou *shall* use every reasonable means to enforce this restraining order." *Id.* It further dictated that an officer *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. *Id.* at 91a-92a (emphasis added). Additionally, officers were required 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.*

Not only does the court order itself mandate that it be enforced, but the Colorado legislature passed a series of statutes to ensure its enforcement. The front of Ms. Gonzales' restraining order states that it was issued pursuant to Colo. Rev. Stat. § 14-10-108. That statute details that a party may request the court to issue an order "[e]njoining a party from molesting or disturbing the peace of the other party or of any child [or][e]xcluding a party from the family home . . . upon a showing that physical or emotional harm would otherwise result." Colo. Rev. Stat. § 14-10-108(2)(b)-(c). In addition, Colo. Rev. Stat. § 14-10-109 dictates that "[t]he duties of police officers enforcing orders issued pursuant to . . . 14-10-108 shall be in accordance with section 18-6-803.5, C.R.S . . . . " Colo. Rev. Stat. § 14-10-109.

In 1994, Colorado adopted a statutory scheme to strengthen domestic violence protective orders. *See 1994 Legislature Strengthens Domestic Violence Protective Orders*, 23 Colo. Lawyer 2327 (Oct. 1994). The Legislature's purpose in doing so was to counteract the societal and historical tendency not to enforce laws against domestic violence, to emphasize the need for enforcement of existing laws, and to provide guidance to law enforcement agencies in how to go about enforcing them. *Id.; see also* Transcript of February 15, 1994, House Judiciary Committee Hearings on House Bill 1253 at 2-5 & 40-42 (attached as Exhibit C to Respondent's Opening Brief in the Tenth Circuit Court of Appeals).

The state's intent in creating a protected interest in the enforcement of restraining orders is highlighted by the legislative history for the statute, which emphasizes the importance of the police's mandatory enforcement of domestic restraining orders. Recognizing domestic abuse as an exceedingly important social ill, lawmakers:

> wanted to put together a bill that would really attack the domestic violence problems . . . and that the perpetrator has to be held accountable for his actions, and that the victim needs to be made to feel safe.
>
> First of all, . . . *the entire criminal justice system must act in a consistent manner, which does not now occur. The police must make probable cause arrests. The prosecutors must prosecute every case.* Judges must apply appropriate sentences, and probation officers must monitor their probationers closely. And the offender needs to be sentenced to offender-specific therapy.
>
> *So this means the entire system must send the same message and enforce the same moral values, and that is abuse is wrong and violence is criminal.* And so we hope that House Bill 1253 starts us down this road.

Tenth Circuit Appendix at 121-122, Transcript of Colorado House Judiciary Hearings on House Bill 1253, February 15, 1994 (emphasis added); *see also* Michael Booth, *Colo. Socks Domestic Violence,* Denver Post, June 24, 1994, at A1 (law mandates arrest when restraining order is violated or police suspect domestic violence); John Sanko, *Stopping Domestic Violence: Lawmakers Take Approach of Zero Tolerance as They Support Bill, Revamp Laws,* Rocky Mountain News, May 15, 1994, at 5A (police must arrest and remove accused when answering domestic

violence calls). Clearly, the Colorado legislature intended to alter the fact that the police were not enforcing domestic abuse restraining orders.[1]

Among other things, the legislation that was enacted in 1994 created in the Colorado Bureau of Investigations a computerized central registry of restraining orders which is accessible to any state or local law enforcement agency. Colo. Rev. Stat. § 18-6-803.7. Any Colorado court issuing a restraining order is required, within 24 hours of the order's issuance, to enter the order and certain identifying information regarding the restrained person into the central registry. *Id*.

The statutory scheme adopted by the Legislature in 1994 also imposed an affirmative duty on the part of police officers to protect persons who have a valid restraining order. Colo. Rev. Stat. § 18-6-803.5(3) provides in pertinent part:

> (a) Whenever a restraining 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 restraining order.

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[1] Colorado was not alone in this respect. In the early 1990's, state legislatures across the country finally took notice of the problems endemic to the criminal justice system in dealing with violence against women and children and agreed that radical and beneficial change was needed to ensure that women could rely on consistent enforcement of court-issued protection orders. By 1994, the majority of states to have considered the issue had passed statutes mandating arrest when there is probable cause to believe that a violation of a protection order has occurred. *See* G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence and the Conservatization of the Battered Women's Movement,* ___ Houston L. Rev. ___ (2004).

(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 probably cause that:

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

(II) The restrained person has been properly served with a copy of the restraining 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 restraining order whether or not there is a record of the restraining order in the registry.

(Emphasis added.)

Significantly, the legislature included in the statute a provision which states that:

> [a] peace officer arresting a person for violating a restraining order or otherwise enforcing a restraining 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.

Colo. Rev. Stat. § 18-6-803.5(5). Hence, even if an officer is mistaken in his or her determination that there is probable cause a domestic abuse restraining order is being violated, the officer will not be held liable. Rather than "suggesting that Colorado did not intend to create a property interest," Petitioner's Opening Brief at 27, the passage of subsection (5) supports the legislature's goal that officers be vigilant and consistent in enforcing restraining orders by relieving them of any fear that an erroneous enforcement of restraining orders might result in liability. It also supports the conclusion that the state of Colorado fully intended that the recipient of a domestic abuse restraining order have an entitlement to its enforcement

Ms. Gonzales' right to a restraining order against her estranged husband for the protection of herself and her children was established by statute, C.R.S. § 14-10-108. Ms. Gonzales sought and obtained such an order in this case. As a matter of law, "such an order incurs a duty on the part of the government. It is immaterial that the right is created by a judicial function at the statutory behest of the [Colorado] General Assembly." *Siddle v. City of Cambridge*, 761 F.Supp. 503, 508 (S.D. Ohio 1991). A restraining order such as Ms. Gonzales' "would have no valid purpose unless a means to enforce it exists." *Id*. In Colorado, this enforcement mechanism is established by statue at C.R.S. § 18-6-803.5(3).[2]

[2] Under C.R.S. § 14-10-109, "(t)he duties of peace officers enforcing orders issued pursuant to section 14-10-107 or 14-10-108 shall be in accordance with section 18-6-803.5."

This statute imposes a mandatory, affirmative duty on the part of police officers to protect persons who have a valid restraining order. The word "shall," which is used throughout the statute, is mandatory, not merely precatory, and provides Ms. Gonzales and her deceased daughters with "a legitimate claim of entitlement," *Roth*, 408 U.S. at 577, to police protection and enforcement of the subject restraining order. On its face, the subject provision creates in favor of Ms. Gonzales a property interest in her restraining order and a corresponding duty on the part of the Castle Rock to enforce the restraining order that is cognizable under *Roth*. Castle Rock's failure to perform adequately its statutory duties in this regard constituted a denial of Ms. Gonzales' procedural due process. *See Coffman v. Wilson Police Dept.*, 739 F.Supp 257, 263-66 (E.D. Pa. 1990) (properly served protective order issued pursuant to the Pennsylvania Protection from Abuse Act created special relationship between police and spousal victim and, thus, created constitutionally protected "property interest" in police enforcement); *Siddle*, 761 F.Supp. at 509-10 (protective order issued to prevent domestic abuse creates a property right that incurs a duty on the part of the state to protect the beneficiary of the order, and failure to do so may constitute denial of right to procedural due process); *see also Meador v. Cabinet for Human Resources*, 902 F.2d 474 (6th Cir.), *cert denied*, 498 U.S. 867 (1990) (finding procedural due process interest in favor of foster care children under Kentucky's mandatory protection against abuse statutes); *Taylor By and Through Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (same under Georgia's statutory scheme).

Although no reported Circuit Court decision (other than the one at bar) has yet to address the precise issue presented in this appeal, two reported district court cases (*Coffman* and *Siddle*) have done so. In both of those cases, the district court found that the issuance of a restraining order, *in and of itself*, incurred a procedural due process right to the holder of the restraining order in "reasonable protection" or a "reasoned police response." *Siddle*, 761 F.Supp. at 510; *Coffman*, 739 F.Supp. at 266. This right was so articulated in the absence in either of those cases of any specific enforcement mechanism dictated by statute. In the present case, the Colorado Legislature has expressed in Colo. Rev. Stat. § 18-6-803.5(3) the procedural due process right to "every reasonable means to enforce" the restraining order, including the "arrest" or "warrant for the arrest" of a violator of a restraining order.

The language commanding that the officers use "every reasonable means to enforce this restraining order," PA at 91a, in no way undermines the order's mandatory nature. First, the order's more general command of enforcement by "every reasonable means" does not negate its more specific command that officers shall make arrests or obtain arrest warrants when certain requirements are met. Second, the order's language commanding that officers use every reasonable means to enforce the order simply indicates there may be instances where the mandatory duty of enforcing a restraining order could be accomplished through means other than arrest.

In her complaint, Ms. Gonzales specifically alleged that she had a valid restraining order against her estranged husband, Simon Gonzales, which ordered him not to molest or disturb her or her three children; that the information regarding the restraining order was entered

into the Colorado central registry on May 21, 1999 and was accessible to Castle Rock; that the restraining order was duly served on Simon Gonzales on, and made permanent by stipulation effective as of, June 4, 1999; that the order was violated by Simon Gonzales on June 22 1999; and that on June 22, Ms.Gonzales informed Castle Rock police officers of the violation and, on repeated occasions on June 22, requested their assistance in enforcing the order, but Castle Rock refused to enforce the order as required by C.R.S. § 18-6-803.5(3). PA at 125a-127a. As a matter of law, Ms. Gonzales has alleged a cognizable claim under 42 U.S.C. § 1983 for procedural due process violations with respect to the property interests of her and the three children in the subject restraining order and the concomitant police protection and enforcement duties.

B. The Mandatory Enforcement Terms of the Order and Statute Are Not Inconsistent With Police Discretion With Respect to Probable Cause Determinations.

A fundamental flaw in the analysis of Castle Rock is its misreading of the mandatory enforcement language of C.R.S. § 18-6-803.5(3) as being triggered if, and only if, a police officer has determined at his or her own "discretion" that probable cause exists of a restraining order violation. The issue of whether probable cause exists is not, however, a mere subjective discretionary determination to be made by a police officer. Rather, whether probable cause exists is an *objective* standard. "Probable cause exists if the facts and circumstances within the arresting officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to lead a prudent person to believe that the arrestee has committed or is committing an

offense." *Jones v. City and County of Denver*, 854 F.2d 1206, 1210 (10th Cir. 1988). The determination of whether probable cause to arrest exists necessarily involves questions of fact. *See, e.g., Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584 (10th Cir. 1999); *Guffey v. Wyatt*, 18 F.3d 869 (10th Cir. 1994).

In this context, a police officer's finding of probable cause is not a wholly discretionary determination which undermines the mandatory edict of the restraining order or statute. While an officer must obviously exercise some judgment in determining the existence of probable cause, the validity and accuracy of that decision is reviewed under objectively ascertainable standards and judged by what a reasonably well trained officer would know. *See Malley v. Briggs*, 475 U.S. 335, 345 (1986); *see also Beck v. Ohio*, 379 U.S. 89, 96 (1964) ("When the constitutional validity of an arrest is challenged, it is the function of a court to determine whether the facts available to the officers at the moment of the arrest would warrant a man of reasonable caution in the belief that an offense has been committed.") (quotation and citation omitted); *United States v. Davis*, 197 F.3d 1048, 1051 (10th Cir. 1999) (probable cause is measured against objective standard and evaluated against what a prudent, cautious and well trained officer would believe).

An officer must certainly exercise a measure of judgment and discretion in determining whether probable cause exists. There may be, for instance, circumstances where a police officer determines a technical violation of a restraining order to be immaterial and properly concludes, in his own discretion, that probable cause does not exist, such as when the restrained individual is found standing 99 yards away from the family home when the restraining

order requires him to remain at least 100 yards away at all times. In making that decision, the officer is bound to "facts and circumstances within the arresting officer's knowledge and of which he or she has reasonably trustworthy information [which] are sufficient to lead a prudent person to believe the arrestee has committed or is committing an offense." *Guffey,* 18 F.3d at 873 (internal quotation omitted); *see also Nearing v. Weaver,* 295 Or. 702, 670 P.2d 137, 142 & n.7 (1983) (duty to arrest domestic order violator not discretionary despite requirement that arrest be supported by probable cause); *Campbell v. Campbell,* 294 N.J. Super. 18, 682 A.2d 272, 274-75 (Law Div. 1996) (same), *rejected in part on other grounds by Macaluso v. Knowles,* 341 N.J. Super. 112, 775 A.2d 108, 111 (App. Div. 2001). Thus, an officer's determination of probable cause is not so discretionary as to eliminate the protected interest asserted here in having the restraining order enforced according to its terms. The officer must make a decision which, upon review, will be deemed right or wrong. Moreover, once probable cause exists, any discretion the officer may have possessed in determining whether or how to enforce the restraining order is wholly extinguished. If the officer has probable cause to believe the terms of the court order are being violated, the officer is required to enforce the restraining order.

The officers here were not faced with the necessity of making an instant judgment in a rapidly evolving situation. More importantly, they were not given carte blanche discretion to take no action whatsoever. The restraining order and its enforcement statute took away the officers' discretion to do nothing and instead mandated that they use every reasonable means, up to and including arrest, to

enforce the order's terms. Hence, while the police officers may have some discretion in how they enforce a restraining order, this by no means eviscerates the underlying entitlement to have the order enforced if there is probable cause to believe the objective predicates are met.

Ms. Gonzales' complaint alleges more than sufficient facts which, when taken as true as they must be for purposes of a Rule 12(b)(6) motion, establish that the Castle Rock police officers had "information amounting to probable cause that [Simon Gonzales] has violated or attempted to violate any provision of a restraining order." C.R.S. § 18-6-803.5(3)(b)(I).

In assessing Ms. Gonzales' complaint on a 12(b)(6) motion, this Court must construe the allegations in the complaint, and any reasonable inferences to be drawn therefrom, in favor of Ms. Gonzales. *Currier v. Doran*, 242 F.3d 905, 911 (10th Cir. 2001). Here, the complaint specifically alleges that the restraining order, which expressly precluded Simon Gonzales from molesting or disturbing the peace of Ms. Gonzales or the three children, was made permanent on June 4, 1999, with the exception that Simon Gonzales was allowed to have contact with the three children for "parenting time" purposes, which was defined as, among other things, a prearranged, advance notice mid-week dinner visit, and two non-consecutive weeks during the summer. PA at 125a-126a. The complaint further alleges that on the evening of Tuesday, June 22, 1999, Simon Gonzales took the three girls from Ms. Gonzales' home without her knowledge or permission and without any advance notice or arrangements having been made for Simon Gonzales to have any "parenting time" with the three children for that evening, and that Ms. Gonzales notified Castle Rock of the restraining order and

its violation, and requested on several occasions that Castle Rock assist her. PA at 126a-127a. When read in the light most favorable to Ms. Gonzales, a reasonable inference can be drawn from these complaint allegations that Castle Rock had information amounting to probable cause that Simon Gonzales was in violation of the restraining order against him. Armed with such information, Castle Rock was required by the plain language of the court order and C.R.S. § 18-6-803.5(3) to perform the non-discretionary, ministerial task of using "every reasonable means to enforce" the restraining order and to "arrest" or "seek a warrant for the arrest of" Simon Gonzales for his violations of the restraining order. Castle Rock's failure to follow this legislative and court mandate denied Ms. Gonzales and her three daughters their fundamental due process rights.

Under the circumstances alleged in the complaint, C.R.S. § 18-6-803.5(3) and the court order mandated that the Castle Rock police officers enforce the restraining order. *Id*. "The statute allows no discretion." *Campbell*, 682 A.2d at 274 (interpreting similar provision of New Jersey's Prevention of Domestic Violence Act, which provides that a defendant "shall be arrested and taken into custody by a law enforcement officer" when the "officer finds that there is probable cause that a defendant has committed contempt of" a restraining order); *see also Nearing*, 670 P.2d at 142 (purpose of similar Oregon statute [ORS 133.310(3)] requiring a police officer to arrest and take into custody any person who he has probable cause to believe has violated a restraining order "was to negate any discretion. . . . in enforcing restraining orders issued under Oregon's Abuse Prevention Act"). This language is "so mandatory that it creates a right to

rely on that language thereby creating an entitlement that could not be withdrawn without due process." *Cosco v. Uphoff*, 195 F.3d 1221, 1223 (10th Cir. 1999), *cert. denied*, 121 S.Ct. 784, 148 L.Ed. 2d 680 (2001). "The *mandatory* nature of the regulation is the key, as a Plaintiff 'must have a legitimate claim of entitlement to the interest, not simply a unilateral expectation of it.'" *Washington v. Starke*, 855 F.2d 346, 349 (6th Cir. 1988) (emphasis in original) (quoting *Bills v. Henderson*, 631 F.2d 1287, 1292 (6th Cir. 1980)).

There can be no question that the restraining order here mandated the arrest of Mr. Gonzales under specified circumstances, or at a minimum required the use of reasonable means to enforce the order. Those circumstances were defined by the restraining order which told the police what its objective terms were and commanded that an arrest occur upon an officer's probable cause determination that the order was being violated and that Mr. Gonzales had notice of the order. The restraining order here specifically directed, with only the narrowest of exceptions, that Mr. Gonzales stay away from Ms. Gonzales and her daughters. Thus, the restraining order provided objective predicates which, when present, mandated enforcement of its terms.

III. THE PROCESS DUE RESPONDENT IS SIMPLE AND PRACTICAL.

In addressing the question of what process was due to Ms. Gonzales, the Tenth Circuit applied the long-standing balancing test required by *Mathews v. Eldridge*, 424 U.S. 319 (1976). Castle Rock makes a generalized claim that the Tenth Circuit failed to provide any guidance as to the

kind of process due and has imposed upon the district courts the burden of designing procedures. This simply is not the case. The Tenth Circuit applied the *Mathews* analysis to the particular facts of this matter, and expressly held that Ms. Gonzales was entitled to the following process:

> The statute directs police officers to determine whether a valid order exists, whether probable cause exists that the restrained party is violating the order, and whether probable cause exists that the restrained party has notice of the order. If, after completing these three basic steps, an officer finds the restraining order does not qualify for mandatory enforcement, the person claiming the right should be notified of the officer's decision and the reason for it.

PA at 40a (citations and footnotes omitted). The Tenth Circuit provided Castle Rock and other municipalities in Colorado with a specific process to follow when presented with an alleged restraining order violation.

The identified procedure does not amount to a substantial burden upon the interests of police departments and municipalities. Indeed, the process would only take minutes to perform, and includes tasks officers regularly perform in the course of their daily duties. Under the balancing test required by *Mathews*, and reading the allegations of Ms. Gonzales' complaint in the light most favorable to her, the scales tip in her favor. Ms. Gonzales' interest in having the restraining order enforced was substantial, and without question the officers' alleged failure to provide her with any meaningful process prior to refusing to enforce the court order erroneously deprived her of her protected entitlement. Moreover, the use of

additional safeguards would have certainly aided in preventing the risk of wrongful deprivation. Finally, requiring the officers to engage in this three-step process prior to depriving an individual of her enforcement rights is hardly an unreasonable burden to place on the police.

Castle Rock implies that Ms. Gonzales did receive some form of a hearing from the officers and hence her complaint cannot be construed as challenging the lack of process she received, but, instead, is a challenge to the results of that hearing. Ms. Gonzales' repeated phone calls to the police department and the officers' seemingly outright dismissal of her claims in no way constitutes "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333. According to Ms. Gonzales' complaint, in effect no one was listening.

It is apparent that the restraining order enforcement statute provides direction in answering the question of what additional procedural safeguards could have been employed by the police officers. *See* Colo. Rev. Stat. § 18-6-803.5. The statute guides officers as to the process they should provide a holder of a restraining order before depriving that individual of his or her enforcement rights. By completing the three steps laid out in the statute, the wrongful denial of Ms. Gonzales' right could have been prevented, and three lives potentially spared.

IV. THE TENTH CIRCUIT'S HOLDING IS NARROWLY TAILORED AND OF LIMITED APPLICABILITY TO OTHER FACT PATTERNS.

In its Opening Brief, Castle Rock loses sight of the issue actually decided by the Tenth Circuit. The Tenth Circuit's opinion emphasized at length the fact that, in

reaching its conclusion that Ms. Gonzales had a protected interest in enforcement of the order which was cognizable under *Roth*, it was relying on the specific language in the restraining order itself, *coupled with* certain statutory language regarding mandatory enforcement of the order. PA at 16a-29a. The Tenth Circuit *never* held that the statutory language mandating enforcement of the restraining order in and of itself created any protected property interest. In fact, the Tenth Circuit stated just the opposite:

> In this case, the Colorado statute alone does *not* create the property interest. Rather, the court-issued restraining order, which specifically dictated that its terms must be enforced, *and* the state statute commanding the same, establish the basis for Ms. Gonzales' procedural due process claim.

PA at 12a, n.5 (emphasis added).

This point was emphasized recently by the Tenth Circuit in *Jennings v. City of Stillwater,* 383 F.3d 1199 (10th Cir. 2004). In *Jennings*, the plaintiff asserted a violation of her procedural due process rights, arguing that an Oklahoma statute created a constitutionally-protected property interest in "not being discouraged from prosecuting" a sexual assault claim. *Jennings,* 383 F.3d at 1206. Writing for a unanimous panel, Judge McConnell (who dissented in the case at bar and was joined in *Jennings* by Judge Kelly, who also dissented in the present case) stated:

> Relying on the panel opinion in *Gonzales v. City of Castle Rock,* 307 F.3d 1258, 1264 (10th Cir.2002), Plaintiff argues that when regulatory language in a statute "is so mandatory that it

creates a right to rely on that language," an entitlement is created that "[cannot] be withdrawn without due process." *Id.*, *quoting Cosco v. Uphoff,* 195 F.3d 1221, 1223 (10th Cir. 1999) (per curiam). Plaintiff argues that Okla. Stat. tit. 22, § 40.3(A) entitles her not to be discouraged from prosecuting the offenders, and that Detective Buzzard deprived her of this right.

Whatever the force of this argument under our *Gonzales* holding as it existed at the time Plaintiff filed her appeal, it is foreclosed by our subsequent en banc opinion, issued just before this case was argued. *See Gonzales v. City of Castle Rock,* 366 F.3d 1093 (10th Cir. 2004) (en banc) [hereinafter *Gonzales II*]. In *Gonzales II* we analyzed due process claims brought against local police officers who failed to enforce a court-issued restraining order. Both the restraining order and the relevant state statute contained language that required police to arrest restrained persons who were in violation of the order. The statute provided: "A peace officer shall arrest, or, if arrest is impractical . . . seek a warrant for the arrest of the restrained person." *Gonzales II,* 366 F.3d at 1097, 1104. While the original panel opinion left open the possibility that the mandatory statutory language, standing alone, could create an interest enforceable through the due process clause, that position was rejected by the en banc Court. The en banc Court characterized Ms. Gonzales' property interest as the product of a court-issued restraining order, coupled with statutory language requiring enforcement. *See id.* at 1101-05. The Court disclaimed the theory Plaintiff now urges:

> In this context, many of the cases cite[d in the] dissent are inapposite to the specific

> facts and legal arguments raised in the present case because the courts in those cases rejected the argument that statutes detailing procedures regarding general child abuse investigations and reporting could *alone* create a protected interest in such services. [citing cases] In this case, *the [state] statute alone does not create the property interest*. Rather, the court-issued restraining order, which specifically dictated that its terms must be enforced, and the state statute commanding the same, establish the basis for Ms. Gonzales' procedural due process claim.

Id. at 1101 n.5 (emphasis added).

Similarly, after addressing the state's statutory regime, the Court dropped a footnote stating:

> While we asked the parties to brief whether a protected property interest was created by the mandatory terms and objective predicates laid out in [the state statutes], we do not so hold. Rather, we conclude that the statute's force derives from the existence of a restraining order issued by a court on behalf of a particular person and directed at specific individuals and the police.

Id. at 1104 n. 9.

> Here, unlike *Gonzales II*, Plaintiff's asserted property interest rests solely on the language of the Oklahoma statute. There was no court order specifically applying the protections of the statute to her. The procedural due process claim can thus not be maintained.

Id.

In this regard, the Tenth Circuit's opinion in the present matter must be read as reflecting a very narrow, fact-specific issue. In fact, *Jennings* is the *sole* reported decision to date which addresses or relies upon, in any way, the Tenth Circuit's holding in the present case. Despite Castle Rock's urgings to the contrary, it does not appear that the sky is falling after all.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the decision of the Tenth Circuit Court of Appeals and remand this case for further proceedings below.

Respectfully submitted,

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